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A Radical Theory of Jurisprudence: The "Decisionmaker" as the Source of Law - The Ohio Supreme Court's Adoption of the Spendthrift Trust Doctrine as a Model

Gerald P. Moran

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A RADICAL THEORY OF JURISPRUDENCE:
THE "DECISIONMAKER" AS THE SOURCE OF LAW —
THE OHIO SUPREME COURT'S ADOPTION OF THE SPENDTHRIFT
TRUST DOCTRINE AS A MODEL

by

GERALD P. MORAN*

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I. INTRODUCTION

This article develops a theory of jurisprudence in which the "Decision-maker" is seen as the source of that which we call the law. This theory will be explained through an analysis of the evolution of Ohio's spendthrift trust doctrine as "enacted" by the Ohio Supreme Court.

For almost thirty years, a classic spendthrift provision\(^1\) included in a \textit{cestui que} trust was not enforceable in the State of Ohio against the claims of a creditor.\(^2\) When the Ohio Supreme Court first faced the question of whether such spendthrift provisions are valid, it held that the ability to permanently exempt any category of assets from the claims of creditors is not within any person's authority.\(^3\) The Court stated that the validity of such exemptions hinged on whether the exemption was one which was either created by Ohio's statutes or Constitution.\(^4\) In the absence of such authority, the Court refused to create a new form of exemption from the external cloth of public policy.\(^5\)

At that time, the concept of a "spendthrift trust" had been approved by an overwhelming number of state courts\(^6\) and there existed substantial dicta in

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3. \textit{Id.} at 94.

4. \textit{Id.} at 93-94.

5. \textit{Id.} at 94.

6. \textit{Id.} at 92. For a comprehensive overview of dynastic trusts and the evolution of the spendthrift trust, see Friedman, \textit{supra}, note 1 at 572; see also Griswold, \textit{supra} note 1, at §§ 73-79; \textit{Recent Developments: Ohio Adopts Minority View in Rejecting Spendthrift Trusts}, 24 \textit{Ohio St. L.J.} 567 (1963) [hereinafter \textit{Ohio Adopts Minority View}].

several Ohio cases favoring enforcement. Therefore, it must have been a considerable shock to the Ohio legal community when the Ohio Supreme Court, in Sherrow v. Brookover, enforced the claims of a creditor against an interest in trust despite the existence of a spendthrift provision. Indeed, the fact that the rule in Sherrow survived for almost thirty years is testament to both the conceptual foundation of the Court's opinion and the simple directness by which the Court, speaking through Chief Justice Kingsley A. Taft, rendered its 4 to 3 decision.

The spendthrift trust doctrine is largely a product of the original property owner's desire to transfer assets in trust for the limited enjoyment of designated beneficiaries, while both restricting such beneficiaries from assigning their interest and precluding their creditors from executing on such beneficial interests. From the grantor's perspective, the combination of these two restrictions prevents the "wasting" of the trust’s assets by a potentially profligate beneficiary.

This unique protection of trust assets cannot be found in our early English common law tradition. Rather, the spendthrift doctrine evolved through an interesting process which was largely conceived and delivered by the American judicial system during the late eighteenth century. The spendthrift trust’s evolution demonstrates that law is a mechanism by which property interested members of the community have given themselves special legal recognition.

Commentators and justices alike have extensively discussed and reviewed the spendthrift trust’s legal evolution through numerous articles and treatises. Some have questioned the providence of spendthrift trusts. For example, we can almost feel the anguish of the late John Chipman Gray as he fought valiantly,
in thought, word and deed, against the advent of the spendthrift doctrine.\textsuperscript{13} That the spendthrift doctrine should be spun by the courts from the mythical blanket of public policy was a result more than Professor Gray could endure. He still rests uncomfortably.\textsuperscript{14}

The unstated question at this point is not whether the spendthrift trust has met with widespread judicial approval (it has).\textsuperscript{15} Rather, why have decision makers ratified the grantor’s intent in such trusts over the claims of certain unsecured creditors? There may be no real explanation, other than the fact that the Decisionmakers have decided to enforce these provisions; and, by this choice, have effected a legal response to the demands of a select few—but obviously powerful—property holding members of the community. The Sherrow opinion, once written, became the law and, by custom, that law spread through other communities. In short, a potential “ought” matured into an “is.” This paper will address the jurisprudential basis of that transformation from the principal perspective of the Ohio Supreme Court’s Decisionmakers.

Ohio’s judicial approbation of the spendthrift doctrine is simply another example of the enduring exercise of a “naked preference” of laws.\textsuperscript{16} The deci-

\textsuperscript{13} see John C. Gray, Restraints On Alienation Of Property III, (1883); see also Friedman, supra note 1, at 574.

\textsuperscript{14} In the second edition of the same book, Professor Gray refused to give in notwithstanding the accelerated extension and approval of the spendthrift provision. John C. Gray, Restraints On Alienation 4 (2nd ed. 1895); see also Friedman, supra note 1, at 574.

\textsuperscript{15} Only New Hampshire and North Carolina deny spendthrift trusts. Adam J. Hirsch, Spendthrift Trusts and Public Policy: Economics and Cognitive Perspectives, 73 Wash. U. L.Q. 1, 3 n. 8 (1995). Kansas and South Dakota both have statutes acknowledging the validity of spendthrift trusts to real property only. Id. Alaska, Idaho, Utah and Wyoming have not addressed the issue of spendthrift trusts by either statute or case law. Id.

\textsuperscript{16} The reference to a “naked preference” as used herein is critical to an understanding of this article. Most commentators use such terms with an intentional negative connotation, as if referring to a decision which is arrived at by or through an arbitrary exercise of political power. The use here is that in exercising the political power to decide, the Decisionmaker is not otherwise limited with respect to what he or she decides. It does not mean that there is no premise to support such decision in that a skilled Decisionmaker can always create a logical premise for her conclusion; and as such, fully believes that she acted in good faith in arriving at such decision. It denies not only that there is a single correct answer, but also that there are significant legal limits imposed on such Decisionmaker, other than inherent political restraints.

The author does not see the Decisionmaker as being constrained by the legal materials, rules or precedents. In each case, it is as if the decision is made from nothing. Yet, there is no act that does not have a verbal reference or rule on which such decision can be premised to sustain the apparent logic and validity of the decision. In earlier times, Professor Herbert Wechsler espoused a theory by which courts, as naked power mechanisms, were united in that decisions must reflect a type of legal reasoning. See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959).

Cass Sunstein speaks of “naked preference” as a “raw exercise of political power.” Indeed, Professor Sunstein uses the term “naked preference” with a specific connotation and he compares “naked preference” to private pressure groups and insists that decisions be reflected “by reference to some public value.” See Cass R. Sunstein, Naked Preferences and the
sion is itself that which makes the doctrine legitimate; in short, law by judicial edict. This is not to suggest or imply that the spendthrift doctrine is erroneous or a miscreant within our legal customs — it exists and, as such, must be accepted. Nor does this result suggest or imply that there is a right or wrong answer, or that one answer is more favorably supported by "legal reason." Law, so we have been taught, is fundamentally the exercise of reason. Unfortunately, the traditional fiction of "legal reason" conceals the underlying reality that law

Constitution, 84 COLUM. L. REV. 1689, 1692 (1984). Although these clauses (six specific clauses of the constitution) have different historical roots and were originally directed at different problems, they are united by a common theme and focused on a single underlying evil, the allocation of resources or opportunities to one group rather than another solely on the ground that those favored groups have exercised the raw political power to obtain what they want. I will call this underlying evil a "naked preference." Id.

The prohibition of "naked preferences," according to Sunstein, implies that the judicial role is more than mere balancing of claims of the constituent members of the public, but also reflects a recognition of a "distinctly substantive value." Id., at 1692-93. His definition of public value is "any justification for government action that goes beyond the exercise of raw political power." Id. at 1694. Having established bi-polarity tension between the terms "naked preference" and "civic value" and then by defining civic value to constitute any justification for governmental action, I am not certain whether there is indeed any limitation on such power except as the decisionmaker decides. Thus (without regard to the constitutional analysis provided thereafter), it is the decisionmaker that resolves the question and determines whether the governmental action is acceptable. In so doing, this author asserts, the decisionmaker is exercising a "naked preference" in resolving the test or tension of the bipolar terms. I would not view what the Decisionmaker does as doing evil, but rather for filling the function of her position.

Indeed, Professor Sunstein also notes, in connection with the rationality method of court review:

Modern rationality review is also characterized by the extremely differential means-end scrutiny. The Supreme Court demand only the weakest link between a public value and the measure in question, and it is sometimes willing to hypothesize legitimate ends not realistically attributable to the enacting legislature. As a result, few statutes fail rationality review. This phenomenon raises the question whether the Court's commitment to the prohibition of naked preferences, exemplified by the existence of rationality review, is merely rhetorical. Id. at 1697-98 (emphasis added).

The suggestion that the judicial interest may only be rhetorical is in the nature of an admission that the Court is free to decide and is not otherwise limited in deciding what it chooses to decide; e.g., the decision to uphold the imprisonment (relocation centers) of Japanese-American citizens during World War II as not constituting a "raw" exercise of a naked preference. Korematsu v. United States, 323 U.S. 214 (1944). In any event, I recognize the customary evil connotation of "naked preference," but believe it more precisely expressed the sharpness of what courts do in fact.

Professor Alexander is of the view that "[t]he historical account offered here suggests that within the individualistic regime of consolidated property there is no objective basis for choosing between the autonomy of the donor and that of the donee, the dead hand dilemma; any resolution of that problem is a 'naked preference.'" Gregory Alexander, The Dead Hand and the Law of Trusts in the Nineteenth Century, 37 STAN. L. REV. 1189, 1193 (1985). Thus, notwithstanding the fact that the scope of the responsibility concept itself is politically and morally contestable, the practical judgment requirement to resolve those political and moral conflicts is intensely context-dependant.
is the “naked preference” of the Decisionmaker; it always has been, is, and will forever be so! End of article? Not quite.

This article will apply the jurisprudential thesis that law is essentially the naked preference of the Decisionmaker in examining the judicial enactment of Ohio’s spendthrift trust doctrine. With some degree of hope, such an examination will clarify the Decisionmaker’s institutional role in the Ohio Supreme Court’s determination of whether a spendthrift trust is valid. In doing so, the article will ask why the Court adopted one line of legal reasoning over another? To this end, the often noted observation of the great sage Holmes enlightens us to the principle that an explanation is not found in the exercise of logic, it lies in experience. Thus, in pursuit of the answer, this article will clarify the Decisionmaker’s experiences; i.e., his or her relationship to the community as part of the decisionmaking process. Experience is not, of course, perfectly quantifiable either from the Decisionmaker’s perspective or the observer’s perspective. From a law professor’s point of view, the Decisionmaker’s unique experience’s can only be summarized as a creative abstraction because judges expertly create the appearance of neutrality and conceal their unique individual motivations. What attracts or drives a judge to a particular answer and how or why that decision is made often remains obscured to all but the judge. Yet, in order to understand the judge’s decision, one must delve into that which is the asserted principal ingredient of a decision, i.e., the idiosyncratic experience of that individual Decisionmaker. Only because we do not know how to scientifically obtain such data regarding the experience of the Decisionmaker, we have omitted its study. Among the intriguing aspects of the spendthrift doctrine’s

17. Notwithstanding the author’s assertion of this underlying reality, we generally assume, and are taught in the American legal monasteries, that a decision is a product of reason. And further, we are taught that in the analysis of such “legal reason” we can ascertain the Decisionmakers motivation and understand the basis upon which the Decisionmaker reached his or her decision. It is upon this principal mythology that Dean Langdell’s law school system was designed, executed, replicated and multiplied. See Robert Stevens, Law School Legal Education In America From The 1850s To The 1980s 35-50 (1983) (discussing the evolution of american law schools).

18. See Oliver W. Holmes, Jr., The Common Law (1881).

19. Even the best of biographies, or an autobiography, involves an exercise of an artistic abstraction. In comparison, the academic projections tend to rise towards the level of fiction. See also Richard A. Posner, The Problems Of Jurisprudence 111 (1990), (Judge Posner’s concern for the limitation of judges, lawyers and law professors regarding the judicial process.); see also Judge Frankfurter’s comments, infra note 20.


It is intriguing that so little has been written or published about what it is that judges do when they decide cases. It is even more intriguing that when judges or others do attempt to write about what it is that judges do when they decide cases, they do so with great misgivings about whether an explanation of the enterprise or task of deciding cases can adequately grasp the mysterious nature of the judge’s mission. From those
birth are: (1) it was delivered largely through judicial edict; and (2) it necessarily inhibits the alienation of property by a trust beneficiary in a direct and, in some respects, costly fashion. These characteristics raise the question: to what extent can consumers of political preferences seek and secure further protection for their definition of property? In this context, we are familiar with the fact that certain legal and social institutions have acquired potential immortality, i.e., they exist in perpetuity. Among such favored institutions are corporations, charitable trusts, and religious institutions, all of which acquired their favorable entitlements during a particular time and social milieu.

who can and do and must speak with a judge's authority in the rendering of judicial decisions and judicial opinions, there is such surprising reluctance, reticence and reservation in articulating the inner-workings and foundations, so to speak, of the decision-making process.

Id. at 1-2; see also BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921). Clearly a distinguished attempt at explaining the nature of decisionmaking:

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? If what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?

Grib, supra at 2.

One other pertinent observation as offered by Professor Grib is the insightful quotation from Justice Frankfurter which states as follows:

The power of searching analysis of what it is that they are doing seems rarely to be possessed by judges, either because they are lacking in the art of critical exposition or because they are inhibited from practicing it. The fact is that pitifully little of significance has been contributed by judges regarding the nature of the endeavor, and, I might add that which is written by those who are not judges is too often a confident caricature rather than a seer's vision of the judicial process of the Supreme Court [Of Law and Men 32 (1956).

Id. at 3 (citing AHARON BARAK, JUDICIAL DISCRETION (Yadin Kaufman trans., 1989)).

21. There is a movement seeking the repeal of the Rule Against Perpetuities ("RAP") so that private individuals may be free to convey property in trust without limitations as to time of vesting. The movement seeking the repeal of the RAP and the creation of dynastic trusts seems inexorable though it is not without opponents. Simply because the rules of the past, whether judicial, legislative or custom, have largely curtailed the opportunity for most institutions to possess life without death is no reason to assume that such rules will continue into the indefinite future. As noted by Justice Holmes, the fact that a rule was in existence at the time of Henry VIII is no reason to assume it should be in existence today. The initial response to such an extension of the authority to convey without time limitation as to vesting is one of a serious concern because it conflicts with one of the fundamental premises of our legal culture; i.e., the RAP. Incremental changes over time frequently collect sufficient momentum to beget new premises. The law expresses the values within and reflects the interaction of such stated values with the externalities of a fluid social community, and at some future point, the incremental modifications blossom into a new legal regime.

As noted above, the principal purpose of this article is to: (1) review the criteria by which the Ohio Supreme Court Decisionmakers reversed the Court's position on the validity of the spendthrift trust; and (2) clarify the criteria whereby such legal inventions were delivered, modified and expanded or limited. This article necessarily seeks a self-sustaining criterion by which to measure present issues and clarify the mechanisms by which courts will resolve future issues. As part of that process, the article will provide: (1) a limited review of the traditional jurisprudential theories, focusing briefly on the currently developing trends under the broadly defined category of "postmodernism;"22 (2) a review of the Ohio judicial experience with respect to spendthrift trust; (3) a clarification of the legal concept of Decisionmakers and their relationship to the community; (4) a brief discussion of the adjudication forum; (5) an analysis of the Ohio Supreme Court as Decisionmaker; and (6) an identification of the factors by which the Ohio Supreme Court reached its decisions. The end product will result in a useful paradigm if it is realistically applied to comparable issues arising before any court. However, this article's utility may lie more in its use as a political and descriptive composite rather than a traditional legal analysis.23

With respect to the author's methodology, this article is written from the legal sociology perspective.24 That is, the article describes the interactive insti-

22. In what the author believes an exceptional piece of scholarship, the conceptual difficulty of defining modernism and postmodernism is described as follows:

What, specifically is modernism? As a way of reacting to the modern world, modernism is the consciousness of what once was presumed to be present and is now seen as missing. It might be considered as a series of felt absences, the gap between what we know is not and what we desire to be: knowledge without truth, power without authority, society without spirit, self without identity, politics without virtue, existence without purpose, history without meaning. Such dualism and gaps have been known since Plato, but traditionally it had been assumed that the faculties of mind or the forces of faith would enable humankind to resolve them. Today the contemporary "postmodernist" offers a different message: we should go beyond modernism and take a more relaxed look at things, either by comprehending how knowledge, power, and society function, by viewing history without purpose and meaning as simply the longing of human desire for its completion, or by giving up trying to explain the nature of things and being content with studying how beliefs come to be justified.


23. As law students frequently say, it all depends.

24. This term, legal sociology, is used here somewhat as a ruse. There are two distinct type of sociology groups: the sociologist as sociologist and the legalist acting as a sociologist or under the influence of other sociologists. In the first groups are such luminaries are Max Weber, Talcott Parsons, and Eugene Ehrlich. In the second group, I would include legal luminaries such as Professor Laswell and McDougal, Dean Pound and the philosopher John Finnis. The second group generally asserts the existence of certain facts or values as a product of empirical research or otherwise founded in the theories of other sociologists. Apparently, Dean Pound was not comfortable in coining the concept of sociological
Institutions involved in decisionmaking from both the author's perspective as a lawyer and law professor, and the uniqueness of the author's individual culture. In short, this article will identify the truly subjective basis of allegedly objective decisions. Thus, the article is, in its truest form, a type of personal narrative describing what the author perceives to be the nature of a Decisionmaker's decision.

Do not be mistaken, from a moral or ideological point of view, Decisionmakers do not attempt to either sanctify the law as a means of raising society to more virtuous levels of concern or expand the resources of society to more community members. Law is an institution which sanctifies the win-


25. For a similar proposition, see Grib, supra note 20, at 11. Grib provides guidance that decisionmakers:

have to take account of “inherited instincts, traditional beliefs, acquired convictions.” This must be the setting for articulating the guidelines for judging; we recognize that no matter how diligently we strive for objectivity in our efforts to explain the judicial process, we are limited by our own eyes. The most we can hope to achieve, according to Cardozo, is a kind of subjective objectivity, if you will.

Id.; (emphasis added); see also CARDOZO, supra note 20, at 11.

26. If we chose to romanticize the reality regarding the decisionmaking process in law school and in legal literature, we will be engaging in delightful fantasies, not unlike those of knightly justice emanating from the village of Camelot. Camelot, if it existed, exists no more. Why not? As both Aristotle and St. Thomas Aquinas agreed, man-woman is a political animal. The Holocaust is . . . It was a result of decisionmaking. I would add first and foremost, it is the “potential” of reason and its use in law that has been overly emphasized and the reality of the political element which has been omitted and/or denied.

By my cultural and educational birth process, I am trained to see the law as a means of achieving the greater good for society. Indeed, much of philosophy and jurisprudential writings are directed to seek a higher standard or universal criteria by which law can be evaluated and corrected. My ancestral heritage provides unlimited DNA to engage in such philosophical speculations. Yet, like that day when my daughter, at age 3 1/2, asked what happened to my mother, the simple but painful reality required that I tell her of our shared mortality as a simple statement of fact.

27. For the view that law must be based upon some inherent moral or ethical foundation, see Grib, supra note 20, at 27-28, wherein he states in part:

I affirm the need to recognize the ethical values and principles which provide the foundations undergirding the phenomenon of law, legal system, and in particular, adjudication. The ethical foundations of judicial decisionmaking are thus affirmed as not merely or purely the result of subjective (i.e., non-objective) determination.

* * *

Rather, the ethical foundations asserted are those required by or demanded by the reality of life, the moral “reals” required by the human and within the grasp of practical reason.

Id.; see also Professor Grib's discussion of Finnis' “designation of the principles of natural
ners and punishes the losers; both parties accepting, albeit some reluctantly, the decision. In this sense, law is synonymous with the formal authority by which certain participants secure control over the community. Law is neither moral nor virtuous, it simply is the law. 28

How others might choose to classify the views herein is completely irrelevant to the purpose of this article. Therefore, this article does not use the language or customs of any particular brand of current (polemic) jurisprudence. The footnotes herein are offered to provide the reader with some general context regarding other congruent and dissonant views. There is no intentional attempt to describe, in a comprehensive manner, the underpinning of competing, complimentary, or idiosyncratic schools of jurisprudence. 29

II. TRADITIONAL THEORIES OF JURISPRUDENCE AND THE AGE OF POSTMODERNISM

The future, unless appropriately bridled, explodes into the present in a way which sometimes threatens our internal expectations. Culture itself is a repository of our collective expectations about what we expect from others and what

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28. Professor Diggins observes that Justice Holmes had a particular view of the role of law: "Holmes saw power as some vague force determined to move toward its own ends regardless of the intentions of human agents." Diggins, supra note 22, at 355.

we expect from the community itself. Thus, culture is our security, even though it may violate or lessen the security of others. There is nothing in culture which requires fairness or equity, except the power generated by different claimants to effect change. In short, culture's current existence and dynamic is a product of power.

The past, as memorialized by certain elitist institutions of our society, has been, and remains, a powerful restraint on change. There is no clearer representation of this exchange between the present and the future than that which can be observed in legal language, such as *stare decisis* and precedent, employed in the craft of explaining or negotiating a decision. It is through tradition that current legal conflicts are reviewed. Indeed, the use of the past and, in particular,

MIND, SELF AND EMOTION 97 (1984) wherein the authors state: the directives of cultural rules are based on the individual's generalized desire to conform to whatever it is that other people are observed to do, rather than on what people really want to do. Id.

31. The Supreme Court's decision in upholding the constitutionality of homosexual criminal statutes as outside the established right of privacy is difficult to understand except as it reflects the decision of the particular community in question. See Bowers v. Hardwick, 478 U.S. 186 (1986); Sanford H. Kadish, *Foreward*, 77 CAL. L. REV. 475, 477 (1989) (raising the question as to what extent does the majority have a right to establish its moral premise for a community). See also Michael S. Moore, *The Interpretative Turn in Modern Theory: A Turn for the Worse*, 41 STAN. L. REV. 871 (1989).

32. Judge Posner has significant information to provide with respect to *stare decisis* and precedent. He expresses his view with respect to precedent by stating that it "is more significant as information than as authority." Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 846 (1988). He also expresses the following: "the prior case may be authoritative in the sense of announcing a major premise which cannot be questioned, but if not, it is just a source of data, anecdotal in character, or of reasons, considerations, values, policies." Id. at 845. Judge Posner, in discussing the limited role of reason by analogy, offered the following comments:

I grant that people have an innate capacity for recognizing patterns, an innate standard of similarity; that is what enables us to recognize faces after an interval and objects seen from a new angle. And a set of cases can compose a pattern. But whenever lawyers or judges differ on what pattern a set of cases composes, their disagreement cannot be resolved by an appeal to an intuitive sense of pattern or similarity.

Id.

Judge Posner further articulates his view that even when precedent is controlling, the court may choose to read such precedent in a way that it loses its authority. Id. at 846-47. Posner's conclusion with respect to precedent is of major importance:

If it were more generally recognized that the main significance of precedence is information rather than authority, judges and lawyers might make greater use than they do of nonlegal and comparative materials — important sources of information but not of authority. Modern judicial opinions do cite nonlegal materials, but all too often these reflect the reading of the law clerks rather than the judges. . . .

Id. at 848. Judge Posner also indirectly suggests that Decisionmakers are not necessarily reading broader based philosophical materials and implies that such Decisionmakers are not even reading that which can be found in law journals.

lar, the articulation of the past in the form of a specific model as distinguished from an infinity of different perspectives, remains the main vehicle through which the judicial system deals with and resolves current conflicts. Thus, so long as jurists view future legal conflicts through the traditional and historical lens of allegedly "neutral" legal analysis, the community will continue to believe in the legitimacy and sanctity of the legal process. However, what would happen if there were no historical or empirical foundation to our current legal system?

Philosophers and commentators alike have developed numerous theories to explain how "power" has been civilized or curtailed by or through the law. The Greek philosophers, among others, lead the charge on the concept of man-woman as a rational being. For centuries prior to the evolution of institutional rationality, man-woman has been subjected to the arbitrary powers of tribal chiefs, community-states, empires, roving bands of barbaric militarists, elected officials, kings, queens and dictators. Yet "law," or the fiction of "law," offers the only hopeful vehicle to provide meaningful security to the community. The law's primary social function is to provide resolution of disputes, along

34. Indeed, a particular brand of jurisprudence focuses on the concept of neutral principles. See supra note 16.

35. See HENRY J. ABRAHAM, THE JUDICIAL PROCESS 3 (6th ed. 1993), wherein the author describes the system as the following:

[I]t is in the courts and not the legislature that our citizens primarily feel the keen, cutting edge of the law. If they have respect for the work of their courts, their respect for law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of society.

Id.

36. As children, we have been forced to confront and lose the security of certain basic beliefs. For me, I have forever captured the pain of Bambi's loss of his mother. For others, it maybe the story of the King without clothes, the movie in which the Great Wizard of Oz was without the power to return Dorothy to her home or the fiction of a Santa Claus that effected major increases in the loss of our personal security. Interestingly, Santa Claus is also used as a means of enforcing behavior in some of our children.

37. The author recognizes we haven't discovered the appropriate term which reflects the broader dimension of that which we refer to as "man" and "woman." We chose to use this term as a means of inclusion. In view of our sexist society it is not unreasonable to consider the concept of reason as belonging to man. For a provocative discussion of the maleness of the man of reason, see GENEVIEVE LLOYD, THE MAN OF REASON "MALE" AND "FEMALE" IN WESTERN PHILOSOPHY (1984).

38. It is likely that more people have been killed through man-made atrocities in this century than in any prior century in which there exist records of human existence.

39. If law is essentially arbitrary, and does not rest on a rationally established foundation, then law is merely an exercise of naked power. Under this reality, the fears of the multitude may be rent and once free, never to return to the "active-passive" acceptance of central authority (government) which provides the mechanisms by which different tribes are able to bond

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with an explanation set forth as an acceptable liturgical rationalization. As individual citizens, we assert that the primary task of law is to control, for our own individual security, the exercise of power. Thus, we believe, as part of this process, that we are a government of laws and not of people. Another axiom of this socialization process is that no person is "above the law."

The "philosopher king" intends to capture power through reason, not through efficient, brutal exercise of the sword. Philosophers and religious icons have claimed that man/woman exists as a "rational" animal, and as such people are, theoretically, free to exercise reason. In fact, the struggle to protect these and other basic muted beliefs of our society continues; however, this paradigm for human decisionmaking fails because actions (laws) are not controlled by reason, but rather by power of equal or greater measure.

How are these inconsistencies (the exercise of power and the theory of justice) reflected in our judicial process? Judicial panels do not directly speak of this reality. The Decisionmakers express themselves in skillfully drafted legal opinions which are frequently subject to revision and written over existing within larger communities and then into larger political organizations. See ABRAHAM, supra note 35.

40. We are trained to believe that law is conducted for the good of the community. As stated by St. Thomas Aquinas, "Law is an ordination of the right reason towards the common good promulgated by him who has care of the community."

41. Of course this axiom is somewhat controversial in light of contemporary jurisprudential theories. As one commentator noted: "The very idea of a government of laws, rather than men, rests on the wrongheaded premise that social structures have an objective existence that enables them to exert power over individuals. Ultra-theorists [radical CLS'ers] condemn the premise as an instance of the mistake of reification." ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE 168 (1990).


43. Id.

44. Professor Minda, in developing his thesis that law and economics (CLS) as well as feminist jurisprudence share an evolution from legal realism, stated the following:

CLS and feminist legal scholars have also raised new theoretical questions about the nature of truth and meaning as well as concepts of rationality and the limits of scientific reasoning. In pushing realists' deconstructive approach to new limits, CLS and feminist practitioners have developed a theoretical critique which "transcends" law, in its attempt to demonstrate the "politics of reason." Both CLS and feminism legal scholars have argued that the revitalization of the liberal ideal of "a government of law and not men" requires a controversial metaphysics disguised as the patriarchal structures of "gender and political hierarchies."


45. As succinctly observed by Judge Posner: "To be blunt, the ultima ratio of law is indeed force — precisely what is excluded by even the most latitudinarian definitions of rationality." POSNER, supra note 19, at 83.

46. James Boyd White sees the law not as a system of rules, but rather as a branch of
These legal opinions express the basis of a particular decision through syllogistical connections carefully tied into a traditional proposition of law through well reasoned articulations. By and large, the role of the legal Decisionmaker is to support the basic social norms of each community. Thus, the final decision becomes both a legal reference point and a somrhetoric. See James B. White, Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life, 52 U. Chi. L. Rev. 684, 697 (1985). This author believes we should describe legal education as schools of rhetoric as opposed to schools of law.


Judge Posner makes the distinction between the style of thinking and the dominant style by which the decisionmakers draft their opinions. He states:

The approach to judicial decisionmaking that I have sketched may describe the style of thinking, but it does not describe the dominant style of writing, of modern judges. Most judicial opinions even in the toughest cases depict the process of reasoning of a logical deduction (syllogistic or enthymematic) from previous decisions or statutes viewed as transparent sources of rules and consistent with the logical form, imply that even the very toughest case has a right and a wrong answer and only a fool would doubt that the author of the opinion had hit on the right one.

* * *

By concealing from the judges themselves the degree to which they exercise discretion, the formalist mode may make them more restrained: virtue begins in hypocrisy (maybe). By pulling the wool over the public's eyes, the pretense of servitude and neutrality may strengthen the political position of the courts in our society, and maybe that is a good thing — or maybe not. The psychology of judging may make it impossible for most judges to take a detached view of their decision. Maybe law clerks, who today write most judicial opinions, just cannot write any other way. Only one thing is clear: we should not be so naive as to infer the nature of the judicial process from the rhetoric of judicial opinions.

Posner, supra note 32, at 865 (emphasis added).

Judge Posner suggests that there is no distinctive methodology of legal reasoning. For a general discussion of the role and limitation of general reasoning, see Posner, supra note 32, at 858-60.

See Grib, supra note 20, at 15-16, wherein he states:

The judges conception of the judicial function has to be in accord with what is acceptable to the legal community. The judge's worldview is based on his human experience and on social principles and policies underlying his conception of the judicial function. The subjective prism which is the ultimate criterion for judicial discretion has an "objectivity" guaranteed by the acceptable values of the society, its fundamental values, the articles of faith of the nation. And although judicial intuition is one of the dimensions involved in the exercise of discretion, the discretion must nonetheless be expressed in rational thought.

Id. Admittedly, a decision has to be justified or explained but that doesn't necessarily mean that the decision is arrived at through exercise of reason merely, that the decision be expressed in the form of reason or the appearance of reason in the form of rhetoric.

Professor Diggins enjoyed the view of Holmes, who viewed law as relative and temporal rather than absolute and timeless, "Like all institutions, it evolved upward from the needs and pressures of a changing environment and not downward from divine, transcendental sources."
The principle schools of jurisprudence by which power has been the focus of study are numerous and expanding. After the Greek concept of "reason" was selectively canonized\(^\text{50}\) by the Roman Church through the writings of St. Thomas Aquinas as part of his Natural Law thesis, it became a theoretical assertion that man-woman possessed derivative, inherent and inalienable rights that no person or community could violate. Yet, power elitists, and to some degree, the very same religious institutions\(^\text{51}\) which heralded these inalienable rights, continued to violate them in spite of the proclaimed "new age" of reason. In fact, Natural Law's failure to curtail the power elitists' was one reason why John Austin and Jeremy Bentham attempted to define law in a more limited but descriptive fashion.

John Austin stated that law was the command of the sovereign.\(^\text{52}\) The difficulty with this "positive law" theory was that it enhanced and justified the fact that power was the law, and that legal professionals were merely scribes to the Queen's dictates.\(^\text{53}\) Indeed, Austin's view reflects an empirical reality that dates back to the Romans and beyond. Under Austin's theory of law, no person...
possessed individual security, except to the extent that he or she might enjoy the emperor's temporary good will. Surely, this sovereign-enhancing theory could not be sustained if individuals were to secure a degree of freedom independent of the will of the sovereign.

Another methodology posed to secure the entitlement of individual freedom can be developed from Hobbesian-Locke contractarian theory. Here, the idea is that as people establish a "central authority" by giving up certain basic rights, that authority is, at least under Locke's view, subject to certain restraints; namely, the person or entity holding the authority cannot abuse the community's trust, and the community's individuals retain certain natural rights. Thus, man/woman saw the age of revolution; a movement of power from the dictates of the few to the dictates of a group larger than the few.

These jurisprudential methodologies, i.e., natural rights, positive law and historical jurisprudence theories, along with the hybrid "social contract" theory, which supposedly guaranteed certain basic natural rights through the institutionalization of authority, viewed power as civilized and curtailed. Of course, the history of power elites confronting other power elites, in the context of such legal beliefs and abstractions thereof, in conjunction with the results of such interactions, reveal the absence of state-protected security for both the individual man-woman and the community. Nevertheless, these traditional visions of freedom and security evolved over the centuries as the dominant jurisprudential theories and continued to provide succor to both the community and legal institutions through the end of the nineteenth century.

54. Id.

55. A democratic society will never occur; because power will always reside in something less than all or even the many.

One of the fascinating issues for our country is understanding the basis of the American revolution. Remember, the revolution began at Concord in 1775; well before the natural rights rationalization was set forth in The Declaration of Independence by Thomas Jefferson. See THEODORE DRAPER, THE AMERICAN REVOLUTION (1995).


57. See Austin, supra note 52, JEREMY BENTHAM, OF LAW IN GENERAL (H.L.A. Hart ed. 1970).

58. Historical jurisprudence views law as emanating from society itself; and each community generates its own legal system. See generally, F.K. VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Abraham Hayward trans., 1831). I view historical jurisprudence as the precursor to the development of sociological jurisprudence in regards to the scientific methodology applied by likes of Max Weber and others (as opposed to the legal sociologists).

59. Where does security exist? Was the state ever able to provide security for the many and if the state can not protect you, what is the basis for its existence?

60. Not true, you say? How is it you feel that death is not an actual possibility for you?
Simultaneously, the secular knowledge of the seventeenth and eighteenth century Enlightenment trumps the views of the medieval ancients and church. This “new” knowledge meant that philosophers and scholars would now test the old theories and propositions of alleged fact by the scientific method of trial and error. Thus, man-woman developed a pattern of thinking whereby the quest for cause and effect provided a conceptual mechanism whereby reality became an idea, or a product of one’s abstraction. Through this process, finite man-woman synthesized a basic belief that seldom focused on either the unknown or the complex dynamics of reality. In short, man/woman acted as if most, if not all, that was knowable was indeed “known.” We never suffer from a lack of “belief” about what we in fact “know.” Thus, focus on the unknown, such as the source of being and the purpose of life, requires an agitated and unnatural effort and commonly generates excessive fear and anxiety. To rigorously apply an ideological thesis to the actual dynamics of reality also raises painful questions of uncertainty. Thus, the liturgical concepts of freedom are easily shared by the multitudes even though, in their individual situations, they might be serfs, peasants, coal miners, slaves, indentured servants or forced warriors. Simply put, when ideas of justice and freedom are confronted by contrary realities, we observe social unrest and confrontation between divergent social concepts. This struggle is mankind’s basic dialectic.

B. Contemporary Theories of Jurisprudence

Realism is a reaction to conceptualizations or ideologies which do not accord with one’s experience of reality. Legal realism is frequently considered to have been born in the visions of the great Justice Holmes and other legal scholars of the late nineteenth century. However, legal realism, in fact, predates this specific time zone. Legal realism necessarily existed as soon as cave man-woman and their descendants began to describe reality through complex concepts. Yet, Plato did not create a novel focus on the “Form of Ideas.” He viewed

61. By what force, spiritual or otherwise, did waves of young men leap out of their trenches in the Great War to test their human flesh against bullets? Were their last thoughts of freedom, the State or death? Did it matter what they thought? Does the state have a right to be so frivolous with the lives of its constituents? What wars were necessary to defend human security and what wars were by mistake, frivolous, or avoidable? Does it matter? 62. See Peter Gay, The Enlightenment; The Rise Of Modern Paganism (1995), who views the age of realism reflected in Cicero’s preference of the “res” to “verba” and that the Enlightenment reflected the fact that the “philosophers were realists in that they took the material for their activity from the concrete experience of daily existence and continually returned to that existence for refreshment and continuation . . . .” Id. at 178. Indeed, Socrates was a realist in that he confronted conventional wisdom and for which in part he was put to death. It is not good to interfere with the wisdom of those in central authority; that is an evil. 63. See Robert Stevens, Two Cheers For 1870: The American Law School In Law
the "Form of Ideas" as universal; that is to say, that we of the post-concept community are born within concepts and captured by the same. Such universal concepts are the primary communication mechanisms by which we are socialized into the larger social order of our communities.

At exactly the same time historians have chosen to date the birth of legal realism, Dean Christopher Columbus Langdell was leading the charge to view law as a natural, scientific segment of the university system. Thus, the case method was born; and with it came both the alleged "Socratic" method and the establishment of an enormous bureaucracy by which American men, and now women, are trained in legal "sciences." This Langdellian regime spread through numerous academic communities.

Legal philosophy followed the new regime in a lesser capacity as a type of secondary matter; however, legal positivism was the main ingredient in this substratum. Historical jurisprudence showed more of a flavor of the continental theory of law and foreshadowed, to some extent, the development of sociological jurisprudence. Also, a broad but limited range of differing jurisprudential themes, such as legal realism, sociological jurisprudence, legal process, and analytical jurisprudence, which continued through the late sixties and early seventies, added a certain spice to legal philosophy's main under currents. However, despite strident discord from a variety of professionals who criticized legal positivism and its limitations from the perspective of legal realism or sociological jurisprudence, the themes of these spicy legal philosophies found less

In American Society 405 (1971).

Not surprisingly, lawyers seeking affirmation of their judicial nominations generally promise to apply the law. See Mark V. Tushnet, Following the Rules Laid Down; A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781 (1983).


65. For an excellent overview of the evolution of modern jurisprudence, see Grib, supra note 20, at 43-44, wherein he states:

And yet, since 1961 with the publication of H.L.A. Hart's The Concept of Law, there has been a new openness to and a revived interest in the kind of theoretical efforts to provide a foundational or philosophical systematic account of law, legal reasoning, and legal system. The last three decades in the Anglo-American legal community have witnessed a burgeoning jurisprudential literature, a rich and luxuriant testimony to contemporary efforts to dialogue on the significance of the legal enterprise, from construction to re-construction to de-construction. The American scene has produced a rich harvest of jurisprudential thinkers: Lon Fuller, John Rawls, Ronald Dworkin, Robert Unger, Robert Nozick, George Anastapolo, Harold Berman, Philop Soper, Joseph Vining, Robert Rodes, Catherine MacKinnon, Richard Posner and many others. A multiplicity of methods and concepts in jurisprudential thinking abounds—analytical, sociological, naturalist, legal realist, law and economics, critical legal studies, feminist jurisprudence, pragmatic—and sometimes to the chagrin of the participants in the dialogue who yearn for a common public discourse and the possibility of a societal

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success in academic and legal institutions than the traditional positivism branch. Thus, H.L.A. Hart, through his great work *The Concept of Law*, resurrected, in a meaningful way, a more empirical and analytical vision of legal positivism. An important element of Hart’s construction was a move from less conceptualization to more description. Hart also brought jurisprudence into being a matter of major consideration for the law school community. Not surprisingly, in view of the realities of the Holocaust, Professor Hart also included a basic commitment to a minimal concept of natural law as an element of his jurisprudence.

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69. JOHN RAWL, *A THEORY OF JUSTICE* (1971). By the invention of the “veil of ignorance,” Professor Rawls creates a mechanism by which law can be seen as a product of power; that is, the legal benefits are in proportions to one’s status (gender, race, property, etc.). Although Critical Legal Studies is grounded in part in legal realism, as well as sociology, a microscopic view of law as politics is derivative from the “veil of ignorance” and reveals that one’s entitlements under a specific legal regime is a product of status. The uncertainty of status reminds us of the author’s concern about temporal security being dependent on retaining the good graces of the sovereign. See *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Romer v. Evans*, 116 S.Ct. 1620 (1996).

The current cultural definition of status also allows us to understand why the Supreme Court can decide that certain sexual activity of heterosexuals is protected by the right of privacy whereas the sexual activity of homosexuals is not so protected. What is intriguing about that alleged logical decision as being protected by the right of privacy is that there is no sexual activity that is unique to homosexuals as opposed to heterosexuals. Thus, it is not the sexual activity which is protected, but rather it is the status of the participants. It will be interesting to see whether the Supreme Court can further extricate itself from the obvious contradiction and legal dilemma.

One of the more interesting elements of the Colorado litigation relates to Professor Finnis’ theory that the only appropriate form of sexual activity is that which is available for people who are married. Professor Kaufman offers the astute comment with regard to the Supreme Court’s decision in *Bowers v. Hardwick*:

The decision in *Bowers v. Hardwick* can best be understood as reflecting the Court’s judgment that value changes in our society over the past twenty-five years had not sufficiently established a long-term change such that the right of consenting adults to commit sodomy in private ought to be recognized as having constitutional status.

Major increases in the focus on jurisprudence are attributable, in part, to other scholarly developments such as Ronald Coase’s watershed article *The Problems of Social Cost,* the publication of John Rawls’ major opus *A Theory of Justice,* and the development of Professors’ McDougal and Lasswell public policy theories. These and other interacting factors and participants have historically generated an enormous increase in the analysis of legal jurisprudence in law schools and law journals. For instance, Rawl’s theory of justice produced the emergence of a well defined pro-active jurisprudence in critical legal studies, feminist jurisprudence and critical race theory.

Leaving the economic analysis of the law as expressed by Ronald Coase, we now turn to the voluminous scholarship efforts of Judge Posner and Pro-
fessor Richard Epstein. The interacting aspects of both Posner’s and Epstein’s jurisprudential ideologies have presented a moderately vicious campaign to discover the most relevant concept of justice and/or truth. As such, each school of jurisprudence can be seen as a distinct political party, espousing dogma, cross-citing scholarships, and generating “closed” conferences. The primary benefit of the interaction between these competing philosophies is not in deciding which dogma will become the community’s norms; rather, these competing philosophies have made asking basic legal questions an exciting, enervating experience for law students and professors alike. These rival theories’ most positive aspect can be seen in the metaphysical study of both the question of objective truth and the equally important question of individual epistemology.

Yet, despite this enormous increase in scholarship, philosophy, and “politics,” the Decisionmaker remains ensconced in his or her regal position. Have these jurisprudential theories moved or modified the basic norms of our society? Tentatively, I would answer “yes.” To what extent have these theories modified our basic norms? This question of major importance can not fully be answered from any present perspective. In short, the impact may be major, or then again, it may be minor. Despite the influx of respectively “new” or “modern” experiences and belief systems brought into present day jurisprudence through the political expansion in the number of women and minority judges, our

REV. I (1986), and Carrington, supra note 72. It is well known that the critics have gathered from time to time in interactive legal symposiums. See Minda, supra note 44, at 614 n.66. Such responses by Fiss and Dean Carrington simply exaggerated the impact of the CLS movement while understating the degree to which culture (academic and others) can absorb information without effecting significant change. These responses also mimic some of the same charges made against Legal Realism in the early 1930s. Chill out; law school still continues in same fashion, the numerous increases in specialized seminars or larger classes in jurisprudence does not necessarily suggest that the authority of Langdell is in serious jeopardy. Remember, although much is written about changes in legal theory, less actual change takes places. Indeed there may be an inverse proportion that is the more that is written about the change conceals the fact that the law school of 1870 survives in the 1990s.

78. As to the failure or near death experience of legal realism, see John W. Poulos, The Judicial Philosophy of Roger Traynor, 46 HASTINGS L. J. 1643, 1670-1675 (1995); see also Moore, supra note 31, at 874-878.

79. See infra notes 106-122 and accompanying text.

80. Professor Gary Minda observed:

Sometimes the emergence of a new jurisprudential perspective or theory gives rise to a new intellectual and political movement resulting in paradigmatic shifts and real revolution in legal theory and practice. More often than not, it is quickly absorbed by the prevailing legal paradigm, resulting in modification, perhaps revision, but not in revolution . . . .

Minda, supra note 44, at 599 (emphasis added).

81. Judge Posner supports the concept of the authority of the Decisionmaker by the following insight:

Scientific authority, on which nonscientists rely in forming their beliefs on scientific
society's center norms have absorbed these different visions and remain only slightly modified. Thus, the ideological struggle for a significant change in our society's basic norms has passed its apex.\textsuperscript{80} In short, our culture remains the ultimate source of resistance to accelerated social change.

If law is to be found in the Decisionmaker,\textsuperscript{81} we still must question whether there are any alternative bases, other than our naked preferences, upon which to couch our decisions.\textsuperscript{82} Ultimately, our legal system's legitimacy is at stake and the apparent necessity of society's belief in the "legal" process' formal legitimacy remains the major, if not the only, constraint on our legal system's public burial.

C. Postmodernism

Notwithstanding the intense ideological jurisprudential struggle during the

matters, is derivative from the genuine power in well-deserved prestige of scientific methodology; science works. Judicial authority is essentially political: Decisions are authoritative because they emanate from a politically authorized source rather than because they are agreed to be correct by persons in whom the community reposes an absolute epistemic trust. The political connotations of the word 'authoritative' are apt; the work evokes power and submission, not truth and conviction.

Posner, supra note 32, at 842-43 (emphasis added) (One cannot add to the efficiency of such an observation).

82. I recognize that Professor Dworkin believes there are right answers for hard cases. \textit{See RONALD DWORKIN, LAW'S EMPIRE} (1986).

As to the originator of the intuitive or "hunch" theory, see, Joseph C. Hutcheson, Jr., \textit{The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision}, \textit{14 CORNELL L. REV.} 274 (1929). Judge Hutcheson explained the relationship of the legal result with reference to the judicial "hunch" and concern for each of the claimants by the following:

But I, proceeding according to custom, got my hunch, found invention and infringement, and by the practice of logomachy so bewordled my opinion in support of my hunch that I found myself in the happy situation of having so satisfied the intuitive lawyer by the correctness of the hunch, and the logomachic lawyer by the spell of my logomancy, that both sides accepted the result and the cause was ended.

\textit{Id.} at 280. Interesting, Judge Hutcheson is also concerned as to the perceptions of the results of the consumers of the decision and carefully makes each feel as if they had their day in court. \textit{See also} Max Radin, \textit{Theory of Judicial Decision}, 2 A.B.A. J. 39 (1925).

83. One description of postmodernism has been stated as follows:

"Postmodernism is all the rage." Indeed, the use of the label "postmodern" has grown so in the last ten years that it is difficult to know what authors mean when they describe an event or cultural form as postmodern. Postmodernism is a fashionable description of an array of cultural phenomena ranging from architecture to art to science. Indeed, the scholarship of postmodernism is varied and, by its own admission, contains divergent postmodernisms.

\textit{See Andrew M. Jacobs, God Save This Postmodern Court: The Death of Necessity and The Transformation of the Supreme Court's Overruling Rhetoric, 63 U. CIN. L. REV.} 1119, 1143 (1995).

84. One attempted clarification of the term "postmodernism" has been explained as follows:

"Postmodernism," moreover, is an elusive concept. After all, its identity is constituted negatively in its differentiation from its predecessor. To Lyotard, postmodernism is "undoubtedly a part of the modern. All that has been received, if only yesterday..."
last thirty years, which has yet to find its academic resting place, law schools have been forced to confront another complex but academically exciting model of jurisprudence, i.e., the genre of postmodernism.83

The legal community is currently witnessing comprehensive discourse with regard to the absence of an empirical foundation for our culture.84 It is a serious debate which can be found by pound and volume in many law journals.

must be suspected” (Lytard 1984:79). “Postmodernism” is identified by what it is not — not foundational, not epistemological, not essentialist, not rationalist.


85. Professor Hasnas provides an insightful statement regarding the impact of postmodernism by summarizing the process by which text has no meaning under the position of the “irrationalist” as influenced by postmodernism:

Unlike the mainstream Cits, the irrationalists offer no specific program for legal reform. This is because, as their designation suggests, they believe that reason is impotent to resolve legal and moral issues. Heavily influenced by the philosophy of Richard Rorty and the deconstructionist school of literary criticism associated with Jacques Derrida, the irrationalist believe that objective knowledge is impossible. Following Rorty, they reject the correspondence theory of truth that holds that a statement is true when it is an accurate representation of an underlying reality. They assert that since it is impossible “to step outside our skins—the traditions, linguistic and other, within which we do our thinking and self-criticism—and compare ourselves with something absolute,” reality is socially constructed, i.e., the result of social practices that “embody contingent choices concerning how to organize the thick texture of the world in consciousness.” Thus, the irrationalists adopt the coherence theory in which “the meaning of words are not determined by external referents, but instead by their coherence with other words or judgments within our total body of knowledge.” This, however, implies that “the attempt to fix the meaning of an expression leads to an infinite regress,” and hence, that “meaning is ultimately indeterminate.” Since this is true generally, it obviously must be true within the legal realm as well. Therefore, for the irrationalists, the indeterminancy of the law is merely a consequence of the inherent indeterminacy of human language.


There is another aspect of legal realism from the position of Hasnas, it is not essentially different from some of the current propositions of postmodernisms an he suggests that the CLS are not necessarily follow the proposition that law is politics.


87. The starting point of postmodernism may be found in deconstruction. For a review of deconstructionist theory and the consequences thereof, see the comments of Vincent Leitch, who states: “contemporary deconstruction subverts almost everything in the tradition, putting in question received ideas of the sign and language, the text, the concept, the author, the reader, the role of history, the work of interpretation, and the forms of critical writing.” VINCENT B. LEITCH, DECONSTRUCTIVE CRITICISM (1983). See also CHRISTOPHER NORRIS,
Modern day scholars have invented vocabularies which question historical claims of transcendence in law and other social philosophies from both textual

DECONSTRUCTION: THEORY AND PRACTICE vii (1982) ("Deconstruction is the active antithesis of everything that criticism ought to be if one accepts its traditional values and concepts.").

For a brief but comprehensive history of postmodernism and the role of French philosophers, see LAWRENCE CAHOONE, FROM MODERNISM TO POSTMODERNISM: AN ANTHOLOGY 3-21 (1994).

Professor Alexander distinguishes postmodernism from legal modernity in the following passage:

1. call this dialectic ‘post-modern’ because the present stage of legal discourse about property post dates the era when legal discourse exhibited a widely-shared understanding that property had a single meaning or purpose. Legal discourse during that era, the era of legal modernity, in fact was also dialectical, but the dialectic was not dominantly articulated in terms of conflict between two contradictory core purposes of property. Post-modernity, which I want to distinguish from postmodernism, is the legal culture that we now inhabit. In post-modern legal culture —our culture —legal discourse no longer plausibly assume a common, unified political theory of property right or indeed assume that property rights do or should have a central role to play in politics . . . .


88. JACQUES DERRIDA, OF GRAMMATOLOGY (G.C. Spivak trans., 1976); CHRISTOPHER NORRIS, DERRIDA, (1987); JACQUES DERRIDA: ACTS OF LITERATURE (Derek Attridge ed., 1992); JONATHAN LOESBERG, AESTHETICISM AND DECONSTRUCTION: PATER, DERRIDA AND DE MAN (1991); see also Claire Dalton, An Essay in the Deconstruction of Contract Doctrine, 94 YALE L. REV. 997, 1008 (1985) (noting that the attack by Derrida on the claim by which philosophy is represented as objective reality and the erroneous belief thereof are equally applicable to an analysis of the legal order which also is founded in part on claims to objectivity).


and contextual perspectives. Through postmodernism, text no longer has any unitary meaning apart from its context, and one interpretation is as good as any other. Thus, postmodernism's underlying themes and its impact on the legal process are largely derivatives of other schools of academic interest formulated by disparate groups of experts, e.g., the themes and philosophies developed by Derrida, Focault, Habermas, Rorty and Wittgenstein. These differential themes are first interpreted (or reinterpreted) and then utilized collectively to both attack and undermine our beliefs in rationality itself, and clarify the mythological basis for classical rationality's empirical foundations. In lieu of ratio-

91. RICHARD RORTY, Solidarity of Objectivity in 3 POST-ANALYTICAL PHILOSOPHY (John Rajchman & Cornel West eds., 1985); RICHARD RORTY, CONSEQUENCES OF PRAGMATISM (1983); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1974); c.f. KAI NIELSEN, AFTER THE DEMISE OF THE TRADITION: RORTY, CRITICAL THEORY AND THE FATE OF PHILOSOPHY (1991). Nielsen points out that Rorty's views are in part based on the view that: "Philosophers cannot provide such foundations. There is no coherent conceptualizations of knowledge in which knowledge claims can be construed as correct representations of nature as if we at last found nature's own language . . . ." Id. at 4.


Apart from his major impact on postmodern philosophy, Richard Rorty is well known for his 1979 address to the American Philosophical Association in which he announced, "The end of philosophy." DIGGINS, supra note 23, at 11. Having slain the dragon of philosophical methodology, Rorty advocated studying how beliefs came to be formed socially and expressed the view that the scholar can demonstrate that ideas are neither validated by reason nor rules of logic. His principal interest is in ascertaining how ideas are legitimated and justified. Id. at 15.


93. As Professor Diggins described, "In recent years this crisis of liberalism supposedly constant since World War I, has been linked to 'poststructuralism,' which is the culmination of modernism in a world view where language is the only reality and behind words lurks the meaningless void." DIGGINS, supra note 23, at 25.

94. Any other description of the legal science would be nothing other than an enjoyable and, yes, very teachable fable. Yes, my students enjoy the stability of traditional legal analysis even if it has no meaning, (other than on the bar exam).

One tentative description of the role of the post-modern lawyer is as follows:

Postmodern lawyers and their clients must studiously ensure that they do not become only actors in others' stultifying scripts of social enlightenment and political empowerment. There is no one true story to tell or enact, all claims to knowledge must be tentative and provisional, and the sites for transformative advocacy must remain multiple and dynamic. Under a postmodern attachment, the details and priorities of an activist program must be the continuing subject of healthy debate, respectful
nality, legal issues are resolved through linguistic games and subjective interpretations of context. When this methodology is blended with the Decisionmaker's wide range of discretion, the traditional analysis used to predict what a court might do leaves the realm of ancient rhymes in which a traditional legal analysis of existing precedents are applied to each case's unique facts, and wanders off toward a quest for the principal cultural perspectives from which facts are reorganized as "relevant" facts.

Each era's legal and philosophical trends are consumed by secondary disagreement, and continual reappraisal. To "do the right thing" is a fluctuating and unfinished duty that is always fraught with risk: it is not a blanket willingness (or refusal) to "do the right thing." Rejecting comprehensive programs and universal positions, the postmodern lawyer must attend to the local circumstances of disputes, to the situated places in which people exist, and the contingent possibilities for action. At the heart of their professional existence is the acute responsibility to turn the unavoidable occasions of resistance into meaningful moments of transformation, not invidious instances of subtle complicity or lost opportunities of misjudged insurrection.


95. The renowned Jacques Lacan, a psychoanalyst, expressed the concern for the quality of premises derived from secondary texts by the following:

At this point I must note that in order to handle any Freudian concept, reading Freud cannot be considered superfluous, even for those concepts that are homonyms of current notions. This had been well demonstrated. I am opportunely reminded, by the misadventure that befell a theory of instincts in a revision of Freud's position by an author somewhat less than alert to its explicitly stated mythical content. Obviously he could hardly be aware of it, since he tackles the theory through the work of Marie Bonaparte, which he repeatedly cites as the equivalent of the text of Freud - without the reader being advised of the fact - relying no doubt on the good taste of the reader, not without reason, not to confuse the two, but proving no less that he has not the remotest understanding of the true level of secondary text. As a result, from reductions to deductions, and from inductions to hypothesis, the author comes to his conclusion by way of strict tautology of his false premises: Namely, that the instincts in question are reducible to the reflex arc. Like the pile of plates whose collapse is the main attraction of the classic music hall turn - leaving nothing in the hands of the performer but a couple of ill sorted fragments - the complex construction that moves from the discovery of the migrations of the libido in the erogenous zones to the metapsychological passage from a generalized pleasure principle to the death instinct becomes the binomial dualism of a passive erotic instinct, modelled on the activity of lice seekers so dear to the poet, and a destructive instinct, identified simply with motility. A result that merits an honorable mention for art, intentional or otherwise, of carrying a misunderstanding to its ultimate logical conclusion.

JACQUES LACAN, ECRITS 39 (Alan Sheridan trans.).

96. The Supreme Court's decision in Romer v. Evans, 116 S.Ct. 1620 (1996), might provide further insight as to the extent governmental control over individual sexual freedom or the extent to which gay members of our society have the same rights to privacy as non-gay members.

97. This is not to criticize either the manifest conceptions or conditions of the past or the present; it simply suggests, to some extent, that we enjoy a universal experience. In this sense, we observe the pattern of using philosophy as a means of supporting subjective assertions.
interpreters\(^95\) (law professors) of various legal texts who, in turn, tend to lend a unique and special authority to their admittedly subjective judgments, which, in the past, were frequently proffered as "objective judgments." The same is true today. The content of each philosophy is less important than the manner in which the legal scholars (the secondary interpreters) utilize it. Men and women are both inherently political and necessarily driven to seek personal freedom\(^96\) and security from the perspective of their unique experiences; and they will do so at the expense of others where the circumstances offer no alternative.\(^97\) Thus, the utilization of philosophy to support individual preferences renders philosophy a subject matter without content or significance.\(^98\)

Philosophy's utility, as previously considered by the ancients, was not that it was accessible only to the few nor that its technical language precluded the many from its study. Rather, philosophy assisted the community in facing its existential and dependent conditions. In short, philosophy provided a conceptual ambiance within which the insecurity of our mortality was lessened, not as a needed myth, but as a collective best effort to understand humanity and its relation to the cosmos. Philosophy provided a thoughtful person the opportunity to reflect without requiring that person to make any particular commitment to one of his or her epoch religions.

The search for the truth (objective reality) of philosophy is dead in the hands of postmodern legal scholars. They seek only to be recognized as one of the more noted groups of pallbearers. The new centers of authoritarian values (can't say truth or facts) constitute, in academic implementation, political parties wherein the more charismatic leaders become icons of legal significance and exercise the power to decide who among the competing academic scribes will be admitted as "ordained" disciples to their temple. It is not unlike the authority of a bartender or maître d' in a hip "in" bar or high culture restaurant - when he or she says "hi Jerry," he confers me the identity as a known being within the context of others who are of unknown being status.

98. Unfortunately, a large quantum of legal scholarship has become more a means of professional and personal academic fulfillment through highly conceptual rhetorical interchanges than a concern for either the existential isolation of the Decisionmaker or the members of the community. There is no unique obligation on the part of legal scholars, other than their individual desire, to seek control of the political agenda and culture through the adoption of "their" value systems. All begin and end with their official concern for the public good. The suggestion or implication of much current legal scholarship is that while we have the medicine for survival in the next millennium, such medicine is not available for distribution to those unable to comprehend its prescriptions. As for those current philosophies which have less complexity and more of a commitment to a specific political agenda, its representatives desire instant totalitarian enforcement. Philosophy as a search for truth remains a noble and uplifting quest, but nonexistent in current legal scholarship. Legal philosophy is means to validate or support "my" preferred politically desired end.

99. These views were expressed by Professor Suppe as a member of the Philosophy Department, University of Scranton. Eugene Ehrlich, a very influential sociologist of law, expressed the following on December 25, 1912, as a foreward to one of his books:
Postmodernism invites us to join a new religion of truths and preferred propositions, or the absence of truth, where truths and propositions of the past are, at best, uncertain. As a result, new visions of individual liberation and economic justice, not necessarily substituted truths, are postmodernism's proffered goals. The passageway is lighted, the intensity of participation welcomed, and a promise of social healing can be found in the new postmodern attitude. The astute observations of Professor Bernard Suppe, S.J., follow that if one has an insight or perspective with respect to external reality or the absence thereof, that insight can be explained to the masses.99 Thus, postmodernism's scholastic rhetoric becomes a language of ritual and religion for the few. Therefore, because postmodernism reflects the human experience through the thoughts of a select few within our current culture,100 it is not likely to capture the community's conscious as its underlying premise will always continue to treat "truth" as an objective reality rather than a product of subjective power.

There is also a developing sense that the new postmodern philosophy may not endure the coming of the second millennium — what then?101 It will necessarily be consumed into successive movements through the normal dialectic process. Thus, postmodernism's ultimate test, despite the consensus expressed herein regarding the philosophy's complex rituals, is whether the Decisionmakers and the community will consciously purchase its proffered objectives.

More importantly, does postmodernism explain the underlying reality by

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It is often said that a book must be written in a manner that permits of summing up its content in a single sentence. If the present volume were to be subjected to this test, the sentence might be the following: At the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself. This sentence, perhaps, contains the substance of every attempt to state the fundamental principles of the sociology of the law.

EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (Walter L. Moll trans., 1962). Clearly, the distinguished professor Ehrlich fulfilled all of Father Suppe's prescription.

100. One of the classic definitions of culture is that of "an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate and develop their knowledge about and attitudes toward life." CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 89 (1973).

101. Perhaps, we need not fear its demise in that one commentator expresses the view that postmodernism is reflected in the mechanisms by which the Supreme Court has reversed itself:

Instead prior opinions are mere points, entailing no particular subsequent result, chosen by the Court like the instant opinion, but not dictated by the compulsion of a unifying theory of a particular substantive area. In this postmodern consciousness, the Court's overrulings are frankly (or transparently) chosen and not compelled. The legitimating power of reason fades.

Jacobs, supra note 83, at 1146.
which society and Decisionmakers act? A collective review of the historical content of law journals, and legal philosophy in particular, suggests a limited lifeline for most new extreme philosophical propositions. Today, we need, individually and collectively, philosophical protection to provide us safe passage through the end of this millennium and buy us some time to adjust into the second millennium. In the same sense, we will hear society's fear of man-woman's mortality expressed through many different voices, crying out in the face of a perceived terminal phase (the end of humanity) simply because we are entering a new millennium. Postmodernism may itself be the metaphorical parachute which will slow our decent and cushion our landing upon the perceived rocks in our uncertain future. However, in all likelihood, the politically philosophical voices of the next century will fix on a new philosophy, one which will focus on a major reconstruction of some modified form of legal foundationalism. Thus, the question becomes: are we forever locked into sub-

102. For the view that CLS movement is already passe, see, e.g. Hasnas, supra note 85; Minda, supra note 44, at 30.

103. Indeed the focus has been on the concept of reconstruction.

It seems a possibility worth considering that there is not, and is not going to be, any critical speaker for whom the reconstructive, the visionary, the committed moment is not always already coming, and thus is not always already here. We can deconstruct because we can reconstruct; we are anti-normative insofar as we are normative. As the reconstructive moment seems ineradicable, so too does the human experience of agency. It seems, in other words, a possibility worth considering that the problematic, elusive, "humanist" experience of subjectivity-agency-is an historically irreversible, inexpungible, constitutive aspect of our experience of (human) being. Part of what we do, as concept-making strivers caught in forms of life, is think about the good-the better-world and ourselves acting towards it. We cannot deny our own agency. (We cannot speak the sentence of denial except as speaking subjects, affirming by speaking the sentence what the sentence means to deny.) We can call agency into question, and we had better, but to call into question is also to (re)affirm, (re)create, (re)construct.


I enjoy Professors Radin and Michaelman's description of the reconstructive movement as a necessary evolution, I question the thought that "concept-making-strivers" are going to have an lasting impact on changing that which is — the power of the decisionmaker. The academic community will, however, add volumes to out legal literature. I abhor endless evolutions of legal ideologies.

The use of the term deconstruction focuses on a functioning of destroying mythological premises. From another perspective, the same term can provide direct access to the process of decisionmaking itself. If I see more of the temporal and contingencies in the decisionmaking process, I can accept those realities without necessarily being required to engage in poststructuralism. Thus, I don't necessarily see poststructuralism as a necessary response, although the term deconstruction logically implies a response in the form of poststructuralism. That is not necessarily true.

104. See text infra note 129.

105. "[N]oting that if the law is just a prediction of what the judges will do, it is meaningless to ask how the judges can use prediction to discover the law. The law
jective dialectics? Such appears to be the case. Not withstanding this skeptical attitude with respect to postmodernism, can postmodernism describe the unknown element of decisionmaking, i.e., the Decisionmaker’s inherent discretion to determine that in which they decide. Here, my sociological crystal ball remains cloudy.

is not a thing they discover, it is the name of their activity. They do not act in accordance with something called ‘law,’ they just act; and the law is the bar’s attempt to discern the regularities in their action.”

Posner, supra note 32, at 881 (emphasis added).

Indeed, the Decisionmakers execute thought into act; e.g., it is the metaphysical mother by which the law is created and delivered. With respect to seeing law as act, Judge Posner further comments:

The first usage, which conceives of practical reason as the methodology for deciding what to do, might seem more appropriate that than third usage to a worldly activity like law. But my focus is on the judicial decision, especially the appellate decision, which is action of a sort but contemplative action. The judge is not deciding what to do in his life; he is deciding what the litigants should have done in their lives, and the litigants and society demand a statement of reasons. But this is not correct either; actually the judge is in the uncomfortable position of having both to act and to offer convincing reasons for acting. He does not have the luxury of the pure thinker, who can defer coming to a conclusion until the evidence gels.

POSNER, supra note 19, at 72.


107. There are a few exceptions. Individuals such as Judge Posner, Justice Cardozo, Judge Keeton, Judge Traynor, Judge Bork and the great Justice Holmes have entered into such a discourse. One author, recognizing the widening gulf, has suggested the establishment of a special type of training or seminars for judges to bridge this gap. Professor Grib states as follows:

There is a need to restructure old programs and establish new programs for the education of judges newly arrived on the bench and for those who have been judges for some years; these introductory and continuing education kinds of programs, however, need to devote more time to a substantial study of the judicial decision-making process itself. Though not professional philosophers of law or jurisprudence, though not professional legal academics, judges as practitioners of the art and science of judicial casuistry need to be aware of the ultimate criteriological issues to be faced in deciding “hard” cases in whatever substantive areas of the law.

Grib, supra note 20, at 55. If such a judicial training program were developed, who would be selected to administer it? I would nominate judges first, and selected practitioners of unusual legal achievement. It would be difficult to decide on what type of academics and/or lay persons should be selected, if any.

Judge Bork appears to express the view that reading the academic journals provide no assistance to the Decisionmakers:

So it is with moral philosophers of constitutional law. None of the, so far as I know, proposes simply to apply Kant or Hume to create new constitutional rights. Instead, they begin again, albeit with the help of various moral philosophers to construct the morality they would have judges use to devise new constitutional rights. It seems not to occur to most such academics that they are undertaking to succeed where the greatest minds of the centuries are commonly thought to have failed. It seems not to
D. Academic Insensitivity to the Decisionmaker

This article's principal concern relates to the Decisionmaker, as it is the Decisionmaker who creates the law's legitimacy by making a decision. Yes, this observation is circular, but alas, it necessarily describes our present legal condition! Law is not thought, law is act!\(^\text{105}\) We too often have spun theories of legal jurisprudence which read as riddles wrapped in a puzzle and concealed within an enigma!\(^\text{106}\) Such a waste. What Decisionmakers have the time, discipline, need or concern to enter into a prolonged discourse with legal scholars? Moreover, what legal scholars have the comprehension or concern for the contingencies faced by Decisionmakers, i.e., time restrictions, space, pressure, politics, personalities, consequences, expectations, etc.?\(^\text{107}\) For most Decisionmakers, the study of jurisprudence, philosophy, epistemology, meaning of text, and understanding of context, is a trivial factor among an infinity of interacting data requiring his or her immediate attention. To the Decisionmaker, these are occur to them that they might, if they are confident of success, to move from their law schools to the philosophy departments of their universities and work out the structure of a just society without the pretense, harmful on both sides, that what they are teaching their students is, in some real sense, law.


109. Frank Michelman adequately described the necessity of this development when he stated as follows:

"Freedom understood as self-government involves constant mediations between objectivity and subjectivity, universe and context, sameness and difference, empire and paideia - mediations that are extremely difficult to articulate in theory and to envision in practice." Clarifying and explaining the requisite mediations, or reconciliations, is a chief project of contemporary social theory.


110. Professor Diggins, in his superb book, The Promise of Pragmatism, states the following when discussing the evolution of pragmatism:

But [Henry] Adams and [Max] Weber were historians, and, more struck by the physical rather than the biological sciences, were completely modern in recognizing that science had become divorced from philosophy and its traditional quest for foundations and first principles. The idea of a quest implies searching to get at the truth of things by thinking thoughts that are true to the way things are and consistent with other thoughts. The quest came to an end with Darwinism, the theory of evolution that demonstrated the nature of things to be a succession of events in which nothing is fixed and everything is change and transition. No longer could the reality of things be a matter of photographic representation, copied in the mind like a "kodak fixation", as Dewey put it, for modern science cannot reveal what things are but only what effects they have when experimented upon. With pragmatism, then, ideas are tested in experience in view of their observable outcomes, as opposed to being measured against some standard that is atemporal and external to experience. Similarly, the rational meaning of ideas would lay in the future since
circular concepts by which we seek to explain the decision through a consistent legal theory or reason which is separate and distinct from the Decisionmaker's ultimate motivation. However, the current reluctant movement toward pragmatic hermeneutics or pragmatic conceptions of jurisprudence does not necessarily mean that we are willing to leave the academic arenas of complex conceptions and enter into meaningful discourse with the Decisionmakers. Rather, the movement constitutes an admission that our past conceptions simply do not comport with the legal process' claimed objective determinations; nor do the old only the future, and not the past, could be subject to alteration and control. Philosophy once saw itself as finding knowledge: [William] James and [John] Dewey joined modern science in declaring that knowledge is produced rather than discovered. Pragmatism looks to what follows on the assumption that to "verify" is to "make true." The pragmatists also accepted what Weber described as an "unambiguous evolutionary principle" in that they not only regarded knowledge and value emerging from practical human effort but also assumed a kind of Darwinian theory of life that saw truth as that which survives the scrutiny of continuous inquiry as well as the reality of biological struggle.

Diggins, supra note 22, at 39.

In legal literature the predominant terminology is that of practical reason. Professor Daniel A. Farber provided some guidance with respect to the definition of practical reasons when he stated:

Practical reason, unfortunately, is easier to invoke than to define. Advocates of practical reason are a diverse group, both politically and intellectually. Like many groups, they are most united by what they reject-the primary (or even exclusive) reliance on deduction as a method of analysis. At the level of legal theory, practical reason means a rejection of foundationalism, the view that normative conclusions can be deduced from a single unifying value or principle. At the level of judicial practice, practical reason rejects legal formalism, the view that the proper decision in a case can be deduced from a pre-existing set of rules. Both of these rejected techniques rely heavily on deductive logic (i.e., the syllogism) as the primary method of analysis. Both endorse a procedure in which a court first explicitly identifies the applicable abstract rule or principle for a class of situations and then determines whether a particular situation belongs to the class.


111. Philip Grib offers this description of Judge Robert Keeton's analysis:

For Keeton, judging is choice. Choice is power. Power in itself is neither good nor bad, but power as allocated and used can be for good or ill. Judicial decision-making is judicial choice which is reasoned, involving a reasoning which is deductive, informative (inductive) and analogizing. Judges make law and they do so on value-based reasoning. Judges are obliged to apply the authoritative legal sources of the community (constitutions, statutes, precedents ....

Grib, supra note 20, at 16.

The foundational aspect of law has been succinctly expressed:

It is a foundational idea of our legal system that when people come before the court to resolve a dispute, it is the law, not the judge, that governs their affairs and their real world abstractions (such as government, partnerships, and corporations). This separation of the law from the person who enforces it is a common theme in varying
concepts admit the possibility of implementing pristine and complex conceptions. Observing this conflict of fact with theory, some authorities are migrating toward pragmatic jurisprudence by embracing a modified theory of law which relates to actual events. Thus, "less of this" and "more of that" provides the only realistic mechanism by which men and women can control or understand their "desired" destiny yet remain guided by some jurisprudential theory.

There are significant distillations of inquiry concerning the situations in which judges reside and make decisions. Can we reduce judicial isolation? I think so. Will the current trends in legal scholarship provide both more efficient and more insightful observations relating to the dynamics of decisionmaking? Maybe. Does it matter? Probably not. It appears that postmodernism's legal scholars would rather attempt to provide a comprehensive comment on the ultimate conditions of humankind than deal with our generation's legal issues. Yes, postmodernism has produced numerous and weighty volumes concerning this epoch's critical issues. However, the pressing question is: do these articles provide a continued focus on the issues or simply a point of departure from the point of engagement? Who can tell? Surely the postmodernist secondary interpreters have developed similar preferences but these similarities are packaged in a more subtle, definitional and conceptual form of delivery.

In view of the uncertain and complex theories of jurisprudence, what views of the Anglo-American legal process. It is a major part of what we mean by the "Rule of Law." In extreme manifestations of this idea, the judges apply or enforce the law solely as it was received from others.

See Poulos, supra note 78, at 1647-1648.

112. The complexity of understanding that there is no real understanding, and then proceeding on an arbitrary poststructural basis, is not particularly relevant to decisionmaking.

113. If legal scholars have lost the ability to communicate, they deserve the concomitant loss of respect by or from the judiciary and/or the community. It is doubtful that lay persons are affected by the spirited enterprises sailing under the flag of postmodernism except as culture itself is modified by such. Indeed, it is more likely that the legal scholars borrow from the political agenda of the "community" while expecting public recognition for their alleged academic and political leadership. I believe it is more the reverse. There is also the incessant institutional practice of utilizing current theories of life; whether emanating from science, social-science, philosophy or the arts, as a new methodology of saying something about truth and the construction of law. However, we all speak in vox presenti.

114. Oh, how good it is to be of the leisure class—tenured, endowed and cautiously dependent on the view of peers as to what constitutes good scholarship. There is no way out from within. The late Gustave Wagel, S. J., remarked, "There are few theologians in heaven." It is true that in some cases the life of theological abstractions and/or clarifications of definitional issues does not always allow one to see the heart of the matter or feel the passion of the experience. I fear that we of the academic community may be more blinded than enlightened by the rhetorical conceptions of our profession; at the very least, it reveals a severe case of academic ennui, not life threatening mind you, but time consuming.

Before accusing the writer of seeking the security of the (false) past, where law was controlled by the economic elite for their benefit, through the mind and eyes of the legally...
Decisionmaker would consistently base her decisions on such fleeting propositions? Where the ice is so thin, the cost of acquiring terminology is so expensive, and the quality of guidance is so uncertain and incomplete, the Decisionmaker is necessarily excluded from participation. Thus, there is little in or of contemporary theory that provides safe harbor to the Decisionmaker either as a medium upon which a decision is premised or the manner in which such decision is rationalized. Not surprisingly, the Decisionmaker reciprocates with active indifference. Conversely, it is not likely that the "philosopher king" will control the Decisionmaker through the imposition of his or her philosophical agenda from the pages of a legal journal.

E. A Theory of Jurisprudence: The Decisionmaker as the Source of Law

While these theories of sociological jurisprudence necessarily attacked the premises of legal foundationalism, legal realism, more than any movement, laid open the basic myth of legal tradition so efficiently delivered by American law schools. Independent of the brand of legal realism, such an attitude neces-

115. I do not seriously view the scholar as having the ability or skill to operate the functions of government in the manner described by Socrates. See PLATO, supra note 42.

116. See White, supra note 29.

117. The law is most likely indeterminate. For an insightful review of this argument, see Hasnas, supra note 85, at 86-98.

118. Even Justice Cardozo admitted that judges necessarily construct the law. See CARDOZO, supra note 20. ("The inherent lawmaking aspect of a decisionmaker is one of necessity and not one of choice. Independent of the methodology or the result reached it is in creating the result that the decisionmaker legislates.") The author recalls, in the late fifties, the resonance of this statement as evolving from the college debate topic in which the national proposition involved the proposal that Congress have the power to reverse the decisions of the Supreme Court.

119. Charles Masner has brought together an interesting analysis of critical legal studies and the opportunity to reconstruct the debate on the competing views for the basis of the reconstruction of a legal system. He, however, shares with the author a concern that the decisions are not a product of reasoning. He states in part:

That is, I believe there are no answers which can be proven to be preferred or superior answers, which are disconnected from a judge's values. However, for purposes of making judicial decisions in this life, a Freedom worth having could not require judges whose decisions were unaffected by their values. If it did, we would either have to give up judges and judging, or give up Freedom. At least, this will continue to be the case until such time as universal consensus is obtained and maintained which, it seems to me, will require the appearance of a judge named God and a Freedom I cannot yet comprehend. Until then, we have to get by as best we can.

necessarily required that we focus on the Decisionmaker’s nature and conditions. The conception of Decisionmakers being “philosophically free to decide” what the law is, juxtaposed against the belief that Decisionmakers are required to apply the law rather than create the law encapsulates the two extremes of legal jurisprudence. The position or belief that judges find the law has been, by and large, laid to rest. Once it was recognized that men and women may be less free to decide on a certain outcomes (all Freudian insights set aside) by virtue of their unique birth process and particular culture, legal realism’s central problem then becomes how to ascertain, in a more or less scientific manner, the processes by which decisions are “filtered” through the Decisionmaker’s intellectual structure. Thus, we seek some conceptual criterion or paradigm by which we can understand the decisionmaking process. In developing this model we must recognize that legal realism essentially supports legal positivism. That is to say, the Decisionmaker is both the authority and the criterion by which decisions are made. As such, the Decisionmaker, not the law, is the

120. Andrew Jacobs discussion on the issue of whether judges make the law provides a telling point in reviewing Justice Scalia’s claim to objectivity of text; Jacobs, supra note 83, at 1154. Judge Keeton also admits that judges obviously make the law. See ROBERT E. KEETON, JUDGING 12-13 (1990).

121. It may be that none exists.

122. If one were to search for comprehensive understanding of H. L. Hart’s premise regarding the mysterious rule of recognition, I nominate the decisionmaker as the institution by which laws are selected and determined to be valid.

123. In law school, the law student is fairly well entrenched in the doctrinal aspects of the legal system by the end of his or her first year. The postmodern proposition that there is no truth and that the law is a product of contemporary genesis, if conveyed to some law students, might create an excessive degree of stress and confusion, particularly in view of the conventional expectations regarding the bar exam. I recognize that there is no inherent conflict if the bar applicant recognizes that law is a series of temporary doctrinal distillations which are constantly in flux.

124. The issue remains, as it has always been—how do we know reality; and if known, how do we explain it—first to ourselves and then to our community. As Masner has stated: “The problem is indeterminacy. We are continually engaged in an interpretative conversation about our reality without being able to provide absolute proof that there is a reality independent of the reality from which we define from our situated perspective.” Masner, supra note 119, at 477.

If reality is not knowable, how do we continue? Since there are enormous resources allocated to underwrite legal scholarship, one might presume, as never before, that there is a modest degree of progress in the metaphysical, rational, linguistic, ideological, political, empirical or poetical reference to that which we intuitively perceive as the externalities of our condition and the clarification of the limits of the contingencies that we seek to describe in a more or less comprehensive fashion.

Too tired to know;
Too tired to care;
Yet I go;
I know not where;
I go.

(author unknown).
principal institution for the adjudication of conflicts.

I bring to the analysis of the Ohio Supreme Court’s decision to reverse thirty years of precedent a concern for both the Decisionmaker and for the conceptual criteria utilized by the Decisionmaker in order to explain the basis for the Court’s major modification of the law regarding spendthrift trusts.¹²³ A moderately enticing observation is that the same methodology utilized by the

125. Why is it that there is so little discourse or interchange between the Decisionmakers and the academic community. Is it that judges fear the excessive needs of the academic community to criticize their judgment and personhood as part of the academic job description? Or is it that we know or care so little for their professional life? When is the last time we had tea with a judge? Must the primary contact be carried on through academic projections about life as a Decisionmaker—what, and why judges decide that which they do? Alternatively, do judges read current scholarship? Do judges have time to be attentive to legal scholarship as they conduct their activity of making decisions, and do we of the academic community have so little in common with the law that we must now speak in foreign tongues? Why do the postmodern legal philosophers teach in law school? Are there truly postmodern philosophers on law school faculties?

126. Justice Holmes articulated this consideration in the following: “The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong.” Lloyd Morris, Postscripts In Yesterday 341 (1947); see also Diggins, supra note 23, at 358-59.


There is a significant movement and concern about developing a new vision of the good which can provide evidence with respect to human decisionmaking process under the terminology of the dialogic community. As Charles Masner explains:

More moderate anti-liberals — Civic Republicans — who believe in social structure and do not want to jettison liberalism completely, are nonetheless not satisfied with a liberalism which includes no vision of the good and fosters no community of do-gooders. These moderate anti-liberals, unlike their more radical CLS counterparts, believe liberalism can be saved by removing these defects. The means of salvation they offer is Dialogic Community.

Masner, supra note 119, at 482.

The concept of developing a complex alternative method by which an articulated view of “good” is invented and then applied as a means or criteria to limit or control the discretion of the Decisionmaker is not likely to be successful. Without wishing engaging in heresy, the Decisionmaker as an institution does not consciously intend to be destructive or, alternatively, to be (constructive (good) when he/she makes a decision. Independent of that assertion of fact, I do not believe the decisionmaking culture will be seriously affected by the rather complex, but perhaps highly intelligent, and esoteric propositions of sponsors of the concept of dialogic community. I can’t even say that such articles are even enjoyable to read. As previously noted, the act of deconstructing a fallacious premise does not contain the converse premise of constructing an alternative vision of the good.

Although Professor Michelman may be committed to the development of the dialogic community, he described the process of decisionmaking in a different context which is very applicable to the thesis as used in this article:

Decisionism is the conviction that moral choice proceeds not from publicly certifiable grounds or reasoning, but from the inexplicable private impulses of individuals, objectively unfounded and rationally unguided. Decisionism, which denies all

http://ideaexchange.uakron.edu/akronlawreview/vol30/iss3/2
Court to effect a change in one area of the law was also utilized to reaffirm precedent in another.\textsuperscript{124} Robert Frost might ask, "What road less traveled might Decisionmakers take in future cases on the same or different issues?" Unhappily, and with great discomfort, I would answer: "The road of their choice."

Law, like religion, has died in the philosophers' hands, yet Decisionmakers continue to make decisions and suffer for lack of our concern. Why? Because they need our assistance to clarify the framework or parameters within which they must make their decisions.\textsuperscript{125} This article will identify some conditions in which the Decisionmaker exists. This article will also clarify the judicial criteria for effecting change, and in so doing, ascertain whether such criteria exist independent of the Decisionmaker and/or are a product of the community expressed through the Decisionmaker's act. As to this principal question, Decisionmakers give birth to the demands of the community in which he or she lives.\textsuperscript{126} There is no intrinsic concern for individual justice,\textsuperscript{127} but rather there exists a demand for the community's collective security. This interchange between individual and collective security creates tension, conflict and a demand for resolution without violence, as well as a concomitant and necessary loss of individual freedom. One of legal realism's surviving tenet is that the Decisionmaker, as a unique person, decides. The Decisionmaker's authority\textsuperscript{128} to decide, and the exercise of that authority, has, does and will continue to create that which we call the law. Again, law is act, not thought.\textsuperscript{129} The greater the connection between moral choice and rational deliberation, dwells comfortably with the doctrine of negative liberty: that freedom depends strictly on protection of individual subjectivity against social oppression. By the same token decisionism is hostile to the positive libertarian idea that "ethical situation" — inclusion in a social process of deliberation about how to live — is a condition of freedom.


128. Judge Posner's comments with respect to the concept of authority are directly applicable: ""Authority" means something else in law. Legal decisions are authoritative not when they command a consensus among lawyers, corresponding to a consensus among scientists, but when they emanate from the top of the judicial hierarchy." POSNER, \textit{supra} note 19, at 79.

In discussing authority, Judge Posner continues in a slightly different (but relevant) context: "Authority in law is different. Judicial decisions are authoritative because they emanate from a politically accredited source rather than because they are agreed to be correct by individuals in whom the community reposes an absolute epistemic trust . . . ." POSNER, \textit{supra} note 19, at 82.

129. \textit{See} ABRAHAM, \textit{supra} note 35, at 4; wherein he states:

"What is Law?" has been asked by priests and poets, philosophers and kings, by masses no less than by prophets. A host of answers might be given, yet the answer to the questions remains one of the most persistent and elusive problems in the whole range of thought. For one may well view the entire gamut of human life, both in thought and in action, as being comprised within the concept Law (although a legal system is in fact but part of a larger social order).
political ramifications to the Decisionmaker, the greater the ease with which he or she will provide contemporary political decisions.

The emerging legal philosophies or suggested legal criteria which commentators have proposed that we adopt after legal foundationalism’s demise are no more valid than the myth of legal foundationalism. In fact, they are, perhaps, more dangerous to the extent that they attack the Decisionmakers’ authority. To destroy legal authority as an arbitrary exercise of power would be to destroy society itself. There can be no society without a centralized institutionalization of power. To this end, we might reluctantly subscribe to legal realism, which necessarily supports the legal positivism regime and the corollary fact that, given humanity’s political nature, we are always at risk of duplicating legal foundationalism’s negative effects. Everything else constitutes hope or idealism. Thus, nothing less than the power to immediately remove and/or appoint Decisionmakers can change the law’s political nature.130

The age of judicial imperialism has never waned.131 Despite intensive attacks, we cannot survive without umpires. Without a primary social contract, societal cohesion would be unattainable. Regardless of my critical posture and rejection, the community will accept the Decisionmaker’s authority, no matter

130. It must be noted that Ohio’s judges are elected officials. For a comprehensive discussion of the impact of election on decisionmaking, see Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. CHI. L. REV. 689 (1995).

There are a variety of political pressures that can be applied to affect the removal of a Decisionmaker, particularly in California, where citizens conducted a very intensive political campaign and saw to it that three members of its Supreme Court were removed. See Paul Reidinger, The Politics of Judging, 73 A.B.A. J. 52 (1987). It is, of course, true that most judges who face the election process are retained in office. This is due in part to the authoritarian position that they have in society which is internalized by the constituent members. A Decisionmaker has to commit a major error from the perspective of the prevailing interests and values of the community before he or she will be removed.

There are of course other forms of political pressure which can be applied to an attempt to change the decision. Indeed, President Franklin D. Roosevelt made a serious move to confront the Supreme Court by attempting to expand the number of justices on the Court. Although President Roosevelt failed this goal, he was ultimately successful, in that the Court, not surprisingly, found new reasons to change their constitutional decisions regarding Roosevelt’s New Deal programs.

There is also the question of the basis and procedure for removal of elected judges. See William Braithwaite, Who Judges the Judges? (1971).

131. See Jacobs, supra note 83, at 1122-1141.

132. I experienced the reality of an umpire’s power in the early fifties. I was playing on an undefeated baseball team (Chinchilla) and we were playing a team from Clarks-Green. I was pitching, two persons were on base, two outs and the count was 3 balls, 2 strikes. Bill Smith was batting. I threw a “perfect” strike; Ray Davis, Sr., as umpire, called ball four. Billy Smith took first base, then Billy O’Malley, the next batter, hit a grand slam home run. Ray Davis, Jr., played for the Clarks-Green team. We lost 4-3!

The fact that the NFL chose not to continue with instant replay reflects a decision that the need for an immediate answer exceeds the concern for arriving at a more technically correct
how painful the decision. By analogy, I invite the reader’s attention to a famous photograph, prominently displayed in the University of Michigan’s Crisler Arena. The photo reveals, or suggests, that Charles White, a famous University of Southern California football player, fumbled the football before he crossed the goal line in the 1979 Rose Bowl. The umpire called the play a touchdown. Thus, the play was, is, and will remain a touchdown (all due respect to Bo Schembechler). Again, “law” is act. As the late Justice Marshall stated in an aggressive dissent, “Power, not reason is the new currency of this Court’s decisionmaking.” I suspect that Marshall’s proposition always has been true. Justice Marshall’s candid view that power is the new currency of jurisprudence assumes that some other factor governed the conclusions reached in the classical judicial opinions of an earlier age. However, I disagree with Justice Marshall’s view that power is a new currency; rather, power has been and remains the preferred coin of judicial outcome.

III. REVIEW OF OHIO’S LEGAL HISTORY WITH RESPECT TO SPENDTHRIFT TRUSTS

In 1963, The Ohio Supreme Court held that the spendthrift provision of a cestui que trust was not effective against the claims of the beneficiary’s creditors. Remarkably the Court, speaking through Chief Justice Kingsley Taft, clearly set forth the principles supporting the validity of spendthrift provisions. Chief Justice Taft stated in part:

The decided weight of authority, both in number of decisions and number of jurisdictions, favors the validity of such trusts where the beneficiary is not the settler of the trust. . . . However, the reasons advanced for sustaining the validity of spendthrift trusts have been severely criticized by eminent authorities. . . . Hence, we believe that we should carefully weigh the reasons for and against the validity of such trusts in deciding the instant case.

Note that Taft was more concerned about the reasons “advanced” to justify approval of the spendthrift provision and less concerned about the overwhelming judicial authority validating spendthrift provisions. Indeed, as far as precedent goes, the Court could have argued that there was sufficient prior dicta and other legal support under Ohio Law to require enforcement of spendthrift trusts. In fact, as early as 1928, one author had commented:

This much may be said, that the more recent Ohio cases do not seem to answer. The Roman Amphitheater continues — thumbs up or down.
manifest any particular hostility to spendthrift trusts, and if by law we mean, as Mr. Justice Holmes says, our prediction as to what the courts will do, one may, we believe, safely predict that the Ohio courts will prefer to follow the weight of authority on this question, rather than to follow Gray, and will hold spendthrift trusts valid.\textsuperscript{138}

Furthermore, the fact that both the trial court and the appellate court in \textit{Sherrow} held that the spendthrift trust at question was valid, more than suggests that this 1928 prediction was, most likely, the practicing bar's view as well. It took the Ohio Supreme Court's somewhat surprising \textit{Sherrow} decision to destroy that belief.

Therefore, we must ask: \textit{why} did the Ohio Supreme Court sustain the minority view in 1963, some 35 years after the above-quoted prediction; and on what legal criteria did the Court base its decision? In turn, this question raises other questions of political motivation; identification with the claimants; presumed views of existing legal standards; whether it is more appropriate (on a public policy level) to preserve the interest in trust over an innocent creditor's valid claims; whether it is appropriate to allow donors to carve out exemptions; the impact of those exemptions on future commercial transactions; and who will or should bear the ultimate economic burden of such exemptions? This article will review these questions in the context of three Ohio Supreme Court cases: \textit{Sherrow v. Brookover};\textsuperscript{139} \textit{Scott v. Bank One Trust Co.};\textsuperscript{140} and \textit{Dorno v. McCarthy}.

A. \textit{Sherrow v. Brookover}

Writing in a stern judicial tone, consistent with ancient rigid legal custom, the Ohio Supreme Court, at that time not particularly noted for legal innovation,\textsuperscript{142} found that spendthrift trusts were unenforceable against a creditor's valid claims. The Court, in reaching this conclusion, relied primarily on Griswold's spendthrift trust treatise.\textsuperscript{143} Griswold claims that the primary legal premise offered to justify enforcement of any spendthrift trust, namely the assumption that an owner or donor may dispose of property as he or she chooses,\textsuperscript{144} is patently false. Few would quibble over this simple premise.

However, in reliance upon Griswold's statement, Chief Justice Taft as-

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\textsuperscript{136} Id. at 92 (citations omitted).
\textsuperscript{137} See Friedman, \textit{supra} note 1.
\textsuperscript{139} 189 N.E.2d 90 (Ohio 1963), \textit{overruled by} Scott v. Bank One Trust Co., 577 N.E.2d 1077 (Ohio 1971).
\textsuperscript{140} 577 N.E.2d 1077 (Ohio 1971).
sumed that a beneficiary claiming an exemption against property or rights subject
to execution by a creditor must rest his or her case on either a constitutional
or statutory provision allowing the exclusion. Since the Court could not find
either a constitutional or statutory exemption, the Court reversed, finding spend-
thrift trusts ineffective against a creditor's valid claims.

On the other hand, the dissenters' position in Sherrow employed opposite logic. Justice Zimmerman, speaking for the dissent, stated:

In the absence of any statutory inhibition against the creation and validity
of so-called spendthrift trusts, I can find no persuasive or compelling rea-
son for invalidating or impairing them in Ohio by judicial pronouncement,
when such trusts are properly established and are as plain and explicit as the
one involved in the instant case.\textsuperscript{143}

In spite of the dissent's insight into the active nature of the majority's position, spendthrift trusts were held to be invalid by a vote of four to three — law by judicial edict. Note, however, that law by judicial edict also would have oc-
curred if the dissenters' position had constituted the majority's position, because
either decision's ultimate foundation is extra-legal; i.e., the results would have
followed depending on whichever premise the majority adopted. However, why
the Court chose one premise over the other remains unknown and, for the most
part, inexplicable other than that it expresses the majority's naked preference, independent of the allegedly rational basis by which the majority struck their conclusion.

As legal readers, we have become conditioned by the liturgical techniques
employed by Decisionmakers to draft eminently rational decisions. As such,
even deceptive liturgical techniques do not surprise us. The courts have the
power to decide; a power not likely limited by any particular array of legal au-
thority, even when the legal authority directly conflicts with the
Decisionmaker's judgment. In short, the courts have elected the custom of
delivering well-crafted fictitious legal authority disguised as non-fiction rather
than pure fiction.

As consumers of the judicial process, we know: (1) how courts have de-
cided cases; and (2) the mechanism by which courts "elaborate" creative rhetori-
cal responses as the principal rationale on which their decisions rest. Whether
these formal assertions support the decisions and actually constitute the basis

\textsuperscript{141}. 612 N.E.2d 706 (Ohio 1993).
\textsuperscript{142}. See Lawrence Baum, \textit{Judicial Election & Appointment at the State Level}, 77 KY. L. J.
645, 652 (1988-89); see also Lawrence Baum, \textit{Explaining the Vote in Judicial Elections: The
\textsuperscript{143}. See, e.g., Griswold, \textit{supra} note 1.
\textsuperscript{144}. Sherrow, 189 N.E.2d at 92-93.
\textsuperscript{145}. \textit{Id}. at 94 (Zimmerman, J., dissenting) (emphasis added).
by which the courts reach their decisions remains the central question for any
theory of jurisprudence. The development of legal realism in its variegated
forms, along with sociological or functional policy questions, gives further
import to Holmes’ observation that law is not logic, but rather, experience. Still, how do we quantify or qualify judicial experience in either a scientific or

146. Though Holmes used the phrase more than once, HOLMES, supra note 18, I think it is
significant that he first said, “The life of the law has not been logic: it has been experience” in a review of Langdell’s case book on Contracts. 14 AM. L. REV. 233, 234 (1880). I also believe that this particular statement is the most frequently quoted statement in the American legal system.

147. Griswold, supra note 1, at 631.

148. There are exceptions to the spendthrift trust. In the following situations, the interest of the beneficiary can be reached:

   a) by the wife or child of the beneficiary for support, or by the wife for alimony;
   b) for necessary services rendered to the beneficiary or necessary supplies furnishes him;
   c) for services rendered and materials furnished which preserved or benefit the interest of the beneficiary;
   d) by the United States or a State to satisfy a claim against a beneficiary.


The interest of the beneficiary of a spendthrift trust . . . may be reached in cases other than those enumerated, if considerations of public policy so require. Thus it is possible that a person who has a claim in tort against the beneficiary of a spendthrift trust may be able to reach his interest under the trust.

RESTATEMENT, supra note 1, at §157 cmt. a. This has opened the door to recognition of “special creditors” such as tort creditors and contract creditors. Marty-Nelson, supra at 40-43. The following jurisdictions have statutes allowing special creditors to break into trusts: California, Georgia, Kentucky, Louisiana, Missouri, North Dakota, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia, Wisconsin.

To date however, only Louisiana and Georgia have statutes naming tort creditors as special creditors which can take against the spendthrift. Id. at 42; Emanuel, supra note 12, at 198. In all other jurisdictions, the presence of a spendthrift provision in a trust precludes the tort creditor from collecting. Marty-Nelson supra at 43.

Spendthrift trusts preclude the collection for contract creditors in all jurisdictions. Id.; see also Laurene M. Brooks, A Tort-Creditor Exception to the Spendthrift Trust Doctrine: A Call to the Wisconsin Legislature, 73 MARQ. L. REV. 109 (1989).

An example of a necessary provider is a hospital when the injured persons only property interest is a life estate in a trust. Id. at 43-44. “Where a creditor provides necessary goods or services to the beneficiary, courts allow access to the trust. Medical care, food, clothing and lodging are necessary goods and services.” Brad Berkness, Abusive Discretion: Discretionary and Supplemental Trusts Created in Settlement of Personal Injury Claims, 67 WASH. L. REV. 437, 440 n. 21-22 (1992).

See Matthews v. Matthews, 450 N.E.2d 278 (Ohio Ct. App. 1981) (wherein the court stated: “The income from a trust which is not purely discretionary nor a strict support trust and which contains no express exclusion of the income beneficiary’s children may be attached for
artistic fashion? Before focusing further on these jurisprudential considerations, it is necessary to continue our study of the Ohio Supreme Court as it dealt with the validity and scope of spendthrift trusts.

As noted by Chief Justice Taft in Sherrow, Griswold states that the basis on which most courts held spendthrift trusts to be valid rests on an false premise, to wit: "that the owner of property may dispose of it as he desires — is patently fallacious."\(^{147}\)

However, a fair reading of Griswold's entire discussion of spendthrift trusts reveals that Griswold understood that there is no absolute right for an owner to protect his property from all claimants and that under circumstances where such transfers or restrictions would violate important social policy values, spendthrift provisions ought not be recognized.\(^{148}\) Indeed, Griswold was calling for legislative enactments to clarify the spendthrift exemption's scope.\(^{149}\) To suggest that Griswold, the expert on spendthrift trusts, was opposed to judicial recognition or protection of the spendthrift doctrine on grounds that a property owner can't always dispose of his or her property at will creates phantom authority to deny the legal validity of spendthrift trusts. This phenomena reflects the basic reality that is rediscovered every time we question a Decisionmaker's authority, \textit{i.e.,} "whoever hath an absolute authority to interpret any written or spoken law... is truly the Law Giver to all intents and purposes, and not the Person who first wrote or spoke them."\(^{150}\) Sherrow rested in peace, giving some solace to Professor Gray, as an expression of the law in Ohio until the Ohio Supreme Court's 1991 \textit{Scott} decision.

B. Scott v. Bank One Trust Co.

Twenty eight years after Sherrow, the Ohio Supreme Court, in \textit{Scott v. Bank One Trust Co.},\(^{151}\) again questioned the validity of spendthrift trusts. Unlike the classic spendthrift provisions considered in Sherrow, the provisions in \textit{Scott} changed the beneficiary's interest from one in which he or she would be entitled to specific distributions to one in which he or she became the beneficiary of a purely discretionary trust in order to shield his or her interest from the claims of creditors.\(^{152}\) Notwithstanding the subtle difference in terminology, \textit{Scott} presented "exactly" the same issue decided in Sherrow, namely, whether a spendthrift trust is valid.\(^{153}\)

\(^{147}\) Moran: The Decisionmaker as the Source of Law

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Surprisingly, the Ohio Supreme Court reversed Sherrow and determined that spendthrift trusts are valid. Given that Sherrow involved a moderately important question of trust law, it is even more surprising that the Court reversed Sherrow via Scott's per curium opinion without any dissent. Clearly, there had not been any change or diminution in Sherrow’s legal authority. So much for the importance and continuity of stare decisis.

The Scott decision is even more perplexing in that it reverses Ohio law in the context of a certified state question from a federal district court with respect to the validity of spendthrift trusts in Ohio. Wasn’t Sherrow clear enough? No legal doctrine had changed since Sherrow. Admittedly, one might distinguish Scott from Sherrow on grounds that Sherrow involved a pure spendthrift provision and Scott involved a provision which created a purely discretionary beneficiary. However, even the Court’s Scott opinion recognized that the provision under examination in Scott was, essentially, a spendthrift trust. This acknowledgment by the Court raised an even more onerous procedural question: should the Ohio Supreme Court reverse clear and unambiguous precedent through the resolution of a certified question? Alas, that issue became relatively unimportant once the Court had manifested an apparent momentum for reversal.

The Scott opinion is a classic hornbook statement as to why spendthrift trusts ought to be, and are, generally valid against the claims of creditors. In reaching its conclusion the Court reversed the principal assumption on which the Sherrow Court relied to deny the validity of spendthrift trusts. Namely, the Scott Court determined that a property owner does have the right to dispose of


151. 577 N.E.2d 1077 (Ohio 1991) (before the Ohio Supreme Court on a certified question from a federal district Court).

152. Id. at 1078.

153. Id.

154. Id.

155. The issue of whether a trust constitutes a conveyance of property as opposed to being premised on some other basic legal structure is important as one ascertains the validity of a spendthrift trust. In those legal jurisdictions which reorganized trust law as property law, it is logically acceptable (a justifiable fiction) to take the view that what is not transferred can not be subjected to the claims of a potential creditor. Under this view (or fiction), the spendthrift trust has been recognized as valid. Professor Langbein has recently developed the thesis that the modern trusts can also be seen as being premised on the law of contracts. See John H. Langbein, The Contractarian Basis of the Law of Trusts, 105 YALE L. REV. 625 (1995). While there are elements of property and contract law involved in the foundation of a trust, the contractarian view as it might for example relate to a third party beneficiary, would not provide authority for the recognition of a spendthrift provision. For example, a contract between A and B, with respect to the use and management of property for the benefit of the C, the cestui que, does not provide a legal basis by which the beneficiary can avoid payment of his or her debts from the asset held by B unless one believes we do not need a legal basis (real or fiction) to exempt such assets from the claims of C’s creditors. If contract law is the
his or her property as he or she chooses, including the ability to exempt certain interest from the claims of creditors.\textsuperscript{155} Thus, the \textit{Scott} Court determined that since the converse proposition is true, no legal foundation supported the \textit{Sherrow} decision. Interestingly, the logic of both \textit{Scott} and \textit{Sherrow} assumes contrary presumptions to determine an outcome. Ironically, the \textit{Scott} assumption equally begs the question by assuming that Griswold's proposition, \textit{i.e.}, that a person can dispose of his or her property within reasonable limits, is true.\textsuperscript{156} This proposition seems imminently unfair to the unsecured creditor of a trust beneficiary. Thus, the true issue in \textit{Scott} essentially became: who wins between the trust's beneficiary and his or her creditors?

More promising is the \textit{Scott} Court's reference to Griswold for the proposition that that the validity of spendthrift trusts is a matter of policy, not logic.\textsuperscript{157} Hence, the Court relied upon Griswold's trustees to deny the validity of spendthrift trusts in \textit{Sherrow} and grant validity to the same in \textit{Scott}. Not a bad day's work for the same legal treatise.\textsuperscript{158}

This is not to suggest that a court may not reverse its precedent, indeed, precedent reversal is one of any court's main functions inherent in our concept of justice. In fact, the \textit{Scott} Court gave appropriate citation to its limited authority to reverse the \textit{Sherrow} decision. Thus, a court's current statement of the law is always correct until it renders a subsequent statement modifying or reversing the prior opinion. As the Ohio Supreme Court noted, it is within the province a court's authority "to correct judicially created 'doctrines' if they are no longer grounded in good morals and sound law."\textsuperscript{159} However, since the affirmation of a spendthrift trust in \textit{Scott} gave life to the spendthrift "doctrine" in Ohio, it is difficult to see how \textit{Sherrow} was either a judicially created "doctrine" or how its reversal was required by good morals or sound law. In reality, the Court's reasoning is an interesting exercise of reverse logic; it makes no sense.

The Court's conclusion in \textit{Scott} is both comprehensive and concise. The Court stated:

\begin{quote}
We are no longer satisfied with the balance struck twenty-eight years ago. The policy reasons against spendthrift trusts, \textit{which seemed so strong then}, now look weak. The \textit{Sherrow} court too easily dismissed the countervailing policy that the law should allow the property owner, within reason, to dispose of her property as she chooses. We can no longer sustain the \textit{Sherrow} doctrine.\textsuperscript{160}
\end{quote}

basis for such exemption of assets, we have an expanded opportunity to avoid payment of our debts. For this and other reasons, Professor Langbein does not suggest that trust law should be removed from property concepts, only that trust law is involved with more contractarian aspects than has been historically recognized.

\begin{itemize}
\item \textsuperscript{156} Griswold, \textit{supra} note 1.
\item \textsuperscript{157} \textit{Scott}, 577 N.E.2d at 1083 (\textit{quoting Erwin N. Griswold, Spendthrift Trusts 634 (2d. ed. 1947))}.
\end{itemize}
This statement is very peculiar. Sherrow denied the enforceability of a spendthrift trust; there was no judicially created spendthrift doctrine. Reversal of a negative does not necessarily create a doctrine — simply stated, there was no spendthrift doctrine in Ohio prior to Scott. Additionally, the Scott Court fixated on Griswold’s proposition that a person can dispose of property as he or she chooses. Why must a reversal appear to be nothing more than a slight legal nuance when the members of one court disagree with the prior members of the same court? Since spendthrift trusts are largely a product of judicial edict in most states, why not proclaim the obvious? The court’s authority to reverse is limited only by the possibility that the community would view the new law as an arbitrary and temporary ad hoc determination. In short, belief in legal mystery demands that the litany of rationality be continued, however fictitious the rational might be.

Note also that the Scott Court stated that “[t]he policy reasons against spendthrift trusts, which seemed so strong then, now look weak . . . .” However, how does the Court measure policy reasons? Why does one court see them as strong and a subsequent court see them as rather weak? The Ohio Bar Association filed an amicus brief requesting recognition of the spendthrift provision in Scott. Since spendthrift trusts benefit only a few designated beneficiaries under certain trust instruments, the community’s general concerns with respect to such issues are almost non-existent. However, if the organized Bar, and the Ohio Bankers Association inform the Ohio Supreme Court that the members of those organizations want enforceable spendthrift trusts, the Court is in a position to enact such a rule and protect its select constituency, i.e., the few donor members of a community who customarily transfer assets via trusts.

C. Domo v. McCarthy.

Only two years after Scott, the spendthrift trust was again before the Ohio Supreme Court in Domo v. McCarthy, Justice Douglas, speaking for the divided Domo court, reviewed the existing law with respect to Ohio’s spendthrift trust doctrine and summarized as follows:

- A spendthrift provision is valid in Ohio by reason of Scott;
- A beneficiary has only that interest given to him by the settler; and

158. It should be noted that the treatise cited in both cases is the same 1947 (2nd) edition. What was there in 1963 for the Ohio Supreme Court was also there in 1991. Griswold, supra note 1.
159. Scott, 577 N.E.2d at 1082 (quoting Albritton v. Neighborhood Ctr. Ass’n For Child Dev., 466 N.E.2d 867, 871 (Ohio 1984)).
160. Id. at 1084 (emphasis added).
161. Id. at 1083-84.
162. Scott, 377 N.E. 2d at 1079.
163. 612 N.E.2d 706 (Ohio 1993).
164. Id. at 708-09.
A creditor can not attack that which the beneficiary does not have.\textsuperscript{164}

In reviewing \textit{Scott}, Justice Douglas focused on the \textit{Scott} Court's principal foundation — the maxim that a settlor has, under most circumstances, unfettered discretion to dispose of assets according to his or her choice.\textsuperscript{165} This maxim, which was rejected in \textit{Sherrow} and even questioned by Griswold, became the ultimate legal authority by which the spendthrift trusts doctrine has been sustained and expanded in Ohio.

There are many subtleties in \textit{Domo} because the case involved a suit in equity by the judgment creditor against the beneficiaries of two separate trusts which were not identical.\textsuperscript{166} \textit{Domo} extended \textit{Scott} by holding that equitable future interests\textsuperscript{167} subject to a spendthrift clause are not subject to attachment by a judgment creditor.\textsuperscript{168} Justice Douglas held that, in light of the very specific terminology of the trust,\textsuperscript{169} the beneficiary was precluded from possessing an equitable future interest.\textsuperscript{170} Thus, since the suit by the creditor, \textit{ipso facto}, converted the \textit{Domo} beneficiary's interest into the same interest held by the \textit{Scott} beneficiary, \textit{i.e.}, a discretionary beneficial interest, there was no interest subject to attachment. Justice Douglas admitted that this extension of the spendthrift doctrine to include future equitable interests was subject to a split in the legal authority; nevertheless, the Court gave comprehensive protection to such future interests. Douglas reasoned that the donor's intent to create a spendthrift trust could be implied by the specific limitation's found in the \textit{Domo} trust instrument's language.\textsuperscript{171}

\textbf{D. Judicial Criterion}

The evolution of Ohio's spendthrift trust doctrine reflects a surprising reversal and an expansion during a brief span of only two years. What had been the law became invalid, after \textit{Scott}; and after \textit{Domo}, the spendthrift trust doctrine achieved an extreme level of protection in that even vested interests are not subject to attachment. Yet, during the same time frame, the underlying legal authorities largely remained unchanged. Thus, \textit{Sherrow}, \textit{Scott}, and \textit{Domo} each represent the creation of law by judicial edict.

As academics and practicing attorneys, we seek the keys to comprehensive knowledge and understanding. We seek a predictable and measurable decisionmaking system because uncertainty is painful and costly. Thus, a legal system must be (1) generally understandable; (2) predictable; (3) reasonably efficient; and (4) enforceable.

If we were to apply these assumptions to our analysis of the enforceabil-

\textsuperscript{165} Id. at 710.
\textsuperscript{166} Id. at 709, 711.
\textsuperscript{167} In this case, the right to receive a distribution on reaching a specified age or on termination of the trust. Id. at 713-14.
ity of a spendthrift trust in 1928, prior to Sherrow, what result would we have foretold as academics or practicing attorneys? This same question was considered by the Ohio Supreme Court in 1963 in Sherrow; again in 1991 with Scott; and finally, the extended question of whether a vested interest in a spendthrift trust was subject to attachment by a creditor was considered in the 1993 Domo case. To what extent could you or I have predicted those outcomes on the sole basis of legal analysis? Not very well.

From a perspective of the law in 1928, most of us probably would have predicted that spendthrift trusts would be enforced. The same conclusion probably would have applied in 1963 prior to the Ohio Supreme Court's contrary decision. Most legal experts probably would not have predicted that Sherrow would be reversed twenty-eight years later, particularly as a certified question from a federal court. It would also have been at least moderately uncertain as to whether the Court would extend the holding in Scott to vested future interests such as those present in Domo. What model then is there to predict the outcome of cases prior to judgment? That is the question to which this article seeks an answer.172

IV. THE INSTITUTION OF THE DECISIONMAKER

The basic or elemental question for any legal system is whether it provides a mechanism whereby the participants can reasonably predict the outcome of litigation prior to the actual decision. The degree of predictability rests largely

168. Id.
169. In this case, the trust explicitly denied the beneficiary any right to receive the trust res until age of 35 and prevented vesting of the beneficiary's interest prior to receipt of the res. Id.
170. Id.
171. Id. at 713.
172. "We have learned the answers, all the answers: It is the question that we do not know." ARCHIBALD MACLEISH, THE HAMLET OF A. MACLEISH (1928).
173. See Dalton, supra note 88, at 1009-1010, wherein her methodology is to expose the inherent limitation of legal doctrine and to provide an alternative basis to explain the contract decisions. She suggests that while judicial decisionmaking is indeterminate one must still recognize that we have freedom to successfully speculate about how some cases come out.
174. There is considerable academic dispute about the extent of judicial discretion which is available to a judge. Obviously, the views as to the effect of such judicial discretion range from none to unlimited. My view is that there is unlimited discretion afforded to the Decisionmaker. For a discussion on other views, see Grib, supra note 20, at 14, wherein he states:

In being free to choose, the judge is not obligated or required to decide in a certain way. This notion of discretion in the strong sense characterizes the judge as lawmaker in his or her own right, exercising a lawmaking function which is seen as required in a democratic polity and not in contradiction thereof.
on whether Decisionmakers are controlled or dominated by existing legal rules. To the extent that rules affect or restrict the Decisionmaker's discretion to decide against the rules, law becomes a more conceptually rational system as opposed to a series of disconnected ad hoc determinations. Cass Sunstein explains the utility of rules, as compared to a system without rules:

Others retain a more traditional view of decisionmaking. These people view law as interpretation and observe that the judge exercises rational choices in finding an objective meaning in a particular text. See Owen M. Fiss, Objectivity in Interpretation, 34 Stan. L. Rev. 739 (1982).


Judge Posner provides an excellent descriptive essay on the functions and limitations on the concept of rules in law:

Another problem with rules is that inconsistent rules may be applicable to the same activity. Here logic reasserts its claims. Logically inconsistent rules cannot be applied to the same activity. The judge has a duty to eliminate the inconsistency. But logic does not tell him which rule to discard.

Many legal rules, moreover, are judge-made, and they can be judge-unmade. The common law is a vast collection of judge-made rules, and much of statutory and constitutional law also consists of judge-made rules, loosely tethered to debatable interpretations of ambiguous enactments. The estoppel exception to the statute of limitations is judge-made, and the judges could unmake it if persuaded that such an exception was unnecessary in the case of a long statute of limitations and produced too much uncertainty and litigation. As long as either the rule or its exceptions are contestable, the neat logical pattern of rule and exception will resolve all cases even if the rule is both clear and consistent with all related rules. Adherence to a rule is, as Wittgenstein famously explained in Part I of Philosophical Investigations, not a dictate of logic: the rule does not tell you when to follow it.

We thus have the paradox that a legal question might be at once determinative and indeterminate; determinate because a clear rule covers it, indeterminate because the judge is not obligated to follow the rule. This paradox makes a legal rule a little like a natural law. In addition, it supports Holmes's view that the law is really just a prediction of what judges will do with a given set of facts, because judges are not bound to do anything.

POSNER, supra note 19, at 47.

I obviously suggest that rules have less impact; and I would classify myself as a "rule-skeptic." By reason of such label, I am guilty of that which was so profoundly pointed out many years ago by the late professor Hart.

The rule-skeptic is sometimes a disappointed absolutist; he has found that rules are not all they would be in a formalist's heaven, or in a world where men were like gods and could anticipate all possible combination of fact, so that open-texture was not a necessary feature of rules. The sceptic's conception of what it is for a rule to exist, may thus be an unattainable ideal, and when he discovers that it is not attained by what are called rules, he expresses his disappointment by the denial that there are, or can be, any rules. Thus the fact that the rules, which judges claim bind them in deciding a case, have an open texture, or have exceptions not exhaustively specifiable in advance, and the fact that deviation from the rules will not draw down on the judge a physical sanction are often used to establish a sceptic's case. These facts are stressed to show that 'rules are important so fact as they help you to predict what judges will do. That is all their importance except as pretty playthings.
A special advantage of rules is that judges (and others) can be emboldened to enforce them even when the particular stakes and the particular political costs are high. Because rules resolve all cases before the fact, rules can make it easier for the officials to stick with unpopular judgments when they should do so, but might be tempted to back down.\(^{175}\)

Thus, rules are mechanisms which limit discretion and engender a more reliable and predictable legal system.

However, this theory begs the question of whether the Decisionmaker is motivated to interpret and apply the rule to any particular case in a predetermined fashion. In other words, rules are not able to deliver themselves because they do not contain self-evident propositions. Furthermore, rules are always capable of being distinguished.\(^{176}\) In this sense, the rule may create an agenda or consensus of interest which the Decisionmaker must process. As such, the rule has no operative impact or intent absent the Decisionmaker’s motivation.\(^{177}\)

Therefore, we are never certain as to the extent to which, or under which circumstances or situations, a Decisionmaker’s personal agenda will motivate his or her application of a rule in accordance with the legal community’s general consensus. Of course, factions within a consensus regarding an automatic application of a rule often differentiate between the rule’s meaning; e.g., how it should be applied; and, the case’s “relevant” facts?\(^{178}\) Thus, the rule is a pure form of law without the necessary impregnation by the Decisionmaker’s will. In this sense,

HART, supra note 67, at 135.

In a different context, Professors Radin and Michelman, in discussing pragmatism, also warn against the extreme destruction of the role of rules when they state as follows:

One weakness to which the pragmatist temperament is prone is a disabling radical particularism. The nonideal pragmatist, awash in formalist/legalist culture, too lazily thinks that since rules can’t possibly be what that culture says rules have to be in order to be any good at all - that is, fact-independently and precontextually operative-then we had better keep away from rules altogether. From rejection of the formalist conception of ruleness, the nonideal pragmatist may leap (unpragmatically) to the conclusion that all notions of ruleness are misleading, all pretenses of ruleness misdirected. In other words, she may try to practice the rule case that-by-case judgment, situated decisionmaking moment by moment, describes all there is and can be to practical, active intelligence. She may embrace the rule that attempting to implement rules is always bad (not useful) and attempting to decide by case-by-case judgment is always good (useful).

Radin & Michelman, supra note 103, at 1046 (I also plead guilty to this charge).

178. The author has not dealt with the matter of purely factual questions where the trial court has enormous discretion. As Justice Frankfurter recognized, once the question is left to the main spring experience of the trial court there will be no legal consensus. See Commission v. Duberstein, 363 U.S. 278 (1960) (Frankfurter, J., concurring in part and dissenting). The late great Judge Friendly noted that none particular tax question, the answer generally resulted in a finding of taxable income by the Tax Court but not so by the federal district court. See Estate of Carter v. Commission, 453 F.2d 61 (2d Cir. 1971).

179. In this sense a rule only exists to the extent it is applied.

180. In truth, the answer to this question is inherent to each person’s individual belief system and is not capable of being empirically verified from the perspective of any particular
with all due respect to the Restatement, "rules" may be more fiction than reality.\textsuperscript{179}

Indeed, how do we know which theory of rules represents reality?\textsuperscript{180} There is no scientific answer. There is only an assertion of fact or a belief of such being the fact; there is nothing else. The Decisionmaker's motivation decides whether the rule is fiction or reality in each case. Since motivation is a product of ultimate outcome, the Decisionmaker views the "selection" of "rule" or "no rule" as a means to his or her predetermined end result.\textsuperscript{181} Thus, the mysterious rule selection process never explains the true basis for the Decisionmaker's result. If one desires to understand a result and its predictability, an analysis of the means selection process is misleading at best. However, such analysis does provide a milieu in which the decision radiates the appearance of a cohesive exercise in that special brand of logic, which scholars have cleverly dubbed "legal reasoning."\textsuperscript{182}

In each system of jurisprudence, we frequently find a step which involves a "leap of faith."\textsuperscript{183} For example, in H.L.A. Hart's theory, the "leap of faith" is the "Rule of Recognition." Hart explained that the Rule of Recognition is a secondary rule by which other rules are selected as valid. Thus, the Rule of Recognition is the ultimate criterion by which one ascertains any other rule's validity. Hart would also assert that we are aware that the Rule of Recognition exists because courts exercise it when they make decisions.\textsuperscript{184} Similarly, Hans Kelsen's leap of faith is the "ground norm," which he posits as the ultimate norm belief.

\textsuperscript{181} Here, "no rule" encompasses rule modifications and distinctions.

\textsuperscript{182} See Posner, \textit{supra} note 32, at 830.

The other form, skepticism about the existence of a distinctive legal-analysis methodology ("legal reasoning"),... is consistent with the possibility that some legal outcomes can be made determinative by methods of analysis that owe little or nothing to legal training or experience. The 'right answer' thesis may be said to reflect nostalgia for lost certitudes; the 'artificial reason' thesis, nostalgic for a lost sense of the law's autonomy.

\textit{ld.}

\textsuperscript{183} We are reminded of Bertrand Russell's advice that science is what we know and philosophy is what we believe. \textit{See BERTRAND RUSSELL, MY PHILOSOPHICAL DEVELOPMENT} 276 (1959).

\textsuperscript{184} HART, \textit{supra} note 67, at 94-95.

\textsuperscript{185} HANS KELSEN, THE PURE THEORY OF LAW (Max Knight trans., 1960).

\textsuperscript{186} Perhaps, this is more appropriately described as an ontological theory of decisionmaking in the sense utilized by Professor Moore; that is a theory of truth about the Decisionmaker which is independent of my perception, although it becomes an ontological theory as a derivative of intentional experience.

\textsuperscript{187} In a theological sense, churchmen have disputed the dual nature of Christ as man and God — how could two natures exist in one being? It was natural that such a metaphysical and religious question would move into a rather rigid definition and a rigid answer and that
of his "pure theory of law" and asserts that the "ground norm" is something other than a norm itself. This "leap of faith" element exists whenever a jurisprudential theory supplants an asserted reality, which is not necessarily visible or otherwise clearly founded on any empirically verifiable fact, with a metaphysical logical dependency. In short, it, the "leap of faith," rests on some asserted logical necessity.

My ontological theory of jurisprudence, which focuses on the Decisionmaker as the ultimate authority by which law both exists and is determined to be valid, raises the question: what or who is the Decisionmaker? In some respects, this question or the suggested answer represents a "leap of faith," or, in other words, the necessary foundation for the jurisprudential propositions offered herein.

The Decisionmaker is both a person and an element of the community in which he or she exists. As a person, the Decisionmaker absorbs a unique experience in the community-birthing process. The person achieves a certain identity and personality as an interactive agent; consumes various portions of community norms; lives and is raised in a variety of basic institutions during a specific time period; learns and attempts to achieve security and approval while realizing fulfillment of emotional, intellectual, sexual, professional and political needs. A modest degree of political ambition is the sine qua non of all Decisionmakers, i.e., the ambitious commitment to secure a decisionmaking position of power. Surprisingly, not all Decisionmakers enjoy exercising such power.

Each Decisionmaker's legal presumptions or legal framework differs as much as their respective personalities. Thus, we observe a range of professional attitudes or perspectives from the extreme of the exclusively political functionary to the highly conservative technical bureaucrat; as well as a variety of differing professional attitudes between these two extremes. In short, each Decisionmaker possesses a well defined belief system as to what is best for our society, and some become fixed upon their individual vision.

Another element is the Decisionmaker's ongoing concern as to the influences of his or her community's politicians. Some Decisionmakers maintain close political contacts, while others believe that such political relationships are at conflict with their position. However, all Decisionmakers share a degree of personal and professional paranoia based upon their experiences and the perceived need for privacy in the exercise of their powers to decide. The Decisionmaker's professional matrix consists of the connection between their "personal alternative views or definitions would necessarily be considered heretical. By analogy, a Decisionmaker has its own soul (personal experiences and values) and interrelates with the abstract soul of the community. A being does not exist in two distinct forms but rather strives for or is nevertheless influenced to integrate the thought of the person with the thought of the community. Like individuals, but perhaps more so, a Decisionmaker is constantly viewing
belief system" and their "individual political agenda" in conjunction with each individual Decisionmaker's "skepticism about their belief system."

To this point I have discussed the "person" of the Decisionmaker. However, the Decisionmaker is still a part of the community and the community is consistently interacting with the Decisionmaker. Sometimes this interaction results from direct responses to their decisions, but more frequently, the Decisionmaker interacts with the community through the infinity of transactions that are a part of everyone's life. Decisionmakers do not carry legal doctrines in their heads, but reflect and act like us, as if we are a part of them.

Some Decisionmakers find the professional isolation of their position intolerable. A few even resign. However, most continue in their careers until retirement, and many choose to stay active even after official retirement. Most Decisionmakers are active readers and enjoy the news, sports, and other cultural events. Few read law reviews, although they, or more precisely, their law clerks, may choose to cite them for a variety of different reasons. Many Decisionmakers are intellectual gladiators. They enjoy fierce intellectual interaction with each other and learned counsel. Most importantly, Decisionmakers quickly learn that they can trust few. Hence, their normal need for personal intimacy is wisely restricted to true and long trusting friends. A breach of friendship results in a complete excommunication and reduces the possibility

the chasm between self and the community.

From a sociological point of view, the issue of man and society has always been a focus of radical concern. As noted by Professor Diggins, the progressive sociologist saw man-woman as: "social in nature and society cooperative in spirit. The new sociological manifesto could be summed up in five simple words: 'one man is no man.'" DIGGINS, supra note 22, at 364.

188. POSNER, supra note 19, at 84.

189. See Posner, supra note 32, at 848, 865 (where he indicates that law clerks write some opinions).

190. There are a number of these embarrassing personal incidents, but I choose not to describe them in order to reduce the flow of that which can only be described as gossip!

191. It is not an easy life to be called upon by the community to decide, particularly, if you do not decide that which the community desires. There is anxiety, insecurity, competition and jealousy, and, perhaps, some one out there wants to get you.

192. Judge Lance Ito clearly attempted to publicly display the full range of the rationality of legal rules in the public (ceremonial) trial of O. J. Simpson. It was evident that on separate evidentiary rulings that the parties were arguing the reverse of what they argued in a prior evidentiary dispute. In providing extensive opportunity to debate the rational elements of the separate legal issues, the trial process became disjointed. If Judge Ito's position allocated less time to debate or more time with the trial, the trial would have retained more efficiency, but at the loss of perfect rationality. Judge Ito was in a dilemma either way. Judge Ito's dominant legal posture with respect to evidentiary ruling was that he would do whatever was needed to avoid being personally responsible for a "not guilty" verdict. From this perspective, his rulings are more understanding even though less rational.

Edward Coke is of course most famous in his response to James I, in referring to a special type of reason upon which law was founded, i.e., artificial reason. POSNER, supra note 19, at 10, n.15.
of future open and moderately intimate friendships. Decisionmakers also recognize that the community seeks to both idealize them as civic gods and, when unpopular decisions occur, cannibalize them as traitors to the community’s cause and standards of justice.¹⁹¹

In short, a Decisionmaker is both a person within and an extension of the community. They know as individuals what portions of the community seek any given answer and which answer is desired over others. The Decisionmaker receives this extra legal information despite the limitations suggested by the existence of official public records. To say that the Decisionmakers decide cases upon “legal rules and reasoning” in the context of his or her political milieu is to create an empty and aberrant artifice.¹⁹² Indeed, the custom of the “written opinion” as the source of a decision allows the Decisionmaker to exclude the entire context of his or her primal existence. Decisionmakers who achieve long-term legal significance, independent of our “liberal” or “conservative” characterizations, develop a refined sense of pragmatic intuition¹⁹³ in which they review the appearance or form of legal claims from political, social, and metaphysical perspectives. Their decision is good (efficient and sensitive),

¹⁹³. As to the decision itself, a Decisionmaker becomes adept at identifying the issues in litigation, the bases of the claimant’s arguments, awareness of impact on the case at hand, and other cases before and thereafter, interests of the community which are parts of the puzzle to be solved. The judicial skill is that of creating a decision that architecturally connects with all of these institutions and seemingly respects all of the interest while reaching a specific result. While there are “pragmatic” aspects to this process, I do not see such concerns as rising to a theory of jurisprudence; but constitutes one element of doing the decisions. For the most part, there is little formal training needed to develop these skills and for the most part such skills evolve as a product of the doing; and the more one does, the more likely, not necessarily, the doing will be sensitive to the cross current needs of the differing interests competing for approval. Thus, the construction of the bridge is somewhat separate from the technical answer arrived at. A sophisticated Decisionmaker leaves all of the parties, or institutions having an interest, feeling as if their arguments or claims were appropriately considered even though not necessarily accepted. The pragmatic judicial skills in constructing bridges are somewhat separate from the decision itself, but both elements are blended together. It appears that they are one and the same.

Professor Moore points out that even assuming that judges hunch their tentative decisions that the result is nonetheless based in part as tacit knowledge:

For even if the decisionmaker experiences her decision as produced by ‘tacit knowledge’ whose source seems mysterious, that knowledge does not come from nowhere. Tacit knowledge (about judging, at least) is learned, just as tacit knowledge exercised in playing the piano is learned. That knowledge comes from practice that is itself guided by a theory of how to play the piano.

Moore, supra note 31, at 915.

The practice element goes to the packaging of the decision; how it is delivered as opposed to what it is. In my sense, the decision itself on the substantive element is somewhat separate from the delivery system. Judges become experts at the skill of the delivery system and to some extent create a substantive answer out of nothing; that is, a decision which appears to be legally responsive according to such decisionmaker.

¹⁹⁴. The first Justice, John Marshall Harden, clearly qualifies for the accolade. See TINSLEY
not only for today, but also, they impact favorably on the distant future’s decisions. Such Decisionmakers anticipate the consequences of their decisions the decision’s impact on future circumstances. They express concern for society’s long term interests through the immediacy of the present case and remain prescient in their prescription.\textsuperscript{194}


195. For those who have attended faculty meetings, we can all recall a day or time when the intensity of conflict created an environment of mindless and childlike regression.

196. I am quite concerned about engaging in speculation of this nature. Nevertheless, Judge Posner confirms the existence of this reality when he states:

Another reason not to place too much weight on the fact that many judicial decisions are unanimous (even in the Supreme Court) is that few judges will write or even note a dissent in every case in which they disagree with the majority. And sometimes when a case is indeterminative but not highly charged ideologically, some, maybe most, members of the court will lack a powerful conviction about how it should be decided and will defer to a colleague who does not have such a conviction - without necessarily agreeing in any strong sense with him. Finally, while there is \textit{very little} explicit vote trading in appellate courts, judges do make efforts to minimize disagreement with each other and as a result will on occasion go along with the strongly expressed conviction of a colleague, even if their impulse is to disagree. This is particularly likely within factions of a factionalized court.

\textit{Posner, supra} note 19, at 80 (emphasis added).

197. Why is it that, after the oral argument, the judicial conference is a matter of private deliberation for the members of the court? If such proceedings are allegedly reflective of the way of the Oracle of Delphi; \textit{i.e}, the abstract mysticism of the law, it is important that these judicial activities remain confidential. That is to say, the individual rancor or biases of the participants must be protected from public observation. Yet, most Decisionmakers, including the author if he were one, desire the freedom of private communication that is prevalent in such deliberations. As Senator William Cohen recently stated when discussing the reason for not running for re-election in the Senate:

When I first came here, we had people like Abe Ribicoff, Scoop Jackson, Howard Baker, Jack Javits. There was a sense of ‘the club,’ which is much more absent since television has transformed the situation . . . . When the lights are on, it is theater. And I think we have evolved into more performing rather than deliberating and working things out in an intimate atmosphere.

Lloyd Grove, \textit{For Bill Cohen, A Midlife Correction}, WASH. POST, Jan. 26, 1996, at F1. Accordingly, we should not expect the post-argument deliberations of the members of the Ohio Supreme Court or any other court to be made public in the next millennium. Unfortunately, the fiction of law as a product of legal “reasoning” is also thereby supported and continued.

The author does not suggest that all judicial conferences are or must be rancorous. Indeed, the reverse may be true in many cases because the process by which the community selects judges, whether by appointment or election, does not result in radically different types of individuals. The entire process of selection insures the nomination of those types of individuals who generally reflect the same basic (not all) values of that community. This process guarantees a modest degree of uniformity and continuity in the law.

198. There is one book which focused on the political entanglements of the legal process at the Supreme Court during the period of 1969 to 1976 (the first seven years of Warren E.
Decisionmakers frequently exist as members of a larger court, and, as such, can only act through or in consort with other members of their court. Unfortunately, long term group interaction sometimes creates an opportune environment for competition, control, criticism, cliqueism, hurt feelings, and active animosity.\textsuperscript{195} Thus, the group’s interactive aspect has a direct and complex impact on the decisionmaking process. In extreme situations, personal conflicts may grow so strong that a particular decisionmaker may vote to support a member of his or her “clique,” even though the Decisionmaker, from the perspective of his or her own personal or professional criteria, prefers a different result.\textsuperscript{196} This is not to think less of any court, but more to illustrate that Decisionmakers act in the same fashion as the rest of us. Yet, this reality, like other aspects of group living, is considered embarrassing so long as the court is deemed to operate within the sanctity and efficiency of the Oracle of Delphi.\textsuperscript{197}

We know very little of court life\textsuperscript{198} and its impact on Decisionmakers.\textsuperscript{199} This aspect of the decisionmaking process has been omitted from most scholarly writing because of the erroneous underlying belief that law is a product of reason rather than politics, preferences, or the desire to respond to the community’s needs. The time has come to be more supportive of these judicial realities. I do not believe that any court’s authority will be diminished significantly by admitting these truths. We must learn to live with more information about our Decisionmaker’s ways and respect history’s mystical judicial liturgy.

The professional contact between Decisionmakers and law schools\textsuperscript{200} reflects the “legal rules and reasoning” school of jurisprudence.\textsuperscript{201} For example, Moot Court competitions create an opportunity for law students to personally observe the Decisionmaker’s more formal attributes; namely, their intellect—Burger’s tenure as Chief Justice). \textit{See BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN (INSIDE THE SUPREME COURT)} (1979). This book reveals the political turmoil and guerilla warfare of the justices during the transition from the “Warren Court.” The book is noteworthy in two separate respects; first for the show and tell elements shared outside the Court (mostly through law clerks); and, secondly, for the fact that the intrigue reported therein is essentially disregarded by the cannons of our legal traditions, \textit{i.e.}, if not discussed, it does not exist.

\textsuperscript{199}. Judge Posner cautions us both in terms of listening to the description of the experience from the perspective of the Decisionmaker and is particularly concerned about the quality of projections by an academic. Clearly, this is applicable to the discussion of this article. But we must admit the absence of such judicial information is, moderately speaking, “staggering.” Is there some dynamic in the actual decisionmaking process that must be protected by the templars of modern society – the Decisionmaker? Quite frankly, Judge Posner has given us, in my opinion, more information about the relevant aspects of the Decisionmaker than any other academic or judge. There is more in his article than what is directly stated.

The unknown question is “what motivates a particular Decisionmaker to decide in a particular way?” Knowledge of the techniques and variety of alternative methodologies by which a Decisionmaker can rationalize a decision does not tell us anything of or why the Decisionmaker decided in the way she or he did. Indeed, Judge Posner is the first person to admit that most of the drafted opinions may indeed be the law clerks product. This is not surprising, (as it has
ual autonomy; precision of attack; their ability to create questions fraught with risks and dilemmas; their appearance in the forum of omnipotent knowledge; their political insight; and the charm and warmth which emanates from these intellectual gladiators, dressed in black, peering from the high bench — powerful without limit. Most if not all law students can recall their Moot Court experience as if it is a perpetual reality. It suddenly begins, “Oyez, Oyez, this Court is now in session.” The oralist raises his or her voice, “May it please the Court, I am here to represent petitioners . . . .” The interaction begins, “Do you really mean to say . . . .” Then, an eternal deafening silence (a 10 second pause) . . . a member of the court senses that the oralist is caught. Then, just when all seems lost, the oralist’s creative recovery induces an episode of academic mirth, among the audience. Such brilliance! Such an exchange of the best! The Court speaks: “We are pleased to be here . . . . and if you practice the way you demonstrated before the court today, we know you all will be very successful attorneys.”

Notwithstanding the law student’s Moot Court experience, Justice Ginsberg suggests that oral arguments probably have less impact on judicial decisions than any other element affecting the case. 202 Yet, such ceremonial events reinforce both faculty and student beliefs that law is truly an exercise of reason which can be most clearly observed and validated through formal arguments. 204 That such interactions are delicately choreographed verbal fencing, fraught with formalism, is totally lost in the process. Still, the ceremony itself becomes proof of our mistaken belief that law is reason. Just as scriptures attempt to strengthen the community’s faith in religion, legal liturgy always has been the elixir which attempts to strengthen the community’s faith in the law.

V. THE ADJUDICATIVE FORUM

Because I suggest that law is a product of the Decisionmaker does not, in turn, suggest that Decisionmakers conduct their courtrooms or judicial offices

been known for a long time), but it is surprising in that Posner actually admitted it. We welcome the quality of his scholarship on the decisionmaking process.

200. It should be noted that numerous judges do teach in law school as adjunct professors and that there is some unique benefit from their participation. See Judith A. Lanzinger, Judges Teaching in Law School: Who, What, Where, and Why Not?, 43 J. LEGAL EDUC. 96 (1993). It would not appear that these judges reveal the dynamics of decisionmaking in the process of teaching, but rather that they adopt the traditional standards of law professors.

201. For another attempt to explain the socialization process of law students, see EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948).

202. Then, Judge Ruth Bader Ginsberg stated, at an informal reception following the University of Toledo Fornoff Moot Court Competition in November, 1995, that oral arguments had a very modest impact on the outcome of an appeal.

203. Joseph Vining has focused on the formal likeness of law and religion in practice. See JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN (1986). Repair to formalism

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in a manner inconsistent with that of a highly reason-oriented agency. Law clerks review numerous legal arguments, motions, and briefs, and respond with memorandums and decisions, drafted pursuant to the Court’s instruction and guidance, for the Decisionmakers’ review. The process is conducted under the Decisionmaker’s authority and each office is structured in a way which conforms to the Decisionmaker’s unique personality and working habits. A limited few Decisionmakers may write their own opinions, but more often, the Decisionmaker’s law clerk(s) share the experience of drafting opinions. To this end, the Decisionmaker and law clerk are normally in constant dialogue on a variety of issues calling for resolution. In addition, the Decisionmaker also receives input from attorneys through a variety of institutional methods.

Fundamentally, this formal pattern of information gathering and rational testing completely supports the idea that law is “rational.” Indeed, most of the participants, law clerks, staff assistant, bailiff, and clerk of court as well as the Decisionmaker, see the process as essentially, if not solely, a rational exercise of logic. In fact, the suggestion that law is, in fact, a product of the Decisionmaker’s edict becomes an abhorrent, invidious attack on every Decisionmaker’s judicial integrity.

The unique and special hierarchy in which all courts interact, creating that which is the legal system, also impacts upon the decisionmaking process. For instance, the ideal set of rules, evolving from such a volatile and interactive system, can be described as a traffic light that provides “definitive” guidance for the participants and the Decisionmaker. However, in reality the light patterns are constantly changing; the green light sometimes becomes a red or a yellow,

as a means of achieving acceptance of belief is understandable and traditional. Yet, liturgy could also become a principal means of concealing the inherent limitations of any system and simply constitute a means of returning to authority as the sine que non of its validity. Such a view is congruent with the authority and role in society of a Decisionmaker; a type of civic god in which “we hope” wisdom resonates.

204. “It is no doubt ironic, that the gist of study in law schools, which still sees the Langdellian insight playing itself out in the major preoccupation with appellate court decisions, is unwilling to examine, analyze, and evaluate the phenomenon of judicial decision-making.” Grib, supra note 20, at 8.

205. The methodology by which effective pressure can be applied to induce litigants to settle can be observed in the following comments occasioned by the Honorable S. Arthur Spiegel, Judge for the United States District Court for the Southern District of Ohio taking senior status:

Judge Spiegel has also provided himself to be one of the most effective settlement judges, presiding over settlement negotiations in numerous bitter disputes that seem unresolvable short of trial: the Zimmer Power Plant litigation, the Fernald litigation, the General Electric False Claims Act cases, and the Merrill Lynch Boxcar Securities Fraud litigation. No judge pursues settlement with more patience, determination, and good humor than Judge Spiegel. Judge Spiegel popularized the innovative nonbinding summary jury trial to help parties and counsel learn how jurors view their cases. Settlement conferences are often held both before and after a summary
the yellow a green or a red, and the red a green or yellow. Each issue is treated by identifying the color pattern at a time specific with an eye toward the intrinsic direction of such color pattern's directive. In this sense, the Decisionmaker and his or her cohorts may not recognize the uncertainty of ascertaining the "ideal" color or the extent to which any formal rule provides illumination of the outcome associated with that color. Apart from the search for the ideal answer (color), there are innumerable aspects of the Decisionmaker's office, such as resolution of conflicts brought on by pressures emanating directly from the demands of the Decisionmaker's office, that are, in some sense, extra-legal, e.g., the desire to settle a particular case, or reach a criminal plea agreement. These informal incentives, although premised in part on an extended analysis of ideal rules, may reflect other pressures or concerns, such as the need to properly manage one's docket.

More importantly, the judicial system is interacting function guarantees incessant modification of rules even if the legislative body never enacts any legislation. Thus this article does not bash the Decisionmaker or question his or her integrity. Simply put, the thesis expressed herein is that the Decisionmaker is the source of law, not that the Decisionmaker is a bad source of law.

Would litigation cease if we have no further legislation to interpret? No. Nor would the law become less contingent. Each Decisionmaker is concerned with the quality of a specific decision and his or her focus is on resolving a particular set of circumstances. This process separates and shields the

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James B. Helmer, Jr., 64 U. CIN. L. REV. 5, 6-7 (1995) (Dedication to Judge Spiegel).

206. It can not be questioned that (thankfully) most cases are settled or pleaded out.

207. Some indeed believe that we have created a new type of pollution; statutory pollution. See, eg., FLAT TAX PROPOSALS, REPORT OF THE NATIONAL COMMISSION ON ECONOMIC GROWTH AND TAX REFORM (1995) (Kemp Commission Report). (criticism regarding the seven million word internal review code as exceeding our ability to comprehend or to administer).

208. I would hope that Judge Robert E. Keeton would not include the thesis of this article as constituting judge bashing and that it conforms to his willingness to listen to alternative views with respect to the nature of decisionmaking. See KEETON, supra note 120, at 10-12.

209. ld. at 12. I would rephrase it and state that decisions are all made as law. Law is not to be seen as made during that process; but rather, it is the central object of the controversy. Judge Keeton's main concern is that judges are criticized for arriving at decisions for reasons different than those stated. Judge Keeton's concern is that judges should be committed to the "principle of reasoned decisionmaking, candidly explained" ld. at 13.
Decisionmaker from the unknown and ever changing rule of law. As Judge Keeton noted, “More and more judges acknowledge, even in writing their judicial opinions, that judges often make law in deciding cases.” Only when the Decisionmaker is reversed does his or her connection to the unknown ideal rule of law invade his or her office; then, the Decisionmaker re-experiences his or her susceptibility to the law’s unpredictable character. Thus, the formal process by which the Decisionmaker operates his or her office does not inveigh against this article’s thesis, nor the Decisionmaker’s integrity.

The same interaction process applies at the appellate level but there the process is slightly different in that appellate courts enforce the ideal rule of law through the review process. The traditional stated standards for judicial review do not limit an appellate court’s decision to affirm, modify or reverse. In an appellate court, the Decisionmaker must deal with group dynamics. In addition, the appellate courts are more formally charged with creating new law. In fact, we are not surprised when an appellate court enacts a major change to the ideal

210. Query: does an appellate reversal find an immediate and honest acceptance by the Decisionmaker? One tends to doubt it; but like the lay community, the Decisionmaker accepts, however reluctantly, that reversal by virtue of the “authority” of such appellate court and not by reason of the “reason” offered to justify such reversal. Id. at 4 (regarding the perception of a trial court commenting on appellate decisionmaking).


212. The hierarchy of the judicial process is structured to eradicate the inconsistent or erroneous decision. But the hierarchy aspect is more precisely premised on providing a structure for power. It is not unlike the religious institutional practice regarding interpretation of revelation. Since the uncaused being is knowledge itself; we, the finite being, need interpretive assistance. The rabbinical institution first focused on the word as containing within it perfect meaning until Rabbi Hillel instituted the prosbul to allow a creditor to collect on his debts after the sabbatical year despite the biblical injunction to the contrary (Deut. 15:2). See ENCYCLOPEDIA JUDAICA 1181 (1972). The invention of such a legal fiction gave birth to the authority of the Rabbinical institution to interpret revelation in the context of the needs of the community. The Roman Church (the Christian Church initially becoming Roman—legally and otherwise) moved into autocracy on its formal assertion of a monopoly over interpretation. In 1870, the Roman Church adopted the policy of infallibility when the Pope exercises his power, ex cathedra, over matters of faith and morals. See PAUL JOHNSON, A HISTORY OF CHRISTIANITY 392-95 (1976). Pius XII applied that authority in 1958 view to include the “whole matter of the natural law.” Others, of course, claim that biblical interpretation was for every one. Yet, it is the formal structure of interpretation in the Jewish tradition and the assertion of hierarchal authority by the Pope which are now reflected in our standard of judicial review; that is the institution by which a decision is made and considered valid, the authority to decide!

213. See Carol Chomsky, Progressive Judges in A Progressive Age: Regulatory Legislation in Minnesota Supreme Court, 1880-1925, 11 L. & HIST. REV. 383 (1993). Professor Chomsky states, “The absence of such studies of the state courts is particularly significant because of the tremendous diversity among the states . . . .” Id. at 393; see also James Leonard, Ideology and Judicial Behavior: A Statistical Study of the Ohio Supreme Court: 1970, 1975, 1980 and 1985 Terms, 57 U. CIN. L. REV. 935 (1989). Professor Leonard observed, “[t]o date no comprehensive have studies of the Ohio Supreme Court’s ideological temperament have appeared in the scholarly literature.” Id. at 936. It was Leonard’s conclusion that the Ohio
rule of law. Why? Because the Decisionmaker's role existed well before the age of legislation or legal realism and, as such, the Decisionmaker has always been able to provide an answer.\(^{212}\) Simply put, Decisionmakers, through their acts, create law!

VI. CLARIFICATION OF THE DECISIONMAKERS

The Ohio Supreme Court's own particular socio-economic history, like other state supreme courts, factors heavily in the Court's interpretation of Ohio's laws. However, legal scholars, by and large, generally have not focused on the these unique socio-economic contributions.\(^{213}\) Rather, most commentators have operated on the assumption that state supreme courts share the U.S. Supreme Court's socio-economic views,\(^{214}\) as expressed during the early part of this century when that highest of federal courts established "liberty of contract's" priority over substantive due process.\(^{215}\) That state supreme courts may not hold these truths self-evident offers a great opportunity for legal scholars to refocus their efforts on a comprehensive study of the role of the state courts in American jurisprudence.\(^{216}\)

Not surprisingly, apart from more emotional and intense newspaper coverage, the Ohio Supreme Court has not been the subject of any extensive study with respect to its general jurisprudence.\(^{217}\) Commentators have done a modest amount of research with respect to specific issues, but a major study awaits future scholars.\(^{218}\) A comprehensive history, from the perspective of the Ohio Supreme Court's members, would tell us what types of issues were litigated; the impact such decisions have on the legislature's right to enact general laws un-

\(^{212}\) Moran: The Decisionmaker as the Source of Law

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under the police power; the extent to which the legislature actively responds to the Court’s decisions; the scope of an individual’s contract and property rights; and the extent to which evolving dictates emanating from state or federal constitutions would harness police activities. In short, such a study would disclose the Ohio Supreme Court’s historical and political roles in developing laws that respond to a series of claimed, but uncertain private and public rights. Without a comprehensive study of the Ohio Supreme Court’s principal decisions, one can not readily clarify the existence of a general theory of jurisprudence on the Court; the Court’s particular legal norms and expectations during different periods; or the manner by which such norms or expectations have evolved over time. This article, while obviously not a study of that scope or nature, simply observes the ease by which the Court can, on its own, declare or, more precisely, enact law.

As Professor Baum observed, with respect to the prior election of Frank Celebrezze as Chief Justice, most commentators described the Court’s general jurisprudential reputation as either traditional or conservative. However, after Celebrezze’s election, the Ohio Supreme Court became the subject of intense public scrutiny and controversy. Coincidentally, it was precisely during this time, as further noted by Professor Baum, that the Ohio Supreme Court became active in certain areas of law, such as tort law. Not surprisingly, the Court incurred the business and insurance communities’ wrath. On the other hand, the Court’s change in legal direction received support from a number of different constituencies and certainly pleased the labor movement. Obviously, each of the then newly elected or appointed Democratic justices

219. Former Chief Justice Celebrezze stated in 1982 that the “Ohio Supreme Court was a people’s court dedicated to the needs of individual Ohioans” and also previously stated in a review of the 1982 term that “individuals gained significant legal rights in dealing with business and others.” See Frank D. Celebrezze, The Supreme Court of Ohio Fall-1984 Term, 12 OHIO N.U. L. REV. 33 (1984); Frank D. Celebrezze, Ohioans Gain Rights: The Supreme Court of Ohio, 9 OHIO N.U. L. REV. 559 (1982); see also Leonard, supra note 213, at 937.

220. Baum, supra note 142, at 652-79.

221. Professors Porter and Tarr describe the former view of the Ohio Supreme Court as follows:

The Ohio Supreme Court has not pioneered in reforming tort law, family law, or indeed, any other area of law. Rather, it has acted largely to legitimate and maintain the social, political, and legal status quo in the state, assuming a policy orientation that reflects the traditional, non-ideological character of Ohio politics generally.” In this respect, the Ohio court differs little from many other state supreme courts; and although, for reasons to be discussed later, one is reluctant to label it, or any state supreme court, as typical, it is clearly more representative of state high courts than are those that are consistently activist and often controversial.

Id. at 144; see also G. ALAN TARR & MARY C. A. PORTER, STATE SUPREME COURTS IN STATE AND NATION (1988).

222. See Miller, supra note 213 at 257, wherein it is concluded after an extensive study that “The Ohio Supreme Court plays a very active and partisan role in the state’s policymaking
brought his or her relative pro-active perspective of tort law to the Court.

Partly because of these changes in tort policy, but also due to the forceful personality of Chief Justice Celebrezze and certain activities he undertook, such as his on again/off again decision to run for Governor, the Chief Justice developed a strained and somewhat confrontational relationship with the Ohio Bar Association. The Ohio State Bar Association’s reaction, and the termination of certain regular business relationships between the parties, although couched in terms of certain ethical issues, also reflects the business community’s intense present antagonism against Chief Justice Celebrezze and his alleged domination of the Court. These developments resulted in the Chief Justice’s very intense, personal, and expensive 1986 campaign for re-election. Thomas Moyer, a highly articulate and well regarded legal traditionalist who was at the time a

process . . . .” Id. at 257.

Professor Miller further observes that “[t]his research suggest that the more visible and political the selection system (election nominating or Bar Approval), the more active role the courts play in the policy making process.” Id. 257.

223. Baum, supra note 142, at 218.
224. Id.
225. If one likes to refer to a political organization as having control of a court. As noted by Professor Mark C. Miller:

In Ohio, on the other hand, state judges are elected from top to bottom in technically nonpartisan elections following nomination from partisan primaries. During the general election campaign in Ohio, the two parties widely distribute party voting cards listing the judicial candidates of their party. The media in Ohio covers most judicial races, especially those for seats on the Ohio Supreme Court, as extremely partisan events. In reality, the Ohio courts, and especially the Ohio Supreme Court, are extremely partisan bodies whose decisions tend to change depending on which party controls the bench.

Miller, supra note 213, at 243 (emphasis added).

226. As recently noted:

Thomas J. Moyer has always espoused the importance of an independent, impartial court. It was the very springboard that helped the underdog knock off a controversial opponent, the former chief justice Frank D. Celebrezze in 1986.

A decade has passed, and Chief Justice Moyer’s avowed commitment to an independent court remains stronger than ever, in part because of challenges in Ohio and abroad that he could not have even imaged 10 years ago.

It has been an interesting journey for Moyer. As the current chair of the National center for State courts, he is immersed in the issues and trends that confront courts. Nothing concerns him more than maintaining public confidence in the judicial system as a place where disputes can be fairly resolved.

“I think it’s a little like keeping one’s good health. You need to be careful you don’t let it slip because ultimately everything else doesn’t mean a thing,” he said. “If the judicial system breaks down because people don’t want to take their disputes there, we can look around the world and see how people resolve those disputes.
sitting judge on an Ohio Court of Appeals, opposed Chief Justice Celebrezze. The 1986 elections resulted in Republican control and a turnover of the Ohio Supreme Court and Thomas Moyer being elected as Chief Justice. During the period following Moyer’s election as Chief Justice, the Ohio Supreme Court attempted to reestablish respect (assuming one believes its respect had been injured) for its conservative legal tradition and reduce the perceived tension between the Court, the community and the Bar Association. In this respect, Chief Justice Moyer and the Court have been somewhat successful. However, the Court remains very active in its resolution of what the community perceives as important political issues. In fact, the Court has, on numerous occasions, reversed a number of politically important precedents.

This rapid change in the Court’s dominate political ethos from Democratic to Republican was complicated by the 1984 election of Republican Associate Justice Andy Douglas, an eclectic and charming individual blessed with both extensive judicial and political experience. Justice Douglas brought a pro-active political vision to the Ohio Supreme Court; namely, that law does not exist in a vacuum but rather, law is a mechanism by which government responds to the community’s needs. In this respect, Douglas’ jurisprudential perspective conflicts somewhat with the classical legal tradition which regards the law as a principle source of stability and predictability. For Justice Douglas, and other members of the Court voting with him, the concept of stare decisis or precedent has less impact upon the decisionmaking process.

One of the Ohio Supreme Court’s more noticeable legal flip-flops occurred in Gallimore v. Children’s Hospital Medical Center. In Gallimore, Justice


227. For example, Justice Moyer’s dissent in Savoie v. Grange Mutual Ins. Co., 620 N.E. 2d 809 (Ohio 1993) reflects some degree of frustration when he states in part: “My primary objection to these holdings, which overrule three recent decisions and limit another, is the court’s continued disrespect for stare decisis.” Id. at 821.

228. See Posner, supra note 32, at 846-47.

When a court chooses to read a precedent more broadly than it has to, the key step in its analysis is that choice, which is not itself compelled by precedent. Once the choice has been made, the precedent, viewed as authority rather than example, drops out of the picture; for there is no practical difference between on the one hand treating a case as one of ‘first impression,’ and on the other hand subsuming it under a previous case after first deciding as a matter of discretion to read the previous case broadly enough to enable the subsumption.

Id.

229. The question raised in Gallimore is whether a parent or a child possesses a consortium right upon an injury sustained by the other. 617 N.E. 2d 1052 (Ohio 1993). See generally, William D. Fergus, High v. Howard and Gallimore v. Children’s Hospital Medical Center: A
Douglas described the common law as a medium by which the community’s evolving or modern norms are delivered in the context of current legal decisions. As such, reversal of precedent bares little impact on society because the new norm already exists. Obviously, Douglas’ formal admission that law is born of politics was more than frustrating to the traditionalist members of the Ohio Supreme Court. From their perspective, Douglas’ opinion threatened to undermine both the institution of the Court and respect for the law.

The Gallimore dissenters, lead by Chief Justice Moyer, stated that the majority’s decision was wrong and could only be explained by the change in the Court’s political composition. To this end, the Gallimore dissent is both effective and succinct; the Court must follow precedent absent a major reason for reversal. Chief Justice Moyer wrote:

\[
\text{The ease with which the majority has discarded a decision of this court, one that followed the majority view in the country, is not a good sign for judges, lawyers and others who look to the Supreme Court not only for pronouncements but for stability and predictability in the law.}\]

The intense interaction created between the Court members’ different

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231. Id.

232. Former Justice Craig Wright of the Ohio Supreme Court noted on the occasion of his retirement, “Judges most certainly should interpret the Constitution as it is written. Many judges are all too willing to make it up as they go along.” James Bradsaw, Too Many Judges Try to Make the Law, COLUMBUS DISPATCH. Feb. 28, 1996, at 4B (emphasis added).

233. See Gallimore, 617 N.E.2d at 1061 (Moyer, J., dissenting), 1062 (Wright, J., dissenting).

234. Id. at 1062 (Moyer, J., dissenting). It is completely nonscientific to focus on judicial comments from a few cases and make some generalized conclusions. Yet, these polar positions are reflected in a number of cases. When the dissent bespeaks of the majority view as being disingenuous, you can be sure that there exists a serious personal and professional disagreement about the result, and the implicit accusation of the dissenting opinion is that the majority opinion is not “legal” or “principled.”

Chief Justice Moyer should not feel slighted in that there are numerous cases in which the dissent does not believe the majority opinion is “legal.” As noted by Andrew M. Jacobs, the belief that majority decisions are illegal is not a rara avis when he stated in part as follows:

\[
\text{Langdell’s ideal of law as science of reason has broken down generally within the law because postrealist legal thought of today finds unremarkable the idea of adjudication as an exercise of largely unconstrained discretion. The Langdellian ideal has also broken down in the area of overruling, as partisans of both the right and left regularly inveigh against the ‘illegitimate’ overrulings of their opponents. Thus, Justice Marshall’s fiery dissent elicits no shock and fails to delegitimize the decision in Payne.}\]

See Jacobs, supra note 83, at 1119-1120.

Not surprisingly, it is the radical tone and directness of Justice Marshall’s dissent in Payne
views in Gallimore generated a particular doctrinal response which arose directly out of, or in context with, their disagreement. In sum, the views of the judges, like artists, are always subject to change and the response to one legal controversy does not necessarily apply, as a matter of logic or doctrine, to another case. For this reason, judges seldom develop doctrines which might later be used against them. However if this were the perfect practice, no judge would ever write a rule. Chief Justice Moyer and the more traditional members of the Ohio Supreme Court criticized Gallimore’s majority. However, would the Gallimore dissenters’ limit their right to reverse any other precedent if they were motivated toward such action and they believed that the legal premise supporting such precedent was no longer valid? I think not.

Under the Ohio Supreme Court’s formal political scheme, candidates run in a primary election as Democrats or Republicans, then they run in a general election as nonpartisans. Therefore, the Court is, not surprisingly, comprised of a number of legal traditionalists. However, even these legal traditionalists seem more flexible and slightly less rigid than one might expect to be true of those referred to as strict traditionalist when it comes to the Court’s acceptance of new standards. On the other hand, some members of the Court are ideologically committed to particular legal answers or public policy goals which coincide with his or her constituents’ goals, i.e., business, labor, women and/or minorities. Within these judicial viewpoints, there exists the controlling authority or lack thereof that each justice attributes to existing legal doctrine. Separately, the members may unanimously agree on such issues as prisoner v. Tennessee which excites Jacobs’ and our interest. Justice Marshall states:

'It takes little real detective work to discern just what has changed since this Court decided Booth and Gathers: This Court’s own personnel. Indeed, the majority candidly explain why this particular contingency, which until now has almost universally understood not to be sufficient to overruling a precedent is sufficient to justify overruling Booth and Gathers.

235. That the Ohio courts, and in particular, the Ohio Supreme Court are seen as “highly active and partisan actors in the state’s policy making process” cannot be questioned. See Miller, supra note 213, at 247-48.

236. For example, Justice Alice Robie Resnick wrote a comprehensive dissent regarding the right of a surviving spouse to elect against assets held in her deceased husband’s revocable trust. See Dumas v. Estate of Dumas, 627 N.E. 2d 978 (Ohio 1994). There was, of course, a clearly established precedent in Massachusetts where such right of election against assets in a revocable trust were recognized. See Sullivan v. Burkin, 460 N.E. 2d 572 (Mass. 1984). Justice Resnick requested legislative action to reverse the decision. It appears the Justice Resnick’s dissent may indeed become the law as Ohio is proceeding to consider adoption that portion of the Uniform Probate Code which allows a spouse to elect against the augmented estate, which concept includes those assets held in a revocable trust.

237. Note the disparity in views as to that issue reflected in Gallimore by Chief Justice Moyer and Justice Douglas.

238. A comprehensive analysis of the decisions of the Ohio Supreme Court will likely reveal group patterns or congruence in voting.

http://ideaexchange.uakron.edu/akronlawreview/vol30/iss3/2
rights, criminal constitutional protections, or capital punishment, since the community offers little support for the Court to expand individual rights in those cases. All of these factors impact on the Court members’ decisionmaking process.

Thus, the Ohio Supreme Court is first and last most directly reflective of

239. Professor Miller concludes with respect to his study of the Ohio Supreme Court as follows:

Thus, the Ohio courts became most activist and more visible in part because they needed to prove to the voters that the change in party control of the Ohio Supreme Court had produced important substantive changes in policy outcomes. The highly partisan judicial election system used in Ohio helps produce highly partisan state judges who feel that they need to play an activist role in the state’s policymaking process in order to get themselves re-elected and to help their fellow partisans in the other institutions of state government get elected as well.

Miller, supra note 213, at 252; see also City of Rocky River v. State Employment Relations Bd., 530 N.E.2d 1 (Ohio 1988); reh’g denied, 533 N.E.2d 270 (Ohio 1988); reh’g granted, 535 N.E.2d 657 (Ohio 1989); rev’d, 539 N.E.2d 103 (Ohio 1989). For an excellent analysis of the absence of a jurisprudential basis for such action, see James T. O’Reilly, More Magic With Less Smoke: A Ten Year Retrospective on Ohio’s Collective Bargaining Law, 19 U. DAYTON L. REV. 1 (1993). O’Reilly explains in very graphic and harsh terms the basis for the reversal by the following:

Scholars who study this period in future years will try to diagnose this spot on the X-rays of Ohio jurisprudence, for something very abnormal in jurisprudence transpired. Those who tend to favor conciliation over police strikes and fire fighter walkouts agreed with the minority in the original decision, but all concede that the question of home rule constitutional authority is a close one. The majority opinion in Rocky River I was persuasive, although the down side of it was to reopen the delicate balance of strike tradeoffs. In contrast, the 4-3 majority in Rocky River II, which overturned Rocky River I; wrote a disappointing, poorly reasoned opinion. The court heard a chorus of jeers that marked the loss of value to the court’s use of precedent. The Rocky River II opinion bore the rhetorical equivalent of the kind of shallow cover that bulldozers pour over a landfill from day to day; one knows what lies underneath. It may be too harsh to place the court on a pedestal and expect its elected members to ignore election results. . . . Again, one can love both conciliations as a policy and the Supreme Court as an institution, but unfortunately the rescue of the former diminished the reputation of the latter.

Id. at 8-9.

the "belief system" of jurisprudence. As a group of seven, the composition of the majority opinion frequently changes. There is no consistent majority or politically committed clique. However, even though the Court is concerned about stability and respect, it must admit that its legal doctrine is less certain today than it was in the early part of this century. The number of cases in which the Court has reversed or modified existing law has increased greatly in recent times over the same percentage as reflected in earlier time periods.

In sum, the Court is a unique political institution through which the current final word on Ohio public and private law is cast. As such, the Court reflects the community's evolving shifts in political views. As a result, the Court either spins more new legal doctrine or returns to old legal doctrine more readily than it has during any time in its history; except, of course, when Chief Justice Celebrezze was at the helm. Thus, the Ohio Supreme Court is truly a political agency which utilizes "legal logic" to enact law from its position of authority, i.e., the Court has the formal last word.

VII. LEGAL CRITERIA OR JUDICIAL EDICT?— THE FACTORS BY WHICH THE OHIO SUPREME COURT REJECTED, ADOPTED, THEN EXPANDED PROTECTION OF SPENDTHRIFT PROVISIONS

Those of us who were brought up in the analytical and historical jurisprudence of the last century may well bear this in mind as we read and seek to appraise the work of the on-coming generation of American law teachers. Very likely our unconscious measure may be that of philosophy and psychology of the past, whereas they are struggling to put things in terms of philosophy and psychology of today, and thus to set up a legal science for the twentieth century.

— Roscoe Pound

For centuries, commentators have stressed the importance of an independent judiciary. We are committed to a system of laws, under which all persons, including the President and citizens alike are accountable to certain basic


241. The Ohio General Assembly has, on occasion, modified a particular decision through the enactment of subsequent legislation as it may also decide to reverse Dumas. Also see the analysis of Professor Miller wherein a number of Ohio legislators have expressed the view that they would reverse the Ohio Supreme Court. See Miller, supra note 213, at 250.


243. See e.g., Madison's Notes On The Constitution Convention.

244. King Charles I came to experience the reality of accountability to the law as he laid
The judiciary, as an institution, is a natural outgrowth of the resulting difficulty of enforcing emerging national norms on both a heterogeneous and homogenous society. Thus, we have developed the judiciary as a necessary bureaucratic mechanism to exercise independent autonomy over the entire community. In light of this judicial process and the courts’ direct “exercise” of power, society must, in turn, believe that our legal system is fair and, like some fairy tale, equally applied to all. Indeed, society must believe, either consciously or subconsciously, that such a perfect mosaic of divine principles exists in order to ensure each individual’s interdependent commitment to and acceptance of the community’s norms. As part of its need to believe, the community must see the judicial system as more or less mysteriously impartial, with his head on the block and listened to the final words of his executioner “[A]n’ it please your Majesty.” See C.V. Wedgwood, A Coffin for King Charles: The Trial and Execution of Charles I 223 (1969).


246. Pound, supra note 64, at 697.
247. Id.
248. Id.

249. L.L. Fuller, American Legal Realism, 82 U. PA. L. REV. 429 (1934).
250. Professor D’Amato suggest that one reason for the indetermining of rules or law is due in part to law schools:

The massive task of educating the public would need to begin in the law schools, because much of what the public believes law is stems from what attorneys say it is. However, law school education today seems to be heading in precisely the wrong direction. Instead of examining issues of rightness and fairness, exploring moral philosophy and its relation to conflict resolution, and examining the facts of reported cases in detail to sort out the question of which side deserved to win, legal study is increasingly becoming a matter of learning an enormous body of rules. When some professors, trying to swim against the entropic tide of legal disintegration, spend an entire class examining one or two cases with a view toward formulating the rule of decision and criticizing it, students comment impatiently that the professor took a great deal of time to get to a simple point. And when a fraction of those professors end the class without stating the rule-leaving it to the students to figure it out for themselves—students make themselves heard in the dining hall and student newspaper that those professors seem ignorant of the law.

The students can hardly be criticized, for their very casebooks are becoming more rule-oriented. Compilers of casebooks are increasingly filling pages with notes and comments, explaining for the lazy student what the principal case stands for. And in order to make room for these editorial notes, the cases are whittled down. Issues in the case that are not relevant to the particular point the compiler is making in that chapter are simply excised. Worse, facts in cases are summarized or often omitted entirely. The true source of the law— the real events in the lives of real people—are shunned aside in the mad rush to give the students more rules, more disembodied
judgments delivered as an appropriate communal consideration of all relevant legal principles and rules.

Under this view, there ought to be one correct answer as to why the system is favorable: law became predictable and judges became the emerging arguments, more slabs of opinionated, pedestrian prose. And there is so much of the latter that casebooks are getting bigger, with consequent pressure on students to read more pages and to think less about them.

The illusion of legal certainty in law study is fostered by "black-letter" rote learning, the idea that students must learn laws and not the law. Canned outlines, hornbooks, nutshells, highlights, and other mentally stultifying paraphernalia prepared by professors and assiduously marketed to students by commercial publishing houses have created a crisis of logorrhea in even the best law schools. Perhaps the trouble all started over fifty years ago when the first "restatement of the law" introduced the black-letter law concept. These compendia that simplify by distortion the logic and value orientation of the common law have proliferated. Students exposed to them in law school who go on to become judges incorporate into their judgments the prescriptions in the restatements as if they were handed down from Mount Sinai, and the cycle accelerates and feeds upon itself.

Students are increasingly getting the message that the law consists entirely of words that can be manipulated. Somehow the meanings of the words, and more importantly the real-life facts of the case and the real-life crises of the parties, fade into background insignificance. Students become adept at manipulating words; but they are losing a critical attitude toward those words, a sense of comparing those words to underlying but real questions of fairness and equity. There is a Coase-theorem apathy that it does not matter which side wins a case — so long as the attorney's high transaction costs are paid. Law school becomes training in how to generate attorney's fees.

But underlying equities will not go away. The natural-law rules cannot be snuffed out; they persist to create a tension between the law on the books and the law that ought to be. By emphasizing the former, law schools contribute to the increasing uncertainty of the law. They teach a law that has lost its moorings, that drifts on a sea of verbiage.


For a comprehensive discussion on the utility of a predictive model for lower court judges, see Michael C. Dorf, Prediction and the Rule of Law, 42 UCLA L. REV. 651 (1995). While admitting personal values have an impact on decisionmaking, Professor Dorf focuses on what is written as the essential foundation for what is decided. See id. at 686-687. Furthermore, he suggests that by making decisions on the basis of personal views, a Decisionmaker weakens the law. Professor Dorf entirely misses the point that the personal view of the Decisionmaker, in the mystical art of adjudication, is not uniquely separate from his or her professional views; there is in the Decisionmaker a syncretism by which all become one, the Decisionmaker does not act as two separate parts; there is no separate intellectual existence from the personal; a Decisionmaker is one and that one is part of the community. However, viewed from the text of what is written all decisions appear to be "legal." Even Professors Moore and Hope recognized long ago that decisionmaking requires a study of context and human nature. As they stated in part

Finally, the results of such correlations have been generalized into laws of judicial and administrative behaviors, from which it is supposed that, if 'the facts of the case' are known, future behavior of a particular judge in a particular case may be predicted.
technocrats of legal science. Master these basic principles and one might reasonably predict or describe the outcomes of any litigation.

One of man-woman's constant objectives is to label the legal process as "science" and establish law as both a product of reason and predictable decisions. As the early legal realists attacked the existing legal regime's errors, Dean Pound requested that legal realists clarify their theory's status as a science, or, in other words, explain how "faithful adherence to the activities of the legal order" qualifies "as the basis of a science of law." Pound believed that a science of law must be something more than a descriptive inventory.

Similarly, Lon Fuller, in his hunt for the science of legal predictability, searched in vain to ascertain the same clarification from Karl Llewellyn. Llewellyn responded formally to Dean Pound and anticipated some of Fuller's criticisms. Llewellyn asserted that there is no school of legal realism and that "there is less possibility of accurate prediction of what courts will do than the traditional rules would lead us to suppose:" adding that "the kind of certainty that men have thus far thought to find in law is in good measure is an illusion." Of course, the great Justice Holmes preceded everyone by identifying the conflict between stability and predictability in 1879 when he stated:

What has been said will explain the failure of all theories which consider the law only from its formal side, whether they attempt to deduce the corpus from a *priori* postulates, or fall into the humble error of supposing the sci-
ence of law to reside in the *elegantia juris*, or logical cohesion of part with part. The truth is, that law hitherto has been, and it would seem by necessity is always approaching and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other end which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.\footnote{253}

That is to say, law is always changing; yet, it remains the same. Within such perfect Oracle of Delphi conceptual mysticism and logical contradiction, law students are taught to believe in the certainty of the “rule” even though each “rule” is in a perpetual state of flux, subject to modification or reversal.\footnote{254} Notwithstanding, the student prepares for formal jousting in the context of the bar exam, fully prepped with “artificial” knowledge of specific answers.

Query: can law be partly scientific and partly not; and, yet remain a science? Most, if not all, admit that law is not in itself wholly subject to the scientific method. Nor does a mere reference to legal science mean anything other than the conclusion that law is not scientific.\footnote{255} I reach this conclusion on the basis of experiences as opposed to syllogistic games. The law and its primary source of being is more precisely found in the community’s standards or norms.\footnote{256} However, the community only speaks formally though the Decisionmaker. As such, the Decisionmaker is free to “cast” the law’s final form according to his or her interpretation of the community’s standards or norms. Thus, the law reflects the community’s “norms” as interpreted by the Decisionmaker, or group of the same such as the Ohio Supreme Court, on a fixed date.

Some early legal realists such as Underhill Moore or Theodore Hope, Jr., are fairly good at creating authority through such an institution. We are less successful in understanding how decisions are made!

\footnote{255}{Posner, *supra* note 22, at 841. “[D]ecisions have much less intrinsic persuasiveness than unanimous scientific judgments, because judge’s methods of inquiry are so much feeble than scientists’ methods.” *Id.* Judge Posner also adds:

Scientific authority, on which nonscientists rely in forming their beliefs on scientific methodology: science works. Judicial authority is essentially political: Decisions are authoritative because they emanate from a politically authorized source rather than because they are agreed to be correct by persons in whom the community reposes an absolute epistemic trust. The political connotations of the word “authoritative” are apt; the word evokes power and submission, not truth and conviction.

*Id.* at 843.}

\footnote{256}{From the perspective of historical jurisprudence some, like Von Savigny and Eugene Ehrlich, claim that law is a product of folk-ways. See Fuller, *supra* note 242 at 452. Indeed, Professor Fuller described Savigny as denying the law as being anything other than a “kind of glorified Folk-way.” *Id.* at 452. Others describe the role of the Decisionmaker to apply the abstract formal rules in a way which comports to the communities views. See EHRLICH, *supra* note 99. Professor Ehrlich viewed law as being found in the society itself. Quite frankly, the views of Professor Ehrlich may not be that radical if the soul of the decisionmaker...}
mistakenly attempted to establish that the community controlled the Decisionmaker and dominated and determined the law. However, even though the Decisionmaker is a member of the community, the community necessarily depends on the Decisionmaker for his or her interpretation of its norms and values as they relate to a particular set of circumstances. Thus, the principal actor, the institution in power, is the Decisionmaker. He or she decides the status of the law on a date specific, regardless of whether his or her interpretation may be in accord or at odds with the community’s standards or norms. Whatever the decision reached, that decision is the law. Thus, the deciding catalyst, the principal actor, is the Decisionmaker, not the community. Over the long run, the community’s standards or norms will interact with particular decisions; but in the interim, a particular decision may not necessarily rest in accord with the community’s norms. Moreover, as issues become more technical and less political, the community’s standards have less impact on the Decisionmaker’s will. Thus, the Decisionmaker will have greater freedom to select an answer according to his or her personal liking even despite any potential concentration of legal rules.

Indeed, the greater the concentration of “formal rules,” it is more likely that the property owning members of the community will be given special legal recognition. This phenomena holds particularly true where legal issues are highly complex and affect only a few property owners. Where the community’s interests are vague or non-existent, the Decisionmaker is certainly less constrained in his or her ability to design a new law that meets the needs of these powerful few.

The development of Ohio’s spendthrift doctrine is a perfect example of this process. The losing creditor is generally a less sophisticated provider of goods or services, payment for which is not protected by a security interest. Banks and crediting institutions are not so naive as to provide goods or services without securing adequate collateral or other legal protection. In this sense, from the Decisionmaker’s perspective, the decisionmaking process constitutes an evaluation of each claimant’s power base. Thus the decision becomes, if you will, trial by intellectual assessment of the claimants’ power base. There is no

is part of the community; the formal and the informal criteria merge to reach one and the same conclusion.

257. See Moore & Hope supra note 250.

258. Conversely, most would believe that the more technical the issue, less discretion is available for the Decisionmaker. This represents the traditional view. However, I believe that the view does not comport with the practice. The Decisionmaker retains substantial discretion notwithstanding the existence of a complex legal regime; she decides what the rule is and how it shall be applied. See also Hans W. Baade, The Casus Omissus: A Pre-History of Statutory Analogy, 20 SYRACUSE J. INT’L L. & COM. 45, 83 (1994).
longer a need for actual trial by ordeal or rational analysis because the power holders will not question favorable outcomes. For that reason, the support interests of a beneficiary’s child will triumph over the spendthrift doctrine, not as a matter of logic or reason, but as a matter of “power” assessment.

Well then, what is the criterion by which the Ohio Supreme Court reached its decisions in Scott and Domo? Was it possible to predict, with reasonable certainty or otherwise, that the Court would reverse Sherrow on a certified question from a federal district court? Was it possible to predict whether the Court would greatly expand the spendthrift doctrine to cover future interests in Domo? The answer is no - impossible! Simply put, neither of these decisions reflect a logical derivation of then existing principles of law.

The ancient proscriptions against reversal of precedent are equally lifeless as a means of explaining such reversals. Clearly, only a few community members hold interests in spendthrift trusts. Moreover, the spendthrift trust doctrine is clearly a highly technical issue and the general community’s standards are almost non-existent. Thus, on the day before the Court made each of these decisions, neither I nor anyone else could have predicted, with statistical certainty, the Court’s decisions! If Decisionmakers are not committed to retaining precedent, for whatever doctrinal or social purpose, and if each believes that the community is not adversely affected by a reversal or an expansion of any particular doctrine, then their decision will become the law. Thus, the Decisionmaker is the institution of the authority by which law is made and determined to be “valid.” Law by judicial edict!

That some members of the Ohio Supreme Court vigorously dissented to the protection given to a vested future interest in Domo is to say that some members believed the Court had gone too far. Admittedly, the Domo dissent clearly focused on the general standards or norms of other communities as a basis for their position. However, the Domo dissent involves a judgment of degrees not of kind.

259. I am reminded of the intense frustration expressed by Justice Scalia in his dissent in the recently decided VMI case. Justice Scalia stated:

Ultimately, in fact, the Court does not deny the evidence supporting these findings .... It instead makes evident that the parties to this case could have saved themselves a great deal of time, trouble and expense by omitting a trial. The Court simply dispenses with the evidence submitted at trial — it never says that a single finding of the District Court is clearly erroneous — in favor of the Justices’ own world. ....

United States v. Virginia, 116 S. Ct 2264, 2301 (1996) (Scalia, J., dissenting). Justice Scalia continues in a latter portion of his opinion:

The only hope for a state-assisted single-sex private schools is that the Court will not apply in the future the principles of law it has applied today. That is a substantial hope, I am happy and ashamed to say. After all, did not the Court today abandon the principles of law it has applied in our earlier sex-classification cases? And does not the Court positively invite private colleges to rely upon our ad-hocery by
Having given birth to a new model of law, the Ohio Supreme Court possessed unlimited power to mold that new law to meet their personal aesthetic sense of right proportions. Thus, with all due respect to Professors Kelsen and Hart, Decisionmakers are truly the "ground norm" and/or the "rule of recognition" in our legal system. We are born and eventually die under the law as the product of the Decisionmaker's edict.

Since postmodernism's theme (assuming these diverse and eclectic views can be summarized in one theme) is that language has no necessary meaning and that any answer as to language's meaning can be rhetorically validated at any given time, the Decisionmaker, by giving a particular meaning to text, creates the law. In fact, Decisionmakers have utilized language by custom and structure to reveal that language has no consistent meaning; it can be interpreted to mean whatever the Decisionmaker believes it should mean.

Without fanfare, the Decisionmakers entered the realm of postmodernism many years prior to the formal development of postmodernism theories. The Ohio Supreme Court, as well as other courts of similar authority, began to operate upon postmodernism's underlying authority. However, now these courts should celebrate that there exists a philosophy of law which reflects the reality of their decisionmaking process.

Because of foundationalism's formal breakdown of the law and our recognition that competing schools of jurisprudence do not comport with the realistic operation and determination of law, it is not surprising that many commentators are rushing toward the concept of rational pragmatism. This theory of jurisprudence softens postmodernism's highly rational philosophical ideology and recognizes the inherent political constraints that a Decisionmaker faces if he or she attempts to impose a decision as a product of legal science or "legal

assuring them this case is "unique"? . . .

Id. at 2307.

260. For a contrary view, see Grib, supra note 20, at 51 ("The enterprise of law is purposive. It serves the needs and desires of the human community consistent with what is good for human flourishing.").

I reluctantly agree with Hans Kelsen that all decisions are correct insofar as they are the law. Even when such decision is otherwise despicable. The subsequent prosecution of Nazi war criminals is also correct even if it was not clearly established as "a precedent" that there were universal rights which demanded recognition. It is the authority to decide that produces that which we call the law.

261. The specific issue of pragmatic jurisprudence is reserved for a forthcoming article by the author.

262. Indeed, I express deep appreciation for the intense and enjoyable exchanges with students as it relates to their views with respect to how Decisionmakers create decisions.

263. Indeed, what one sees may itself raise the responsibility to say it. See Guido Calabresi to Paul D. Carrington, 35 J. LEGAL EDUC. 1 (1985).
reasoning.” If one chooses to utilize Merlinesque magic to protect the belief that law is a result of either scientific methodology and/or a rational process, that choice reflects a preference for illusion and a fear of reality as to the source of law. It is time to admit that law is the political preference of the Decisionmaker. It is not the product of a scientific system. Although the process of deciding helps the Decisionmaker develop a new skill in evaluating consequences (frequently referred to as pragmatism), that skill does not thereby create a theory of jurisprudence.261

VIII. CONCLUSION

My law students are sometimes piqued as I pierce, with their reluctant cooperation, the rational autonomy of law.262 In this sense, I am a destroyer of their vision of a rational system involving justice. I destroy, not out of preference, but rather, out of necessity. In short, for me to teach that which is not true, would require an abandonment of my sense of personal reality and, in turn, create a new form of professional hypocrisy.263

My admiration for the law is not diminished because the law is a product or creation of a social and political motivations. Law’s dignity exists in human hands; it need not be elevated by some blind reference to justice, efficiency, or oughtness.

The community may try to excoriate the Decisionmaker or intensify a campaign to reverse a decision; but until that reversal is effected, the decision is viewed as the law. Law is the Decisionmaker’s edict. Law is act, not thought. Thus law is indeterminate; and, despite claims to the contrary, certainly not predictable.