# EVERYMAN'S JURISPRUDENCE: IN SEARCH OF A COMMON SENSE THEORY OF LEGAL JUSTIFICATION

BRIAN V. FALLER*

Judges and lawyers daily confront one of the most vexing problems of modern jurisprudence: they must determine whether a given legal rule or an interpretation of it is *legally correct*. To make this determination they consider a variety of factors such as the literal meaning of the rule, the intent of the rule's creator, the consequences that one rule or interpretation would have as opposed to another, and the interpretations that courts have given to the rule or to a similar rule. Yet, even with this guidance, they are often hard put to justify their assertion that a given rule reflects a *correct* weighing of these factors. In order to supply such justification, it is necessary to have a theory of legal justification.

This article develops a theory of legal justification, the Value Structure Theory (VST). VST asserts that our legal system is essentially a complex value structure and that the correctness of any given legal standard is determined by its coherence with that value structure. The purpose of this article is to show how VST can help us clarify which legal rules apply in concrete cases. Section I, the General Theory, examines the concept of legal values and the hierarchical relationship between these values and legal rules. Section II, the Specific Theory, brings the General Theory to the level of concrete application. It develops an account of the considerations that determine whether a given rule best reflects the existing order of legal values. This account forms the basis for an outline of the relevant factors that judges and lawyers should weigh in determining the appropriateness of creating a new legal standard.

## I. THE GENERAL THEORY

Most law students begin law school with a rule-centered conception of

* Associate, Pierson, Semmes & Finley, Washington, D.C.; B.A., 1978, St. Olaf College; J.D., 1980, University of Minnesota; M.A. (Philosophy), 1982, University of Minnesota; member, Minnesota and District of Columbia Bars; law clerk to the Hon. Richard S. Arnold, United States Court of Appeals Eighth Circuit, 1983-85. I am indebted to Greg T. Jones, K. Zabelle Derounian, and the editors of this journal for their valuable suggestions. This Article is dedicated to the Hon. Richard S. Arnold, whose decisions stand for me as a model of reasoned legal justification.

the legal universe. They believe that judges[1] justify legal decisions by showing that decisions logically flow from existing legal rules. However, few if any students leave law school with this conception. They learn that legal rules are not changeless and self-applying but are interpreted, modified, and sometimes even abolished and recreated. More importantly, they learn that rules are not self-justifying but instead are justified by the body of policies and principles that give legal rules their purpose. These policies and principles represent fundamental values, and thus for brevity shall hereinafter be referred to as "values."

Values are not simply a secondary justification to which courts resort when legal rules cannot be mechanically applied. Rather, values control the outcome of both easy cases in which a previously articulated legal rule clearly dictates a given outcome and hard cases in which the meaning or correctness of a legal rule is in dispute. In easy cases, values determine whether the existing rule is correct and should be applied in the given context. In hard cases, values control the interpretation of ambiguous or vague language, as well as the determination of whether a given rule is correct or within judicial authority to establish.

The shift from a paradigm of rules to one of values has important consequences for the quality of legal reasoning. Acknowledgement of the crucial role of values in all legal decisions increases the legal community's capacity to identify and resolve the value conflicts presented by cases. By basing legal rules on the most important values implicated by the rules, judges can attempt to ensure that these rules are rational, just, and internally consistent. It is irrational to ignore values previously recognized as important and to overlook considerations that may be necessary to devising a just rule.[2]

Although the value-centered conception of legal justification is more satisfactory than the rule-centered conception, it too is fundamentally incomplete. The value-centered conception fails to provide a way to determine which values are most important in a particular situation so as to

1. A theory of legal justification is equally useful to both judges and lawyers. Throughout this Article, where for convenience's sake only one or the other is referred to, the principles discussed are applicable to both.

2. More than sixty years ago, Walter Cook observed:

> [T]he danger in continuing to deceive ourselves into believing that we are merely "applying" the old rule or principle to "a new case" by purely deductive reasoning lies in the fact that as the real thought-process is thus obscured, we fail to realize that our choice is really being guided by considerations of social and economic policy or ethics, and so fail to take into consideration all the relevant facts of life required for a wise decision.

Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 487 (1924).

justify one rule rather than another. Herein lies the contribution of VST.[3] VST asserts that legal values are part of a complex legal value structure that embodies the predominance or inferiority of one value to another. Accordingly, VST defines a correct legal rule as one that is most consistent with the ordering of values embodied in the authoritative legal sources.[4]

The legal sources referred to in this definition are: (1) judicial precedents; (2) legislative enactments, including statutes, regulations, treaties, ordinances; and (3) constitutional provisions. These sources are authoritative in the sense that the legal community and ultimately the outside community accepts them as authoritative.[5] The Constitution is, of

3. VST is similar to Professor Dworkin's "soundest theory of law" (STL) in that both theories maintain that a correct legal rule is one that is most consistent with the primary legal norms. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 66, 340 (1978) (STL maintains that a correct legal rule is the one that is most consistent with the set of principles best justifying the black-letter rules of the legal system). However, VST differs from STL in that it posits values rather than principles as the primary legal norms. This reliance on values has two primary advantages. First, it is easier to identify legal values than legal "principles." Under STL, a principle is legally relevant if it best justifies the existing black-letter rules. *Id.* at 66. But under VST, a value is legally relevant if it is implicated by an existing legal rule; for example, the rule of battery implicates the value of protecting one's sense of physical security.

Second, by grounding legal justification on values, VST allows for "policies" to have a role in this process, whereas, under Dworkin's rigid distinction between principles and policies, the latter are excluded from a role in this process. *Id.* at 22, 91-94. Certain remarks that Dworkin has made in response to his critics suggest that he would argue that policies can be legally relevant if principles support them. *Id.* at 314. Nevertheless, even if Dworkin is correct in arguing that most of the policies that judges rely on are supported by principles, as a matter of actual practice, judges treat policies as sufficient justifications in and of themselves and do not seek to derive policies from underlying principles. For further discussion of this issue, see Faller, *Does Dworkin's Rights Thesis Solve the Problem of Judicial Discretion?*, 22 U.W. ONT. L. REV. 15, 26-31 (1984).

4. If two or more rules are equally consistent with the governing value structure, each would be legally correct and the judge would be forced to choose among them on an extra-legal ground. The analysis of legal consistency presented in the Specific Theory, *see infra* notes 13-69 and accompanying text, confirms the impression that in many hard cases, the order of legal values will be indeterminate, although the legal value structure will still limit the number of rules from which judges may choose.

Professor Dworkin's writings have given rise to a lively debate over the question whether there are uniquely correct answers to hard cases. *See, e.g.*, R. DWORKIN, *supra* note 3, at 279-368; Galis, *The Real and Unrefuted Rights Thesis*, 92 PHIL. REV. 197 (1983); Munzer, *Right Answers, Preexisting Rights, and Fairness*, 11 GA. L. REV. 1055 (1977); Perry, *Contested Concepts and Hard Cases*, 88 ETHICS 20 (1977). VST offers a useful way of understanding this issue. One would hardly believe that the legal value structure offers a single solution to every value conflict. Even if one believes that the legal value structure incorporates moral reasoning as a legitimate legal consideration, this would still leave one with the insuperable task of showing that every moral dilemma has a uniquely correct answer.

5. For discussion of what makes a legal source or norm authoritative, see H.L.A. HART, THE

course, the primary legal source because it is the wellspring of authority for all organs of government: the Supreme Court, the Congress, the President, and the states.

Values are ends that the valuing entity, here the legal system, seeks to promote. In the legal setting, values serve to justify legal standards. They operate as self-justifying basic considerations. Thus, a court might reject a proposed legal rule on the ground that it is inconsistent with the values of democratic rule and legislative supremacy without supporting its reliance on those values. By definition, not all values are legally relevant. A judge or lawyer might personally hold racist or elitist values, but these would not be relevant in a legal argument precisely because they are not embodied in authoritative legal sources. For a value to be legally relevant, it must be expressly or implicitly endorsed in an authoritative legal source.

Many legal values are readily identifiable as considerations used by courts to justify their interpretation or creation of a legal rule. For example, it is obvious that the values of personal security and moral responsibility for voluntary action underlie the rule of battery which allows one who is deliberately injured to obtain damages from the wrongdoer.[6] In statutes, a policy statement often identifies the underlying values of the statute in the preamble, definitional sections, or legislative reports. An example is the committee report to the federal open meeting statute stating that the public's presence at meetings of elected representatives will build integrity and confidence in the governmental process.[7]

Conversely, for some rules, interpretation is required to isolate the underlying legal values, especially when the rule in question uses broad and undefined terms. For example, the First Amendment guarantee of free speech does not itself specify the primary values that free speech is to serve. Thus, courts must determine these values largely in light of the background values of democratic rule and individual liberty.[8] Not surprisingly, different accounts of these values have emerged. Some theorists argue that the fundamental purpose of the free speech provision is to

---

CONCEPT OF LAW 97-120; Fisk, *Objectivity and Interpretation,* 34 STAN. L. REV. 739, 745-47, 755-58 (1982); Sartorius, *The Concept of Law,* 52 ARCH. FOR PHIL. OF LAW AND SOC. PHIL. 161, 168-84 (1966); MacCormick, Book Review, 66 MINN. L. REV. 953 (1982).

6. *See* RESTATEMENT SECOND OF TORTS §§ 13, 18 & 20 (1964).

7. *See* 5 U.S.C. § 552(b)(1982); 1976 U.S. CODE CONG. & AD. NEWS 2183-84.

8. For a discussion of the purposes of the First Amendment, see T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

safeguard democratic institutions;[9] others argue that its fundamental purpose is to protect the citizen's interest in making up his or her own mind about what is worth hearing or expressing;[10] and still others argue that the purpose is to assist the individual in his or her search for truth.[11]

One of the main explanatory hurdles confronting a theory of legal justification is the problem of legal change. A satisfactory theory must explain how judges can justify overruling old standards and recognizing new standards. Under VST, a court should apply the rule that best reflects the value orderings embodied in existing legal sources. Thus, a court would usually be justified in overruling an existing rule if the value ordering established in that rule was inconsistent with the value ordering established in a substantial majority of other similar rules.[12] Likewise, a court would usually be justified in recognizing a new rule in a previously uncharted area if the values supporting the new rule were recognized as being of greater weight than those values opposing the rule, including the value of following precedent.

So far VST has defined a correct legal rule as a rule which is most consistent with the existing legal value structure or at least no less consistent with that value structure than any other rule.. Yet this theory standing alone does not indicate how to measure a rule's consistency with the legal value structure. In our legal system nearly all reasonable values have some support in one or more authoritative sources. Given this widespread support for diverse values, courts frequently will not be able to resolve underlying value conflicts by determining which values have legal support and which do not. Rather, to resolve such conflicts, courts must examine the relevant legal sources to determine which of the competing values has greater weight in a specific case. Section II of this Article examines the process of resolving legal value conflicts and the constraints that the doctrine of precedent places on this process.

---

9. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

10. Scanlon, *A Theory of Free Expression,* 1 PHIL. & PUB. AFF. 204 (1972).

11. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

12. As illustrated at *infra* notes 29-30 and accompanying text, many recent decisions overruling existing doctrines may be justified on these grounds. *See, e.g.,* Muskopk v. Corning Hosp. Dist., 55 Cal. 2d 211, 221, 359 P.2d 457, 463, 11 Cal. Rptr. 89, 95 (1961) (abrogation of governmental sovereign immunity); Goetzman v. Wichern, 327 N.W.2d 742, 754 (Iowa 1982) (abrogation of contributory negligence as a bar to recovery); Turner v. Turner, 304 N.W.2d 786, 788-89 (Iowa 1981) (partial abrogation of parental immunity); Fundermann v. Mickelson, 304 N.W.2d 790, 791-92 (Iowa 1981) (abolition of action for alienation of affection).

## II. THE SPECIFIC THEORY

The Specific Theory identifies the basic considerations governing the process of evaluating a rule's consistency with existing legal values. An understanding of this process necessitates a distinction between institutional and substantive values. This discussion also distinguishes between institutional and substantive reasons which are based on these two types of values.

Institutional values are values associated with the doctrines of precedent and legislative supremacy. They confer persuasive force where a judicial authority or a legislative body has explicitly or implicitly endorsed a certain rule. Thus, a court that applies a judicially endorsed rule relies on an institutional value to justify its application of the rule. In contrast, substantive values concern the merits of a rule itself and address the moral, social, or economic consequences of the rule. A rule might, for example, uphold a moral value such as the distribution of liability according to one's fault, or promote a social value such as the deterrence of dilatory discovery tactics. If a court adopted a rule on either of these grounds, it would rely on a substantive value, that is, a value that concerns a consequence of the rule itself rather than the fact that a legal authority has approved the rule.

In some cases, institutional values severely limit a court's substantive evaluation of a rule. All lower courts must apply a rule endorsed by a higher court within the same jurisdiction. Lower courts, however, retain some authority to qualify broad rules if the case in which the rule is to be applied raises a significant consideration not raised in the higher court case.[13] Therefore, outside of those cases in which lower courts are

13. Some commentators have suggested that a lower court is bound only to apply a rule that would reach the same result as the higher court reached in prior cases. This is referred to as "result stare decisis." *See* Hardisty, *Reflections on Stare Decisis,* 55 IND. L. REV. 41, 56 (1979); Note, *The Precedential Value of Supreme Court Plurality Decisions,* 80 COLUM. L. REV. 756, 758 & n.10 (1980).

This interpretation of stare decisis would theoretically allow a lower court to modify a rule even if a new case does not raise a new consideration. Suppose in case one, an appellate court applies rule R in favor of the plaintiff. A second case arises, case two, which would also come out in favor of the plaintiff under rule R. The trial court in case two, however, believes that rule R is clearly mistaken and that rule Q should be applied. Case two does not implicate any new considerations; rather it differs only in the degree to which the considerations are implicated. Applied to case two, rule Q would result in a judgment for the defendant, but applied to case one, rule Q would, like rule R, result in judgment for the plaintiff. If the trial court were bound by only result stare decisis, it would have the authority to abandon rule R in favor of rule Q because the latter rule preserves the result the prior court reached in case one. *See* Hardisty, *supra* at 56-57.

clearly bound by higher court rules, courts must consider both substantive and institutional values in determining the rule that should be applied.

The next two parts of this Article identify the basic considerations guiding a court's substantive and institutional evaluation of a rule. Although these two types of evaluation are often interconnected, a separate analysis of each will clarify the overall process of legal justification.

### *A. Substantive Evaluation*

#### *1. The Process of Substantive Evaluation*

Under the General Theory, a court must determine which rule is most consistent with the existing legal value structure. The reasons given by a court for adopting one rule over another will be persuasive insofar as they show that the adopted rule is more consistent with the legal value structure than the rejected rule. Consistent with this analysis, the evaluation of the persuasive force of a reason can be broken down into a four step procedure. First, the court must determine whether the reason in question points to a legally recognized value. A reason that does not rest upon a recognized value will fail to persuade simply because it does not point to a relevant consideration. If one argues that a court should modify a rule of battery to except a defendant from liability because he was wearing a top hat, this argument would obviously not impress the court because the wearing of a top hat is not a recognized legal value.

Second, the court must determine whether the value underlying the reason supports the rule in question. Although lawyers or judges often directly or indirectly assert that a rule is supported by a certain value, these assertions are sometimes open to question. Take for example the reason the Supreme Court gave for the test upholding a retroactive change in tax law if it is a change in tax rates rather than the imposition of a new tax.[14] Originally, this test was justified on the assumption that a taxpayer could reasonably foresee a change in tax rates but not the imposition of a new tax.[15] The Court asserts that the test implicates the value of fair notice in determining whether retroactive tax rate application of a law violates due process. This assertion is dubious. No substantial difference exists between the foreseeability of retroactive tax rate changes and of retroactive new taxes, other than the Supreme Court's assertion of

14. United States v. Darusmont, 449 U.S. 292, 300 (1981) (per curiam).

15. Milliken v. United States, 283 U.S. 15, 23-24 (1931).

a distinction. While tax rate changes may generally be less substantial than changes in the basis of taxation, this does not render rate changes any more foreseeable. Congress has perhaps just as frequently retroactively changed the descriptions of taxes as it has the tax rates. Thus, the proffered reason for the tax rate change test fails to persuade because it does not implicate the value of fair notice, as asserted by the reason.

Another example of a reason that does not implicate the claimed value is the initial justification given for the doctrine that voluntary presence in a state gives that state jurisdiction over the person.[16] It was claimed that a person who voluntarily enters a state "consents" to being sued in that state, therefore implicating the value of individual self-determination. Yet it is simply not true that a person who enters a state "consents" in any meaningful sense to being sued there. Most people who engaged in interstate travel at the time the Supreme Court announced this doctrine were not versed in the law of personal jurisdiction. They had no idea that crossing the state line would expose them to suit in that state. Recognition of this reality has prompted the Supreme Court to shift its focus from the voluntary presence doctrine to considerations of fairness such as the degree and type of contact with a state, availability of evidence and witnesses, and convenience to the parties.[17]

Third, the court must determine the degree to which the rule implicates the value underlying the reason. Sometimes a court's assertion that a rule will significantly advance a value is vulnerable to attack. Some commentators, for example, argue that the strict liability doctrine does not appreciably serve the goal of economic distribution of the costs of injury.[18] Likewise, courts reject the tort of intentional infliction of emotional distress on the ground that the tort allows widespread recovery by undeserving plaintiffs. These courts, however, would be hard-pressed to show that even a few undeserving plaintiffs have recovered in jurisdictions that have accepted the tort.

Judges often rely on common-sense assumptions regarding the consequences that adoption of certain rules will have on certain values. They assume, for example, that a contingency fee limitation on the recovery of

16. *See* Hess v. Pawloski, 273 U.S. 352 (1927).

17. *See, e.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

18. *See* Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 210 (1973). *But see* Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229, 292-93 (1981); Posner, Book Review, 37 CHI. L. REV. 636, 638-41 (1970).

attorney's fees in a civil rights case will unduly discourage civil rights suits for injunctive relief.[19] They assume that the public's presence at pretrial suppression hearings will promote and safeguard the fairness of those proceedings.[20] In a close case, these common-sense assumptions may be all that a court has to rely on. The slightest possibility that a proposed rule will affect certain values may be enough to tip the balance.[21] Nevertheless, the strength of a reason will be diminished insofar as it can be shown that the claimed benefit is unlikely to occur at a significant level.

Fourth, the court must determine the weight that the value underlying a reason receives relative to other values. Not all values have the same degree of importance, even assuming they are implicated to a similar extent. Numerous cases indicate that the value of free expression can be overridden only if the competing value is very important and is seriously implicated. Thus, mere public inconvenience or public disapproval of certain speech would not be sufficient to justify suppression of speech. Rather, to justify such suppression, there must be a substantial risk of serious consequences.[22]

Prior cases that indicate the extent to which relevant values must be implicated to justify a given legal result or to override a competing value guide the determination of the relative weight of legal values. The more closely a prior case implicates the same values as a new case, the clearer its indication of the ordering of legal values. Institutional values are inextricably involved in this determination because the importance accorded the value orderings in a case will depend on the rank and jurisdiction of the deciding court, the status of the relevant language as holding or dicta, and, to some extent, the age of the decision.

Yet, as judges and lawyers are well aware, legal sources frequently do

---

19. *See, e.g.*, Cooper v. Singer, 719 F.2d 1496, 1503 (10th Cir. 1983).

20 *See, e.g.*, United States v. Criden, 675 F.2d 550, 556-57 (3d Cir. 1982).

21. Professor McCormick unqualifiedly endorses the use of justifications resting on only the merest possibility that a rule will have certain consequences. *See* McCormick, *On Judicial Decisions and Their Consequences: From* Dewey *to* Dworkin, 58 N.Y.U. L. REV. 239, 253-54 (1983). Such justifications seem inherently suspect; justifications based on a mere possibility should be used only as a last resort and should be founded on reasonable assumptions about human behavior.

For further discussion of the role of consequences in legal justification, see Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification,* 63 CORNELL L. REV. 707 (1978).

22. This is, of course, reflected in the clear and present danger standard. *See generally* J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 874-94 (2d ed. 1983) (discussing history of the clear and present danger test and the doctrine of prior restraint).

not supply a clear ordering of values. Cases in which the courts directly address the same or a similar value conflict are rare. Sometimes, more recent cases erode the decision that seems most on point. And if that decision were a close one, for example, a 5-4 judge majority, one might reasonably conclude that the legal sources themselves fail to supply a unique answer.[23]

In these situations, the judge must draw upon the ordering of values that he or she believes is most enlightened.[24] To a great extent, judges make such judgments based on an intuitive weighing formed partly from prior cases and moral standards presenting similar value conflicts. Generally speaking, the legal weight given to most values parallels the weight of these values in the community. For example, our basic moral norms arguably indicate that the primary value supporting comparative negligence,[25] the allocation of liability according to degree of fault, is more important than the primary value supporting contributory negligence, the reduction of recoveries by undeserving plaintiffs.[26]

In cases in which judges exercise what many refer to as "judicial creativity," the judge's personal view of what is enlightened law enters the decision-making process by supplying the impetus to extend an established value to create a new legal rule when other courts or legislative bodies had not generally accorded that value such respect. As noted above, most reasonable values have support in legal sources; the same is also true of most if not all of the values judges rely on to modify or create

23. An example of the indeterminacy of the priority of legal values is the standard for directed verdicts. In ruling on a motion for a directed verdict, some courts consider evidence offered by both the moving and the opposing party, but require that the evidence for the movant overwhelmingly favor the movant before granting a directed verdict. *See, e.g.*, Feldman v. Simkins Indus., Inc., 679 F.2d 1299 (9th Cir. 1983). Other courts that show greater deference to jury verdicts consider only evidence that supports the opposing party. *See, e.g.*, Dace v. ACF Indus., Inc., 722 F.2d 374, 376-77 (8th Cir. 1983). Under the latter standard, a directed verdict must be denied if the nonmovant's evidence considered alone would allow a reasonable jury to return a verdict for the nonmovant, even though uncontested evidence of the movant thoroughly "disproves" the nonmovant's case.

24. Professor Dworkin's view that a court should determine the validity of a legal rule by considering "sound political morality" seems substantially the same as the suggestion that the court should assess the validity of a rule with reference to the value ordering that it views as necessary to having an enlightened rule. *See* R. DWORKIN, *supra* note 3, at 340; Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165, 166 (1982).

25. This rule generally allows a plaintiff to recover for injuries inflicted by a defendant's negligence if the plaintiff's own negligence was less than the defendant's.

26. This rule bars a plaintiff from recovering for injuries caused by a defendant's negligence if the plaintiff's negligence even slightly contributed to causing his injuries.

a legal rule. But in cases involving judicial creativity, judges elaborate upon these values to establish new value orderings.

An example of judicial creativity is the judicial adoption of the tort of intentional infliction of emotional distress. When courts first created this tort, the value of protecting a person's interest in emotional security had limited recognition in the law, primarily in assessing damages in negligence, battery, and assault cases, and in tort actions for invasion of privacy.[27] In negligence actions, for example, plaintiffs could recover damages for emotional distress if they had also suffered bodily injury. Courts, however, expressly held that the interest in emotional security was not significant enough to warrant the creation of a separate cause of action for infliction of emotional distress.[28] Thus, a court seeking to create the tort of intentional infliction of emotional distress could not find full support in established rules recognizing a person's interest in emotional security. The court had to extrapolate *beyond* the value ordering found in the existing rules to hold that the value of emotional security is worthy of protection.

In summary, the persuasiveness of a reason supporting a rule is a function of the degree to which the reason implicates a legally recognized value and the weight that legal sources accord that value relative to other values. If it turns out that a reason does not implicate the value in question, or that it implicates that value only slightly, then the reason has little or no persuasive force.

### 2. *Evaluating an Established Rule*

When evaluating the substantive merit of an existing rule, it is best to begin with the substantive reasons for and against the rule that prior courts considered in endorsing the rule. As noted in section 1, such an evaluation may reveal that a court exaggerated the extent to which a rule implicates a supporting value. Further, examination of the reasons may show that previous courts overvalued or undervalued a relevant value.

One way to strengthen the critique of a prior court's reasons is to demonstrate that the reasons are no longer viable because conditions

27. Justice Traynor's famous opinion, State Rubbish Collector's Ass'n v. Siliznoff, 38 Cal. 2d 330, 336-39, 240 P.2d 282, 284-86 (1952), canvasses the areas in which the value of protecting emotional security had legal support.

28. *See, e.g.*, Easton v. United Trade School Contracting Co., 173 Cal. 199, 204, 159 P.2d 597, 600 (1916); Newman v. Smith, 77 Cal. 22, 27, 18 P. 791, 793 (1888); 52 AM. JUR. *Torts* § 45 (1944); RESTATEMENT OF TORTS § 46 comment c (1934).

have changed since announcement of the rule. This argument is persuasive because judges are more likely to overrule their predecessors if analysis shows not that their predecessors erred in creating a rule, but that changed conditions now obviate that rule. Conditions can change in two important respects: first, the degree to which a value is implicated may change over time; and second, present-day courts may recognize different values or different value orderings. Thus, it is possible that a rule may have been justified at its conception but not at a later time. Before the advent of modern credit practices, for example, the Pennsylvania Supreme Court created a rule favoring the placement of liens on property.[29] However, the court later abolished this rule because it created an unanticipated barrier to the value of developing a modern credit system.

Another example is the rule of contributory negligence. Courts first developed the rule of contributory negligence to protect infant industries, especially the railroads.[30] As these industries became prosperous and worker accidents mounted, the circumstances had sufficiently changed so that the value of protecting persons from injury due to the fault of others outweighed the value of protecting infant industries. Furthermore, because many industries had advanced beyond infancy, the degree to which the rule would promote such industries was significantly lessened.

A thorough critique must examine not only the reasons that a prior court considered in adopting a rule, but also any reasons favoring or opposing the rule that the prior court did not consider. The prior court may have overlooked a significant value or failed to see all the ways in which a value was implicated. Higher court opinions reversing or affirming lower courts on grounds neglected by the latter present numerous instances of courts overlooking significant values. For example, in 1976, Allen Clifford became comatose as a result of a prescription drug issued by a Veterans Administration physician. Three years later, the state appointed Clifford's father as his guardian. Clifford's father initiated a malpractice suit against the Veterans Administration. The trial court dismissed the suit on the ground that the two-year statute of limitations for torts against the United States barred the suit. Relying on several earlier cases, the court rejected the argument that Allen's mental incompetency tolled the limitations period. The court of appeals reversed, distinguishing Allen's case from the earlier cases because Allen,

29. *See* Mitchell v. Standard Repair Co., 275 Pa. 328, 331-32, 119 A. 410, 411 (1923), cited in von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 417-18 (1924).

30. *See* Ursin, *supra* note 18, at 260-61.

unlike the earlier plaintiffs, contended that his incompetency was caused by his doctor's malpractice.[31] The court of appeals based its reversal on a value that the lower court did not consider in its opinion: the value of not rewarding a person for his own wrong.

An evaluation of an established rule must not only assemble a full listing and critique of the reasons for and against a standard, but also determine which set of reasons is more persuasive. This determination is, for all practical purposes, implicit in the critique of the reasons. If the evaluation leads to the conclusion that a value is not implicated to the degree a prior court assumed it was or that the present ordering of values has changed, then courts may reject the old rule. If, however, the conclusion is that the rule implicates significant values and that the relative weight of these values has not changed over time, courts will reaffirm the rule.

### 3. *An Example of Substantive Evaluation*

A detailed hypothetical will help synthesize several of the points discussed in the previous section. Sally sues her former husband, John, for permanent injuries resulting from a severe beating he gave her during their marriage. John moves to dismiss Sally's suit on the ground that the common law bars one spouse from suing the other for injuries inflicted during their marriage. In response, Sally argues that the common-law rule of spousal immunity should be overruled.

Sally begins her attack on the rule by showing that the value claimed to support the rule, the preservation of marriage, fails to do so. She points out that given the current liberal divorce laws and high divorce rates, it is highly questionable that spousal immunity reduces divorce. To emphasize this point, Sally might refer to available social science studies and relevant statistical data. She might also point out that even common sense suggests that the rule is ineffective to preserve marriages. On the one hand, most spouses who would bring personal injury actions are already beyond the point of reconciliation. On the other hand, in those cases in which reconciliation is possible, a suit could arguably serve to reconcile the parties almost as often as it would add to the divorce rate. Finally, Sally could direct the court's attention to the emergence of no-fault divorce laws and changes in numerous areas of law—adoption, inheritance, tax, contract, and property—reflecting the lower priority

31. Clifford v. United States, 738 F.2d 977, 980 (8th Cir. 1984).

modern courts and legislatures have attached to encouraging the preservation of marriages relative to other ends.

In the second part of her argument, Sally demonstrates that the rule of spousal immunity is inconsistent with the values of bodily security and sexual equality. The rule prevents spouses from recovering for gross violations of their bodily security and fails to deter this wrongful conduct. It further discriminates against women, because they are more likely to be the victims of spousal abuse. Obviously, precedents in tort and criminal law overwhelmingly support the value of personal security. At the time spousal immunity was created, legal sources did not afford much weight to the value of sexual equality. Now, however, it has received greater recognition in civil rights law.

From this examination, Sally concludes that the rule establishes an ordering of values that is grossly inconsistent with the present legal value structure. Specifically, the rule slights the values of bodily security and of sexual equality and overrates the value of preserving marriage. The rule does not significantly advance the latter value but it necessarily prevents victims of spousal abuse from obtaining compensation for invasions of their bodily security.

The foregoing discussion of substantive consistency presupposes that courts have the authority to abolish objectionable rules and create new rules where none previously existed. Obviously, however, there must be limits to this authority, lest the exercise of judicial creativity undermine the stability of rules as well as the democratic process of policy formulation. The next section of this Article identifies the limits that institutional values place on the exercise of judicial creativity.

### *B. Institutional Evaluation*

The major sources that limit judicial authority to create new legal rules are the values underlying the doctrines of precedent and legislative supremacy.[32] These values give rise to many other constraining doctrines, such as the principle that a court should not issue advisory opinions. They also ground the institutional considerations that judges weigh in determining the precedential force of a given case: the rank and juris-

32. For other discussions of these values, see E. BODENHEIMER, JURISPRUDENCE 425-28 (3d rev. ed. 1974); L. CARTER, REASON IN LAW, 28-47 (2d ed. 1984); H.M. HART & A. SACKS, THE LEGAL PROCESS 587-97 (1958); R. WASSERSTROM, THE JUDICIAL DECISION, 56-83 (1961).

diction of the court, the status of the language relied on as holding or dictum, and the age of the decision.

The following discussion identifies the fundamental values that constrain judicial creation of new legal doctrines. This analysis culls out the two factors that have the most practical importance in determining the legitimacy of judicial innovation. The analysis focuses on how these factors limit the overruling of an existing rule, rather than the creation of a new legal rule. Later, however, the discussion demonstrates that the same analysis applies to both questions, because the values that support maintaining the existing system of legal rules without addition or change also constrain creation of new legal rules.

### *1. The Values Constraining Judicial Creativity*

#### *a. Social Efficiency*

A court of final authority that deviates frequently from its announced or implied rules is likely to produce an inefficient society and thereby upset the basis for social cooperation. Such frequent changes would not only frustrate the reliance people place in legal rules, but also, more seriously, undermine the possibility of reasonable reliance. People would not rely on legal rules that could suddenly change. Such a system would likely fail to obtain the respect and confidence of its citizens and thereby weaken the basis for compliance with its laws. Further, excessive use of judicial power might give rise to public backlash that would severely limit the legitimate and desirable use of such power.[33] For these reasons, most philosophers agree that the existence of a stable system of rules is a necessary condition for social cooperation and community.[34]

The value of social efficiency, however, does not dictate that a court must strictly adhere to its prior rules. Judicial deviation from prior rules threatens social stability only if it occurs frequently, without warning, and concerns rules on which there is widespread reliance. Where a judge-made rule is viewed as unjust, continued adherence to it may itself undercut the respect for law required for social stability. Moreover, in a legal system that allows judges some authority to abolish judicially cre-

33. *See* Greenwalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1019-20 (1978).

34. *See* L. FULLER, THE MORALITY OF LAW (1964); H.L.A. HART, SUPRA note 5, at 6-13; J. RAWLS, A THEORY OF JUSTICE 3-6 (1971).

ated rules, it would be unreasonable for a party to rely on a rule that is widely viewed as unjust.

For the most part, the effect that changing a rule will have on social efficiency depends on the reliance involved. The public places a great deal of reliance on the existing rules in certain areas of law such as contract, tax, trusts and estates, insurance, securities and real property. People, however, seldom plan their affairs based on other areas of the law, such as tort. Also, explicit rules will more likely serve as a basis for reliance than implied rules. Finally, through the device of prospective overruling, judges can avoid frustrating widespread reliance on a rule yet still reform the law. Thus, a court might state that, at some time far enough in the future to give parties adequate warning of the change, a given rule shall change.[35]

### *b. Protection of Reasonable Reliance*

A court that fails to apply the rules it has endorsed may unfairly frus-

35. Professor von Moschzisker has advanced four arguments against the use of prospective rules that warrant consideration. von Moschzisker, *supra* note 29. First, he argues that prospective overruling would be "plain and outright legislation by the courts." *Id.* at 426. It is hard to see why this sort of overruling is any more "legislative" than the straight overruling that von Moschzisker endorses. In a sense prospective overruling is less "legislative" because judges are limiting the effect of the overruling to cases arising after some future date and because the legislature can repudiate the change before it takes effect.

Second, von Moschzisker argues that the practice of prospective overruling would be ineffective because counsel will lack motivation to argue that a rule should be overturned if they will not benefit from the new rule in their case. *Id.* This objection is not as serious as it may first seem. In many of the cases in which prospective overruling might be appropriate, counsel will try to convince the court that it is not appropriate and that the other party did not reasonably rely on the rule in question. As a practical matter, there will be very few cases in which prospective overruling is clearly required. Additionally, judges themselves are capable of raising an objection to a rule and can direct the counsel to argue the merits of the rule. Indeed, VST obligates judges to question rules which conflict with fundamental values.

Third, von Moschzisker argues that a prospective overruling would be merely dictum and hence have no legal force. *Id.* This argument presupposes that the unjustness of frustrating a party's reliance on a rule and the importance of modifying a mistaken rule for future cases would not justify a limited exception to the holding-dictum doctrine.

Fourth, von Moschzisker argues that prospective overruling will not do "even-handed justice" to the present litigants because they are not given the benefit of the new rule. *Id.* at 428. The court, therefore, should apply the new rule in the present case. This argument overlooks the reason for having prospective overruling in the first place: contemporary overruling would frustrate the reasonable reliance of one of the present parties. This difference between the present case and cases that may arise after the new rule takes effect provides a strong reason for believing that it would be unfair to apply the new rule presently but fair to apply it in future cases in which such reasonable reliance will not be possible.

trate the reliance of various parties on those rules. To ignore the parties' good faith reliance is to disrespect the rational expectations they have built from the past stability of those rules. Thus, while frequent deviation from prior rules would undercut social efficiency, any one deviation from a rule has the potential of frustrating reasonable reliance. What distinguishes the protection of reliance from the protection of social efficiency is that the former is founded on respect for the individual and the latter on promotion of the general welfare.

The value of protecting reasonable reliance does not automatically require the court to follow a prior rule. In many cases, the parties will have placed no reliance on the existing rule: for example, a tort defendant does not drive negligently because he relies on the rule of contributory negligence. Further, in some cases reliance would be unreasonable if a strong indication exists that the court would repeal the rule or if the party deliberately does some evil in reliance on the rule. Finally, in those instances in which application of a new rule would frustrate reasonable reliance, judges can still overturn rules on a prospective basis, and declare that at a future date, a new rule will govern similar events.

### *c. Judicial Economy*

The value of judicial economy supports adherence to courts' prior rules because such adherence saves judges and lawyers considerable time and effort in devising new standards. The sheer monetary cost and complexity of a legal system that required such efforts would be prohibitive.[36] Indeed, the value of judicial economy is an aspect of social efficiency because overburdened judges and costly legal services would be socially inefficient.

While use of existing rules fosters judicial economy, justified and limited deviation from existing rules would not seriously compromise efficiency. Judges have a strong interest in minimizing such deviation to conserve the time and effort they expand in legal analysis and to avoid the anxiety that accompanies legal uncertainty.

36. As then Chief Justice of the New York Court of Appeals, Benjamin Cardozo observed: "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921). *See also* K. LLEWELLYN, THE BRAMBLE BUSH 64-65 (1960).

*d. Consistency*

The value of consistency, variously referred to as treating like cases alike, supports the application of prior rules to new cases covered by those rules. In thinking about consistency it is important to understand why consistency is valued. Although it might be argued that consistency is valuable because it sometimes protects reasonable reliance, furthers judicial economy, or promotes social efficiency, the concept of consistency discussed here is disassociated from these values.

To clarify this concept, this discussion distinguishes between formal consistency and substantive consistency. Formal consistency obtains when the same rule is applied to all factually indistinguishable cases. To give a simple hypothetical, suppose identical twins sustained identical injuries from an airplane crash. In a joint lawsuit, twin A recovers $100,000 and twin B recovers $200,000. Although either amount might be considered reasonable compensation for the injuries sustained, this disparate recovery violates formal consistency because no relevant difference exists between A's and B's situation. Formal consistency requires that courts apply existing legal rules to new cases covered by those rules. Applied strictly, it would forbid all judicial overruling. Thus, under the concept of formal consistency, a court that has recognized the rule that a minor child cannot sue a parent in tort must apply that rule in new cases in which a child seeks to sue.

The value attached to formal consistency stems primarily from the apparent fairness of applying the same rule in factually similar circumstances. If one person has a legal entitlement to X in circumstances Q, then the public ordinarily expects another person to have the same legal entitlement in similar circumstances. Formal consistency also reduces the degree to which judges may adjust legal doctrines to fit their personal values and biases.[37] This check, however, is imperfect because courts often distort a rule's meaning to reach a desired result. To avoid such distortion, courts must squarely face the issue of overruling or modifying existing rules in light of perceived deficiencies. By stretching a concept beyond its understood extension, courts create the impression that they are motivated by bias rather than by a reason that would withstand pub-

37. While the requirement of public written opinions that explicitly state the reasons for a judgment is itself perhaps the single most effective check on judicial bias, this requirement is ineffective to the extent that a judge makes his or her decision for reasons other than those stated in the decision.

lic scrutiny.[38]

Substantive consistency is the consistency that obtains when a court applies a rule that is maximally consistent with the substantive values of the legal system. This consistency supports following a prior legal rule only if that rule resolves the conflicts between the values it involves in the same way that the legal system explicitly or implicitly resolves those conflicts.

The rule of contributory negligence illustrates how substantive consistency can oppose the application of an existing legal rule. In the first half of the twentieth century, courts applied this rule throughout the country. Later, some courts abandoned this rule in favor of the comparative negligence rule. In doing so, the courts violated formal consistency by applying a different rule to cases that were factually indistinguishable from the prior cases. The courts, however, upheld substantive consistency, because the rule of contributory negligence is inconsistent with the value widely supported in tort, criminal, property, and contract law, of setting liability according to one's degree of fault.

The value of substantive consistency flows from the rationality and justness of following the priority of values embodied in the legal system. Just as it is irrational to interpret a legal rule without considering its purpose, it is also irrational to ignore the other legal values that the rule affects. No doubt, instances arise where the rationality of certain value priorities in our legal system is questionable; however, the basic ordering of values is accepted as fundamentally just. Thus, insofar as judges ignore or undervalue basic values, their decisions are likely to produce unjust results.

In sum, formal consistency and substantive consistency provide separate reasons for following or not following legal rules. Yet, as the contributory negligence illustration shows, these two values sometimes conflict, thus forcing judges to determine which value has greater weight under the circumstances. At least when basic values are involved, it seems reasonable to conclude that substantive consistency is intrinsically

38. In practice, it is often difficult to distinguish whether a judge arrives at a rule because he believes it best reflects legal or moral values or because he is biased in favor of the party or parties that would benefit from the rule. In the paradigm case of bias, the judge shapes the rule so that it will benefit the party he or she favors without regard to any underlying legal or moral values. Yet in practice, bias is rarely so blatant, because moral and legal considerations as well as bias may influence the judge's mental process.

more valuable than formal consistency.[39] The apparent fairness of formal consistency is putatively less valuable than the rationality and justice of acting consistently with basic values. A legal system that does not require consistency with the basic values it embodies in its rules is irrational because it ignores the values it declares are important to pursue.

Further, a legal system that ignored basic values would likely be unjust. Justice requires that judges base their decisions on legal standards that embody substantive moral values rather than on legal formalisms or public sentiment. No doubt a legal system could exist in which judges mechanically apply legal rules or act as pollsters of public sentiment about a particular result, but the public would condemn such a system as a caricature of justice.

It would be premature, however, to conclude that appellate judges should abolish every legal rule that is inconsistent with a basic legal value. Other values, such as the protection of reasonable reliance and respect for democratic rule, may justify keeping an objectionable rule. Nevertheless, substantive inconsistency may provide a powerful reason to overturn a legal rule, shifting the burden to those who would uphold it to find other values that would override this objection.

### *e. Democratic Rule*

Commentators have argued that the value of democratic rule favors application of existing judge-made rules and opposes judicial creation of new rules.[40] These commentators advance two distinct types of argu-

39. One possible argument for favoring formal consistency over substantive consistency is that application of different rules to factually indistinguishable cases would deny the equality of both sets of litigants. The answer to this argument is that both sets of litigants are accorded equal respect and concern insofar as a good reason is given to justify application of a new rule in the second case. Of course, if as the parties in the second case reasonably relied on the existing rule, this would pose a strong objection to application of the new rule.

40. Obviously, the value of democratic rule requires judges to apply existing statutes that pass constitutional scrutiny. In statutory interpretation, the court must, if possible, ground its interpretation on the values and value orderings that the legislature endorsed in the statute, as amplified in its legislative history. By contrast, in caselaw reasoning, the court is free to draw upon any relevant values that have support in legal sources.

There will be cases in which the values and value orderings embodied in a statute or its legislative history fail to supply a clear answer. In such cases, the court must broaden its consideration to include substantive values that are not embodied in the statute. The appeal to extra-statutory values and value orderings is, however, limited to noncontroversial values such as procedural fairness and the principle of lenity. For discussion of some of these values, see Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values,* 72 CAL. L. REV. 200, 208-14 (1984); Sneed, *The Art of Statutory Interpretation,* 62 TEX. L. REV. 665 (1983).

ments to support this conclusion. First, legal rules have tacit legislative approval and hence failing to apply these rules violates the legislative will. Second, courts should not repeal existing rules or create new ones because doing so denies the citizen's interest in having accountable and accessible lawmakers. A third arguments asserts that the limits placed on courts prevent them from creating and administering laws that are as efficient as those created and administered by legislatures.

*i. The Argument from Tacit Legislative Approval*

The tacit legislative approval argument submits that a legislature implicitly adopts existing legal rules because it takes no steps to repeal or change those rules. This argument presupposes that the legislature fails to act because it approves of the legal rule. However, that presupposition overlooks many other common reasons why legislatures fail to act.[41] A legislature may not be aware of a problem with a legal rule if the problem affects only a few people or deals with a technical point. Similarly, even if legislators are aware of a problem with a rule, they may fail to offer corrective legislation because they do not consider the problem to be serious enough to generate political interest, because other matters are more pressing, or because the people who are adversely affected do not constitute a well-organized political group.[42] Legislators are often swamped with new bills and thus must devote their energy and time to those measures that have the most political importance. Furthermore, legislators may fail to pass remedial legislation because doing so may alienate a

41. Many commentators have similarly attacked the argument from tacit legislative approval. *See* L. CARTER, *supra* note 32, at 96-97; A. HART & J. SACKS, *supra* note 32, at 1395-96; Peck, Comments on Judicial Creativity, 69 IOWA L. REV. 1, 6-10 (1983).

> It cannot sensibly be argued that legislative abstinence shows that the politically responsible body has decided that a particular area of law [should not be judicially changed], since legislators are not often likely to focus on that particular issue. Legislative uninvolvement more realistically reflects either lack of political interest or some vague sense that the problems are being adequately handled by the courts.

Greenawalt, *Policy Rights and Judicial Decision*, 11 GA. L. REV. 991, 1004-5 (1977).

Professor Hart offers another rejoinder to the argument from tacit legislative approval. Hart, *The Courts and Lawmaking*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 40, 46 (M. Paulsen ed. 1959). He argues that the United States Constitution and state constitutions prescribe the ways in which bills become law, and the failure to enact a law is not one of those ways. However, this rejoinder fails to address the main point of the argument from the tacit legislative approval, that the people through their elected representatives showed approval for the existing rules by not changing them. It begs the question to assume that merely because the failure to repeal a rule is not formally endorsed as a method of making law, that this fact should be given no consideration in determining the propriety of creating a new judicial rule.

42. *See* Peck, *supra* note 41, at 13, 16.

wealthy lobby group or raise unsought controversy.[43] Fourth, legislation that would receive majority approval if put to a vote is often subverted by powerful opponents who kill the legislation in committee. Finally, the legislature may fail to act partly because it believes that the court that created the rule is itself fully capable of correcting it and is possibly a better judge of the rule's correctness.

Thus, a legislature's failure to change existing legal rules does not necessarily mean that it would not approve of such a changes on the merits if it took up the issue. For example, a legislature's failure to pass a comparative negligence statute does not itself show that it believes the contributory negligence rule is superior to a comparative negligence rule. If, however, the full legislature defeated a comparative negligence bill on several occasions, judges could properly infer that the legislature disapproved of the change.[44]

### *ii. The Argument from Electoral Accountability and Accessibility*

Most appellate judges are either appointed for life or elected for long terms. Hence, when they establish a rule that does not have public support, the public cannot vote them out of office. The public can change that rule through the legislative process, provided, of course, that the rule in question is not a constitutional rule.[45] Further, judges are less accessible to the public than legislators because of the restrictions placed on the persons who may bring suit, the contacts judges may have with parties and nonparties, and the admission of evidence. Therefore, when judges make new rules, the citizen's input is seldom considered or, if considered, not to the same degree as when legislators make new rules.

---

43. *See* D. TRUMEN, THE GOVERNMENTAL PROCESS—POLITICAL INTERESTS AND PUBLIC OPINION xx-xxii, xli-xlii (2d ed. 1971); G. WILSON, INTEREST GROUPS IN THE UNITED STATES 107-29 (1981).

44. Some courts have dismissed this inference on the ground that the bill's defeat constitutes legislative intent to leave this issue to the judiciary. *See* Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973); Goetzman v. Wichern, 327 N.W. 2d 742, 748 (Iowa 1982). This argument is unconvincing because when the full legislature defeats a bill, it usually does so because of the bill's substance. Only if one were able to supply concrete evidence that the legislature acted for other reasons would it be convincing to argue that the defeat of a bill does not disclose the legislature's opinion of the bill's merits.

45. Professor Clinton has argued that because the Constitution provides a process for amendment, citizens have "democratic" control even over constitutional rules. *See* Clinton, *Judges Must Make Law: A Realistic Appraisal of the Judicial Function in a Democratic Society,* 67 IOWA L. REV. 711, 722-23 (1982). Given the supermajority required for a Constitutional amendment (⅔ majority of the Senate, House, and states), as a practical matter nearly all of the constitutional standards that courts create are beyond democratic control.

Judges could use polls and other indicators of public value ordering far more than they currently do, but judges view this sort of consideration as outside the proper scope of decision-making.

The persuasive force of this argument derives from the assumption that legislative enactment rather than judicial creation best serves the citizen's interest in having the opportunity to participate in or influence the formation of public policy. Many commentators, however, argue that the democratic nature of legislative bodies is greatly exaggerated given the undemocratic control of conference committees, the importance of wealth and social standing to political access, the fact that legislators can vote against the wishes of their constituencies, and the extensive influence of special interest groups.[46] The courts, they contend, are uniquely situated to protect those groups without the resources or social status to muster political power. They also stress the fact that in reality the courts are not immune from public control, because in nonconsitutional cases the legislature can overrule judge-made rules. Finally, they point out that courts, through greater use of such devices as amicus curiae briefs, class actions, and expert testimony, are now better able to take account of the full range of interests a case implicates.

Judicial action, nonetheless, is not as democratic as legislative action. The citizen's access to and influence over the policy-maker is far greater in the legislative setting than it is in the judicial setting. Further, the citizen's influence on policy issues is more direct when the issue is before a legislature than when it is before a court; a citizen may work to defeat legislation before it becomes law, but once a judicial rule becomes law, it acquires an inertia of its own and remains in force until sufficient political support is rallied in the legislature to repeal it. Last, the public can vote unpopular legislators out of office, but only continuing legislative intervention can control an unpopular supreme court. Legislators can act as platonic guardians just as much as judges can, but only the former are held to account on election day.

Commentators might assert that the imperfections of existing legislative bodies do not furnish a reason for greater judicial authority but

46. *See, e.g.*, Miller, *In Defense of Judicial Activism*, in SUPREME COURT ACTIVISM AND RESTRAINT 167, 171 (S. Halpern and C. Lamb eds. 1983); R. NEELEY, HOW COURTS GOVERN AMERICA (1981); Ursin, *supra* note 18, at 248-49. In an address delivered in 1982, Professor Dworkin seems to reject the argument that democratic values support the following of existing rules. *See* Dworkin, *supra* note 24, at 180, 184. This position seems inconsistent with his previous writing, *see* TAKING RIGHTS SERIOUSLY, *supra* note 3, at 84, 323-24, and perhaps should not be regarded as Dworkin's definitive opinion on the subject.

rather for legislative reform.[47] This argument, however, has significant limitations. First, effective legislative reform may for all practical purposes not be possible. For example, states might create legislative reform commissions that would review existing laws to determine which were unfair or otherwise defective. These commissions, however, would likely do little, if anything, to eliminate the distortions arising from wealth, social standing, and special-interest lobbies. Second, even if effective reform were possible, legislatures might be slow in enacting reform, and in the interval parties would suffer from unjust rules. While the legislature should make every effort to pass effective reforms, until this is done, the need for judicial intervention will continue.

The citizen's interest in participating in and influencing the creation of legal standards will depend to a great extent on the rule in question. The rules that the citizen is most interested in leaving to legislative action are those which fall within what might conveniently be called the legislative domain. If a legal rule concerns a subject that falls within this domain, the value of democratic rule would likely oppose judicial "enactment" of that rule. Several considerations help set the parameter of the *legislative domain*. Although courts rarely address these considerations openly, they are often at the root of judicial reluctance to create the legal doctrines urged upon them. Courts are conscious of the need to retain public confidence in the judiciary and at least implicitly consider the extent to which their decisions enter the legislative domain.

First, courts should consider the extent to which the rule in question draws its support from values embedded in the legal value structure or accepted social morality.[48] The greater such support, the more justified the reliance on that value. Justice Traynor has written that judges

47. I am indebted to Professor Rolf Sartorius for pointing out this line of argument.

48. The use of social consensus as a criterion of legal validity is found in the writings of widely divergent commentators. *Compare* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 239 (1962) *and* Nelson, Book Review, 131 U. PA. L. REV. 489, 496-500 (1982) (reviewing G. HASKINS AND H. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15 (1981)) *with* HART & SACKS, *supra* note 26; Ursin, *supra* note 18 at 256 n.195 ("Judicial lawmaking should attempt to implement the societal values, not the idiosyncratic views of the particular judge. To determine what these societal values are, a judge can be informed by existing legislative and judge-made law and by examination of history."), *and* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication,* 83 YALE L.J. 221, 236-38 (1973) (justifying values must be widely viewed as socially desirable). "[J]udges should make new law whenever they rightly discern that new law is desirable, and the test of desirability is acceptance of the new law by other judges, by legislators, and by the society." K. DAVIS, ADMINISTRATIVE LAW TREATISE 138 (2d ed. 1978).

should abide by the tenet that "the law must lag a respectful pace back of popular mores not only to insure its own acceptance but also to delay legal formulization of community values until they become seasoned."[49]

A second factor that judges should consider is whether the proposed standard would interfere or overlap with existing legislation. Judicial creation of a new standard on a subject on which the public has already spoken through their elected representatives obviously undercuts the democratic process. This consideration is essentially one of legislative preemption. Although a legislature may occasionally expressly forbid courts from creating a new legal standard,[50] most often legislative preemption is inferred from existing legislation. The more directly an existing statute addresses the same subject covered by the proposed standard, the more persuasive the argument for preemption. The age of the statute and the history of judicial change may also be tangentially relevant. A sixty-year-old statute that narrowly treats a subject upon which modern courts have widely expanded obviously presents a weaker case for preemption than would a recent statute of broader scope.[51]

Third, judges should consider whether the proposed standard would cause far-reaching social consequences[52] or call for significant public expenditure. If a new standard would have a significant social or economic

---

49. Traynor, *No Magic Words Could Do It Justice,* 49 CALIF. L. REV. 615, 621 (1961). Ironically, one of the strongest grounds for attacking Justice Traynor's landmark decisions is the consideration of whether the values they formalized were seasoned. For example, Justice Traynor's reliance on the value of widely distributing the costs of injury in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring), is the subject of much criticism because this value had little legal support in comparison to the opposing value of distributing liability according to fault. Justice Traynor might have sought support for his reliance in workmen's compensation statutes and social welfare programs, but even this support might be insufficiently seasoned to meet the judge's own requirements.

50. *See, e.g.,* MINN. STAT. ANN. § 145.424(1) (West Supp. 1985), which states: "No person shall maintain a cause of action or receive an award of damages on behalf of himself based on the claim that but for the negligent conduct of another he would have been aborted."

51. *See, e.g.,* Aetna Casualty & Surety Co. v. Broadway Arms Corp., 281 Ark. 128, 132-33, 664 S.W.2d 463, 465 (1984). In *Aetna,* the Arkansas Supreme Court adopted a cause of action for bad faith refusal to pay an insurance claim in spite of the objection that a 1959 Arkansas statute preempted the action. The statute in question, ARK. STAT. ANN. § 66-3238 (1980), allows an insured party to obtain a 12% penalty and attorney's fees from his insurer if the insured recovers on a claim that the insurer refused to pay within the insurance policy's time limits.

52. Other commentators have proposed similar considerations. Dean Wellington would require that the consequences of a rule be neutral so that the rule would not impose disproportionate burdens on a particular group, unless there are special reasons for imposing this burden. Wellington, *supra* note 48, at 238. This requirement is unworkably vague because of the problems in defining what groups count. For example, because comparative negligence would disproportionately affect

impact, the citizen would generally prefer that legislators rather than judges create the standard. This is especially true when new standards require the imposition of a tax or the expenditure of public revenues.

A good example of this consideration is the proposed tort of negligent parenting. Here a court is asked to create a cause of action by a child against its parents for retarding the child's potential development. A strong argument can be made that this cause of action is exclusively a matter for legislative enactment because of its potentially far-reaching social consequences. Similarly, a rule calling for the creation of an administrative agency to carry out a policy arguably invades the legislature's function in determining the distribution of public resources.

The recent judicial development of the wrongful discharge doctrine is another interesting case.[53] Modern courts have allowed employees to sue their employers for wrongful discharge if the discharge was for reasons violating a clear public policy. Many commentators, however, argue that this doctrine should be expanded to allow a cause of action for any arbitrary or unfair discharge. This proposed standard would radically restructure the current employee-employer relationship. Employers would be liable for discharging competent employees because of a personality conflict or lack of extra initiative. In sum, by severely restricting the discretion traditionally allotted to employers, this expanded rule invades the legislative domain.[54]

The extent of the social or economic impact, however, is not always

---

manufacturers and employers, does this mean that it would be improper for judges to adopt this doctrine?

Professor Keeton focuses on the magnitude of the change that a new standard would predictably occasion, the degree of controversy the change would provoke, and whether the change is "political" or "nonpolitical." R. KEETON, VENTURING TO DO JUSTICE 43, 44 (1969). Aside from the problem of identifying whether a proposed standard is "controversial" or "political," Keeton's exclusive emphasis on these considerations ignores the political reality that legislative bodies confronting serious problems often fail to take steps to correct a serious problem precisely because it is controversial. To avoid jeopardizing its reelection, the legislature abstains, sometimes even in the expectation that the courts will intervene to correct the problem. Where substantial legal support exists for the value motivating a proposed standard, a strong argument can be made that such support overrides the "controversial" or "political" nature of the standard. Judicial adoption of comparative negligence in states in which the legislative enactment of this doctrine repeatedly failed is but one example of this situation.

53. For discussion of this doctrine, see Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power,* 67 COLUM. L. REV. 1404 (1967); Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception,* 96 HARV. L. REV. 1931 (1983); Comment, *Wrongful Termination of Employees at Will: The California Trend,* 78 NW. U. L. REV. 259 (1983).

54. *See* Murphy v. American Home Products Corp., 58 N.Y.2d 293, 300-02, 448 N.E.2d 86,

decisive. Many important acts of judicial creation have significant social consequences: the use of busing to achieve educational opportunities, the institutional reform of facilities for the mentally handicapped, and the creation of such common-law doctrines as comparative negligence, the right of redemption, and the covenant of habitability. Many if not most of these applications of judicial creativity are justifiable notwithstanding their significant social consequences because they implicated important values with strong support in legal sources and community norms.

As a fourth consideration, courts should weigh whether the proposed rule would benefit persons unlikely to have their needs met through the legislative process. Tort laws are examples of such rules. Injured persons, spouses, children, consumers, and innocent trespassers are not members of politically organized groups that can effectively bring political pressure to bear upon the legislature. In the vast number of instances, they are isolated individuals who belong to a group only because they suffer similar misfortunes. Thus, in cases in which the reform of a doctrine would benefit such amorphous groups, courts should be less reluctant to leave reform to legislative action.

### *iii. The Argument from Institutional Competence*

Many commentators argue that courts are inherently less competent than legislatures to create new legal rules.[55] This argument has its underpinnings in the value of social efficiency and not the value of democratic rule, because its central thesis maintains that the legislature is a more efficient institution to create "good" law than the judiciary. Because of the common theme of legislative versus judicial rule creation, this argument is included with arguments addressed to democratic rule.

Commentators who raise this argument argue that the legislative superiority arises from the absence of limitations inherent to the judiciary.

---

89-90, 461 N.Y.S.2d 232, 235-36 (1983) (creation of tort of wrongful discharge most appropriately left to the legislature).

55. *See, e.g.*, Pound, *Common Law and Legislation,* 21 HARV. L. REV. 383, 403-04 (1908):

> [C]ourts are less and less competent to formulate rules for new relations which require regulation. They have the experience of the past. But they do not have the facts of the present. They have but one case before them, to be decided upon the principles of the past, the equities of the one situation, and the prejudices which the individualism of common law institutional writers, the dogmas learned in a college course in economics, and habitual association with the business and professional class, must inevitably produce.

*Id.* (footnotes omitted). *See also* Ursin, *supra* note 13, at 246-48. *See generally* Peck, *The Role of Courts and Legislatures in the Reform of Tort Law,* 48 MINN. L. REV. 265 (1963) (advocating ad hoc determination of the propriety of judicial lawmaking).

First, the rules of evidence, the requirements of standing, the quality of counsel, and the scope of the pleadings restrict considerations and evidence the court may take into account. For example, a legislature may solicit testimony from ordinary citizens, call in experts from many backgrounds, engage in protracted debate, commission studies, or consult reports and factual sources, whereas a court facing the same problem may have access only to a few of these sources.

Many lawyers, law professors, and social scientists question this alleged difference in competence.[56] They point to the haphazard and senseless course that legislation often follows, the failure of legislators to consider the merits of legislation apart from its political consequences, the inadequacy of hearings to divulge the relative strengths and weaknesses of a bill, the inexperience and low pay of legislators, and the arbitrariness of procedures in the life of a bill. They also observe that courts increasingly draw upon professional studies by social scientists and other sources that formerly did not play a role in judicial decision-making. In sum, critics maintain that the evidence does not support the argument of legislative superiority in creating efficient law.

Second, critics of judicial creativity also argue that the prohibition on advisory opinions and the holding-dicta doctrine makes the judiciary less competent to create new rules. They argue that this prohibition prevents courts from resolving the collateral issues that, although presently not in dispute, will accompany the new rule. For example, courts and commentators argue that judicial adoption of contributory negligence leaves unresolved issues concerning its effect on joint and several liability and the contribution of other tortfeasors.[57] In contrast, comprehensive legislation could resolve such issues.

This argument, however, is subject to several rejoinders. Legislators often do not foresee the problems that a given piece of legislation might create; when they do, they often fail to address them. For example, few comparative negligence statutes address the problems noted above.[58]

56. *See, e.g.*, Dworkin, *supra* note 3, at 323; R. POSNER, ECONOMIC ANALYSIS OF LAW § 19.2 (2d ed. 1977) (Posner argues that the common law has promoted efficiency much more effectively than legislation and economic regulation); Peck, *supra* note 35, at 8-10; Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 281-85 (1963).

57. *See, e.g.*, Goetzman v. Wichern, 327 N.W.2d 742, 754-55 (Iowa 1982) (Carter, J., dissenting); *see also* Leflar, *Comment*, 21 VAND. L. REV. 918, 920-21 in *Comments on* Maki v. Frelk —— *Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 889 (1968); Wellington, *supra* note 42, at 241.

58. *See* Leflar, *supra* note 57, at 926-27; Ursin, *supra* note 18, at 247.

Also, the unresolved collateral issues might be appropriately handled on a case-by-case basis. This has the advantage of exposing the policy-maker to the unforeseen complications that arise in actual cases as compared to the laboratory conditions of legislation. Moreover, piecemeal correction of legal rules by judicial "enactment" may be the most efficient method of change when the legislature has consistently failed to correct a problem. The benefits of correcting the problem one step at a time might well advance social efficiency more than the failure to address the problem at all.

Finally, it is disputable whether a jurisdiction's highest court lacks the prerogative to issue advisory opinions on matters collateral to a rule change. Sufficient justification for allowing an exception to the advisory opinions rule exists in cases in which reasonable reliance would be frustrated or impaired if matters were left unresolved. Indeed, appellate courts occasionally address an issue that is unnecessary to its decision in order to guide other courts, litigants, and law enforcement officers in applying and discerning the law.[59]

A third argument against judicial rule-creation focuses on the limited means available to the judiciary to administer, monitor, and enforce new laws.[60] A legislature, unlike a judge, may create a special agency or task force to administer or monitor new laws. In reality, this difference, however, has little bearing on the issue of judicial creativity. This argument suggests that judges should not create laws that need administrative monitoring, but few if any of the controversial judge-created rules require such control or oversight.

While this discussion of relative institutional competence hardly skims the surface of this subject, it is reasonable to conclude that a court should not automatically presume that it is less competent to create legal rules than the legislature, but should consider each rule on a case-by-case basis.

### *2. Examples of Institutional Evaluation*

Before turning to examples of institutional evaluation, some general conclusions about institutional evaluation can be distilled from the previous discussion of the values limiting judicial creativity. Although the

59 *See, e.g.*, United States v. Place, 462 U.S. 696, 707-10 (1983); Yates v. United States, 354 U.S. 298, 327-28 (1957), *overruled on other grounds,* Burkes v. United States, 437 U.S. 1 (1978); *In re* Iowa Freedom of Information Council, 724 F.2d 658, 663-64 (8th Cir. 1984).

60. *See* Wellington, *supra* note 48 at 240-41.

values of social efficiency, judicial economy, and consistency lend support to following existing rules and maintaining the current state of the law, this support is not without limitation. These values allow judicial overruling or innovation when strong reasons exist for adopting a new rule. In contrast, the values of protecting reasonable reliance and democratic rule pose limitations that are more particular and more practical. The discussion of the limitations these two values impose can be summarized in the following two considerations:

(1) The court should consider whether the parties or other potential parties reasonably relied on an existing rule. The greater such reasonable reliance, the stronger the justification needed for overruling. In cases in which such reliance would prohibit immediate overruling, the court should consider the use of prospective overruling.

(2) The court should consider whether a proposed rule falls within the judicial or legislative domain. The following four factors are most central to this inquiry:

(i) the extent to which the values supporting the new rule are embodied in legal sources or community norms;

(ii) the extent to which existing legislation preempts the new rule;

(iii) the extent to which the new rule would have significant social consequences or call for new public expenditure;

(iv) the extent to which the rule would offer protection to people who are unable to obtain the attention of the legislature.

The first example of institutional evaluation returns to the earlier hypothetical situation in which Sally sued her former husband, John, for bodily injuries that he inflicted on her during the course of their marriage. John resisted this suit on the ground that the rule of spousal immunity prohibits suits between spouses. Presumably, Sally's arguments have persuaded the court that the values opposing the rule of spousal immunity outweigh those values supporting it. To complete her attack on the rule, Sally must now show that the values limiting judicial creativity do not present an obstacle to eliminating the rule. Her new arguments follow the two practical considerations stated above.

Accordingly, Sally first argues that overturning the rule of spousal immunity would not frustrate any reasonable reliance on her husband's part. John undoubtedly did not beat Sally in reliance on the rule of spousal immunity. Furthermore, even if he had, it seems clear that courts would reject such reliance as unreasonable because of the inherently wrong nature of John's conduct.

Second, Sally argues that abolishing this rule would not invade the legislative domain. No important legal values support the rule as there is little or no evidence that the rule reduces the divorce rate. Yet the rule allows persons (usually women) to have their bodily integrity violated without compensation. Further, the abolition of this judicially created rule would not interfere with any existing legislation. Nor would the abolition have any significant social effects or any effects so serious that the values opposing the rule would not override them.[61] Finally, although women's groups in some states have campaigned to repeal the rule of spousal immunity, in most jurisdictions legislatures have focused little attention on abolishing the rule.

If Sally's arguments are persuasive, she has succeeded in showing that substantial values support the abolition of the rule of spousal immunity and that abolition is consistent with the doctrine of *stare decisis*. In this hypothetical, Sally challenged an existing legal rule. Most often, judges must derive a rule where none is available or clarify the meaning of a general rule, instead of rejecting an existing rule *in toto*.

The facts of the next hypothetical are drawn from a New York Court of Appeals case, *Hynes v. New York Central Railroad Co.*[62] Hynes, a youth of 16, and two companions had dived off a board into the Harlem River. The board was anchored in the defendant's land and extended 7½ feet over the river. Swimmers had been diving off the board for more than five years without any protest. At the moment Hynes was preparing to dive from the end of the board, electric wires fell from a pole, struck Hynes, shattered the board, and flung him to his death. Hynes' estate brought suit against the railway for damages.

The trial court dismissed the suit on the ground that Hynes was a trespasser and not entitled to recovery unless the railroad had been willfully and wantonly negligent. The New York Court of Appeals reversed, holding that "Hynes was in the enjoyment of the public water" and as such was protected by his presence in those waters. Because the court did not state whether or not Hynes was a trespasser, either the court was holding that a person in Hynes' position was not a trespasser or it was creating an exception to the trespass doctrine for users of public highways. Justice Cardozo stated, "We think that considerations of analogy,

61. Normally a claim of this sort should be supported with statistical evidence, yet in a situation like this in which it is clear that a rule causes some evil, it seems the burden should be on the supporter of this rule to show that its abolition would cause some countervailing evil.

62. 231 N.Y. 229, 131 N.E. 898 (1921).

of convenience, of policy, and of justice, exclude Hynes from the field of defendant's immunity and exemption and place him in the field of liability and duty."[63]

Justice Cardozo presented four analogies to show that it is arbitrary to disallow recovery just because Hynes was on the board rather than in the water. In his analogies, he contrasted the situation of Hynes to situations in which falling wires injure someone while he is vaulting over the water with a pole, jumping into the water from a boat, flying over the water in a plane, or standing in the water leaning on the diving board.[64] Justice Cardozo did not examine these situations to determine whether they presented any relevant difference from Hynes' case. For example, he did not address the argument that the defendant's interest in controlling his property is implicated when the plaintiff is actually on the defendant's diving board.

Unfortunately, Justice Cardozo did not explicitly define the policy, convenience, and justice considerations that support the court's decision. Nowhere, for example, does Justice Cardozo indicate that the public policy of protecting the public from injury while using public waterways justifies a special exception to the trespass doctrine. Justice Cardozo's failure to clarify the policies and values supporting the court's result is not merely a matter of judicial fastidiousness, for without such clarification it is difficult to determine what application the case may have in future cases. Hindsight and the theory of legal justification discussed above can help complete this task.

A logical place to start would be the question of whether or not Hynes was a trespasser, the question that the lower court found decisive. To answer this question, it is first necessary to identify what value the doctrine of trespass protects and determine whether it applies here. Trespass is designed to protect one's interest in controlling the use of his land and property. Here the railroad has an interest in controlling the use of fixtures attached to its land. The question, however, arises whether this interest is strong enough to merit protection when the fixture extends over a public highway. Because the fixture enters the public domain, it is reasonable to expect that the public would come into contact with it and that the owner must therefore surrender some degree of control over the

63. 231 N.Y. at 236, 131 N.E. at 900.

64. Similarly, Cardozo presented an analogy that contrasts a boy who is injured while sitting on an overhanging tree limb with a boy who is injured while merely leaning on the limb. Since this analogy is essentially a duplication of the last analogy, it is omitted from the discussion.

fixture.[65] Based on this expectation, the use of that part of a fixture extending over a public highway is arguably not a trespass because the owner can reasonably expect that users of the highway will come into contact with the public part of the fixture.

Even if, however, the railroad's possessory interest in the extended part of the board is great enough to justify protecting it under the doctrine of trespass, the plaintiff has several avenues to pursue. First, Hynes might argue that the defendant's failure to prevent swimmers from using the diving board during the past five years constitutes an "implied invitation" and negates the finding that Hynes was a trespasser.[66] Justice Cardozo did not consider this possibility and thus overlooked a relevant aspect of the defendant's fault.

Similarly, Hynes could argue that the railroad's failure to stop the use of the diving board was willful and wanton conduct and invited Hynes to expose himself to a dangerous situation.[67] Again, Cardozo did not consider the railroad's fault in allowing the use of the board. In fact, he suggested that the railroad would not be liable if Hynes had been injured because the board broke under his weight.[68]

If the above arguments fail to strike any resonant chords, the court should consider whether the public's interest in using public waterways free from injury is sufficiently important to carve out an exception to the trespass doctrine. Here the decisive factor is the public interest and not, as Justice Cardozo suggests, the arbitrariness of denying recovery. If Hynes was a trespasser, it follows that his presence on the board implicates a value not involved in Cardozo's analogies. Unless the court is prepared to abandon the whole trespass doctrine, a step that Justice Car-

65. Cardozo's citation of authority to the effect that ownership does not include rights *usque ab coelum* can be used to support the assertion that the owner's interest in an extended fixture is not sufficiently great to give rise to an action for trespass to the extended part.

66. *See, e.g.*, Mooneyham v. State, 29 Ill. Ct. Cl. 144, 154 (1973) (state liable for damages due to implied invitation). As a matter of historical interest, this exception to the trespass rule may not yet have been recognized at the time Cardozo made this decision; nonetheless, *Hynes* gave rise to the same values considerations that motivated the exception.

67. Many courts have considerably diluted the "willful and wanton" exception in order to mitigate the harshness of the trespass rule. *See, e.g.*, Beverly Bank v. Penn. Cent. Co., 21 Ill. App.3d 77, 82, 315 N.E.2d 110, 115 (1974); Spivak v. Hara, 69 Ill. App.2d 22, 26, 216 N.E.2d 173, 175 (1966) (willfulness and wantonness is a "vague and somewhat shadowy area close to ordinary negligence"); Cooper v. Cox, 31 Ill. App.2d 51, 56, 175 N.E.2d 651, 653 (1961). A more forthright approach would be to recognize explicitly that the trespass rule is draconian by today's values and to modify the rule accordingly.

68. *See* Hynes, 231 N.Y. at 235, 131 N.E. at 900.

dozo was unwilling to take, it must find a principled way to distinguish between the trespasser who trespasses incident to using a public highway and the trespasser who does not. The difference is the public policy of protecting the public from injury when using public highways.[69]

If the policy justifies an exception to the trespass rule, then the theory of precedent outlined above would require a determination of whether this judicially created exception would be consistent with primary institutional values. This can be accomplished by using the two practical considerations set out above. First, there is no reliance on an existing rule because this case raises a novel question. Surely the railroad could not in good faith claim that it led the crossbar holding the wires rot because it believed that it would not be liable for injuries to those using fixtures overhanging the river.

Second, it seems equally clear that creating this exception would not intrude upon the legislative domain. Legal sources support the value of having safe highways. Also numerous programs and laws provide for public highway safety. Similarly, limitations on rights of owners in innumerable property doctrines such as prescriptive easements, adverse possession, zoning, and eminent domain indicate that such a public policy is justified. Next, the exception will not conflict with any legislation because the general trespass rule is of judicial origin. Nor would this small exception have any major social consequences. The novelty of the issue is evidence of its insignificance. Finally, the exception would help to protect a politically amorphous group, those injured incident to trespassing on a fixture extending over a public highway. This examination supports the conclusion that institutional values do not obstruct the judicial creation of this exception to the trespass rule.

## CONCLUSION

This Article has attempted to complete two tasks: first, to develop a general theory of legal justification that can explain the complexity of the judicial process and, second, to build from this general theory a specific theory that illuminates the justification of legal decisions in concrete cases. The general theory maintains that all disputes over the content of legal rules should be seen as disputes between conflicting values, and that a correct legal rule is one that is maximally consistent with the legal

69. Although Cardozo arguably had this in mind when he wrote *Hynes*, the opinion is silent on this point.

value structure. The specific theory divides legal justification into two parts: substantive and institutional evaluation. This theory presents an analysis of special considerations that a court should consider during each type of evaluation, and in particular, develops an account of the limitations that democratic rule places on the recognition of new legal doctrines.

# WASHINGTON UNIVERSITY
# LAW QUARTERLY

VOLUME 63 NUMBER 3 1985