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JURISPRUDENCE FOR A FREE SOCIETY

*Myres S. McDougal**

THE search for a jurisprudence, a theory about law, appropriate for a free society, has long been a subject of concern to legal scholars. In attempting to make some modest contribution to this search, the major themes and arguments I will explore are as follows: first, the intimate interrelations of law and public order in any community; second, the intellectual functions required of a useful jurisprudence or theory about law; third, the most important contributions of past schools of jurisprudence to a useful theory about law; fourth, the basic pattern of a policy-oriented approach to inquiry about law; fifth, and finally, some of the conditions for promoting a public order of freedom and human dignity.

It will be obvious that to touch even briefly upon so many vast topics, one must perforce be somewhat abstract. It may be recalled that Professor Thomas Reed Powell, a famous professor of constitutional law at Harvard, once said that a man has a good legal mind if he can think about something to which something is attached without thinking about the thing which is attached. If, therefore, we are to employ good legal minds, we must remember that all levels of abstraction, when the terms admit of empirical specification, are necessary to comprehensive and effective communication.

THE INTERRELATIONSHIP OF LAW AND PUBLIC ORDER

To understand the intimate interrelations of law and public order we must be clear about what we mean by both law and public order. Too frequently law is still thought of as something that is written in a book—as rules on a piece of paper or the words that came to us in

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1787. On a deeper level of understanding, we know that this conception of law as a body of rules is hopelessly inadequate. Whatever our roles—whether we are judges, other officials, effective power holders, advocates, scholars, or simply members of the community—we are interested in more than rules. We are interested in decisions, what's done, the consequences of the making and application of rules for human beings. Indeed, many of us today prefer to think of law as a *process*, a process of *authoritative* decision.

In other words, if one thinks in terms of decision, he thinks of judges and other officials, established in appropriate institutions and with effective power at their disposal, responding to controversies which arise in social process, and resolving these controversies in accordance with community expectations about how such controversies should be resolved. A decision is a choice made in response to competing demands arising from social process and having consequences for future social process. It is part of a continuing interaction, involving many participants. The rules which are sometimes called "law" are but shorthand expressions of community expectations, and as instruments of communication, have the same inadequacies as any shorthand.

When we reflect, we know that rules are not given; they are continually being made and remade. The important questions are: (1) who makes the rules; (2) who applies the rules; (3) for whom; (4) with what degree of conformity with basic community expectations; and (5) with what consequences for community public order. Every experienced lawyer knows also that rules commonly travel in pairs of opposites. Even our constitutional principles are continuously being created and recreated in pairs of opposites. Thus, one set of principles confers power, competence, upon officials: these principles are illustrated by the grants to the Congress, the President, and the Supreme Court or by the allocation of power between the federal government and the states. Whereas another set of principles purports to impose limits upon the competences so granted: these principles are illustrated in the Bill of Rights and the specific prohibitions of the Constitution. Any application of these principles to the facts of a particular controversy obviously requires a very delicate balancing of many different community interests.

Looking more closely, for example, at the allocation of competences between the federal government and the states, one of the principal purposes of the Convention of 1787 was to make this nation one. The various states had refused to abide by the treaties of the central govern-

ment. The central government could not even enforce the treaty designed to consolidate our freedom. Hence, in the making and enforcing of treaties, the Constitution conferred a broad competence upon the central government, to the exclusion of the states. Still the tenth amendment sought to preserve a federal form of government by reserving to the states the powers not delegated to the nation. The result, doctrinally, is that with respect to any particular controversy, if the subject-matter is within the scope of the "treaty-power" it is not among the competences reserved to the states; if, on the other hand, the subject-matter is within the reservation of the tenth amendment, it is not within the scope of the treaty-power. Fortunately, our established decision-makers have uniformly interpreted this complementary structure of principles in favor of a strong national competence.

A similar complementarity in principle pervades even the very conception of judicial competence. This is expressed in the familiar distinction between "legal" and "political" questions. When a court wishes to decide a question, it calls the question "legal"; when it wishes to avoid a question, or to bounce it to another branch of the government, it calls the question "political" or, as in the recent *Sabbatino*¹ case, finds that it involves an "act of state."

If we shift from national to international law, we find a similar all-pervasive complementarity in principle. Corresponding to our "federal power"—"tenth amendment" dichotomy, is the distinction between matters of "international concern" and of "domestic jurisdiction." If a matter is of "international concern," the general community of states, through both international organization and unilateral action of particular states, may make and apply law for the matter. On the other hand if a matter is of "domestic jurisdiction," the general community is not supposed to bother with it. In comparable vein, states and international governmental organizations are said to be appropriate "subjects of international law," whereas individuals and private associations are not; attacks upon the territorial integrity and political independence of states are not permissible "aggression" under the United Nations Charter, but a use of the military instrument in response to, or reasonably imminent anticipation of, such attacks is permissible "self-defense."

This complementarity in principle, which could be documented in every major field, is not an accident. It exists because the in-

¹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

terests, which the principles express, are themselves complementary. Our contemporary communities, whether earth-space, regional, or national, do in fact exhibit a plural society—a society in which many different groups, of varying functional organization, assert demands for values and enjoy varying expectations about the conditions under which these demands can be achieved. The legal processes which these communities maintain for accommodating these competing demands quite naturally formulate principles which express the perspectives and interests of all component groups.

A “community” is a group of people, organized in varying degree on a geographic basis and affected by interdependences or interdependence in the social processes by which they seek values. A more complete description of any community would outline the participants (group and individual), the range of values sought, the situations or interaction, the base values at the disposal of different participants, the strategies employed in different contexts, and finally, the outcome achieved in the shaping and sharing of values.

In any particular community it is possible to observe among its constituent social processes a process of effective power, *i.e.*, decisions of community-wide impact are in fact made and put into controlling effect. Complete description would require identification of effective elites and reference to all phases of social process. In such description, these effective power decisions would be seen to be of two different kinds. Some such decisions are taken from simple expediency, or sheer naked power, and enforced by severe deprivation or high indulgences, whether the community members like them or not. Other decisions, however, are taken in accordance with community expectations about how such decisions should be taken: they are taken by established decision-makers, in recognized structures of authority, related to community expectations of common interest, and supported by enough effective power to be put into effect in consequential degree.

It is these latter decisions, those taken in accordance with community expectations and enforced by organized community coercion, which are, from the perspectives we recommend, most appropriately called “law.” In this conception law is, thus, a process of decision in which authority and control are conjoined. Without authority, decision is but arbitrary coercion, naked power; without control, it is often illusion.

When closely examined, the decisions which we describe as “authoritative” may also be seen to be of two different kinds. There are, first,

the constitutive decisions, the decisions which establish the most comprehensive process of authoritative decision, and, secondly, the whole flow of particular decisions which come out of the constitutive process for regulating the various community value processes. The constitutive decisions are those which identify the authorized decision-makers, establish appropriate institutional structures, prescribe the basic policies to guide particular decisions, confer a basis of power necessary to effectiveness, provide for economic procedures, and secure the continuous performance of the different types of functions (intelligence-gathering, recommendation, prescription, innovation, etc.) which are necessary to the making and application of general community policy. The particular decisions which emerge from this constitutive process determine the protected features of all other value processes, whether relating to wealth, human rights, enlightenment, health and welfare, rectitude, and so on.

It is these legally protected features of the various community value processes to which we refer by "public order." In the broadest sense, because authority builds upon and protects authority, even the kind of constitutive process a community establishes, as a protected feature of the larger process of effective power, might be regarded as a part of its "public order."

The kind of a constitutive process a community can establish and maintain is of course critical for the freedom, security, and abundance of the public order it can achieve. Too often the maintenance of an appropriate constitutive process is impeded by misunderstanding, even among scholars, of the comprehensive nature of such a process. Our own Constitution is not confined to a few words on parchment and its making did not stop short, as some still seem to assume, in 1787. Our effective Constitution today is established by our living, contemporary expectations about all the various features of our most comprehensive process of decision. These expectations are created not merely by an embossed document or a few judicial decisions, but by a whole flow of relevant communications, beginning even prior to 1787 and coming down to date. The task of a contemporary interpreter is to examine and assess this entire flow of prior communication for the closest possible approximation to the genuine shared subjectivities of our present community members as to what their Constitution really provides on basic issues. Some of the crucial questions are: What are our genuine shared expectations about an appropriate division of power between the legislature, the executive, and the courts? With respect to foreign affairs?

With respect to the many different types of internal affairs? What are our expectations about an appropriate allocation between the states and the central government? How realistic, and complete in reference, are manifest expectations? Do they take into account what the conditions even of survival in the contemporary world require by way of central government? Do they take into account the decentralization indispensable to the maintenance of freedom? How do we most effectively supplement the complementarities, gaps, and ambiguities in official communications by reference to basic community policies in demanded public order?

Shifting our attention from the national to the world arena, we find an even greater confusion about constitutive process and its relation to public order. Because of the absence of highly centralized legislative and executive institutions, many people assume that there is no constitutive process on a global scale. They do not see that there are in fact (1) established decision-makers (located in both international and national structures of authority), (2) a high efficiency in the unorganized interactions of these decision-makers, (3) many policies reflecting a clarified common interest and wide acceptance around the world, (4) effective sanctions in reciprocity and retaliation for the enforcement of decisions, (5) a considerable agreement about permissible procedures, and (6) a continuous flow of decisions which make and apply law on a transnational scale.

The most dramatic confusion about constitutive process in the larger arena relates to the law of outer space. Many friends have laughed at my study of this area. "How could you," they say, "write a thousand page book on such an imaginary subject?" "Why," they add, "there are no rules about outer space and nobody authorized to make such rules." Such comments, of course, betray a complete ignorance of the interrelations of effective power, law, and public order. A moment's reflection should suggest that the same people who have effective power with respect to earth-bound processes also have effective power in outer space. The most comprehensive perspectives of these people—their demands for values, their identifications with others, and their expectations about the conditions affecting the achievement of their values—have caused them to establish and maintain the rudiments of constitutive process and public order on earth. To expect that they will not project comparable policies and institutions for the regulation of their interactions in space would be to disregard human nature and the factors which affect decision.

The design of all this illustration is to document the deep interdependences—even identities—of community process, law, and public order. What is being insisted is that, while the people who have effective power in a community maintain law—authoritative decision—for the securing of their common interests, authority in turn becomes itself a base of effective power and feeds control, thus establishing a most intimate relationship between control and authority. Similarly, it is suggested that a comparable relationship exists between constitutive process and public order: the economy and effectiveness of the constitutive process a community can achieve vitally affects the freedom, security, and abundance of its public order; the quality of the public order a community attains, in turn, affects the viability of the constitutive process it can maintain. The most important lesson which we would draw from this documentation of interrelationship and interdependence is that one who seeks to affect the future course of decision and public order must also seek to affect the basic perspectives, the most deeply rooted pre-dispositions, of the effective elites of the community with which he is concerned.

THE INTELLECTUAL FUNCTIONS REQUIRED OF A USEFUL JURISPRUDENCE OR THEORY ABOUT LAW

We couple the words “theory *about* law” with jurisprudence in order to emphasize that by jurisprudence we refer to theory which is useful to an observer, or scholar, who is primarily concerned with enlightenment about the whole community process, which includes the relationship between authoritative decision and other processes. The contrast is with “theory of law,” which is the theory actually employed by decision-makers in obtaining and justifying effects within power processes and is one of the variables about which the scholar seeks enlightenment. Occasionally, good theory about law may be found useful by decision-makers and, hence, be made also a part of theory of law; similarly, good theory of law may sometimes be sufficiently precise and relevant to serve some purposes of the scholar in his more comprehensive inquiry. However, it is important to keep clear the differences in observational standpoint and purpose which may attend the use of the same or comparable words.

The principal social function of legal scholarship, law teaching and inquiry, is commonly assumed to be that of transmitting the more fundamental community perspectives about law and public order from one generation to the next. This function includes both the inculcation

of general understanding and training in specific skills, as well as at least a modest responsibility for improvement of the heritage. The question is by what kind of theory can the performance of this function best be facilitated.

It may require emphasis that everyone, whether he is explicitly conscious of it or not, has a jurisprudence. We all have expectations and make assumptions about the course of future decision and have our notions, realistic or not, about the factors that affect decision. Similarly, we all have our community identifications and contribute our preferences and prejudices to the total demands for public order. One task of a relevant jurisprudence is to bring all these vague and implicit assumptions to a clear focus for critical examination and appraisal.

It may be suggested that the more important intellectual functions of a relevant and comprehensive jurisprudence are three-fold: first, to establish clarity about observational standpoint; second, to delimit a realistic focus of inquiry; and, third, to facilitate performance of all the various intellectual tasks necessary to both enlightenment and rational decision. What we mean by each of these references can be briefly explained.

Observational standpoint is important because it affects perception and the performance of relevant intellectual tasks. The objectives in inquiry of the scholar, the official decision maker, the professional advocate, the effective power holder, and the community member may be very different. If the scholarly observer does not assume perspectives different from those of the community member making claims or of the authoritative decision maker who responds to such claims, he can have no criteria for appraising the rationality in terms of common interest of either the claims or decision. The failure to recognize this difference is, for example, the simple obfuscation which underlies the frequent false contraposition of "national" and "international" interests in inquiry about international law.

An appropriate delimitation of the focus, or subject-matter, of inquiry is important because it affects how problems are formulated and, hence, both the effectiveness of proposed solutions and the consequentiality of inquiry. When inquiry is focused only upon rules—perspectives—to the exclusion of actual practices—operations—there can be no assurance that it will have any relevance to what is actually happening in a community. When considerations of authority are overemphasized, with relative neglect of control or effective power, the outcomes of inquiry

may have little bearing upon the future course of law and public order. When law is conceived only as rules applied by courts, there may be disastrous neglect of how rules are made, as well as of other important aspects of the comprehensive process of authoritative decision. When law is regarded as something autonomous and distinct from community policy, no intellectual tools are afforded for relating decisions to the events in social process to which they are a response and, in turn, affect. When neat distinctions are made between national and international law, and national law is regarded as isolated from the larger world about us, it becomes impossible either to account for many important factors which affect decision or rationally to clarify policies for the various interpenetrating communities which in fact embrace the activities of man. A viable jurisprudence, as will be developed below, must achieve a clear focus upon processes of authoritative decision, as composed both of perspectives and operations and as combining both authority and control, and locate such decision processes, not merely within the arbitrarily isolated social interstices of a single national community, but also in the whole global or earth-space community which both affects and is affected by its component lesser communities.

The appropriate specification of a comprehensive set of intellectual tasks, or skills, is important because the range of tasks performed in inquiry determines the relevance of inquiry for policy. When the task of legal scholarship is conceived as largely that of making logical derivations from allegedly given and unequivocal rules, the outcomes are likely to be barren exercises in black-letter abstractions. Explicit attempts to clarify community policy which do not at the same time systematically pursue other tasks, such as the description of past trends in decision and the analysis of factors affecting decision, may be still-born. Descriptions of past trends in decision which are not explicitly related to social processes and community policies may afford no bases for comparisons either through time or across nation-state boundaries. The scientific study of factors affecting decision, when not guided by and related to preferred community policies may, as demonstrated in the era of the American legal realists, involve enormous costs and yield few benefits. The prediction of future trends in decision by the mere extrapolation of past trends, without the discipline of scientific study of changing conditions, more often produces illusion rather than genuine forecast. In the confusion of all the other tasks, that of deliberately inventing and evaluating policy alternatives is too often lost. A viable jurisprudence must, again, provide theory and specify procedures for

the systematic, disciplined, and contextual performance of a comprehensive range of policy and relevant intellectual tasks.

AN APPRAISAL OF THE CONTRIBUTIONS OF
PAST SCHOOLS OF JURISPRUDENCE

We begin with the natural law school. The most important contributions of this school down through the centuries are in its insistence upon the relevance of goals and its appeals from the realities of naked power to authority. It is common knowledge how much these notions have aided the development of national constitutions and the birth and development of international law. Unfortunately, however, the technique of goal clarification exemplified by this school has too often been simply that of logical derivation and the premises from which its devotees have sought to derive authority have too often been transempirical, rather than empirical, in reference. The origins even of law, all the more of theory about law, are still quite dim, largely unexplored by scholarship, but it would appear that in the beginnings of what we call civilization, notions of family authority, religion, morality, law, and various practical arts were all mixed up together. Though secular notions of authority began to appear with the emergence of cities in the great river valleys, the dominant appeals for authority in the natural law tradition have throughout history been to transempirical sources, and this would appear to obtain still today. Similarly, adherents to natural law schools, perhaps because of their preoccupation with transempirical sources, have seldom shown a great concern for the close examination of decisions or the location of decisions in secular social and community processes.

The important contribution of the historical school of jurisprudence, arising in Europe and spreading to this country and in measure a revolt against the transempiricism of the natural lawyers, was its location of law firmly in secular community process. For adherents to this school, the authority of law was to be found in custom, behavior, the flow of peoples' habits: law was like poetry or music, it sprang from the souls and common wills of people. It will be observed that some of these notions are scarcely less mystical than those of the natural lawyers. Unfortunately, also, the exemplars of the historical school, perhaps because of their concern for aggregate processes, never achieved a clear focus on decision and its relation to social processes. Hence, they never devised a method, other than purely anecdotal, for even the historical task. The potentialities of goal clarification they minimized because of a certain

fatalism—what had been would continue to be—and a corresponding belittlement of the role of legislatures.

The most significant contribution of the analytical school, which has dominated thinking in England and the United States for more than a century, is in its very timid approach to the conception of authoritative decision. Reacting against both the transempirical notions of the natural lawyers and the vague diffuseness of the historical school, the devotees of this jurisprudence have sought to define law as the rules prescribed and applied by distinctive institutions of authority. Sometimes emphasis has been placed upon the commands of putative sovereigns, sometimes upon the rules made and applied by judges, and sometimes even upon the prescriptions announced by legislators. The one consistent emphasis, however, is that upon *rules*, as distinguished from actual choices or operations; and another almost equally consistent emphasis is that these rules are something unique or autonomous, different from community policy. In this absence of a clear notion of authoritative decision and of its function in social process, it is not surprising that the intellectual task most performed and recommended by the analytical jurists is that of logical derivation. When it is assumed that one set of rules can simultaneously describe what has been, what will be, and what ought to be, there remains, of course, little place for more comprehensive or intensive inquiry.

The principal innovation of the sociological school, originating in Europe during the past century and spreading to the English speaking countries in this, was in its emphasis upon the scientific study of explanatory factors. Improvements in techniques of inquiry and knowledge, first about the physical sciences and later about the social sciences, gave scholars a new incentive to attempt to bring scientific skills to bear upon the study of law. Some of the European representatives of this new aspiration remained, however, infected with much of the mysticism of the historical school and few of them came much closer than had the analytical school to a realistic understanding of a comprehensive process of authoritative decision and its relation to public order. Even the most creative, such as Max Weber, sought to keep their legal and sociological inquiries in separate compartments. Lacking a clear focus of inquiry and ignoring the dependence of the scientific task of inquiry upon all the other tasks, especially that of goal clarification, their permanent contributions to knowledge have not been as great as might have been hoped. In this country Dean Pound for some decades made eloquent and articulate demands for a “continuously more efficacious

social engineering," but his own conception of law never fully escaped from the confines of judicial techniques and rules and he never elaborated his conception of "interests" into a comprehensive and homogeneous set of categories in aid of performance of the various relevant intellectual tasks.

The abiding contribution of the American legal realist school, which built upon the insights of the sociologists, was in its discovering of the importance of a clear focus on decision. The late Judge Jerome Frank, long a member of the Yale law faculty, was among the first to refer to law as a process of authoritative decision, but a comparable emphasis was both explicit and implicit among many other scholars. This emphasis was, unfortunately, sometimes carried so far, under the influence of a behaviorist psychology, that the "perspectives" or "rules" element in decision was largely ignored in an exaggerated concern for "operations," factual choices. Similarly, though most of the adherents to this movement were deeply concerned about the consequences of decision, about the impact of law upon human beings, few of them had either a comprehensive set of value categories, or a systematic set of appropriate procedures for goal clarification, to aid them in the appraisal of decisions. The abstractions which they formulated were largely low-level abstractions, and the problems with which they worked, in the absence of a comprehensive guiding theory, were related to each other only anecdotally. Early death unhappily, took an exceptionally heavy toll among the members of this group, and it would appear that the whole movement, save to the extent that it has become a part of our common thought, is now in rigor mortis.

The one significant contribution of the Scandinavian realists would appear to reside in their development of the art of verbal windmill jousting. The members of this group have been deadly bent upon destroying any lingering deference any of us might have about any alleged unique "validity" or "binding character" of legal rules. For many of us, fortunately, this is a work of supererogation. For others the work of the Scandinavians may serve a liberating purpose, freeing energies for more constructive tasks.

A broad conspectus of contemporary views in the English speaking countries would suggest that both natural law and analytical jurisprudence are still very strong. Unable to focus clearly upon law as decision, proponents of natural law insist upon an alleged impossibility of distinguishing "is" and "ought," and commingle all the different, relevant intellectual tasks into one "big, blooming, buzzing confusion."

For goals, they postulate "common need" but decline to offer indices by which such need can be identified at lower levels of abstraction or procedures for detailed clarification in particular instances. Unwilling to confront the difficulties of a genuinely contextual approach, proponents of analytical theory seek to substitute for comprehensive sociological inquiry whatever occasional glimpses of reality they can secure through the peepholes of "linguistic usage." One foremost proponent of this newer analytical theory, Professor H. L. A. Hart of Oxford, continues to define law as rules but adds a new kind of rules: "rules of recognition." These rules of recognition are supposed to be able to tell an observer, or a decision maker, what rules are genuinely rules of law and what are mere rules of morality or something else. The rules of recognition he offers are, however, but very thin and pale substitutes for a notion of comprehensive constitutive process.

The unfortunate fact is that the assumption that law is something autonomous, distinct from community policy, continues to create a very large desert in our legal thinking in this country. Professor Herbert Wechsler of Columbia, not long ago published an article,² the principal theme of which appears to be that judicial interpretations should be "principled decisions" in the sense that "in their generality and neutrality" they transcend "any immediate result that is involved." If all this means is that long-term consequences should be evaluated along with short-term consequences in choosing among alternatives, it is of course innocuous. If, however, what it is intended to suggest is that principles for guiding decision can be formulated which are independent of the immediate consequences of choice, a heavy burden would appear to be incumbent upon Professor Wechsler to indicate the detailed content of these principles and the procedures by which they are to be applied.

BASIC FEATURES OF A POLICY-ORIENTED APPROACH TO INQUIRY ABOUT LAW

We come now to our fourth major point, the specification of the basic features we recommend for an explicitly policy-oriented jurisprudence. These features are implicit in what we have said above, but may now be recapitulated in a few principal recommendations.

We recommend, first, that a theory of inquiry provide for the utmost clarity about observational standpoints. Though the scholar, the official, the member of the effective elite, the advocate and the

² Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

mere community member may all require the same information and find it necessary to engage in comparable intellectual tasks, their purposes and social roles, it must be emphasized, are quite distinct. The primary concern of the scholar is, as already indicated, for enlightenment about the aggregate interrelationships of authoritative decision and other aspects of a community process. True, the scholar may on occasion employ the enlightenment he obtains in the performance of roles, such as intelligence-gathering and recommendation, in authoritative decision, but if he permits the perspectives which are part of the data he is observing to be substituted for, or to dominate, his own perspectives, the consequence can only be confusion or loss of enlightenment.

We recommend, second, the delimitation of a focus of inquiry which locates authoritative decision in the largest community process which it affects and is affected by. The achievement of so comprehensive a location will require:

1. A balanced emphasis in the conception of law upon both perspectives and operations, upon rules and actual choices made and enforced.
2. Clarity in distinguishing between patterns of authority and patterns of control in community process, and an adequate emphasis upon both in inquiry.
3. The conception of law not merely as decision, but as a *process* of authoritative decision, which includes both constitutive and particular public order decisions.
4. The relation of processes of authoritative decision within any particular community to the whole social process of that community, noting both what events give rise to claims to authoritative decision and what the consequences of decision are for future social process.
5. The relation of decisions within any particular community to the whole complex of interpenetrating communities (from local through regional to global) which reciprocally affect each other in the largest earth-space community.

We recommend, third, in lieu of the logical derivation which characterizes so much jurisprudential writing, the performance in the most systematic, disciplined, and contextual manner possible of a wide range of policy-relevant intellectual tasks. By the word "contextual" we wish to emphasize that the rational performance of any particular task requires, not merely the careful location of specific problems in community process, but also the systematic testing of the findings and formulations achieved by the task immediately being performed against the

findings and formulations achieved by performance of all the other tasks. The specific tasks which we recommend as policy-relevant include:

1. The clarification of goals. The procedures preferred include systematic statements with reference to the entire community process and detailed specifications which are disciplined in particular contexts by empirical observation and analysis.
2. The description of past trends in decision. The categories recommended both relate decisions to social process events and characterize decisions for their approximations to clarified goal values.
3. The analysis of conditions affecting decision. Attention is given to the formulation of comprehensive theories designed to explain decision, and both intensive and extensive procedures are employed in the study of such explanatory factors as culture, class, interest, personality, and exposure to crisis.
4. The projection of future trends in decision. The simple extrapolations of conventional theory are critically assessed in the light of available scientific findings and other bases of inference.
5. The invention and evaluation of policy alternatives. The cultivation of creativity and the invention and evaluation of policy alternatives are explicitly encouraged.

We recommend, fourth, the deliberate postulation—without regard for the many possible derivations from the premises of religion, history, metaphysics, and science that might be invoked for their justification—of a comprehensive set of goal values for the guidance of inquiry. For every observer the appropriate question is: What values is he, as a responsible citizen of the larger community of mankind and of various lesser communities, willing to recommend to other similarly responsible citizens? For what values is he, as a consequence of all the factors affecting him, willing to take his stand?

The comprehensive set of goal values which we, because of many heritages, recommend are those which are today commonly known as the basic values of human dignity. If subjected to the procedures for clarification indicated above, this high-level abstraction would be said to refer, at slightly lower level to the greatest production and widest distribution of all the representative values of our culture. With respect to power, it implies a strong preference for control by persuasion rather than by coercion and the widest possible diffusion of power through a community that is compatible with common interest in the appropriate shaping and sharing of all values. It would suggest enough concentra-

tion of power at the center to protect the whole, but enough diffusion to the provinces, the peripheries, to protect freedom. With respect to wealth, it implies a balance in governmental and private control over resources, which precludes a monopolization of power, and the widest possible distribution of goods and services in a community. With regard to the value "respect," it requires an absence of discriminations irrelevant to capabilities and positive measures to reward contribution. And so on for every representative value. The more detailed specification of the reference of any particular value demand would in every particular context depend upon the effective performance of all the various intellectual tasks, outlined above, in relation to all the significant features of that context.

We recommend, fifth and finally, an organization of both comprehensive inquiry and particular studies in social process terms which would facilitate the more adequate performance of the various relevant intellectual tasks with respect to the insistent problems of our time. This would require the construction of our research programs and teaching curricula in terms of community power processes (global, hemispheric, regional, and local) and of protected features of wealth, enlightenment, respect, health, and other value processes. It would also require the formulation of more particular inquiries in ways which would enable them best to contribute knowledge about the more comprehensive processes. This final recommendation is perhaps too complex to be made understandable by brief allusion. What we have in mind is in some measure indicated in our published studies of the law of outer space and of the public order of the oceans.

CONDITIONS FOR PROMOTING A PUBLIC ORDER OF FREEDOM AND HUMAN DIGNITY

The concluding major theme, to which at long last we come, relates to the conditions for promoting a public order of freedom and human dignity. It seems to me that the dominant challenge today to us as lawyers is not merely to establish some legal order, to make law prevail over naked force, but rather to establish a public order of freedom, a public order in which all the basic goal values of human dignity may be sought in security and with abundance. I would state also that the most effective way in which we can meet this challenge is by seeking to affect the hearts and minds of men—by changing the fundamental perspectives, the more basic demands, identifications, and expectations, of the people who maintain our processes of authoritative decision and

determine the content of our public order. We all know today that the raw facts of nature, our cultural environment, and even the technological changes which overwhelm us have no meaning except through the subjectivities of human beings: the demands they make for values, the identifications they do or do not make with fellow human beings, and the realism with which they understand the conditions which affect them. The question is how the appropriate perspectives can be created and nurtured in the effective leaders who shape our future.

The role of the scholarly observer in seeking to create appropriate perspectives in our time of crisis is explicit in all that has been said above. His task is, by employing an appropriate jurisprudence and all the findings and procedures of contemporary science, to enlarge his community's enlightenment about the interrelations of its law and public order and about how these can be changed for closer approximation to demanded goals.

The role of the lawyer—the established decision-maker, the advocate—who is a more active participant in his community's power processes may require further mention. In sum, his responsibility is of course that of asserting leadership in the establishment and maintenance of processes of authoritative decision adequate to secure our preferred public order. In detail, the economy and effectiveness with which he performs this over-all role must depend upon the degree to which he understands the potential, and necessary, creativity in his task.

Let me be specific by reference to problems in constitutional interpretation. As a Mississippian, a teacher in a national law school, and an observer primarily concerned with international law, I hope that I can take a somewhat objective view of these grave problems which cut so deeply into our future. Certainly I would not want to underestimate their delicacy or complexity. Beset as we are by mounting external threats and deep internal conflicts, not merely the kind of public order we can achieve but even our very survival, may depend upon the wisdom with which these problems can be resolved. The point I would emphasize, however, is that our inherited constitutional doctrine imposes upon us no rigid, automatic solutions to these problems: every interpreter confronted with one of these problems must make a creative choice; the critical issue is with what enlightenment about the requirements of common interest he makes this choice.

An analogy to the interpretation of international agreements may help to clarify the point. Two colleagues, a political scientist and a psychologist, and I have been studying the large body of our inherited

principles for the interpretation of international agreements to see if they can be improved in aid of more rational choice. Looking at the agreements which are to be interpreted, we find that like most human communications they are always complementary in reference, ambiguous, and incomplete: the human mind, even when operating in tandem, does not appear to be able to anticipate the precise flow of future events and controversy. Turning to principles of interpretation, we find two diametrically opposed attitudes about their past and potential future utility: one view is that the task of interpretation is so simple and automatic that one only has to look at the words of an agreement, as Mr. Justice Roberts suggested we look at our Constitution, to know its meaning; the other view is that the task of interpretation is so difficult and complex as to be practically impossible and, hence, that principles of interpretation can serve only to gloss an arbitrary discretion. Our study suggests of course that the truth is somewhere in between these two extremes. The words of an agreement, oral or written, are seldom the only, or even the best evidence of the parties' genuine shared expectations, and principles can easily be devised both effectively to guide interpreters to many other indices of expectation and to express the relevance, for supplementing and policing defective expressions, of the basic public order policies of the community which contains the parties.

It will be recalled that the provisions of our Constitution, whether taken as a document or a more comprehensive flow of communication, exhibit the same complementarities, ambiguities, and incomplete references as do international agreements or customary international law. For supplementing these inadequacies in communication, and in responsible effort to ascertain genuine contemporary community expectation from the whole past flow of relevant communication, an interpreter is authorized to, and must perforce, have recourse to pre-1787 negotiations, subsequent practice by all branches of the government, statutory interpretations, judicial decisions and opinions, and the vast literature of expressions, formal and informal, about preferred public order. Appropriate principles of constitutional interpretation may of course aid in the canvass and assessment of all these different evidences of community expectation and common interest, but there would appear to be as yet no miracle-working formula or computer which can reduce decision to automatic projection. In the last analysis, the interpreter must himself take responsibility for a creative choice and be prepared to relate his choice to the basic goal values of the community he represents.

A comparable creativity in decision could equally easily be demonstrated in the interpretation and application of statutes, judicial and other precedent, executive orders, and customary law. Whatever the form of prescription, the exigencies of communication and continuous change in social process make future choice inescapable, and we would scarcely wish it otherwise. The important concern must be to keep choice as informed and as rational as possible.

The suggestion is sometimes made that deliberately creative efforts by judges and other authoritative decision-makers to relate their choices to fundamental public order goals introduce arbitrariness and uncertainty into decision. Exactly the opposite would appear to be the case. Every experienced lawyer knows that the rationality and certainty claimed for decision by reference to allegedly "neutral" or "autonomous" rules are in fact largely illusory. The discipline required in systematically relating specific choices to public order goals by explicitly stated intellectual procedures might indeed both offer decision-makers a better guarantee that their choices are appropriately compatible with the goal values to which they are committed and afford the members of the general community greater assurance that their genuine expectations and common interests are realistically and consistently being taken into account. It is upon this latter score, upon the matter of craftsmanship, that I would in some measure agree with those who criticize recent decisions by the Supreme Court. However rational these decisions may have been in relation to our dominant public order goals, their rationality was not effectively documented by appropriate procedures and persuasive reasoning. In the field of international law, I would agree further, this failure in craftsmanship has on occasion produced even demonstrably bad decisions—as in the *Sabbatino*³ case in which the Court, creating a new shibboleth of "act of state" as an equivalent of "political questions," refused to apply customary international law in appraisal of Castro's confiscation of the property of American citizens.

The conditions of a public order of freedom and human dignity require, in sum, that we all, as so eloquently urged by Mr. Sibley,⁴ strike deep into "the fundamental issues upon which the very essence of our government rests" and seek to "illuminate and enlarge the breadth and depth of our knowledge about these issues."

³ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

⁴ Address by Mr. John A. Sibley, Introduction to the First John A. Sibley Lecture, November, 1964.