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Active Rationality in Judicial Review

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The requirement that laws be rational[1]—that they make

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1. The rationality requirement is most often identified with the doctrine of substantive due process. This doctrine commands that "a law bear a rational relation to a constitutionally permissible objective [and that the law produce] effects that advance, rather than retard or have no bearing on, the attainment of the objective." P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1004 (1975). *See* Kelley v. Johnson, 425 U.S. 238, 244 (1976) (due process clause "affords not only a procedural guarantee against the deprivation of 'liberty,' but likewise protects substantive aspects of liberty against unconstitutional restrictions by the State"). Judicial consideration of the rationality of legislative classifications is central to equal protection analysis as well. *See, e.g.*, Mathews v. De Castro, 429 U.S. 181, 185 (1976) (equal protection clause requires invalidation of classification that is "clearly wrong, a display of arbitrary power, not an exercise of judgment"); McLaughlin v. Florida, 379 U.S. 184, 191 (1964) ("courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose"). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2, at 994 (1978) ("The Supreme Court, from its earliest examination of socioeconomic regulation, has considered that equal protection demands reasonableness in legislative and administrative classifications."). In addition, the two primary tests for cruel and unusual punishment under the eighth amendment embody rationality requirements. The excessiveness test prohibits forms of punishment that serve no penal purpose more effectively than less severe punishment, *see* Furman v. Georgia, 408 U.S. 238, 279-80 (1972) (Brennan, J., concurring); Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968), while the proportionality test prohibits punishments that are grossly disproportionate to the gravity of the crime, *see* Weems v. United States, 217 U.S. 349, 367, 371 (1910); *In re* Lynch, 8 Cal. 3d 410, 421-23, 503 P.2d 921, 927-29, 105 Cal. Rptr. 217, 223-25 (1973). Courts also have questioned the rationality of certain irrebuttable statutory presumptions. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972). *See generally* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

In the cases of both substantive due process and equal protection, the rationality requirement controls regardless of whether the level of scrutiny employed by the court is that of deferential rational basis review, *see, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938); Williamson v. Lee Optical, Inc., 348 U.S. 483, 491 (1955); L. TRIBE, *supra*, § 16-3, at 996 (deferential test

sense[2]—is one of our most pervasive and insistent constitutional guarantees.[3] Invoking the rationality requirement, courts have struck down statutes, both civil and penal, that were found to lack rationality at the time of their enactment,[4] or that proved to be irrational in light of later-acquired information.[5]

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equivalent to a presumption of legislative regularity or constitutionality); strict scrutiny review, *see, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (strict scrutiny triggered by deprivation of a fundamental right); Minersville School Dist. v. Gobitis, 310 U.S. 586, 606 (1940) (Stone, J., dissenting) (strict scrutiny triggered by law that adversely affects suspect class); or intermediate means-end review, *see, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"). *See also* L. TRIBE, *supra*, §§ 16-30 to -32, at 1082-97; Gunther, *supra*, at 21-48.

2. For a discussion of ways in which laws can be said to make sense, see Bice, *Rationality Analysis in Constitutional Law* (publication forthcoming in 1980). Professor Bice identifies five paradigms of irrationality: (1) actor does not believe that his actions will further his goals; (2) actor believes that his actions will further his goals, but his belief is empirically implausible; (3) actor believes that the goal of his action is in conflict with other goals he deems superior; (4) actor believes that he has not selected the most efficient means of achieving his goals; and (5) actor believes that he has selected the most efficient means of achieving his goals, but his belief is empirically implausible. Although Professor Bice's paradigms seem to concern primarily means-ends, instrumental rationality, this Article does not assume that all laws are intended exclusively, or even largely, to express some form of instrumental rationality. *See* text accompanying notes 152-172 *infra*.

3. *See generally* P. FREUND, THE SUPREME COURT OF THE UNITED STATES 153-54 (1961) (proposing scientific advisory panel to brief Supreme Court Justices on scientific and technological matters); O.W. HOLMES, *Learning and Science*, in COLLECTED LEGAL PAPERS 139, 140 (1920) ("An ideal system of law should draw its postulates and its legislative justifications from science.").

4. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (gender-based statutory classification invalidated using intermediate scrutiny test). *See also* Shapiro v. Thompson, 394 U.S. 618 (1969) (measure that interfered with exercise of fundamental right to interstate travel invalidated, in part, because it failed to promote compelling state interest by least restrictive means).

5. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 492-95 (1954) (statute requiring racially segregated schools struck down because of realization that, among other things, segregated schooling is psychologically harmful to black children in grammar schools); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (statute permitting sterilization of habitual larcenists but not habitual embezzlers struck down in part on the ground that the differences between these two types of criminals could not possibly demarcate relevant genetic categories); Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48 (1924) (classic case of changed facts—"A Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared."). *See generally* Oteri & Silverglate, *The Pursuit of Pleasure: Constitutional Dimensions of the Marijuana Problem*, 3 SUFFOLK L. REV. 55 (1968). Statutes or regulations of this type that seem ripe for constitutional attack include those relating to sexual conduct, pornography, the death penalty, illicit drugs, gender-based differences, constraints on marriage or reproduction, and insanity defenses. *See, e.g.*, Kahn v. Shevin, 416 U.S. 351 (1974) (gender-based classification); Furman v. Georgia, 408 U.S. 238 (1972) (death penalty); Ginsberg v. New York, 390 U.S. 629 (1968) (pornography); Buck v. Bell, 274 U.S. 200 (1927) (sterilization); Durham

This Article is concerned with a slightly different case: that of a person who wishes to challenge a statute for its lack of rationality, but who cannot make the requisite showing of irrationality because the government controls the instrumentalities necessary for generating the information essential to the challenge.

A successful constitutional challenge often requires that the challenger make certain factual showings. A challenge may therefore fail simply because of informational barriers erected by the government. These barriers can take the form of outright bans or moratoria on certain kinds of research,[6] or limitations on access to certain substances needed for testing.[7] The government's blockage of access to necessary information may be veiled or indirect, such as that resulting from its unexplained refusal to underwrite research that ordinarily would be governmentally sponsored.[8] In each of these situations, the government's refusal to permit or to participate in the production of essential information means that the constitutional challenge will fail regardless of its merit. Consequently, a bad law may remain in force far beyond the time when it should have been repealed or declared unconstitutional.

Two cases concerning illicit drug use illustrate this problem. In *United States v. Ward*,[9] the defendant challenged a fed-

v. United States, 214 F.2d 862 (D.C. Cir. 1954) (insanity defense); Berg v. Clayton, 436 F. Supp. 76 (D.D.C. 1977), *vacated*, 591 F.2d 849 (D.C. Cir. 1978) (homosexuality); Morrison v. Board of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) (homosexuality); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (illicit drug use). *See generally* P. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE (1972); Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant*, 63 MINN. L. REV. 1 (1978); *Apricot Power: Washington to Test Laetrile*, TIME, Oct. 9, 1978, at 104-05.

6. For a discussion of recent limitations and proposed curbs on race-based intelligence research, genetic manipulation, and fetal research, see Delgado & Millen, *God, Galileo and Government: Toward Constitutional Protection for Scientific Inquiry*, 53 WASH. L. REV. 349, 349-51 (1978).

7. For example, certain controlled substances, such as cocaine and LSD, can be obtained only through federal dispensation. *See* The Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 811-12 (1976) (establishing schedules of controlled substances classified according to dangerousness and medical value).

8. The government's refusal to fund certain kinds of scientific research may implicate expression-related rights of researchers. *See* Delgado & Millen, *supra* note 6, at 389, 396-97, 401. *But see* Robertson, *The Scientist's Right to Research: A Constitutional Analysis*, 51 S. CAL. L. REV. 1203, 1208, 1267-79 (1978) (right to research is subordinate to government's power to exercise budgetary discretion). *See generally* G. CALABRESI, TRAGIC CHOICES (1978) (when technology is within grasp in "tragic choice" situations, failure to proceed with its development may be morally culpable).

9. 387 F.2d 843 (7th Cir. 1967).

eral marijuana statute on rational basis grounds, arguing that under the current state of scientific knowledge, marijuana was improperly classified because it was placed in the same category as far more dangerous drugs such as opium and heroin. The government countered, arguing that existing studies adequately demonstrated the dangerousness of marijuana. After reviewing the evidence, Chief Judge Hastings of the Seventh Circuit concluded that neither side had presented a persuasive case; he therefore deferred to the judgment of Congress and upheld the statute. Despite his ruling, Judge Hastings expressed misgivings over the strength of the state's case, and called upon the government "to focus attention on the need for definitive research" because the problem was one "requiring the careful attention of the legislative branch."[10]

In *United States v. Castro*,[11] a federal district court considered a similar challenge to a federal statute penalizing persons for distributing cocaine. The defendant argued that cocaine is a relatively harmless substance and that its sale did not warrant the severe penalties called for by the statute. Both sides offered scientific evidence concerning the drug, after which the judge found that "from a medical viewpoint . . . Congress has erroneously classified cocaine with heroin and other opiates for penalty purposes."[12] The judge declined to declare the statute unconstitutional, however, because he felt that other goals, such as a desire to discourage euphoric states,[13] might have motivated Congress. Another factor that saved the statute from unconstitutionality was its corrective clause, which empowered the Attorney General to delete substances from the Act's coverage based on newly acquired information.[14] The judge in *Castro* strongly recommended that the Attorney General reconsider the classification of cocaine, since "[i]t is clearly preferable that the drug laws be based upon more substantial factual evidence than the slender threads of minimum rationality present here."[15]

More than ten years have passed since *United States v. Ward*. If a court today, faced with a similar challenge, found that the federal government had not yet carried out the research urged by Judge Hastings, should that court continue to

10. *Id.* at 848.
11. 401 F. Supp. 120 (N.D. Ill. 1975).
12. *Id.* at 124.
13. *Id.* at 125.
14. *See id.* at 127; 21 U.S.C. § 811 (1976).
15. 401 F. Supp. at 127.

respect the presumption of the statute's constitutionality? Similarly, if the Attorney General fails within a reasonable time to reclassify cocaine, or at least to request the full-scale study urged by the court in *United States v. Castro*, should a court nevertheless sustain the antidistribution statute when it is next challenged?[16]

This Article proposes that, as an aspect of ensuring that laws are rational, courts must in appropriate cases[17] assume the function of protecting society's interest in what might be called "active" or "developmental" rationality.[18] For the sake of manageability the exposition of this novel rationality concept is limited to penal statutes.[19] In Part I, the Article examines the nature of the duty courts may owe to criminal defendants facing prosecution under statutes like those challenged in *Ward* and *Castro*; it reviews many aspects of our judicial system in

16. For a discussion of the slow rate of research into the physiological effects of illicit drug use, see Carr, *Cocaine Today*, HUMAN BEHAVIOR, Mar. 1979, at 43-44; Greenberg, *The Lore of Cocaine*, SCIENCE NEWS, Sept. 9, 1978, at 187; *The Medical View*, TIME, Jan. 29, 1979, at 26.

17. Many commentators feel that society's interest in rational statutes is becoming more important as its dependence on technology increases. Professor Tribe has argued that changing conditions demand adjustments to our notion of due process, and that our decisional structures must vary to promote substantive constitutional ideals and human ends. *See* L. TRIBE, *supra* note 1, §§ 17-1 to -3, at 1137-46; Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

18. The terms "active" and "developmental" rationality are used interchangeably throughout this Article. They are meant to designate the interest that persons have in ensuring that legislation is kept current. The difference between ordinary rationality and active rationality can be seen by comparing two hypothetical statutes. Suppose that Statute *A* was enacted twenty years ago, following extensive hearings. At the hearings, a "case" was made for the factual basis on which the statute rests. Since then, no countervailing evidence has appeared, nor has the government impeded research into the factual assumptions underlying Statute *A*. In addition, no second-order evidence, *see* note 24 *infra*, has been presented which suggests that Statute *A* could be made to appear irrational if certain studies were carried out. Statute *A* is therefore both ordinarily rational and actively rational.

Suppose further that Statute *B* was also enacted twenty years ago, following extensive hearings at which its factual foundations were amply supported by reputable studies. Immediately upon the close of the hearings, however, the government ordered a moratorium on all research into the subject matter of the factual assumptions underlying Statute *B*. Moreover, there is credible second-order evidence that suggests that if the moratorium were lifted, the results of additional research would conclusively demonstrate that Statute *B* is irrational. In this case, Statute *B* would meet the requirements of ordinary rationality, but not the requirements of active rationality.

19. The primary purpose of penal statutes is to regulate human behavior through criminal sanction. This Article is concerned mainly with statutes which deal with criminal conduct that is *malum in se*, rather than regulatory statutes that deal with criminal conduct that is merely *malum prohibitum*. *See* text accompanying notes 209-210 *infra*.

order to demonstrate the system's preference for active or developmental rationality when litigation centers around adjudicative rather than legislative facts. Also reviewed in this section is the related issue of why courts rather than some other institution should assume the duty of actively protecting society from irrational criminal laws. In Part II, the Article considers the elements of the prima facie case that, if shown, should entitle one who challenges a criminal statute to relief, and also discusses the various forms that such relief could take. Part III of the Article analyzes the arguments that can be made against courts' following a policy of actively intervening on behalf of defendants who are prosecuted under statutes that have been effectively removed from rational basis review. The Article concludes that since considerations of policy and institutional competence suggest that active or developmental rationality is an important and justiciable value, courts should develop effective remedies for those defendants whose access to judicial review might otherwise be denied.[20]

I. RATIONALITY AS A PROTECTABLE VALUE: WHY JUDICIAL SOLICITUDE?

A. THE PARADIGM

Imagine a case in which a person wishes to challenge the validity of the criminal statute under which he is prosecuted,[21] but cannot do so successfully because the state controls access to the information needed to mount a credible challenge.[22] The

20. Despite its use of two drug cases to illustrate the problem, *see* text accompanying notes 9-15 *supra*, this Article does not advocate that drugs be decriminalized, nor does it advocate that any substantive area of the law be changed. The Article also does not urge that courts utilize the active rationality concept to revive the excesses of substantive due process. *See* note 111 *infra* (reconsideration of rationality could lead to conclusion that penal statutes need to be strengthened rather than repealed). Moreover, the author does not subscribe to the view that courts may freely invent or find new fundamental interests lurking in every conceivable corner of the Constitution. Thus, while the impact of adopting a standard of affirmative rationality would be significant and highly beneficial, the author does not believe that the number of cases in which it can be successfully invoked will be very great. Finally, this Article does not propose that the government should be required to prove everything conclusively before enacting a statute in a given area. Under the affirmative rationality concept, the government would remain free, however, to pass legislation based on doubt or reasonable guess; the government would not be free to prevent subsequent efforts to show that doubt was not reasonable after all.

21. We therefore are not concerned with cases in which a prosecutorial choice not to enforce an obsolete statute has been exercised.

22. The challenge might be made under the so-called "minimum rationality" test that courts apply when no fundamental interest or suspect class is

challenger is convinced that if governmentally imposed regulatory or funding barriers were lowered, new information would be generated that would prove the statute irrational. To complete our paradigm, assume that the challenged statute was rational when enacted, that is, that there existed sufficient information in the form of reports and studies for it to withstand rational basis attack. Further assume that no new authoritative information that would render the statute infirm has since become available. If reviewed today, therefore, the statute would still meet the minimum rationality standard. By hypothesis, however, our challenger can point to circumstances tending to support his belief that further study would demonstrate the statute's irrationality.[23] In other words, he has reliable second-order evidence[24] that there is first-order evidence available which would show that the statute is no longer rational.

If our challenger can convince the court that the legislature should reexamine the rationality of its own statute when such second-order evidence of irrationality exists, the court has several alternatives open to it. First, it can simply ignore the inference raised by the second-order evidence and insist on conclusive, first-order evidence before taking any action designed to alter the status quo. This means that the statute will remain in effect, perhaps indefinitely, since our defendant does not have access to the precise factual information necessary for striking down the statute. Second, the court can uphold the statute, but express its discontent to the legislature as an admonition that reform of the statute is needed. Finally, the

present, or it might be made using equal protection, eighth amendment, or irrebuttable presumption analyses. Each of these tests contains a rationality requirement of one kind or another. *See* note 1 *supra*. Thus, the active rationality concept must not be identified exclusively with the minimum rationality test applied when courts review run-of-the-mill economic or other legislation that does not implicate a fundamental interest or suspect class.

23. This type of statute suffers from what could be called second-order technological desuetude, that is, irrationality that the defendant cannot prove but feels could be shown if the government were to permit the necessary investigation to go forward.

24. Second-order evidence is that which is not by itself sufficient to overturn a statute, but which suggests that further investigation may lead to conclusive evidence that the statute is fatally irrational. Examples of second-order evidence would include (1) small pilot studies conducted by reputable researchers who have employed research techniques not available at the time the statute was enacted; (2) foreign studies which suggest that a statute is irrational, but which require duplication by American scientists before acceptance; (3) animal studies from which effects on humans can be generalized; and (4) a showing that there was a significant methodological error in the studies upon which a statute was originally based.

court can take some more significant action designed to overcome the blockage of information. The remainder of this section examines instances of judicial action that support this third alternative.

B. Considerations Drawn from the Judicial Process

The first consideration in favor of requiring active judicial review of the rationality of certain criminal statutes is that rationality is a value that our legal system already actively protects in many other adjudicative contexts. Requiring courts to protect this value actively when they review statutes would therefore constitute simply an extension of current practice.[25]

1. *Procedural and Evidentiary Trial Doctrines*

Many of the procedural and evidentiary devices that courts have developed to process information for trial evince a clear-cut concern for the active protection of rationality. For instance, the devices of discovery,[26] compelled production of documents[27] and witnesses,[28] cross-examination,[29] and most forms of motion practice[30] are aimed at making information available to the litigants or to the trier of fact. Sanctions are often provided for persons who without justification refuse to cooperate with these fact-finding processes.[31] Voir dire,[32] state-appointed counsel,[33] and state-provided transcripts for appeal[34] are examples of costly measures that the state underwrites in the hope that they will facilitate access to facts or arguments that will lead to just results in legal dispute. Although there are a few adjudicative rules such as evidentiary privileges that impede the fact-finding function of courts, these rules do so only to promote some other more pressing goal, such as encouraging public confidence in physicians. Courts therefore

25. Arguments more affirmative in character are considered in the next section.

26. *E.g.*, Fed. R. Civ. P. 26-37.

27. *E.g.*, Fed. R. Civ. P. 34, 37, 45.

28. *E.g.*, Fed. R. Civ. P. 45.

29. *See, e.g.*, Alford v. United States, 282 U.S. 687 (1931). *See generally* F. Wellman, The Art of Cross-Examination 27 (1st Collier ed. 1962).

30. *E.g.*, Fed. R. Civ. P. 50.

31. *See, e.g.*, Fed. R. Civ. P. 37 (sanctions for failure to cooperate in discovery include finding contempt, levying fines, assessing attorney's fees and trial expenses, striking claims or defenses, and dismissing actions).

32. *E.g.*, Fed. R. Civ. P. 47.

33. *See* Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963).

34. *See* Griffin v. Illinois, 351 U.S. 12, 18-19 (1956).

tend to construe these privileges narrowly.[35]

One example of active judicial protection of rationality in criminal trials is the rule that requires prosecutors to disclose exculpatory evidence in their possession, at least when so requested by the defense.[36] In this situation, society's desire for accurate and truthful adjudication of criminal cases overrides our legal system's customary preference for the adversarial mode of adjudication.[37] Some cases suggest that the prosecutor's duty to disclose information extends even to evidence that is not positively known to be exculpatory, but that may prove to be so upon further development or investigation.[38] This requirement is tantamount to imposing a duty of developmental rationality on the state, since it forces prosecutors to consider the implications of second-order evidence that merely indicates the existence of more probative first-order evidence. Courts have applied a similar rule in cases in which a prosecutor has information that there may be a suspect other than the person on trial.[39] The rule imposes a duty on the prosecutor to follow up the lead until he is satisfied that the theory of an alternative suspect is groundless. Failure to follow up the lead or at least to disclose it to the defense may result in reversal on appeal.[40] In both these examples, it is no justification for inaction by the prosecutor that he did not know the precise form that the potentially exonerating evidence would take; the prosecutor cannot avert his gaze from such evidence and attempt to obtain a conviction based on a one-sided presentation of facts that he knows may be misleading or untrue.

Another mechanism that illustrates the premium trial

35. *See* 8 J. WIGMORE, EVIDENCE §§ 2195, 2285 (McNaughton rev. ed. 1961).

36. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); *In re* Kapatos, 208 F. Supp. 883, 888 (S.D.N.Y. 1962) (duty arises in part because state has superior fact-finding powers); *In re* Ferguson, 5 Cal. 3d 525, 532, 487 P.2d 1234, 1238, 96 Cal. Rptr. 594, 598 (1971).

37. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); *In re* Ferguson, 5 Cal. 3d 525, 531, 487 P.2d 1234, 1238, 96 Cal. Rptr. 594, 598 (1971). *Cf.* Engstrom v. Superior Ct., 20 Cal. App. 3d 240, 244, 97 Cal. Rptr. 484, 486 (1971) (prosecutor must voluntarily disclose data that impeaches key prosecution witness). The *Engstrom* case provides inferential support for the proposition that in certain situations courts should impose an analogous obligation on the government to cooperate with criminal defendants in "impeaching" the factual assumptions underlying its own statutes.

38. *See* United States *ex rel.* Thompson v. Dye, 221 F.2d 763, 765-67 (3d Cir. 1955), *cert. denied*, 350 U.S. 875 (1955); United States *ex rel.* Almeida v. Baldi, 195 F.2d 815, 819-20 (3d Cir. 1952), *cert. denied*, 345 U.S. 904 (1953); Griffin v. United States, 183 F.2d 990, 993 (D.C. Cir. 1950).

39. *See, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963) (prosecutor suppressed evidence that another person had confessed to crime).

40. *See id.*

courts place on developmental rationality is the set of evidentiary rules that permit inferences to be drawn against parties who decline to produce probative evidence when it is reasonable under the circumstances to expect them to produce it.[41] In many jurisdictions, these rules also permit the trier of fact to draw a negative inference if a party produces evidence that is less probative than that which he might reasonably have been expected to produce.[42] Like the rules that require prosecutors to develop or disclose certain information, this rule is an example of shifting the burden of production simply on the basis of a second-order showing that there appears to be more probative evidence than that which has been produced. Because of the close relationship between the rules governing judicial inference and the standards governing judicial review,[43] the negative inference cases suggest that it is not unrealistic for courts to develop analogous doctrines for application to judicial review of criminal laws.[44]

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41. *See generally* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 272, at 656 (2d ed. 1972); J. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 507 (1895); 2 J. WIGMORE, EVIDENCE §§ 285-91, at 162-88 (3d ed. 1940).

42. *See, e.g.*, Georgia S. & F. Ry. v. Perry, 326 F.2d 921, 925 (5th Cir. 1964); Secondino v. New Haven Gas Co., 147 Conn. 672, 675, 165 A.2d 598, 600 (1960); Carr v. Amusement, Inc., 47 Wis. 2d 368, 375-76, 177 N.W.2d 388, 392 (1970). *See generally* C. MCCORMICK, *supra* note 41, § 272, at 656-57.

43. *See* L. TRIBE, *supra* note 1, § 16-30, at 1084 n.23; Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 147-48 (1893).

44. Because of the parallelism between procedures for judicial review and trial mechanisms such as burdens of proof, inference rules, and presumptions, some indication of the likelihood that courts reviewing the constitutionality of criminal laws will accept the active rationality concept can be gained by examining the policies underlying the rules relating to presumptions and burdens of proof. Professor Cleary identifies three elements that influence the rules for allocating pleading burdens: policy, probability, and fairness. *See* Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 11 (1959). Applying these elements to our paradigm, it appears that each factor favors the active rationality concept. There are powerful policy reasons for actively protecting rationality, principally that a sense of legitimacy should pervade governmental acts and laws. *See* text accompanying notes 104-111 *infra*. Considerations of probable outcome also support active rationality. The second-order evidence amassed by the challenger decreases the probability that the compelled investigation will be fruitless, and increases the chance that a beneficial change in legislation may result. The factor of fairness also militates in favor of imposing a duty of active rationality on the state. The research necessary to prove the irrationality of a statute will often be expensive and beyond the capacity of any individual defendant to carry out. *See* text accompanying note 8 *supra*. The convenience factor is, of course, most persuasive when the government has monopoly power over inquiry in an area, so that no private person can perform the studies necessary for effectively challenging a statute. These factors suggest that if a challenger's task were to prove adjudicative

A third indication of the affirmative manner in which courts protect rationality is the traditional practice of opinion writing.[45] It is certainly possible that judges could simply announce their decisions without written comment. That would not be satisfactory, however, because a simple fiat such as "plaintiff wins" or "the statute is unconstitutional" would discourage reasoned analyses of factual settings, and would impede the dialectical search for a consistent body of law.[46] The practice of avoiding inconsistent decisions by writing opinions[47] is thus another example of active judicial solicitude for rationality.

State-provided counsel and transcripts for appeal, court-appointed expert witnesses, compelled production of documents and witnesses, and the practice of opinion writing are all costly in the financial sense. The rules of discovery, the mandatory policy of disclosing exculpatory evidence, and the doctrines of negative inference entail other kinds of costs that tax the adversarial nature of our legal system. Society accepts these costs because it believes that the litigant's and fact-finder's interests in access to critical adjudicative facts justify incurring them. The ability to command legislative facts,[48] however, may be equally critical to a defendant's case. It certainly is illogical to place such a high value on assisting defendants in obtaining helpful adjudicative facts, while at the same time denying them any assistance in obtaining necessary legislative facts when their defense may rest on overcoming a presumption of statutory rationality. Aside from being illogical, this unwillingness to help defendants ascertain legislative facts allocates re-

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facts, he would probably be aided by a presumption or some other burden-shifting device that would make his task easier. It seems equally reasonable that similar aids might be employed by courts which must rely on constitutional and legislative facts when reviewing the rationality of a criminal statute. Devices such as burden-shifting and legislative remands could be utilized to protect interests that are essentially identical to those that are at stake when adjudicative facts are implicated. *See* text accompanying notes 142-151 *infra*.

45. *See* Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 4 (1957).

46. *See id.* at 5; Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15, 19 (1959) (courts should not decide on ad hoc or result-oriented bases, but should reach decisions based on articulable principles and give reasons for their holdings).

47. The rationality interest protected by the practice of opinion writing is one concerned mainly with internal consistency, rather than correspondence with external reality. Nevertheless, it is a developmental rationality interest in that it permits, indeed encourages, changes over time that take account of changed conditions in society.

48. For a discussion of the concept of legislative facts, see 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 15.04 (1st ed. 1958).

sources in questionable fashion. A single expenditure on behalf of a defendant mounting a constitutional challenge could result in the reform or abolition of an obsolete law, thereby benefiting all of society. Expenditures mandated by procedural and evidentiary doctrines, by contrast, are recurring rather than single costs, and result only in individualized benefits. Committing the state to a single outlay for ascertaining whether the factual assumptions underlying a widely applied criminal statute remain valid makes at least as good sense as committing it to a recurring outlay for ensuring the fair application of that statute.[49]

2. *Substantive Trial Doctrines*

The expense and trouble that society willingly assumes in order to assure defendants procedural fairness suggest that the assurance of substantive legislative fairness should receive similar affirmative protection. There are, in fact, areas of law in which courts alter substantive duties of the government after second-order evidence tending to show the existence of relevant first-order evidence has been presented. Action that would otherwise be impermissible is thereby allowed. The issuance of a search warrant, for example, partially invalidates a police officer's duty to refrain from entering private premises against the will of the occupants. When an officer enters premises against the will of its occupants, the entry is legal only if the officer has first obtained a search warrant by making a prima facie showing, before a judge or magistrate, that certain evidence is likely to be found on the premises.[50] The officer need not convince the judge that the evidence sought will inculpate the suspect, nor must the officer describe the evidence with specificity.[51] A successful showing might consist of nothing more than the tip of an informant who is known from past experience to be reliable.[52] The reliability of this type of second-order showing is sufficient to alter the nature of the gov-

49. *See generally* text accompanying notes 98-103 *infra* (single outlay required by affirmative rationality also makes sense since it serves informational needs of courts).

50. *See* U.S. CONST. amend. IV (government agent must show probable cause in order to obtain search warrant). *See generally* Jones v. United States, 362 U.S. 257 (1960).

51. *See* Steele v. United States, 267 U.S. 498, 504 (1925) (particularity requirement for search warrant is satisfied if officer gives general description of the type of contraband sought).

52. *See, e.g.*, Spinelli v. United States, 393 U.S. 410 (1969); McCray v. Illinois, 386 U.S. 300 (1967); Aguilar v. Texas, 378 U.S. 108 (1964).

ernment's duty to respect its citizens' interests in privacy. Thus, even if no first-order evidence were ultimately found, this fact would not affect the legality of the search.

In most other situations, the reverse of the search warrant example occurs. Upon a second-order showing that a defendant neglected to investigate the possible existence of important first-order evidence, a court will often punish him for action that would otherwise be permissible. In other words, courts recognize that certain showings of second-order evidence are sufficient to mature previously inchoate duties. For example, certain tort cases hold that when an individual or agency is put on notice of a possible hazard, a duty to inquire may arise.[53] Thus, a proprietor of premises open to the public or a municipality responsible for maintaining a roadway may, after learning of one or two accidents, be under a duty to carry out or fund a study to determine whether their facilities are in fact dangerous. Evidence that such accidents have occurred is not necessarily sufficient to establish negligent operation by the proprietor. But since notice of such accidents is second-order evidence of the possible existence of a hazard, such a showing often induces courts to impose on proprietors a duty to inquire into the existence of more probative first-order evidence. The proprietors in cases like these are therefore not under a duty to repair or redesign their facilities; this duty would arise only upon a showing of first-order evidence clearly indicating the existence of a hazard. The second-order showing that the proprietors had notice of a probable hazard has simply imposed on them a duty to search for first-order evidence that would positively indicate the existence or nonexistence of a hazard.

Courts have imposed a similar obligation to inquire on physicians and other persons charged with special responsibilities.[54] Physicians are often visited by patients who show some but not all symptoms of a certain disease or condition.[55] On

53. *See, e.g.*, Gas Serv. Co. v. Payton, 180 F.2d 505, 509 (8th Cir. 1950); Le Blanc v. Louisiana Highway Comm'n, 5 So. 2d 204, 206 (La. App. 1941); Moore v. Kenockee Township, 75 Mich. 332, 341, 42 N.W. 944, 947 (1889). *Cf.* Naccarato v. Grob, 384 Mich. 248, 252-54, 180 N.W.2d 788, 789-91 (1970) (development of simple, inexpensive medical test for phenylketonuria imposes a duty on physicians to use the test on newborn children; "can implies ought"). *See also* Dinwiddie v. Cox, 9 So. 2d 68, 72 (La. App. 1942) (general duty to investigate exists once defendant placed on "inquiry notice").

54. *See, e.g.*, Gates v. Jensen, 92 Wash. 2d 246, 595 P.2d 919 (1979).

55. In *Gates*, the patient showed certain symptoms of glaucoma, a disabling eye disease, the effects of which become more pronounced with time. The symptoms found put the patient in a "borderline glaucoma area." *Id.* at 248, 595 P.2d at 921.

the basis of such incomplete evidence, a physician may feel that there is no reason for treating the patient as though he actually has the disease or condition, since the treatment may be expensive, painful, or risky. On these facts, a patient could not prevail in a malpractice suit against a physician for negligent failure to treat. Notice of the patient's symptoms, however, may impose on the physician a duty to perform additional diagnostic tests.[56] Failure to carry out such tests—to pursue first-order medical evidence—may cause a court to find against a physician for negligent failure to inquire.[57]

Certain substantive criminal doctrines also indicate a judicial preference for rules that encourage rather than hinder the development of essential factual information. In the "willful blindness" cases,[58] courts have in effect imposed a duty to search for additional facts upon actors who have been exposed to certain second-order evidence. For instance, the prosecutor in *United States v. Jewell*[59] relied on the willful blindness concept to obtain the conviction of a defendant who had brought marijuana into the United States in a secret compartment of his car. The defendant disclaimed knowledge of both the compartment and its contents. The Ninth Circuit approved the trial judge's instruction to the jury concerning implied knowledge, citing Glanville Williams' treatise on criminal law[60] for the proposition that "willful blindness is equivalent to knowledge."[61] Thus, if a party has his "suspicions aroused" that actual evidence of criminal conduct may exist[62] and nevertheless refuses to make further inquiries, the law may deem

56. The court in *Gates* indicated its awareness that diagnostic tests for glaucoma are safe and inexpensive, although somewhat uncomfortable. *Id.*

57. *See, e.g., id.* at 248-49, 595 P.2d at 923-24.

58. *See, e.g.*, Barnes v. United States, 412 U.S. 837 (1973); Turner v. United States, 396 U.S. 398 (1970); Leary v. United States, 395 U.S. 6 (1969); United States v. Restrepo-Granda, 575 F.2d 524 (5th Cir.), *cert. denied*, 439 U.S. 935 (1978); United States v. Evans, 559 F.2d 244 (5th Cir. 1977); United States v. Murrieta-Bejarano, 552 F.2d 1323 (9th Cir. 1977). *See also* United States v. Brawner, 482 F.2d 117 (2d Cir. 1973), *cert. denied*, 419 U.S. 1051 (1974).

59. 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976).

60. G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 57, at 159 (2d ed. 1961).

61. 532 F.2d at 700 n.7.

62. In *Jewell*, the prosecution was unable to prove that the defendant had positive knowledge that he was carrying illegal cargo. The court did find, however, that there was evidence indicating that the defendant knew of the secret compartment in his trunk, and that he had knowledge of facts indicating that the compartment might contain marijuana. *Id.* at 699. It was the defendant's deliberate attempt to remain ignorant of the compartment's contents that led the court to attribute such knowledge to him. *See id.* at 702-04.

him to have knowledge of that evidence.[63]

These tort and criminal doctrines demonstrate that when knowledge of certain facts establishes culpability, the deliberate refusal to acquire such knowledge, despite second-order evidence of its existence, may itself be culpable. Thus, when second-order evidence suggests to lawmakers that further inquiry should be made into a statute's continuing viability, their failure to so inquire might also be considered culpable. Recent examples of institutional litigation demonstrate that when important interests are at stake, the government is not necessarily exempt from sanctions normally imposed only on private litigants.[64] Under the facts of our paradigm, courts could apply such sanctions if the defendant showed that the government had violated an important obligation: the duty to inquire into the rationality of a law when existing second-order evidence indicates probable existence of first-order evidence that would prove the law irrational.[65]

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63. It is worth observing that the willful blindness cases may stand for a narrow proposition of law. In *Jewell*, the appellate court let stand the following jury instruction delivered by the trial judge: "[T]he government must prove, 'beyond a reasonable doubt, that if the defendant was not actually aware . . . his ignorance in that regard was *solely* and *entirely* a result of . . . a conscious purpose to avoid learning the truth.'" *Id.* at 704 (emphasis supplied by court). The appellate court suggested, however, that the jury should have been instructed directly (1) that the required knowledge is established if the accused is aware of a high probability of the existence of the fact in question, (2) unless he actually believes it does not exist. *Id.* at 704 n.21. This gloss on the trial judge's instruction more closely addresses the potential application of the willful blindness theory to our paradigm.

64. *See, e.g.*, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala.), *hearing on standards ordered*, 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969); Crawford v. Board of Educ., 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976). *See generally* Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

65. A person challenging the rationality of a criminal law would probably be required to show that enforcement of the government's duty to reexamine critical legislative facts is as essential as requiring that school districts be integrated, *see, e.g.*, Crawford v. Board of Educ., 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976); that jails and prisons not be filthy or overcrowded, *see, e.g.*, Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969), 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); and that mental institutions offer minimally humane care. *See, e.g.*, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala.), *hearing on standards ordered*, 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). For an excellent discussion of "institutional litigation" cases, see Eisen-

3. *Post-trial Procedures*

Although not couched in terms of culpability or duty, the role of post-trial motions further supports the notion that courts recognize an affirmative obligation to generate certain types of information to avoid irrationality. For example, motions for new trial[66] or for judgment n.o.v.[67] require courts to decide whether a reasonable jury could have found for the prevailing party on the facts as presented.[68] In ruling on such motions, the judge cannot substitute his judgment for the jury's.[69] It is not the object of these motions to permit courts to replace one notion of rationality with another; rather, their object is to ensure that utterly irrational verdicts, ones without support in the evidence, do not remain in effect.[70] Thus, courts will not set aside a judgment if it appears that the jury heard the evidence, weighed it, and came to its decision based on a rational application of the evidence to the governing laws.[71] But if there is evidence that the jury decided on the basis of prejudice or extraneous information,[72] or that it did not weigh the facts at all,[73] the court will set aside the verdict. In effect, the court tells the parties that the fact-finding process must be repeated since it did not work correctly the first time. The use of these post-trial motions shows that courts actively protect rationality in adjudicative settings even when doing so requires breaching the barrier that separates courts from other participants in the legal process. If in flagrant cases of irresponsibility courts will command that the jury's work be redone, it does not seem unthinkable that they might require the same for the work of leg-

berg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

66. *E.g.*, FED. R. CIV. P. 59.

67. *E.g.*, FED. R. CIV. P. 50.

68. These motions, of course, do not seek the same end, nor are the standards applied to them the same. *See generally* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 95, at 467 (3d ed. 1976). What the two motions do have in common is that they permit the trial judge to correct a verdict when he feels that the proceeding has been badly tainted with error. *See id.*

69. *See, e.g.*, Lavender v. Kurn, 327 U.S. 645 (1946).

70. *See id.* at 652-53.

71. *See id.* at 653.

72. *E.g.*, FED. R. EVID. 606(b) (attack on verdict may be made when it appears that "extraneous prejudicial information was improperly brought to the jury's attention").

73. *See, e.g.*, Hukle v. Kimble, 172 Kan. 630, 243 P.2d 225 (1952) (quotient verdict). *See generally* J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE, CASES AND MATERIALS 886-91 (2d ed. 1974) (improper jury conduct includes quotient verdicts, and verdicts reached by coin toss or by jurors who were inebriated).

islatures. Legislative facts are treated somewhat more deferentially than adjudicative facts,[74] but they are never permitted to remain completely beyond judicial cognizance.

Other instances in which courts have actively protected rationality can be found in the final stages of criminal adjudication. For example, eighth amendment and due process doctrines governing discretion in sentencing impose obligations to respect instrumental rationality: the punishment meted out must promote agreed-upon penal objectives and must be proportional to the gravity of the offense.[75] Even the requirement that in criminal proceedings the state must prove its case beyond a reasonable doubt[76] is an aspect of active rationality. By allocating the risk of error to the state, this requirement reflects our belief that the outcome to be particularly avoided is the conviction of an innocent person.[77]

4. *Rules of Statutory Interpretation*

Another example of courts actively seeking to ensure rationality is their treatment of problems of statutory interpretation. Courts are often confronted with cases in which the "plain meaning" of a statute is uncertain. In these cases, they generally look to legislative purpose to discern the meaning of the statute.[78] Assuming that the statute in question does in fact have an instrumental purpose, the court decides the case by attempting to ascertain what it was the legislature intended

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74. *See generally* Thayer, *supra* note 43.

75. *See* note 1 *supra*. This instrumental rationality requirement is typically met by having the government carry out investigations and prepare presentence reports designed to gather information about the defendant. *See, e.g.*, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES §§ 4-5 (approved draft, 1968). Individual consideration of each defendant is constitutionally mandated in dealth penalty cases. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

76. In Speiser v. Randall, 357 U.S. 513 (1958), the Court observed:

> There is always in litigation a margin of error . . . . Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.

Id. at 525-26.

77. *See id.* at 529; Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1019-20 (1978) (risk-of-error analysis explains differing intensities of judicial review).

78. *See generally* Bice, *supra* note 2.

to accomplish by enacting the statute.[79]

For example, suppose that a state legislature has decreed that "parades and processions" shall be prohibited in public parks unless authorized by the park service. A group of jogging enthusiasts organizes a series of cross-country races across public parkland, and a conservationist group sues to enjoin the park department from permitting the races. In order to decide whether a cross-country foot race is a "parade or procession," the court ascertains the goals of the statute and determines whether these goals would be furthered by regulating foot races in public parks. If the court finds that the legislature ordered the prohibition to preserve the serenity and privacy of public parks, it enjoins the races. If, however, the court finds that the objective of the decree was to eliminate the pollution of and strain on park facilities caused by cars, trucks, floats and other parade equipment, the court permits the foot races to proceed. This type of inquiry requires that the court surmise how the legislature would have resolved the problem. To justify this type of action, the court necessarily assumes that the legislation expresses rational objectives, that the legislature desires that new cases be resolved in accordance with these objectives, and that it is legitimate for the court to discern legislative goals and see that they are furthered in the current situation.

This approach to statutory interpretation protects values that are very similar to the active or developmental rationality concept advanced in this Article. Active rationality assumes that legislation is designed to serve identifiable goals, that such goals should be construed dynamically so that statutes remain viable in the face of new or changing circumstances, and that courts have an appropriate role in assuring the validity of these assumptions. There is, to be sure, one significant difference between active rationality and its statutory interpretation analogue. When construing a statute in a new context, the court accepts the statute's original core of rationality, and simply applies that core to the facts before it. Under the active rationality concept, however, the court concedes the statute's initial rationality, but questions whether its rationality would be undermined if certain additional evidence, the probable existence of which has been demonstrated, were available to the court. Nevertheless, both these modes of judicial action seek to en-

79. *See id.; see also* United States v. Shirey, 359 U.S. 255, 260-61 (1959); Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

sure that laws operate rationally, that they promote their own purposes, and that they make sense. If, in the process of interpretation, courts subject statutes to robust and sometimes imaginative treatment to ensure their continuing correspondence with constantly changing realities, it is not unreasonable to imagine courts taking equally decisive action when they are frustrated in ascertaining whether certain realities even exist.

5. *Judicial Review*

Mention was made earlier of the various kinds of rationality tests courts employ when reviewing legislative enactments.[80] A further argument in favor of active judicial protection of rationality in situations like our paradigm, then, is that rationality is a value which courts traditionally protect when reviewing statutes. If lack of rationality is such a nonvalue that upon finding it courts will nullify measures enacted by a separate branch of government on this ground, then it seems reasonable that courts would likewise view active or developmental rationality as a value worth preserving in certain cases.[81] One indication that courts view active or developmental rationality as a protectable interest is their treatment of certain disfavored grounds of decision. Some reviewing courts have refused to consider certain justifications that, although originally advanced by the state in defense of a statute, are no longer put forward because the state finds them anachronistic, embarrassing, or politically untenable.[82] If courts are willing to rule out obsolete or lame facts that nevertheless provide colorable support for an outmoded statute, it seems but a small step

80. *See* note 1 *supra.*

81. This result, of course, does not follow in strict logic. Courts may with logical consistency take the position that they should strike down only that legislation which, on the record, appears irremediably irrational, and refuse to participate in the process by which the evidence of irrationality in statutes is developed. Indeed, it appears that modern courts have lapsed into this passive mode of protecting rationality for fear of resurrecting the excesses of *Lochner*-era substantive due process. *See* Ferguson v. Skrupa, 372 U.S. 726, 728-32 (1963).

82. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (reasons advanced in justification of a gender-based classification rejected as " 'archaic and overbroad' generalizations" about women); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (Court refused to consider obvious possible justifications for birth control prohibition). *Cf.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 641 n.9 (1974) (Court mentioned that the original purposes for barring pregnant school teachers from teaching included a desire to prevent young children from seeing pregnant women, "to illustrate the possible role of outmoded taboos in the adoption of rules"). *See also* L. TRIBE, *supra* note 1, § 16-30, at 1085-86; *id.* § 17-3, at 1145.

to have courts ensure that under certain circumstances the government considers whether the grounds it once advocated for a statute have in fact become lame.[83] Indeed, this latter function could probably be carried out with even less loss of institutional goodwill than the former. Telling a coordinate branch of government that its work product, although once sound, is now in need of reconsideration is apt to be more favorably received than overturning its work product as being unworthy of salvage.

Another indication of reviewing courts' concern for developmental rationality is supplied by cases such as *Ward*[84] and *Castro*,[85] in which the courts apparently believe that the state is shirking a duty. In these cases, judges occasionally issue requests or warnings that bring to mind the increasingly sharply worded admonitions that federal courts have issued in cases of institutional litigation before taking more decisive action.[86]

83. *See* L. TRIBE, *supra* note 1, § 16-30, at 1085.

84. *See* text accompanying notes 9-10 *supra*.

85. *See* text accompanying notes 11-15 *supra*.

86. Before seizing control of school districts, jail systems, or mental institutions, courts have usually first communicated their displeasure with the shocking conditions found in these institutions. When it becomes apparent that the agency in charge of such an institution, despite the court's warnings, will not repair the situation, courts have taken charge by appointing receivers or issuing detailed orders. *See, e.g.*, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala.), *hearing on standards ordered*, 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reversed in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). The plaintiffs in *Wyatt*, a group of inmates at an Alabama mental institution, complained of wretched living conditions and inadequate treatment. An initial hearing determined that the state was in violation of its duty to provide minimally adequate care. The plaintiffs therefore requested that the court adopt procedures for determining what would constitute adequate standards of mental treatment at the facility. *See* 325 F. Supp. at 785. The court, however, declined to rule on this request until the state of Alabama had been given an adequate opportunity to consider and promulgate such standards. The court gave Alabama six months to produce standards of treatment, and indicated that if the state failed to do so, the court would appoint a panel of experts to carry out a study. Nine months later, the court found that the existing treatment program at the institution was still completely inadequate, *see* 334 F. Supp. at 1344 n.3, and scheduled a hearing for the parties to propose new standards. At this hearing, an even more sordid tale of institutional neglect was told, and the court immediately issued an interim emergency order aimed at remedying the most appalling conditions, *see id.* at 373; one month later, a second, more detailed order was issued, *see id.* at 387. The Fifth Circuit recently affirmed the substance of Judge Johnson's earlier orders. *See* 503 F.2d 1305 (5th Cir. 1974). For a vivid account of this running battle, see Eisenberg & Yeazell, *supra* note 65, at 468-70.

Where enforcement of a statutory scheme is expressly committed to a state or federal administrative agency, courts have felt even less hesitation at pressuring the agency through remands, orders to reconsider, and writs of mandamus to carry out studies or to investigate further some matter related to the

And, where no suitable target for such a warning is readily available, courts have often tried to supplement the record before them by carrying out empirical or library research, by exhorting counsel to brief certain matters, or by appointing special masters to gather information.[87] Courts that take such

agency's jurisdiction. Many of these skirmishes have concerned environmental protection. *See, e.g.*, Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). An important case for conservationists battling government agencies is Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). In *Vermont Yankee*, the Supreme Court implicitly approved a reviewing court's power, under the National Environmental Policy Act, 42 U.S.C. §§ 4321-61 (1976), to order an administrative investigation reopened upon submission to the administrative agency of second-order evidence that was "sufficient to require reasonable minds to inquire further." 435 U.S. at 554. The Court cautioned, however, that "cryptic and obscure references to matters that 'ought to be' " do not constitute such sufficient second-order evidence. *Id.* This was a response to the consumer group's contention that the agency should have investigated the alternative of energy conservation before licensing the nuclear power plant. *Vermont Yankee* therefore establishes certain upper limits on the power of reviewing courts to question the rationality of administrative agency decisionmaking.

In the environmental law field, a court's power to compel an agency to update its conduct or guidelines to conform with technological advances is often aided by statutes containing "technology-forcing" provisions. Of these statutes, the best known are the National Environmental Policy Act, 42 U.S.C. §§ 4321-61 (1976); the Clean Air Act, 42 U.S.C. §§ 7401, 7642 (Supp. I 1977); and the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976). *See, e.g.*, Union Elec. Co. v. Environmental Protection Agency, 593 F.2d 299 (8th Cir. 1979) (technology-forcing application of Clean Air Act).

87. *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972) (Justices concurring and dissenting with per curiam decision used statistics from various studies in arguments on constitutionality of death penalty); Brown v. Board of Educ., 347 U.S. 483, 494 n.11 (1954) (Court in landmark school desegregation case cited numerous social science studies, some apparently not briefed by counsel); Muller v. Oregon, 208 U.S. 412, 421 (1908) (for consideration of constitutionality of statute limiting hours of employment for women, Court took "judicial cognizance of all matters of general knowledge"); United States v. Castro, 401 F. Supp. 120 (N.D. Ill. 1975) (judge apparently carried out research on classification of cocaine as a narcotic); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (in upholding use of peyote by Native American Church for religious purposes, court relied on studies apparently uncovered during original research). *See also* Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 547 (1957) (Frankfurter, J., dissenting) (judges increasingly doing research beyond record when they must decide policy issues); Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 213 (1934) (Court remanded case to trial court with instructions to develop needed legislative facts); Chastleton Corp. v. Sinclair, 264 U.S. 543, 548 (1924) ("Court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law."); Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 227 (1908) (Holmes, J.) (judges must discover facts needed to establish laws). *See generally* P. FREUND, ON UNDERSTANDING THE SUPREME COURT 50-51 (1949) (citing Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 520 (Brandeis, J., dissenting) for proposition that the "Brandeis Brief" was motivated by a "sense of the controlling vitality of facts"); Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 30, 32, 37 (1978) (courts go beyond rec-

action give unmistakable evidence of their concern for developmental rationality, since the course of least resistance would be simply to leave the record as they received it.

The "irrebuttable presumption" cases[88] are yet another example of the manner in which reviewing courts protect developmental rationality in the public law domain. As seen by some commentators, the common thread in these cases is the judiciary's insistence that, in zones of fluid attitudinal change, the state provide individualized treatment rather than rely on uniform rules applicable to all.[89] The underlying notion is that strict application of rules in such zones impairs development of the factual knowledge and moral insights necessary for forming new social consensuses.[90] In *Cleveland Board of Education v. LaFleur*,[91] for example, the Supreme Court was faced with a school board regulation that required pregnant school teachers to take unpaid maternity leave at the onset of their fifth month of pregnancy. The regulation created an irrebuttable presumption that pregnant school teachers become physically unfit to teach upon reaching this point in their pregnancy.[92] The Court held that a blanket rule compelling all pregnant school teachers to take leave, without permitting them to present evidence concerning their health and ability to teach, violated due process.[93]

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ord to ascertain needed facts); Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 546, 550 (1974) (approves of federal courts using special masters or requesting counsel to supplement record in order to ensure factual integrity in complex environmental decisions).

88. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972).

89. *See generally* Tribe, *Structural Due Process, supra* note 17, at 305-07.

90. *See id.* at 306-07. There is a persuasive argument that the irrebuttable presumption cases can be viewed as judicially enforced experiments. *See id.* Under this view, the Court's decisions stem from its members' concern that the debate over society's treatment of pregnant school teachers, *see* notes 91-92 *infra* and accompanying text, and unmarried fathers, *see* note 93 *infra*, might be advanced by the presence of an able pregnant school teacher or a nurturing unmarried father, since such examples would tend to weaken certain ingrained concepts of gender-based abilities and limitations. *See* Tribe, *Structural Due Process*, *supra* note 17, at 305-06.

91. 414 U.S. 632 (1974).

92. *Id.* at 644. The Court noted, however, that the regulation may originally have been intended not as a measure for removing physically incapacitated teachers from the classroom, but as a method of insulating school children from the sight of conspicuously pregnant women. *Id.* at 641 n.9. The school board did not contend that this consideration could serve as a legitimate basis for the rule, however, and the Court noted it simply to demonstrate how "outmoded taboos" may sometimes form the actual basis of unchallengeable rules. *Id. See also* note 82 *supra* and accompanying text.

93. 414 U.S. at 650. Similarly, in Stanley v. Illinois, 405 U.S. 645 (1972), the Court held that a law making the children of unmarried fathers wards of the state upon the death of the mother, without permitting the fathers to present

In effect, the irrebuttable presumption cases hold that when the state attempts to impose a deprivation that implicates an important liberty or that significantly burdens some "sensitive" class of persons,[94] it is fundamentally unfair for the state to restrict the scope of the evidence that may be presented at a hearing on the propriety of that deprivation. This, of course, is simply an analogue of judicial action designed to supplement the record;[95] it is judicial action designed to prevent the government from unreasonably abridging the record that will eventually reach a reviewing court. The unfairness of the government's action is not overridden by the consideration that it may be rational for the state to restrict the record for reasons of administrative convenience. Returning for the moment to our paradigm situation,[96] it is clear that our hypothetical defendant is faced with the deprivation of an important liberty—he will be incarcerated if his constitutional challenge fails—and also that he is a member of a special class—persons formally accused but not yet convicted of crimes.[97] Surely it would be unthinkable for the government, in the name of administrative convenience, to prevent defendants from presenting any evidence at all at their hearings or trials. But this is precisely what occurs, albeit indirectly, when the government deprives defendants of the ability to command the legislative facts they need to prove a statute's irrationality.

6. *Summary: The Informational Needs of Courts*

The major consideration in favor of actively protecting rationality in situations like that of our paradigm is simply that courts already actively protect rationality in almost every other area—procedural as well as substantive—of our judicial system.

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evidence of their ability to raise their children, violated due process. *Id.* at 657-58.

94. *See* L. TRIBE, *supra* note 1, § 16-32, at 1095 ("Court has applied the irrebuttable presumption doctrine only in situations where *intermediate* or strict scrutiny was independently warranted either by the involvement of a *sensitive* classification or by the presence of an *important* liberty") (emphasis added).

95. *See* note 87 *supra* and accompanying text.

96. See text accompanying notes 21-24 *supra*.

97. The recent case of Bell v. Wolfish, 441 U.S. 520 (1979), is an example of the Court devising, on behalf of pretrial detainees, a special substantive test to determine what types of action by jailers amount to unconstitutional punishment. *See id.* at 584-85 (Stevens, J., dissenting). *See generally* Note, *Standards of Judicial Review for Conditions of Pretrial Detention*, 63 MINN. L. REV. 457 (1979). Arguably, the *Wolfish* decision represents the implicit concern of the Court that persons formally accused of crimes, because they may be the subject of unwarranted animus, comprise at least a sensitive, even if not a suspect class. *See* note 94 *supra*.

This protection of rationality is apparent in the trial functions of courts, as well as in the exercise of their powers of statutory construction and judicial review. This suggests that courts faced with the choice of whether or not to protect active rationality in situations resembling our paradigm will find a wealth of guidance in other areas that points toward protecting this value.

The argument to this point has proceeded largely by induction: since courts actively protect rationality in many similar situations, it is certainly plausible for them to do so in our paradigm situation as well. Implicit in this proposal, however, is another argument that proceeds along far more positive lines: that it is in the self-interest of courts to protect rationality actively in our paradigm situation since such action would be a means for courts to satisfy their own legitimate informational needs. This argument leads to the conclusion that judicial action in this respect is not only plausible, but desirable from the viewpoint of courts.

As observed earlier, courts need certain facts in order to function properly.[98] If neither the court nor the party interested in proving some fact is able to carry out this function because the necessary legislative facts are being kept hidden by the action or inaction of another branch of government, the reviewing court must labor under a significant handicap. If the court has good reason, in the form of second-order evidence,[99] to believe that further inquiry would yield the needed information, it would not be surprising if the court attempts to remove its handicap[100] by ordering or at least encouraging remedial ac-

98. This factual showing will always be relevant to the court's final determination, and in many cases it will be determinative. *See* Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 19 (1924)("the necessity for . . . independent consideration [of facts] by the courts exists, whatever be the degree of deference which the courts will pay to the legislative finding"). *See also* Charles Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 536 (1923) ("It is manifest . . . that the mere declaration by a legislature that a business is affected with a public interest is not conclusive . . . . The circumstances . . . are always a subject of judicial inquiry."). *See generally* C. BLACK, THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960) (power to strike down acts of the legislature is essential for "validation" function of courts in our political system).

99. The concept of second-order evidence is discussed in note 24 *supra*.

100. This result may be more likely to occur in state courts, since there is some indication that, in due process cases, state courts have applied the rational basis standard more vigorously than federal courts. *See, e.g.*, State v. A.J. Bayless Mkts., Inc., 86 Ariz. 193, 342 P.2d 1088 (1959); Coffee-Rich, Inc. v. Commissioner of Pub. Health, 348 Mass. 414, 204 N.E.2d 281 (1965); State v. Park, 42

tion designed to generate these facts.[101]

Consider the analogy that can be drawn from a hypothetical card game between two players, presided over by a referee or judge. The game is thrown into chaos when the lettering on the playing cards suddenly fades and disappears. Player *A* submits evidence to the referee tending to show that player *B* introduced a trick deck whose markings become invisible when the cards are exposed to a small magnet that a player can easily conceal in his sleeve. Player *B* then demands to be declared the game's winner since he was ahead at the time the trick was played. What are the equities in favor of player *A*? Although he probably would have lost anyway, he still has a right to play the game out according to the rules. Perhaps he might even save a victory. In this situation, it is likely that the referee would refuse to declare player *B* the winner and would require instead that a new deck be introduced and the hand replayed.

This example suggests that litigants who are unable to challenge a penal statute successfully because their governmental opponent has interfered with the development of necessary information may find themselves assisted by judges asserting their own interests in fair adjudication.[102] Just as the referee in our card game would insist on a replaying of the hand so that he can fairly judge the outcome, judges in cases like that of our paradigm may take similar actions to ensure that the government refrains from interfering with the judging function. It has already been demonstrated that courts do not hesitate to penalize parties who refuse to cooperate with the adjudicative fact-finding function of the judiciary.[103] This Arti-

Nev. 386, 178 P. 389 (1919); Gundaker Cent. Motors, Inc. v. Gassert, 23 N.J. 71, 127 A.2d 566 (1956), *appeal dismissed*, 354 U.S. 933 (1957).

101. A court's willingness to take such remedial action would probably correspond roughly to the intensity of the level of review employed by the court. The various levels of judicial review, *see* note 1 *supra*, reflect the judiciary's concern over the propriety of reviewing certain matters; that is, some matters are more clearly the court's business than others. The least stringent level is the "minimum rationality" test, which courts apply when reviewing legislation that does not implicate a fundamental interest or burden a suspect class or one of the sensitive categories, such as gender. Even when reviewing this kind of economics-based legislation, however, a court might justifiably become impatient when government-erected informational barriers affect the court's ability to carry out even a cursory review of the subject. Seen in this light, rationality review reflects judicial acquiescence with respect to certain matters, but does not rule out judicial activity when courts are faced with unreasonable impediments to the very exercise of this already minimized function.

102. *See* sources cited in note 98 *supra*. *See generally* R. WASSERSTROM, THE JUDICIAL DECISION 92-97 (1961); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75; *see also* Gunther, *supra* note 1, at 18-22.

103. *See* notes 31, 42, 86 *supra* and accompanying text.

cle simply proposes that courts should take a comparably dim view of adversaries who impede the court's ability to ascertain legislative facts.

The proposal may seem novel because issues of developmental rationality have only recently begun to arise in connection with legislative facts. Constitutional and legislative facts are not often challenged, and when they are the court's attention tends to be drawn to other issues such as the nature of the interest asserted and the appropriate standard of review. But what if any level of judicial review is rendered impossible because of an information blockage brought about by one of the parties? Regardless of the interests of the injured litigant, then, courts in this situation might well find a basis for remedial action in their own institutional need for adequate information.

C. Theoretical and Policy Considerations: Protecting Legitimacy and the Integrity of the Political Process

1. *Legitimacy*

Legitimacy—the assurance that a citizen feels when he knows that laws are fair—is essential to a government that rules by consent of the governed.[104] Without it, the stability of a political system is constantly threatened, since laws lacking legitimacy command little loyalty.[105] Rationality, of course, is

104. *See* C. Black, *supra* note 98, at 36 (the lack of such legitimacy "must surely enfeeble [the government] and strip it of moral force"); J. Freedman, Crisis and Legitimacy 10 (1978). *See generally* M. Weber, The Theory of Social and Economic Organizations 130-32 (T. Parsons ed. 1947); Tribe, *supra* note 17; *see also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) ("The validity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person . . . notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.").

This section is concerned primarily with formal legitimacy, that is, the legitimacy of process referred to by Frankfurter in the *Joint Anti-Fascist Refugee Committee* case, rather than the legitimacy of result. *See* C. Black, *supra* note 98, at 38 (distinguishing between formal and substantive legitimacy).

105. *See, e.g.*, J. Freedman, *supra* note 104, at 10. Freedman identifies a number of aspects of the administrative process that safeguard legitimacy, including the following: (1) the decisionmaker is effective; (2) the decisionmaker is accountable; and (3) the public perceives the decisionmaker as fair. *Id.* at 11. All three of these aspects of legitimacy are eroded if lawmakers can with impunity ignore affirmative rationality. Lawmakers who permit archaic laws to remain on the books, even after their attention has been drawn to them, are certainly not effective decisionmakers. Nor are such decisionmakers accountable if they can suppress information that would reveal their poor performance

not the only element of legitimacy. If it were, a tyrant could claim legitimacy merely by employing experts and technocrats to advise him. But it is clear that rationality is an important part of legitimacy,[106] especially in connection with penal laws, because of the fundamental ways in which these laws order our lives.[107] Any irrationality perceived in connection with these laws will greatly erode the feeling of legitimacy upon which respect for the rule of law is based.

The legitimacy that a rational foundation gives criminal laws is also essential to preserve the human dignity of individual citizens. Without a foundation of rationality, laws may eventually be viewed as nothing more than naked exercises of power to which citizens accede out of fear rather than by choice. As Jerome Hall has pointed out:

> So long as that legal institution [criminal law] survives in its essential rational and ethical character, even the least of men is given some assurance of human worth. By like token, if people come to believe that the foundation of the criminal law is unsound, a new strange era in our history will have arrived.[108]

Certainly, one of the judiciary's natural roles is to assume responsibility for preventing the arrival of this "new strange era."

An additional aspect of legitimacy that favors the protection of active rationality is the effect of legitimacy on the utility of criminal laws. Without the specific protection of active rationality, the social cohesion effect[109] of criminal laws is likely

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to their constituency. *See* text accompanying notes 125-133 *infra*. Moreover, if a lawmaker fails to reconsider a statute once a case has been made against it by means of second-order evidence, citizens will begin to doubt the fairness of the system.

106. Perhaps rationality is essential for the reason that citizens must believe that they could put themselves in the place of a legislator, work through his calculations, and arrive at the same result. *Cf.* C. BLACK, *supra* note 98, at 38 (formal aspect of legitimacy achieved when lawmakers adhere to accepted forms of policy-making); Tribe, *supra* note 17 (structural due process defined as a set of adjustments aimed at producing a consensus among citizenry and lawmakers). Legitimacy, then, would presuppose rationality out of political-epistemological necessity: to say that laws must be rational is to specify, in part, what we mean by "good" laws. A good law would thus be one that is sound or valid, though not necessarily morally impeccable.

The present argument can also be transposed into utilitarian economic terms. The effective operation of a self-interest-based free-market system requires rational laws, including penal ones, so that individual behavior will correspond to the public good. Without this correspondence, rational entrepreneurs would become discouraged, since they would be penalized in ways that are not calculated to maximize private profit or public gain.

107. *See* Speiser v. Randall, 357 U.S. 513, 525-26 (1958) (in criminal trials, prosecutor must prove guilt beyond a reasonable doubt because of importance of interest at stake).

108. J. HALL, SCIENCE, COMMON SENSE AND CRIMINAL LAW REFORM 4 (1963).

109. *See generally* P. DEVLIN, THE ENFORCEMENT OF MORALS (1968).

to suffer because laws that are perceived as questionable are difficult to enforce.[110] There is an additional danger that the contempt for lawmakers that citizens come to feel when dubious criminal laws are enforced may become generalized so that citizens begin to view most criminal laws as ridiculous or oppressive.[111]

2. *Integrity of the Political Process*

Closely related to society's interest in protecting legitimacy is the interest that courts have often expressed in protecting the effective functioning of our society's political processes.[112] This interest subsumes our concept of active rationality in two respects. First, courts might feel a concern for the integrity of the political process if it appeared to them that a coordinate branch of government is isolating itself from the influence of facts that might reveal that certain statutes are in need of modification or repeal. Second, courts might be concerned if a coor-

110. *See, e.g.*, S. REID, CRIME AND CRIMINOLOGY 44 (1976). *See generally* J. KAPLAN, MARIJUANA—THE NEW PROHIBITION (1970). These types of laws tend to be widely violated. This situation makes it difficult to obtain complaints, tips, and clues necessary for enforcement. It therefore encourages the police to resort to entrapment, paid informers, spying, bugging, and other unsavory enforcement techniques that further erode respect for the law. *See* S. REID, *supra*, at 42-45.

That developing nations and revolutionary societies make penal reform an early order of business, *see, e.g.*, F. SCHUMAN, INTERNATIONAL POLITICS 549-50 (7th ed. 1969); E. SCHUR, LAW AND SOCIETY 118-21 (1968) (post-Stalin increase in harsh criminal treatment for "parasites" and those guilty of crimes against the state), and that in our own society intense interest has been generated in reforming statutes that make homosexuality, abortion, and drug use criminal offenses, suggests that pressure for law reform is especially strong during periods of pronounced social change.

111. It is worth observing that legitimacy-based arguments are not exclusively weapons of progressive or left-leaning reformers. Careful empirical studies may well show that laws penalizing conduct such as sodomy and drug use are sound, or even that the penalties should be increased.

112. Courts have protected voting rights, *e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); political representation, *e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962); access to courts for test cases, *e.g.*, Bounds v. Smith, 430 U.S. 817 (1977); NAACP v. Button, 371 U.S. 415, 429-31 (1963); and political speech, *e.g.*, Police Dep't v. Mosely, 408 U.S. 92 (1972). The process of social and political decisionmaking is one of the most highly protected interests in our system of jurisprudence. *See, e.g.*, Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); *see also* Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring) (action that affects "the indispensable condition of an open as against a closed society" deserves searching judicial scrutiny); Spece, *A Purposive Analysis of Constitutional Standards of Judicial Review and a Practical Assessment of the Constitutionality of Regulating Recombinant DNA Research*, 51 S. CAL. L. REV. 1281, 1289 & n.16, 1290-93 (1978) (discussing the purposes of judicial review, including the improvement of the political process).

dinate branch of government were to create impediments to the information-generating processes that citizens rely on to assert their interests in a political system premised on consent. Applied to either of these aspects of the political process, active rationality would protect interests very much like the "footnote four" interests discussed by Justice Stone in *United States v. Carolene Products Co.*[113]—interests that courts protect with special vigilance because they are essential to the proper functioning of representative government.[114]

Another reason why courts can be expected to be receptive to the concept of affirmative rationality is its close connection with political openness. Lawrence Tribe's interpretation of the irrebuttable presumption cases as aimed at the protection of this value has already been discussed.[115] In a recent article,

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113. 304 U.S. 144 (1938). In the famous "footnote four" of his *Carolene Products* opinion, Justice Stone observed:

> There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .
>
> It is unnecessary to consider now whether legislation which restricts those *political processes which can ordinarily be expected to bring about repeal of undesirable legislation*, is to be subjected to more exacting judicial scrutiny . . . than are most other types of legislation.

Id. at 152 n.4 (citations omitted) (emphasis added). One of these suspect restrictions of the political process explicitly referred to by Justice Stone was "restraints upon the dissemination of information." *Id.* at 153 n.4. Thus, the interest in active rationality could be considered a "footnote four" interest, since without an adequate informational basis, citizens are unable to participate effectively in the political process. *See generally* Delgado & Millen, *supra* note 6; Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978); *see also* L. TRIBE, *supra* note 1, at 904-05 & n.18; Emerson, *Legal Foundation of the Right to Know*, 1976 WASH. U.L.Q. 1.

114. The process of judicial review has been criticized as undemocratic and counter-majoritarian, *see, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962); Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1976); Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 815 (1974); McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUS. L. REV. 354, 359 (1966); however, the rationality form of review proposed in this Article is less susceptible to this criticism, since it serves to protect one of the notable means by which people exercise their political prerogatives. *See* note 113 *supra*. *See generally* Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099 (1977) (judicial review is a protective force for popular participation in political processes).

115. *See generally* Tribe, *supra* note 17; *see also* Witherspoon v. Illinois, 391 U.S. 510 (1968) (Court struck down rule excluding jurors who admitted to having scruples against death penalty, since jury service is a door to citizen participation in political and moral change that cannot be arbitrarily closed). Professor Tribe argues that *Witherspoon*, like Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), and Stanley v. Illinois, 405 U.S. 645 (1972), *see* notes

Gerald Gunther has expressed the view that courts are moving toward a multi-tiered system of review that, among other things, would protect political openness.[116] Multi-tiered review, which emphasizes means-ends congruence, "place[s] a greater burden on the state to come forth with explanations"[117] of the ways in which its laws serve their purported ends. Gunther posits that this is a proper and respectful stance for courts to take vis-à-vis the legislature, and that it does not constitute a revival of the excesses of substantive due process.[118]

Both Tribe's and Gunther's hypotheses, like the concept of active rationality advocated in this Article, are highly protective of formal,[119] but not substantive rationality. The individualized treatment advocated by Professor Tribe would protect our interest in the "freezing" or "thawing" of rules at appropriate moments in the social dialectic. Similarly, Professor Gunther's means-ends review authorizes judicial invasion of the legislative domain only when certain formal evidence of irrationality appears: a statute fails to advance its own ends, or does so in an unreasonably overinclusive manner. Since both Tribe's and Gunther's proposals justify intervention only on formal grounds, they support judicial remands of matter for legislative reconsideration, but not with specific instructions to reach a certain result. The court simply directs the legislature to redo that which was earlier done improperly. On remand, the legislature may enact a very similar statute, but it will do so in an atmosphere of greater public attention.

The writings of first amendment theorists also suggest that courts should not permit the state to exploit a monopoly power it may have over the means for generating certain sorts of knowledge. According to Emerson and Meiklejohn, the system of free expression exists to facilitate the effective operation of the mechanisms by which we govern ourselves.[120] Prime

88-97 *supra* and accompanying text, shows the Court's desire to ensure that the government confront the divergent views necessary to sustain an ongoing social dialectic.

116. "Means scrutiny . . . can improve the quality of the political process—without second-guessing the substantive validity of its results—by encouraging a fuller airing . . . of the grounds for legislative action." Gunther, *supra* note 1, at 44.

117. *Id.* at 20-21.

118. *See id.* at 44-48.

119. *Cf.* Comment, *Judicial Review of the Legislative Process of Enactment: An Assessment Following* Childers v. Couey, 30 ALA. L. REV. 495 (1979) (discussing judicial review of the regularity of process by which a bill was enacted, including being read, voted on, enrolled, and finally signed).

120. *See* A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS

among these mechanisms are those that enable us to arrive at new political or social consensuses.[121] Professor Kenneth Karst's principle of equality in the field of ideas[122] also supports a judicially enforced requirement that the legislature not use its powers to promote an uneven or disorderly growth of knowledge in order to sustain favored laws, structures, or ideas beyond the time when they would ordinarily be cast aside.[123] Although Professor Karst's principle appears to have been formulated with reference to facts and ideas already in existence, rather than ones that remained to be unearthed, the same policies that underlie his principle argue for equality among undiscovered facts.[124]

The same concern for developmental rationality is evident in the writings of constitutional right-to-know theorists. Thomas Emerson has argued that the right to know should be, and to some extent already is, protected as a necessary reciprocal of the rights to speak, teach, and publish.[125] "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[126] Courts have protected the right to know in contexts such as advertising,[127] academic freedom,[128] broadcasting,[129]

OF THE PEOPLE 14-19, 25-27 (1960); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 882-84 (1963); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255.

121. *See generally* authorities cited in note 120 *supra*; cases cited in note 112 *supra*.

122. *See* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

123. *Compare* Karst, *supra* note 122, at 20, *with* Emerson, *supra* note 120, at 882-86. *See generally* A. MEIKLEJOHN, *supra* note 120, at 25-27; *see also* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (content censorship); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring) (allowing the government to act selectively frustrates the political dynamic on which we rely for effective self-government).

124. Indeed, the policies may argue more strongly in favor of equality among undiscovered facts. This is because a truth, once known, tends to spread. Attempted repression of such facts will ultimately prove self-defeating, since underground networks and anonymous communications will promote dissemination. *See* Delgado & Millen, *supra* note 6, at 367-68. Ideas that cannot be imagined or tested are far more vulnerable, since a tyrannical government can ensure that certain ideas or theories never become current, simply by banning certain types of inquiry.

125. *See* Emerson, *supra* note 120, at 881-82. *See also* A. BICKEL, *supra* note 114.

126. Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

127. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976).

128. *See* Barenblatt v. United States, 360 U.S 109, 112 (1959).

and religious pamphleteering.[130] The intent has been not only to protect the primary right—expression—but to encourage other valued objectives: the maintenance of a "balance between stability and change in the society," the discovery of the truth, and the participation of citizens "in social, including political, decision-making."[131] If the right to know were recognized as a protected interest under the first amendment, the equal protection guarantee might require that the government avoid favoring the generation of one idea over another, at least without good reason.[132] Accordingly, an alternative means of gaining access to the information necessary for initiating penal reform would be to give criminal defendants standing to assert the rights of either the researchers or citizens who would benefit from the dissemination of such information.[133]

Writing in a slightly different vein, Professor Kenneth Culp Davis has traced the career of legislative facts. In his treatise on administrative law, Davis observes that legislative facts are typically discovered or invented by courts and administrative agencies and then are enshrined as legal precedent or as judicially noticed facts.[134] In the years that follow, the process is reversed and the facts are slowly abandoned as they come to be seen as archaic or obsolete. If it is to operate smoothly, this process requires the active involvement of courts, administrative factfinders, and legislatures. Davis believes that the interaction of these bodies in developing or abandoning such facts is essential to the health of society.[135] Although he never appears to address the problem of deliberate or inadvertent informa-

129. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

130. *See* Martin v. City of Struthers, 319 U.S. 141, 149 (1943).

131. Emerson, *supra* note 120, at 878-79. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-8 (1970); Emerson, *supra* note 120, at 878-86.

132. *See generally* Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977).

133. For a discussion of researchers' need for information, see Delgado & Millen, *supra* note 6. *See also* Robertson, *supra* note 8. A number of commentators have identified this problem area of the law as one of constitutional magnitude that is bound to require Supreme Court attention in the near future. *See, e.g.*, Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 746-47 (1977) ("Courts must soon decide . . . whether certain kinds of . . . research may be prohibited or regulated. It is hard to predict where these issues will lead.") (footnote omitted); Toulmin, *Research and the Public Interest*, in RESEARCH WITH RECOMBINANT DNA 101, 103 (1977) ("I . . . would predict that a case raising this question will probably reach the Supreme Court sometime during the next fifteen years or so, and that the Court will probably decide that freedom of speech does, at least in general terms, embrace freedom of scientific inquiry.").

134. *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 15.04 (1st ed. 1958).

135. *See generally id.* at 338-434 (ch. 15).

tional blockages that interrupt this developmental process, Davis's discussion has enough overtones of first amendment and "footnote four" reasoning that it seems likely that he would approve of judicial activism designed to protect this interest.

II. DEFINING THE RIGHT: THE PRIMA FACIE CASE AND APPROPRIATE REMEDIES

The foregoing discussion suggests that under certain circumstances courts may decide to impose on the government an affirmative obligation to ensure the continuing rationality of its penal statutes. Statutory challenges that rely on the existence of such a duty are most likely to arise in situations like that of our paradigm,[136] and to be brought under some variant of the rational basis test.[137] When should courts entertain such challenges? It seems that a challenger should be entitled to relief when

(1) he presents data, information, or some product of research that appears relevant[138] to a constitutional challenge of the criminal statute under which he is charged; and
(2) he presents evidence either that the government has actively impeded further data collection inquiry, or research, or that it exercises monopoly control over the field and without good reason[139] refuses to carry out the investigation itself; and
(3) there is good reason to believe that the inquiry will prove successful.[140]

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136. *See* text accompanying notes 21-24 *supra*.

137. In this context, the rational basis test is used as a generic term that comprehends the minimum rationality, strict scrutiny, and intermediate means-ends tests, *see* note 1 *supra*, since each of these tests contains some form of rationality requirement.

138. The concept of relevancy here is limited by the extent to which a penal statute purports to be rationally based or is otherwise susceptible to analytical reconsideration. *See* text accompanying notes 152-154 *infra* (not all penal statutes are intended to express instrumental rationality concerns). This view of the relevancy of data and research findings would result in a graduated scale in which courts would actively protect rationality more assiduously in some contexts than in others. *Cf.* Gunther, *supra* note 1, at 20-24 (proposing sliding scale, multi-tiered model of review in equal protection cases).

139. The purpose of this requirement is to prevent courts from forcing the government to take unreasonably hasty action. *See also* note 206 *infra* (inordinate cost, physical danger, and the inability to obtain or use human subjects are justifications for refusal to carry out research).

140. *See* note 24 *supra*; text accompanying notes 21-24 *supra*. This requirement might also provide that the suspect condition of the challenged statute is unlikely to prove self-correcting, and that government has given no signs of taking independent corrective action. This aspect of the requirement is probably

The intensity with which courts should scrutinize governmental action or inaction under element (2) would probably vary according to the extent that any of the following factors appeared to play a causal role: (a) religious intolerance; (b) intergenerational conflict; (c) race, class, or gender-based animosity; and (d) self-serving bureaucratic inertia.[141]

If there is a duty for government to ensure developmental rationality, what should a court do when it finds that the government has breached this duty? It would certainly be an excessive response for a court immediately to declare the challenged statute unconstitutional. The challenger, after all, has produced only second-order evidence; further investigation may show that the law is in fact justifiable. The only permissible inference raised by the second-order evidence is that the legislature has without good reason refused to inquire into matters when circumstances indicate that it should. The remedy must be addressed to this problem.

There are a number of feasible remedies. The most draconian would be for the court to impound funds, appoint a scientific magistrate or receiver, and order that the necessary research be carried out under the court's supervision. The power of courts to act in this manner could be viewed as an aspect of their power to issue orders in aid of discovery.[142] This remedy, which courts could apply only in cases of extreme government intransigence, is similar to remedies that courts have

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self-evident, however, and would be applied instinctively by courts out of deference to the legislative branch.

141. *Cf.* N.Y. Times, Feb. 15, 1979, § 6 (Magazine), at 14 (arrest of middle-class children resulted in changes in public climate with respect to reform of drug laws). *See generally* P. BREST, *supra* note 1, at 938 ("[P]olitical pressures and biases may compromise the objectivity of [legislative] investigations."); M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 32-37 (1966) (heightened judicial concern appropriate where legislature ignores rights of minority groups or individuals because of lobbying or public pressure); Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 996-97 (1970) (racial animosities underlie marijuana and opium statutes); Dickson, *Bureaucracy and Morality: An Organizational Perspective on a Moral Crusade*, 16 SOC. PROB. 143 (1968) (bureaucratic inertia aids in persistence of marijuana and other drug laws); Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 30-32, 45 (1973) (religious intolerance and bureaucratic inertia can block legislative function).

It seems likely that the degree to which a court would actively protect rationality will also vary according to: (1) the manner in which the challenged statute infringes upon liberty, judged according to the severity of its penalties; and (2) the extent to which remediation can be accomplished quickly and inexpensively (*e.g.*, through an inexpensive study or review of literature).

142. *See, e.g.*, FED. R. CIV. P. 34, 37.

applied when faced with recalcitrant school boards, jail administrators, or state mental health authorities.[143]

A less drastic remedy would be for a court to shift to the government the burden of proving that the statute is affirmatively rational.[144] In other words, if a petitioner presents enough second-order evidence that the state has been remiss in its housekeeping, the presumption that the state is adequately policing its own statute books would dissolve, at least with respect to the statute in question. The state would then be required to show that a sound factual basis for the statute remains; this soundness would be measured not only against the evidence available at the time of the statute's enactment, but also against all information currently within reach.[145] If the state fails to satisfy this burden, the court would simply refuse to enforce the statute. If the state fails to meet its burden in a series of cases dealing with the same statute, the continuing embarrassment, cost, and public clamor will presumably cause it to reconsider its position. The difference between this remedy and the first, then, is that in this case the statute remains in effect but simply becomes much more costly to administer. Of course, since defendants would learn quickly that the statute had been denied effect in a series of cases, it would become a "marked man."[146]

Another possible remedy would be to suspend operation of the statute until the court is satisfied that the legislature has

143. *See* note 86 *supra*. *Compare* Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 201 (8th Cir. 1974) ("Lack of funds is not an acceptable excuse for unconstitutional conditions of incarceration.") *and* Vest v. Lubbock County Comm'rs Ct., 444 F. Supp. 824, 834 (N.D. Tex. 1977) (refusal to accept government's plea of lack of funds) *with* Griffin v. County School Bd., 377 U.S. 218, 233 (1964) (Court threatened to force levy for school desegregation funds) *and* United States v. County of Clark, 96 U.S. 211, 217-18 (1877) (Court required that judgment creditor of Clark County be paid out of funds in county treasury).

144. This is essentially what courts do when a challenged statute implicates a fundamental liberty or burdens a suspect class.

145. There is apparently still some disagreement over the proper allocation of burdens when the Court employs minimum rationality review. For the view that the burden shifts at various points of proof, see P. BREST, *supra* note 1, at 1005-06. Where the government is demonstrably responsible for the challenger's predicament, functional considerations suggest that the burden of proof with respect to constitutional or legislative facts should be placed, at least initially, on the government. *See* note 44 *supra* (considerations of policy, probability, and fairness argue for allocation of the burden of proof to the government).

146. This approach is consistent with the dialectic-protecting, experiment-forcing approach that Professor Tribe attributes to the irrebuttable presumption cases. *See* notes 88-90 *supra* and accompanying text.

carried out the necessary studies or further inquiries.[147] For the duration of the suspension, no prosecutions could be brought under the statute. This remedy would be an intermediate solution, less harsh than striking down the statute, but more severe than suspending the statute only as it applies to a single defendant. In this respect, the remedy operates as an interim measure like a temporary restraining order or an injunction; it is issued to protect the status quo until more definite proof is brought forth by the parties.[148]

Yet another alternative, milder than any discussed so far, would be for a court to require that the government simply lower any barriers it has erected against private research. This remedy would do nothing to alter the status of the statute itself, since it would remain in effect while the research was carried out. Moreover, the court would retain neither continuing jurisdiction over the controversy nor supervisory control over the investigation. Therefore, the defendant who brought the statutory challenge would gain no immediate personal benefit. Instead, any change in the legislation would await the results of further study, and the operation of the slow-moving mechanisms by which an informed public convinces its government to change malevolent or obsolete legislation: lobbying, letters, petitions, discussions in the press, and so forth.[149] One last possi-

147. The effect of this remedy would be similar to a legislative "remand." *See generally* J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 175 (1971); Bickel & Wellington, *supra* note 45, at 31-35.

148. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 109 (1973). Perhaps a further justification for temporarily suspending certain statutes can be made by analogy to the doctrines of lapse and abandonment. Because of its inattention to a statute that covers a matter in a rapidly changing field, the legislature could be deemed to have abandoned it. Alternatively, rapidly changing conditions could be seen as bringing about the statute's constructive lapse. While a statute is in this suspended state, either party could conduct research. Ideally, the results of this research would demonstrate conclusively either that the statute is constitutionally infirm or that it is indeed rational. If neither party came forward with new evidence, or if the evidence was hopelessly inconclusive, the statute would remain suspended indefinitely.

149. *See* D'Amato, *Environmental Degradation and Legal Action*, 26 BULL. ATOM. SCI. 24, 25 (Mar. 1970) ("As the public becomes more concerned . . . it will follow that judges, reading the same newspapers and magazines, will also begin to want to do something about the problem. . . . Public education, therefore, will have a direct effect upon the law as well as upon the public."); Loevinger, *Jurimetrics: Science in Law*, in SCIENTISTS IN THE LEGAL SYSTEM 7, 21 (W. Thomas ed. 1974) ("In a democracy the most appropriate and promising method for incorporating scientific knowledge into public law is public dialogue. This is the method by which other disciplines . . . make their contribution to government and exert their influence on public policy. There is no reason to claim a preferred position for science."). *See generally* E. PATTERSON, LAW IN A SCIENTIFIC AGE 33-34 (1963); Miller, *Technology, Social Change, and*

ble solution would be for the court to examine the enabling legislation creating administrative agencies having jurisdiction over areas that touch penal administration. By interpreting these statutory provisions liberally, a court might find that certain administrative agencies have a statutory responsibility to study or carry out research in an area under attack. Our criminal defendant could then request a declaration that the penal statute is irrational since it is unsupported by research that the legislature ordered the agency to carry out. In the alternative, our defendant could ask that the operation of the statute be suspended until the agency carries out studies that are designed to determine whether the penal statute is in fact rational. The difficulty with this remedy, of course, is finding an agency with statutory jurisdiction over the challenged subject matter.[150]

III. DIFFICULTIES WITH IMPOSING A DUTY OF ACTIVE OR DEVELOPMENTAL RATIONALITY: OBJECTIONS AND RESPONSES

A. THE MORAL BASIS OF CRIMINAL LAWS

One objection to the concept of active rationality developed in this Article is that criminal laws need not be rational at all because they are merely symbolic expressions of the innate loathing we feel for certain forms of behavior. For example, society prohibits murder and sodomy not because there is some instrumentally rational reason for doing so, or because the prohibition serves some extrinsic goal, but rather because these acts violate deeply held social convictions concerning moral be-

the Constitution, 33 GEO. WASH. L. REV. 17, 18 (1964) (technological change has mediate as well as immediate effects on public perceptions and policies).

150. In order to lend some viability to this remedy, the government could create a single agency charged with the responsibility of maintaining a research agenda relating to the administration of penal laws. This obligation could be added to the responsibilities of an existing agency such as the Law Enforcement Assistance Administration. *Cf.* Note, *Enforcing a Congressional Mandate: LEAA and Civil Rights*, 85 YALE L.J. 721, 739 (1976) (urging judicial review to ensure that the LEAA adheres to its statutory obligation to disburse grant funds only to grantees who do not subvert civil rights). Alternatively, an entirely new agency could be set up.

There is a danger, of course, that government-sponsored research could prove self-serving or biased in favor of existing scientific knowledge. But this risk can be dealt with in the ways that scientists usually deal with dishonest or methodologically unsound work: criticism and replication of the questionable work. In a case in which the court actually believed that the government would be tempted to slant its research results to support a questionable statute, the court can instead select from among the other remedies mentioned in this section.

havior.[151] Facts and values inhabit different moral universes; one cannot derive an ought from an is.[152]

A partial response to this objection is that this generalized description simply does not fit all penal legislation. Many penal statutes are enacted primarily for regulatory reasons—they promote purposes that we agree are good.[153] These more instrumental penal laws can be attacked by showing that the behavior they prohibit is harmless, or that the prohibition does not advance the statute's purported goal.[154] Moreover, regardless of whether a regulatory penal statute prohibits harmless behavior or fails to advance its purported goals, there are many other kinds of factual showings[155] that may render it of questionable validity. For instance, a criminal defendant may wish to show that the statute trenches on areas or classifications protected by the Constitution,[156] or that it fails to govern the

151. P. DEVLIN, THE ENFORCEMENT OF MORALS 7 (1968) ("I think . . . the criminal law as we know it is based upon moral principle."). *See also* Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966); Hart, *Immorality and Treason*, in MORALITY AND THE LAW (R. Wasserstrom ed. 1971); Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1 (1967); Hughes, *Morals and the Criminal Law*, 71 YALE L.J. 662 (1962); Rostow, *The Enforcement of Morals*, 1960 CAMBRIDGE L.J. 174.

152. This is termed the "naturalist fallacy." G. MOORE, PRINCIPIA ETHICA 18 (1903). *See id.* at 15-18.

153. For example, traffic laws exist not because driving slowly or on the right-hand side of the street is intrinsically good, but because we wish to promote the extrinsic good of highway safety.

154. A traffic law imposing a speed limit of 30 m.p.h. on a freeway would be one example. Such a rule could actually lead to more accidents if some drivers observed the rule while others ignored it and drove at the speeds for which the highway was designed. Thus, absent some countervailing reason such as conserving fuel, a court might overturn such a rule as irrational.

155. For a discussion of the pervasiveness of fact issues, see Karst, *supra* note 102, at 86. For a model of legislative action that emphasizes the importance of factfinding and instrumental rationality, see Cohen, *Hearing on a Bill: Legislative Folklore?*, 37 MINN. L. REV. 34 (1952) (concluding that the hearing process ought to be made even more reliable by incorporating expert, nonpartisan testimony and reports). *See also* E. PATTERSON, LAW IN A SCIENTIFIC AGE 17 (1963) ("May one not generalize further and say that no crevice or cranny of our legal order is immune from some revision or modification because of the persuasive influence of newly emerging facts?").

156. The challenged statute may have a "chilling effect" on the freedom of expression. *See, e.g.*, Talley v. California, 362 U.S. 60, 64 (1960); Marsh v. Alabama, 326 U.S. 501, 508-09 (1946); Martin v. City of Struthers, 319 U.S. 141, 146-48 (1941). *Cf.* United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (test for whether a criminal statute only incidentally burdens freedom of expression). Alternatively, the statute may have an adverse impact on some other constitutionally protected liberty. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). The statute, even if facially neutral, may instead have an unreasonably adverse impact on racial minorities. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (rejecting equal application theory of Virginia's antimiscegenation law); *cf.* Griggs v.

conduct in question by sufficiently precise means.[157] A defendant may also be able to show that the criminalized behavior is physically caused and not within his power to control.[158]

Even the most purely noninstrumental, morals-based regulations, however, may be susceptible to factual arguments. Dworkin has pointed out that legal norms, to be defensible, must be capable of being supported with good reasons.[159] Laws without foundation in good reasons cannot be distinguished from the personal preferences, prejudices, or quirks of the lawgiver,[160] and are insufficient causes for limiting freedom in a civilized society.[161] In terms of active rationality, the significant aspect of Dworkin's good reasons requirement is that many of the reasons that justify penal laws are either wholly or partly factual.[162] It is apparent, then, that the set of criminal statutes impervious to factually-based rationality attacks is much smaller than might be thought. A criminal defendant should at least be given the opportunity to argue that the statute he wishes to challenge is one that is vulnerable in this respect.[163]

A variation of this objection is that criminal laws are impervious to rational-basis review not because they embody unassailable moral judgments, but because like all laws they represent nothing more than the legislature's market-like reconciliation of competing forces. Under this "public choice"

Duke Power Co., 401 U.S. 424, 431 (1974) (facially neutral employment test violates title VII of the Civil Rights Act because of its adverse effect on blacks).

157. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 488 (1960) (state-imposed deprivation of a fundamental interest must be narrow in scope).

158. This sort of factual showing might help a criminal defendant attack a conviction based on acts similar to sleepwalking or other automatic acts. *See, e.g.*, Fain v. Commonwealth, 78 Ky. 183, 191-92 (1879); *see also* CAL. PENAL CODE § 26 (West Supp. 1979); MODEL PENAL CODE § 2.01 (Tent. Draft No. 4, 1955). A related showing would be that the statute penalizes a status rather than an act, or that the perpetrators are mentally ill rather than malevolent. *See* Powell v. Texas, 392 U.S. 514, 532 (1968); Robinson v. California, 370 U.S. 660, 666 (1962).

159. Dworkin, *supra* note 152, at 996-1004.

160. *Id.* at 996. Thus, under Dworkin's view, it would not be enough to say "I am against sodomy because I find it disgusting." It might, however, be adequate to say "I am against sodomy because it disequips the sodomist for marriage or parenthood, and threatens the family as an institution."

161. *Id.* at 1004.

162. *Id.* at 996-98.

163. For other views of the way in which the world of facts impinges on morals-based legislation or moral discourse in general, see K. POPPER, THE POVERTY OF HISTORICISM 64-66 (1957); Weber, *The Meaning of "Ethical Neutrality" in Sociology and Economics*, in THE METHODOLOGY OF THE SOCIAL SCIENCES 20-21 (E. Shils & H. Finch eds. 1949); P. Hauser, *The Chaotic Society: Product of the Social Morphological Revolution*, 34 AM. SOC. REV. 1, 15 (1969); Spece, *supra* note 112, at 1326-27. *See also* J. RAWLS, A THEORY OF JUSTICE 47-48 (1971).

model of the legislative process,[164] one may not assume that the process is designed to produce instrumentally rational laws. Rather, laws represent compromises calculated to satisfy the various interest groups that manage to make their presence felt in the legislative arena; they are products of a log-rolling contest between these groups rather than of a principled and serious inquiry. If it is true that laws do not result from a search for rationality, but are merely struck bargains, then it can be argued that a rationality based standard of judicial review is wholly inappropriate. It would impose on the legislature a duty to do something of which it is institutionally incapable.

Although this is not the place for an extended discussion of the public choice model, three brief observations can be made. First, even if the public choice model gives a reasonably accurate approximation of the process by which general economic legislation is enacted, it is far less adequate for describing the formulation of penal legislation.[165] Second, regardless of whether the public choice model is an accurate characterization of legislative behavior, it does not logically follow that the model renders laws impervious to rationality based review. The model does not require that legislatures forsake instrumental rationality, it merely explains that they often do; a model that simply explains a facet of the legislative process cannot disable courts from reviewing the rationality of statutes.[166] Third, it can even be argued that the public choice

164. For an explanation of the competing "public choice" and "public interest" models of legislative action, see Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J 145 (1978). *See also* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 195 (1976).

165. *See* Bice, *supra* note 2, at 28-36, 78-86 (public choice model fits some contexts better than others). There are a number of specific restraints upon the enactment of criminal laws. Some are constitutional—the prohibitions against cruel and unusual punishment and against ex post facto laws, as well as the procedural guarantees of the fourth, fifth, and sixth amendments—while others, like the *mens rea* requirement, have common law origins. There is also the traditional requirement that punishment serve the purposes of deterrence, retribution, societal safety, or rehabilitation. These restraints limit what the legislature may do in enacting penal legislation, and thereby place a limit on the logrolling aspect of the public choice model of lawmaking.

166. If the public choice model did in fact describe a process that produces laws impervious to rationality-based review, then all forms of judicial review, not just active rationality, would be improper. Obviously, this is not the path our jurisprudence has taken; judicial review has been seen as a limiting force, the purpose of which is to ensure that the legislature respects values basic to our system. *See* Bice, *supra* note 2, at 114-16. *See generally* Michelman, *supra* note 165. Thus, active rationality is part of a tradition that stretches back to

model describes a legislative marketplace that, when perfectly competitive, will inexorably produce rational legislation, just as a perfectly competitive economic marketplace will inexorably lead to rational production. Under this view of the public choice model, irrational legislation can result only from imperfect competition in the legislative marketplace, and rationality-based judicial review would be nothing more than a search for laws produced in an imperfectly competitive marketplace.[167] Thus, once it is understood that the public choice model de-

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Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and the Constitutional Convention.

Scientific, rationalist thought was central to the political ideals of the framers of our Constitution. Science was seen as the paradigm of truth-seeking activity, a model that politics should emulate whenever possible. Many of the leading colonial figures were scientists in their own right; virtually all were steeped in Enlightenment thought. *See, e.g.*, E. BURNS, JAMES MADISON: PHILOSOPHER OF THE CONSTITUTION 24-25 (1938); B. HINDLE, THE PURSUIT OF SCIENCE IN REVOLUTIONARY AMERICA 1735-1789, at 381-82 (1956); R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 61-62 (1955); C. PATTERSON, THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON 188-89 (1953); Emerson, *supra* note 133, at 740-45. Political theory of that time borrowed its basic values and metaphors from science, and politics in turn supplied some fundamental notions for science. *See* J. CROWTHER, FAMOUS AMERICAN MEN OF SCIENCE 138, 148-49 (1937); Delgado & Millen, *supra* note 6, at 355. James Madison, for example, believed that laws for governments could be derived from a systematic study of the natural world, carried out according to the method of "science." J. CROWTHER, *supra*, at 141; E. BURNS, *supra*, at 24-25. The principal obstacles to the establishment of a rational political system were seen as ignorance, superstition, and dogma. *See* C. PATTERSON, *supra*, at 188-89; A. KOCH, MADISON'S "ADVICE TO MY COUNTRY" 35 (1966); D. PRICE, THE SCIENTIFIC ESTATE 86-88 (1965); Delgado & Millen, *supra* note 6, at 355-57. The early colonials even formed scientific societies, and relied on their advice in matters concerning agriculture, health, and public works. *See* R. BATES, SCIENTIFIC SOCIETIES IN THE UNITED STATES (3d ed. 1965).

167. The "logrolling" aspect of the public choice model emphasizes the manner in which interest groups assert themselves through lobbying, initiatives, and other forms of arm-wringing carried out in the halls of legislatures. If all interest groups in society were equally able to express themselves to the legislature in this manner, the interplay of competing self-interested forces would lead to rational legislative production, just as in a perfectly competitive economic market, the interplay of competing self-interested firms leads to efficient (*i.e.*, rational) production. If competition in the legislative marketplace were perfect, judicial review would not only be counter-majoritarian, but also counterrational, since the legislative process would be incapable of producing irrational secular legislation. Of course, the problem with the economic competitive market model is that extrinsic forces prevent markets from becoming perfectly competitive; thus, production is inefficient. The same problem exists with the public choice model; since extraneous forces prevent certain interest groups from competing effectively in the legislative marketplace, legislation will sometimes be irrational. Thus, under the public choice model, when a court finds that a law is irrational, it has actually identified an instance in which the working of the legislative marketplace has flagrantly deviated from the ideal process presumed by the public choice model.

scribes a process that produces rational laws[168] whenever the legislative marketplace is perfectly competitive, but that the legislative marketplace is sometimes flagrantly noncompetitive,[169] judicial review becomes perfectly compatible with the model. Judicial review represents nothing more than a formal check on the structure of legislative decisionmaking;[170] it would remand legislation only when it appears that the legislative process has deviated significantly from the ideal hypothesized by the public choice model.[171]

B. The Separation of Powers Doctrine

If a court finds a lack of legislative diligence and actually

168. The term "rational," as it is used here, is not meant to convey any judgment concerning metaphysical or logical sufficiency. Rather, it is used in the same sense as rational production in an efficient economic market, where rationality simply reflects an optimal allocation of resources given the various forces competing with the market. Thus, in a perfectly efficient legislative marketplace, rational legislation would reflect an optimal allocation of benefits and disbenefits throughout society given the various social and economic forces competing within the marketplace. This conception of rationality is dynamic; it is not a static value of positive law, but varies along with the constantly changing levels of influence exerted by discrete segments of society.

169. In order for the legislative marketplace to be perfectly competitive, it is not sufficient for all interest groups merely to have access to legislators. It is also necessary that interest groups have the ability to recognize their own self-interest. Factual knowledge is often a prerequisite to recognizing self-interest, and if facts have been suppressed, the logrolling function stressed by public choice theorists functions poorly even if access to the legislature is perfect. Active rationality, then, is not a means of subverting the logrolling function; rather, it is a means of ensuring its integrity by requiring that all the interest groups involved have adequate factual knowledge.

Even Linde, the foremost advocate of the public choice model, recognizes that legislatures must "duly consider" bills before enacting them, and that "[o]ur institutions and procedures are designed to curb power to make law capriciously, on merely personal or inarticulate impulse." Linde, *supra* note 165, at 253. These mechanisms are necessary for protecting political legitimacy. *See id.* at 254-55. Thus, even Linde's view that courts may only insist that legislatures duly consider a law before enacting it is consistent with the view advocated here, since a lawmaker who deliberately chose not to hear the informed voice of interest groups would clearly be guilty of inadequate consideration.

170. *See* notes 115-119 *supra* and accompanying text.

171. The case for active rationality review in our paradigm situation may be even stronger than the generalized case for judicial review. Even if the log-rolling function has operated efficiently, that is, all interest groups have had access to the legislature, *see* note 168 *supra*, and all necessary factual data have been available, *see* note 170 *supra*, conditions may change over time. It is possible that new factual data, if injected into the legislative process, would produce laws opposite to those that now exist. When there is second-order evidence that such facts are available, a judicial remand of legislation would not constitute an attack upon the logrolling process, but rather a method of ensuring that changing conditions do not subvert the integrity of the process.

puts into effect one of the remedies discussed earlier,[172] a second objection arises: that the court has invaded the domain of the legislature in violation of the separation of powers doctrine.[173]

1. *Institutional Competence of Courts*

One aspect of the separation of powers doctrine revolves around the institutional shortcomings of courts. It can be argued that courts, by their very nature, are incapable of carrying out the complex fact-finding required by the type of statutory challenge contemplated in our paradigm.[174] What this objection overlooks, however, is that in our paradigm the court's task is limited to ascertaining whether second-order evidence exists. The court need only decide whether the challenger has shown that the government has without good reason failed to pursue first-order evidence affecting the statute's constitutionality.[175] This requires little in the way of elaborate fact-finding. Rather, the court must only determine whether the challenger has presented evidence of inadequate diligence on the part of the state in gathering information. Courts, as we have seen, routinely process this sort of evidence under varying degrees of scrutiny.[176] Furthermore, they are accustomed to imposing penalties on parties, including governmental ones, who fail to comply with informational requirements.[177] The institutional competency aspect of the separation of powers principle, then, offers little theoretical or practical difficulty for courts confronted with cases like our paradigm.

It may even be that courts are more competent than legislatures to deal with the second-order evidence problem. People may be unaware of an outmoded penal law unless they find

172. *See* text accompanying notes 142-151 *supra*. We can eliminate from discussion remedies as mild as the politely worded exhortations to greater diligence issued by the courts in *Ward* and *Castro, see* text accompanying notes 9-16 *supra*, since these are likely to strike no one as offensive. It is the application of more coercive measures, such as suspending a statute's operation, that is certain to provoke the complaint that the court has invaded the province of a coordinate branch of government.

173. *See generally* L. TRIBE, *supra* note 1, § 2-2, at 15-17.

174. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 487 (1955). *See also* BREST, *supra* note 1, at 941, 981-83 (legislatures are generally more qualified to carry out novel factfinding than courts).

175. The prima facie case is discussed in text accompanying notes 136-141 *supra*.

176. *See* text accompanying notes 26-31 *supra*.

177. *See* notes 31, 86 *supra* and accompanying text.

themselves charged with a crime under it.[178] Or, a person may know of an outmoded penal law yet be simply too unconcerned to question it until brought into court for violating it; until that time the threat of wrongful prosecution has seemed too remote.[179] It is unrealistic to require that such complainants bring their arguments in a different forum once they have already been brought before the court. At the same time, the legislative arena may be an unpromising one, because the number of individuals immediately affected by the questionable law will undoubtedly be small, and they will probably lack voting or lobbying power.[180] Thus, their plight may not be seen as one that justifies the attention of the legislature. Moreover, courts are often in a better position than legislatures to observe the delayed effects of certain legislation. Statutes may have unintended consequences, for which reviewing courts can serve as warning systems, alerting the legislature that something is amiss in the statute books and needs further attention.

2. *Usurpation of Legislative Prerogative*

Even if courts are a competent tribunal for protecting active rationality, another separation of powers objection can be raised: that courts engaged in active rationality review are usurping the powers of a coordinate branch of government.[181] This concern can be answered by pointing out that in situations like that of our paradigm, there has been a second-order showing that the legislature has abdicated its responsibility by failing to carry out further investigation of a demonstrably questionable statute. The legislature has thus left a vacuum into which another arm of government may properly move,[182]

178. *See* S. Bice, *supra* note 2, at 59-60.

179. The statute may be of a kind that is enforced unevenly or sporadically. *See id.* at 60.

180. *See id.*

181. *See* Kilbourn v. Thompson, 103 U.S. 168, 191 (1880); A. HAMILTON, THE FEDERALIST No. 51, at 356 (B. Wright ed. 1961); Montesquieu, *The Spirit of Laws*, in 38 GREAT BOOKS OF THE WESTERN WORLD 70 (1952); *see also* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 14, 15 (1962).

182. *Cf.* A. BICKEL, *supra* note 181, at 24 (criteria for active judicial review include that the function be one "not likely [to] be performed elsewhere if the courts do not assume it"). The "unlawful delegation" cases, *see, e.g.*, National Cable TV Ass'n v. United States, 415 U.S. 336 (1974); Kent v. Dulles, 357 U.S. 116 (1958), which hold that an extreme abdication of congressional power to an agency or other arm of government is unlawful, also support the power of courts to fill such vacuums. *See generally* A. BICKEL, *supra* note 181, at 165-66 (Court's action in some of the unlawful delegation cases constitutes in effect a remand of the problem to Congress, so that any subsequent abdication will at

particularly if the entry is brief, self-limiting, and formal rather than substantive.[183] As in cases of institutional litigation, when courts have intervened only after a clear showing of neglect by prison, school, or mental health authorities,[184] courts hearing statutory challenges would take affirmative action only when the legislature is clearly guilty of similar neglect. In such cases, the cry of usurpation rings untrue, because the court has done nothing that would otherwise have been carried out by another arm of government. Moreover, most of the remedies that courts in this situation are likely to impose will consist of measures designed merely to encourage the inactive branch to reassume its responsibilities.[185]

To be fair, courts have in fact recognized that actively forcing a complex or sensitive legislative issue can place strains on government. Thus, courts have devised doctrines of restraint concerning advisory opinions,[186] standing,[187] ripeness,[188] and

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least appear to be a deliberate choice, subject to correction through its political consequences); C. BLACK, *supra* note 98, at 95 (excessive delegation of a congressional prerogative justifies judicial intervention). Since Congress cannot delegate a duty that only it is competent to perform, *see* J. FREEDMAN, *supra* note 104, at 87, it would seem that Congress' refusal to carry out a duty such as checking the validity of its own statutes, while at the same time preventing anyone else from performing it, would be even worse. In the latter case, it is a virtual certainty that the duty will not be discharged; in the former case, the duty will be discharged, but simply by the wrong body.

Vague criminal statutes have sometimes been declared void under the improper delegation theory. The notion is that the legislature, in drafting a hopelessly vague law, unlawfully delegated the task of finding the statute's meaning to the judiciary. *See* United States v. Evans, 333 U.S. 483 (1948); James v. Bowman, 190 U.S. 127 (1903). Criminal statutes lacking in developmental rationality could be treated like these vague statutes, since constitutional status is unclear. It could be argued that the legislature has improperly delegated power, since it has not developed the information necessary for clarifying the statute's constitutionality.

183. *See* text accompanying note 119 *supra*.

184. *See* note 86 *supra*.

185. *See* text accompanying notes 148-149 *supra*. Legislative remands have recently been proposed by J. SAX, DEFENDING THE ENVIRONMENT 175 (1970) and by Bickel & Wellington, *supra* note 45, at 10. *See also* cases cited in note 87 *supra* (remands to supplement record with legislative or constitutional facts).

186. In United Pub. Workers v. Mitchell, 330 U.S. 75 (1947), the Court observed, "As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *Id.* at 89. *See* Laird v. Tatum, 408 U.S. 1, 13-14 (1972); Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1154 (D.C. Cir. 1978). The mootness doctrine is related to the advisory opinion issue because judicial explanations of controversies that are in fact moot, though not vacated as such, often amount to advisory opinions.

187. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498-502 (1975); Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940).

188. The issue of ripeness often arises in preenforcement suits challenging the validity of administrative regulations. *See, e.g.*, Abbott Laboratories v.

political questions[189] that permit them to avoid taking a stand when doing so would produce this sort of strain.[190] Although these doctrines show that courts often decline to step into the vacuum created when a coordinate branch has abdicated its responsibilities, they are generally not invoked when courts are faced with claimants whose dilemmas are pressing and immediate, and which cannot be solved without judicial intervention.[191] The purpose of these doctrines is to allow courts to avoid reaching the merits in difficult cases. In our paradigm case, however, the merits must be reached if justice is to be done; our defendant cannot obtain meaningful relief unless the court finds some way to order the necessary facts developed or collected. These refined theories of judicial restraint are thus poor candidates for application to our concept of active rationality.[192] In judging whether enforcing an obligation of develop-

Gardner, 387 U.S. 136, 148-56 (1967); Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1149-52 (D.C. Cir. 1977); National Wildlife Fed'n v. Snow, 561 F.2d 227, 236-37 (D.C. Cir. 1976). In *Abbott Laboratories*, the Court observed that the rationale of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way." 387 U.S. at 148. *See generally* Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443 (1971).

189. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 208-37 (1962); Vincent v. Schlesinger, 388 F. Supp. 370, 373 (D.D.C. 1975); Dickson v. Nixon, 379 F. Supp. 1345, 1348 (W.D. Tex. 1974). The standing and mootness doctrines, *see* notes 187-188 *supra*, regulate the procedural posture in which issues are presented to the judiciary. "The political question doctrine plays an analogous role in policing the substantive nature of the problems which litigants seek to have the judiciary solve." 1 N. DORSEN, P. BENDER & B. NEUBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1528 (4th ed. 1976).

190. *See* Eisenberg & Yeazell, *supra* note 65, at 495-98; Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1143 (1977).

191. *See* Eisenberg & Yeazell, *supra* note 65, at 500.

192. Courts usually invoke these doctrines to weed out overzealous plaintiffs with premature or otherwise troublesome complaints. There is no good reason why these doctrines could not be used to penalize underzealous defendants as well. *Cf.* FED. R. CIV. P. 41(b) (dismissal of action for lack of prosecution). Standing requirements, for example, are designed to ensure that only plaintiffs who have a genuine stake in the outcome of a case can be party to it. If the lawmaker has been derelict in its duty to protect the public from irrational criminal statutes, a court might choose to penalize the lawmaker by denying it standing to defend those statutes that it apparently has lost interest in keeping current. A similar argument can be made under the rubric of ripeness or justiciability: that government action or inaction has rendered the case before the court extremely difficult if not impossible to adjudicate fairly.

Perhaps the reason why these suggestions sound novel is that the primary governmental vice with which courts are usually concerned is excess. "[The] government is virtually sure to exercise power in debatable ground." C. BLACK,

mental rationality would offend basic notions of the proper roles of courts and legislatures, it should be remembered that it is a much simpler task to determine when research or study might be needed than it is to conclude that a statute is in fact irrational. Making second-order determinations that further study is needed is therefore less offensive to the separation of powers doctrine than is outright substantive review. Yet this latter, more difficult function is one that courts carry out routinely. In our paradigm the court is not asked to reverse something that the legislature purports to have found, but merely to note that the legislature has found nothing because it has failed to inquire.

3. *Reordering the Legislative Agenda*

Regardless of whether courts engaged in active rationality review may be protecting only formal rationality values,[193] the objection remains that in remanding cases for further consideration, courts are drafting the legislature's agenda and imposing spending priorities on it. The legislature is invested with wide power and discretion in the area of economic legislation,[194] since it is uniquely qualified to weigh competing demands on the public fisc.[195] If courts in effect mandate spending for further research, this will surely have an impact on the legislature's exercise of its traditional allocative functions. Why should courts have the power to mandate research into the empirical bases of a statute when a knowledgeable legislator might prefer to spend the money on cancer research or on low-cost housing for the aged? Who is to say that ensuring the rationality of a given law is more important than finding a cure for a dread disease or remedying the plight of the indigent elderly?

A partial answer is that the government is directly responsible for the laws it enacts, while it is not responsible, at least

supra note 98, at 46. But the underexercise of a power can lead to equally acute problems, and courts should be willing to adapt legal doctrines to cope with these situations as well. *Cf.* 28 U.S.C. § 1361 (1976) (writ of mandamus to compel an officer of the United States to perform a duty owed to plaintiff).

193. *See* text accompanying note 183 *supra*.

194. *See* Nebbia v. New York, 291 U.S. 502, 537-38 (1934) ("the legislature is primarily the judge of the necessity of such an enactment, [and] every possible presumption is in favor of its validity"). *See generally* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

195. *See* United States v. Butler, 297 U.S. 1 (1936) (federal spending power invested in Congress); Flemming v. Nestor, 363 U.S. 603 (1960). *See generally* McCloskey, *supra* note 194.

in the same way, for cancer or poverty.[196] A more complete answer, perhaps, is that criminal defendants are entitled to be governed by rational laws,[197] and that this entitlement is one of the most fundamental in our system of politics. Any breach, or even the appearance of a breach in this regard, weakens one of the most basic ingredients of political legitimacy. This aspect removes spending earmarked for the purpose of validating penal statutes from the arena of competing legislative priorities, and places it on a level with spending necessary to guarantee our basic liberties and physical security.[198] Moreover, the legislature's prior refusal to examine the spending problem takes it out of the discretionary area from which courts normally steer clear. By its refusal to consider the possible deficiencies of a challenged statute, the legislature has abdicated its spending authority and opened the area to the courts.[199] Of course, if there were evidence that the legislature had already examined the second-order case for reopening inquiry, and nevertheless decided that the matter warranted no further attention, the legislature's decision would be final.[200]

4. *Review of Administrative Agencies*

A final reason for rejecting the separation of powers objection stems from similarities between active rationality and the form of judicial review applied to administrative agency action. Courts have seldom hesitated to reverse factual findings of administrative agencies or to order agencies to carry out further studies where such action appeared warranted.[201] The notion

196. The government may have an affirmative obligation to eliminate cancer and poverty. But if this obligation exists, it is not because the government has established these evils in a formal, deliberate sense, as it has with penal laws. The responsibility of government for bad laws, however, is far more direct and immediate than its responsibility for the physical or fiscal welfare of its citizenry.

197. *See* text accompanying notes 104-110 (rationality as aspect of legitimacy), 112-133 *supra* (rationality as precondition of effective functioning of political processes).

198. Judicial activism is at its highest in connection with rights and interests that are given to the people by our Constitution or political traditions. *See* C. BLACK, *supra* note 98, at 94; P. BREST, *supra* note 1, at 981-82; McCloskey, *supra* note 194, at 45-49.

199. *See* text accompanying notes 181-182 *supra*.

200. The same result would occur where it appears that the legislature found the challenger's second-order evidence convincing, but determined that the research called for would present insuperable problems of cost, physical danger, or ethical risl. *See* note 206 *infra*.

201. *See* Udall v. FPC, 387 U.S. 428 (1967); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (courts insist that administrative agencies give "reasoned consideration to all the mate-

is that when a court coerces an administrative agency, the separation of powers problem is less acute than when the executive or legislative branches are more directly affected.[202] Perhaps the reason for this is that administrative agencies are created with definite and articulated goals in mind. Since agencies' goals are already limited, judicial activism in reviewing their actions seems relatively inoffensive. The review generally consists of nothing more than examining the instrumental rationality of measures designed to promote known goals, or possibly of the data bases upon which such measures are based. This limited form of review avoids judicial entanglement with the more purely legislative functions of goal-setting and interest-balancing.

In a number of respects, Congress functions like an administrative agency when it legislates in the field of criminal law.[203] Congress' role in this area is limited in many of the same ways as the roles of specialized agencies. There are preexisting and relatively well-defined legislative goals in this area that spring from the Constitution or centuries of tradition.[204] When Congress has attempted to expand or alter these goals, courts have often intervened and found the proposed changes invalid.[205] When it legislates in the area of criminal law, therefore, the

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rial facts and issues"); Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (matter remanded to agency where agency clearly failed to explore important alternatives or investigate significant issues); Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974); Comment, *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L.J. 1750 (1975); note 86 *supra* and accompanying text. *But see* Marinoff v. Department of HEW, 456 F. Supp. 1120 (S.D.N.Y. 1978) (issuance of writ of mandamus compelling investigation by HEW into whether or not certain substances could cure cancer held inappropriate because of generality of Department's responsibilities in area and lack of proof that HEW had abused discretion in refusing to investigate, *aff'd*, 595 F.2d 1208 (2d Cir.), *cert. denied*, 99 S. Ct. 2829 (1979). *See also* Christie, *A Model of Judicial Review of Legislation*, 48 S. CAL. L. REV. 1306 (1975).

202. *See generally* Linde, *supra* note 165, at 225.

203. *See* text accompanying note 86 *supra* (comparing penal legislation to agency action); text accompanying note 166 *supra*.

204. *See* note 203 *supra*. *See also* United States v. Brown, 381 U.S. 437, 458 (1965); Williams v. New York, 337 U.S. 241, 248 (1949); Sauer v. United States, 241 F.2d 640, 648 (9th Cir.), *cert. denied*, 354 U.S. 940 (1957); Berrigan v. Norton, 322 F. Supp. 46, 51 (D. Conn.), *aff'd*, 451 F.2d 790 (1971); K. MENNINGER, THE CRIME OF PUNISHMENT 254 (1968); Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L.C. & P.S. 226 (1959) (rehabilitation); Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966) (deterrence); Mabbott, *Punishment*, 48 MIND 152 (1939) (retribution).

205. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280 (1976) (mandatory death sentence held incompatible with individual treatment due offenders). *See also* Furman v. Georgia, 408 U.S. 238 (1972).

scope of the legislature's function is constrained by the narrow range of its permissible objectives, just as the scope of an administrative agency's functions is constrained by its enabling act. If courts have the power to tell administrative agencies to carry out certain functions, to redraft certain guidelines, or to gather additional information before acting, then it is not unreasonable that courts might exercise the same supervisory power over legislatures in those areas of lawmaking in which the legislature's authority is similarly circumscribed by law.

C. The Nature of Second-Order Evidence

Another problem with active rationality concerns the suitability of second-order evidence as the basis for imposing a duty to investigate, since such evidence will at times be unavailable or conflicting. Moreover, the duty to investigate may conflict with other duties imposed on the government. It could therefore be argued that the decision to follow up second-order evidence should be entrusted to legislative discretion, since the legislature is best able to balance the competing considerations in a manner that will lead to a reasoned decision.

Even though this objection has some merit, it certainly does not undermine the principle of active rationality itself. When second-order evidence is fragmentary or hopelessly conflicting, courts should not rely on it in imposing a duty to investigate. Showing the existence of consistent second-order evidence is the obligation of the person challenging the statute; he must convince the court that there is good reason to believe a law is irrational. In addition, the government can avoid the obligation to re-research a statute simply by controverting the petitioner's second-order case.[206] Finally, a consideration not to be overlooked is that the nature of the duty imposed by second-order evidence is not always adverse to the government's self-interest. The government might carry out the inquiry and find that the results actually support the statute. When, as here, the imposition of a duty is as likely to benefit as to burden the person upon whom it is imposed, courts need not insist

206. The government may show that even though the inquiry could prove fruitful, there are countervailing reasons why it should not proceed. These reasons could include physical hazards posed by the inquiry itself, the inability to use human test subjects, or inordinate expense. *See generally* Delgado & Millen, *supra* note 6, at 350-52. It cannot simply be assumed in every case, however, that the legislature considered such reasons before deciding not to carry out further study. If there is no record indicating that the legislature considered these reasons, there is no basis for inferring that it did. *See* C. Black, *supra* note 98, at 148.

on inordinate precision in the evidence upon which they base the duty.

D. The Financial Burden

Yet another objection to active rationality is that even if the duty were based only on appropriate second-order evidence, the ability of courts to impose the duty would be potentially limitless. If the duty became too pervasive, legislatures might find themselves devoting unreasonable amounts of money to reexamining old statutes. This, of course, could be accomplished only at the expense of the legislature's more traditional pursuits.

The fault with this objection is that it is overly broad. Every judicial decree forces someone to do something he does not want to do, and usually it entails spending money.[207] Thus, it is hardly an insoluble objection to the judicial role proposed here that it would force the government, upon a showing that it had been derelict, to bestir itself and spend some money setting matters straight.[208] When courts announced that attorneys for criminal defendants, transcripts for appeal, and expert witnesses were to be provided as a matter of right, the expense cast upon the government was enormous. In comparison, the cost of requiring the government to reexamine a statute occasionally for substantive defects is minimal. Moreover, the expense will occur on a one-time-only basis, while state-provided counsel and the like are recurring expenses. The financial burden of active rationality would be limited in other ways as well. First, the duty to investigate would arise only when a petitioner has made an extraordinary showing: that the government has been put on notice of the seriously defective nature of the factual basis underlying one of its statutes, and yet has done nothing. Second, courts would certainly limit their active intervention to cases in which suspicious elements are present[209] and a failure to act would seriously undermine trust in our system of laws.[210] In short, courts would surely reserve this power for cases of serious injustice.[211]

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207. *See* Eisenberg & Yeazell, *supra* note 65, at 507.

208. Of course, not all the remedies that courts could employ in furtherance of active rationality require that the government spend money. For instance, suspension of a statute's operation until the government reexamines its factual basis allows government the cost-free option of letting the statute lapse into permanent unenforceability.

209. *See* text accompanying note 141 *supra*.

210. *See* text accompanying notes 104-111 *supra*.

211. There is little loss of legitimacy when minor regulatory statutes are

Another aspect of the fiscal objection is that if statutes must be rationalized, it should be the petitioners, not the government, who should foot the bill. Our legal system generally requires that parties bear the cost of their own suit.[212] Why should challenges of the kind considered in this Article be treated any differently? On one level, the answer is that the government, by enacting criminal laws, has altered the status quo. Fairness therefore requires that the government assume the burden of repairing the statute.[213] On a more practical level, it would simply be unfeasible for most private litigants to bear the cost of developing the type of new information required.[214] Furthermore, within some areas the government may actually prohibit private research into the subject matter of the challenged statute.[215] In such a situation, the cost of research to a private litigant includes far more than financial outlay, since he will be forced to break other laws to prove the challenged law unconstitutional.

A final consideration for allocating the fiscal burden of research to the government in our paradigm is the pattern by which the aggregate benefits of active rationality would be distributed: society as a whole would benefit far more than any individual litigant from a scheme designed to eliminate irrational criminal laws. This consideration may in part explain the courts' predilection for placing certain financial burdens of litigation on the government where criminal matters are con-

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slightly out of kilter. Thus, courts would dismiss as trivial challenges such as one by a defendant prosecuted for violating a thirty-second stoplight, who seeks to show that twenty seconds would probably be a much more rational interval.

212. *See* Alyeska Serv. Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) ("American rule" requires that parties bear the cost of their own suits).

213. This duty to be fair is a component of legitimacy; it is something that citizens may rightly feel is the concomitant of entrusting certain powers to the government.

214. *See* P. BREST, *supra* note 1, at 941 (since empirical research is often "time-consuming and expensive," government is in a better position to bring resources to bear in disputes relating to constitutional and legislative facts); P. FREUND, ON UNDERSTANDING THE SUPREME COURT 87 (1949) (submission of the Brandeis brief places on an advocate the burden of compiling "a mass of factual data"). In Maher v. Roe, 432 U.S. 464 (1977), the Court held that the government may refuse to pay for the abortions of indigent women even though it would pay their childbirth expenses. Decisions such as *Maher* undercut to a certain extent the argument that courts should assign a burden to the government if it appears that it is more efficient for the government to bear it. There is, however, a significant difference between the facts of *Maher* and our active rationality paradigm: the government is responsible for the plight of criminal defendants in a way that it is not for pregnant women. That is, the government creates criminal laws, but it does not create pregnancies.

215. *See* notes 6-7 *supra*.

cerned, even though that tendency is virtually nonexistent in civil matters. In other words, where the simple shifting of a minor financial burden could result in the immediate conferral of broad social benefits, courts may prefer this solution over one that defers the benefits by forcing society to wait for a wealthy private litigant to come along.[216]

E. THE TYRANNY OF SCIENCE

A final objection that could be made to active rationality is that it would result in the government's being turned over to a horde of Strangelovian, slide rule-wielding technocrats who would issue decrees based on charts, tables, and computer print-outs. Such decisionmakers would ignore the wisdom, compassion, and common sense necessary to enlightened policymaking.[217]

This objection is unnecessarily alarmist. After all, science—the methodical assembly of facts and testing of hypotheses—is little more than an extension of our "common sense."[218]

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216. Courts have ordered states to supply indigent criminal defendants with attorneys, *see* Gideon v. Wainwright, 372 U.S. 335 (1963), expert witnesses or investigators, *see* People v. Watson, 36 Ill. 2d 228, 221 N.E.2d 645 (1966); Annot., 34 A.L.R.3d 1256 (1970), translators and interpreters, *see* Safford, *No Comprendo: The Non-English-Speaking Defendant and the Criminal Process*, 68 J. CRIM. L. & C. 15 (1977), and transcripts on appeal. *See* Griffin v. Illinois, 351 U.S. 12, 18 (1956). The now discredited case of Buck v. Bell, 274 U.S. 200 (1927) points out the type of hardships that can be avoided if certain financial burdens are shifted to the government. In *Buck*, the Court condoned the sterilization of a borderline retardate to prevent the condition from being repeated in her progeny—"[t]hree generations of imbeciles are enough." *Id.* at 207. *Buck* has never been overruled, and many states still permit sterilization of the mentally retarded and persons convicted of certain offenses. *See* Shaman, *Persons Who Are Mentally Retarded: Their Right to Marry and Have Children*, 12 FAM. L.Q. 61, 74-77 (1978). If scientific literature existed that showed that further research would prove that the sterilization of retardates serves no valid eugenic purpose, it would hardly be fair for a court to continue sanctioning the sterilizations simply because no retardate wealthy enough to fund the research wished to challenge the law. In such a situation, the possibility of broad social benefits would virtually require the court to shift the burden of research to the government.

217. For discussions of the current antipathy toward science that exists in some quarters, see J. HALL, SCIENCE, COMMON SENSE, AND CRIMINAL LAW REFORM 3 (1963); C. SNOW, THE TWO CULTURES (1958) (mutual antagonism between humanists and scientists); Beresford, *Lawyers, Science, and the Government*, 33 GEO. WASH. L. REV. 181, 207-08 (1964); Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157-60 (1955); Cowan, *Some Problems Common to Jurisprudence and Technology*, 33 GEO. WASH. L. REV. 3, 5-7 (1964); Curlin, *Law, Science, and Public Policy*, in SCIENTISTS IN THE LEGAL SYSTEM 35, 40-41 (W. Thomas ed. 1974); *A New Distrust of the Experts*, TIME, May 14, 1979, at 54. *See generally* R. HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE (1963).

218. K. PEARSON, THE GRAMMAR OF SCIENCE 6-7 (1892); *see* Loevinger, *Jurimetrics, Science in Law*, in SCIENTISTS IN THE LEGAL SYSTEM 7, 12 (W. Thomas ed. 1974). *See generally* P. BRIDGMAN, THE LOGIC OF MODERN PHYSICS

The fear that common sense and science are somehow opposed thus seems groundless.[219] So, too, is the concern that creating a place for facts in policy-setting somehow reduces the space available for values and feelings. Scientific findings will be relevant to, but never conclusive of, legal norms and values;[220] at most, they provide a basis for concluding that a given law or mechanism should be modified or repealed. The fear, then, that active rationality will bring about a tyranny of science has little to support it.[221]

IV. CONCLUSION

This Article began by considering the predicament of a criminal defendant who was unable to obtain effective judicial review of the criminal statute under which he was charged, even though he had second-order evidence of its irrationality, because the government controlled access to the information critical to his case. It then suggested that a reviewing court faced with this situation might avoid injustice by imposing on the state a duty to investigate the current rationality of the questionable statute. The interest protected by such judicial action was termed "active" or "developmental" rationality, and an appropriate prima facie case and set of remedies were devised for judicial implementation.

Whether courts should protect this interest, and the extent to which they should do so, are ultimately meta-questions. It is clear that having courts command total legislative rationality would be unwise—the cost would be too great. Thus, the active rationality concept should come into play only in sensitive situ-

(1929); C. CHURCHMAN, THEORY OF EXPERIMENTAL INFERENCE (1948); J. CONANT, ON UNDERSTANDING SCIENCE (1947); T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962); K. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (1959).

219. It is more accurate to say that common sense is shaped by science. In earlier times, common sense told us our earth was flat and the center of the universe. Common sense once also told us that there were witches and possessed persons. The mentally ill, epileptics, and persons with brain anomalies were treated either as possessed by demons or as savants. Today, largely because of the discoveries of scientists, these are no longer part of our common sense. More recently our "common sense" concerning homosexuals, drug addicts, and alcoholics has been in flux, partly because of new scientific perceptions of the physical bases of these conditions.

220. *See* text accompanying notes 152-172 *supra*.

221. In fact, one of the active rationality remedies exerts no direct coercive power against the legislature to implement more scientific research, but simply provides a more favorable atmosphere for change to take place through the force of public opinion. *See* text accompanying note 150 *supra* (court may decree that governmental barriers to private research be lowered, stimulating public knowledge and debate of questions).

ations. The problem is that even if this intrusion into the legislative prerogative were kept to a minimum, it would require the setting of an incrementally higher value on the process of judicial review, a process which many people have charged is already overvalued. Nevertheless, active rationality is a value that our society should regard highly; it is closely related to the important social constructs of legitimacy and citizen participation in the political process, and it has historical roots in the political values that underlie our legal system.

On a practical level, it would seem that we can no longer avoid valuing active rationality. Some courts have at least recognized the problem; but as technology advances, the problem of contrived arrearages in legislative rationality can only become more glaring. The time has come, therefore, for courts to decide just how much active rationality is worth.