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The Rule of Law for Judges

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Judge Learned Hand told of a time when he bid goodbye to Justice Oliver Wendell Holmes by saying: "Do justice."[1] To this, Holmes replied that his job was to do the law and not justice.[2] I wonder how many Americans can understand this statement by a judge, and how many would agree with it. The response would more likely be affirmative if the inquiry were restated: would you prefer a government where justice for all is served by the separation and limitation of powers and by judges who respect those limits and follow the law, or do you want judges to impose their personal notions of justice in each case?

We talk often about the rule of law. I am confident that everyone – other than an anarchist or warlord – would affirm the vital importance, not only to America but also to every nation, of the rule of law.

Human rights and capital investment can be reasonably secure only if protected by rules that are known today and can be enforced tomorrow. Government will enjoy the respect of its people only if laws are designed to obtain equal treatment of all. Conflicts between citizens must be settled by rules rather than by unpredictable decree of officials or judges. Otherwise citizens cannot plan their affairs and will not respect authority. And if the rules are uncertain, perhaps because of judges who have an agenda that trumps the law, every dispute will be taken to court and pursued to the end, clogging the courts and favoring the party who can best afford the process.

It follows that judges should be constrained by the rule of law, by its letter and by its traditions, and they may not substitute personal preference – right or wrong, popular or unpopular - for the law that rules them also.

That is where I am going. On the way I will address the meaning of this

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* Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit. This Article is a derivation of a speech delivered on May 15, 2002 at Bass Performance Hall in Fort Worth, Texas. The speech was part of a lecture series named for Senior United States District Judge Eldon B. Mahon.

1. Michael Hertz, *"Do Justice!": Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111, 111 (1996) (quoting LEARNED HAND, A PERSONAL CONFESSION, IN THE SPIRIT OF LIBERTY 302, 306-07 (Irving Dilliard ed., 3d ed. 1960)).

2. *Id.*

"rule of law" expression, and how I believe it should be applied by judges to the cases before them. Then I am moved to describe the erosion in the application of the rule of law by American lawyers and judges, an erosion I lament and believe must be corrected.

First, some explanation and a little history. The law of which I speak is positive law, distinguished from custom, values, notions of justice or natural law - all of which inform the making of positive law by those authorized to enact it.

Nor am I concerned with original decisions upon new rules by those authorized to enact them. I focus only on judges who are subject to pre-existing positive law.

The expression "rule of law" has changed in meaning and import over Western history. Codes of positive law – rules of conduct and sanctions for misconduct prescribed by authority – were developed by the Babylonian king Hammurabi around 1780 B.C., by the leaders of ancient Israel who gave us the Old Testament, by the Roman Emperor Justinian in 534 A.D., in the Napoleonic Code that informed European law, and in the thirteenth-century Spanish Code that formed the basis of the legal systems in most of Latin America.

Fast forward to the origins of American law and we are told that we are a nation "of laws and not of men."[3] That expression was repeated by the Supreme Court in *Marbury v. Madison*[4] and originated in the Massachusetts Constitution of 1780, drafted by John Adams.[5] Read in context the clause was clearly an expression of the doctrine of separation of powers. The entire text of Article XXX of the Massachusetts Declaration of Rights, part 1 of the Constitution, reads:

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.[6]

For John Adams the statement that we have "a government of laws and not of men"[7] was joined to the separation of powers. That was of paramount concern to the originators of American law. James Madison in Federalist No. 47 states that "[t]he accumulation of all powers, legislative, executive,

3. MASS. CONST. of 1780, pt. I, art. XXX.
4. 5 U.S. (2 Cranch) 137, 163 (1803).
5. MASS. CONST. of 1780, pt. I, art. XXX.
6. *Id.* (quoted in Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting)).
7. *Id.*

and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[8] The first three articles of the United States Constitution can fairly be described as an elaborate and ingenious monument to the doctrine of separation of powers.

Section 8 of Article I of that Constitution states that Congress has the power to "make all Laws which shall be necessary and proper" to execute the powers "vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[9]

Article III of the Constitution vests the judicial power over cases in a Supreme Court and such inferior courts as Congress may establish.[10] In deciding those cases the courts necessarily add to the law in assigning specific meaning to the general provisions of the Constitution and legislative enactments. The court must decide, for example, whether government has made a law "respecting an establishment of religion"[11] or inflicted a "cruel and unusual punishment"[12] or denied "due process of law."[13] And I concede that the Supreme Court should and must be allowed some latitude beyond the bare words of the Constitution and Bill of Rights as originally chosen. While I am so bold as to differ with some decisions of the Supreme Court, I recognize that its responsibility in applying the Constitution to cases that arise over time may present unique problems beyond my reach today.

All courts are constantly called upon to add meaning to the language of statutes in order to decide cases. After Congress prohibited in the Sherman Act "every contract, combination . . . or conspiracy, in restraint of trade,"[14] virtually the entire substantive content of antitrust law had to be worked out by the courts. In the vast area of regulation of securities and commerce, of labor and safety, and environmental control, Congress assigns the task to an administrative agency and then the courts mark out the bounds of administrative discretion and the available scope of relief.

The judicial application of a constitution or statute is itself positive law, by what we call *stare decisis*, meaning "to stand by things decided."[15] That means a court must abide by former judicial decisions when the same points

8. United States v. Brown, 381 U.S. 437, 443 (1965) (quoting THE FEDERALIST NO. 47, at 373-74 (James Madison) (Hamilton ed. 1880)).

9. U.S. CONST. art. I, § 8, cl. 18.

10. U.S. CONST. art. III, § 1.

11. U.S. CONST. amend. I.

12. U.S. CONST. amend. VIII.

13. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

14. 15 U.S.C. § 1 (2002).

15. BLACK'S LAW DICTIONARY 1414 (7th ed. 1999).

arise again in litigation. Many rules, that we call "common law," originate with judicial decisions. Rules of legal duty and the construction of contracts, for example, are largely law made by previous court decisions. While tradition allows judicial rules to be changed, that is acceptable only when required by changing custom and precept. Courts of last resort are expected to consider changes in circumstance and the expectation of society in the development of legal rules over which they have jurisdiction.

Justices O'Connor, Kennedy, and Souter addressed *stare decisis* in refusing to overrule *Roe v. Wade*[16] in their opinion in *Planned Parenthood v. Casey*,[17] where they said respect for precedent is indispensable for the rule of law underlying the Constitution.[18] They explained that the Supreme Court would overrule its prior decision only with justification.[19] The justices listed four changes in the underpinning of the former rule that might justify a change.[20] So, they inquired:

> [W]hether *Roe's* central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left *Roe's* central rule a doctrinal anachronism discounted by society; and whether *Roe's* premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.[21]

Now I come to the problem, or challenge, of how a judge goes about applying pre-existing positive law in a particular case when she belongs to a profession so adept at making the law meet one's own preferences.

The December 10, 2001 issue of The New Yorker magazine carried an extensive interview with Judge Richard Posner of the Seventh Circuit, and this is how he is said to decide his cases: "[H]e doesn't first inquire into the

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16. 410 U.S. 959 (1973).

17. 505 U.S. 833 (1992).

18. *Id.* at 854. "Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Id.*

19. *Id.* at 854-55.

20. *Id.* The Court stated that in determining whether a prior rule should be overturned:

> [W]e may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Id. (citations omitted).

21. *Id.* at 855.

constricting dictates of precedent; instead, he comes up with what strikes him as a sensible solution, then looks to see whether precedent excludes it."[22]

I have no inclination to debate legal theory with Judge Posner, but his methodology will ensure a deviation from the rule of law to be the rule of judges in a significant number of cases. My experience convinces me that the prevailing method employed by judges today is with Judge Posner. If the law is to rule the judge, she must begin with the existing positive law and, laying aside personal preference as to the outcome, reach the judgment a knowledgeable observer would predict. The judge should begin with existing and governing precedents and decide what result lawyers and litigants should reasonably expect.

I can guarantee different judgments between judges who seek to meet a preference and judges who seek to meet expectation from pre-existing law. Richard John Neuhaus has said, "biblical texts, like wax noses, can be twisted to fit."[23] And so can the law, depending on the twister and his object.

I turn to some cases to illustrate the difference between the Posner method and the rule of law method, conceding that others may differ over my reading. But this is how I see it.

I begin with *Bush v. Gore*.[24] Five justices had good reason to want to stop the vote count. I respect those justices and do not accuse them of abuse of power to name their choice for President. We did need to settle the election and do so preferably by December 12, 2000. So those five justices decided that the Florida Supreme Court was violating the Equal Protection clause of the Fourteenth Amendment by allowing standardless manual recount of ballots.[25] And three justices said that Florida would violate Article II of the United States Constitution by not completing the count by December 12, 2000 in order to meet the "safe harbor" of Title III U.S.C. § 5.[26]

Much has been said about this decision, and much will be said, but what cannot be said is that any pre-existing federal law would justify that judgment. The Court stopped a state's election process on application of a party who had no standing. At that stage Bush could show no injury.

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22. Larissa MacFarquhar, *The Bench Burner*, THE NEW YORKER, Dec. 10, 2002, at 78.

23. Richard John Neuhaus, *How I Became the Catholic I Was*, FIRST THINGS, Apr. 2002, at 18, *available at* http://www.firstthings.com/ftissues/ft0204/articles/neuhaus.html (last visited September 15, 2002) (on file with the Pepperdine Law Review).

24. 531 U.S. 98 (2000).

25. *Id.* at 103.

26. *Id.* at 113, 122 (Rehnquist, C.J., concurring, joined by Scalia and Thomas, JJ.).

As for equal protection, Florida had a legal standard that cannot be faulted: clear intent of the voter.[27] But the Supreme Court of the United States reasoned as follows: while we have an unequal evaluation due to the fact that the machines tabulate ballots incorrectly, the canvassing boards are not given instructions on what marks they must find on the ballots in order to determine intent of the voter; and since there is not enough time before December 12 to determine the marking requirement and count the ballots consistently, we will stay with the machine count.[28]

I digress to put this question to the constitutional law scholars. Suppose that you were on the Florida Supreme Court and were warned to meet this requirement for equal protection. How would you write an opinion to state a fixed formula for finding voter intent – without violating Article II?

A knowledgeable observer would expect the Supreme Court to overturn a Florida court's judgment only after it is final and then to do so only if either the state court has erroneously applied the legal intent standard or if the standard had been changed. The observer would never expect the Supreme Court to intervene in the middle of the process to point to a problem in the manual recount and then to order that the recount be stopped.

As for Article II, the Florida legislature did decide the manner of choosing electors: by Florida election law.[29] Florida courts recognized the desirability of making the safe harbor date, but that was not required by any reading of which I am aware in the Florida election law. The majority of the Supreme Court decided what was in the best interest of the country as they saw it and compounded their law to justify that result. I am sad to say that I do not see that they complied with the rule of law.

Turn next to the opinion of my court in *Hopwood v. State of Texas*.[30] Although it was not necessary in order to decide the case on appeal, two judges of the three-judge panel thought that the Fourteenth Amendment prevents state schools from giving any consideration to race as a factor in granting admission.[31] They had a problem, however, because the Supreme Court had rejected that view in *Regents of Univ. of California v. Bakke*.[32] The *Hopwood* court devoted eight printed pages to justify the result they wanted

27. *Id.* at 102 (acknowledging that a "legal vote," as determined by Florida statute, is one in which there is a "clear indication of the intent of the voter.") (quoting the Florida Supreme Court in *Gore v. Harris*, 772 So.2d. 1243, 1257 (2000)).

28. *Id.* at 110.

29. *Id.* at 116 (Rehnquist, C.J., concurring). "[T]he Florida Legislature has created a detailed, if not perfectly crafted, statutory scheme that provides for appointment of Presidential electors by direct election." *Id.* (citing FLA. STAT. ANN. § 103.011 (1992)).

30. 78 F.3d 932 (5th Cir. 1996).

31. *Id.* at 934, 962.

32. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 320 (1978) (stating that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.").

by explaining why they thought the Supreme Court would change *Bakke* if presented with the question at the time of the *Hopwood* appeal.[33] They opined that the reasoning of the justices stated in *Bakke* would not be followed by a majority of the Court today.[34] So they told the schools of Texas, Louisiana, and Mississippi that the Fourteenth Amendment prohibited any consideration of race or ethnicity as a factor in admissions.[35]

There could have been no uncertainty in predicting from controlling law. Circuit courts are inferior to the Supreme Court and must take the law as the Supreme Court says it is. While we frequently predict what that Court would say on a question it has not yet decided, only that Court may change its decisions. We may not. And in *Bakke* the Supreme Court had reversed an injunction of the California Supreme Court that ordered exactly what the *Hopwood* court ordered.[36] The judgment of the Supreme Court was certain, and the *Hopwood* judges chose not to follow it.

I turn now to judicial decisions that fail to follow the prior law of the meaning of statutes, beginning with the Texas Supreme Court. The Texas Insurance Code has this provision:

> The interest of a beneficiary in a life insurance policy . . . . shall be forfeited when the beneficiary is the principal or an accomplice in willfully bringing about the death of the insured. When such is the case, the nearest relative of the insured shall receive said insurance.[37]

Suppose there is a contingent beneficiary who has no role in the murder of the insured. Does the contingent beneficiary or the next of kin receive the insurance benefits? That question came to the Supreme Court of Texas in 1975, and the court decided in *Deveroex v. Nelson* that the contingent bene-

33. Hopwood v. Texas, 78 F.3d 932, 941-48 (5th Cir. 1996).

34. *Id.* at 944 (stating that "recent Supreme Court precedent shows that the diversity interest will not satisfy strict scrutiny.").

35. *Id.*

36. *Compare Bakke*, 438 U.S. at 320 (stating that "so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed") *with Hopwood*, 78 F.3d at 962.

> In summary, we hold that the University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school.

Id.

37. TEX. INS. CODE art. 14.28 (2002).

ficiary should prevail.[38] The statute was construed to deny the interest of the guilty beneficiary but not that of the wholly innocent contingent beneficiary.[39]

The very same question arose again in a case that reached the Supreme Court of Texas in 1987. And in *Crawford v. Coleman*, the court held that it was the next of kin who prevailed.[40] There had been no intervening action of the legislature. It was the same statute, but the majority of the judges in 1987 read it differently. For twelve years the law of Texas was that the interest of a contingent beneficiary was not forfeited under those circumstances.[41] The members of the Texas legislature, insurance company executives, and potential beneficiaries of insurance policies would find that to be the law. Presumably, some of them acted and changed their position accordingly. But the majority of the members of the Texas Supreme Court in 1987 felt free to disregard that reading of the statute and give it their own personal reading.[42]

I agree with Justice Black and what he wrote in his dissent in *Boys Markets v. Clerk's Union*:

> [W]hen this Court first interprets a statute, then the statue becomes what this court has said it is. Such an initial interpretation is proper, and unavoidable, in any system in which courts have the task of applying general statutes in a multitude of situations. . . . When the law has been settled by an earlier case then any subsequent 'reinterpretation' of the statute is gratuitous and neither more nor less than an amendment: it is no different in effect from a judicial alteration of language that Congress itself placed in the statute. . . . When the Court changes its mind years later, simply because the judges have changed, in my judgment, it takes upon itself the function of the legislature.[43]

This has not been the thinking of all of the members of the high court. In *Monroe v. Pape* in 1961 they said that the word "person" in 42 U.S.C. § 1983, made liable for the deprivation of federal rights, does not include municipal corporations.[44] But in 1978 they said in *Monell v. Dept. of Social*

38. Deveroex v. Nelson, 529 S.W.2d 510, 513 (1975).

39. *Id.*

40. Crawford v. Coleman, 726 S.W.2d 9, 11 (1987).

41. *Deveroex*, 529 S.W.2d at 510.

42. *Crawford*, 726 S.W.2d at 10. In *Deveroex*, we reasoned that distributing insurance proceeds to the nearest relative only if all beneficiaries were disqualified effectuated both the obvious intent of the insured and the legislature's objective to deny proceeds to the individual responsible for the insured's death. *Id.* Upon review, we find our reasoning no longer persuasive.

43. 398 U.S. 235, 257-58 (1970) (citations omitted).

44. *See* Monroe v. Pape, 365 U.S. 167, 187-92 (1961).

Serv. of New York that "person" did include municipal corporations.[45]

You may ask how judges and professors and lawyers came to speak of the rule of law while condoning something quite different. It is not surprising that lawyers would advocate justice for their clients over the constraints of pre-existing law. And professors of law usually approve of court decisions insofar as they match what the professors think the law should be. But I respectfully suggest that the Supreme Court of the United States bears the major responsibility.

Not long before Justice Harry Blackmun retired from the Court, Mortimer Adler interviewed him on television. Both of them agreed that it was the duty of the Supreme Court to render justice in all of its cases.

Whatever latitude we give the Supreme Court in applying the Constitution, there are limits. The Fifth Amendment simply says that no person "shall be compelled in any criminal case to be a witness against himself."[46] The Supreme Court preferred to say that a defendant may not suffer any adverse consequence if he chooses not to testify.[47] Therefore, the judge instructs the jury, with a straight face and in all solemnity, that they may not consider for any purpose the failure of the defendant to testify in his own defense.[48] That is a most remarkable ruling. The defendant is charged with serious criminal conduct, on trial for his liberty and reputation, maybe for his life. If he is innocent, would he sit there without saying a word? And yet every court in this country must tell the jurors to ignore the obvious. When the defendant chooses between testifying and sitting mute, he is not "compelled" to make his choice. I do not believe the Constitution should be modified to be irrational.

I do not see that law schools are teaching the rule of law.

In 1949 Professor Lon Fuller published a classic law review article that I read as a test of judicial treatment of the rule of law. It was "The Case of The Speluncean Explorers."[49] In this hypothetical case, five cave explorers in the year 4299 are trapped deep beneath the surface in a rock cavern.[50] In order to survive, they put one of their number to death and consumed his flesh.[51] The other four are rescued and prosecuted for murder in the Com-

45. Monell v. Dept. of Social Serv. of New York, 436 U.S. 658, 689 (1978).
46. U.S. CONST. amend. V.
47. Bruno v. United States, 308 U.S. 287, 292-94 (1939).
48. *Id.*
49. Lon Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 616 (1949).
50. *Id.*
51. *Id.* at 618.

monwealth of Newgarth under a statute, which provides "Whoever shall willfully take the life of another shall be punished by death."[52]

All four are convicted and sentenced to death.[53] The law review article sets forth the opinions of each of the five members of the Supreme Court of Newgarth. I have assigned this article to students over some 20 years and, consistently, almost all of the students have joined the chimerical opinions of the two justices who voted to reverse the convictions.

One of those, Justice Handy, says that his decision comes down to the matter of practical wisdom and the opinion of the majority of the people.[54] He cites a public opinion poll taken by a newspaper showing that 90% of the people side with the defendants.[55]

Justice Foster writes a long scholarly decision to achieve justice.[56] He rules first on the basis of natural law, and then he construes the Newgarth statute to mean something that it does not say.[57] He claims that judges are entitled to look to the intent of the legislation behind the wording of the statute and thereby correct legislative errors or oversight.[58] The statute was intended to deter a man from crime and not to preserve one's own life.[59] These defendants only chose to live, and any law declaring that choice to be murder would not operate in a deterrent manner.[60] Therefore the statute was not intended to make this act a crime.[61]

Justice Keen reveals in his opinion that there had been a civil war in Newgarth arising out of conflict between the judiciary and the executive and the legislature.[62] The problem was that statutes were being "thoroughly made over by the judiciary."[63] Not one of my students caught the significance of the civil war and its cause. They were not troubled by the problem of construing a statute to say something different than what the words mean – as long as justice can be achieved. Of all of my students who have read this article, rarely did any of them appreciate the necessity of fidelity to the rule of law.

Justice Keen is said to be the positivist, because he follows the positive law, the statute.

Justice Handy is the realist or the current professor of critical legal stud-

52. *Id.* at 619.
53. *Id.*
54. *Id.* at 637, 640.
55. *Id.* at 639.
56. *Id.* at 620-26.
57. *Id.* at 620-24.
58. *Id.* at 624-26.
59. *Id.* at 625.
60. *Id.*
61. *Id.*
62. *Id.* at 633.
63. *Id.*

ies as he keeps his decision in accord with the sentiments of those subject to judicial rule.

Justice Foster applied natural law, what Aquinas called "right reason" to reach justice.

I say the judge may subscribe to whatever philosophy she prefers, but her authority when ruling as a judge is confined to the positive law. And no other view is consistent with a judge's obedience to the rule of law.

The public seldom hears or reads about the importance of courts following the rule of law. Instead, court decisions are customarily measured according to the preferences of the speakers. I submit that this is the prevailing view of writers and opinion leaders in our society today.

Where does a judge get the authority to render personal notions of justice apart from the law? How does a federal judge who opposes capital punishment deny a writ of habeas corpus to a petitioner about to be put to death? The State of Texas has executed many people who could have lived constructive lives, at least in prison if not in society at large.[64] So what does the judge do? If there has been no violation of the United States Constitution, she denies the writ because that is the extent of her authority. It seems to me that she abuses her office, her oath, and the rule of law if she does otherwise.

I surely do not say that judges should mute their concerns with justice. As witnesses to social ills and legal error, we should be active – much more so than we are – to speak and write about problems and advocate solutions. We spend our days complicating the judicial process to serve our interests or habits when we should be working to change it to serve the public better. We do not say enough, for example, about the appalling failure of criminal justice, where far too many people are imprisoned or put to death, and where prisons only deaden the capacity for useful and joyful life.

I respectfully suggest that scholars of all areas need a better appreciation of the rule of law. Lawrence Kohlberg was known as a premier scholar in the field of moral development. He undertook to describe a universal concept of morality and justice, and described six stages of moral development.[65] A person who has reached the fifth stage recognizes moral values and principles having validity and application apart from the authority of the immediate group with which that person identifies, but based on law and the

64. Texas leads the nation in the number of executions since the death penalty was reinstated in 1976. During that time 285 inmates have been put to death by lethal injection. Texas Department of Justice, *Death Row Facts*, *at* http://www.tdcj.state.tx.us/stat/drowfacts.htm (last visited Jan. 2, 2003).

65. LAWRENCE KOHLBERG, ESSAYS ON MORAL DEVELOPMENT VOLUME 1: THE PHILOSOPHY OF MORAL DEVELOPMENT (Harper & Row, 1981).

social contract.[66] Kohlberg described this as "the 'official' morality of the American government and Constitution."[67] He recognized that the law is allowed to change through the rational consideration of social utility, but rights and standards are determined by consensus on law and procedural rules.[68] I would consider a society under the rule of law as being consistent with a people who had reached the fifth state of moral development.

But Kohlberg went on to a sixth stage of higher morality, which he seemed to regard as inconsistent with the rule of law.[69] He wrote that Justice William Brennan and Justice Thurgood Marshall proved that they had reached the higher stage by their decisions and votes on the unconstitutionality of capital punishment.[70] Kohlberg praised the two justices for their recognition that capital punishment is cruel and unusual because it treats some members of the human race as non-human.[71]

I suggest several problems with Kohlberg's position. In the first place, capital punishment may not be entirely inconsistent with universal respect for all humans. Aside from retribution as a legitimate national purpose, if an individual truly has a heart fatally bent on mischief, totally bereft of social duty, he will be a danger to all with whom he lives in the prison environment. We should consider the other prisoners in deciding what to do about the depraved person. Secondly, Justices Brennan and Marshall were not construing the words "cruel and unusual" apart from the Constitution. As the other justices of the Supreme Court explained, capital punishment was expressly contemplated by the Constitution itself.[72] Because the authority of the justices could go no further than the terms of the Constitution would allow, the justices were limited to those terms and not entitled to give meaning to "cruel and unusual" apart from the Constitution.

Finally, after the Supreme Court majority had said, and said repeatedly, that the Constitution does not prohibit capital punishment,[73] by what legal

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66. *Id.* at 18-19.

67. *Id.* at 19.

68. *Id.* at 18-19.

69. *Id.* at 19.

> *Stage 6. The Universal Ethical Principle Orientation*
> Right is defined by the decision of conscience in accord with self-chosen ethical principles appealing to logical comprehensiveness, universality, and consistency. These principles are abstract and ethical (the Golden Rule, the categorical imperative); they are not concrete moral rules such as the Ten Commandments. At heart, these are universal principles of justice, of the reciprocity and equality of human rights, and of respect for the dignity of human beings as individuals.

Id.

70. *Id.*

71. *Id.* at 242-45.

72. Furman v. Georgia, 408 U.S. 238, 380 (1972) (Burger, C.J., with whom Blackmun, J., Powell, J., and Rehnquist, J., join dissenting) (stating that "it is . . . clear from the language of the Constitution itself that there was no thought whatever of the elimination of capital punishment").

73. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947) (providing that in upholding

right did Justices Brennan and Marshall continue to vote, as justices under the rule of law, to the contrary? Though they had the right to disagree about the moral question, or even the constitutional question, they were not entitled to exercise the authority of that office in violation of the rule of law.

What of the future of the rule of law? It may be that courts will continue to enjoy respect and obedience by rendering decisions that are popular with most of the public. But voices are heard today denying the legitimacy of the courts. We dare not lose trust and respect for the courts. Those who rule by judges risk the coming of a time when the public will look elsewhere for both law and justice.

I close with an admonition to judges given by Justice Oran M. Roberts in *Duncan v. Magette*, an 1860 decision of the Texas Supreme Court.[74] Justice Roberts said:

> Whoever undertakes to determine a case solely by his own notion of abstract justice, breaks down the barriers by which rules of justice are erected into a system, and thereby annihilates law.
>
> To follow the dictates of justice, when in harmony with the law, must be a pleasure; but to follow the rules of law, in their true spirit, to whatever consequences they may lead, is a duty.[75]

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the constitutionality of electrocuting an inmate after the first attempt failed, the Court stated, "[t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."); *In re* Kemmler, 136 U.S. 436, 447 (1890) (stating, "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."); Wilkerson *v.* Utah, 99 U.S. 130, 134-35 (1879) (providing that "[c]ruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment.").

74. 1860 Tex. LEXIS 116.

75. *Id.* at 11-12.