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I. INTRODUCTION

It is not customary in this country to say that judicial decisions and legislative enactments are acts of rulemaking. In our legal literature the term "rulemaking" is strongly associated with the administrative aspect of government. A statute might provide that the *XYZ* agency is charged with administering Great Lakes fishing activities as well as with the adoption of appropriate rules to carry out its task. Any student of administrative law could seize upon *XYZ*'s rulemaking power as a familiar subject of interest. The agency must deliberately sit down and write provisions which will "regulate" Great Lakes fishing along the lines generally set forth by the enabling statute. Literally, the agency will make the rules. Yet, while legislatures and appellate courts are more frequent participants in this kind of process than their administrative brethren in government, to say that judges or legislators "make rules" in the course of their work would strike the American legal ear as wrong, or at least as inappropriate.

The linguistic paradox is unfortunate. Not only does it exclude from the universe of rulemakers in our government those who most often make the most important rules; it also keeps from the judicial and legislative branches the tremendously salutary connotations of the idea of making a rule. While in one sense "making things" might connote child's play, in a more typical sense the phrases "making a suit of clothes," "making fine jewelry" and "making a point" connote skilled craftsmanship. "To make" is to fashion—and to do it well is to accomplish the goals of the craft: beauty, functionality, persuasion or whatever. Making a rule is no different.

This article presents an approach to legal rules as the substance of a general class of action. The purpose is to build a rather basic structure of legal rules to permit an appreciation of certain key criteria for excellence in fashioning them. The following example of

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legal rulemaking will serve to demonstrate the problem and the challenge to which this article is addressed.

In *Wood v. Strickland*[1] the Supreme Court had to decide whether school board members could be held liable in damages to a student for injuries caused by an unconstitutional disciplinary measure. A majority of the Court articulated a rule whereby the motivation of a school board member could affect such liability.

> [I]n the specific context of school discipline, we hold that a school board member is not immune from liability for damages under [42 U.S.C.] § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. . . . A compensatory award will be appropriate only if the school board member has acted with such *an impermissible motivation* or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.[2]

The question presented for our purposes is whether the Supreme Court should have included the element of "an impermissible motivation" in the holding or rule of the case. The problem: how are we to go about *assessing* the wisdom or lack of wisdom in the Supreme Court's exercise of its rulemaking power? The challenge: to develop criteria by which rulemakers and their critics can examine a problem, to look at alternative rules that could be made to deal with the problem, and to grope toward a sense of judgment about which rule would best solve the problem. A premise of this article is that alternative rule formulations are always possible within the bounds of the various higher or previous authorities that exist. The rulemaker's challenge is to do the job as well as language and wisdom permit.

In order to lay a groundwork for application of the techniques of legal rulemaking to *Wood*, this article will first explore the general characteristics of rulemaking, and then specifically develop three different categories of legal rules.

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1. 420 U.S. 308 (1975).
2. *Id.* at 322 (emphasis added).

II. Rulemaking and its Evaluation

An understanding of legal rules requires one to grasp the general category of human activity of which law is a species. It is a verbal activity: the formulation and articulation of bits of language, whether verbally or in writing. Verbal rulemaking derives from the notion of regularity. A rule is a statement relating two or more events with an express or implied quality of regularity in the relationship. The different species of rules, and so of rulemaking, differ only in the force of the verb connecting the events in the statement.

A rule of the ethical variety takes the following schematic form:

When *X*, *Y* ought to follow.

In that form, *X* and *Y* are human events related by the normative admonition "ought to." For example, an ethical rule might be:

When you're asked for your opinion, you ought to tell the truth.

One might also say, "you ought to tell the truth when you're asked for your opinion," but the same structure is contained in both variants. The former separates the two elements in a manner effective for present purposes.

Another basic species of rules is the scientific variety, appearing in its two subspecies of descriptive and predictive statements. The descriptive form is simply:

When *X*, *Y* follows.

And the predictive form is:

When *X*, *Y* will follow.

Here *X* and *Y* may be human events or natural events. An example in the descriptive group is:

When Joe is asked for his opinion, he tells the truth.

The third broad category of rules, of which legal rules are an example, is the consequential variety. Here, the second event is set forth as the consequence of the occurrence of the first. The second event *is to* follow, and form is:

When *X*, *Y* shall follow.

An example of this type of rule in games is:

When a runner reaches first base after the ball is caught there, he must retire to the dugout.

In law, an example of a rule in this form is:

> When a lawyer fails to tell his true opinion on a legal matter to his client, the lawyer shall pay damages for any resulting injury to the client.

In *Wood v. Strickland,* a part of the rule expressed by the Court could be framed as follows:

> When a school board member participates in an unconstitutional disciplinary action against a student with an impermissible motivation in doing so, he shall pay damages for any resulting injuries to the student.

Rules of the consequential variety are also employed in businesses and other organizations where consequences relating to economic rewards or decisionmaking processes are tied to certain events. For example:

> When an office manager lies to the boss, he shall receive no further salary increases, no further invitations to lunch or parties, and shall otherwise be made miserable until his resignation or discharge.

Once it is understood that legal rulemaking is a branch of the described general activity, the next step is to identify criteria for judging the excellence of particular efforts of that kind. The simple proposition advanced here is that *to evaluate the merits of a rule one must articulate its goals.* Before turning to an extended analysis of legal rules, a look at the goals and an evaluation of ethical, scientific and consequential rules will be of some assistance.[3]

Certain broad goals distinguish the three types of rules which have so far been identified. Ethical rules are principles by which to criticize behavior, and their effectiveness can be judged by their ability to influence people in desirable directions. To discover the goal of an ethical rule, and thereby to evaluate its excellence, the relevant question might be: to what extent, if any, will adoption of the rule tend to guide human conduct toward the goal? After contrasting alternative formulations of ethical rules we would then choose the one most fit. Thus the rule:

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3. Further development of the analysis warrants the self-evident observation that to evaluate the product of any activity one must ascertain the goal(s) of the activity. Whether that product is a rule or a sandcastle, we ask *whether and how well* it is productive of good for its maker or others. With rules, it can readily be seen that to answer that question requires identification of the class of rules involved.

> When you're asked for your opinion, you ought to tell the truth,

may be compared to the rule:

> When you're asked for your opinion by someone with good motives for asking, you ought to tell the truth,

or to the rule:

> When you're asked for your opinion, you ought to tell the truth unless you have good motives not to or bad motives to do so.

Although all three proposals may have some merit as ethical rules, rigorous assessment of their relative excellence demands precise articulation of the goals of this kind of rule.

In assessing the utility of scientific rules of the descriptive variety, the criterion is the *accuracy* of the rule in relating the one event to the other. Thus the rule:

> When Joe is asked for his opinion, he tells the truth,

may be compared to the rule:

> When Joe is motivated by hunger, if asked for his opinion he tells the truth unless to do so would decrease the likelihood that he would receive food,

or simply:

> When Joe is asked for his opinion, he tells the truth unless he is sufficiently motivated not to.

The second or third rule may be more accurate and therefore better than the first.

The same process occurs when a predictive rule and its alternatives are being assessed. Thus, a rule such as the following is likely to be a good scientific predictive rule:

> When Joe is asked for his opinion about anything by a woman who excites in him a motive to have sexual intercourse, he will, irrespective of her motives for asking his opinion, tell her the truth or not tell her the truth as it will appear to him to increase the likelihood of gratifying his sexual motive.

Here, both the inclusion and exclusion of various motives are likely to make the rule fit for its purpose, the accurate prediction of human behavior.

Of course, one type of rule can include another type within the events being related. Thus an ethical rule might take the form:

> When *X*, *Y* ought to follow,

with X being a predictive rule. Thus:

> When it can accurately be predicted that Joe will lie to Suzy to advance his sexual interest in her, his friend ought to tell him not to do so.

Another motive element, however, might change this rule into:

> When it can accurately be predicted that Joe will lie to Suzy to advance his sexual interest in her, his friend ought to tell him not to do so unless the friend's motive in doing so is to pursue Suzy himself.

In the second version of this rule, the accuracy of the predictive rule X still determines the applicability of the ethically related event, but now the propriety of event Y depends on the friend's motives. In evaluating these rules as a whole, we ask whether on balance the inclusion of motives at any point adds to the fitness of the alternatives to influence human conduct toward the good.

By the same token, a predictive scientific rule might take the form:

When X, Y will follow,

wherein X is an ethical rule. For example:

> When the ethical rule in Anytown allows lying for good motives, people there will lie more than they would otherwise whether or not they are motivated to follow that rule.

The fitness of this rule in achieving its purpose of accurately predicting behavior depends upon: (1) the accurate determination of whether motives *are* included in the ethical rule at Anytown; and (2) the accuracy of excluding motives from the prediction of event Y. In no other sense can it be properly asked whether motives should or should not be employed in that rule. The same process can be applied to the various types of consequential rules of which legal rules are one species.

III. The Structure and Variety of Legal Rules

The first step in this effort to systematize the evaluation of legal rules is to express legal rules in a manner facilitating the evaluation. Some may find the conventions here adopted too simple, and others may find them not simple enough. However, the aim is to present legal rules as the product of a dynamic process rather than as static

entities.[4] The subject here is the process whereby rules create and govern human relationships.[5]

Legal rules are statements formulated by various officials which relate one or more events to a third event which is the legally prescribed and enforceable consequence thereof. Thus:

> When anyone commits an intentional homicide, he shall be punished by death.

It should be observed that the *truth* of a legal rule, its "validity," is a function of its *accuracy* in predicting the actual enforcement of Y consequence given the occurrence of X event—or, from a different point of view, the accuracy with which it states which consequence (if any) is prescribed by relevant legal authorities for X event.[6]

H.L.A. Hart's notion of a union of primary and secondary rules[7] serves as a broad analogy to the framework presented there. However, Hart's purpose was to counter the school of thought claiming that all of law could be reduced to the "gunman" situation of direct orders from a sovereign to the subjects backed by threat of force.[8] Instead, he proposed that there existed in legal systems two kinds of rules: "primary" rules[9] telling people how to conduct themselves with respect to others and "secondary" rules[10] providing methods recognizing, changing and adjudicating violations of the primary rules. Among the secondary rules are "power-conferring" rules. Such rules are really a category of rules of change, with which it is possible for private individuals to accomplish certain goals by creat-

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4. The works of Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) and *Fundamental Legal Conceptions as Applied to Judicial Reasoning*, 26 YALE L.J. 710 (1917), for example, are to be distinguished in that his is a system of legal "terminal points." He describes human relationships in terms of reciprocal rights and duties, etc., which obtain at any given point in time. The two systems are not necessarily contradictory since this article refers to some relationships which Hohfeld does not discuss in his works.

5. The conventions presently adopted serve their purpose reasonably well, and no particular claim is made that their use is of universal utility.

6. On this score, one might ask whether the *Wood* rule (see text accompanying note 2 *supra*) accurately reflects the thrust of relevant constitutional, statutory and/or judicial authority in including "permissible motivation" among the given elements. The task here is to consider the utility, not the truth, of legal rules so that questions of whether a court adopted a rule "contrary to authority" are immaterial. What is material is knowing how to judge among alternative formulations of rules for a given problem assuming that the alternatives are legally permissible.

7. H.L.A. HART, THE CONCEPT OF LAW 91 (1961).

8. *Id.* at 89.

9. *Id.* at 89-92.

10. *Id.* at 91-92.

ing or changing primary rules within certain spheres.[11] The classical example of a power-conferring rule would be one providing for an individual to change primary property relationships by means of a will. A legal rule sets out the procedures by which the individual can create a binding disposition of property and thereby affect the way all people must conduct themselves with respect to ownership and other rights relating to that property. Hart's mission was to portray the great components of legal systems by insisting that there are on the one hand rules about behavior and on the other rules about rules.[12] In this fundamental mission he succeeded admirably.

The scheme presented here begins with the notion that legal rules work by coupling a "primary" type rule with one that could be called "secondary" but which is not explicitly set out as such by Hart. An example of a primary type rule is that given previously:

> When anyone commits an intentional homicide, he shall be punished by death.

The rule relates one event, the commission of intentional homicide, to the other, punishment by death. Of course, the second event is the consequence of the first. It is prescribed to follow the first so that the consequential rule category rather than the ethical or scientific category, is the one involved. It is "primary" in Hart's sense because it tells people how to conduct themselves, not how to change their manner of conduct.

A legal rule of a different sort is the following:

> When the legislature enacts and the governor signs words attaching a sanction to such conduct as committing an intentional homicide, a criminal law takes effect.

Again, two events are related in an authoritative statement where the second is the prescribed consequence of the first. But obviously this rule does not tell citizens how to behave. In Hart's scheme it would be classified either as a rule of change of the power-conferring variety, prescribing procedures for changing primary rules of behavior, or as a subrule of recognition, telling people how to know when an authoritative primary rule of behavior is "valid." For present purposes no label is needed: it is the kind of rule that, together with a Hartian primary rule, makes a complete compound

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11. *Id.* at 93.
12. *Id.* at 96.

legal rule. All legal rules can be expressed by putting the two together in the following manner:

> When the legislature enacts and the governor signs words attaching the death penalty to such conduct as committing an intentional homicide, a criminal law takes effect, and if so then when anyone commits an intentional homicide, he shall be punished by death.

Hart was concerned with distinguishing the primary criminal-law type behavioral rule, "Do not commit intentional homicide or else!" from the secondary type rule whereby a formulation of words becomes a valid criminal statute. The concern in this article is to state different types of legal rules in a uniform pattern to facilitate their evaluation. The uniform compound can be expressed schematically as follows:

> When *A*, *B* shall follow, and if so then when *C*, *D* shall follow.

Of greatest interest to the layman is the second rule wherein *D* will be a consequence in the nature of a legal remedy such as damages, an injunction, a criminal penalty, or perhaps a judicial ruling in the nature of a decision to admit or exclude evidence. *D* is therefore the *ultimate consequence* in the entire compound. The occurrence of the ultimate consequence *D* depends most immediately upon *C* occurring. *C* is the event, such as the commission of an intentional homicide, which gives rise to the provision in the second rule that the actor is to be prosecuted and punished. This important event will be referred to with the programmatic label of *litigation condition.* The event must occur in order for the ultimate consequence to be properly applied. As we shall see, the law requires more than a litigation condition for that ultimate consequence.

The first rule in the above compound must take effect to put the second rule into operation. Only if *B* occurs can the litigation condition properly lead to the ultimate consequence. *B* is simply an intermediate consequence "bridging" the two rules. The presence of *B* merely assures that the second rule is in effect at the relevant time. *A* is the other "external" human event in the compound which must occur before *B* and the second rule attach. As such, *A* will be called the *expectation condition.* When the expectation condition takes place, all interested persons have reason to expect that the relevant *B* event, together with the litigation condition, could trigger the ultimate consequence or remedy. Further, assuming that the possible occurrence of the ultimate consequence influences the behavior of people who may be affected by its application, all inter-

ested persons have reason to expect that if and when *A* occurs, the behavior amounting to litigation condition *C* is less likely to occur. However, when *A* occurs all persons have a right to expect that the ultimate consequence *D* will be brought to bear if and when litigation condition *C* occurs.

To summarize, any legal rule can be expressed as a statement falling into one or the other composite rules in the following compound form:

> When *A*, *B* shall follow, and if so then when *C*, *D* shall follow.

The compound may be expressed as the following sentence:

> When an event occurs which is the expectation condition for a dependent rule to take effect, then when the litigation condition of that dependent rule occurs, the ultimate consequence shall be effected.

At this point three major types of legal rules, rules of command, rules of undertaking and rules of authorization, will be introduced.[13] Each follows the universal pattern. The three types are distinguished by their modes of operation, *not by the subject matter they cover or even by the remedy they provide as the ultimate consequence.* In effect, the types represent three different ways to regulate (or attempt to regulate) human affairs by framing official statements which attach enforceable consequences to defined events. The *Wood v. Strickland* rule encompasses all three modes of operation.[14]

The nature of the ultimate consequence is surely vital to an evaluation of the efficacy of each type of rule. However, of more central importance to this discussion is the composition of the two events in the compound rule-statement, the expectation and litigation conditions. Here lies the issue of whether "an impermissible motivation" element should be included in the litigation condition of the *Wood* rule.

An approach to the events in legal rule-statements as *sets*, in that term's mathematical usage, will be helpful to the discussion. Each such event is a collection of constituent elements to which the intermediate or ultimate consequence is attached. The set of ele-

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13. Hart's primary and secondary rule categories (see text accompanying notes 7-12 *supra*) which are combined in the compound rule do not adequately account for the distinctions now to be developed. It is apparent that primary and secondary rules function together in three distinct ways in actual legal operation.

14. See text accompanying notes 38-51 *infra*.

ments is accurately described as a condition in a legal rule if and only if the occurrence of all of the elements is necessary and sufficient to trigger the appropriate consequence in the rule. Thus, it would be inaccurate to say that:

When (*A*, *B*, and *C*), *Y* shall follow,

is a legal rule, if the truth is that either a further element *D* is necessary to trigger *Y*, or that *Y* could be triggered by *A* and *B* alone.[15]

In general, the utility of a proposed legal rule depends upon how well it achieves desirable human ends by regulating human affairs through conditions and consequences. The virtues of good ethical and scientific rules redound to the benefit of legal rulemakers by providing accurate information and predictions about human responses, as well as guidelines by which conduct may be influenced through the appeal of principle alone. However, our task is to develop the categories of rules of command, authorization and undertaking a step further: to demonstrate albeit briefly how the evaluation of legal rules can be assisted by particularizing their goals and means. First, each category of legal rule can be seen as governing a particular kind of relationship. Then for each type of relationship a general aim can be articulated with respect to effective governance thereof. And finally, some basic requisites to achieve the appropriate kind of effectiveness can be extrapolated.

A. Rules of Command

Rules of command can be expressed as follows:

> When event *E* occurs, a command takes effect, and then when event *L* occurs, a sanction shall follow.

E is the expectation condition, which in the case of the criminal law, for example, is the process of legislative enactment.[16] The event *L*, the action set out as a deviation from the prescribed course of conduct, is the litigation condition of the compound.[17]

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15. If a court acts on an *erroneous* view as to what rule is operative, or which elements comprise a particular rule's condition-set, then a rule of authorization will provide for the nullification of the judicial action to the extent that the action rests upon error. The nullification consequence may be unavailing due to some other rule (*e.g.*, when a time period must be respected in exercising the right to appeal).

16. A command is deemed in effect when the authorized legal agent acts in its requisite command-issuing fashion. A different type of rule will determine the question of authority to issue a command.

17. The term "violation" is not used in this article because it is too general. To say "he

In rules of command, rulemakers can seize upon a defined course of conduct to which everyone subject to the rule must conform. In order to effect deterrence, rulemakers universally threaten an unpleasant consequence, or sanction, for deviation from the rule. Criminal laws of all kinds exemplify rules of command, as do the laws which authorize punishment for the commission of intentional torts. By definition, all persons subject to the law of a jurisdiction are subject to a universal threat of an unpleasant consequence if they commit such acts.[18]

The sovereign establishes rules of command in order to establish and maintain universal standards of conduct in situations deemed important enough to pit the sovereign power directly and constantly against the individual.[19] The utility of the first part of a rule of command is determined by its ability to establish clearly that a command backed by a threat of sanction is in effect. For example, such a statement might read:

> When the legislature enacts and the governor signs words attaching a fine and/or imprisonment to the action of injuring another's property, a criminal law takes effect.

Or it might read:

> When the legislature enacts and the governor, with proper motives, signs words attaching a fine and/or imprisonment to the action of injuring another's property, a criminal law takes effect.

The ultility of including the motive element in the rule-statement may be negative, since providing for certainty in a rule of command is overwhelmingly more important than avoiding ill-motivated gubernatorial signatures.

The second part of a rule of command may be more difficult to judge. The rule-statement attaching the sanction to condition *L*

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violated the rule" is to say nothing about the operation of rules of law. The term "deviation" is used in the context of rules of command because here the litigation condition is conduct by someone which deviates or differs from the proper path.

18. The consequences differ with the various rules, of course. Fines and/or incarceration may follow criminal behavior, while damage awards and/or injunctive relief are plausible results of civil "wrongs."

19. The manner and extent of the use of the criminal sanction has been the subject of considerable attention. One commentator writes: "The criminal sanction is the law's ultimate threat. . . . The sanction is at once uniquely coercive and, in the broadest sense, uniquely expensive. It should be reserved for what really matters." H.L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 250 (1968). See the discussion of the damages remedy in text accompanying note 39 *infra*. The "overcriminalization" debate should probably be rephrased as the "oversanctionalization" debate to refer to rules of command in general.

must perform the distinct task of securing maximum conformity to the behavior desired by the sovereign. Thus, the rule:[20]

> When anyone leaves rocks on another's land and thereby injures it, the sanction shall be applied,

may be compared to the alternative:

> When anyone improperly motivated to do so leaves rocks on another's land and thereby injures it, the sanction shall be applied.

The main utility issue as to these two alternatives is whether the greater moral discrimination permitted by the second alternative outweighs whatever tendency that alternative may have to encourage injuries to property.[21] Of course there are ways of making exceptions to the applicability of sanctions in a condition L set other than by a general reference to proper motives. For example:

> When anyone not primarily induced to do so by a law enforcement officer leaves rocks on another's land and thereby injures it, the sanction shall follow.

But a question of utility exists here also. Does the need for firm maintenance of the universal threat of a sanction for injuring another's property outweigh whatever good may be realized in the sovereign/subject relationship by including the added element in the rule of command?[22] In dealing with the question, as with that of the utility of the condition E set, it is significant that this type of rule governs the sovereign/subject relationship with regard to behavior deemed important enough to invoke the rule directly.

B. Rules of Authorization

In this mode, rulemakers give people the means to delegate authority or the permission to act, and they assure that the aims and limits of the delegation will be respected or enforced. The means by which the goals are advanced is a consequence aimed at

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20. The following examples are based on the facts of Wheelock v. Noonan, 108 N.Y. 179, 15 N.E. 67 (1888).

21. There are opposing positions on this matter. *Compare* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 70-104 (1960), *with* Hitchler, *Motive as an Essential Element of Crime*, 35 DICK. L. REV. 105 (1931).

22. This issue must be addressed in connection with such alternative approaches to the entrapment problem as a rule of authorization which allows courts to dismiss charges or lighten sentences in appropriate cases, or a rule of undertaking which provides for a damage award to enforce the express or implied promise of all law enforcement officers to act only with proper methods.

nullifying any action which is beyond the authorization, or ultra vires. Any rule governing public or private delegations of authority will function as a rule of authorization if the rule provides for some form of nullification of action ultra vires. If an unauthorized action is attached by legal rule to a sanction, then a rule of command is in operation. The "unconstitutional statute" frequently is one which is held to have exceeded the delegation of authority to the legislature. In such a case a rule of authorization calls for the ultimate consequence: judicial *nullification* of the action ultra vires by "striking down" or refusing to enforce the statute. Nullification is thus accomplished literally. The same holds true when grants of authority under contracts, licenses, trusts, agencies, and immigration, parental, property or other "rights" are found to be abused or exceeded. The ultimate consequence in any of the foregoing situations is revocation or nullification of the grant of authority itself, which, as in the case of breaches of an agent's duties, sometimes occurs automatically under the rule. To the extent that revocation of authority in fact operates as a sanction, one should say that action ultra vires is the litigation condition in a rule of command, not authorization.

A rule of authorization can be expressed schematically as follows:

> When event E occurs an authorization takes effect, and if so then when event L occurs, a nullification shall follow.

An authorization is in effect when an authorized public or private legal agent acts in its requisite authorizing manner. Such action, the event E or expectation condition, could be anything from the ratification of constitutional language by the people of the United States granting their judicial power to a Supreme Court to the words or conduct of a settlor conferring on another the powers of a trustee. If such authorization takes place, then the grantee of authority usually *may*[23] and *can*[24] effectively exercise the authority granted. But if the grantee employing his apparent authority does something beyond the scope of his authority or ultra vires, then litigation condition L is fulfilled and the nullification should be applied.

Rules of authorization govern the relationship between any public or private grantor and grantee of authority to act.[25] The crite-

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23. He cannot be sanctioned.

24. His acts will not be nullified.

25. In addition, the rule affects such third parties as need or desire to rely on the effective establishment and enforcement of the grant of authority involved. Their interests are derived from those of the grantor and grantee, however, so separate treatment does not seem necessary.

rion for judging the utility of this type of rule is a simple but vital one. A good rule of authorization is one that *encourages* groups or individuals either to let others perform tasks for them or with their necessary permission. The broad aim of this type of rule is the realization of the socioeconomic efficacy of facilitating the pursuit of desirable ends through delegation and cooperation. The aim applies as well to the sovereign people's grant of authority to presidents, legislators and judges as it does to an individual's grant of authority to a doctor, lawyer or trust company or to a neighbor to "cut across" his property.

The utility of the rule-statement establishing a grant of authority is determined by its ability to specifically and effectively set out the aims and limits of the grant as well as the fact and duration of the grant's existence. Specificity will presumably foster trust among the parties that the terms of the grant are understood. The effectiveness with which the terms of the grant are set out maximizes the likelihood that its aims and limits will be respected although that effort may require less than complete specificity. To the extent that its elements attain both specificity and effectiveness in establishing grants of authority given the needs of the parties, a condition E set has been wisely drafted. For example, the first part of a rule of authorization might read:

> When a landowner communicates his permission to another to leave a few rocks on his land for a short time, a license takes effect.

Alternatively it might read:

> When a landowner with no profit motive to do so communicates his permission to another to leave a few rocks on his land for a short time, a license takes effect.

If the presence of a profit motive would turn a license into a contract, for example, then both parties would be more wary of entering into a licensor/licensee relationship. The landowner would be more wary because if the motive was proven he would lose his absolute right to terminate the permitted action with legal impunity, while the rock depositor would be more wary because if the motive was revealed he would have to pay for depositing the rocks. The mutual wariness engendered by the motive element in the rule-statement would contravene the aim of a rule of authorization and accordingly should cause that element to be rejected. A different conclusion might be required about the following rule:

> When a landowner communicates his permission to another to leave a few rocks on his land for a short time for noncriminal motives only, a license takes effect.

Utility analysis would approach this variation with the same inquiry: to what extent does the proposed condition E set encourage the parties to enter into the contemplated relationship? In this case the motive element might indeed encourage the landowner while it would discourage the apparently criminally motivated depositor of rocks. The latter would find himself a tortfeasor or a criminal *for depositing rocks without permission* should his motives be discovered or successfully impugned. In addition, he would find himself liable to sanctions as well as remedies of nullification.

The second part of a rule of authorization attaches the consequence of nullification to the litigation condition, action ultra vires the compound rule. The choice of elements for the condition L set must be evaluated for its utility in *maintaining trust* in grantor/grantee relationships. A good set of elements is one that will effectively enforce the terms of the grant: preventing both the defeat of its aims and the exceeding of its limits by the grantee while upholding the grantee's and others' reasonable expectations that authorized action will *not* be nullified. Thus, the rule:

> When the licensee leaves a huge quantity of rocks on the land or leaves any rocks on the land for more than a short time, the action shall be nullified.

This may be compared to the rule:

> When the licensee leaves a quantity of rocks on the land or leaves any rocks on the land for a time greater than the parties' mutually recognized motives reasonably permitted when the license was established or renewed, the action shall be nullified.

If the second alternative is a better rule, it is due to the addition of a motive element. In the second alternative, parties could rely on legal enforcement of the terms of the grant embodying the motives of the parties.[26] The ability to bring such evidence of motives into court under the second alternative statement could, therefore, en-

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26. Indeed, the court in *Wheelock v. Noonan* mentioned in its opinion that the defendant and plaintiff were total strangers. That fact seems to have influenced the granting of the injunction for the removal of the wayward rocks. See note 20 *supra* and accompanying text.

hance trust in the grantor/grantee relationship and so encourage its creation. However, there is always some risk that in court motives could be fabricated or inadequately provable to counterbalance that advantage. But other uses of motives, such as:

> When the licensee leaves a huge quantity of rocks on the land or leaves any rocks on the land for more than a short time where motivated to do so only by hatred of the landowner, the action shall be nullified,

would leave little question that the great disincentive to the landowner to give the license would never be overcome in a utility analysis by the incentive to the licensee to seek the license on those terms.

C. Rules of Undertaking

Under these rules, rulemakers prescribe ways in which people can take upon themselves duties to act (or refrain from acting) so that others can rely upon the performance or nonperformance of such an action. They can then perhaps offer their own undertaking or other value in return. If the person undertaking to act defaults by *failing* wholly or in part to do so, the consequence provided aims at making good on the undertaking to those relying upon it. The consequence could be a specific order to the defaulting party to perform an undertaking (an injunction or writ of mandamus), or an award of money to the relying party as a substitute for the inadequate performance.

Rules of undertaking can be expressed as follows:

> When event E occurs an undertaking takes effect, and if so then when event L occurs, a performance shall follow.

A first distinction from rules of command is that some action by a person is necessary to put the second clause of the compound rule with its ultimate consequence into effect. The expectation condition is the action by a duly authorized legal agent conforming to the rule's duty-conferring prerequisite. The action in the case of a public official could be the swearing-in or signing-in ceremony. In the case of a private individual it could be words or conduct held to amount to the consummation of a contractual promise. L in this type of rule is the default giving rise to one of the performance remedies through litigation. Although a damage award of $5000 could be the ultimate consequence for a breach of contract or for an intentional tort based upon the same external event, the thrust of

the $5000 award might be quite different, as later discussion will more fully bring out.

Although the contractual undertaking is the archetype of rules of undertaking, for present purposes negligence, the unintentional tort, should also be classified in this category. Liability for damages in negligence only arises by virtue of affirmative action or quite deliberate inaction. One can be negligent only by *doing* something or deliberately *refraining* from doing something one should have done. The act of doing or refraining is the expectation condition: namely, that people have the right and some reason to expect that the actor will act or refrain from acting *with due care.* At least in some respects the actor impliedly promises that he will act so as not to risk injuring those people who must rely upon such a promise. Negligent behavior sets up a promissory estoppel of sorts. One who defaults on his undertaking to act with due care may not argue that the beneficiaries of the undertaking should not have relied upon his promise. The ultimate consequence provided in the event of default is damages which substitute for the performance of the undertaken duty. The law seeks to put the victim in the position he would have been in had the prescribed standard of due care been fulfilled.

In rules of undertaking the relationship being governed is that between one who promises certain performance and one or more beneficiaries.[27] Whether the promise is explicit or implied, public or private, sounding in contract or in tort,[28] the utility of a rule of undertaking is determined by its single general aim: to govern the promiser[29]-beneficiary relationship in such a manner that undertakings can be counted on when made. *Good* rules of undertaking effectively foster the universal expectation that when promises are made they will be kept, with the aid of legal remedies if necessary. That expectation is nearly as vital to civilized, minimally trusting behavior in society as are the basic norms enforced by rules of command.

The mission of the first part of a rule of undertaking, like its counterparts in the other types of rules, is to establish the terms of a legally enforceable undertaking in a clear and effective manner.

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27. As with rules of authorization, third parties frequently have an interest in relying on the establishment and enforcement of undertakings. Third parties could be included in the category of "beneficiaries" in the text, and indeed they sometimes have the rights of a party, or their interests are solely derivative and again need no separate treatment. See note 25 *supra.*

28. There is an implied promise to undertake an action with due care.

29. The author has specifically chosen the term "promiser" rather than "promisor" owing to the legal significance attached to the latter term.

However, the utility of the statements depends upon the key requirement of effective governance of promiser/beneficiary relationships: the need of the parties to know upon what they are relying and as of when reliance is justified. Whether the need for reliance is in the voluntary relationship of contracting parties, in the involuntary relationship of a driver and a potential accident victim, or in the quasi-voluntary relationship of an official and a member of the public, it is frustrated by rules which obfuscate the existence or terms of the undertaking. We might compare the rule-statement:

> When a person seeking a license to leave rocks on another's land says he will remove them by springtime, a promise takes effect,

with this alternative:

> When a person seeking a license to leave rocks on another's land says he will remove them by springtime, a promise takes effect, unless he says so out of justified fear of insolvency and ruin for want of a place to deposit them.

The second alternative is so inimical to the need to rely upon the fact that a promise has been made that the suggested formulation comes across as a contradiction in terms. It brings to mind the adage that "a promise is a promise," which makes the point that the law does and should treat apparent promises as binding in all but the most compelling cases such as fraud and duress.

The second part of a rule of undertaking is the statement attaching the ultimate consequence, a required performance, to condition L, a default in the action promised. In our example if removal of the rocks has been promised, then failure to remove them in whole or in part challenges the reliance need in the promiser/beneficiary relationship. The utility of rule-statements attaching a performance consequence to a default is thus judged by their ability to *maintain* the expectation that, when in effect, promises will be performed or enforced in accordance with their terms. The rule-statement:

> When the promiser fails to remove all the rocks by springtime, a remedy of performance shall be applied,

may be compared with:

> When the promiser fails because of greed or hatred of the landowner to remove all the rocks by springtime, a remedy of performance shall be applied.

If the performance consequence were to depend upon proof of phenomena such as greed or hatred, expectations that unfulfilled promises will be enforced should quickly grow dimmer. On the other hand, the following rule has just the opposite effect on the parties' expectations:

> When the promiser fails to remove all the rocks by springtime, unless such failure was caused by his fear of the raging forest fire on the land, a remedy of performance shall be applied.

Neither party in our example expects performance by the promiser voluntarily *or under legal process* when conditions threaten his life or safety. His motive to avoid any such threat is fully within the contemplation of the parties at the time of the undertaking, as a limitation on the promiser's duty to remove the rocks. No further discussion of competing values is necessary to justify this element in the litigation condition for a performance as it might be to justify such an element in the condition subsequent for the sanction in a criminal-law rule. Should the legal remedy of performance be denied because the promiser feared a forest fire, the parties' expectations would be maintained, not frustrated.

IV. Summary

The evaluation of a specific proposal for a legal rule requires the inclusion or noninclusion of the particular fact in question to be viewed in the context of the legal rule involved. *Rules of command* invoke the sovereign directly against individuals within the sovereign's jurisdiction, establishing a constant and universal threat of a sanction for deviation from a prescribed course of action. Thus, the criteria for judging alternative compositions of events in such a rule are: (1) whether the compositions establish with clarity and certainty the fact that such a threat is in effect; and (2) whether the compositions attach the sanction to an event in such a manner as will effectively maintain the universal threat and the behavior desired. *Rules of authorization* establish and regulate relationships between grantors and grantees of authority. The criteria for judging their excellence are: (1) whether a particular composition of an event establishes the relationship in a manner that effectively encourages resort thereto where desirable; and (2) whether the consequence of nullifying an action taken under the grant is so related to an event that the trust required in entering into the grantor/grantee relationship will be vindicated, *i.e.*, the aims and limits of the au-

thority granted will be respected. *Rules of undertaking* establish and regulate voluntary or involuntary relationships between one who promises a certain course of action and the beneficiaries of the promise. The criteria of excellence of rule formulation are: (1) whether a legally enforceable promise is related to an event so composed that reliance on a promise is clearly justified as of a certain time and as to a certain action; and (2) whether the provision of a performance remedy is related to an event so composed that reliance once justified is vindicated.

In sum, the composition of the events upon which legal consequences are conditioned should be judged by the efficacy with which the resulting rules tend to achieve either universal conformity to minimally acceptable behavior,[30] trusting grants of authority,[31] or reliable undertakings,[32] depending upon which type of result is at issue.

V. An Evaluation of Wood v. Strickland

To apply the analytical framework of this article to *Wood v. Strickland* we must first ask what type or types of legal rule might be involved. The Supreme Court majority announced their rule governing school board members' liability in damages to students as a "construction of a federal statute,"[33] not as a matter of constitutional law. The pertinent section of the statute, section 1983, is:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.[34]

The portion of the *Wood* decision at issue is a rule governing the availability of one of the possible remedies, damages, for a deprivation of rights under the statute.[35] The ultimate consequence of the

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30. This is so in rules of command.

31. This is so in rules of authorization.

32. This is so in rules of undertaking.

33. 420 U.S. at 314.

34. 42 U.S.C. § 1983 (1970).

35. The remaining portions of the decision not at issue here were the Court's unanimous determinations: (1) to remand the cause to the court of appeals for consideration of alleged

rule, then, is a judicially imposed debt for a sum of money found appropriate to remedy the injury caused by the deprivation of rights. However, the nature of the damages remedy itself does not automatically reveal the nature of the legal rule whose condition-sets are to be evaluated.

This rule may be seen as governing three relationships whether or not it was so intended. The first is the relationship between the sovereign people of the United States, acting through Congress and the Supreme Court, and all school board members. In this regard, Congress has established a universal prohibition: the violation of students' constitutional or other rights through a disciplinary measure. The Court in *Wood* has articulated a condition-set for the sanction of damages which includes "impermissible motivation".[36] The second relationship governed by the rule is between those persons who grant school board members their authority by vote or delegation of the appointment power, and those individuals who accept the grant and so serve. The *Wood* rule defines the condition-set for monetary nullification of the consequences of action which, because of "impermissible motivation," may be ultra vires. Third, the rule governs the relationship between the school board member as one who undertakes to act in a certain way, and the student (and perhaps others) who may be seen as beneficiaries of the undertaking. The rule declares that "impermissible motivation" added to a violation of rights in a disciplinary action constitutes a default in the action undertaken such that damages can be awarded as a performance remedy.

A judge or other rulemaker facing the fact that several relationships are involved in the area to be governed by a legal rule confronts a dilemma. One approach would be to consider at the outset which type of relationship is most important under all the circumstances, and then to proceed to fashion a rule designed to govern that relationship most advantageously. Although that approach might be useful in some circumstances, here another approach will be followed in the actual rulemaking process. The recommended approach is to set out the various relationships involved *seriatim*, consider how they would most effectively be governed by the proposed legal rule, and then only at the conclusion decide which rela-

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procedural wrongs, and (2) that the court of appeals had erred in applying its own view of what constituted an intoxicating beverage rather than applying the view of local officials. 420 U.S. at 325-27.

36. *Id.* at 322.

tionship should predominate in fashioning the rule. In practice this latter approach has the advantage of more thoroughly leading the rulemaker through the alternative relationships and their contributions to various goals under different formulations of the rule. It may be that fashioning a good rule for one relationship may produce far better results than fashioning a fair rule for a relationship otherwise thought by the rulemaker to be more important.[37]

A. Wood: Rule of Command

Wood operates as a rule of command insofar as it pits the sovereign power of the United States against every individual school board member by threatening a potentially severe financial consequence for deviation from a prescribed course of action. Even though the rule deals essentially with tort liability, what was said about civil libel actions in *New York Times Co. v. Sullivan*[38] may be said here:

> The fear of damage awards under a rule such as that invoked here by the Alabama courts may be markedly more inhibiting than the fear of prosecution under a criminal statute.[39]

Assuming that this sort of universal threat is desired in order to produce conformity to minimally acceptable behavior by school board members, "impermissible motivation" as an element detracts in several ways from the rule's utility.[40] The variety of motives which

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37. In any event, the serial approach has the advantage of applying the analytic framework developed in the case of each type of rule to *Wood*.

38. 376 U.S. 254 (1963).

39. *Id.* at 277.

40. Textual evidence suggests that the majority used "impermissible motivation" in parallel with and as a synonym for "[im]permissible intentions," or "malicious intention to cause a deprivation of constitutional rights or other injury to the student." 420 U.S. at 322. The association with "intention" would suggest that the majority had a result-oriented sense of "motive" in mind when using the term "motivation." In other words, a finding that a deprivation of rights or other injury was an end or goal of the disciplinary measure adopted, *i.e.*, a desired outcome, would suffice to hold the participating school board member liable in damages. However, the use of both the terms "malicious" and "motivation" lends support to the view that other notions of "motive" were meant to be material, too.

If the general, modern legal sense of "malice" were intended by the *Wood* majority in the phrase "malicious intention to cause a deprivation of constitutional rights or other injury", then the adjective "malicious" would add nothing to the noun "intention." For "malice" is now frequently defined as intention to do an act that is wrongful without legal justification. Another sense of "malice" is that used by the Supreme Court in *New York Times Co. v. Sullivan*, wherein a publication with "actual malice" was said to be one "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 280. That sense of "malice" seems plausibly applicable to "malicious intention" in *Wood* but it

that element can be construed to include makes the condition for the damages consequence too imprecise for an effectively focused threat. The vagueness of the word "impermissible" can only compound such imprecision.[41] School board members wishing to conform to the rule would be hard-pressed to know if and when their goals, thought processes or unconscious drives would put them in noncompliance with the command.[42] Given the open-endedness of the "impermissible motivation" element, enforcement might be defeated by showing in litigation that the alleged "impermissible"

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would make the second basis for damages liability (see text accompanying note 2 *supra*) in part redundant (as to the knowledge requirement) and in part a nullification of the "reckless disregard" element. The latter would almost never be necessary to establish since negligent ignorance would suffice for liability where knowledge could not be proved. Further, combining "malice" with "intention" would suggest that states of mind might occur when the constitutional violation might be a desired outcome (intention) but not known or recklessly disregarded (malice), or vice versa. Such situations would be difficult to contemplate in reality.

The Supreme Court and other high courts have espoused on occasion an older and more popular sense of "malice" which fits more smoothly into the *Wood* rule for better or worse, and which would support the view that "motivation" in the *Wood* rule was a broader term than "intention" or even a subsequent end. In Garrison v. Louisiana, 379 U.S. 64, 72 (1964), the Court spoke of "malice in the sense of ill-will" while rejecting it as a basis for criminal liability for truthful defamation of public figures. The Iowa Supreme Court defined a "malicious" act in terms strikingly parallel to the two parts of the *Wood* rule, as an act which is "willful" but which is "further marked by either hatred or ill will toward the party injured, or by such utter recklessness and disregard of the rights of others as denotes a corrupt or malevolent disposition." State v. Willing, 129 Iowa 72, 74, 105 N.W. 355, 356 (1905). In Aikens v. Wisconsin, 195 U.S. 194 (1904), Justice Holmes, speaking for the Court, defined "maliciously injuring" in a criminal trade conspiracy statute "to import doing a harm malevolently for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired." 195 U.S. at 203. In Stewart v. Sonneborn, 98 U.S. 187 (1878), the Court reversed a judgment for damages when in an action for malicious institution of bankruptcy proceedings, the jury was not told to find "malice" as a necessary element for liability. The Court held it "abundantly settled that no suit can be maintained against an unsuccessful plaintiff or prosecutor, unless it is shown affirmatively that he was actuated in his conduct by malice, or some improper or sinister motive." 98 U.S. at 192. As the Court went on to say, "[h]e may have had no ill-feeling against his supposed debtor." *Id.* The foregoing uses of the term "malice" clearly include notions of "motive" within the realm of feelings, drives, expected utility, or other concepts beyond that of "intention" or even a goal.

That the Court in *Wood* either intended or has opened the door to such other concepts of "motive" in board member versus student litigation is further demonstrated by its choice of the word "motivation" rather than "motive." The former term tends to connote deeper or unconscious roots of behavior whereas the latter, "motive," tends to connote a rational goal-seeking model of behavior more consonant with the "intention" manner of thought. E. Bien, The Function of the Motive Taboo in Criminal Law, 1972 (unpublished LL.M. thesis at Harvard Law School).

41. The vagueness of "impermissible" is not adequately cured by its possible limitation by reference to "malicious intention to cause a deprivation". The reference to maliciousness opens the door to all possible motives and their ethical or other assessment.

42. Morris, *Punishment for Thoughts*, 49 THE MONIST 342 (1965).

motivation was not operative or was less influential than a motivation which was "permissible." Finally, if viewed as a federal threat of sanctions against school board members, the rule might invite jury nullification or public opposition and so lessen its effectiveness to the extent that the oppressiveness of grounding a sanction upon a vague motive element is appreciated. Whatever the morality or constitutionality of such a basis for a sanction, governance of the sovereign/subject relationship might be enhanced by wholly eliminating the motive element, or by narrowing it as follows:

> A school board member is liable in damages only if the deprivation of rights or other injury to the student was consciously desired.

B. Wood: Rule of Undertaking

Although the money damages to be assessed may be the same, the utility of attaching that consequence to a condition-set with an "impermissible motivation" element must be judged in an entirely different manner in the case of a rule of undertaking. While a rule of command takes effect with the enactment of a statute or the announcement of a judicial decision, a rule of undertaking takes effect only when the individual to whom it applies acts in the manner justifying the beneficiaries' reliance upon the promised action. In the *Wood* situation, a rule of undertaking could be seen as taking effect in one of two ways: (1) when the school board member assumes office; or (2) when he or she actually participates in a decision to institute a disciplinary measure. Given the ability of a school board member to abstain from any particular case and the function of a rule of undertaking to govern no more than the promiser/beneficiary relationship, the better view of the point of inception is the moment when the school board member votes for or concurs in the disciplinary measure.

Therefore, in a rule of undertaking the question of utility should be addressed to the more personal relationship between the school board member, the affected students[43] and perhaps their parents. That is not to say that the whole community and nation are not interested in and affected by the operation of the rule. Rather, it is to say that the utility of the rule for all is to be judged by its governance of a smaller relational unit than in the case of the rule

43. The student disciplined is the chief, albeit to some extent involuntary, beneficiary of the school board member's undertaking, at least in terms of reliance need if not otherwise. Other students in the school or system must also rely upon the administration of such measure to their fellows.

of command or authorization. When the *Wood* rule is so evaluated, the issue is whether the "impermissible motivation" element aids or hinders the rule in vindicating the reliance students or others must place upon school board members' implied promise to institute disciplinary measures properly.

Ordinarily the equitable remedy of injunction is considered supplementary to the legal remedy of damages, and the former is allowed only if the latter is found inadequate, but the *Wood* rule establishes the damages remedy as extraordinary. Damages are available only if, in addition to a section 1983 violation, either of its two tests is applicable. The condition-set for an injunctive or other nonmonetary remedy for default does not include "impermissible motivation" or disregard of rights. In this posture the rule governing damages has two applications: (1) in cases where there can be no meaningful injunctive relief, as where a wrongdoing school board member has resigned from the board or where little or nothing injunctively can be done anyway, damages with the more stringent condition-set will be the only remedy; and (2) in cases where damages are sought in addition to other meaningful relief, the *Wood* rule strongly resembles the rule for *punitive* damages in tort cases. In the first situation the "impermissible motivation" element could frustrate the reliance need of school board members' beneficiaries, and in the second case that element is no worse but no better than the general condition for punitive damages.

Where damages may be the only effective remedy to effect a performance of a school board member's defaulted undertaking, the "impermissible motivation" element leaves that remedy too uncertain of application to maintain an effective expectation that promises can be counted upon. Particularly since the promiser/beneficiary relationship is essentially involuntary as to the latter and since money to compensate for injuries is the only means to maintain the expectation of performance, it should not be left to a court with or without a jury to deny the remedy because motives are found to be within the "permissible" range. Changing the categories of motives does not appear to affect that conclusion. If, however, the "impermissible motivation" element is used to grant or deny damages in addition to another reasonably effective remedy, more leeway in the decisionmaking process would be acceptable. With regard to punitive damages Dean Prosser wrote:

> [I]t is not so much the particular tort committed as the defendant's

> motives and conduct in committing it which will be important as the basis of the award.[44]

If the function of damages in a discipline case is to add a stimulus to the plaintiff to bring the case, and at the same time to administer a slap to the school board member where the latter is found to have defaulted in a particularly outrageous manner, then the "impermissible motivation" element functions adequately well. The traditional discretionary standard which governs the award of punitive damages is consistent with a broad motive element under which wide-ranging evidence of "permissible" and "impermissible" motivation would determine whether reliance was not only violated but violated egregiously.

As a rule of undertaking, the utility of the motive element in *Wood* depends on whether damages is the sole or basic remedy, or merely an exemplary measure added in special cases. In practice, this would dictate an assessment of the remedies sought as to their adequacy in vindicating the reliance need. A ruling of whether damages were necessary, and thus governed simply by the terms of section 1983, or exemplary, and thus governed by *Wood*, would be required. That process of weighing remedies for adequacy would hardly be new to Anglo-American jurisprudence; it would be the key threshold test of equitable jurisdiction essentially in reverse. In a discipline case the court would weigh possible equitable remedies and, if they were found to be inadequate, it would declare that a damages judgment was necessary and so not limited by the "impermissible motivation" finding. That order of priorities is also fairest to the defendant school board member, who would face the stricter (no motive element) rule for damages only when other, less harsh remedies were unavailing. The school board member would face a discretionary award of damages in addition to another remedy only by a showing of impermissibly motivated conduct.

C. Wood: Rule of Authorization

It is as a rule of authorization that *Wood* is most defensible in its incorporation of a broad motive element. However, damages will ordinarily not be the most effective consequence to nullify unauthorized actions. The rule of authorization in the school discipline situation takes effect when a school board member assumes office, that is, receives the grant of authority to act as a board member in

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44. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 11 (4th ed. 1971) (footnote omitted).

the designated manner in the local area. In the event that a section 1983 suit framing the unconstitutional or otherwise wrongful action as ultra vires were brought in the name of the grantors of the defendant's authority,[45] the utility of the "impermissible motivation" element would have to be judged in view of the regulation of grantor/grantee relationships. The issue would then be whether, compared to alternative compositions, stating the rule with the "impermissible motivation" element would effectively maintain the grantors' trust that the aims and limits of the grant be respected. The competing interest would be to avoid upsetting the expectation of all concerned that authorized action would be upheld. Ultimately, utility is a function of efficacy in encouraging the formation of grantor/grantee relationships where it is socially desirable to do so, as in the case of a school board.

Although the possibility of legal inquiry into their motives is likely to be a disincentive to most people considering candidacy for school board membership, several important considerations may outweigh that impact by fostering greater trust in the grant of authority by the grantors. First, the very dissuasion just noted may weed out candidates for the school board who are less committed or who are afraid that their motives will not pass muster if challenged. Second, the grantees of authority in this instance, as in most instances, have greater control than the grantors over evidence of the data and reasoning process which produce challenged courses of action. For that reason the grantors' ability to raise an allegation of "impermissible motivation" would, if the burden then shifted to the grantee to defend a challenged course of action, help equalize the disparity of information.[46] Further, the right to raise such an allegation helps equalize the disparity of effective power as well. Grantees' answerability to a challenge of improper motives should increase grantors' trust in grants as it would lessen the grantees' ability to evade the spirit while conforming to the letter of the grant. On the other hand, all but narrowly confined motive elements would present some opportunity to the grantee to evade justified as well as unjustified challenges.

The *Restatement (Second) of Trusts* uses "improper motive" as

45. Standing could conceivably lie in a student, a parent in the district or an appropriate public official.

46. This argument was developed in Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

one of several possible justifications for a court to find and remedy "an abuse by the trustee of his discretion."[47] Comment (g) states:

> *Improper motive.* The court will control the trustee in the exercise of a power where he acts from an improper even though not a dishonest motive, that is where he acts from a motive other than to further the purposes of the trust. Thus, if the trustee in exercising or failing to exercise a power does so because of spite or prejudice or to further some interest of his own or of a person other than the beneficiary, the court will interpose. Although ordinarily the court will not inquire into the motives of the trustee, yet if it is shown that his motives were improper or that he could not have acted from a proper motive, the court will interpose. In the determination of the question whether the trustee in the exercise of a power is acting from an improper motive the fact that the trustee has an interest conflicting with that of the beneficiary is to be considered.[48]

In his article *Legislative and Administrative Motivation in Constitutional Law*,[49] one of Professor Ely's chief arguments for a limited use of essentially the "impermissible motivation" test of *Wood* in reviewing legislation is that such a test is both needed and workable in areas of *discretionary* decisionmaking.[50] A principle supporting the *Restatement's* and Ely's positions is that grantors of important private or public authority have special need of an option to challenge the motives of their grantees in areas of decisionmaking where legal rules of "external" action cannot or should not be very specific. The judgments whether and how to institute a school disciplinary measure are clearly not susceptible in practice or in wisdom to precise legal standards, and therefore the rule of authorization governing the exercise of those judgments has further reason to incorporate a motive element broad enough to bridge the gap between accountability and inhibition of school officials. Ultimately, one could argue that grantors of public authority are entitled to choose grantees in whose conduct and motives they have *complete* confidence. However, that argument would support the remedy of removal from the position of authority as the ultimate nullification, which conclusion neither section 1983 nor *Wood* probably contemplates and which would create conflicts between factions of grantors. A political conflict, its remedy too should probably be political,

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47. RESTATEMENT (SECOND) OF TRUSTS § 187 (1959).
48. *Id.*, comment g, at 404.
49. See note 46 *supra*.
50. Ely, *supra* note 46, at 1235-49. *See id.* at 1261-63.

rather than legal.

While as a rule of authorization *Wood* fares best in utility analysis with its "impermissible motivation" element, a judgment for damages is not a characteristic nullification remedy. If a school board member impermissibly reaped an economic benefit through a disciplinary measure, then a judgment for the money equivalent of such benefit would indeed effect at least partial nullification of the action ultra vires as a classic restitutionary remedy to "undo" unjust enrichment. One could also say that a judgment for enough money to undo the injurious effects of action ultra vires would be one way to nullify that action. However, as in the case of the rule of undertaking, a monetary remedy with its greater harshness on the school board member might be reserved for cases where remedies for "specific" nullification by injunction, reversal of a decision or nullification of the after-effects of the action ultra vires[51] were inadequate. Under that approach the *Wood* "impermissible motivation" test could also be limited to cases where damages were to be considered in addition to another remedy. But given the purposes of a rule of authorization, the motive element nonetheless retains its utility in the condition-set even when damages alone are at stake. The maintenance of trust as well as efficacy in the grantor/grantee relationship justifies the greater flexibility introduced by consideration of motives than would be justified in a rule of command or undertaking.

It is not the intent of the author to proceed to the substantive decision about which of the relationships involved in the *Wood* rule is the most important to govern well. However, it does appear that considering the problem of violating students' constitutional rights from the point of view of rules of authorization leads one to quite different conclusions than from the point of view of rules of command or rules of undertaking. The aim of the discussion will have succeeded, though, if appreciation of the consequences and criteria of the choices has increased. Ultimately, the decision about which group of criteria to apply in fashioning the rule depends on the

51. In *Wood* the plaintiffs-students sought not only "compensatory and punitive damages," which the appellate courts treated simply as a request for damages, but also "injunctive relief allowing respondents [students] to resume attendance, preventing petitioners [officials] from imposing any sanctions as a result of the expulsion, and restraining enforcement of the challenged regulation, declaratory relief as to the constitutional invalidity of the regulation, and expunction of any record of their expulsion." 420 U.S. at 310.

judgment of which on balance has the greatest good to offer. In the case of *Wood*, a major issue to be confronted is to what extent are we prepared to delve into motives and to incur litigation and other costs in doing so.

VI. A Concluding Word About Legal Decisionmaking

Karl Llewellyn often wrote of a "situation sense" which marked the good judge from the merely competent one.[52] This somewhat rough notion could be expressed as the command the judge had or could develop over a certain type of fact situation. The judge could possess this situation sense with respect to certain types of commercial transactions, or with respect to the fact that in modern society products of mass production represent a potential danger to people far beyond the scope of contractual privity. A judge who saw his role in the legal system as developing *good* rules to govern these fact situations would take into account the full implications of alternative rules upon those fact situations and the people affected by them. In this manner he would attempt to produce desirable results through his choices among possible rules.

Any legal rulemaker aware of the workings and implications of the three main types of rules outlined in this article can similarly develop and apply what could be called a rule situation sense. The utility of the framework presented herein does not depend on a line-by-line application of its elements in the practice of rulemaking. In the difficult cases, as where two or three different types of rules demand different formulations of the expectation or litigation conditions, a more explicit analysis might well be justified. But in the long-term evolution of case law, statutes and administrative regulations, the point is to bear in mind: (1) alternative types of rules do exist; (2) each type has its virtues and drawbacks in regulating the subject matter involved; and (3) when working with any of the types its particular ends and means should be respected. Craftsmanship in making legal rules no more tolerates plodding formalism than it tolerates oversimplification of the materials.

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52. *See* W. Twining, Karl Llewellyn and the Realist Movement 216-27 (1973).