Law as Mask—Legal Ritual and Relevance

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In this Article, Professor Weyrauch examines the way in which the legal process "masks" the humanity of its participants. He suggests that such masks are inevitable attributes of any legal system, concluding that we can change the masks of the law, but we cannot eradicate them.

Professor John T. Noonan, Jr.,[1] has shown that some forms of legal reasoning have the potential to dehumanize persons through the use of conceptual "legal masks."[2] This striking metaphor puts into question familiar and fundamental aspects of law and legal processes. Professor Noonan presents an eloquent plea, supported by well-chosen illustrations, for greater consideration of persons, not to the exclusion of rules of law, but to overcome the tendency of the legal process to ignore its individual participants.

Professor Noonan's insights have great appeal. His criticism may be justifiably leveled at the entire legal system. To carry the discussion one step further, many concepts, whether legal or not, may have the intrinsic capacity of masking human reality. The concepts "fact" and "reality," for example, are no less amorphous than legal concepts and are equally amenable to being used as masks, perhaps more so because they appear to be clear. The concept of "property" has been used to enslave people, as Noonan shows, but so have the concepts of "love" and "freedom," and sometimes more effectively. The problem may be insoluble.

There are also positive attributes of masking. It is beneficial that lawyers and judges do not always comprehend the human significance and the gravity of their acts. Such insight might make them cynical and eventually ineffective in their tasks, especially their task of rendering peace as skilled craftsmen even at the cost of occasional injustice. The public too, including the contestants, may need to avoid

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2. J. NOONAN, PERSONS AND MASKS OF THE LAW—CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS (1976).

knowledge of embarrassing details in order to maintain their expectation that legal reasoning will remain on a level of neutral abstraction.

The utility of the masks that dominate legal analysis should not protect them from further examination, however. Their use may be related to the choice of values and the exercise of power that are traditionally manifest in the legal process as a discourse between plaintiffs, often have-nots, and defendants, often haves. Perhaps the styles of legal reasoning brought into focus by Professor Noonan are merely incidental to this perpetual and necessary social conflict.

I first present Professor Noonan's account with my comments. I then discuss the concept of "legal masking" as one closely linked with contemporary rules of evidence in their relation to substantive law, in particular with conceptions of relevance. Thereafter I compare the metaphorical term "masks of the law" with the use of actual masks for purposes of social control in tribal rituals, and examine the connections between the modern social functions of law and those of masks in earlier societies. The use of the metaphor "mask" is not accidental, and the parallels in different forms of legal cultures are sufficiently close to be reflected upon. In conclusion I suggest the inevitability of masks in the settling of disputes and perhaps even in the ways people think. My discussion may shed some light on a topic of great obscurity, the ancient relation between aesthetics and legal practice.

I

NOONAN'S MASKS OF THE LAW

Professor Noonan traces the methods used in legal analysis to disguise reality, beginning with early legal education at the University of Bologna and continuing through contemporary American practice. At Bologna hypotheticals were first used to illustrate legal problems.[3] Hypotheticals and symbols, such as "A and B" or "P and D,"[4] remain important tools of modern legal teaching. This method of legal analysis, however, systematically neglects questions such as: What is the plaintiff's or defendant's personal history? Of what importance are the

3. The use of hypotheticals in Bologna was probably part of a slow process toward academic freedom. The teachers, who as monks were subject to church discipline, could defend themselves by asserting that a particular statement was not meant to be "real." Copernicus' work, for example, was introduced as a mere hypothesis for the use of astronomers and not as description of reality. *See* R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 40 (1955). Medieval law professors and judges used high-level conceptualism and neutrality to shield themselves from repressive state and church authorities. *See* Falk & Shuman, *The Bellagio Conference on Legal Positivism*, 14 J. LEGAL ED. 213, 217-18 (1961).

4. This usage is also of ancient origin. *See* Mellinkoff, *Who Is "John Doe"?*, 12 U.C.L.A. L. REV. 79, 81 (1964) (referring to the uses of A, B, C, and D by Coke and Littleton and to the uses of *Titius* and *Seius* in Roman law).

parties' social class, race, and sex? In what social and economic context did the litigation arise? What are the likely long-term consequences of the adjudication on the parties' lives? Thus, while teaching techniques emphasize the development of analytic skills, the reduction of people to symbols suppresses their identities and often "masks" important aspects of their plight.

Legal scholars would agree with Professor Noonan that rules rather than facts dominate modern legal education and scholarship. Procedural details of a case, such as its disposition in the lower courts and the result on appeal or remand, are frequently edited out of casebook reproductions and other legal literature. The traditional casebook conveys the message that such details contaminate the purity of substantive legal analysis.[5] A casebook editor reduces a long case to two pages emphasizing the specific rule the editor wants the students to learn and admitting, by editorial paraphrase if necessary, only those facts that are essential for that particular rule. Legal analysts regularly omit information about the lawyers representing the parties despite the lawyers' important roles. The names of concurring or dissenting appellate judges and trial judges are similarly suppressed. Legal processes are built upon the assumption that emotional considerations are relevant only to a very limited degree. One step removed from the trial experience, appellate processes are especially likely to be detached from human factors and concerned with legal masks, and appellate cases are of course the basis of legal analysis. In general, modern legal scholarship is concerned with social policies rather than persons. The capacity to think in abstract terms appears to be the measure of legal skill and intelligence as perceived within our culture.

Professor Noonan does not deny that rules are indispensable. Legal rules regulate the conduct of an indefinite number of persons in an indefinite number of situations. Institutions survive because they are independent of particular individuals. For example, corruption can be blamed on individuals while the institution remains intact. The neutrality of judges shields them from personal attack and protects the integrity of litigation. Legal decisionmakers, including practicing

5. *See* J. NOONAN, *supra* note 2, at 7. *But see* R. DONNELLY, J. GOLDSTEIN, & R. SCHWARTZ, CRIMINAL LAW (1962); J. GOLDSTEIN & J. KATZ, THE FAMILY AND THE LAW (1965); J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, PSYCHOANALYSIS PSYCHIATRY AND LAW (1967). For an almost exclusive emphasis on persons rather than legal rules, see H. FREEMAN & H. WEIHOFEN, CLINICAL LAW TRAINING INTERVIEWING AND COUNSELING (1972).

The deemphasis on procedures, strategies, and outcomes has other sources as well. A philosophy of legal skepticism and speculative thinking appears to prevail in elite law schools in the United States, and the belief that law can answer any specific legal problem is regarded as naïve. Attention to trial strategies and outcomes is regarded as mere vocationalism. Middle and lower status law schools, on the other hand, tend to foster a positivistic attitude that "the law" can give detailed answers to specific propositions. Neither approach is concerned with the individual litigant, lawyer, or judge. *See* Klausa, Book Review, 25 AM. J. COMP. L. 164, 167 (1977).

lawyers, have a legitimate need to avoid personal responsibility for decisions that frequently must be made on the basis of insufficient or conflicting information. Rules and persons, however, are equally important for justice, and emphasis on one over the other, warns Professor Noonan, produces monstrous results.[6]

Professor Noonan uses the "mask" metaphor to describe legal constructs that suppress the humanity of participants in the legal process. "Property" as applied to persons in slavery is such a mask.[7] References to "the court" or to "the law" similarly mask the personal predispositions of an individual judge or lawmaker.[8] Noonan illustrates his mask metaphor with histories of some of the most revered figures in American law—Wythe, Jefferson, Holmes, and Cardozo. Any lesser figures would have done. Although he has uncovered shocking details about these great lawyers, Noonan does not imply that they were more prone to use legal masks than their contemporaries or successors. Rather, if "the best lawyers of their age, our best—put on masks, who could have done differently?"[9]

George Wythe and his friend and former student, Thomas Jefferson, are tragic figures in Professor Noonan's history. As lawyers they gave substantial and sometimes emphatic support to the slave laws of Virginia.[10] But both also lived with and fathered children of black

6. Our jurisprudence, according to Professor Noonan, has emphasized the dangers that result from an abandonment of rules. In reaction he deliberately stresses the place of persons in law without denying, however, that "monsters" can be produced by neglecting rules and emphasizing persons. *See* J. NOONAN, *supra* note 2, at 14-19 (referring to Pound, *Juristic Science and Law*, 31 HARV. L. REV. 1047, 1059-62 (1918); Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22-24 (1967); and M. KADISH & S. KADISH, DISCRETION TO DISOBEY 29-31, 217-18 (1973)).

7. Additional work by Professor Noonan on slavery has resulted in another recent book, THE ANTELOPE—THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS (1977). The book deals with the fate of 281 Africans on board a slave ship seized by a United States Treasury cutter in 1820, when importing slaves was illegal although ownership of slaves was not. Sale of the ship, The Antelope, to benefit the lawyers handling the case posed no problem, but disposition of the Africans who found themselves legally free, at least in theory, on American soil, put the American legal system under severe strain. The adjudication, in which the Africans were neither parties nor persons represented, took eight years. During this period they remained in the custody of a United States Marshall who used them for his own purposes as if they were his slaves. It appears that the majority of the Africans died, others were returned to Africa, and some, "for humanitarian reasons," finally wound up as slaves of a United States Congressman from Georgia. At the culmination of these events is an opinion of Mr. Chief Justice John Marshall who saw issues of momentous importance "in which the sacred rights of liberty and of property come in conflict with each other." *See* The Antelope, 23 U.S. (10 Wheat.) 66, 113 (1825). *See also* 25 U.S. (12 Wheat.) 546 (1827) (remaining Africans to be unconditionally delivered to the United States, without the precedent payment of expenses); 24 U.S. (11 Wheat.) 413 (1826) (method of disposition over certain Africans certified to the United States Circuit Court for the District of Georgia).

8. *See* J. NOONAN, *supra* note 2, at 21-22.

9. *Id.* at 27.

10. Much of the litigation before Wythe's Chancery Court involved property in slaves. It would have been impossible to be a practicing lawyer or judge in Virginia at that time without supporting the institution of slavery, and Wythe's reported decisions make this quite clear. *See* J.

women whom, under the laws of Virginia, they could own but not marry. Both maintained their public lives, as lawyers and politicians, by applying the legal mask of property to slaves. Their private lives culminated in tragedy when, in 1806, Wythe and his black son, Michael, were murdered by an enraged and greedy white relation, and Jefferson, living under similar conditions, was subjected to threats of scandal and intimidation. Wythe's life companion, Lydia Broadnax, survived, but as a black woman she could not testify against the white murderer. The latter was acquitted.[11] Jefferson, then President and named as trustee in Wythe's will to the benefit of Wythe's black family, kept quiet.[12]

There was no tragedy about Oliver Wendell Holmes. He knew his powers, and he asserted them. Noonan analyzes Holmes' decision in *American Banana Co. v. United Fruit Co.*[13] which, in effect, helped protect an established New England monopoly against the challenge of an Alabama newcomer who had tried to cut into the banana import market. United Fruit had engaged in a plethora of corrupt practices, including bribery of high-ranking Costa Rican officials, invasion of the territory of Colombia (later Panama) by Costa Rican soldiers to seize the newcomer's banana plantation, and clever legal maneuvers through respected and well-connected American lawyers.[14] The company se-

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NOONAN, *supra* note 2, at 54-61. As a practicing lawyer, Jefferson applied the slave laws of Virginia. He owned about 200 slaves. *See* H. MAY, THE ENLIGHTENMENT IN AMERICA 300 (1976). When he and Wythe as Virginia legislators had a chance to adopt Blackstone's view that fundamentally opposed slavery, 1 W. BLACKSTONE, COMMENTARIES *123-*130, *423-*425, they cast their negative votes because a wholesale adoption of the COMMENTARIES would have resulted in protracted litigation and thus, in Jefferson's words, would have "render[ed] property uncertain."

11. *See* J. NOONAN, *supra* note 2, at 61-62. The murder was committed by George Wythe Swinney, a white grandnephew and prospective heir of Wythe. By poisoning all members of Wythe's family with arsenic, Swinney, who was in need of money, attempted to increase his inheritance. Young Michael seems to have died immediately. Wythe survived long enough to disinherit Swinney, and Lydia recovered. The murder trial of Swinney was a sensation in Virginia. White society felt that Wythe had by his last will advertised his cohabitation with a black woman. The acquittal of Swinney for the murder of Wythe and the quashing of the indictment for the murder of Michael were perceived as vindication of slavery and a way of life. Jefferson, who a few years earlier had been viciously and publicly attacked in the press for his relationship with Sally Hemings, and who was closely counected with the murder scandal by being appointed trustee in Wythe's will, must have felt severely threatened. *See* F. BRODIE, THOMAS JEFFERSON, AN INTIMATE HISTORY 344-75, 389-92 (1974).

12. Fear of a renewal of scandal about his private life was only one reason of many for Jefferson's silence. He was deeply concerned about the successful slave revolt in Haiti under Toussaint L'Ouverture and Jean Jacques Dessalines, which he feared could spread to the United States. *See* F. BRODIE, *supra* note 11, at 343-44. On the other hand, he felt that slaves, once emancipated, would have no place in the United States, but should depart for a new land. Even these measures, he thought, should wait until the public was ready to accept them. *See* J. NOONAN, *supra* note 2, at 50-54.

13. 213 U.S. 347 (1909).

14. *See* J. NOONAN, *supra* note 2, at 73-100. Referring to *American Banana*, Noonan has pointed out in a recent article that lawyers are likely to be consulted for and drawn into corrupt

cured the collaboration of persons of distinction: Moorfield Storey, Henry W. Taft, and Secretary of State Elihu Root. Holmes upheld this maze of stratagems by a terse assertion that the sovereignty of Costa Rica precluded the argument that its actions were anything but law. It could not be unlawful "to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper."[15] Noonan does not question the good faith of Holmes, but he points out the mask of "sovereignty" that covered a reality of graft and raw power.[16]

Professor Noonan's account of Benjamin N. Cardozo's use of masks is even more disturbing.[17] Helen Palsgraf, a poor, working class mother of three, sued the Long Island Railroad for damages for injuries that she sustained in a freak railroad accident. The New York Court of Appeals, under Cardozo's decisive influence,[18] denied Mrs. Palsgraf recovery.[19] Cardozo's famous opinion reduced the complex facts of the case to a bare minimum. Mrs. Palsgraf was transformed into a "plaintiff" without age, family status, or occupation. The opinion omitted the nature of her injury, the amount of damages that she sought, and the size of the jury award.[20] Mrs. Palsgraf lost on the

practices by their business clients. He gives some suggestions on dealing with the complexities of international legal practice. *See* Noonan, *Bribes and the Boycott: The Responsibilities of American Lawyers*, 62 A.B.A.J. 1606 (1976). The article was prompted by the series of international scandals involving American business, among them an alleged payment of $1.25 million by United Brands Co. (formerly United Fruit Co.) to President Oswaldo Lopez of Honduras who, as a result, was ousted from office. *See* McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L.J. 215, 215 n.2 (1976). The United Brands Chairman of the Board, anticipating the Oswaldo Lopez scandal, committed suicide in New York City on Feb. 3, 1975. *See* Galbraith, *Bananas*, N.Y. REV. OF BOOKS, Oct. 14, 1976, at 10.

15. American Banana Co. v. United Fruit Co., 213 U.S. 347, 358 (1909). This holding has continuing validity today. *See* McManis, *supra* note 14, at 233-35.

16. For a contemporary use of "sovereignty" as mask, see Fiallo v. Bell, 430 U.S. 787, 795-96 n.6 (1977).

Noonan mentions that Holmes would have loathed the suggestion that any general preference for the rich or powerful played a part in his thinking. J. NOONAN, *supra* note 2, at 104. While this is probably true, it does not explain the fundamental problem of "good faith." It is difficult to believe that Holmes was unaware of the implications of his decision. But his visionary perception of law very likely gave him the deeply felt authority to decide without regard to those implications. The same attitude guides the many lawyers for whom the daily practice of law is an exercise in which legal analysis simply "falls into place" and coincides with their unconscious preferences. The dichotomy of "good faith" or "bad faith" is too simplistic to aid an analysis of the judicial process.

17. *See* J. NOONAN, *supra* note 2, at 111-51.

18. On Cardozo's skill to orchestrate the members of the court in judicial conferences, see J. NOONAN, *supra* note 2, at 134; Lehman, *Judge Cardozo in the Court of Appeals*, 52 HARV. L. REV. 364, 369 (1939).

19. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

20. *Id.* at 340-41, 162 N.E. at 99. The statement of facts is unusual insofar as it appears in extraordinarily terse and complete form in the first paragraph of the opinion. This style of opinion writing supports Noonan's and Prosser's belief that Cardozo tried in *Palsgraf* to promulgate "a law professor's dream of an examination question." J. NOONAN, *supra* note 2, at 120; W. PROS-

striking legal theory that her injuries were outside the scope of the risk, which Cardozo defined as the "risk to another or to others within the range of apprehension."[21]

Contrary to his appearance of impartiality, Cardozo had a personal stake in the outcome of the case. As one of the collaborators in drafting the Restatement of Torts, he was engaged in the pursuit of an abstract truth. At the time *Palsgraf* was about to be argued before his court, Cardozo attended an American Law Institute (ALI) meeting at which the facts of the case were presented as a "perfect illustration" of the unforeseeable plaintiff problem.[22] By a margin of one vote the group adopted a position which would deny Mrs. Palsgraf recovery. Cardozo abstained from the vote. In the actual case, however, Cardozo adopted and refined the ALI's unforeseeable plaintiff rule.[23] Thus, Helen Palsgraf became a pawn in an irregular, bifurcated procedure in which two separate institutions participated—one a quasi-legislative, private body of legal scholars, the other the state's highest court—with Cardozo acting as intermediary.[24] Her case became an abstract proposition drained of life. The impersonal mask of the unforeseeable plaintiff was imposed on Mrs. Palsgraf, and the railroad

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SER, TORTS 254 (4th ed. 1971). Cardozo's aims were apparently more scholarly than judicial in that he appeared to be concerned more with a quest for an abstract truth than with a just resolution of an individual dispute.

21. 248 N.Y. at 344, 162 N.E. at 100.

22. *See* J. NOONAN, *supra* note 2, at 148; Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 4-8 (1953).

23. *See* J. NOONAN, *supra* note 2, at 150-51; Prosser, *supra* note 22, at 8; RESTATEMENT OF TORTS § 165 (Tent. Draft No. 4, 1929); RESTATEMENT (SECOND) OF TORTS § 281 (1965).

24. Noonan admits that it is not always improper for a judge to listen to an argument about a point of law out of the presence of the interested lawyers, even if such argument is significant for a case pending before him. This may happen, for example, if he hears issues argued by law students in a moot court case related to a controversy pending before his court. *See* J. NOONAN, *supra* note 2, at 148. It appears, however, that *Palsgraf* itself, not an imaginary case, was made the basis of the discussion before the Bohlen committee of the American Law Institute (ALI), even though the case had not yet been finally adjudicated. *See* Prosser, *supra* note 22, at 4-5. The facts of the case were also inevitably shaped by Bohlen's restatement of them for purposes of pressing home his viewpoint of "no liability."

Bohlen's discomfort with what he knew to be parallel discussions before the ALI and the New York courts may be seen in the minute changes made in the facts of *Palsgraf* used to illustrate § 165 of the Restatement of Torts about to be finally approved in May 1929. The package in *Palsgraf* became "a number of obviously fragile parcels." The unspecified injury to Helen Palsgraf became an injury to "A's eyes," although no eye damage was involved in the actual case. Bohlen may have felt that these minor changes in otherwise identical facts were necessary to demonstrate that the case discussed before his committee had not really been *Palsgraf*. The current editions of the Restatement have abandoned this pretense. The illustration is now identical in all respects to *Palsgraf*, including reference to the scale knocked over by the impact of the explosion thirty feet away. The distance, which had been thus far neglected in the Restatement, was taken from Andrews' dissenting opinion. RESTATEMENT (SECOND) OF TORTS § 281, Comment b, Illustration 1 (1965); Palsgraf v. Long Island R.R., 248 N.Y. 339, 356, 162 N.E. 99, 105 (1928) (Andrews, J., dissenting).

gained in the process.[25]

II

RELEVANCE

A. Masks and Relevance

Professor Noonan bases his discussion on the premise that if more information is known about the participants in legal processes the results might be more consistent with our sense of justice. He furnishes facts neglected by courts and legal scholarship to make this point. The invocation of the mask metaphor within a legal context to describe this neglect of facts is original and valuable. The concept of relevance[26] is by contrast one every lawyer is familiar with.[27] Yet the concepts of mask and of relevance are interrelated because both serve to narrow a court's inquiry by excluding information.

The term relevance has a variety of meanings, and it is not always clear to which of them the legal literature refers. Many judicial references to relevance are substantive dispositions in the guise of rules of

25. On the orientation of Cardozo toward the defense in personal injury matters, see J. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 49 (1967); Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 373 (1939). *But see, e.g.*, Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

Noonan raises several additional factors that may have influenced Cardozo in *Palsgraf*. For instance, what impact had the fee arrangement of Helen Palsgraf's lawyer? Circumstantial evidence from the record indicates a contingent fee questionable under New York law and probably exorbitant in case of success. *See* J. NOONAN, *supra* note 2, at 123-25, 138. What impact that Cardozo's father had resigned from the New York Supreme Court under threat of impeachment for corruption? *Id.* at 143-44. What impact that Cardozo, unlike Helen Palsgraf, never married and never had to care for children? *Id.* at 143. What impact social class and ethnic origin? *Id.* at 132-34. None of these questions goes beyond the problems faced in any adjudication. Cardozo's dual role as judge and member of the American Law Institute, on the other hand, is critical.

New evidence important for a broader understanding of *Palsgraf* has been uncovered. The course of litigation, raising Helen Palsgraf's hopes before destroying them, seems to have had an impact on her life more serious than the accident itself. Even her children and grandchildren were affected. According to an interview with Lilian Palsgraf Farmer, Helen Palsgraf's daughter, her mother died in October 1945, twenty-one years after the accident. Developing a stutter at the time of the trial, she later became mute and spent her life in ill health and depression, apparently as a result of losing the case. *See* Roberts, *Palsgraf Kin Tell Human Side of Famed Case*, HARV. L. REC., April 14, 1978, at 1, 9.

26. The terms *relevance* and *relevancy* are ordinarily used interchangeably. Lawyers, however, often prefer the more archaic *relevancy* to connote specific and limited concerns of a legal nature. *See, e.g.*, BLACK'S LAW DICTIONARY 1454-55 (rev. 4th ed. 1968); 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 24-26 (3d ed. 1940); Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385 (1952). Some contemporary authors favor the term *relevance*. *See, e.g.*, R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 140-247 (1977); D. LOUISELL, J. KAPLAN & J. WALTZ, CASES AND MATERIALS ON EVIDENCE 45-87, 375-472 (3d. ed. 1976).

27. Noonan refers occasionally to relevant or irrelevant facts, *see, e.g.*, J. NOONAN, *supra* note 2, at 141-42, but without discussing the conceptual relation of legal masks and relevance.

evidence.[28] Still another level of confusion blurs the distinction between relevance, a seemingly narrow conception, and other rules of evidence. Our leading casebooks in the field illustrate the extent to which relevance permeates the whole law of evidence.[29] The reason for the apparent confusion is relatively simple. Both rules of evidence and conceptions of relevance act to exclude certain information, often of a human nature, that cannot be subsumed under a given rule, and therefore have elements of legal masks.

A legal construct like "property" can function as a mask in several ways. Attorneys may screen out human information beforehand because they are trained not to see it.[30] Thus some American lawyers of the eighteenth century may not have perceived slaves as anything other than personal or real property. Had the lawyer arguing a case recognized the humanity of slaves, opposing counsel would likely have objected to the pleadings and evidence as "irrelevant." Even if the judge listened to the argument, he would have kept the information from the jury because it was "as a matter of law" outside the scope of the associations connected with the concept of property. In written opinions he could refer to slaves only as property, even if he may personally have regarded them as human beings.[31]

Professor Noonan's illustration of how the concept of "property" becomes a mask when its function is to support slavery by excluding human information presents an extreme case. Any legal construct can be used to keep out human information in less drastic ways. To use another example from the law of property, if we talk about "ownership," we focus on one aspect of complex personal relations. It would be possible to give a vivid description of the characteristics of the

28. James Bradley Thayer furnishes several illustrations: "When a man mistakes his proposition of substantive law and offers evidence to sustain the erroneous view, he is daily told that his evidence is not admissible, when the thing meant is that he is wrong in his notion of the law of damages; or of the legal standard of diligence; or of the scope of the general issue in pleading, or of a plea of payment. In such cases a determination that what is offered in evidence is or is not receivable, means (1) you are wrong in your proposition of substantive law; and (2), having regard to the true proposition, your 'evidence' (*i.e.*, what you offer as evidence) is logically irrelevant." J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 269 (1898) (footnotes omitted). *See also id.* at 511-16.

29. *See, e.g.*, D. LOUISELL, J. KAPLAN & J. WALTZ, *supra* note 26, at 45-87, 375-472.

30. On the proclivity of lawyers to exclude evidence rather than appraise what facts they introduce, see J. MAGUIRE, EVIDENCE COMMON SENSE AND COMMON LAW 10, 221 (1947).

31. Even then, however, a judge may have felt the need to explain, somewhat defensively, how the concept of property includes humans, especially if inheritance or other transfer of this form of "property" was in issue. *See, e.g.*, the language of Wythe in Fowler v. Saunders, Va. Rep. Ann. II (Wythe), 284, 286-87 (Chancery, March 1798): "slaves, perhaps cattle, things needful and convenient for housekeeping, and so forth"; "that effect [transfer of property] may be wrought with as little diplomatic formality in the case of a slave as in the case of a horse, an ox, and the like"; "if herds, flocks, supellectile ware, culinary utensils, and other personal property, had been, as probably they or some of them were, delivered and removed at the same time with the slaves, no man would have made a question . . . ."

"owner," but these human facts are excluded in the context of applying rules. Thus by calling someone an "owner in fee simple" we have masked him, or, if rights of ownership are asserted, the owner masks himself. Illustrations of an extreme and revolting kind make it easy to overlook the universal nature of this phenomenon.

Because legal education emphasizes concepts and rules, it inevitably trains students in the use of masks. Professor Noonan finds this deplorable.[32] One can agree and yet wonder whether masking is not inherent in any form of reasoning. Perceived as a capacity for abstract thinking, intelligence involves the ability to disregard *any* information that does not fit into a particular scope of inquiry, including human information. Skills in differentiating, sorting, excluding, and not seeing the irrelevant are necessary to process masses of chaotic and amorphous facts. Much of legal training, like training in the natural sciences, is concerned with developing this skill.

Thus, abstraction is an integral and necessary part of legal thought. If the lawyer or judge were aware of the human elements of a case, for example, that the plaintiff is in great personal distress, that might affect the exercise of his legal skills. The lawyer or judge might feel empathy, which could interfere with the clarity of legal analysis by raising scruples or emotions.[33] Certainly, this would at minimum slow the decision process.

At the same time, masking serves to fulfill the expectations of the public. Observers of the legal system will suppose that lawyers and judges have acted in good faith in the interests of detached and objective adjudication. The process of abstracting does have less desirable features, making its practitioners appear callous or obtuse—accusations that have perennially been levelled at lawyers. Professor Noonan stresses the negative side of these dynamics, but they are understood more neutrally by lawyers as exclusion of irrelevant facts.

B. Relevance as Value Choice

The evolution of relevance as a legal concept reflects these complexities. Historically there was doubt whether relevance had anything

32. *See, e.g.*, J. NOONAN, *supra* note 2, at ix-xii, 6-7.

33. The effect on legal practitioners is important even in jury trials. The presence of a jury matters less today because of the trial judge's control over the exclusion of evidence for reasons that, in last analysis, are based on expediencies and policies instinctively felt by the judge. *See, e.g.*, J. WIGMORE, *supra* note 26, at § 27; Trautman, *supra* note 26, at 392-98. Historically it is true, however, that jurisdictions which had no jury were less likely to develop a law of evidence in the common law meaning. *See* J. THAYER, *supra* note 28, at 1-5. Judges in the so-called civil law jurisdictions, similar to English chancellors in equity, presumably felt sufficiently secure in their powers to listen to any evidence presented and to exclude what they considered "irrelevant" in an essentially internal process. Perhaps the common law judge, to wrestle jurisdictional power from the jury, raised patterns of proof-taking into law.

to do with legal rules. The choice of what was relevant was theoretically made according to logic.[34] Soon it became evident that the choices were made roughly, loosely, and in a general way according to every day experience.[35] Convenience and practical policy as perceived by ordinary minds were, according to Cardozo, determinative.[36] Necessarily, the judges' decisions reflected the prevailing value judgments of the society in which they lived. In this way, relevance became a useful conceptual tool for discarding arguments and evidence that challenged significant and usually unspoken societal values.

Some writers have stressed the role of judicial discretion and precedent in giving an appearance of order to the mass of potentially relevant information.[37] Some facts can be viewed as likely to mislead the jury, to introduce emotions into the courtroom or, even more bluntly, to waste the judge's time.[38] If so, the judge will find the facts irrelevant. If a judge attempts to explain why, he is likely to refer to logic and reason, daily experience, common knowledge, and proper courtroom atmosphere. Rarely do judges probe in depth beyond the assumptions inherent in these evidentiary rules, apparently because their pronouncements seem self-evident.[39] Such confidence is suspect, how-

34. *See, e.g.*, J. THAYER, *supra* note 28, at 265; Thayer, *Presumptions and the Law of Evidence*, 3 HARV. L. REV. 141, 144 (1889).

35. *See* J. WIGMORE, *supra* note 26, at § 27. John Chipman Gray, when teaching evidence, was reported to have responded to student inquiries "by leaning back time and again at turns in the discussion, and murmuring audibly: *'Shall we let it in? Shall we let it in?'* After which incantation he would state his result." *See* J. MAGUIRE, *supra* note 30, at 2.

Refcrences to logic, reason, experience, and to similar conceptions such as common sense, may have little intrinsic truth value. They merely invoke consistency within given belief systems that may not only vary from time to time and culture to culture, but also clash within a specific legal dispute. *See* Weyrauch, *Taboo and Magic in Law*, 25 STAN. L. REV. 782, 800 (1973). Viewed from this perspective, the various theories on the nature of relevance have a circular quality, insofar as they stay within cultural presuppositions deeply ingrained in legal processes.

36. Shepard v. United States, 290 U.S. 96, 104 (1933) (Cardozo, J.). By way of negative illustration Cardozo stated that rules of evidence are not framed for psychoanalysts. Wigmore had already noted that the result of exclusion of facts, in itself, tells us nothing about the elnsive underlying reasons, although he felt we should strive to know. *See* J. WIGMORE, *supra* note 26, at § 29a.

37. The patterns are not uniform. A precedent oriented approach can be found in, *e.g.*, C. MCCORMICK, F. ELLIOTT & J. SUTTON, CASES AND MATERIALS ON EVIDENCE (4th ed. 1971); J. WIGMORE, *supra* note 26, at § 12(1)(b). For emphasis on policy, *see, e.g.*, R. LEMPERT & S. SALTZBURG, *supra* note 26; D. LOUISELL, J. KAPLAN & J. WALTZ, *supra* note 26. The stare decisis approach to relevance has been criticized. *See, e.g.*, 2 K. HUGHES, FLORIDA EVIDENCE MANUAL § 216(2) (1976); *Trautman, supra* note 26, at 391-96.

38. *See, e.g.*, FED. R. EVID. 403.

39. Kenneth B. Hughes has stressed that the premises for determining relevance are largely unarticulated and elusive. K. HUGHES, *supra* note 37, at § 204. There is no time during a trial for an in depth analysis. *But see* the complex literature on the relevance of mathematical probability statistics in the wake of People v. Collins, 68 Cal.2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968), critically evaluated in Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971). For a recent article in favor of mathematical models as heuristic devices for thinking about relevance, *see* Lempert, *Modeling Relevance*, 75 MICH. L.

ever. Whenever we think that some matter has become so clear that it defies further explanation, it may be more realistic to say that we have reached the outer limits of our capacity to perceive and should try to extend the scope of our perception.

Typically a judge does not disclose the value preferences underlying relevance decisions, although written opinions may often furnish clues. To stay with the materials referred to by Professor Noonan, eighteenth century lawyers in Virginia may have considered it objectionable to refer to slaves as human beings. It clearly did not fit into the logic of concepts of property. Indeed, to admit evidence on the human quality of slaves would have been deeply threatening to the value structure of white Virginians of the times. Logic, reason, and so on, have little to do with this fundamental threat. Similarly, in *American Banana*, the admission of evidence on corrupt business practices and government involvement would have challenged the free enterprise system and capitalism. To consider evidence on the desperate personal situation of Helen Palsgraf would have challenged the concept of neutrality of law. It also would have imported ideas of "social justice," "equalization of wealth," and "socialism." To a judge, any effort to look behind the scheme of relevance provided by legal masks could involve a challenge to his conceptions of law, importing politics into legal processes and threatening society as he perceives it. Insofar as he sees himself as a loyal member of this society, the challenge to relevance becomes a personal attack.[40]

The rules of relevance, in short, have little to do with logic, reason, daily experience, common knowledge, and proper courtroom atmosphere. They are, rather, the product of deep-seated and largely unconscious value choices. Detailed articulation of the reasons for such choices is omitted because the need for such articulation does not reach the consciousness of the judge who in good faith is able to exclude information from his vision, especially when it is of a disturbing human nature. If such information is introduced into the courtroom, opposing counsel is likely to object to it as "irrelevant" because, if it were permit-

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REV. 1021 (1977). The article proceeds, however, under contemporary assumptions on the nature of factfinding that neglect the ancient origins of rules of relevance as legal masks. *See also* Tribe, *supra*, at 1376-77.

40. It was indeed a revolutionary assertion and an attack on the prevailing Cuban judicial system when Fidel Castro, a lawyer by training, argued in 1953 in his trial for his abortive raid on the Moncada barracks that courts should judge persons, and not crimes: "When you judge a defendant for robbery, your honors, do you ask him how long he has been unemployed? Do you ask him how many children he has, which days of the week he ate and which he didn't, do you concern yourselves with his environment at all? You send him to jail without further thought." *See* F. CASTRO, HISTORY WILL ABSOLVE ME (1967), *quoted in* Berman, *The Cuban Popular Tribunals*, 69 COLUM. L. REV. 1317, 1317 (1969). While the revolutionary context is obvious in this instance, any attempt to introduce "irrelevant" matters into legal proceedings involves a challenge, sometimes subtly so, to the established values as protected by rules of law.

ted, it would indeed affect the outcome. The judge may say, more often than not with a touch of irritation, "Excluded as irrelevant and immaterial," when he might as meaningfully have said, "I do not want to hear this at all!"[41] If the lawyer persists he may worsen his client's position and even find himself in contempt for challenging the masks of law.

C. *Relevance and the Persons of the Law*

The effort to unmask the persons of the law is subject to the same dynamics of value choice that underlies legal relevance. If one attempts not to focus on rules to the exclusion of human factors, still there remains the question of exactly what in a person's life is relevant. Any author must exclude certain facts in writing his account, just as judges and lawyers exclude facts in stating the law. This problem can be illustrated with Thomas Jefferson's life. Noonan stresses the public side of Jefferson's life, his support of the slave laws of Virginia in his capacity as lawyer and legislator. But there was a private side to his life that had a bearing on his support of slavery.[42] He had a long-lasting intimate relation with a slave by whom he had several children. To some extent, considering the times, the concept of property as applied to this woman and her offspring may have protected Jefferson's de facto family. By excluding these facts, Noonan accentuates the dehumanizing characteristics of the mask of property as applied to persons. Including them shows that even a blatantly dehumanizing legal mask can be humanitarian in some respects. We must ask which picture of Jefferson—the public or private—more accurately portrays him.

After Wythe's murder because of his cohabitation with an emancipated slave woman, Jefferson's position was complicated by his involvement as trustee of Wythe's estate and by his own intimate relationship with his slave housekeeper, Sally Hemings. There was more to this relationship than mere infatuation. It lasted thirty-eight years and resulted, although this continues to be disputed, in seven children—four sons, Tom, Beverly, Madison, and Eston, and three daughters, Harriet, Edy (both deceased in infancy), and a surviving daughter also named Harriet.[43] A half sister of Jefferson's deceased

41. Even appellate judges have retained some of this power, for instance, by their statement of facts and by emphasizing one rule or legal construct over another. Each shift of wording implies exclusion of underlying facts thought not to be necessary ("relevant") for the opinion.

42. *See* text accompanying notes 10-12 *supra*.

43. My account is based on F. BRODIE, *supra* note 11. References to Sally Hemings and the children appear throughout the book. *See, e.g., id.* at 228-56 (Sally Hemings), 287-300 (Jefferson's children with Sally Hemings), 471-82 (reminiscences of Madison Hemings and Israel Jefferson). The evidence on Jefferson and Sally Hemings, collected from archives, the Monticello Farm Book, and the Reminiscences of Madison Hemings, is persuasive and exhaustively documented by Brodie. Brodie also refutes the rumors that Jefferson's nephew, Peter Carr, might

wife Martha, Sally was a "quadroon" of one-fourth black and three-fourths white ancestry. Some of her children by Jefferson were sufficiently lightskinned to pass as white and to marry into white families. Jefferson seems to have facilitated this for Beverly and Harriet by permitting them, as was then customary, "to run away" rather than emancipating them.[44] Although this extralegal process obscured the lineage of their descendants, the custom of letting the offspring of miscegenation run away removed the mask of slavery more effectively, at least for those who could pass for white, than the legal act of emancipation.

Professor Noonan mentions the family histories, but he does not make them part of his analysis beyond showing inconsistencies in the behavior of Jefferson and Wythe.[45] He seems to say that there was a severe cleavage between the democratic teachings of Jefferson and Wythe and their personal conduct. Their lives as lawyers in Virginia were sustained by the uses of "property" as a mask hiding the humanity of slaves, although they might have pursued more just alternatives. Thus, according to this view, the legal mask becomes something that they could have avoided. The scope of inquiry, emphasizing the public lives of Jefferson and Wythe, appears to justify this conclusion.

A quite different picture emerges, however, when we consider the private lives. It becomes clear that the alternatives for Jefferson and Wythe were limited. They could of course have refrained from establishing longlasting de facto family relations with their black housekeepers. But short of that, there was little they could do. Marriage was entirely out of the question at the time. Leaving the United States was not a realistic alternative. At least as far as Jefferson is concerned, the concept of property as applied to Sally Hemings and the children preserved the integrity of his family at a time when no other viable legal alternatives were available. As "property" Sally Hemings could not be separated from the "owner" Jefferson. Both were subject to the legal

have been the father of Sally's children. *Id.* at 296, 440, 493-98. *But see* the general criticism, without reference to specific facts by way of rebuttal and now probably dated, by Malone and Peterson, as reported in Shenker, *Jefferson Inspires a Prosperous Field for Scholars Making the Most of His Life*, N.Y. Times, Jan. 9, 1975, at 37, col. 1. *See also* H. MAY, *supra* note 10, at 301: "The evideuce is impossible to dismiss, yet certainty is impossible." For newly uncovered evidence, *see* Brodie, *Thomas Jefferson's Unknown Grandchildren—A Study in Historical Silences*, AMERICAN HERITAGE, Oct. 1976, 28.

Any doubt about the validity of the Brodie account is due to the esteemed position of Thomas Jefferson in American history and the strong feelings generated by the issue. *See, e.g.*, J. MILLER, THE WOLF BY THE EARS—THOMAS JEFFERSON AND SLAVERY 162-76 (1977). However, even if the nature of the relationship between Jefferson and Sally Hemmings is not established with certainty, it is still significant for purposes of showing how the problem of relevance underlies any historical analysis. As in legal proceedings, it is a matter of choice whether or not disputed facts are included.

44. *See* F. BRODIE, *supra* note 11, at 435-38. *See also id.* at 292 (letter from Jefferson's granddaughter, Ellen Randolph Coolidge, to Joseph Coolidge, Jr., dated Oct. 24, 1858).

45. *See* J. NOONAN, *supra* note 2, at 54-62.

safeguards developed by the feudal common law of property.[46] His reluctance to emancipate her, as he had promised earlier, becomes therefore at least somewhat understandable. Had Jefferson emancipated Sally, any further cohabitation with her would have become impossible and, after 1806, illegal under the laws of Virginia. Under a statute passed in that year by the Virginia legislature, all emancipated slaves could be banished from the state within twelve months "or sold for the benefit of the literary fund."[47]

Examination of Jefferson's private life shows, then, that even the most outrageously dehumanizing mask can have some positive functions. This suggests that there is nothing inherently wicked in legal masks. Although it "masks" reality, any legal construct has the capacity to be used in various ways, not merely negatively. Another way of putting this is to say that Professor Noonan's use of the mask metaphor excludes as irrelevant certain functions of masks. But his insightful presentation of the masks of the law also invites examination of those other functions, especially the use of masks in enforcing social policies and in achieving social control.

III

LAW AS MASK: SOCIAL FUNCTIONS OF LEGAL MASKS

Professor Noonan's metaphor of the masks distinguishes him from most Legal Realists. It invokes aesthetics, drama, and ancient rites;[48] legal processes acquire some aspects of theater and play[49] and perhaps of magic in the anthropological sense. If we understand ancient magic as being based on a belief that verbal incantations and the casting of spells can affect the universe, legal constructs can be viewed as magical tools for objectification which make persons and human emotions disappear.[50] Even the term "person" has its origins in some aspects of a mask: in antiquity "persona" meant a disguise adopted by the actor.[51]

46. Even today de facto marriage is viewed as less objectionable if its incidents are presented in terms borrowed from the law of property, for example, as a landlord-tenant relationship, co-ownership, or perhaps even cotenancy at will. *See, e.g.*, Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101, 116 n.59 (1976).

47. *See* F. BRODIE, *supra* note 11, at 289-93.

48. Somewhat related is the discussion by Karl N. Llewellyn and E. Adamson Hoebel of the Cheyenne Holy Hat and the Keeper of the Holy Hat. They realized that the Hat, similar to law, was used for purposes of social control. *See* K. LLEWELLYN & E. HOEBEL, THE CHEYENNE WAY 151-57, 319-30 (1941). *See also* Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224 (1942).

49. *See* J. NOONAN, *supra* note 2, at 22-23. This aspect of law has been brilliantly described by the Dutch historian, Johan Huizinga. *See* J. HUIZINGA, HOMO LUDENS: A STUDY OF THE PLAY-ELEMENT IN CULTURE 76-88 (1955).

50. I have described this process in greater detail. *See* Weyrauch, *supra* note 35, at 797-800.

51. *See* H. PITKIN, THE CONCEPT OF REPRESENTATION 24-27 (1967); J. NOONAN, *supra* note

Thus, the legal process has layers of masks building upon masks, or metaphors building upon metaphors, that disguise an elusive reality and, in effect, eliminate it from consideration.

The major role of masks in our legal system is to objectify human conflict and exclude much human information that would be relevant if the only purpose of the system were to render "justice." Masks are not limited to the law, however, and legal masks serve a variety of social functions. Masks aid the exercise of control, are tools for the enforcement of social policies, and are beneficial in the legal system's function as peace-keeper. They appeal to our aesthetic sense of symmetry and balance in law. It is this multiplicity of connotations that makes the choice of the mask metaphor particularly appropriate and ingenious. An examination of the role of actual masks in traditional rituals will illustrate the point.[52]

A. Masks as Agents of Social Control

According to our limited vision, masks are pieces of art used in "primitive" religious exercises. They can also be understood as agents of social control.[53] They were symbols for spiritual forces that sup-

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2, at 27. For a literary description of the interplay between person and mask, see Y. MISHIMA, CONFESSIONS OF A MASK (1958).

52. The following discussion is based primarily on G. Harley, Masks as Agents of Social Control in Northeast Liberia (1950) (32 Papers of the Peabody Museum of American Archaeology and Ethnology, Harvard University No. 2); Sieber, *Masks as Agents of Social Control*, 5 AFR. STUD. BULL. No. II, May 1962, at 8, *reprinted in* D. FRASER, THE MANY FACES OF PRIMITIVE ART 257 (1966); L. Siroto, Masks and Social Organization Among the BaKwele People of Western Equatorial Africa (1969) (unpublished Ph.D. thesis, Columbia University). For the extensive literature in the fields of art history and anthropology, see A. LOMMEL, MASKS: THEIR MEANING AND FUNCTION (H. Fowler trans. 1972); R. THOMPSON, AFRICAN ART IN MOTION (1974); Cole, *Ibo Art and Authority*, in AFRICAN ART & LEADERSHIP 79 (D. Fraser & H. Cole eds. 1972); Siroto, *Gon: A Mask Used in Competition for Leadership among the BaKwele*, in AFRICAN ART & LEADERSHIP, *supra*, at 57; Thompson, *The Sign of the Divine King: Yoruba Bead-Embroidered Crowns with Veil and Bird Decorations*, in AFRICAN ART & LEADERSHIP, *supra*, at 227.

53. L. Siroto, *supra* note 52, has added some qualifications. Siroto stresses functions of masks other than exercising control, such as entertainment, *id.* at 3, and competition for leadership, *id.* at 43-57, 273-76. However, these functions of masks are not inconsistent with characteristics of legal processes. In some cultures law and entertainment can be indistinguishable. Among some Eskimo tribes controversies were resolved in a festive and joyful mood. The contestants traded verbal and physical insults, and the spectators, after much applause, decided who was the winner. Even in case of severe crime there was no other jurisdiction or sanction. *See* E. HOEBEL, THE LAW OF PRIMITIVE MAN 93-99 (1954); J. HUIZINGA, *supra* note 49, at 85-88. Aspects of entertainment and competition for power are not absent in American law, as the proceedings relating to the Watergate scandal show. Television is likely to increase the entertainment value of law.

In regard to the normative aspects of masks, Siroto suggests four elements for purposes of analysis: uniformity, consistency, exclusiveness, and efficacy. Since he discovers weaknesses in any of these elements, he concludes that the premise of masks as agents of social control, while to a considerable extent valid, is overstated. L. Siroto, *supra* note 52, at 22-42. Siroto's analysis, however, confirms conceptual parallels between the ritual use of masks and legal procedures. Law, too, should ideally show uniformity, consistency, exclusiveness, and efficacy. As applied it

ported the authority of the established powers within a given culture group. Use of masks was essential to give sanctity to the decrees that resolved group conflict.[54] Of course, reference to "social" matters is an imposition of contemporary conceptions on cultures that did not necessarily perceive reality in terms of social and legal interactions. Nor were the masks perceived as "art" in the purely aesthetic meaning. The rituals in which masks were used are related in function to our legal proceedings.[55]

The masks were probably recognized as mere symbols by the keepers of the masks, persons of established power such as owners of the land who had an interest in maintaining order or elders who wished to impress their authority on younger men and women. The keepers of the masks nonetheless also believed that proper use would invest them with spiritual powers to exercise governmental authority and to make decisions in crises.[56] Sometimes the masks represented ancestral spirits who could be made responsible for decisions and the administration of justice. The decisions could be preceded by deliberation among the elders under the guidance of the owner of the land and keeper of the mask who acted as a chief justice. They could even consult the mask before an individual decision would become final and binding.[57]

The powers of a mask were also invoked for purposes of lawmaking. The implementation of such laws was sometimes delegated to the keepers of lesser masks to aid in the settlement of disputes arising from credit transactions, collection of debts, neighborhood squabbles, and so on.[58] Keepers of lesser masks could be hired or bought off, leaving open the question whether the payment was, in our terms, a fine, a

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regularly falls short of these aspirations. Nevertheless the capacity of law as an agent of social control is hardly questioned. Apparently Siroto assumes the concepts of "social control" or law to be more certain than they really are. *Consider* Hoebel's three "essential elements" of law—regularity, official authority, and sanction. *See* Pospisil, *E. Adamson Hoebel and the Anthropology of Law*, 7 LAW & SOC'Y REV. 537, 543-47 (1973).

54. *See* G. Harley, *supra* note 52, at 11-12; Sieber, *supra* note 52.

55. Referring to English judges, Johan Huizinga has observed that they step outside ordinary life as soon as they don wig and gown. The wig, rather than merely an antiquated professional dress, functionally "has close connections with the dancing masks of savages." *See* J. HUIZINGA, *supra* note 49, at 77.

Use of masks has survived in European prelenten carnivals, sometimes in the context of mock-trials. Since 1315 such a trial has taken place annually in Stockach, Germany. A "criminal court" with masked judges sits in trial over alleged misdeeds of burghers and politicians. The accused are brought to court by "policemen" and are expected to accept insults and reprimands in good humor. Participation in these mock-courts is viewed as a traditional entrée for political office. *See* Tomkowitz & Thomann, *Hexen, Hänseles und allerlei Narretey*, STERN MAGAZIN, Feb. 17, 1977, at 38, 50.

56. *See* Sieber, *supra* note 52, at 9.

57. *See* G. Harley, *supra* note 52, at x-xi, 11.

58. *Id.* at 11-12.

bribe, or an advocate's fee.[59] One function of masks was to prevent private revenge. If the masks were used in the exactly prescribed form, any other form of sanction, beyond the "legal" form, had to cease.[60]

Thus, ceremonial masks and law perform comparable social functions. Individual decisions are given an institutional or transcendental legitimacy. Those in power can maintain their position by relying on a "higher" authority, protecting themselves from direct criticism. Social conflict can be resolved and defused relatively peacefully. Whether the forces relied upon to achieve these purposes are called the "ancestors," spirits, deities, or "objectivity and neutrality," the effect is the same. Both ancient masks and modern law use masking magically and authoritatively to shape social decisions by imposing a set of implicit values on otherwise chaotic reality.

The idea that our legal system has magical and religious roots, and that there is an identity of functions between tribal masks and legal concepts and rules, is hard to accept because of our belief in the intrinsic rationality of modern law. But this idea is not very different from Holmes' observation that rules survive the forces that give rise to them:

> The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.[61]

Thirty years after Holmes, Freud described in *Totem and Taboo* how a preceding stage of human development, while overshadowed by more recent stages, may continue to be effective in changed appearances.[62] The original customs lose their sanctity and appear as superstition. Thus disclosure of the ancient origins of the beliefs and customs of the legal system will seem superficially ridiculous and deeply threatening. This is particularly so because we believe that contemporary legal reasoning is rational while tribal rituals were not. Anthropologists, however, have pointed out that "rationality" signifies only consistency within a given system of belief.[63] The use of masks for the purpose of social control is, accordingly, just as "rational" from

59. *See* L. Siroto, *supra* note 52, at 33-35, which also notes that this system favored the rich.

60. *See* Sieber, *supra* note 52, at 12.

61. O. W. HOLMES, THE COMMON LAW 5 (1881).

62. 13 S. FREUD, THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 25 (Strachey ed. 1953).

63. *See, e.g.*, E. EVANS-PRITCHARD, WITCHCRAFT, ORACLES AND MAGIC AMONG THE

the perspective of a tribal chief as our use of law for similar purposes is from our perspective.[64]

B. Enforcement of Social Policies

1. The Power of Masks

In American history, legal masks have often been used to enforce social policies. Masks are particularly effective tools for enforcement because they disguise the implicit value judgments of the legal process, for example, by labeling fellow human beings as "property" or "unforeseeable plaintiffs." The beneficiaries of the legal masks discussed by Noonan were the established powers: the landed slave owners in colonial Virginia, the railroads in the first decades of this century, and an established New England business in *American Banana*.[65]

The element of disguise in legal masks is particularly important to their utility. Participants and observers of the legal system are less likely to criticize or even question decisions that appear to be based on an objective application of neutral laws. Participating lawyers and judges are not confronted with personal responsibility for the results.[66] They can indeed ignore personal reproach directed at them in good conscience. The phrase "Government of laws, and not of men" implies the use of masks throughout the legal system. If a losing party comes to a judge, to give a somewhat exaggerated illustration, and asks, "Why did you do this to me?," the judge may answer, "I did not do anything to you. It was the law." The winning party can make the same claim to ward off reproach, and even the losing party may eventually tell himself, "Nobody is to blame; it was the law."

Thus, the parties themselves may prefer the masks. Winners avoid the embarrassment that would result if underlying reasons for decisions were stated,[67] and losers are more easily assuaged by a deci-

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AZANDE 25 (1937); Winch, *Understanding a Primitive Society*, 1 AM. PHILOSOPHICAL Q. 307, 309-15 (1964). *See also* H. PITKIN, WITTGENSTEIN AND JUSTICE 247-50 (1972).

64. *See* Weyrauch, *supra* note 35, at 800.

65. *See* J. NOONAN, *supra* note 2, at 103-05. On legal masks as cover for fundamental political and economic interests, *see* Book Note, 91 HARV. L. REV. 1114, 1115-16 (1978) (J. NOONAN, PERSONS AND MASKS OF THE LAW).

66. *See* text accompanying note 6 *supra*.

67. I have maintained elsewhere that it is a function of law to minimize embarrassment, namely the strain to participants in legal processes that would result if all decisive factors were disclosed. The appearance of objectivity thus has a soothing effect on the parties and the judge. "The qualifications of a lawyer may be judged by the extent to which he succeeds in avoiding embarrassment and anxieties, while participating in a process that still has retained much of its ancient flavor of naked power." W. WEYRAUCH, THE PERSONALITY OF LAWYERS 244 (1964). *See also* Ingber, *Procedure, Ceremony and Rhetoric: The Minimization of Ideological Conflict in Deviance Control*, 56 B.U. L. REV. 266, 269 (1976). In an earlier article Stanley Ingber speaks of a "leveling effect" of legal processes, the criminal process in particular. *See* Ingber, *A Dialectic: The Fulfillment and Decrease of Passion in Criminal Law*, 28 RUTGERS L. REV. 861, 864 (1975).

sion that is not an obvious reflection of social power. Surely the railroad in *Palsgraf* must have preferred to win for legal reasons rather than on some other less respectable grounds. Helen Palsgraf may have felt better losing under a novel legal theory rather than as a victim of overpowering railroad interests or, even worse, as the client of a plaintiff lawyer who annoyed a judge with his objectionable, if only suspected, contingent fee arrangements.[68]

Members of this society may even feel an instinct not to inquire behind the mask of the law. Legal masks, like physical masks in ancient societies, satisfy the quasi-religious faith of people in the righteousness and neutrality of adjudication. As a result, the masks of objectivity, neutrality, and fairness give the legal process an independent power so that it is not merely the tool of dominant social forces.

The independent authority of the law gives lawmakers, the modern equivalent of the holders of the mask, the power to challenge established powers in some circumstances. For example, in *Brown v. Board of Education* the United States Supreme Court used a mask to contradict segregationist interests which, according to the Court, had deprived the plaintiffs of equal educational opportunities guaranteed under the fourteenth amendment.[69] Mr. Chief Justice Warren exchanged one legal mask for another, subtly establishing a new rule of law that would be supported by most of the public. In his fact statement, he called the plaintiffs "minors of the Negro race," while later he referred to them as "children."[70] Obviously, the losing defendants would have preferred the initial classification to capitalize from the associations counected with the dehumanizing racial mask "Negro." The use of the term "children" facilitated the Court's purpose of making race irrelevant by excluding it. The enforcement of this new social policy would have been far less effective if the plaintiffs had been told, "You win because you are blacks, and blacks, now in 1954, have more political clout than in 1896 when *Plessy v. Ferguson*[71] was decided."

2. The Peace-Keeping Function

Similarly, law has an independent social function of keeping the peace. Masks are essential to this function, which in itself limits the possible scope of a factual approach. This poses a dilemma for those legal scholars who, according to ancient tradition, are engaged in a pursuit of truth in the sense of what really happened and for those judges

68. *See* J. NOONAN, *supra* note 2, at 123-25, 138. *See also* note 25 *supra*.

69. 347 U.S. 483, 493-95 (1954) (Warren, C.J.).

70. *Id.* at 487, 493.

71. 163 U.S. 537 (1896). It is interesting that Plessy argued unsuccessfully, among other positions, that the reputation of belonging to the white race "is *property*, in the same sense that a right of action, or of inheritance, is property." *Id.* at 549 (Court's emphasis).

who strive for a just result with full regard to the social background and the historical context of the litigation. They may find it difficult to describe or apply consciously masks in law without damaging the peace-keeping function which requires a certain degree of disguise.

Both substantive and procedural rules serve to keep the peace because they prevent extralegal action. But procedural rules do so to a greater extent. For example, a plaintiff may offer evidence on the content of a contract that he believes is binding. In fact, the pleadings reveal that there is no valid contract at all because its alleged content would violate public policy. A judge may choose to find the evidence irrelevant. Thayer thinks this line of reasoning is impure because it confuses substantive law with an evidentiary rule.[72] But Thayer misapprehends the significance of the law's purpose of minimizing conflict. Similar judicial rulings are not only common but also socially desirable for they may help avoid social confrontation.[73] A losing party would prefer to lose on account of a "technicality" rather than because a judge disagrees with his values or publicly calls him a crook. Since courts usually hint at the real reasons for their decisions, the losing party may let it go at that rather than risk loss of face on appeal. In effect, the judge has overlaid the mask of a procedural rule on the mask of a substantive rule to minimize the law's aggravation of social tension. Perhaps one difference between procedural and substantive rules is that, although both are designed to keep out human information, substantive rules do so to a lesser degree. They mask reality to a lesser extent because they must apply to at least some of the facts of the parties' actual dispute. When there is a choice between the lesser or greater mask, judges can justifiably choose the greater to serve the peace-keeping function.

Thus, legal masks are crucial in minimizing conflict. The characterization of lawyers as professionals rather than as scholars, in other words, as skilled craftsmen who are paid to produce a result, allows them to apply rules that have legitimacy. The rules, for example, a deadline that forecloses appeal although a lower court was in error, necessarily suppress human information. The scope of inquiry, at least in the individual case, seems inevitably narrowed by the purpose of maintaining peace.

3. The Support of Established Powers

Nevertheless, masks may be more important to parties that win than to those that lose or to the rest of society. It is an advantage to prevail because of some rule or concept rather than because of underly-

72. *See* note 28 *supra*.

73. *See* Ingber, *supra* note 67, 56 B.U. L. REV. at 269.

ing human factors. United Fruit probably preferred to win over American Banana because the sovereign powers of Costa Rica prevented an American court from questioning the legality of its actions to being officially told by the Supreme Court that it prevailed because of its better connections, longer establishment, and greater power. The loser can always claim to have been victimized, but to a winner it becomes extremely important to prevail because of the law.

It has been shown that masks usually favor established powers.[74] The conceptual masks of the present legal system reflect the values of the powerful,[75] while the factual approach does not. For example, nineteenth century judges who were close to entrepreneurial and railroad interests developed legal theories that alleviated or minimized liability for lay-offs (breaches of contract) and accidents (torts). The dismissed worker, not infrequently a former slave, was judicially perceived to be under a duty to mitigate the damages caused by the entrepreneurial breach of contract by not "being idle." The courts developed a multitude of legal theories that avoided entrepreneurial liability altogether in cases of "no negligence," "contributory negligence," "assumption of risk," and when damages were caused by the negligence of a "fellow servant."[76] If the injured workman had pointed out that (in the absence of welfare, social security, and workmen's compensation) he would be left to perish, this argument would have been excluded as "irrelevant." Courts also liked to reply at that time that under "freedom of contract" he could have protected himself by an appropriate stipulation, for example, for higher payment.[77] The counterargument of inequality of bargaining power, if the worker's lawyer had thought of it, would also have been ruled "irrelevant."

The courts that had created the legal defenses against contract and tort liability were less willing to be equally creative in the twentieth century. They often refused to engage in "judicial lawmaking," pointing out that changes must come from the legislature. The en-

74. *See* text accompanying notes 53-65 *supra*.

75. Although this may be generally true, it is particularly applicable in personal injury litigation. Inevitably the skills of the plaintiff and defendant lawyers develop differently. Defendant lawyers may seem to be reserved, detached, and rule oriented, while plaintiff lawyers appear to lack objectivity and lean more toward emotional expression and drama. Actually, the views of plaintiff lawyers on law differ from those of defendant lawyers. *See, e.g.*, M. BELLI, MODERN TRIALS (1954, abridged ed. 1963).

76. *See, e.g.*, on the historical evolution of contributory negligence—2 F. HARPER & F. JAMES, THE LAW OF TORTS § 22.1 (1956); Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946). As to assumption of risks, *see, e.g.*, 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 21.4 (1956). As to the fellow-servant rule, *see, e.g.*, R. STEFFEN, CASES ON AGENCY—PARTNERSHIP 107-08 (3d ed. 1969). Professor John Fleming discusses the historical interrelation of all these defenses. *See* J. FLEMING, *supra* note 25, at 4-6.

77. *See, e.g.*, Farwell v. Boston & W.R. Corp., 45 Mass. (4 Met.) 49 (Sup. Jud. Ct. Mass. 1842).

trepreneurial interest had now become the interest of insurance companies which, of course, were protected from hostile legislation by an effective lobby.[78]

In actual litigation these social struggles were often reflected in efforts of injured plaintiffs to spread out the facts of their plight before a jury by means of photographs of their wounds and other demonstrative evidence. The established powers, more often than not now insurance companies, were likely to react in a different style, with cool legal argument, addressed to the judge, pointing out flaws in causality and alternatively raising a host of affirmative defenses. On the whole, the emphasis on factual argument opens up the floodgates that ordinarily contain human misery.[79]

IV

THE INEVITABILITY OF MASKS

Masks are at the heart of the legal process. Legal masks can operate as rules of relevance that in turn may act as camouflaged substantive rules. The rules reflect unconscious value choices and, like masks in ancient law and within a tribal context, function to enforce social policies, usually those of the established powers. The factual approach advocated by Professor Noonan counters these tendencies. But masks permeate legal thinking and therefore limit the scope of the change that is possible.

A. Standards of Choice

In any legal system, a methodology for selecting relevant facts to consider must be chosen. When Professor Noonan argues that rules and persons should complement each other, he is implicitly pleading for a wider scope of relevance.[80] He would have more facts included in legal proceedings. Obviously, it would be impossible to throw open

78. *See, e.g.*, Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968). *See also* Li v. Yellow Cab Co., 13 Cal. 3d 804, 832-34, 532 P.2d 1226, 1246-47, 119 Cal. Rptr. 858, 878-79 (1975) (Clark, J., dissenting). Since legislation was impeded, eventually the courts had to give in by, for instance, permitting comparative negligence instead of contributory negligence, but only in the recent past. *See, e.g.*, Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). *See also* Fleming, *The Supreme Court of California 1974-1975—Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239 (1976).

79. Of course there are exceptions. For example, an insurance company, on behalf of the defense, may make a factual argument about the social impact if it were to lose the litigation and, as a resnlt, had to satisfy many similar claims. But as factual as this *in terrorem* argument is in arguing from effects on society, it is nonetheless a considerably more abstract form of reasoning than showing the persoual misery of Helen Palsgraf.

80. *See* J. NOONAN, *supra* note 2, at 17-28. Perhaps it is not so much the wider scope of relevance as such that matters, but a frame of mind favoring a continued quest for expansion of relevance.

the universe in each legal controversy. The question of which additional facts we should consider remains to be answered in each individual case.

Our system of adjudication assumes traditionally that outcomes can be affected on several levels, in the selection of "the facts," "the issues," and "the law." The skill of the lawyer consists in choosing the facts that will make his client win, then choosing the issues that assure winning, and finally choosing the winning law.[81] In reality these three levels are interdependent and difficult to distinguish, and the process is circular. It is impossible to select facts or issues without underlying legal theory. Obviously any standard that precedes the fact selection is not of a factual nature itself and probably inherently prejudicial. It is a matter of values, just as much as the submerged and unconscious standards that made Justices Holmes and Cardozo select "facts" in an impersonal way.

While an approach that is oriented more toward facts and less toward concepts favors plaintiffs against dominant social forces, it does not avoid the necessity for some rules to guide decisioumakers. A factual approach does not do away with the masking process itself; it ouly alters the values which the system enforces. The effort to individuate legal proceedings and to bring about recognition of the person results in subtle applications of new masks that exclude human factors. The California *Bakke* case is in point.[82] In showing the plight of an individual white applicant to medical school in a proceeding involving only whites as parties, and in masking blacks as nonparties or *amici curiae*, the process excludes past discrimination from clear vision, another important human factor. Thus, legal rules have inevitably the attributes of masks, although some masks allow the introduction of more human information into the legal process, and there are advantages to doing so.

B. Justice, Truth, and Rendering Peace

Professor Noonan's perspective on the legal system offers important and highly useful insights into the conflict between the impersonal approach to dispute resolution and the goal of rendering justice. His arguments for including persons as well as rules in our understanding of the law appear plaintiff-oriented. Seeing the legal process as a relation between love and power, he argues that force can be applied with ease to those that we mask from vision, mostly have-nots. Because we

81. *See, e.g.*, F. COOPER, LIVING THE LAW 6-70 (1958). The high point for use of these skills in the United States was probably in the time of strict common law pleading. They are, however, still more alive in actual practice than is assumed.

82. *See* Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976). *See also* 98 S. Ct. 2733 (1978).

do not see them, we need hardly love them.[83] If we remove the masks and see them as human beings, the power becomes more difficult to apply.

But Professor Noonan's position is more complex than that and his analysis is rooted in a particular perspective. He writes as a historian and legal philosopher who is engaged in a pursuit of truth as an end in itself.[84] Of course the scope of inquiry for the legal historian differs from that of the practicing lawyer. In a sense, this perspective masks some of the practical truths of the legal system from analysis and so limits the scope of inquiry.

There is a conflict between legal and historical-philosophical reasoning that Professor Noonan tries to bridge. Both law and history are concerned with the meaning of the past. But law is more concerned with the subjection of past pronouncements to present social needs, while history is interested in precisely what was said and done. Historians must be empathic to their subjects because their goal is the reconstruction of the past and the persons who lived in the past. According to Professor Noonan, law is sometimes treated as if it were removed from this personal dimension, "the putting together of dead abstractions."[85] The failure to see human conflicts as they are prevents the legal system from educating either lawyers or the public properly. Education demands that standards of conduct be internalized and not merely heard and obeyed. This requires, he concludes, an understanding of the personal, historical dimension of law.[86]

In European academic tradition, law and history were both intellectual disciplines, part of the *Geisteswissenschaften*. But the standards of relevance, of admissible or inadmissible evidence, are different for law, history, and philosophy. At first, the professional lawyer's scope of inquiry appears more constricted than that of the historian or philosopher. Historical and philosophical analyses often take notice of numerous facts that are of little interest to lawyers.[87] When we consider

83. *See* J. NOONAN, *supra* note 2, at xii, 18.

84. *See, e.g., id.* at vii-xiii (Foreword), 152-67 (The Alliance of Law and History).

85. *Id.* at 163.

86. *See id.* at 152-67; Noonan, *The Law as Teacher*, 3 THE HUMAN LIFE REV., Summer 1977, at 8.

87. History and philosophy share certain universal assumptions with the natural sciences, namely that these disciplines are able to produce cumulative increments to human knowledge. *See* Hexter, *Historiography*, 6 INT'L ENCYC. SOC. SCI. 368, 368-69 (1968). While this may be true of legal scholarship and the written pronouncements of high courts, the language of law is ordinarily ephemeral. Lawyers communicate mostly by the spoken word and, if they write, they do not think of themselves as writing for the ages, but as resolving individual human conflict. On the other hand, the rhetoric of lawyers and historians shares certain significant characteristics that differ from what is viewed as acceptable form of expression in the natural and social sciences. Both lawyers and historians feel free to use occasionally the language of evocation. *Id.* How far either discipline can go with evocation is determined by etiquette and standards of relevance. *See, e.g.*, as to history, H. MEYERHOFF, THE PHILOSOPHY OF HISTORY IN OUR TIME 19 (1959).

the whole of the legal process, it appears that law must resolve problems that other disciplines cannot resolve and therefore must deal with matters that would be ignored by nonlawyers. Numerous vital factors are litigated daily that have thus far eluded history and philosophy. Law deals with the minutiae of individual conflict in infinite variety, and it does so with an intensity that would be difficult for history or philosophy to reproduce.[88]

Law is concerned not ouly with enlightenment and justice, which both have to do with intellectual discourse, but also with rendering peace and to some extent ordering social interactions. This function necessitates the development of legal rules, which inevitably become legal masks. The factual approach would impede peace-making and would be contradictory to many of the historical social roles of law.[89] Seen in a broad perspective, the whole of law is a mask, not merely individual legal constructs and rules as applied in a specific case. Law derives much of its popular acceptance, hence its social utility, from being a mask. This allows law to be used to enforce social policies and it is not surprising that law-as-mask will generally support established powers. One can certainly oppose this use of the law. But the question for those who would alter the system is not how to destroy legal masks but which masks should be applied.

The element of disguise in the use of masks makes their inevitability somewhat disturbing. It may help to allay fears if we see that legal masks are related to the phenomenon of legal fictions.[90] Professor Lon Fuller has linked legal fictions to the ways people think. Following Vaihinger, he suggests that thinking consists of a progression of mistakes that are then corrected, just as walking can be viewed as a series of falls that are arrested and corrected just in time.[91] It is easy to see that legal constructs, being to some extent misstatements of reality, invite a continuing process of correction. In comparing masks and legal fictions, it is important not to neglect the ancient evolution of masks in the context of legal proceedings. The masks of law seem to satisfy a deeply felt inner need, probably religious in nature, that to some extent defies reality and efforts at correction. There is a persuasive quality in a mask that would be lost if "naked reality" were presented.

In considering the inevitability of legal masks, it will also help to note that while Professor Noonan's investigations of the masks of law

88. *See* C. CHURCHMAN, THE DESIGN OF INQUIRING SYSTEMS 256 (1971); Cowan, *Decision Theory in Law, Science and Technology*, 17 RUTGERS L. REV. 499, 500 (1963).

89. *See especially* text accompanying notes 72-73 *supra*. *See generally* text accompanying notes 48-79 *supra*.

90. *See* J. NOONAN, *supra* note 2, at 25-26.

91. *See* L. FULLER, LEGAL FICTIONS 118 (1967), referring to H. VAIHINGER, THE PHILOSOPHY OF 'AS IF' (2d ed. C.K. Ogden trans. 1935). On the relation between thinking and the use of metaphors, see 1 H. ARENDT, THE LIFE OF THE MIND—THINKING 98-125 (1977-78).

reveal fallacy, pretense, and subterfuge in their use, he does not exclude from the meaning of "mask" concepts as broad as "construct" and "abstraction." These terms are inherently ambiguous and have developed over time, not as part of a closed logical system. Professor Fuller, to illustrate this point, writes about fictions, concepts, constructs, and metaphors, sometimes using them almost synonymously.[92] Yet his terms, upon further examination, reveal that they are not synonymous, although all of them relate to the ways people think. Thus the term "fiction," as used by Professor Fuller, includes multiple meanings and positive and negative connotations, similar in this regard to the term "mask." My concern is with the interrelation between legal masks, fictions, and conceptions of relevance, a term more readily familiar to practicing lawyers. It is essentially my position that legal masks are not only inevitable and morally neutral, but also eminently practical.

CONCLUSION

Whether we deal with masks of law metaphorically or in a more actual sense, the phenomenon described has wide application. It can be found wherever abstract concepts are applied in any given culture, when, for instance, people speak or litigate. It may seem to have deplorable or laudable effects, depending on one's values. Most of us will disagree with some of the value choices of Wythe, Jefferson, Holmes, and Cardozo without being affected in our respect for them. They were influenced by the preferences of the historical period in which they lived. Since we live in a different era, we are able to perceive this. We also look for a higher degree of insight into our own use of masks in law, and we expect to make greater efforts to reach this level of awareness. Because of the presence of cultural blinders, or masks of which we are not conscious, this task is difficult indeed.

Professor Noonan is justified in demanding of lawyers that they expand the human content of law. But it is essential to realize that any such effort serves to introduce yet another set of implicit value choices into the legal process, in other words, to substitute masks. Although inhumanity must be fought, it is the nature of the legal system and the tasks it seeks to accomplish that inevitably lead to legal "masks." Nevertheless, an area of tension must remain because legal practice and the administration of law require the continued and undisturbed use of legal constructs, while scholarship and some courts of last resort may find it difficult to tolerate what appears to be, at least in part, a suppression of truth and of humanity.

To state the theme of this Article concisely: law as mask is an ancient device to invoke a higher authority in a dramatic ceremony, and

92. *See, e.g.*, L. FULLER, *supra* note 91, at 121.

to channel emotions and events into fixed styles of reasoning that are, regardless of their intrinsic truth, aesthetically appealing and persuasive to the participants and the community. Obviously this insight cannot be widely and publicly shared without impeding vital functions of law. The masks of law must therefore be accepted in their important yet profoundly ambivalent role.