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Blind Justice And Other Legal Myths: The Lies That Law Lives By

Whoever coined the expression "lies, damned lies, and statistics" could have substituted "legal aphorisms" for "statistics."[1] Everyone knows the aphorisms I mean:

- Justice is blind.
- Legal language is precise.
- Courts are bound by precedent.
- Law is certain.
- Judges don't create laws; they merely administer them.
- "Strict constructionist" judges are not activists.
- Trials are intended to determine the truth.
- Punishment should fit the crime.
- Procedural solemnity fosters respect for the law and encourages truthful testimony.

Like statistics, these homilies all have a certain basis in truth, but they convey fallacious conclusions if not used cautiously, and with an appreciation of their limitations. Underlying all or most of them is a root fallacy — the "Grundnorm" of legal lies. It is the notion that ours is a "government of laws, and not of men."[2] The first six aphorisms listed above are corollaries of that basic falsehood, and the others are connected to it in one way or another.

As with all myths, there is an important truth embedded in this central lie. Systems of social control that we dignify by the term "law" all possess certain characteristics designed to suppress favoritism, victimization, and arbitrariness in official decision-making. They feature dispute-resolution procedures that aim for consistency, and try to ensure that all relevant points of view are represented before decisions are made. They purport to ensure that arbiters are free from bias, that applicable norms are known in advance, and so on.[3] Reference to "a government of laws" correctly reminds us that our social and political institutions have evolved to the point where important disputes are

regarded as properly determinable by fair and predetermined processes, rather than by brute force, favoritism, whimsy or chance.

The lie is the assertion that the human element has been eliminated — that there are rules which lead to the determination of legal disputes without the intervention of human discretion or judgment. There are a few laws, it is true, that operate more or less in that fashion. Arbitrary highway speed limits are an example; but even they are subject to defences that allow for a weighing of extenuating circumstances.

Most laws are, and must be, designed like application forms — with numerous blank spaces to be filled in by the adjudicator. The purpose of the blanks is to ensure that the outcome of each dispute will be well tailored to suit the unique circumstances of that situation. Filling the blanks properly is a difficult art, calling for the exercise of discriminating human judgment. The discretion it bestows on the adjudicator is double-edged; while it permits individual justice to be done, it also leaves open a risk of arbitrariness or bias. Why not eliminate that risk by removing the blanks from the process? Because a legal system that did not make heavy use of these individualizing blanks would produce unjust and irrational decisions. There are at least two reasons for that.

The first is that human foresight is too puny to divine in advance all the factors that may be relevant to the fair determination of future legal disputes. It is therefore impossible to formulate either laws or precedents that will automatically look after the future. Put yourself in the position of a legislator of the new nation Justicia, which is devising a law to govern the distribution of matrimonial property after marriage breakdown. You and your colleagues readily decide that all property owned by either party prior to the marriage should remain the individual property of each, but that anything acquired by either after the marriage should be divided equally upon separation or divorce. And then various members of the legislature begin asking "what if" questions:

> "What if one of the partners will be taking permanent custody of the children? Should there not be a power to award that partner a higher share of the family assets as security for the other's partial responsibility for the children's upkeep, at least where there appears to be a significant risk that the responsibility will not be met?"
>
> "What if it would be more economical for the spouse with custody of the children to remain in the matrimonial home until the children are independent, rather than selling the home and dividing the proceeds immediately. Would it not make sense to do so?"
>
> "What if the husband turned out to be a drunken lout and a wastrel, and that just before the partners separated the wife's parents gave her a sum of money to invest in order to provide for her personal security and compensate for her husband's improvidence? Shouldn't she be able to keep that investment intact?"

> "What if it could be proved that the wife had agreed to marry only because she knew that the husband would shortly inherit a large sum, and that she had planned to leave him and did, as soon as the inheritance vested? Should she be allowed to share it?"
>
> "What if she'd had the above plan when she married him, but later changed her mind, tried for a while to make the marriage work, and didn't eventually leave for a year or two after the gift vested?"

You and your colleagues could go on for days discussing possible contingencies that might justify deviations from the 50/50 principle, and you would never exhaust them. Your only recourses would be: (a) to substitute for equality a standard like "fairness," that delegated to the courts a complete discretion to judge each case in light of its peculiar circumstances; (b) to convert all the valid identifiable "what ifs" into exceptions to the equality standard, probably with built-in discretionary factors like "significant risk" and a wrap-up exception like "and such other special circumstances as justify deviation from equal division" to cover unforeseeable developments; or (c) to be prepared for a flood of amendments (some retroactive) at each new session of the legislature.

The second reason for "blanks" in the process is that even if all relevant factors could be identified in advance, a suitable resolution of particular disputes depends upon the respective weights to be assigned to each factor in the circumstances of each case. To return to the division of matrimonial property, for example, suppose the legislature provides that an unequal division would be justified as security against the risk that the non-custodial parent would not provide support for the children. The degree of risk would have to be assessed, along with the ages and circumstances of the children, to determine an appropriate deviation from the norm in each case.

For these reasons, automatism cannot produce satisfactory legal decisions. Human discretion is indispensable. We attempt to achieve a measure of objectivity and fairness by legal procedures that constrain, guide and supervise the exercise of that discretion, of course, but the human element is essential. Our government is one of laws *and* of people. Humans make and administer the laws, and laws regulate the manner in which they do so. To understand this complex interrelationship better, it may be useful to examine a few of the specific misconceptions listed above.

Blind Justice

Only a comedic genius of the order of a Woody Allen could invent another symbol for the legal system as absurd as the traditional

gowned woman, scales in one hand and sword in the other, vision obscured by a blindfold. Several aspects of the symbol are certainly appropriate. The scales represent the delicate weighing of countervailing considerations required for most legal determinations, and the sword stands for firm state enforcement of laws and legal decisions. If we forget about the sexism involved in portraying mercy as a woman (a topic for another essay), that is a useful image too. But the blindfold? How can she see which side of the scale is heavier? How does she prevent thumbs and other extraneous weights being added to the balance? What are the consequences of flailing a sword around while blindfolded?[4]

In order to fill in the "blanks" referred to earlier in a satisfactory way, legal decision-makers must have their eyes open. Their other senses of perception should be in working order, too. Attempting to administer justice with those senses shut down would be as stupid as attempting a medical diagnosis without regard to the patient's symptoms. Courts sometimes do make decisions in ignorance of relevant factors, and when they do the results can be disastrous. A notorious example was the decision of the Judicial Committee of the Privy Council to strike down most of R.B. Bennett's "Canadian New Deal" legislation in 1937, without regard to the economic calamity that had made it necessary.[5] A contemporary illustration is the astonishing refusal of British judges to consider actuarial evidence when calculating damage awards for loss of future earnings and their practice of relying instead on an intuitively chosen "multiplier."[6]

What the symbol of the blindfold is supposed to convey is the freedom of justice from improper influences such as favoritism, discrimination, bribery and threats. That's an important notion, of course — and it's sometimes difficult to apply. The difficulty arises from the fact that although equality requires similar situations to be treated similarly, no two situations are identical, and it isn't always easy to decide which differences are legally relevant and which are not. The law should not discriminate between men and women, for example, but it might not be discrimination to decide that a law requiring employers to take precautions against sexual harassment in the workplace calls for different protections in the case of female employees than of males; or that women who are pregnant or are nursing infants are entitled to different working conditions than other employees. While religious favoritism must be avoided, special consideration for the needs of religious minorities in the application of business-hours legislation is not favoritism; it is merely a recognition of the fact that uniformity of treatment can sometimes constitute inequality.[7] Two

co-perpetrators of the same crime may deserve different sentences because of differences in age, potential for rehabilitation, and so on.[8]

The demanding task of deciding which situational differences justify differential legal treatment and which do not call for judges' eyes to be open to every circumstance, including those that are potentially corruptive. Both judges and the general public should be aware of this; the blindfold must go. A better symbol of freedom from bias would be a throng of citizen observers carefully scrutinizing the work of an open-eyed Justice.

Precise Language

The impression that legal language is, or should be, mathematically precise, seems to be widespread. Lawyers serving on volunteer committees tend to be given the drafting chores: "You're a lawyer; you'll know how to express it accurately." Abetting the impression of precision is a large body of interpretative principles, sometimes known as "the canons of construction," which judges purport to consult when seeking the meaning of legal language. Judges' interpretative pronouncements frequently include references — often in Latin — to the particular canon of construction that allegedly dictated the conclusion. These canons have the appearance, collectively, of a kind of juridical Rosetta Stone: an infallible key to legal hieroglyphics.

Some legal language is indeed precise: legal descriptions of surveyed land, for example. It is true, as well, that extremely vague language is occasionally held to be void for uncertainty.[9] The latter principle has been restricted until recently in England and Canada to documents other than statutes,[10] but the Ontario Court of Appeal has now held that statutes which encroach on rights guaranteed by the Canadian Charter of Rights and Freedoms, but are defended under Section 1 of the Charter as "reasonable limits in a free and democratic society" can be struck down if too vague to be considered "prescribed" by law in accordance with that section.[11]

Generally speaking, however, legal language is little different than ordinary language. Normal English or French is usually employed for legal drafting in Canada, and the words don't take on any magic quality because the context is legal. Words like "nuisance," "capacity," or "consideration" may have special meanings in that context, but that is nothing unusual; all language is influenced by context. A "drive," for example, is one thing to a golfer, and quite different things to people who herd cattle, raise funds for charity, or like to explore the countryside by automobile. And even when special terms of art are employed they do not necessarily impose precision; the legal concepts of "nuis-

ance," "capacity," and "consideration," are all vague enough to be capable of application to a very broad range of dissimilar circumstances.

Many lawyers are skilled communicators; but so are successful novelists and poets.[12] Like novelists and poets, legal drafters sometimes aim for unequivocal expression, but just as often they make deliberate use of linguistic ambiguity. This is especially common in the case of legal language designed to express legal norms applicable to unforeseeable future circumstances. The reasons are obvious, and have already been alluded to: limited human foresight, and limited legislative time. Because law-makers lack the time to exhaust the "what ifs" when new laws are being considered, and couldn't realistically imagine them all even if time were unlimited, they commonly employ general terms like "unreasonable," "just" or "arbitrary"; which, in effect, delegate a broad discretion to the judges or other arbiters of particular cases to decide them in accordance with their individual merits. The Privacy Acts of several provinces, for example, impose liability for "unreasonable" invasions of privacy, leaving to the courts the responsibility for deciding which types of intrusion are reasonable and which are not. The legislation does offer some guidance, in the form of examples of conduct that constitute privacy violations, but the examples are not exhaustive, and even those listed are actionable only if committed in circumstances that render them "unreasonable "[13] The Canadian Charter of Rights and Freedoms embodies numerous discretion-delegating standards of this kind: "unreasonable search and seizure,"[14] "arbitrarily detained,"[15] "cruel and unusual,"[16] "principles of fundamental justice,"[17] "wherever . . . the number of children . . . is sufficient to warrant the. provision . . . of minority language instruction,"[18] "reasonable limits . . . demonstrably justified in a free and democratic society,"[19] and so on.

These consciously created ambiguities account for many of the individualizing "blanks" referred to above. Others result from unintended ambiguities. Even the most carefully drafted laws are at the eternal mercy of the unexpected. I like to show my students a *Punch* cartoon of a head waiter confronting a tattered derelict at the entrance to a high-society restaurant. The bum's trousers are held up by a gaudy neck-tie, and he says, indignantly: "But I *am* wearing a tie!" A legal example is *Land v. Canada Permanent*, in which a statutory definition of "cross-walk" as the lateral extension of sidewalks on either side of an intersection was found to be unworkable for an intersection in which a third street intruded diagonally between the others.[20]

Those who believe that the "canons of construction" provide lawyers and judges a unique and surefire tool for resolving ambiguities

would be disillusioned by a careful examination of their actual use. It has often been observed that the canons "hunt in pairs." In most disputes over the meaning of legal language there will usually be at least one canon available to support the arguments of each side to the dispute. Karl Llewellyn once demonstrated this fact dramatically by compiling two long lists of competing interpretative principles, entitled "Thrust" and "Counterthrust." His biographer has described the list as follows:

> A collection of over seventy purported cannons of construction, each backed by authority was placed into two parallel columns, with each entry in the left-hand column countered in the right-hand column by an entry which either contradicted or emasculated it.[21]

Another way to illustrate the real function of interpretation aids is to depict the process of interpretation in mechanical terms. I once attempted to do this by producing for my students a diagram of the interpretation process in the form of whimsical "machine." It incorporated all the major interpretative functions, and showed that any desired result could be achieved, depending upon which buttons were pushed. But irony seldom succeeds. A colleague to whom I showed this "machine" said, in apparent puzzlement: "But interpretation *isn't* a mechanical operation." Exactly. The point of the illustration was to depict the formal interrelationships of various types of interpretative aids, and to demonstrate that no one of them is a conclusive determiner of meaning. Each is a factor to be considered. The judge decides which factors are relevant to the particular case, assigns weights to them in light of the facts of that case, and determines, by an exercise of human judgment, the cumulative weights of the various factors supporting each competing interpretation of the language in question.

The "matched" nature of legal presumptions doesn't impair their usefulness. On the contrary, it helps to ensure that every consideration will be weighed before a decision is made. Popular proverbs perform a similar role in everyday non-legal decision-making. Consider the following dialogue between a university professor and his or her spouse as to whether the professor should spend an upcoming sabbatical leave abroad, or at home where the spouse must remain because of her or his employment:

> Professor: "I know I'll miss you if I go away, dear, but that may not be all bad. They say that 'Absence makes the heart grow fonder.' "
>
> Spouse: "They also say: 'Out of sight, out of mind.' Besides, it'll be cheaper if you spend your leave at home. I know you have a grant to pay your travel and major living expenses abroad, but there will be a lot of incidental expenses your grant won't cover. If those expenses can be

avoided the family finances will be better off. 'A penny saved is a penny earned.' "

Professor: "But study abroad will improve the quality of the book I'm writing, and I've got a good chance for promotion in my department if the book is a success. To jeopardize that chance just to avoid a few incidental expenses would be 'penny wise and pound foolish.' "

Spouse: "You surely don't intend to spend all your time studying?"

Professor: "No, of course not. I plan to do a lot of sight-seeing, and I hope to have some new recreational experiences. I think that part will be energizing — it'll help my work in the long run. 'All work and no play makes Jack a dull boy' you know."

Spouse: "Perhaps. But it's also true that 'The Devil finds work for idle hands.' "

The fact that the proverbs are balanced — like matched duelling pistols — in this little scenario does not render them meaningless. Their function reminds the parties of the factors they needed to consider in making the decision. The decision itself will depend upon the respective weights assigned to each relevant factor. Canons of construction and other aids to legal interpretation perform the same function. They provide a helpful checklist of considerations to be taken into account, but they don't dictate conclusions. The conclusions depend upon the weights given to each relevant consideration by the person called upon to act as interpreter.

Binding Precedent

The role of precedent in legal decision making has acquired an almost mystical quality in the eyes of many, including some judges and lawyers who should know better. References to the phenomenon in general English literature are numerous. In *The Merchant of Venice*, for example, Shakespeare has Portia reject, on grounds of precedent, the possibility of bending the law a little in the interests of justice:

> It must not be; there is no power in Venice
> Can alter a decree established:
> 'Twil all be recorded for a precedent,
> And many an error, by the same example,
> Will rush into the State: it cannot be.[22]

Although the play deals ostensibly with the laws of Venice, Shakespeare is really describing a process more central to English common law than to any other legal system — reliance on previous judicial decisions as guides to the determination of similar future disputes. Some writers have praised this process as one that gives us access to the legal wisdom of the ages and allows for gradual improvement of the law over time. Tennyson described England in "You Ask Why" as:

A land of just and old renown
Where Freedom broadens slowly down
from precedent to precedent.

Other writers point out, however, that taking advantage of the wisdom of the ages requires the ability to abandon prior decisions that prove to be erroneous or obsolete; growth and improvement cannot occur unless it is possible to correct past mistakes and adjust the law to accommodate changing social conditions. Blind obedience to past decisions, right or wrong, would be a process of fossilization, not of growth. William Cowper put it this way in an oft-quoted joust at uncritical adherence to precedent:

The slaves of custom and established mode,
With packhorse constancy we keep the road,
Crooked and straight, through quags and thorny dells,
True to the jingling of our leaders' bells.
To follow foolish precedents and wink
With both our eyes is easier than to think.

While the praise of Tennyson and the criticism of Cowper may seem contradictory, they are, I think, both justified. The Tennyson quotation describes the ideal — the precedent system as it ought to function. To a considerable extent it does operate that way — providing a foundation upon which further growth can be based, without unduly impeding the direction of growth. But the ideal can be frustrated, as Cowper observed, if precedent is applied in the rigid, uncritical manner Portia describes. Portia is mistaken when she says "there is no power in Venice/can alter a decree established." Reading "Venice" for England or Canada, there are in fact numerous "powers" by which unfortunate precedential decrees can be altered or side-stepped. It is the acceptance of the myth of precedential rigidity by some courts, and their resulting unwillingness to apply precedents discriminatingly, that occasionally justifies Cowper's comment.

When the system functions as it should, there are several important purposes served by following precedent:

1. It conserves time and energy. It is wasteful for judges to be deciding the same issues over and over again.
2. It provides an important source of predictability in situations where there is no legislation on the subject. Citizens benefit from knowing that they can, for the most part, safely base their decisions on the assumption that the relevant law is as described in previous decisions.
3. It serves one of the most basic components of justice; fundamental fairness demands that like cases be treated alike.[23]

Justice cannot be fully served, however, unless the honouring of precedent is qualified by two important conditions. First, erroneous or unjust precedents must not be perpetuated. Second, unlike cases must not be treated alike; where there are significant differences between the circumstances of the precedent case and the case at hand, a different result may be called for. Fortunately, the system has sufficient flexibility, when applied properly, to permit both conditions to be observed.

It is not widely understood by non-lawyers that precedents are binding only on courts lower in rank than the original court within the same judicial hierarchy. All Canadian courts are bound by decisions of the Supreme Court of Canada, which is the apex of all 13 judicial hierarchies (10 provinces, 2 territories, and federal courts) in the country. But decisions of intermediate courts of appeal are only binding on the courts they directly supervise. Thus, a ruling by the Ontario Court of Appeal does not tie the hands of, say, the Alberta Court of Queen's Bench. This does not mean that the Alberta judge will ignore the Ontario case. If its reasoning is compelling, the Alberta judge may choose to follow it, just as she or he might follow an instructive ruling of an English, Australian or American court. But if the Alberta judge regards the decision as mistaken, there is no obligation to follow suit. Although there was once a time when the Supreme Court of Canada regarded itself as bound by its own previous decisions, it now takes a different view, and many courts of appeal do so as well. All this flexibility means that when new judicial rulings are made in Canada or abroad there is usually ample opportunity for Canadian courts at all levels to consider their merits, and to express agreement or disagreement, before the Supreme Court of Canada takes a position on the matter. And the Supreme Court itself is free to change its mind later. Even courts that are normally bound by precedent have certain special exceptions open to them, and they always have the right to point out in their reasons for judgment that they regard the binding precedent as erroneous, and to express the hope that a higher court will set matters right. There is, in short, no reason why mistaken or unfair precedents should impede justice.

When a court with the power to reject or overrule a precedent is considering whether or not to do so, the factors it takes into account, and weighs in the same scale it employs to make interpretative rulings about legal language, are such practical matters as:

- What are the pros and cons, with respect to both the immediate litigants and society generally, of the precedent under attack?

- Have all significant points of view been exposed in the arguments before the court, or would it be better to leave change to the Legislature, where a more broad-ranging debate can take place?
- If the matter is left to the Legislature, how likely is it, realistically, that the legislators will get around to doing something about it in the foreseeable future?
- Would a change in the law at this point cause serious harm to reliance interests?

Whatever the outcome, the determining consideration is (or should be) pragmatic human judgment. Blind reverence for the past should not be a factor.

Even greater opportunities for judicial discretion and greater need for human wisdom are involved in deciding whether the circumstances of the current case are substantially the same as those that produced the precedent decision. Precedents are applicable only to like situations, and the ability to recognize relevant differences is one of the essential judicial arts. The difficulty lies not in perceiving the differences — no two situations are identical — but in deciding which differences are so significant as to call for a different legal result. Our courts go wrong more often by "distinguishing" precedents on irrational grounds than by failing to discern relevant differences. An extreme example is *Best v. Fox*, in which the British House of Lords dealt with a claim for damages by a wife for loss of her husband's sexual consortium by reason of his negligent injury by the defendant.[24] After explaining why the long-standing common law rule that only a *husband* may sue in such circumstances was socially obsolete and should be abolished, and declaring that only Parliament could change the rule (a self-imposed impotence the House of Lords later abandoned[25]), it was held that the rule could be "distinguished," and not applied where the plaintiff was a wife, because no *wife* had ever sued before.

Such distinctions without difference are too common. They occur for understandable reasons: judges faced with distasteful precedents find it tempting to side-step the problem, and dispose fairly of the case at hand, by seizing upon some minor factual difference. Unfortunately, the ground for distinction becomes the rationale for a new sub-rule — one that lacks logical or social coherence — and as the process continues the law becomes cluttered with complex and nonsensical refinements. Lord Tennyson, whose paean to precedent was quoted earlier, also drew attention to this failing in "Aylmer's Field": "That codeless myriad of precedent, that wilderness of single instances." Sir John Dodderidge, an English King's Bench judge of the early 17th century, pointed out what good common law judges have always

known — that distinctions must be consonant with the general principle underlying the precedent:

> "Wholly to respect particular cases, without any observation of the general rules and reasons, and to charge the memory with infinite singularities, is utterly to confound the same . . . but engender in ourselves that wrong opinion . . . that there is nothing certain in our laws."[26]

Differences that can properly be taken into account sometimes involve changed social conditions rather than directly distinguishable fact situations. In *Fleming v. Atkinson* a motorist was injured when his vehicle collided with a herd of cows that had negligently been allowed to wander onto the highway.[27] When he sued the owner of the cows, he was met with an old common law rule denying liability for cattle trespass on highways. He persevered in his claim, however, and was ultimately successful when the Supreme Court of Canada found the old rule to be distinguishable from the situation at hand. The rule had developed, the Court held, in a country where highways were traditionally created by usurpation — *de facto* public paths across private land gradually becoming recognized as rights of way — and at a time of slow-moving vehicles, to which wandering animals posed little danger. In modern Ontario, where highways lie on Crown land, and where cattle on the road constitute a serious hazard to automotive traffic, the rule has no place.

While the *Fleming* decision was the work of the Supreme Court of Canada, I believe that the approach it embodied is open to any judge at any level. It is simply an instance of distinguishing the situation at hand from that which was involved in the precedent case — and doing so in a way that respects the rationale of the rule. An Ontario District Court judge was mistaken, I believe, in refusing to take a similar approach in *Gagnon v. Stortini*.[28] The question was whether a married woman could act as "next friend" for the purpose of launching a medical malpractice action on behalf of an infant. The previous common law rule was that only men and unmarried women could do so. Judge Loukidelis examined the origins of the rule, and found it to be based on the fact that married women had no legal status at one time. Although he acknowledged that this is no longer the case, he held that he was bound by the common law precedents, and denied the woman "next friend" status. In my opinion he should simply have "distinguished" the modern situation from the obsolete legal circumstances upon which the precedents were based.

I have to acknowledge that in 1975 the House of Lords rejected the view expressed in the last paragraph. The case in which this occurred

was *Miliangos v. George Frank (Textiles) Ltd.*, the Court of Appeal had recently purported to change the law, however, on the ground that economic circumstances had changed, thereby nullifying the reason for the English currency rule.[29] The Court explicitly invoked the principle that when the reason for a law ceases to exist, so should the law: "*cessante ratione cessat ipsa lex.*" When the issue arose again, at the trial level, in the *Miliangos* case, the trial court refused to follow the new Court of Appeal ruling, holding that it had been made in error ("*per incuriam*") and was therefore not binding. The Court of Appeal, not surprisingly, ruled that the trial court had no power to correct a higher court's errors, and reiterated its earlier decision that judgments could be expressed in foreign currency. When the matter eventually reached the House of Lords on appeal, its resolution of the issues was remarkable:

1. The "*cessante ratione*" principle does not permit a court that is bound by precedent, such as the Court of Appeal, to "disregard an otherwise binding precedent" on the ground that the reason which led to the formulation of the rule embodied in such precedent seems to have lost its cogency," though it is one of the considerations the *House of Lords* should take into account in deciding whether to set the precedent aside.
2. However, the Court of Appeal was right in saying that trial courts have no power to declare a Court of Appeal ruling wrong. The trial court should have honoured the Court of Appeal's ruling.
3. And the substance of the Court of Appeal's ruling was correct: the rule that judgments must be expressed in sterling was no longer justifiable.

Lord Denning, who initiated the reform in the first Court of Appeal decision, has expressed the view that if he and his court had not done so, the outcome would probably have been different:

> It was a decision of greatest importance. But it only came about because we were guilty of a "distortion of the judicial process.' . . . In the end, therefore, a good end was attained but by a bad means.[30]

His tone was not contrite.

Whether the Supreme Court of Canada eventually agrees with Lord Denning that the "*cessante ratione*" principle is available, where appropriate, even to courts that are bound by precedent (as it formally regarded itself at the time it decided *Fleming v. Atkinson*, by the way), or adopts the House of Lords' view that it is open to courts of final resort only, the principle will continue to be an important source of flexibility in the application of precedent. Even if lower level courts

cannot properly apply the principle themselves, they can always suggest appropriate occasions for the Supreme Court to do so.

The purpose of this brief excursus has been to demonstrate that what binds judges is not precedent *per se*, but the obligation to ensure that precedents are employed in a manner that makes best use of the wisdom they embody, without encumbering the law with either outdated principles or unprincipled distinctions. Meeting that obligation calls for the exercise of sound human judgment.

Certain Law

Most people who ask a lawyer whether particular conduct, completed or contemplated, is "legal," expect to get a firm answer: "Yes" or "No." More often than not, in serious matters at least, they receive equivocal responses:

> "That all depends . . ."
> "Why do you want to know?"
> "The odds are about 60/40 that it's legal."
> "That's a tough question; it'll cost you a lot in research or litigation costs to learn the answer."

There are many reasons for such vague replies. The question may, in the first place, be irrelevant to the client's real problem. Often the important question is not whether the conduct is legal but whether (if contemplated) it would be wise; or how (if completed) its detrimental consequences can be minimized. If the issue arises from the conduct of other persons toward the client, the key question may be whether it would be worthwhile pursuing a legal remedy. Another common reason for hesitation is that lawyers can't possibly carry in their heads an extensive knowledge of all areas of law; they are usually familiar with only the broad outlines of substantive law, and require research before venturing opinions on fine points of detail.

But even when legality is a crucial question, and the lawyer has had adequate opportunity to research it, the likelihood of the client's receiving a precise response is not great, because law itself is often uncertain. Much of this uncertainty is attributable to factors I have already discussed: the fecundity of ambiguous language, the malleability of legal precedents, and the various other discretionary elements of law that preclude predictability. Another source of uncertainty is the fact that most legal rules are qualified by exceptions, usually phrased vaguely in an attempt to cover an infinite range of extenuating circumstances. The birth of the Canadian Charter of Rights and Freedoms in 1982 introduced a new and profoundly important dimension of uncer-

tainty: the possibility that even linguistically precise laws may be inoperative because they infringe one or more of the Charter's loosely phrased rights and freedoms to a greater extent than is "reasonable" and "demonstrably justifiable" in a "free and democratic society." It will be a long while before the full impact of this development can be judged, but it will unquestionably be massive.

There is a final source of uncertainty upon which it may be instructive to dwell briefly. This is the fact that legality sometimes depends on context. What is lawful for one purpose may be unlawful for another. It is common, for example, for automobile drivers involved in accidents to be exonerated from civil liability for any personal injuries involved, if their driving was not "unreasonable," even though they may have been exceeding the speed limit or violating some other traffic ordinance. Criminal law and civil law employ different standards. Conduct which is unlawful in the context of criminal law, may not be unlawful under tort law.

A second illustration concerns a woman who came to me with an immigration problem some years ago. She was a Filipino with landed immigrant status in Canada, who wanted to sponsor her fiancé for admission to this country. The problem was that he was married, although separated from his wife, and was unable to obtain a divorce under the laws of his country. His plan was to obtain divorce in Canada after establishing domicile here, and then to marry my client. Canadian immigration regulations would not recognize a married man as a fiancé, however, and the man could not qualify for admission unless he had that status. The client proposed a solution: "Suppose my fiancé comes here via the United States, and gets a divorce in Reno along the way?" I told her that tactic was unlikely to succeed, because Reno divorces, based on ridiculously short "residence" qualifications, are not recognized in Canada for the purpose of re-marriage here. However, when I approached Immigration Department officials with the proposal, their response was surprisingly positive: "So long as he's divorced by the law of some jurisdiction, we'll treat him as divorced for immigration purposes, even though he may not be so for re-marriage purposes." So he came to Winnipeg, via Reno, bearing a Nevada. divorce decree. He planned to obtain a Canadian divorce after becoming a Canadian domiciliary, and then marry my client. I don't know whether he ever did; but if so both Canadian and American law would recognize his new marriage, though he might still be regarded as a bigamist by Phillipine law.

As these illustrations demonstrate, the assumption that a given type of conduct is either legal or illegal, without regard to context, may involve a false dichotomy. Dichotomies postulate only two possibili-

ties, A or B, when in reality there may be other options open: C, D, or E; or, perhaps, A *plus* B. Rather than being either legal or illegal in an absolute sense, the conduct in question might be *partially* legal, or *conditionally* legal. The false dichotomy is an insidious form of diseased reasoning that strikes the legal system with alarming frequency. The "root fallacy." discussed above —that ours is a government of laws and not of people — is a false dichotomy. Other illustrations include the brutal forensic tactic of demanding, in cross-examination, that witnesses answer "yes or no" to complex questions that realistically admit of only qualified answers, and requiring juries to find accused persons either "guilty" or "not guilty." (Scottish law is more realistic in the latter respect, permitting the third verdict of "not proven," though the binary approach employed in England and Canada no doubt better protects acquitted persons from public calumny.)

Other Myths

The other myths I listed at the outset are also demonstrably false. Because of space limitations, however, they must be dealt with summarily.

Judges Don't Make Law: Judges do make law; if we had to rely on the excruciatingly slow and politically-biased legislative process to keep our laws up to date, the legal system would have bogged down completely long ago.[31]

Only Liberal Judges are Activists: Conservative, "strict constructionist" judges are as "activist" as their liberal colleagues: the American judges who applied the Bill of Rights to kill early social welfare legislation were no less activist than the libertarian Warren court.[32] Even the judge who refuses to make a legally possible ruling because such a ruling might encroach on the domain of the legislature, is, unless there is a reasonable likelihood of the legislature's dealing with the matter in the near future, an activist on behalf of the status quo.

Trials Are Searches for Truth: The notion that trials are intended to get at the truth is correct in part, but there are other functions served also, especially in the case of criminal trials, that sometimes impede or frustrate the search for truth. For example, the protections provided by the Canadian Charter of Rights and Freedoms against self-incrimination and evidence obtained in violation of the Charter can sometimes prevent cogent and reliable evidence being made available to a court. So can the rule that spouses cannot be compelled to testify as to communications made between themselves.[33] These provisions and numerous others, exist to ensure that equally important social

values (such as fairness, propriety of behaviour by police, and the sanctity of marriage) are not sacrificed to a relentless pursuit of truth.[34]

Punishment Should Fit the Crime: While the "object all sublime" of Gilbert and Sullivan's Lord High Executioner may have been to "let the punishment fit the crime," the sentencing process in the real world must, to be fair, be more concerned with fitting the punishment to the *criminal*. The public is aroused from time to time by media reports of discrepant sentences awarded to persons convicted of identical crimes. Although this is sometimes the product of differing sentencing philosophies (or even moods) on the part of the various judges involved (an unfortunate but largely unavoidable consequence of the fact that judging is a human process) it is more often the entirely justifiable result of factors such as the age, mental condition, criminal record, and potential for rehabilitation of the persons convicted. Just as the criminal trial serves more purposes than ascertaining truth, so punishment fulfils numerous functions, and the circumstances of each offender need to be taken into account in order to determine the extent to which these various function can be served in particular cases.[35]

Legal Solemnities Encourage Truth and Respect: The final myth listed above concerns the solemnities which clothe so many aspects of the legal process. Most lawyers suppose that there is a positive relationship between rites and liberties. They seem to think that the ceremonial rituals lend a dignity to the proceedings that breeds respect for the law, and conduces truthfulness in witnesses. Those who look at the system from the outside are more skeptical. One of my favourite legal cartoons shows a happy-go-lucky witness being sworn in before a judge, and saying, with a grin: "I swear to tell the truth, but not solemnly." The reason I find the cartoon attractive is that I think it portrays accurately the attitude of most non-lawyers: legal formalities are, for the most part, silly and unnecessary; the judicial process doesn't have to be solemn to be effective. Open-minded lawyers have criticized pompous and overly formal procedures as well. The inutility and ludicrousness of the many legal rites were noted by Jeremy Bentham early in the 19th century.[36] Jerome Frank and other "realists" expressed similar views in the mid-20th century. Frank wrote about "the Cult of the Robe":

> "Robeism is still too much with us. . .. An American President or Senator has no garment to betoken dignity, we all know it. So of the man on the bench: If he deserves respect, he will receive it, although he be dressed in a business suit. But, unfortunately, the bigoted judge, the ignorant judge, can often effect a false show of dignity. Become a judge, the mediocre lawyer can avail himself of the robe to conceal his incompetence: The robe will cover up the man. Worse, his false pomp often nourishes pomposity . . ."[37]

Yet the formality persists. Why? Apart from the obvious ego satisfaction it provides for the judges and lawyers whom it aggrandizes, legal ceremony appears to serve several functional purposes. Some of these have serious negative side-effects for a modern legal system. There are undeniable benefits. Everyone loves parades and plays, and the theatrical elements of legal ritual enhance the unique educational role that public litigation performs. It has been observed that "the criminal trial is a contemporary morality play," and legal pageantry helps to attract the public's attention to these public object lessons.[38] It should be borne in mind, however, that the further the plays deviate from real life the less meaningful and instructive they become for the audience. Excessive pageantry may therefore be educationally counterproductive. The preservation of ancient ritual does, to a point, serve as a useful symbol of stability and consistency in legal values. Again, however, if the solemnities are so silly or so exaggerated as to be perceived by the public as empty pomposity, the symbolism can be destructive of faith in the legal process.

The two most disturbing negative consequences of formalism are related: (a) it vests the legal process with a sacred character that insulates it from criticism; and (b) it cloaks the human dimension of legal decision-making. The quasi-religious aspect of forensic solemnities has often been remarked. J.A.G. Griffith has said: "Scratch a lawyer and find a mystic. Scratch yet deeper and find a religion."[39] Jerome Frank asserted that the use of robes and attendant formalities contributed to a "myth of judicial divinity,"[40] with harmful consequences:

> "The robe, as ceremonial costume, functions as part of a rite, and rites have deep roots in the tabu. An institution ritually protected by tabu is fenced off from the attack of critical reason. So the robe serves to shield the judges and their ways from rational inquiry."[41]

Another way of shielding judges from criticism is by hiding the fact that they rely on their personal judgment when deciding cases. Frank contended that:

> "Just as the robe conceals the physical contours of the man, so it needlessly conceals from the public his mental contours.
>
> The robe. . . gives the impression of uniformity in the decisions of the priestly tribe. Says the uniform black garment in the public mind: Judges attain their wisdom from a single, super-human source; their individual attitudes must never have any effect on what they decide."[42]

Frank believed that this deceptiveness is detrimental: "When the human elements in the judging process are covered up, justice operates darkingly."[43]

Are the Lies Justified?

It is now time to ask, with respect to all the myths examined in this essay, whether it is desirable that the legal system continue to operate "darkingly"; or whether justice would function better by abandoning the lies, and coming out into the sunshine. I am not one who eschews all lying. Falsehood can serve useful ends. To determine whether the mythology of the legal system should be perpetuated, a "cost-benefit analysis" is needed. Let's examine both sides of the ledger.

Benefits of Openness. The greatest advantage of openly acknowledging the actual nature of legal adjudication is that it would ensure that the *relevant issues are addressed* by lawyers and judges, as well as by public critics of judicial decisions.[44]

The first time I appeared before the Supreme Court of Canada was in connection with a refusal by the Manitoba Court of Appeal to consider the merits of an appeal by a client of mine because, in the view of the Court of Appeal, some technical errors of procedure had been committed. In my written appeal to the Supreme Court I dealt exclusively with the alleged technical errors, and made no reference to the merits of the case. The merits were not, strictly speaking, at issue. When I rose to make my verbal presentation to the Court, however, I was immediately bombarded from the bench by questions about the merits. The judges were obviously impatient with arguments about procedure until they knew what the case was "really about." When I explained that my client claimed to be cheated of overtime wages by a complicated and largely fictitious wage/bonus scheme invented by an employer to circumvent wage legislation, and that the procedural objections had prevented the scheme being ruled upon by the Court of Appeal, the judges settled back in their chairs and listened carefully to the technical arguments. They allowed the appeal, and the wage scheme was eventually considered by the Court of Appeal and found to be illegal. By restricting my initial presentation to what was strictly relevant in law, I came close to losing the case. Constant exposure as a law student and young lawyer to the mythology of law had blinded me to the fact that judges can't decide cases usefully on the basis of law alone; they need also, to know what is really at issue between the parties.

Lord Denning, a prominent and often controversial English judge for many years, was notorious for openly acknowledging that many legal questions referred to him and his colleagues were "policy" questions at heart. He would list the policy considerations he weighed when dealing with such questions. A well-known instance was a decision about the circumstances in which damages should be awarded for neg-

ligent conduct leading to "purely economic loss."[45] While Lord Denning's expressed policy views were debatable, the beauty of his approach was that the factors that actually influenced his decision could be openly addressed, both in argument before him and, if necessary, on appeal from his decisions. When the Supreme Court of Canada subsequently dealt with economic loss question, a majority of the judges claimed not to be influenced by policy considerations.[46] The result was a decision that no-one seems to understand. When lawyers have occasion to refer to the Supreme Court's ruling, or to the economic loss issue generally, they are at a loss to know what features of the case or of the issue to stress, since the Supreme Court offered little guidance as to what factors dictated its conclusions.

One would like to think that judges always know what actually shapes their thinking, even when they fail to articulate the influences; but that is far from certain. There is reason to suspect that some judges are taken in by the myths themselves, and regard themselves as automatons, or at least as disinterested oracles of a largely self-sufficient system. To the extent that this is so, it is unfortunate. Judges who don't realize that most decisions depend upon their personal wisdom, rather than the operation of some inexorable law, are a hazard. For them the myths *diminish the sense of personal responsibility on the part of the judge* upon which successful adjudication depends.

The myths that shroud the judicial process can also *prevent effective public scrutiny and criticism* of the process. The chief reason that adjudication is carried out in public is to ensure that the process will be kept honest by constant public vigilance. If the realities of the process are hidden, though the courtrooms are open, that benefit is lost. It is not possible for error or bias to be identified and corrected if the actual bases of judicial decision-making are falsified or obscured by myth.

A final advantage of highlighting the actualities of the adjudicative process may be to head off a recent and regrettable decision taken by some of those who are developing computer applications of law. Computers are starting to play significant roles in the practice of law generally, and legal research in particular. More and more legal data (statutes, regulations, cases and commentaries) are becoming available in electronic form, and this will probably result (after the processes are perfected and lawyers have shed their initial awkwardness with the medium) in more thorough and effective arguments by lawyers. Recently, however, some academics have been attempting to develop programs which not only make relevant information available to the decision-makers, but *substitute automated decision-making for human judgment.*[47] This misguided experimentation is founded upon the root fallacy to which the present essay is addressed, and is doomed

to failure for that reason. In the meantime, however, it diverts time and resources from more productive lines of computer/law research, and contributes to the myth of certainty. A better understanding of the real nature of legal decision-making might help to discourage further flights of fantasy.

Benefits of Secrecy. Let's look at the other side of the ledger. Several advantages for preserving the legal myths are touted.

Foremost among these is the *psychological security* thought to come from the belief that one's vital legal interests will be determined by a process free from bias or chance. We all fear uncertainty, and we like to take refuge in the belief that the persons and processes to which we must unavoidably entrust our welfare from time to time — whether surgeons, aircraft, or courts — are predictable and risk-free. Jerome Frank's classic study *Law and the Modern Mind* addressed this yearning for certainty in legal relations, and concluded that it would be more conducive to mental health in the long run if users of the legal system faced up to reality, rather than continuing to cower behind transparent myths.[48] I'm no psychologist (nor, admittedly, was Frank), but this makes sense to me. As more and more of the formal symbols of certainty — from class structures to religion to marriage — are demonstrated by changing social conditions to be false in their promises of stability, disillusionment takes more and more dangerous forms. We'll be a happier people when we are prepared to acknowledge — and perhaps even savour — the delicious uncertainty of life and law. In any event, even if abandoning the myth of uncertainty contributed nothing to mental health, it would, by assisting us to base our legal strategies on realistic risk assessments, help to reduce the likelihood that the risks will materialize.

From the judges' point of view, even those who are fully aware of the extent of their discretionary power may find it advantageous not to admit openly to the power, for *fear that they will be called upon to exercise it too frequently.* It is a convenient way of refusing discretionary relief in an unmeritorious case to deny that the discretion exists. But the more a judge does so the more difficult it becomes to rely upon discretion when a deserving case comes along. It would be much wiser, in the long run, to concede that judges have broad discretionary powers, and to explain why those powers are, or are not, being exercised in the particular case.

Another alleged advantage of legal mythology is the *respect for law* it is thought to cultivate. It is feared that if people knew how laws are really made and how legal decision-making is really carried out, their willingness to obey the law might diminish in proportion to their awe. There are at least two shaky suppositions here. One is the unproven

belief that obedience is significantly affected by respect and awe.[49] The other, even less plausible, is the assumption that the public's respect for law would be dangerously undermined by the knowledge that it depends heavily on the case-by-case exercise of human judgment. The occasions when people are disposed to think the law an ass seem to me to occur most frequently, not when discretion is being exercised, but when misguided efforts to be legalistic and logical lead to conclusions that defy plain common sense or fairness. A man who was charged with counselling a child to commit a crime by reason of trying to induce a very young girl to have sex with him, was acquitted on the ground that very young children are legally incapable of committing crime; while sexual relations with someone under 14 would be a crime for *him*, it would not be for *her*.[50] The Supreme Court of Canada once held that discrimination based on pregnancy was not *sex* discrimination, but merely discrimination against *pregnant persons*.[51] Decisions of this kind provoke considerable public outrage — not because discerning human judgement was at work, but *because it was not*. Respect for law and legal institutions is more likely to increase than to diminish as the public comes to understand that judges can and usually do employ intelligent discretion in place of the silly chop-logic reflected by the above illustrations.

Related to the contention that mythology reinforces respect for the law is the argument that it also fosters *respect for the bench,* and general acceptance of an appointed judiciary in an otherwise democratic system of government. If judges are perceived as members of an anointed priesthood, whose task is to devine the eternal truths embodied in legal scripture, rather than to exercise human judgment about human problems, it may be easier to justify their selection by appointment on the alleged basis of their priestly competence. If the public were better informed about the actual adjudication process, it is feared, they might demand an elected judiciary like that which exists in State courts in the United States. It is highly improbable, however, that such a demand would ever be acceded to. The dangers of an elected judiciary are well known, and I believe that the Canadian Constitution prohibits the phenomenon in this country for at least most levels of court.[52]

While a wider public awareness of what judges really do could well lead to a critical re-examination of existing procedures for selecting judges, that would not necessarily be an unwelcome development. Sound human judgment is not necessarily conferred by either a university degree in law or years of experience in the legal profession. As the generally successful experience with juries has demonstrated over the centuries, it is a quality often found outside the legal profession, even

where legal disputes are concerned. It is certainly not a concomitant of associating with the political party currently in control of judicial appointments. As an appreciation grows that it is sound human judgment that counts, above all, in the judicial process, it may be possible to persuade governments to seek qualities beyond legal expertise and party loyalty.

Heavier reliance on juries and other, perhaps novel, types of lay adjudicators, could also be in the cards. Surely a society that really knew what it was about would devise methods to employ the wisdom and humanity of people like Edgar Friedenberg in legal dispute resolution.

Conclusion

The only conclusion that seems possible finds expression in yet another aphorism, this one biblical: "The truth shall make you free" (John 8:32). It is, I think, a fitting idea with which to end a contribution in honour of Edgar Friedenberg, whose scholarship and life exemplify the adage.

NOTES

1. Attributed to Benjamin Disraeli in Mark Twain's *Autobiography*.
2. John Adams, *Novanglus Papers*, 1774.
3. L. Fuller, "The Morality That Makes Law Possible," in *The Morality of Law* (New Haven: Yale U. P., 1964), 33.
4. "The blindfold is a relatively recent addition to the imagery of Justice. . . . (T)he blindfold was not a standard element in the depiction of Justice until the sixteenth century. Before then, artists had used the blindfold as a derisive symbol. . . .(A) well-known 1494 woodcut illustrating Brant's *Ship of Fools* depicts a fool placing a blindfold on the goddess Justice —an image generally interpreted to be sharply critical of ignorant judges, the "blindfools' corrupted by attorneys. By the end of the sixteenth century, the previously derisive interpretation of the blindfold had changed; it became a symbol of impartiality." J. Resnik, "The Iconography of Justice," *Harvard Law Review* 96 (1982): 447-8.
5. Unemployment Insurance Act Reference (1937), A.C. 355 (P.C.). W.H. McConnell, "The Judicial Review of Prime Minister Bennett's New Deal," *Osgoode Hall Law Journal* 6 (1968), 39.
6. D. Gibson, "Repairing The Law of Damages," *Manitoba Law Journal* 8 (1978):637.
7. *R. v. Videoflicks Ltd., et al* 14 (1985), D.L.R. (4th) 10 (Ont. C.A.).
8. J. Hogarth, *Sentencing As A Human Process* (Toronto: University of Toronto Press, 1971).
9. *Lace v. Chantler*, 1 K.B. 368 (1944).
10. It is not even mentioned in the two principal Canadian textbooks on statutory interpretation: E. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworth, 1983); P.A. Cot, *Interpretation of Legislation in Canada* (Cowansville, Qc: Yvon Blais, 1984).
11. *Ontario Film and Video Appreciation Society v. Ontario Board of Censors* 147 D.L.R. (3d) 58, affirmed 5 D.L.R. (4th) 766 (Ont. C.A.), (1983).
12. For a lengthy comparison of legal and literary language, see J.B. White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston: Little Brown, 1973).

13. See *Privacy Act*, C.C.S.M., c. P125, ss. 2 and 3. [4] 14. *Ibid.*, S. 8.
15. *Ibid.*, S. 9.
16. *Ibid.*, S. 12.
17. *Ibid.*, S. 7.
18. *Ibid.*, S. 24(3) (a).
19. *Ibid.*, S. 1.
20. (1965) 47 D.L.R. (2d) 448 (B.C.S.C.).
21. W. Twining, *Karl Llewellyn and the Realist Movement*, (London: Weidenfeld and Nicolson, 1973), 242.
22. Cited with approval by L.J. Russell in Sydall v. Castings Ltd. 1 Q.B. 302, at 321 (C.A.), (1967).
23. K. Llewellyn, Encyclopedia of Social Sciences, vol. 3 (New York: Macmillan, 1931), 449.
24. A.C. 716 (H.L.), 1952.
25. Statement re precedent: 3 All E.R. 77 (H.L.), 1966.
26. R.J. Terrill, "Humanism and Rhetoric in Legal Education: The Contribution of Sir John Dodderidge (1555-1628)," *Journal of Legal History* 2 (1981): 30, 41.
27. S.C.R. 513, 18 D.L.R. (2d) 81 (S.C.C.), 1959. See P. Weiler, *In the Last Resort*, (1974), 58.
28. 47 D.L.R. (3d) 650 (Ont.D.C.), 1974.
29. 3 All E.R. 801 (H.L.), 1975; *Schorsch Meir v. Hennin*, 1 All E.R. 152 (C.A.), 1975.
30. Denning, *Its Disciplines*, 308.
31. D. Gibson, "Judges As Legislators: Not Whether But How," *Alberta Law Review* (forthcoming).
32. A.S. Miller, *Toward Increased Judicial Activism* (Westport Conn.:Greenwood, 1982).
33. Canada Evidence Act. R.S.C., C.E10, s. 4(3), 1970.
34. Morton, *The Function of Criminal Law in 1962* (Toronto: CBC, 1962), 26.
35. J. Hogarth, *Sentencing As A Human Process* (Toronto: University of Toronto Press, 1971).
36. H.L.A. Hart, "Bentham and the Demystification of the Law," *Manitoba Law Review* 2 (1973): 36.
37. J. Frank, "The Cult of the Robe," in *Courts on Trial* (New York: Atheneum, 1949), 254, 256.
38. Morton, *Function of Criminal Law*, 30.
39. M. Ginsberg, *Law and Opinion in England in the 20th Century* (London: Stevens, 1959), 117.
40. Frank, *Cult*, 260.
41. *Ibid.*, 256.
42. *Ibid.*, 261; 256-7.
43. *Ibid.*, 261.
44. S. Wexler, "Discretion: The Unacknowledged Side of Law," *University of Toronto Law Journal* 25 (1975):120.
45. *Spartan Steel v. Martin*, Q.B. 27 (C.A.), 1973.
46. *Rivtow Marine v. Washington Iron Works*, S.C.R. 1189 (S.C.C.), 1974.
47. R.E. Susskind, "Expert Systems in Law: A Jurisprudential Approach to Artificial Intelligence and Legal Reasoning," *Manitoba Law Review* 49 (1986):168.
48. Jerome Frank, *Law and the Modern Mind* (Gloucester, Ma.: Peter Smith, 1970).
49. D. Gibson and J. Baldwin, *Law in a Cynical Society: Opinion and Law inthe 1980s* (Calgary: Carswell, 1985).
50. Unreported decision of Manitoba Court of Appeal.
51. *Bliss v. A.-G. Canada* 1 S.C.R. 183 (S.C.C.), 1979.
52. Superior Courts: Constitution Act, s. 99 ands. 96, 1867. District and County Courts: ibid., s. 96.Inferior Courts: Canadian Charter of Rights and Freedoms, s. 11 (d) (criminal) and (perhaps) ss. 7 and 15 (civil).