

JUDICIAL MYTH AND JUDICIAL REALITY

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I. INTRODUCTION

Today, we are confronted with a crisis in our courts. This disturbing news is carried not only in the magazines and tabloids, but even in the Congressional Record. Scandals in Statehouses and the failure of two Presidential Supreme Court appointments remind us that, at all levels of government, the quality and character of public officials has come under scrutiny. While the Chief Justice of the Supreme Court deplorably relates administrative failure in the local courts to crime in the streets, police officers organize vigilance committees to monitor the actions of the bench, youthful defendants mock "juries of their peers", and militants of all persuasions challenge the right of legal institutions to regulate their behavior.

All of this reflects a fundamental crisis not only in our courts, but in all our institutions of government. The basic functions of these institutions have been opened to debate. Should the courts respond to change, or should they continue to perform their traditional function of deferring or buffering the consequences of change? From all points on the political spectrum outraged voices challenge any resolution to this question and, in both word and deed, individuals are increasingly disposed to raise these questions in challenge to the very legitimacy of the legal system.

We use the term "legitimacy" here in a special way: legitimacy is the willingness of people, for a variety of reasons, to defer to the decisions of judges—even if they lose. People may so defer (grant legitimacy) because they feel that the law in their case was fair and impartial, or, if they do not like the law, because the judge appeared to exercise his discretion to look out for their interests. They may defer because the law in point is politically determined and amenable to change, or because in its application the judge applied generous measures of common sense. In short, the citizen may grant legitimacy to the court for substantive reasons (he wins, he likes the outcome, he feels the law protects his interests), or for procedural reasons (decisions are made honestly, by good men, who arrive at their decisions in widely agreed-upon ways).

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What follows is an examination of these foundations of legitimacy, of the reasoning employed by legal scholars to explain the wide and powerful support that our courts have enjoyed, and in particular the notion of a "judicial myth" which underpins a procedural foundation for legitimacy.

II. THE PROBLEM OF LEGITIMACY

Governmental institutions are formal organizations which both make and transmit politically determined allocations of resources. A society's material and symbolic resources are limited and in the process of determining the manner in which they are to be allocated, governmental institutions disturb or reaffirm existing distribution patterns and alter or preserve the relative status of groups and individuals in society. Although citizens in a democratic society may participate in the determination of these allocations, in the end some groups find themselves relatively disadvantaged by political decisions. Thus, the classic question in political theory: why do individuals peacefully acquiesce to decision-makers and decision-making institutions?

The problem of obedience is particularly interesting in the case of the judiciary. Judges, acting in certain ways and following particular procedures, allocate society's resources—they perform a political function. They do not merely transmit allocations of resources (laws) made elsewhere in the system. In determining the manner in which laws will be applied in specific situations, and in interpreting the meaning of often vague legislative mandates, judges play a creative political role. Laws are, in the end, what judges say they are. In reality, law is then merely a set of expectations about judicial behavior.¹ Although they are traditionally insulated from some of the conflicts which constitute democratic politics, in the process of making policy decisions—choosing between alternatives with effective political consequences—members of the judiciary enter the political arena.²

A number of differing "causes" of obedience to the decisions of courts have been postulated. People obey rule-making by decision-makers, some have stated, because it is rational and instrumental to do so. While particular decisions allocating social resources may have an unfavorable effect upon certain social groups and individuals, their stake

1. H. EULAU & J. SPRAGUE, *LAWYERS IN POLITICS* 81 (1964).

2. Dahl, *Decision Making in a Democracy: The Role of the Supreme Court as a National Policy-Maker*, in *READINGS IN AMERICAN POLITICAL BEHAVIOR* 166 (R. Wolfinger ed. 1966).

in preserving social order and predictability in social relationships is such that they choose to abide by the decisions of duly constituted authorities. While this explanation of obedience undoubtedly overestimates the rationality of man and underestimates his personal involvement in governmental decisions with potentially high material and symbolic payoff, it does emphasize the fact that human beings in organized society share common goals which may call for rational submission to certain kinds of decisions advancing these goals.

Both Plato and Aristotle recognized the importance of another source of obedience, that of habit. To them, the most important characteristic of the law was its stability, for ordinary men obeyed law because they learned early to do so. One of the most important functions of the legislator was that of education; social stability was thought to be maximized when the law was firmly rooted in the minds of men.³

Thomas Hobbes' notion of the nature of man precluded such ideas, or ideals. To Hobbes, the only source of law was the will of the sovereign, and the only way men could be compelled to obey it was through fear. To obtain obedience, the sovereign had to control sufficient coercive power to exact punishments more horrible than the benefits any man could reap by disobeying his law.⁴ As a recent Hobbesian put it:

There is little excuse for any literate American to forget that a fair degree of law and order is achievable only when police power is so overwhelming that none but psychopathic persons dare break the law. . . . Law and order prevail only so long as there is a "lid" to suppress disorder. This lid is the sovereign's control of overwhelming physical force. If the lid is removed, the reaction is explosive.⁵

But obedience to judicial decisions, like obedience to the decisions of other institutions, must be in part psychological. If acquiescence to judicial decisions and judge-made law is only a function of the power of the courts to command physical violence, stable social life would be difficult and democratic government impossible.⁶ Decisions by the courts having an unfavorable impact upon major social groups would ultimately be reduced to trials of force, and conflicts between decision-

3. E. BARKER, *THE POLITICAL THOUGHT OF PLATO AND ARISTOTLE* 324-26 (1959) [hereinafter cited as BARKER].

4. C. FRIEDRICK, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* 84-85 (1958) [hereinafter cited as FRIEDRICK].

5. L. GARBER, *OF LAW AND NOT OF MEN* 6 (1966).

6. D. EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 281-86 (1965); M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* 48 (1964); Y. SIMON, *THE TRADITION OF NATURAL LAW* 116 (1965).

makers and decision-resisters would be conducted solely on the basis of the calculated costs of implementing physical sanctions.

An attempt to coerce a large number of people, even short of a majority, is usually difficult . . . For if civil disobedience on a grand scale, or even civil war, is to be avoided, a government engaged in coercing large minorities needs to have at its disposal an imposing array of coercive forces—a centralized and disciplined police force, a secret police, a compliant judiciary, military and bureaucratic establishments ready to obey the government when 'duty' requires the coercion of large numbers of fellow citizens, and a body of law, constitutional doctrine, and practices that permit the government to employ these forces. . . . Although it is conceivable that a popular government might coerce a large fraction of the population on infrequent occasions, and survive, the more often it did so the more the chances of popular government surviving would be reduced.⁷

In a comparatively stable social system, however, more subtle mechanisms of social control exist which not only reinforce the state's exercise of physical violence, but often make such exercise unnecessary. If, in addition to force, the courts are able to rely upon a generalized predisposition on the part of the populace to voluntarily abide by judicial decisions, the probability that large numbers of people will resist such decisions is decreased, and the cost of individual resistance increases. This is true even if earlier compliance was based upon power.

Forced obedience is likely to wither when the show of force ceases, whereas obedience motivated by . . . an internalized conformity . . . may be persisted in indefinitely, even after the power subject . . . is long forgotten.⁸

Like other attitudes and opinions, beliefs about law and the judiciary are learned through a complex process of socialization which begins early in life. Because they arise out of the social and cultural milieu that forms the environment which shapes learning, the attitudes which support judicial legitimacy are closely tied to the general value orientations which characterize a culture at any particular time. The history of the development of law and legal institutions, in fact, can be traced by the changing patterns of beliefs which have served to reinforce the powers of the judiciary.

Individual citizens arrive at their evaluations of the judiciary within

7. R. DAHL, *MODERN POLITICAL ANALYSIS* 76 (1963).

8. C. BAY, *THE STRUCTURE OF FREEDOM* 253 (1965) [hereinafter cited as BAY].

the general value framework which constitutes their culture. Although judicial legitimacy in the abstract may perform highly valued social functions, it exists because the citizenry perceives the judiciary as embodying its most highly valued norms. Each age has developed its own pattern of beliefs about judges and judging, and each age has imputed to the judiciary the quintessence of its most highly regarded values and most value-supported procedures of conduct. Early law-giving, for example, was closely associated with cultural religious patterns.⁹ The mysterious gods which regulated nature and decreed individual human fate were, for many early societies, the central concern of the community. Religious sanctions regulated the totality of human life, and religious beliefs were one of the central reference points upon which individuals anchored their world view.

The awe of primitive religion which was an integral part of the social fabric of the times was the source of early judicial legitimacy. Kings and priests interpreted the law on the basis of divine instruction and served as mediators between society and its gods. The code of Hammurabi, one of the earliest legal systems, was prefaced with a pictorial representation of the Sun God Shamash handing to the King the stone tablets defining the rules of human conduct.¹⁰ Later, Moses laid the basis of Judaic Law upon similarly inspired instructions. Law-giving, then, was surrounded by the mysteries of life, death, and the forces of nature, and the authority of the judge-priests was grounded in the entire fabric of society.

As society changed, so did man's conception of the law and the judiciary. With the decline of old religious forms and the personalization of the gods of ancient Greece, philosophers slowly began to develop the concept of "natural law". To Plato, law was to be found through reason and was grounded in timeless and objective reality.¹¹ Aristotle equated "dispassionate reason" with morality, morality with legality, and legality with justice. The law was to be proclaimed by the Guardian, a skillful, knowledgeable philosopher-king endowed with nearly super-human wisdom and independence.¹² Changes in the nature of religion as well as in the kinds of values and ideas prevalent in society had destroyed the old bases of judicial legitimacy, and man again seemed to find it necessary to adopt some explanation for the existence of law and its

9. R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF THE LAW 26 (1954) [hereinafter cited as POUND].

10. H. WELLS, THE OUTLINE OF HISTORY 188 (1920).

11. BARKER 326.

12. *Id.* 323.

application which removed it from his control. Perhaps, as Roscoe Pound has speculated, man requires:

. . . a sure basis of authority resting upon something more stable than human will and the power of those who govern to impose their will for the time being [for] . . . social control.¹³

The close relationship between law and the social forces prevalent in any given age are also well illustrated in the legal theory of Savigny. The historical school of law that he advanced had a powerful impact upon the development of German jurisprudence during the late nineteenth century. Savigny postulated that law was the organic product of the forces of history and was the embodiment of the spirit of a people, the *Volksgeist*. Law, like language, reflected the spirit of the race and the nation. This view of the nature of law reflected the kinds of ideas which were being expressed concurrently in the Pan-Germanic movement.¹⁴ Demands for ethnic consolidation and national unity, feelings of "chosenness", "tribal consciousness" and "tribal nationalism" were dominant social concerns reflected in formal jurisprudence.

III. THE JUDICIAL MYTH

With the development of the common law in England, there arose a theory of jurisprudence which, although it reached its intellectual culmination in the late nineteenth century, is believed by many to be the basis of current popular beliefs about law and the judicial process.¹⁵

The official theory of judicial behavior is that judges stand outside the body politics. They decide cases, at least the good judges do, by a body of rules and according to the inexorable and unvarying commands of logic. They are the spokesmen for the 'law'. Politicians, like Congressmen and Presidents, should not interfere, for if they do, we will lose our independent judiciary and will cease to have a government of laws and not of men. Such is the core of the official theory which has wide and powerful support and requires those who would influence the judiciary to do so within the context of this belief.¹⁶

This "official theory", or "judicial myth" as it has been described by several social commentators, supposedly serves the dual purpose of

13. POUND 5.

14. H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* 222-236 (1958).

15. Lerner, *Constitution and Court as Symbols*, in *COURTS, JUDGES AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS* 184 (W. Murphy & C. Pritchett eds. 1961).

16. J. PELTASON, *FEDERAL COURTS IN THE POLITICAL PROCESS* 21 (1955).

symbolically removing judicial decision-making from worldly processes and providing a higher source of law, law which members of the judiciary alone may discover. This model of the judicial decision-making process was representative of the governmental theories of the age of constitutionalism, and the same mechanistic, rationalistic (almost Newtonian) political theory which spawned the American Constitution was embodied in the formal judicial theory of the day.

The judicial myth consisted of a series of beliefs about law, judges and the judicial process which were interrelated and interdependent. These beliefs were the implicit base of the jurisprudence of the eighteenth and nineteenth centuries in England and the United States. The myth itself was rarely explicitly stated, and it was not until it began to come under attack that it was systematically presented, but it is possible to reconstruct it by integrating the explicit and implicit assumptions of the legal scholars of the times.

The legal theory implicit in the judicial myth was based upon a belief in an objectively valid law.¹⁷ Law, which was the "perfection of reason", was thought to arise out of the evolution of society and acquired, as it was refined by the wisest men in a succession of ages, an almost transcendental quality.¹⁸ Because of its accumulated wisdom and its objective validity the law could not "but with great hazard and danger" be changed or altered, and, according to Coke, it superceded even Acts of Parliament.¹⁹ Not only was the body of the law universal and valid, but, in addition, its unwritten nature enabled legal theorists to argue that it constituted a complete and closed body of rules.

The law was taken to be complete and self-sufficient, without antinomies and without gaps, wanting only arrangement, logical development of the implications of its several rules and conceptions, and systematic exposition of its several parts. . . .²⁰

This conception of law as an objectively valid, systematic, closed and unchanging set of rules for human conduct is important, for it is central to the nineteenth century conception of the judicial process. Since law was perceived to be logically complete and consistent, the function of the judge was merely to ascertain the relevant facts of a case and, through

17. Oppenheim, *The Natural Law Thesis: Affirmation or Denial*, 51 AM. POL. SCI. REV. 42 (1957).

18. T. BECKER, POLITICAL BEHAVIORALISM AND MODERN JURISPRUDENCE 42-43 (1964) [hereinafter cited at BECKER].

19. FRIEDRICK 79.

20. POUND 19.

strict deduction from general principles, apply the law to the case at hand.

The mechanical theory which postulates absolute legal principles, existing prior to and independent of all judicial decisions, and merely discovered and applied by the courts, has been characterized as a theory of a "judicial slot machine." According to this theory, it is assumed that provisions have been made in advance for legal principles, so that it is merely necessary to put the facts into the machine and draw therefrom an appropriate decision.²¹

Thus, judicial decision-making was reduced to the application of formal reason to the law. Combining the major premise of the law with a minor premise describing a case produced a decision.²² Since the common law was largely unwritten, however, the major premises were often of the judge's own creation.²³ Judges were indeed "the depositaries of the laws, the living oracles, who must decide all cases of doubt"²⁴

The ultimate responsibility of the individual judge for the creation of the law presented great difficulty for legal theorists expounding the judicial myth, for while logical processes could be utilized to find the law in abstract circumstances, most legal theorists realized that judges themselves were human beings. In order to buttress the argument that "the rule of law protects us from the rule of men," therefore, it was necessary to deny that the bench was composed of ordinary mortals.²⁵ While it was possible to disguise most judicial discretion under the function of the logical completeness of the law, the nagging residual of clearly judge-made law had to be explained in another way. While legal scholars emphasized the training and personal skill that individual judges applied to their tasks, they chiefly relied on the argument that, while judges did indeed "fill the gaps" of the law, those gaps had the quality of "higher law", and that, in any event, the morality of the individual judge was superior to the community. "The morality of the Courts," argued Dicey, "is higher than the morality of traders or of

21. Haines, *General Observation on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, in *JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH* 42-43 (G. Schubert ed. 1964).

22. BECKER 42-43.

23. J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 252 (1909) [hereinafter cited as GRAY].

24. BLACKSTONE, *COMMENTARIES* 12 (J. Devereux ed. 1886).

25. GRAY 262-63.

politicians.”²⁶ While “ordinary parliamentary legislation can at best be called only tentative . . . the best judicial legislation is scientific.”²⁷

The judges are the heads of the legal profession. They have acquired the intellectual and moral tone of English lawyers. They are men advanced in life. They are for the most part persons of a conservative disposition. They are in no way dependent for their emoluments, dignity, or reputation upon the favor of the electors. . . .²⁸

As a consequence of these sterling virtues, judges were believed to be independent of the community and of mere political or personal considerations. As a result, Sir John Grey argued,

. . . but suppose in a case where there is nothing to guide him [the judge] but notions of right and wrong, that his notions of right and wrong differ from those of the community,—which ought he to follow—his own notions, or the notions of the community. . . . I believe that he should follow his own notions.²⁹

The consequences of such a judicial philosophy are obvious. If one accepts a view of law like that of Aristotle, “the law is reason unaffected by desire,” and endows only members of the judiciary with the independence, wisdom, morality and training to discover the law, then judging is not an ordinary human process. This was the view of the law expounded by Justice Owen J. Roberts in the controversial 1936 case, *United States v. Butler*:

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch has only one duty,—to lay the article of the Constitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former.³⁰

The judicial myth, therefore, served to legitimate the activities of the judiciary by denying that they rested upon any but legal foundations. Judging was a mechanistic, rational-legal process above mere human passion, and, so long as the courts confined their substantive actions within the broadest limits of popular toleration, individual actions could remain unchallengeable.

The elements of the judicial myth were not only consistent with the

26. A. DICEY, *LAW AND PUBLIC OPINION IN ENGLAND* 368 (1920).

27. *Id.* 371.

28. *Id.* 363-64.

29. GRAY 271.

30. 297 U.S. 1, 62 (1936).

mechanists' political theory of the Enlightenment, but they also tapped all of the basic sources of legitimacy described by Max Weber.³¹ First, judicial decision-making was grounded in *rational* procedures and rituals—witness the emphasis on deduction, objectivity and the mechanistic application of a consistent body of law. Secondly, judicial decisions were based on *traditionally* evolved standards of conduct and, in the United States, were couched in the terms of a venerable constitutional document. Finally, the emphasis on the exemplary character, knowledge and forbearance of the judge, as well as upon the trappings and formal ritual surrounding the courts, appealed to charismatic sources of authority.

Other beliefs characteristic of American culture, however, also make demands upon the functioning of the judiciary, and these demands, seemingly inconsistent with the judicial myth, actually serve to provide new bases for judicial legitimacy.

In his brilliant book *The American Supreme Court*, Robert McCloskey traces two American political ideas which, rising and falling in their respective currency during the course of history, have been important determinants of the fortunes of the Supreme Court in its struggle to maximize its influence upon the political system.³² One idea, the doctrine of "fundamental law", supports the notions implicit in the judicial myth. The other, the notion of "popular sovereignty", strengthens the hand of those wishing to limit the power of the court to thwart the actions of the representatives of the people. In response to this "will-of-the-people" concept, the populist forces of the Progressive Era prompted the widespread adoption of a new method of judicial selection which was alien to the Anglo-American legal tradition: the popular election of judges. Although the participation of judges in the electoral process compromises in part certain elements of the judiciary, it gives to the judiciary the additional quality of representativeness; members of the judiciary are ultimately responsible to the populace for their behavior.³³ Not only does this serve to inhibit judges from stepping outside the boundaries established by popular conceptions of their role, but it encourages them actively to pursue identification with these conceptions and to reinforce them in their public behavior. The hope of any elected official is to be perceived as embodying all of those characteristics

31. M. WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 328 (T. Parsons & A. Henderson eds. 1947).

32. R. McCLOSKEY, *THE AMERICAN SUPREME COURT* 12 (1960).

33. See H. KAUFMAN, *POLITICS AND POLICIES IN STATE AND LOCAL GOVERNMENT* 36-38 (1963).

essential to the performance of his intended office. Although the election of judges does clearly cast them into the political arena, the practical effect of the style of judicial campaign behavior and of the representativeness gained by the formal recognition of their ultimate public responsibility has been to expand the basis of judicial legitimacy in the American system.

The judicial myth was the product of many social forces. As an argument for judicial independence, it was a powerful weapon in the hands of Parliament in its struggle for independence from the King. To the members of the Inns of the Bar, led by Coke, the judicial myth was a useful tool which increased their political influence and independence.³⁴ One could argue that the judicial myth, like legitimating belief systems before it, was a conscious product of groups in society concerned with stability and seeking to inhibit social change. This view of the ideological bases of legitimacy is undoubtedly correct, at least in part, for in every age certain men must have realized that their interest in the protection of the status quo coincided with an interest in the protection of the status of the judiciary. This may not, however, fully explain the remarkable tenacity with which legal scholars, journalists, and social philosophers have expounded upon these myths, and may not explain the widespread support which has been attributed these ideas.

The tendency of man to assign to the law higher sources which remove its basic substantive content from day-to-day conflict, and to impute to judicial institutions the most legitimizing of his beliefs, raises some basic questions about the functions that beliefs serve in helping man to adjust to his environment. Why is it that in many societies beliefs have evolved about law and the judiciary which have had this stabilizing effect? It is not a universal phenomenon. Certain simple segmentary lineage societies have evolved stable social relationships without developing even a general sense of judicial legitimacy. The tenacity of legitimating beliefs in complex societies seems to indicate that the genesis of such beliefs must be imbedded in the interaction between man and his social system.

One approach to an analysis of the sources of judicial legitimacy can be based upon the apparent functions that the judiciary performs in social life. Courts are essentially institutions that routinize conflict resolution by channeling disagreements over the allocation of social resources into orderly and procedurally regularized arenas. As such, courts provide security for individuals. In order to minimize the anxiety

34. C. FRIEDRICK, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY* 101-110 (1950).

that accompanies uncertainty about continued personal satisfaction, individuals come to depend upon those institutions which ensure stability and predictability in social relationships. Avoidance of anxiety is one of the most basic of human drives, and severe anxiety can lead to a loss of what Christian Bay refers to as "psychological freedom."³⁵ Institutions, then, may become good in themselves because they minimize anxiety and maximize security.³⁶ The courts are a mechanism contributing to the stability of social intercourse and maximizing for individuals the probability that they will continue to enjoy the social benefits that traditionally accrue to them.

In his *Sociology of Religion*, George Simmel describes one of the classic dilemmas of human existence: the conflicting psychological demands for individual self-determination and for anxiety-reducing social relationships characterized by harmony, unity, and social stability.³⁷ This need for Community conflicts with the need for what Bay has defined as personal "power," the individual's degree of control over his own fate, the probable difference his own effort will make in his access to desired goals.³⁸ In their interaction with individuals within society the courts control power relationships. The judiciary generally commands sufficient coercive power and manipulative control over individuals within their jurisdiction that these individuals are virtually powerless to resist unfavorable, but legal, allocations of their resources.³⁹ The finality of judicial decisions supported by the power of the state minimizes the individual's feeling of personal power, but at the same time maximizes the kinds of values associated with Community. One way to escape this dilemma, to rationalize the required loss of freedom to another source of collective security, is to create myths that make this not disagreeable loss of individual power inevitable.

Powers of a personal or objective order, interfering to any degree in our lives, are sometimes felt as inconvenient or improper. But they immediately lose this character of interference once the rate of their . . . claims are increased.⁴⁰

35. BAY 160.

36. *Id.* 262.

37. G. SIMMEL, *SOCIOLOGY OF RELIGION* 38-39 (1959) [hereinafter cited as SIMMEL].

38. BAY 163.

39. To Sebastian DeGrazia, members of the Judiciary can in fact become the rulers of a society. As such they control the environment and regulate a hostile world, and therefore are perceived to be "superfathers" who must be obeyed and loved in duplication of earliest family relationships. S. DEGRAZIA, *THE POLITICAL COMMUNITY* (1948).

40. SIMMEL I.

This could be done by unconsciously imputing to the judiciary, which controls the distribution of satisfying benefits, particular qualities which assure the individual that his loss of freedom, his loss of power over this distribution, is not merely to another individual.⁴¹ Legitimizing beliefs, then, could help bridge the gap between McCloskey's contradictory concepts of fundamental law and popular sovereignty which are reflective of the dilemma of man.

If one assumes that most individuals do not possess sufficient psychological strength to survive the anomic breakdown of the social order, to tolerate the anxiety associated with ambiguous social relationships and uncertain access to things they value, then the propensity of mankind to create institutions of social control would appear to be a functional response to the need for security. If, as both Simmel and Erich Fromm argue, human existence and the desire to be "free from" are also inseparable, it may be necessary for man to preserve his individuality and selfhood by retaining at least the fiction that the controls he places upon himself are part of the natural order of things. He may require to believe that they are related to those things his society holds to be of cosmic significance, and do not involve direct submission to other individuals. Legitimacy, therefore, could be interpreted as a functional belief which enables man to resolve the dilemmas of freedom and obedience which arise out of his nature and which constantly confront him in organized society.

IV. THE SURVEY EVIDENCE

As we have seen, legitimating beliefs about law and the judicial process have been a persistent characteristic of complex and stable societies, and the existence of legitimating beliefs has been linked to the ability of the judiciary to resolve conflicts over the allocation of social values in a peaceful and orderly, albeit confining, manner. One common assumption of those describing the function that legitimating beliefs perform in American society has been that public perceptions of law and the judiciary are rooted in the nineteenth century idea of the judicial myth.

Despite every proof to the contrary, we have persisted in attributing to them (judges) the objectivity and infallibility that are ultimately attributes only of a godhead.⁴²

41. *Id.* 32.

42. Lerner, *Constitution and Court as Symbols*, in *COURTS, JUDGES AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS* 184, 191 (W. Murphy & C. Pritchett eds. 1961).

One purpose of this research is to test this hypothesis. Certainly, the little empirical evidence that does exist indicates that at least some elements of the judicial myth no longer enjoy popular support. Twenty-five years ago, for example, 43% of the respondents to a national opinion poll agreed with the statement that "the Supreme Court decides many questions largely on the basis of politics."⁴³ The lack of any evidence about the actual beliefs of the mass of the citizenry before the advent of scientific polling procedures precludes any comparisons with previous ages. However, with the use of survey questionnaires we can confront present populations with elements of the myth and make some estimates of their persistence.

For this purpose, we have chosen to gauge the attitudes of college students. Perceptions of social objects, like the courts, change over time as new belief systems and historical events challenge people's ideas about their world. The investigation of college student's perceptions of the foundations of legitimacy should give us some estimates of the parameters of that legitimacy, for college students are a population perceived as both open to new beliefs and to the impact of contemporary events. The sample reported here consists of 342 undergraduate students at the University of Wisconsin-Milwaukee. Their opinions were polled in the Spring of 1966.⁴⁴

A second question raised by this study is: to what extent does the judicial myth reflect the way in which judges actually make decisions? By presenting judges with a series of questions drawn from elements of the judicial myth we may be able to make some judgments about its operational validity. For this purpose, the same questionnaire answered by the student sample was presented to ten County and Circuit Court judges in the same urban area.⁴⁵ While this is a relatively small sample even for elite interviews, it did represent a random sample of one half of the judges sitting at the time; issues raised by questionnaire responses were extensively discussed with the respondent judges.

Finally, the availability of comparable data on the two populations

43. Strunk, *The Quarter's Polls*, 10 PUB. OPIN. Q. 436 (1946).

44. The characteristics of the student sample are more fully explored in W. Skogan, *The Judicial Myth and Judicial Behavior*, unpublished thesis submitted in partial fulfillment of the requirements for the degree of Master of Arts, University of Wisconsin-Milwaukee (1966).

45. These judges ranged in experience from forty-five days to thirty-four years. Circuit and County judges in this state are elected for six-year terms on a non-partisan basis. Incumbency is tantamount to re-election, and most were initially appointed to the bench by the governor to fill unexpired terms made vacant by retirement or death in office. All of the judges interviewed had held previous public office or filled political roles.

enables us to probe another question: what are the similarities and differences in their perceptions? At what points do they agree upon the nature and functioning of the law, and at what points do their views of the world diverge? If there is a crisis of judicial *legitimacy* it should be apparent in these divergences.

A. *Perceptions of the Law*

As we have seen, one of the classic and unresolved problems plaguing social philosophers has been that of the nature of the law. Be it based on the strength of the sovereign, common consent, or the will of the deity, “. . . law is so much a part of everyone’s life that every person has his own ideas about its nature.”⁴⁶ Two crucial elements of the judicial myth seem to differentiate it from alternative views of the nature of the judicial process: the extent to which it isolates the control of individual behavior from the idiosyncrasies of human intervention and the extent to which it posits law as a complete system of rules.

The classic rubric, “the rule of law protects us from the rule of men,” is an articulation of the first element. The notion that the law both controls the operation of the legal system and the caprice of individual decision-makers is clearly reflective of the judicial myth even in an age when “popular sovereignty” overshadows the theory of a more fundamental law. Empirically we find the following:

The rule of law protects us from the rule of men.

	<u>Judges</u>	<u>Students</u>
Agree very much	50%	9%
Agree	40	33
Don’t know; no opinion	0	8
Disagree	10	42
Disagree very much	0	8

Student opinion clearly reflects polarization around this classic dilemma; fifty percent are unconvinced that law protects against the rule of individual judges.

Among the judges, on the other hand, belief in the rule of law reflects a common *ideal* they all shared, that of achieving through self-discipline an objectivity that would allow the law rather than their personal beliefs to govern. As one judge put it:

Law should not be based on the personal predilections of the judge. We

46. C. HOWARD & R. SUMMERS, LAW, IT’S NATURE, FUNCTIONS AND LIMITS 4 (1965).

have no right to play God. We have to avoid gastronomical jurisprudence by disciplining ourselves. What we had for breakfast should not affect the course of society.

The second element of the legal system posited by the judicial myth is its completeness, *i.e.*, the extent to which it defines the possible universe of human action. While the assumption of the judicial myth is that the law is a system of definite, consistent, known rules which are applied by the judge, both groups would agree with Cardozo that “there are few rules; there are chiefly standards and degrees.”⁴⁷

The law contains a rule for every situation.

	<u>Judges</u>	<u>Students</u>
Agree very much	10%	0%
Agree	0	5
Don't know; no opinion	0	5
Disagree	60	56
Disagree very much	30	34

Both students and members of the judiciary are in substantial agreement that the law does contain many gaps to be filled. “Legislative foresight is finite, and there is no limit to the variety of situations that can arise in a complex and dynamic society. No legal code, no aggregate of statutory directions and judge-made precedents, can ever furnish explicit and unambiguous commands for every conceivable case.”⁴⁸

B. Perceptions of the Decision-Making Process

A more careful look at the factors which are thought to influence and constrain the process by which judges go about applying those “standards and degrees” to individual cases reveals the same pattern: high agreement among judges that they are sensitive to the needs of individual claimants (in their interpretation, open to society) but disciplined by the law, and sharp disagreement within the student community over the same issues. These findings are important as we suggested at the outset. Consensus on the fairness of the decision-making process is as crucial as satisfaction with the substantive outcomes of cases in maintaining sufficient levels of legitimating support for the judicial system.

47. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 161 (1921) [hereinafter cited as CARDOZO].

48. Jones, *The Trial Judge—Role Analysis and Profile*, in THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 125, 129 (H. Jones ed. 1965).

In order to probe our respondents' perceptions of the decision-making process, we presented the judges and students with a number of questions prefaced with the statement:

A judge must weigh a number of factors when he makes a decision in a case. For each of the following, indicate the extent to which you think they are factors that judges here in Milwaukee consider when they are making decisions.

Initially this format will be used to map in a general way the factors which influence judicial behavior: legal precedent, situational factors, the need to protect minority rights. In the next section the same format will be utilized to investigate the political dimension of the judicial role.

Legal precedent is, in theory and in practice, one of the key factors in judicial decision-making. As one experienced jurist described it, "if the precedents are plain and to the point, there may be need of nothing more, for *stare decisis* is at least the everyday working rule of our law."⁴⁹ Precedent is one of the major sources of predictability and stability in the Anglo-American legal system, and a major factor which "isolates" the law from the personality of the presiding judge. In an important and continuing series of experiments, Theodore Becker has empirically demonstrated the power of precedent to both shape the hypothetical decisions of law students and judges and to reduce the influence of their previously measured "substantive value preferences" upon their rule behavior.⁵⁰

With some student dissent, both judges and their public reflected the importance of precedent in our samples.

(Importance of) following the legal precedent established in the past.

	<u>Judges</u>	<u>Students</u>
Very important	20%	19%
Important	80	48
Don't know	0	7
Unimportant	0	22
Very unimportant	0	4

The importance of situational factors unique to concrete and often intractable human reality was also readily recognized by both groups. Our system of common law relied upon the judge to apply often

49. CARDOZO 20.

50. BECKER 113-146.

ambiguous statutes and unclear precedents to individual cases. In the course of applying the law and (hopefully) finding justice, he is forced to consider each case on its own terms, for no two human interactions are likely to be identical in every respect.

. . . There is a substantial incidence of cases in which the law is unclear, that is, in which the judge has no clear mandate to decide one way or another and must choose between the alternative decisions open to him on the basis of his best judgment as to which decision is fair between the parties⁵¹

(Importance of) interpreting the law in light of individual situations.

	<u>Judges</u>	<u>Students</u>
Very important	60%	32%
Important	30	49
Don't know	0	6
Unimportant	10	11
Very unimportant	0	2

Responses to the open-ended questionnaire also reflect the importance judges place on the interpretation of law in the light of individual situations.

Judge K, who thought that “applying the letter of the law” is “unimportant” (in response to another question), defined the law as “ninety-nine percent common sense.” He stressed the importance of securing out-of-court settlements of cases and argued that major element of a judge’s work is “the practical application of psychological techniques to get cases settled.” Judge H, on the other hand, thought that individual interpretation is “unimportant” and strict application important, and he stressed the fact that “the law *is* justice” and that “for every wrong there exists an equitable remedy.” He stated: “The job of the judge is to find the law that fits the facts and apply it. The judge has no right to interfere personally in a case.”

While Judge H clearly expressed a role orientation based upon our classic model of the judicial myth, he also represented a lonely position vis-a-vis his fellow jurists.

These two judges, as well as the division of student and judicial opinion in general, reflects a basic dilemma: the problem of reconciling

51. Jones, *The Trial Judge—Role Analysis and Profile*, in *THE COURTS, THE PUBLIC AND THE LAW EXPLOSION* 125, 130 (H. Jones ed. 1965).

justice (substantive satisfaction) with uniform application (procedural satisfaction, which in the American case is also thought to be a component of "justice"). For Judge A this apparent dilemma presented no difficulty.

The function of the courts is to *settle disputes*. The uniform application of the law is a social necessity. Often decisions are "unjust" in an ethical sense to individuals, but pragmatically the uniform application of the law results in a *social good*.

The uniform application of the law is necessary, Judge C argued, because:

The function of the law is to clarify and order confused relationships between people. Law is the basis upon which we predict relationships.

Despite their various defenses of the uniform application of the law, the judges realized that they shared the standards and prejudices of their society. Moreover, they all recognized the ease with which they could substitute personal judgments for legal standards. The unique aspect of the judicial system as the judges viewed it stems not from the absence of such prejudice, but from an equal prejudice based on procedural rules, rules which all of the judges felt to be as important as substantive ones. In a large sense it is this prejudice based upon procedural rules which legitimates individual interpretations by judges even if they deviate from substantive community prejudices.

One concern which most judges share involved the role of the courts in the protection of individual citizens. In a large and often impersonal society even legal benefits can by-pass certain groups and individuals, therefore, the role of the courts in the protection of minority rights is a major one. The manner and substance of judicial adjudication at the trial court level could be an important factor in determining the extent to which many American minority groups will be integrated into the mainstream of society. An awareness of this judicial function was evidenced by the judges and, to a lesser extent by the students.

(Importance of) upholding the rights of the little guy.

	<u>Judges</u>	<u>Students</u>
Very important	50%	20%
Important	40	46
Don't know	0	10
Unimportant	10	22
Very unimportant	0	2

C. - Perceptions of Individual Discretion and Judicial Politics

Despite the fact that “the nineteenth century abhorred judicial discretion . . .”⁵² students clearly realized that judges do exercise a degree of personal discretion.

How much personal discretion do judges have in the application of the law?

	<u>Students</u>
Very much	23.4%
Some	51.2
A little	12.0
None at all	1.5
Don't know	11.4

Many of the students interviewed turned a somewhat jaundiced eye upon the notions of judicial impartiality.

Judges are impartial and do not let their personal views interfere with their decisions.

	<u>Students</u>
Agree very much6%
Agree	15.5
Don't know; no opinion	19.3
Disagree	52.0
Disagree very much	12.6

(Importance of advancing their personal political and social ideas in decisions.

	<u>Students</u>
Very important	8.5%
Important	31.6
Don't know	11.4
Unimportant	26.6
Very unimportant	21.9

The judges were asked, “Do you get much of a chance to work your personal ideals of ‘justice’ into your decisions?”

Nine of the ten judges interviewed stated that they did. They all agreed that this was most common in (1) ambiguous cases where there existed

52. POUND 55.

no controlling precedents, and (2) in sentencing individuals and fixing monetary settlements. One judge explicitly stated that his personal values played an important role in the fixing of sentences for certain kinds of crimes.

I'm generally a soft touch. If I were a lawyer, I would want to get a judge like me, (that is) for most crimes, like shoplifting, where there is not much damage done to people. But for some crimes, like rape, and in some divorce cases, I'm tough.

Statistical studies of voting on appellate benches suggest the same reality perceived by the majority of students; behind the on-the-bench behaviors of judges lie a relatively stable set of general policy preferences which structure judicial reactions to individual cases and lend a predictability to their decisions over and above the formally recognized constraints of *stare decisis*, legislative enactment, and procedural regularity.⁵³

Despite their ability to shape certain kinds of decisions, and despite the widespread recognition (in at least our student sample of the public) of this power, judges in the American political culture are expected to remain above the political fray.

The protections that have surrounded judges in the Anglo-American systems are significant here as supplying evidence of widespread expectations concerning judicial behavior. These safeguards testify to the expectation that judges should not be subject to the influence that may be exercised through civil liability for their official acts, reduction of pay, and arbitrary removal.⁵⁴

Despite this, local judges are clearly subject to "the vulgar forces that contend in the market for place and power."⁵⁵ While divided, a clear plurality of the student sample perceives judicial political behavior in most unobtrusive forms.

(Importance of) representing important economic interests.

	Students
Very important	8.2%
Important	36.0
Don't know; no opinion	15.5
Unimportant	29.8
Very unimportant	10.0

53. G. SCHUBERT, THE JUDICIAL MIND (1965); Spaeth, *Warren Court Attitudes Toward Business*, in JUDICIAL DECISION-MAKING 79-108 (G. Schubert ed. 1963).

54. D. TRUMAN, THE GOVERNMENTAL PROCESS 483 (1951).

55. *Id.*

While any observer of local court systems would have no difficulty in recognizing the type of judge perceived by the student respondents, Carl Swisher presents a more charitable interpretation of the average judge's sensitivities.

Judges being human in their desire for community approval, it is not surprising that some of them drift with the sentiments of the times and fill the interstices of the law somewhat as if they were the direct agents of democracy.⁵⁶

Both the judges and the students were divided about the importance in the local court of this representational function of shared community prejudices.

(Importance of) reflecting the desires of the majority of people.

	Judges	Students
Very important	20%	10%
Important	40	46
Don't know	10	7
Unimportant	10	30
Very unimportant	20	7

Both the judges and the students were as divided on this issue as upon any we investigated in the course of the interviews. While the students saw a number of factors playing a role in judicial decision-making at the local level, representing majority interests was not seen as the primary one. Judges, on the other hand, saw this to be more important than did the students. This may be in part because of the special sense in which they interpreted the notion "desires of the people", especially in the electoral process.

In response to the question, "Do you think the public's expectations about judges affect what judges here do, and their chances for re-election," most of the judges replied with an emphatic "yes." In their analysis, public expectations of judicial behavior set only the broadest of limits on their public *policy* decisions. Public demands as they saw them were largely imposed upon their *private* lives, upon their probity and public morality. According to Judge A and others, the public feels incompetent to judge the content of a judicial decision, but not the personal life-style of the decision maker. All of the judges stressed the importance of personal probity on the part of judges and their

56. C. SWISHER, THE SUPREME COURT IN MODERN ROLE 5 (1958).

immediate families. The judge cannot in his personal conduct or official demeanor violate the mores of the community.

The public demands that the judge have no taint to his personal life. They *must* be held in high regard, for they are the last check between the individual and the government. They control the lives of others and pass judgment on personal misconduct every day. (Judge B)

Thus, we would suggest that one crucial difference between the attitudes of judges and students (although we have only indirect data on this point) revolves around what they feel judges should do and in fact do vis-a-vis public expectations. Moreover, the gap is not one of "responsiveness", it is a more fundamental difference in the notion of what publics can and do expect from their judges.

By weighing the responses to the questions above concerning the factors which influence judicial decision-making, it is possible to rank them in the order in which both the students and the judges perceive them to be important in the local courts. The items, with their ranks, are:

<u>Rank</u>	<u>Judges</u>	<u>Students</u>
1	Situational interpretation	situational interpretation
2	protection of minority rights	reliance on precedent
3	reliance on precedent	protection of minority rights
4	reflecting majority opinion	reflecting majority opinion
5		estimating impact on re-election
6		representing economic interests
7		advancing personal political/social beliefs

What is interesting is that, despite the apparent disagreement on a number of items, the underlying pattern is the same for both groups. Weighing each response category by its frequency indicates that both groups agree upon the primacy of precedent, the middling importance of reflecting majority opinion, and in the student sample the relatively lesser importance of purely political factors in judicial decision-making.

Political scientists almost universally describe courts as political institutions. Politics involves the authoritative allocation of social benefits; courts authoritatively allocate social benefits; *ergo*, courts are political institutions. To the judges, however, judicial decision-making is rooted in a series of processes which effectively remove it from normal interest-group, bargaining, power politics. The judges, and many students, bow to the importance of doctrines of legal precedent, objectivity, the protection of minority rights and the rule of law. Judges realize that they do make the law and that their judicial activity cannot be abstracted from the cultural milieu of which they are a part, but their conception of the judicial role and of their political responsibility serves to sever the "normal" connections between politics and policy in the judicial process. Although they are elected officials, for example, the judges interviewed were in agreement that the public is not concerned with the content of their decisions. They stressed, rather, the importance of personal characteristics: honesty, humility, objectivity, and human sympathy. They all stated that their re-election depended almost solely upon their personification of the attributes that we have described as characteristic of the judicial myth. If judges believe that their personal interest in retaining office is dependent upon their judicious conduct, then not only will their behavior tend to reinforce the judicial myth among the population, but in addition the independence of their decision-making from normal political pressures will be enhanced. Thus, the legal training, experience and self-interest of the local judiciary enables them to conceive of their jobs, and perhaps to execute them, in what they believe to be "non-political" terms.

V. ANALYSIS AND CONCLUSION

At one level, the data presented above indicate a rather high level of consensus between students and judges on the nature of the judicial role and the nature of the law with which judges deal. Among the judges themselves we found a consistently high level of agreement on all items. The impact of legal and political process on them somehow managed to inculcate in them a strikingly similar set of perceptions about their role. This consensus is especially striking because the socializing influence to which the judges were exposed was by no means homogeneous. It appears that, despite these differences and the different ways in which they were recruited to the judicial role, the commonly shared experience of "judging" shaped their attitudes in similar ways. In one sense, we can indeed talk about the "judicial role"; the empirical data suggests that

the job which they perform sharply affects, in similar and predictable ways, the way in which they think about the world.

The extent to which the actual, operative judicial role resembles the role perscribed by the "judicial myth" is another matter. The data indicate that in many ways the judges do not share the beliefs ascribed to that role. We have suggested, however, that although they may not themselves subscribe to the judicial myth, the way in which they behave vis-a-vis the electorate may in fact tend to reinforce whatever currency the myth has in the wider public. Although judges agree (80%) that through their decisions they "make public policy," and that "political groups have a lot to do with the election of judges" (80%), they feel that politics is not related to the *substance* of their decisions. Judges are selected, they feel, mostly because they resemble the sort of judge glorified by the judicial myth. They feel (100%) that "politics shouldn't have anything to do with the way in which judicial decisions are made," and that in fact judicial decision-making is not directly tied to popular preferences.

Measured by their responses to these questions, it appears that the majority of the students polled would agree with most of the perceptions of judges. The two groups were in high agreement on a number of key items, not the least of which is the highly similar ranking they gave to the factors in judicial decision-making. This high level of between-group consensus was manifest in other ways as well. Both groups, for example, agreed upon the factors they would look for in good judges.

Characteristics respondents would look for in a judge.

	<u>Judges</u>	<u>Students</u>
Honesty and integrity	45%	37%
Knowledge of the law	20	16
Impartiality	20	16
Activity as a lawyer	10	4

As we suggested at the outset, it is these commonly shared role perceptions which lend stability to a political system and ensure the smooth passage of political institutions from generation to generation. In the American system, we have historically stressed the importance of shared procedural perceptions, and in fact it is precisely there that our data indicate the highest levels of inter-group consensus.

It is important to note, however, that the student sample was much

less cohesive in their responses, and that on several key items (like "reflecting social change") there were substantial levels of minority opinion. A separate analysis of the sources of student opinion on key items indicated the following patterns:

(1) the more accurately students perceived the conflictful nature of politics in general, the more "political" was their interpretation of judicial behavior, and the more unresponsive they perceived those courts to be;

(2) the more informed students were about the local courts, the more political were their interpretations, and the more unresponsive they felt them to be;

(3) students who were older, from higher status backgrounds, and interested in politics were more likely to see the courts as unresponsive and political.

While we could go on, the general import of these findings is clear. Like studies of student activism in general, our analysis indicates that it is precisely the sorts of people who have traditionally gone on to positions of power, who have traditionally wielded informal influence in decision-making, and who were most likely to be active in politics who are the most critical (as we would interpret it) of the courts as institutions. Comparing the responses on the items presented above, we find that it is the same people who dissent on a variety of items, and that the dissenters are like those whom our leaders have often referred to as "the leaders of tomorrow." Thus, the congruence between judicial and majority-student attitudes on key items may hide important differences within the student population, differences of great political significance.