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## Reading *The Legal Process*

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# READING *THE LEGAL PROCESS*

Anthony J. Sebok\*

THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW. By Henry M. Hart, Jr. and Albert M. Sacks. Edited by William N. Eskridge, Jr. and Philip P. Frickey. New York: Foundation Press. 1994. Pp. cxxxix, 1387. \$49.95.

## I. DEFINING *THE LEGAL PROCESS*

I saw my first copy of *The Legal Process* during law school when a professor lent me his dogeared photocopy of Henry Hart<sup>1</sup> and Albert Sacks's<sup>2</sup> manuscript. Even though I knew that the manuscript had been copied freely for many years, and that hundreds, maybe thousands, of versions sat in offices and libraries around the world, I still experienced a slight thrill as I held a copy of the famous book that never became a book — as if I had in my hands a *samizdat* or an artifact. Now that Foundation Press has “officially” published *The Legal Process* thirty-six years after Hart and Sacks last edited it, it is worth asking whether the act of publication changes the meaning of *The Legal Process* in any way.

There is great irony in thinking of *The Legal Process* as a *samizdat*. *The Legal Process* was never suppressed, and as William N. Eskridge, Jr. and Philip P. Frickey suggest in their elegant and thoughtful introduction, the reasons for the failure to publish are most likely prosaic.<sup>3</sup> Furthermore, while *samizdats* may become influential through subversion, *The Legal Process* exercised its influ-

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\* Associate Professor, Brooklyn Law School. B.A. 1984, Cornell; M.Phil. 1986, Oxford; J.D. 1991, Yale; Ph.D. 1993, Princeton. — Ed. I am grateful to the Seton Hall University School of Law legal theory workshop for the opportunity to present some of the ideas contained in this essay. I would like to thank Jill Fisch, John Goldberg, Bill Reynolds, Ed Rubin, and Spencer Weber Waller for their comments and suggestions. Thomas Uhl, Brooklyn Law School Class of 1996, provided invaluable assistance in research and editing.

1. Late Dane Professor of Law, Harvard University.

2. Late Dean and Dane Professor of Law, Harvard University.

3. Eskridge and Frickey suggest that Hart and Sacks never delivered a manuscript to Foundation Press, despite a contract for publication signed in 1956, because of delays caused by ill health, Hart's perfectionism, and then, after Hart's death in 1969, Sacks's decanal duties at Harvard. An additional reason suggested by Eskridge and Frickey, and one that I believe carries great significance, is that by 1958 the Warren Court had begun to push public law in a direction that simply did not fit easily into the argument of *The Legal Process*. Pp. xcvii-xcix. See also *infra* note 67.

ence as a pillar, if not *the* pillar, of the established legal community throughout the late 1950s and 1960s.<sup>4</sup> The extraordinary influence of *The Legal Process* in both practice and the academy probably resulted from the fact that Hart and Sacks addressed themselves directly to students, and not to a more self-selecting audience in the law reviews. *The Legal Process* formed the foundation of a course taught at Harvard for thirty years, as well as at many other law schools that Hart and Sacks's friends, admirers, former colleagues, and students populated (pp. ci-civ). It is important to realize that Hart and Sacks could reach students who would not only become the legal scholars of the future, but also partners in law firms, elected and unelected members of government, and judges.<sup>5</sup> One might even think that, unlike the authors of *samizdats*, who cannot publish because of censorship and other threats, Hart and Sacks never published *The Legal Process* because, given its success, they did not really need to.

There is a bit more truth in comparing *The Legal Process* to an artifact. Like a reconstructed object from an archaeological dig, one might wonder what the 1958 edition of *The Legal Process* lacks, and what additions would be necessary to complete it. Despite Eskridge and Frickey's careful explanation of the evolution of *The Legal Process* — tracing its descent from Lloyd Garrison and Willard Hurst's materials for their course "Law and Society" in the late 1930s, to Hart, Abe Feller, and Walter Gellhorn's materials for a course on legislation in the early 1940s, to Hart's postwar materials for his legislation course, to the four versions of the book produced by Hart and Sacks between 1955 and 1958 — there is no way to know how the book would have ultimately looked had it been allowed to continue to evolve. On the one hand, then, to ask whether the book was ever finished is a trivial question; the authors themselves in word and deed declared it to be unfinished.<sup>6</sup> They never

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4. *The Legal Process* "provided the name, the agenda, and much of the analytical structure for a generation of legal thought — the 'legal process school.'" P. lii. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 249 n.20 (1982); NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE, ch. 4 (1995); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, 253-58 (1992); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s, 270-71 (1983); G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT, 144-63 (1978); Clark Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1076-77 (1986); Jan Vetter, *Postwar Legal Scholarship on Judicial Decision Making*, 33 J. LEGAL EDUC. 412, 415-17 (1983); William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945, 962 (1989) (book review); J.D. Hyman, *Constitutional Jurisprudence and the Teaching of Constitutional Law*, 28 STAN. L. REV. 1271, 1286 n.70 (1976) (book review).

5. For example, as Eskridge and Frickey note, five members of the current Supreme Court — Justices Scalia, Kennedy, Souter, Ginsburg, and Breyer — had used *The Legal Process* at Harvard Law School. See p. cxxv.

6. See William N. Eskridge, Jr. & Philip P. Frickey, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2031 (1994).

sent the book to its publisher, and they called it — and, presumably, thought it important that others do so too — a “tentative edition.” In setting out to themselves their own map of the book, they repeatedly included in the table of contents chapters that had not yet been written.<sup>7</sup>

On the other hand, as with other texts, other factors may overwhelm the intentions of the original authors, even on matters as critical as content and closure. Thus, on a very nontrivial level *The Legal Process* is a completed text. This is not because Foundation Press put it between hard covers, but because over the past thirty-six years the 1958 tentative edition has acquired a canonical status in the relevant interpretive communities. By the 1970s lawyers were treating *The Legal Process* as not only an influential set of teaching materials, but as the foundational text of the legal theory known as “legal process.” Regardless of whether Hart and Sacks intended it to serve as an exposition and defense of a legal theory, that is precisely how *The Legal Process* is now viewed, and, in a very real sense, that is precisely what *The Legal Process* now is. *The Legal Process*, in its artifactual form, now states Hart and Sacks’s legal theory, from which scholars have drawn three themes in legal process.

The first theme emphasizes that legal process theory grapples with institutional competence.<sup>8</sup> This perspective stresses that Hart and Sacks “believed that it was possible to distinguish legitimate and illegitimate exercises of official power while simultaneously transcending the centuries-old debate between . . . the ‘is’ and the ‘ought’.”<sup>9</sup> *The Legal Process* demonstrated that lawyers did not have to engage in substantive moral or political reasoning, since

7. See p. lxxxix (Table 2).

8. See, e.g., MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, 254 (1992); LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960*, 222 (1986); GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END* 33-36 (1995); Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935, 943-44 (1994); James A. Henderson, Jr., *Process Constraints in Tort* 67 CORNELL L. REV. 901 (1982); James A. Henderson, Jr., *Process Norms in Products Litigation: Liability for Allergic Reactions*, 51 U. PITT. L. REV. 761, 767-69 (1990); Harold A. McDougall, *Social Movements, Law, and Implementation: A Clinical Dimension for the New Legal Process*, 75 CORNELL L. REV. 83, 90-91 (1989); Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2240 (1993); Gary Peller, *Neutral Principles in the 1950’s*, 21 U. MICH. J.L. REF. 561 (1988) [hereinafter Peller, *Neutral Principles*]; Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 CONST. COMMENT. 463, 479-80 (1994-95); Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 217 (1983); Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413, 429-38 (1987); Akhil R. Amar, *Law Story*, 102 HARV. L. REV. 688, 691-92 (1989) (book review); Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 505-07 (1988) (book review).

9. Peller, *Neutral Principles*, *supra* note 8, at 569; see also Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1183-85 (1985) [hereinafter Peller, *Metaphysics*].

“there could be a kind of natural, functional correlation between different kinds of disputes and different kinds of institutions, so that the categories of dispute could be matched up with the kinds of institutional procedures corresponding to them.”<sup>10</sup> Thus, by adopting the value pluralism of pragmatists like John Dewey, legal process was able to argue — *contra* the realists — that the analysis of legal validity is not reducible to political ideology.<sup>11</sup>

The second theme emphasizes the connection between legal process and the problem of statutory interpretation.<sup>12</sup> This perspective stresses Hart and Sacks’s interest in proving that statutes exemplified “reasonable persons pursuing reasonable purposes reasonably.”<sup>13</sup> In a manner similar to the substance/procedure distinction implicit in the idea of institutional competence, Hart and Sacks’s theory of statutory interpretation rests on the conviction that competing political interest groups could, if governed by the right sort of procedure, produce rational public policy.<sup>14</sup> This view of statutes depended critically on the presumption that procedures existed that could identify the purposes selected by the legislature without actually substantively evaluating those purposes.<sup>15</sup>

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10. Peller, *Neutral Principles*, *supra* note 8, at 594; see also William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation As A Postmodern Cultural Form*, 89 MICH. L. REV. 707, 719-20 (1991); Mark Kelman, *Emerging Centrist Liberalism*, 43 FLA. L. REV. 417, 420-21 (1991).

11. See Peller, *Neutral Principles* at 583-84 (citing JOHN DEWEY, *FREEDOM AND CULTURE* (1939)); see also EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 206 (1973); Minda, *supra* note 8, at 34-35.

12. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 143-44 (1994); William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 694-700 (1987) [hereinafter Eskridge & Frickey, *Legislation Scholarship*]; Eskridge & Peller, *supra* note 10, at 718-19; William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 281-83 (1988) [hereinafter Eskridge, *Politics Without Romance*]; William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1012-13 (1989) [hereinafter Eskridge, *Public Values*]; Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1571 (1988); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 249-50 (1992); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 600-01 (1995); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 434-36 (1989); Wellman, *supra* note 8, at 450-51; Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CAL. L. REV. 919, 941-42 (1989) (book review).

13. P. 1378; see Rodriguez, *supra* note 12, at 942.

14. Eskridge and Frickey call this “optimistic pluralism.” See Eskridge & Frickey, *Legislation Scholarship*, *supra* note 12, at 695-96; Eskridge, *Public Values*, *supra* note 12, at 1014.

15. See Eskridge & Peller, *supra* note 10, at 721-22. To the extent that Hart and Sacks actually believed that such procedures existed, critics from the left exposed their view as naive with the emergence of Critical Legal Studies, and the right with the emergence of public choice scholarship. See, e.g., Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 666-67 (1993) [hereinafter Duxbury, *Faith in Reason*]; Eskridge, *Politics Without Romance*, *supra* note 12, at 296-97; Peller, *Meta-*

The third theme emphasizes the primacy of reason in legal process.<sup>16</sup> This perspective stresses that legal process was “premised, in every instance, on the belief that those who respect and exercise the faculty of reason will be rewarded with the discovery of a priori criteria that gives sense and legitimacy to their legal activities.”<sup>17</sup> Like many in their generation, Hart and Sacks believed that the standard of rationality, independent from any given context or result, could be used to judge the “soundness” of a process.<sup>18</sup> Thus, *The Legal Process* represents a significant episode in the postwar liberal project associated with Robert Dahl and John Rawls.<sup>19</sup>

This essay endorses the idea that reading *The Legal Process* is a reconstructive project in which one must treat the book as a finished whole. In that spirit, I will suggest that a fourth and somewhat different theme lies at the heart of the book. I will argue that the structure of *The Legal Process* reveals an extraordinary concern with the problem of adjudication and that the book adopts and defends Lon Fuller’s conception of adjudication. My interpretation of Hart and Sacks’s argument is inconsistent, in varying degrees, with the three themes identified above, and I hope my analysis will raise some questions about our contemporary view of Hart and Sacks’s understanding of their own project.

## II. THE STRUCTURE OF *THE LEGAL PROCESS* AND ITS LEGAL THEORY

### A. *The Two Faces of The Legal Process*

#### 1. *The Subject of The Legal Process*

*The Legal Process* operates on two levels: pedagogical and jurisprudential. Most immediately it seeks to serve as a casebook for a course that had none. To serve this end, it adopts a casebook’s structure, with appellate decisions, commentary, and illustrative se-

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*physics*, *supra* note 9, at 1183-87; Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 192-94 (1986-87).

16. See RICHARD POSNER, *OVERCOMING LAW* 76-77 (1995); Duxbury, *Faith in Reason*, *supra* note 15, at 602; WHITE, *supra* note 4, at 144; William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 27, 34 (1994); Leslie Pickering Francis, *Law and Philosophy: From Skepticism to Value Theory*, 27 LOY. L.A. L. REV. 65, 75 (1993); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1769-70 (1995).

17. Duxbury, *Faith in Reason*, *supra* note 15, at 605.

18. Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 352 (1973).

19. See, e.g., Duxbury, *Faith in Reason*, *supra* note 15, at 648-53 (discussing ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); John Rawls, *Outline of a Decision Procedure for Ethics*, 60 PHIL. REV. 177 (1951)). As Duxbury notes, the identification of this theme reconciles, to some degree, the seemingly contradictory claim that *The Legal Process* presaged both John Hart Ely’s *Democracy and Distrust* and Ronald Dworkin’s *Taking Rights Seriously*. Duxbury, *Faith in Reason*, *supra* note 15, at 695-701.

lections from law reviews and other secondary sources. *The Legal Process* qua casebook possesses a slightly experimental format, in that its seven chapters revolve around fifty-five problems. The problems ask the student to take the role of a legal actor in a wide range of roles — drafting a lease, giving advice to a legislator, or, most often, deciding a case. Frequently Hart and Sacks follow a problem with an extensive discussion of how real lawyers, legislators, or judges approach the problem, and then ask a series of open-ended questions about the conventional solutions to the problem.

The *subject* of *The Legal Process* is the subset of valid institutional decisions that involve the making or applying of law.<sup>20</sup> Hart and Sacks understand that a large share of society's institutional decisions do not involve the creation or application of law; they simply have little or nothing to say about nonlegal institutional decisions.<sup>21</sup> According to Hart and Sacks, the difference between institutional decisions that focus, in some way, on *law*, and other institutional decisions, is that institutional decisions about law are "general, directive, and authoritative" (p. 114). So the decisions taken by Citizen Smith to rent her house at price *x* and by Governor Jones to appoint a political ally to job *y* may be directive — Smith and Jones speak "from one point of time to another" (p. 113) — and may be authoritative — Smith and Jones claim that their decisions "be entitled to observance and acceptance by all members of the society" (p. 114) — but they are not general. Such "specific" institutional decisions *derive* from law but they are not law: "Individualized arrangements of this kind are almost invariably derivative. They depend for their authority upon the fact that they have been made in compliance with some much broader, underlying arrangement" (p. 114). Conversely, as long as an institutional decision *is* "general, directive, and authoritative," it must involve either

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20. An institutional decision is a decision warranted by the "principle of institutional settlement." P. 4. The principle of institutional settlement "expresses the judgment that decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed." P. 4. Although it reflects a very particular view of political theory, Hart and Sacks provide a scant few pages of argument for the principle of institutional settlement and then assume that its validity is obvious to the reader. The principle of institutional settlement clearly springs from Hobbes: "The alternative to disintegrating resort to violence is the establishment of regularized and peaceable methods of decision." P. 4. In Hart's notes to his "Legislation" course, which Eskridge and Frickey characterize as the foundation of the materials for the course "The Legal Process" (pp. lxxxv-lxxxvii), Hart's debt to Hobbes becomes even more pronounced: "When questions arise which in some way or other have to be settled, people find a means for settling them. The alternative to war is peace; the alternative to force is law." P. lxxxiv. See, e.g., THOMAS HOBBS, *LEVIATHAN* 223 (C.B. MacPherson ed., 1968).

21. In the first substantive section of *The Legal Process*, Hart and Sacks spend the first five pages explaining the justification of the principle of institutional settlement without mentioning "law" or "the courts" except as a subcategory of the social order. See p. 4.

the creation or application of law, whether issued by a court, an administrator, or even a private citizen.<sup>22</sup>

*The Legal Process*, therefore, studies “general, directive, and authoritative” decisionmaking at “all levels”: “private, judicial, legislative, administrative, and constitutional.”<sup>23</sup> Hart and Sacks offer a visual metaphor — “The Great Pyramid of Legal Order” — to describe an orderly, almost geometric, relationship among these different techniques of legal decisionmaking.<sup>24</sup> Thus, the technique that appropriately determines the legal relationship between private citizens — such as a contract — will be different from the technique appropriate to determining the legal relationship at issue in an arbitration, an administrative procedure, or an appellate court argument. A recurrent theme in *The Legal Process* is the idea that a good lawyer should develop the judgment needed to pick the technique appropriate for the type of problem at hand. The book, thus, frequently asks the student to weigh the comparative advan-

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22. This noteworthy definition of law transcends certain traditions that were familiar to readers in the 1950's. For example, the idea that a law must be directive, authoritative, and general leaves out any requirement that a law serve the sovereign. Hart and Sacks carefully define “authoritative” as “claiming to be entitled to observance and acceptance by all members of society,” and because their definition does not rely on the identification of a sovereign, it represents a break with Austinian legal positivism. P. 114 (emphasis added). See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 220-22 (spec. ed. 1984) (1832); see also H.L.A. HART, *THE CONCEPT OF LAW* 89-91 (2d ed. 1994); Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2108-09 (1995) (noting similarity between H.L.A. Hart and Sacks and Hart). Also, their definition of law does not equate law to predictions of what “courts do in fact.” See O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). It thus represents a break with proto-realism and realism. See Holmes, *supra*; JEROME FRANK, *LAW AND THE MODERN MIND* (1930). Finally, their definition does not require that law conform to moral truth. It thus represents a break with the Neo-Scholastic tradition of natural law. See, e.g., Francis E. Lucey, *Natural Law and American Legal Realism: Their Respective Contribution to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493 (1942). In fact, what is refreshing about Hart and Sacks's definition of law is that it is not court-centered. Their definition suggests that any member of society can make or apply law as long as they conform to the three criteria identified with the practice of “general directive arrangements.”

23. P. 107; see also p. 112 (“The further examination of the nature of the process of institutional decision, and of the problems involved in making and appraising the decisions in each of the major types of institutional processes, is the concern of these materials from this beginning to the end.”).

24. See pp. 286-87. The base of the pyramid consists of “billions upon billions of events and non-events” in which members of society make laws through private orderings, apply those laws by complying with contracts, leases, etc., and apply the public laws made by the state by complying with the criminal laws, the tax laws, etc. At the next level are those “situations in which established general arrangements are claimed to have been violated” but no action is taken by the unhappy party. The third level represents those cases in which the parties to a dispute settle their legal disagreement privately, through “agreement and formal release; arbitration; and the decision by private associations.” The fourth level captures those cases that are “instituted in courts or other tribunals endowed with powers of formal adjudication” but that are settled. The fifth level concerns those cases that are ultimately never contested in court but are disposed of through a final judgment, such as a “default or . . . consent judgment,” or a dismissal or plea of guilty. The sixth level consists of litigated cases in courts. Finally, the seventh level “includes all the cases which go to some reviewing tribunal.”



tages of legal decisionmaking through private agreement, majority voting, administrative dictate, arbitration, or adjudication.<sup>25</sup>

## 2. *The Argument of The Legal Process*

A quick look at the table of contents suggests that Hart and Sacks designed the book as a pedagogical exercise in legal methods. After the introductory chapter sets out Hart and Sacks's definition of law, the book proceeds in an orderly fashion through the typical lawmaking and law-applying categories familiar to the social scientist: private agreements (Chapter Two), the common law courts (Chapter Three), referendums and the electoral system (Chapter Four), the legislative process (Chapter Five), the executive branch and its administrative agencies (Chapter Six), and the interpretation of statutes by the courts (Chapter Seven).<sup>26</sup> Although the vast majority of the problems scattered throughout the seven chapters involve *judicial* decisionmaking, one cannot conclude that *The Legal Process* only grapples with institutional decisions made by courts. If this were so, then Hart and Sacks would have called it *The Judicial Process*.<sup>27</sup> It is one of their great achievements that they were able to take Benjamin Cardozo's insights about adjudication and apply them to law outside the courtroom. Thus, while all of the fifty-five problems in *The Legal Process* concern institutional decisions that involve either the creation or application of *law*, not all involve institutional decisions made by courts.

If *The Legal Process* did no more than define and taxonomize the varieties of legal activity in society, it would still be significant as an early example of the influence of the Law and Society movement on mainstream legal education.<sup>28</sup> Hidden behind Hart and

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25. This list illustrates, but does not exhaust, what Hart and Sacks mean when they refer to the "choice among several [institutional] procedures" that society must make in order to take advantage of the principle of institutional settlement. P. 112.

26. Eskridge and Frickey note that the original design of *The Legal Process* called for nine chapters. Chapter 8 would have covered "The Making and Amending of Constitutions" which was originally chapter 2 in the 1955 draft, and chapter 9 would have engaged "Private Remedies for Unlawful Official Action." Neither was written. See p. lxxxix. In some respects, Dean Harry Wellington offered a glimpse of what chapter 8 might have looked like in *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

27. See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 13 (1921) (introducing "the study of judge-made law").

28. As a survey course in the making and application of law by various public and private actors, "The Legal Process" would have closely resembled LLOYD K. GARRISON & WILLARD HURST, *LAW IN SOCIETY: A COURSE DESIGNED FOR UNDERGRADUATES AND BEGINNING LAW STUDENTS* (rev. ed. 1940) (3 volumes), materials designed for the course taught by Garrison and Hurst at the University of Wisconsin. As Eskridge and Frickey note, Garrison and Hurst's "entire project was one of institutional structure, procedure, relationship, and, most of all, institutional competence (a term the authors did not use)." P. lxxii. For more about Hurst and the "Law and Society" movement, see Aviam Soifer, *Willard Hurst, Consensus History, and The Growth of American Law*, 20 REVIEWS IN AM. HIST. 124 (1992).

Sacks's broad view of the relationship of law and society, however, is a subtle twist that makes it much more normative than it would first appear. At first glance, the organization of the table of contents suggests that Hart and Sacks intended to use the book's fifty-five problems to illustrate the advantages and disadvantages of various techniques of lawmaking and law-applying, leaving it to the student to decide, for example, whether a labor dispute is best settled by a private agreement, arbitration, or adjudication. But Hart and Sacks dispense with any pretense of neutrality in their discussion of the solution to the problem, and through their pointed questions they convey to the student exactly what they think of the likely consequences of each choice.<sup>29</sup> Similarly, Hart and Sacks make no effort to hide their opinions towards their theory of lawmaking and law-applying at any point in the book. Although Hart and Sacks are explicitly not court-centered, their book is implicitly but aggressively "adjudication-centered."<sup>30</sup> In other words, the progression from the "judicial" to the "legal" process comes with a catch. They argue throughout *The Legal Process* that although legal decisionmakers do not have to be judges, they should adopt the forms of adjudication in their decisionmaking processes. As I hope to demonstrate below, Hart and Sacks build this argument into the very fabric of their textbook, so that at strategic points in the book's structure, in selection of cases and commentary, they direct the student towards the advantages of their preferred theory and highlight the weaknesses of its rivals.

## B. *The Valorization of Common Law Adjudication*

### 1. *Fuller's Theory of Adjudication*

It is important to stop for a moment to consider more carefully what Hart and Sacks mean by "adjudication." They note that most, but not all, of the *application* of law occurs in courts, and that for this reason lawyers focus on adjudication (p. 178). The first section of the chapter on common law provides some important clues about Hart and Sacks's views on adjudication. In Problem No. 10,<sup>31</sup> Hart and Sacks teach the student about the deceptively simple distinc-

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29. See pp. 275-77. In another example, after presenting Roscoe Pound's argument at some length, Hart and Sacks ask tartly, "Does Dean Pound's analysis hold water?" P. 89. Hart and Sacks often use such open-ended questions rhetorically throughout the book, although perhaps none so sarcastic as the following: "What do you think the [plaintiff railroad workers] thought of the intelligence of Judge Sanborn and Judge Lochren? Is this a healthy attitude for people in a free society to have toward their courts?" P. 1142 (discussing *Johnson v. Southern Pacific Co.*, 117 F. 462 (8th Cir. 1902)).

30. "Advancing a theory of adjudication is a central aim of *The Legal Process*." Wellman, *supra* note 8, at 417.

31. See p. 345 (Problem No. 10: Law, Fact, and Discretion in the Application of Law) (reviewing Holmes's decisions in *Commonwealth v. Wright*, 137 Mass. 250 (1884), and *Commonwealth v. Sullivan*, 15 N.E. 491 (Mass. 1888)).

tion between questions of law and questions of fact in trial. They clearly reject the view, which they attribute to Jerome Frank, that one cannot distinguish between issues of fact and law.<sup>32</sup> Furthermore, they seem to believe that judges, who find and apply the law, should minimize the discretion of juries, who find the facts.<sup>33</sup> One might imagine that Hart and Sacks advocate the reduction of the jury's role because laypeople simply are not as competent at judgment-making as the educated, elite judiciary. But subsequent comments by Hart and Sacks suggest that they would also disapprove of a judge acting like a jury. For example, in a case in which a judge sits without a jury, they consider it an abdication of the judicial role for the judge "to state only his naked conclusion: [for example] that 'the defendant is guilty of driving an automobile so as unreasonably to endanger life.'"<sup>34</sup> Hart and Sacks think that the judicial role demands more, for unless the judge provides *reasons* for the conclusion he reaches:

[t]he parties will have no idea of the basis of his decision; and the losing party, being left in the dark, may be harder to convince that the decision is just. And an appellate court will have trouble in reviewing the decision to decide whether or not it involves error, unless it retraces the whole process of decision *de novo*. Compare the difficulty of reviewing an arbitrator's award or an administrative order which is unexplained by any articulate findings or reasons. Perhaps even more important, other private persons will have no aid in planning future conduct. [p. 357]

This statement leads into a section entitled "The Reason-For-Being of Judicially Declared Law," which uses two problems and finally Lon Fuller's *The Forms and Limits of Adjudication* to set out the essential features of adjudication.<sup>35</sup> Although the Fuller article

32. See p. 344 (citing Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947)); JEROME FRANK, *COURTS ON TRIAL* (1949); see also p. 349.

33. Problem No. 10 concerns jury instructions in which the defendant was accused of promoting a lottery. The defendant admitted that he had promoted the game described by the prosecution, but denied that what he had done was a lottery. Hart and Sacks ask the student to pick between the following jury instructions:

(a) A request by defendant's counsel for an instruction that if the jury believed beyond a reasonable doubt that the defendant had set up and promoted a lottery for money, they should find him guilty; otherwise, not guilty;

(b) A request by the prosecuting attorney for an instruction that if the jury believed beyond a reasonable doubt that the defendant had conducted a game having the following described characteristics (specifically enumerating all of the characteristics of the game which the defendant had admittedly conducted) then they should find him guilty; otherwise not guilty.

P. 345. Hart and Sacks express their dislike of (a) pretty clearly at p. 353.

34. P. 356. Note that this option resembles jury instruction (a) discussed *supra* note 33.

35. The first problem is based on *Norway Plains Co. v. Boston & Me. R.R.*, 1 Gray 263 (1854). Duncan Kennedy has called Chief Judge Shaw's decision in that case to limit the extent of a railroad's duty as a common carrier a classic expression of the rationality of common law adjudication. See Kennedy, *supra* note 18, at 361. Shaw's decision — which "dissolved" the "sharp opposition of legislature and judicial functions" — was successful *because*

appears as just another selection for the student to read, Fuller is not merely just another author whose views Hart and Sacks thought they should present in the text for the student to consider.<sup>36</sup> They cite to Fuller so frequently, and use his terminology so naturally, that there is good reason to believe that Hart and Sacks self-consciously adopted his view of adjudication.<sup>37</sup> Fuller began his argument by noting, like Hart and Sacks, that laws must rest "upon some rule, principle, or standard,"<sup>38</sup> and, like Hart and Sacks, he connected the rationality of law to its being "purposive."<sup>39</sup> Fuller, however, was far more systematic in organizing a conceptual picture of adjudication.<sup>40</sup> Fuller tried to identify the conditions under which adjudication might occur in its ideal form, so that he could then determine at what point legal process ceased to be adjudicative and became either a "Mixed, Parasitic, [or] Perverted Form[ ] of Adjudication."<sup>41</sup> He thought that for a decisionmaking process to be adjudicative in the ideal sense, it had to possess the following features: (1) the process must be adversarial — "[t]he arguments of counsel hold the case, as it were, in suspension between two oppos-

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he conformed to the special form or "rationality" of adjudication. See *id.* Although used primarily to demonstrate the desirability of common law courts to make law, it also serves as an example of adjudication that was successful, more or less, *because* the decisionmaker gave the reasons for his decision.

The next problem, "The Need for the Reasoned Elaboration of Precedent: The Case of the Faithless Fiduciary," was chosen, I suspect, because it rests on a decision that lacks the imagination and creativity of *Norway Plains*. See p. 397 (reviewing *Berenson v. Nirenstein*, 326 Mass. 285 (1950)). In addition to demonstrating how common law courts make law by choosing between competing lines of precedent, this problem also provides an example of a court that failed to give adequate reasons for its adjudicative act.

36. As Eskridge and Frickey note, Hart and Sacks reproduce an excerpt from "[a]n unpublished paper presented by Professor Lon L. Fuller to a group of Harvard University faculty members on November 19, 1957." P. 397, n.\* (citing the 1958 version of *The Legal Process*) [hereinafter Fuller, Manuscript]. This paper — much like *The Legal Process* itself — was famous and often cited during Fuller's lifetime, but remained unpublished for many years. See ROBERT S. SUMMERS, LON L. FULLER 10 (1984). A later, substantially revised version of the essay was published posthumously. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) [hereinafter Fuller, *Forms*].

37. See Duxbury, *Faith in Reason*, *supra* note 15, at 633. The picture of adjudication attributed to Fuller in the following pages of this review bears a strong resemblance to the five features of adjudication that Abram Chayes attributed to the "received tradition" civil litigation in the 1950s and '60s. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83 (1976).

38. P. 398 (quoting Fuller, Manuscript, *supra* note 36). In their introductory section on "general directive arrangements," Hart and Sacks organize laws according to the degree they possessed the features of either a rule or a standard, and promote either a principle or a policy. See pp. 113, 138-43.

39. See p. 400 (quoting Fuller, Manuscript, *supra* note 36). Hart and Sacks attempt to establish, at the very beginning of chapter 1, that "law is concerned essentially with the pursuit of purposes." Pp. 108-09.

40. For an excellent analysis of Fuller's picture of adjudication, see SUMMERS, *supra* note 36, at 90-100.

41. Fuller, *Forms*, *supra* note 36, at 381.

ing interpretations of it"<sup>42</sup>; (2) "the adjudicative process should normally not be initiated by the tribunal itself"<sup>43</sup>; (3) the tribunal should aspire to base its decisions, as much as possible, on the proofs and arguments presented by the parties<sup>44</sup>; (4) the tribunal must be impartial<sup>45</sup>; (5) the tribunal's decision must be retroactive — it may have prospective effects, but it must also have a retroactive effect<sup>46</sup>; and (6) the tribunal "must . . . at some appropriate point . . . give reasons for the result reached."<sup>47</sup>

Hart and Sacks recognize that given the complexity of the definition of adjudication they adopt, adjudication is appropriate for only a fraction of institutional decisions. They follow Fuller by declaring that adjudication most effectively resolves conflicts that result from human organization by common ends or shared purpose,

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42. *Id.* at 383; see also SUMMERS, *supra* note 36, at 91. Hart and Sacks say something similar at 633. See also *id.* at 643 ("Adjudication implies . . . [a] tribunal imposing a solution upon the parties to a dispute in the respects in which they have failed to agree. . . . The process is *not* one of mediation . . .").

43. Fuller, *Forms*, *supra* note 36, at 385.

44. *Id.* at 388-91. Fuller well understood that this condition was more often breached than honored, but he was emphatic about pointing to its breach as one of the early warning signs of a procedure crossing the invisible line between a mixed form of adjudication and a perverted form. See *id.* at 388 ("We need to remind ourselves that if . . . the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant — then the adjudicative process has become a sham . . ."). Summers identifies another reason as well: "As [Fuller] saw it, 'the essence' of [adjudication] is to give each side a chance to know what the other is saying and to afford each an opportunity to refute the other." SUMMERS, *supra* note 36, at 92.

45. See Fuller, *Forms*, *supra* note 36, at 391. Hart and Sacks say something similar and add a criterion: "[A]djudication implies that the deciding officers are not politically accountable to anyone for any particular decision. They [are] subject . . . only to their own consciences." P. 642.

46. "It is not the function of courts to create new aims for society or to impose on society new basic directives." Fuller, *Forms*, *supra* note 36, at 392; see also SUMMERS, *supra* note 36, at 92. Hart and Sacks seem to be less hostile to prospective decisionmaking than Fuller. See pp. 600-15; but see pp. 630-40 (Problem No. 23. Advisory Opinions: The Case of Mr. Jefferson's Incompleted Forward Pass).

47. SUMMERS, *supra* note 36, at 92. This is one of Fuller's most difficult claims to interpret, and while I tend to agree with Summers' statement, Fuller's final version of *Forms* is slightly weaker than the position attributed to Fuller by Summers. See Fuller, *Forms*, *supra* note 36, at 387. On the other hand, Fuller also says that "it seems clear that the fairness and effectiveness of adjudication are promoted by reasoned opinions [in which the tribunal states its reasons]." *Id.* at 388.

What Fuller ultimately believed is not so important because Hart and Sacks appear to agree with the position Summers attributes to Fuller. They say that "it is an integral part of the concept of adjudication as exemplified in the conventional forms of the judicial process that decision is to be arrived at *by reference* to impersonal criteria of decision applicable in the same fashion in any similar case." P. 643 (emphasis added). If "by reference" means that the tribunal must publicly state its reasons, then Hart and Sacks adopt an even stronger position than Fuller on the connection between the giving of reasons and the having of reasons in adjudication. It is interesting that in the version of *Forms* that Hart and Sacks quote in *The Legal Process*, Fuller seems to assume that the tribunal will state to the losing party the reason for its decision. See p. 644. See also White, *supra* note 4, at 144-45; Sebok, *supra* note 22, at 2102 (on Hart and the need for the Supreme Court to explain its reasons).

as opposed to organization by reciprocity.<sup>48</sup> Problems of reciprocity, unlike problems of shared ends, have no rational solution and therefore should not be solved by adjudication but through other forms of institutional decisionmaking, such as negotiation (private lawmaking) or voting (legislation).<sup>49</sup> There is something almost perverse about Hart and Sacks embracing Fuller's form of adjudication and then refusing to apply it to the vast majority of conflicts that arise from private orderings — after all, contract and tort disputes are matters of private law. Fuller anticipated and addressed this problem. He argued that although *creating* and *enforcing* the rules of the market is a shared purpose and therefore an appropriate subject of adjudication, the *outcome* of the market is not a shared purpose and therefore an inappropriate subject of adjudication.<sup>50</sup> For similar reasons, Hart and Sacks follow Fuller in concluding that if a problem involves the application of many rules and principles then it is “polycentric” and “require[s] handling by the method either of *ad hoc* discretion [managerial dictate] or of negotiation or of legislation.”<sup>51</sup>

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48. See pp. 646-47. Fuller offered the following illustrations:

*Order (or organization) through common ends* can be illustrated by the following situation: A common road gives access to two neighboring farms. A boulder rolls across this road, blocking it . . . . Joining together [the two farmers] are able to remove the obstruction. Here an association of two men makes both of them richer.

. . . *Organization by reciprocity*, on the other hand, requires that the participants differ in their “values,” that is, that they evaluate differently the same objects . . . . By a trade of [the objects], both farmers can become richer.

P. 402 (quoting Fuller, Manuscript, *supra* note 36). It is important to note that Fuller accepted that problems stemming from non-converging values — “organization by reciprocity” — are technically susceptible to regulation by *either* the market or political control.

49. See p. 645; see also Fuller, *Forms*, *supra* note 36, at 363-64.

50. “A market is a regime of reciprocity; it presupposes *and* requires a divergence of individual objectives. Establishing the rules necessary for the functioning of such a mechanism is a meaningful task for adjudication; performing the tasks of the mechanism itself is not.” P. 402 (quoting Fuller, Manuscript, *supra* note 36). It is for this reason that Hart and Sacks conclude that “[q]uestions arising within the regime of reciprocity with respect to what constitutes a satisfactory exchange are not ordinarily appropriate for adjudication.” P. 646. This distinction between the rationality of social rules and rationality of their outcomes is based, in part, on Hart and Sacks's adoption of the Fullerian idea of the “fallacy of the static pie.” Pp. 102-03. Hart and Sacks seem to be assuming, contrary to Rawls, that although institutional arrangements concerning the market have a rational structure, the distribution of goods in a society governed by a rational institutional structure is not, in itself, subject to rational analysis. See JOHN RAWLS, *A THEORY OF JUSTICE* 83-90 (1971); Duxbury, *Faith in Reason*, *supra* note 15, at 653; see also Fuller, *Forms*, *supra* note 36, at 404 (“The court gets into difficulty, not when it lays down rules about contracting, but when it attempts to write contracts.”).

51. P. 647; see also p. 647 (“Adjudication of disputes about managerial decisions involving the selection of a course of action for the future from among many possible courses is not ordinarily satisfactory, if it is feasible at all, because of the numerous variables to be taken into account . . . .”). Fuller, *supra* note 36, at 394-404; Chayes, *supra* note 37, at 1289-92 (on the “[d]emise of the [b]ipolar [s]tructure” in modern litigation); Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 424-25 (1978) (arguing that Fuller's polycentric model is partially a result of the parties to the dispute not being evaluated by the same criteria).

Fuller did not argue in "The Forms and Limits of Adjudication" that adjudication bests other institutional decisionmaking procedures from the perspective of either morality or philosophy.<sup>52</sup> In fact, as Hart and Sacks suggest, Fuller understood that adjudication can sometimes be less effective than other techniques at settling disputes.<sup>53</sup> Fuller did suggest, however, that because adjudication concerns itself solely with rationally resolvable disputes, it is "the tendency of the adjudicative process to induce voluntary acceptance of its results."<sup>54</sup> Hart and Sacks's chapter on the common law, like Fuller's essay, explicitly defines adjudication and then determines whether it should be chosen over some other method.<sup>55</sup> Hart and Sacks agree with Fuller that knowing the *limits* of adjudication is as important as knowing its form.<sup>56</sup>

## 2. *The Lure of False Adjudication*

At the end of Chapter Three Hart and Sacks attempt to identify the "kinds of disputes which lend themselves to reasoned decision" (p. 646). They include disputes in which the "claimant asserts a right to a remedy within the power of the tribunal to grant," and disputes in which the available remedy does not require too much discretion on the part of the adjudicator (p. 646). Hart and Sacks exclude, for example, an antitrust dispute that would require a judge to "reorganiz[e] the . . . industry," "questions arising with the regime of reciprocity with respect to what constitutes a satisfactory exchange," and "disputes about managerial decisions involving the selection of a course of action for the future from among many possible courses" (pp. 646-47). In general, the resulting list shows an extraordinary bias towards disputes that arise in common law.<sup>57</sup>

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52. Fuller made these arguments in LON L. FULLER, *THE MORALITY OF LAW* (2d ed. 1969).

53. See p. 645. "To the extent that the resolution of the dispute depends essentially upon what Professor Fuller calls the principle of order by reciprocity, as distinguished from the principle of order through common ends (including the maintenance of a regime of reciprocity), the method of adjudication operates to eliminate the *best judges* of a satisfactory exchange — namely, the parties to the exchange themselves . . ." P. 645 (emphasis added).

54. P. 400 (quoting Fuller, Manuscript, *supra* note 36).

55. Hart and Sacks reject the idea that "there are no disputes of any kind which cannot be effectually settled by establishing an impartial and sufficiently prestigious tribunal to hear them, giving both sides or all sides of the dispute an opportunity to present their evidence and argument, and then having the tribunal make its decision." P. 644.

56. This is true for two reasons. First, "[w]here adjudication is used to settle disputes not subject to rational decision, the *moral force* of the institution suffers." P. 401 (quoting Fuller, Manuscript, *supra* note 36) (emphasis added). Second, "if a dispute is not susceptible to a reasoned solution, then the attempt to force it into the mold of adjudication will render unavailable the very means which are rationally best calculated in most situations to produce a satisfactory settlement." P. 645.

57. See also Duxbury, *Faith in Reason*, *supra* note 15, at 661 ("Hart and Sacks purport to favor neither common law nor legislation, yet they seem to display a peculiar preference for the judicial decision.") (footnote excluded).

Hart and Sacks argue that there is a connection between the *form* of adjudication and common law. Because the “remedies available in the armory of the common law courts [are] few and relatively well defined,” an adjudicator “will always be able to determine whether a claimant does or does not possess a right” (pp. 646-47). As long as law stays within the boundaries fixed by adjudication, it will be provided with “a comprehensive, underlying body of law adequate for the resolution of all the disputes that may arise within the social order.”<sup>58</sup> But the valorization of common law in Chapter Three is not simply an act of exclusion; rather it suggests that, to the extent that other legal techniques are susceptible to rational analysis, they ought to adopt the form of adjudication.

Fuller recognized the concept of adjudication as an ideal type, and that it could manifest itself in the world in greater and lesser degrees. It was with this skeptical attitude that he turned to newer “mixed” forms of adjudication such as arbitration or administrative law. Fuller noted that “tripartite” arbitration, which during the 1940s and 1950s became a widely used decisionmaking procedure in the emerging field of labor law,<sup>59</sup> “tends to deteriorate . . . into a kind of continuation of bargaining behind closed doors, or . . . into an empty form.”<sup>60</sup> Fuller was equally skeptical about the capacity of administrative agencies to operate effectively while adhering to the adjudicative mode of decisionmaking.<sup>61</sup> Fuller thought that, at

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58. P. 647. Hart and Sacks’s description of the “completeness of the common law” is shared by both Christopher Langdell and Ronald Dworkin. See Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PRR. L. REV. 1, 7 (1983). It is worth noting that the example Fuller uses to demonstrate his theory of the inherent rationality of the common law is the problem of what rule to apply “when the acceptance and revocation of an offer cross in the mails.” P. 401 (quoting Fuller, Manuscript, *supra* note 36). Fuller notes that although honest minds might disagree over the proper solution, the choice between the modern rule — acceptance is effective upon dispatch — and its alternative is not “purely arbitrary” but “may be derived rationally from the purposes shared by a commercial community.” P. 401 (quoting Fuller, Manuscript, *supra* note 36). It is unclear whether Fuller, like Langdell, invokes “higher level” legal principles, or solves this legal problem by invoking policy. See C.C. LANGDELL, *A SUMMARY OF THE LAW OF CONTRACTS* 20-21 (2d ed. 1880); Grey, *supra*, at 27; James Boyle, *Legal Realism and the Social Contract: Fuller’s Public Jurisprudence of Form, Private Jurisprudence of Substance*, 78 CORNELL L. REV. 371, 372-73 (1993) (on the tension between Fuller’s instrumentalist tendencies in his contracts scholarship and the formalism that pervades his jurisprudential writings).

59. See p. 330 (citing Edgar L. Warren & Irving Bernstein, *A Profile of Labor Arbitration*, 4 IND. & LAB. REL. 200, 217 (1951)).

60. Fuller, *Forms*, *supra* note 36, at 397. Hart and Sacks equally criticize arbitration in nonlabor cases. At the end of Problem No. 8 (“Private Arbitration: The Case of the Litigious Investor”) they examine with skepticism the arguments in favor of voluntary arbitration. See, e.g., pp. 314-21 (questioning the alleged advantages stemming from private arbitration’s speed, lack of rancor, technical expertise, privacy, freedom from precedent, and finality).

61. Fuller suggested that polycentric problems were often given to administrative agencies because “[t]he instinct for giving the affected citizen his ‘day in court’ pulls powerfully toward casting exercises of governmental power in the mold of adjudication, however inappropriate that mold may turn out to be.” Fuller, *Forms*, *supra* note 36, at 400. He argued that certain administrative agencies, such as the War Manpower Commission, the Office of



a certain point, a law-like process that tries to solve a problem "not susceptible of a reasoned solution"<sup>62</sup> became a perverse form of adjudication that survives only by drawing its "moral strength" from institutions of real adjudication.<sup>63</sup>

Hart and Sacks conclude Chapter Three by focusing on the problem of parasitic adjudication. They refer to the "many well-intentioned bandits [who] engage in attempted raids upon [adjudication's] prestige . . . they want the benefits of judge-made law without having to accept the conditions of decision which are necessary to secure the benefits."<sup>64</sup> As this language suggests, Hart and Sacks see a double threat from public decisionmaking that falsely helps itself to the prestige and authority of true adjudication. They argue that not only can parasitic forms of adjudication deny disputants a process better suited to solve their problem (p. 645), but notwithstanding the success of any individual episode of parasitic adjudication, the practice has a corrosive effect on the overall legal system.<sup>65</sup> In order to help the student identify parasitic adjudication, Hart and Sacks even offer an exercise in which they ask the student to decide whether adjudication could successfully solve any one of the fictional disputes they set out in a list. The list constitutes a spectrum that ranges from a mere award of a license to an international crisis.<sup>66</sup> Hart and Sacks stress that the question is not whether these disputes should be solved in court, but instead whether they should be solved by any of the "tribunals which clothe their proceedings in

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Price Administration, and the War Production Board, could perform their functions effectively and precisely because they did not attempt to "act adjudicatively," while the FCC, for instance, suffered from its attempt to provide an adjudicative procedure in the awarding of television and radio licenses, a task that Fuller thought was ultimately not susceptible to reasoned solution. *See id.* at 400-03.

62. The phrase is Hart and Sacks's. *See* p. 645.

63. Fuller, *Forms*, *supra* note 36, at 406.

64. P. 642 (discussing whether an institutional procedure for obtaining advisory opinions would qualify as adjudication).

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If society is to achieve any degree of effective order, we must leave it to the highest political power to make those decisions that can claim no greater rationality than that they respond to a felt need for *some* decision, right or wrong. . . . [But] the judge must find some better justification for his decision than that they decide.

P. 644 (quoting Fuller, Manuscript, *supra* note 36). In the final version of *Forms*, Fuller takes a slightly less hostile view of parasitic forms of adjudication: "In labeling [a form of decision-making] 'parasitic,' I intend no more condemnation than when a botanist calls a certain fungus 'parasitic.' Just as, from the standpoint of human interest, there are good and bad fungi, so parasitic forms of order may be good or bad." Fuller, *Forms*, *supra* note 36, at 406.

66. The examples are: choosing a recipient of a broadcast license among a set of applicants, the solution of a labor dispute, the final formulation of a zoning plan, the resolution of a regulations dispute between the United States Treasury Department and the Federal Reserve Board, the resolution of a deadlock between the two Houses of Congress over the amending of the Labor Management Relations Act of 1947, and a dispute between two countries over the alleged attempts by one country to change the form of government in the other country. *See* p. 641.

some or all of the conventional trappings of adjudication” (p. 641). The distinct impression one has at the end of Chapter Three is that Hart and Sacks believe that none of the disputes in that list should be solved through adjudication, and that for that reason, they are hostile to an activist use of law for progressive ends.<sup>67</sup> That view is partially right; however, I think it is more accurate to say that Hart and Sacks were less concerned about restricting the subject matter and political direction of the legal process than they were about insuring that important social problems were not mishandled *either* by being forced into an adjudicative process when they were not susceptible to rational analysis, *or* by being subjected to a legal process that was insufficiently adjudicative.<sup>68</sup>

### C. *The Covert Argument for Adjudication in The Legal Process*

*The Legal Process* purports to survey all the techniques contained in the “Great Pyramid of Legal Order,” but the book’s own structure undermines that claim. To be sure, Hart and Sacks do not make the mistake of assuming that only judges can adjudicate, and one of the wonderful features of the book is that they explore ways in which legal actors other than judges can bring the values of adjudication into their legal activity. Even so, it is interesting to look at where Hart and Sacks ultimately dedicate the book’s energies. They spend 42% of the book on just two topics: the enforcement of the common law by judges (Chapter Three) and the interpretation of statutes by judges (Chapter Seven). No other chapter except for the chapter on the creation of legislation (Chapter Five) receives similar attention.<sup>69</sup>

Obviously, one should conclude only so much from the length of chapters. Yet, even this crude measure suggests that Hart and Sacks seem more interested in the work of judges than in work of other actors in the legal system. In fact, a careful review of the content of the seven chapters — especially the chapters on the com-

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67. It is hard not to imagine that Hart and Sacks are addressing the specter of *Brown v. Board of Education* when they state that “[t]he present question is whether the enthusiasts for adjudication as a method of settling every kind of social problem may not be open to the charge of trying to make a similarly parasitic use of the prestige of the method.” P. 642. See Norman Dorsen, *In Memoriam: Albert M. Sacks*, 105 HARV. L. REV. 1, 12 (1991) (contesting the criticism made by progressive lawyers that legal process wallowed in “conservative and procedural fetishism”); see also p. cxix; Vetter, *supra* note 4 at 417.

68. Of course, it is very possible that Hart and Sacks’s deep commitment to maintaining the “prestige” and “integrity” of the legal process by testing its range against the ideal of adjudication is inextricably linked to a politically conservative agenda. This essay will not take up that question. Compare Peller, *Neutral Principles*, *supra* note 8, at 608 (arguing the connection was inevitable) with Duxbury, *Faith in Reason*, *supra* note 15, at 667 (the connection is “exaggerated”).

69. For example chapter 4 (on referendums and the election of lawmakers) is only 42 pages long and chapter 6 (on the executive branch and administrative agencies) is 100 pages long.

mon law, legislation, and statutory interpretation — reveals that Hart and Sacks do not examine *judges* so much as the *work* of judges. That is, Hart and Sacks have a deep commitment to the *idea* of adjudication, an activity that, as noted above, occurs most frequently but not exclusively in the courtroom. Hart and Sacks criticize judges who, in their opinion, evade or pervert adjudication, and they cautiously support nonjudicial actors who, where appropriate, faithfully adopt the forms of adjudication.

For example, Hart and Sacks spend an extraordinary amount of space criticizing Justice Black's "abdication" of judicial responsibility in Problem No. 18.<sup>70</sup> In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*,<sup>71</sup> a worker, covered by the Longshoremen's and Harbor Worker's Compensation Act (LHWA), sued and received judgment against Halcyon, the owner of the ship upon which the worker was injured. In the same action, the jury returned a special verdict finding Halcyon 25% responsible and the worker's employer, Haenn, 75% responsible for the injury. Halcyon then sued Haenn for contribution. The Court heard arguments on whether admiralty allows contribution as between joint tortfeasors on account of claims by third persons, and if it does, whether the LHWA limited Haenn's contribution to the compensation owed the worker under the federal statute. Justice Black, writing for the Court, held that "it would be unwise to fashion new judicial rules of contribution and that the solution of this problem should await congressional action."<sup>72</sup> Hart and Sacks mercilessly critique the Court's argument that admiralty law had not yet developed either precedent or principle upon which to extend the doctrine of contribution from collision cases to noncollision cases.<sup>73</sup> They argue that *Halcyon* was not driven by its doctrinal reasoning — which Hart and

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70. See p. 496. The problem is titled "The Paradox of Making Law by Refusing to Make Law: The *Halcyon* Case."

71. 342 U.S. 282 (1952).

72. P. 498 (quoting *Halcyon*, 342 U.S. at 285). The Court reserved the question of whether, if Congress chose to extend the right to contribution among joint tortfeasors to admiralty cases, the contribution should be limited by the LHWA. See p. 499 n.12.

73. They conclude that:

At one stroke the Court (1) reached an unsound conclusion in the case before it, (2) destroyed the harmony of the underlying maritime law in this general area, and (3) established a precedent which puts into question *the continued vitality in the federal courts of the whole Anglo-American tradition of growth of decisional law.*

P. 515 (emphasis added).

Furthermore, Hart and Sacks argue that by denying the common law right to contribution, the Court turned tortfeasors like Halcyon into absolute indemnitors of joint tortfeasor employers, because the LHWA, a form of workman's compensation, naturally allowed the employer to recover its payments from the employee if the employee successfully sued a third party like Halcyon. See pp. 508-09. It is worth noting that Hart and Sacks unfavorably compare Black's refusal to use the Court's earlier collision cases to solve this noncollision case with Shaw's application of case law to common carriers to the railroads in *Norway Plains*. See p. 501.

Sacks call “so much eyewash” (p. 516) — but by Justice Black’s misunderstanding of the Court’s role. Black’s opinion tried to determine whether *Halcyon* had a right to contribution by asking whether in this matter “the method of legislative growth of the law is to be preferred to the method of judicial growth.” In so concluding, Black pretended that, by deferring to Congress, the Court in fact was not making law.<sup>74</sup> Hart and Sacks suggest that a lack of respect for adjudicative values animated Black’s “profoundly anti-constitutional and indeed unconstitutional” reasoning (p. 517). Black supported his decision by asserting that Congress had entered the sphere of maritime personal injury, which demonstrated that:

many groups of persons with varying interests are vitally concerned with the proper functioning and administration of [maritime torts] . . . [w]e think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups.<sup>75</sup>

On the other hand, noted Black, in the case before the Court the only party “in favor” of allowing contribution was *Halcyon*.<sup>76</sup> Hart and Sacks accuse Black of trivializing the interests of the parties and considering “the wishes” of economic interest groups not even before the Court.<sup>77</sup> In fact, Hart and Sacks accuse Black of stripping away from the case many of the elements that they deem central to adjudication: by ignoring the parties in interest, the Court did not stand “suspended” between two advocates; the Court made and interpreted law but gave no reasons; and finally, instead of limiting itself to the remedies available to it, the Court enthusiastically embraced a polycentric task.<sup>78</sup> This, according to Hart and Sacks,

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74. See p. 517; see also p. 515 (“There can be no doubt, can there, that the Court actually ‘fashioned new judicial rules’ while asserting that it was ‘unwise’ and ‘inappropriate’ to do so . . . ?”).

75. P. 498 (quoting *Halcyon*, 342 U.S. at 286).

76. P. 498 (quoting *Halcyon*, 342 U.S. at 286).

77. See p. 517 (“[C]ould unconcern for the interests of the parties before the Court be made more explicit?”). One might think that *Halcyon* anticipated the modern trend towards expanding the set of parties of interest in public law litigation. See Chayes, *supra* note 37, at 1291; Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1723-47 (1975). However, Hart and Sacks’s criticism of Black’s decision went beyond accusing him of misunderstanding adjudication. They suggest, ultimately, that Black’s decision sought to insure that the worker’s employer in *Halcyon* would have an incentive to advance the worker money while he sued the employer’s co-tortfeasor. Thus, *Halcyon* — its language about deference to Congress notwithstanding — was really about securing a “tactical advantage . . . which will predispose a negligent employer to finance the employee in the employee’s own lawsuit so as to pass the whole buck of the loss in a polite way to the employer’s co-tortfeasor.” P. 521. Hart and Sacks opine that this result would have appealed to Black because it would make it easier for workers to sue negligent third parties like *Halcyon*. This appeal proves in the minds of Hart and Sacks the truly unprincipled and realist roots of the decision. See p. 521.

78. Despite the fact that the result of the Court’s process was to defer to a legislative body, the question that Black asked — who should decide whether there is a right to contri-

was not a case of a nonjudicial body adopting a perverted form of adjudication but of a court adopting a perverted form of legislation.

Although they do not say so explicitly, Hart and Sacks most approve of agencies when they incorporate adjudicative values. For example, in Problem No. 43, aptly named "Drafting an Administrative Opinion: The Oil Pump Fiasco," they compare an actual Federal Trade Commission decision with an alternative model decision written for their book.<sup>79</sup> Whereas the Commission issued a decision that consisted of nothing but findings of fact, a conclusion, and an order, Hart and Sacks's model decision looks like a judicial opinion, with sections entitled, "analysis of issues," "findings of adjudicative fact," and "conclusions of law" (pp. 1084-92). Hart and Sacks make no attempt to hide their preference for their model decision.<sup>80</sup> Hart and Sacks believe that the only reasonable interpretation of Section 5 of the Federal Trade Commission Act is that it required the FTC to "build up a body of administrative law through the articulation of grounds of decision intelligible enough and well enough reasoned to have an impact at the stage of primary private activity" (p. 1103). In other words, the Commission, like a court, was responsible "in the determination[s] of matters of law" (p. 1107), and, like a court, the more its procedures reflected adjudicative values, the better it would do its job.<sup>81</sup> Hart and Sacks's assumption about the centrality of adjudication in the legal process of

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bution in this case — was not "susceptible of reasoned elaboration and . . . ought to be made by a political arm of the government," and had been already answered by Congress. P. 516. Hart and Sacks therefore understood Black's act of judicial passivism with regard to statutes as an act of judicial activism with regard to the Constitution. See, e.g., Peller, *Neutral Principles*, *supra* note 8, at 600 (stating that Hart and Sacks were "staunchly opposed" to judicial activism only at the level of constitutional law).

79. See p. 1083. The decision upon which Hart and Sacks base this example, *Matter of Standard Oil Co. of New Jersey*, Docket No. 337, 2 F.T.C 357 (1920), involved Standard Oil's practice of leasing gasoline pumps at below cost to retail gasoline dealers on the condition that the pumps be used only to pump Standard Oil's gasoline. The Commission found that the leasing arrangement violated Section 5 of the Federal Trade Commission Act of 1914 and Section 3 of the Clayton Act of 1914. The Commission's findings were later invalidated in *Federal Trade Commission v. Standard Oil Co. (New Jersey)*, 261 U.S. 463 (1923).

80. The only secondary source they include, GERARD HENDERSON, *THE FEDERAL TRADE COMMISSION* (1924), clearly inspired their model decision:

It seems to me that the most important single step which the Commission could take . . . would be to abandon the formal and legalistic "findings" to which it is now addicted, and to adopt instead . . . signed opinions of the kind employed . . . in the courts of England and of the United States.

P. 1105 (quoting HENDERSON, *supra*, at 334).

81. Hart and Sacks say that the FTC's standard practice failed to satisfy a number of the conditions for adjudication: (1) the process was not truly adversarial, since the decisionmaker did not technically choose between two competing legal arguments; (2) the tribunal did not, in its decision, base its decision on the proofs and arguments presented by the parties; (3) the decision written by the tribunal did not deal impartially with the arguments presented by both sides. See p. 1106 (quoting HENDERSON, *supra* note 80, at 334-37). Neither Henderson nor Hart and Sacks discuss how an administrative agency could satisfy the adjudicative ideal that the decisionmaker be impartial.

agencies is evident also in their theoretical discussion of the interpretation of statutes by agencies in Chapter Seven. Hart and Sacks approve of Justice Robert Jackson's view that when Congress writes a law like the Federal Trade Commission Act of 1914, which forbade "unfair methods of competition," the relevant agency must, in interpreting the "inchoate" law, make law.<sup>82</sup> But in doing so, the agency finds itself in the same position as a court interpreting an "avowedly indeterminate direction[ ]."<sup>83</sup> Since Hart and Sacks minimize the difference between the judicial interpretation of a statute and legislation,<sup>84</sup> it should not be surprising that they see little difference between adjudication by a court and by an agency: "an agency can formulate law in the same form and manner as a court."<sup>85</sup>

So far, we have seen that Hart and Sacks privilege courtroom adjudication and hypothesize that greater allegiance to adjudication could improve the work of administrative agencies. A final piece of evidence of *The Legal Process's* commitment to the primacy of adjudication is Hart and Sacks's treatment of legislation in Chapter Five. When they find statutory interpretation wanting — and they often do — it is because it lacks one or more of the essential qualities found in adjudication. For example, Hart and Sacks spend an unusual amount of space discussing the origins of the American Law Institute and codification movements in general — a peculiar decision given that Chapter Five purports to discuss legislation. The lesson they draw from the history of the Restatements is that the ALI incorrectly thought that it could usefully organize the common law into a set of rules, not principles, based on authority rather than reason (pp. 740-41). The Restatement project took a turn for the better in 1953 when the ALI "approved[ ] a substantial change in policy . . . [and allowed] an 'enlarged statement of reasons' in the comments" and other steps designed to show "that 'the law does grow by court decisions.'"<sup>86</sup> This early section in the chapter in-

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82. Pp. 1309-10 (quoting *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952) (Jackson, J., dissenting)).

83. P. 150 ("[The] broad standard [established by the Federal Trade Commission Act of 1914] was backed up and informed by principles and policies implicit in the history and general scheme of the statute.").

84. See, e.g., p. 126 ("Enacted law may displace decisional law as a means of initial formulation of legal arrangements, but not as a means of elaboration[. f]or enactments need to be interpreted . . .").

85. Pp. 1311-12. Hart and Sacks argue for the distinctiveness between agencies and juries, and end up showing that judges and agencies share many adjudicative features: (1) both are "capable of formulating legal standards and rules" to guide future conduct — i.e., explain the reasoning; (2) both must be as "even-handed . . . as possible"; and (3) both must formulate the governing rules and standards in the case before them — i.e., restrict themselves to the arguments of the parties before them. Pp. 1311-12.

86. Pp. 746-47 (quoting A.L.I. Proceedings from 1953 & 1954). Hart and Sacks are similarly skeptical about European code systems. They argue, in effect, that in order to avoid

tends to make clear, from the beginning, that the real mistake made by those who distinguish common law and legislation is not that they focus on the fact that the former is announced by judges and the latter created by politicians, but that they think that the former resides in principles and that the latter in a set of rules.<sup>87</sup> Hart and Sacks challenge this idea, as evidenced by the following rhetorical questions: "Cannot there also be postulates of reasoning, which limit and control, behind the words of statutory provisions. . . . Cannot a legislature effectually state its postulates and tell the courts that they are to treat them as lifting and controlling in their reasoning?"<sup>88</sup> The rest of the chapter seeks to show that statutes should reflect, as much as possible, the sort of principles found in common law.

In Problem No. 29 ("Revision of Judicial Interpretation of an Existing Statute"), Hart and Sacks use a lengthy excerpt from a congressional hearing to illustrate the dangers of encouraging the idea that a statute is all rule and no principle. The purpose of the hearing was to pass a relatively simple piece of legislation to reverse a Supreme Court decision that had held that the Federal Food, Drug, and Cosmetic Act did not require a manufacturer to permit entry by a federal inspector.<sup>89</sup> In *Cardiff*, the Court refused to give the Act what clearly was its only reasonable reading, because — according to Hart and Sacks — the Court felt that since Congress had created a "mess" by writing a vague or self-defeating rule, Congress should see its purposes frustrated and then amend the law through subsequent legislation.<sup>90</sup> Hart and Sacks clearly think that had the Court treated the Act like a principle, it could have ren-

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overly rigid and outdated codes, French and German lawyers, when necessary, reason from their codes in the same way that an English or American lawyer reasons from principles in the common law. See pp. 764-66 (discussing the "Recourse to Generality" in the French Civil Code); see also pp. 771-72 (quoting JUSTUS W. HEDEMANN, *DIE FLUCHT IN DIE GENERAL-KLAUSELN* (1933)).

87. Hart and Sacks clearly disagree with the sentiment that "a code must be dogmatic . . . a statute must never be either a reasoning or a dissertation." P. 781 (quoting ERNST FREUND, *LEGISLATIVE REGULATION* (1932)).

88. P. 783. Hart and Sacks illustrate their point with an example based on *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), in which they propose three alternative hypothetical acts of legislation that would enforce the common law right to privacy that the New York Court of Appeals had denied erroneously, in Hart and Sacks's opinion, as well as those of other courts and the New York legislature. The alternative they prefer "avoids the difficulties . . . [of] fragmentary codification by a level of generality that leaves all of [the difficulties in elaborating the principle] to be resolved by future judicial action." P. 783. See also Kennedy, *supra* note 18, at 396; Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 79 n.395 (1992).

89. See pp. 810-33 (discussing *United States v. Cardiff*, 344 U.S. 174 (1952)).

90. See pp. 817-18. Hart and Sacks mockingly refer to this response to poorly framed legislation as the "flagellant theory of statutory interpretation." P. 91. It is quite similar to the position taken by Fuller's mythical Justice Keen. See Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 636-37 (1949).

dered it coherent through adjudication and they use the example of the hearing to show the unintended and unfortunate consequences of the Court's approach. In the relatively insignificant episode they document, an industry lobbyist tried to get a congressional committee to state in the legislative records that the clarification of the FDA's right to entry, which confirmed a previous FDA construction, should not be seen by the courts as a confirmation of *other* previous administration constructions of the same act (pp. 814-15). As Hart and Sacks observe, the congressmen had backed themselves into a corner. By allowing the courts to treat its statute like a limited rule, Congress had no alternative but to tell the courts that their approval of a subsequent reasonable interpretation of its act by the FDA did not indicate an approval of other FDA interpretations of the same statute based on the same reasoning.<sup>91</sup> This case, like others in the chapter, is used by Hart and Sacks to illustrate the perils of viewing legislative intent as no more than a statute's author's specific intentions.<sup>92</sup> The only cure to this problem, Hart and Sacks seem to say, is for courts to treat legislation like common law.<sup>93</sup>

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91. From the questions Hart and Sacks ask the student, it is clear that, *given the premises upon which the statute had been drafted*, the committee had failed to meet the objections raised by the lobbyist at the hearings. See p. 833.

92. The first rule of statutory interpretation Hart and Sacks offer at the end of chapter 7 says, "a court . . . is to decide what meaning ought to be given to the directions of the statute in the respects relevant to the case before it. [This] does not say that the court's function is to ascertain the intention of the legislature with respect to the matter at issue." P. 1374. Hart and Sacks fill chapter 5 with examples of statutes that fail to serve the public interest because they sought to address specific, often private, needs, rather than to create "general directive arrangements." For example, Problem No. 35 ("Provision of Government Services and Pecuniary Inducements: The Uses of Insurance, Especially Against Floods") and Problem No. 36 ("A Special Law Dealing With a Municipal Disaster") are textbook examples of what would later be understood as "rent-seeking" legislation. See Eskridge, *Politics Without Romance*, *supra* note 12, at 288; see also JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 233-48 (1962) (on rent-seeking in public choice). Eskridge and Frickey suggest that Hart and Sacks may not have realized the pessimistic implications of their picture of legislative failure. See pp. cxxi-cxxii; see also William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 705-07 (1987) (Richard Posner's "legisprudence" corrected Hart and Sacks's naive views of legislation).

93. Hart and Sacks implicitly criticize the apparent distinction between the adjudication of common law and statutes in chapter 1 when they discuss their general principle of law — the reasoned elaboration of general directive arrangements — without distinguishing between statutes and common law. See pp. 147-48. Their sense that statutory interpretation should mainly focus on the search for principle explains, for example, their rejection of the "literal approach," and their skepticism of the utility of legislative history. See pp. 1116-48, 1212-54. Hart and Sacks clearly reflect the influence of Edward Levi in this view. Levi was as skeptical about the apparent distinction between statutory interpretation and common law interpretation as Hart and Sacks. See, e.g., EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 29-30 (1949). Levi, however, urged a theory of statutory interpretation that was more deferential to early judicial interpretations of legislative intent than the view adopted by *The Legal Process*. Compare LEVI, *supra*, at 31-32 (in trying to construct legislative intent, a court has "more discretion than it has with case law," and for that reason must be more deferential to precedent) with p. 1343 (commenting on Levi's theory).



## CONCLUSION

The idea that *The Legal Process* is an argument for the superiority of Fuller's conception of adjudication helps to explain the decline of legal process during the 1960s and 1970s.<sup>94</sup> Paradoxically, Hart and Sacks's willingness to locate legal decisionmaking beyond the courtroom was accompanied by an extraordinarily demanding set of criteria for the form of legal decisionmaking. By allowing that not all legal actors had to be judges, but then criticizing their results when they did not act like judges, Hart and Sacks really took away with one hand what they gave with the other. It is likely that Hart and Sacks thought that by defining adjudication according to Fuller's rigorous criteria they were increasing the stature of America's newer nonjudicial adjudicators, and yet what they may have done unwittingly was exactly the opposite. By narrowing the range of problems that both courts and nonjudicial actors such as agencies could solve through adjudication, they may actually have provided the premise upon which critics from the left and the right built the argument that American public law was unprincipled.

As I suggested in Section One, our task as readers of *The Legal Process* is to help complete Hart and Sacks's unfinished text. I offer a reading that takes seriously the idea that their materials reflect a coherent jurisprudential theory. My reading insists on treating *The Legal Process* as a coherent text and uses its structure to indicate the content of Hart and Sacks's argument.

My structural reading of *The Legal Process* suggests certain consequences. First, my reading is not entirely compatible with the three traditional approaches to legal process described in Section One. The particular conception of adjudication that I locate at the core of the book is not primarily motivated by a theory of institutional competence, since it reflects a method available to a variety of social actors. Furthermore, Hart and Sacks's conception of adjudication is not primarily a theory of statutory interpretation, since it is as much (if not more) a theory of common law interpretation. Finally, although Hart and Sacks see rationality as a component of their conception of adjudication, rationality underdetermines adjudication, since Hart and Sacks demand that adjudication take place within certain artificial and highly specific conditions.<sup>95</sup>

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94. As Eskridge and Frickey note, during the very same period that the legal process generation "[w]as exercising power" in society, *The Legal Process* was losing influence in the academy. Pp. cxviii. See also Duxbury, *Faith in Reason*, *supra* note 15, at 669 (noting the tendency for academic critics to dismiss *The Legal Process* as "an anachronism").

95. Hart and Sacks's conception of adjudication may bear the same relationship to rationality that classical common law's concept of "artificial reason" bore to natural reason. See GERALD POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 30-31 (1986).

Second, it is important to ask some hard questions about the degree to which Hart and Sacks were wedded to Fuller's theory of law. While it is clear that they embraced Fuller's conception of adjudication, it is not obvious that the theory of law developed in Chapter One of *The Legal Process* can be reconciled with major elements of Fuller's legal philosophy. The "principle of institutional settlement," which states that a decision is "in some sense 'right' simply because it has been duly made" (p. 109), seems to have more in common with legal positivism than Fuller's own version of natural law.<sup>96</sup> This raises the possibility that, even as a completed work of theory, *The Legal Process* fails the test of coherence.

Third, I cannot ignore the fact that any structural reading of *The Legal Process* can be no more than an act of *virtual* reconstruction, since not all the pieces that are missing from this artifact ever existed. We will never know what the two unwritten chapters of *The Legal Process* would have said, what cases they would have discussed, and how they would have affected the structural reading that produced the specific conception of adjudication proposed in this essay.<sup>97</sup> These problems cannot be wished away, and they are the inevitable consequence of engaging Hart and Sacks on their own terms, as the architects of a theory of adjudication that they believed could both explain and shape the institution of law in modern America.

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96. See, e.g., Eskridge, *Public Values*, *supra* note 12, at 1014-15 (describing legal process as positivist); Sebok, *supra* note 22, at 2105 (same). Fuller's natural law theory was modest and carefully designed to avoid the mistakes of other more extreme views. See SUMMERS, *supra* note 36, at 61. Nonetheless, Fuller seemed to believe in a coincidence between rationality and morality that suggests a thicker theory of process than Hart and Sacks': "[the positivist] seems to assume that evil aims may have as much coherence and inner logic as good ones. I, for one, refuse to accept that assumption." Lon Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 636 (1958). I explore the relationship between Fuller and legal process in ANTHONY SEBOK, *LEGAL POSITIVISM AND THE GROWTH OF AMERICAN JURISPRUDENCE* (forthcoming Cambridge Univ. Press 1996).

97. A further, and less optimistic question raised by the missing chapters is whether the chapter on constitutional law (what was to have been chapter 8) was never written because it *could not* be written. That is, did Hart and Sacks find that their conception of adjudication, which seemed to provide satisfactory explanations of the making and interpretation of common law and statutes, simply could not make sense of the polycentric, prospective, and inherently political problems of constitutional law? See, e.g., Chayes, *supra* note 37, at 1290.