The Ethical Foundations of Judicial Decision-Making

Philip J. Grib, S.J.
THE ETHICAL
FOUNDATIONS OF
JUDICIAL DECISION-
MAKING*

PHILIP J. GRI布, S.J.**

INTRODUCTION

What is it that judges do? They decide cases. They adjudicate disputes between contending, opposing parties. They determine who wins and who loses. And they do this by virtue of their office and authority as members of the judiciary and in accord with the law. Judges have been variously described as being bound to render authoritative decisions by applying the law, to interpret the law, and/or to create/make the law through the legitimate use of judicial discretion accorded those exercising the judicial function. And whether in trial or appellate courts, judges are bound to “justify” or legitimate the judicial decisions they render.

This apparently straightforward characterization of the judicial decision-making function belies the uneasiness suffusing the attempts of judges and their observers to talk about, let alone explain, what deciding cases requires. It is intriguing that so little has been written or published about what it is that judges do when they decide cases. It is even more intriguing that when judges or others do attempt to write about what it is that judges do when they decide cases, they do so with great misgivings about whether an explanation of the enterprise or task of deciding cases can adequately grasp the mysterious nature of the judge’s mission. From those who can and do and must speak with a judge’s authority in the rendering of judicial decisions and judicial opinions, there is such surprising reluctance, reticence, and reservation in articulating the

* Copyright 1991 Philip J. Grib, S.J.
** Assistant Professor, Loyola University of Chicago School of Law; A.B., Xavier University, Chicago 1960; J.D. University of Chicago Law School, 1963; M.Div., Jesuit School of Theology at Chicago, 1973; Ph.D., Catholic University of America, 1983; Fellow, American Judicature Society, 1989-90.
inner-workings and foundations, so to speak, of the decision-making process.

We intend to examine here the "mysterious" nature of the judge's mission to decide cases, through a summary overview of some of the noteworthy studies of judicial decision-making. The classic work of Justice Cardozo will serve as a convenient starting point for a survey of some of the successive attempts to determine what it is that judges are supposed to do when they decide cases. A more detailed summary of Cardozo's account of judicial decision-making will be accompanied by like summaries of the accounts provided by Ronald Dworkin, Aharon Barak, Robert Keeton, and Richard Posner. This brief survey of some of the key authorities will be subject to a limited assessment whose purpose is to suggest a more enlightened and fruitful horizon for doing a jurisprudence of judicial decision-making. The work of John Finnis, lawyer/philosopher/ethicist, and Albert Jonsen and Stephen Toulmin, both ethicists, is presented in summary form sufficient to illustrate the kinds of viewpoints which will provide a more adequate, a more insightful and inspired account of the judicial function.

The "Mysterious" Nature of the Judge's Mission

In 1921, forty years after the publication of Oliver Wendell Holmes' The Common Law, Justice Benjamin Nathan Cardozo, in his The Nature of the Judicial Process, had little hope that he would be able to state the formula which would explain the process of judicial decision-making to his own satisfaction, let alone to that of others. Nonetheless he proceeded to "rationalize" the judge-made law which characterized the common law, although he recognized the inability of judges to explain satisfactorily to others, let alone to themselves, what it was that they did when they decided cases.

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?

---

1 Oliver W. Holmes, Jr., The Common Law (1881).
3 Id.
4 Id. at 10.
Justice Oliver Wendell Holmes, Jr., had earlier been credited with successfully challenging what had been the formalist mode of characterizing the law as rules and principles enshrined in case law to be merely applied by judges through a logical process. Holmes' aphorism that "the life of the law is not logic, but experience" became a touchstone for what would later be characterized as a pragmatic or legal realist approach to the law. Cardozo can be credited with having fleshed out Holmes' insight, insisting on the judge as not merely finding or declaring the law, but in fact making the law.

Over sixty years after Cardozo's "rationalization" of judge-made law, Justice Aharon Barak, of the Supreme Court of Israel, further delineated the characteristics of judicial discretion, that discretion which a judge must exercise when faced with a legal problem that has more than one lawful solution. Barak contends that such discretion is "for the most part, a mystery—to the general public, to the community of lawyers, to teachers of law, and to judges themselves." He quotes Justice Felix Frankfurter:

The power of searching analysis of what it is that they are doing seems rarely to be possessed by judges, either because they are lacking in the art of critical exposition or because they are inhibited from practicing it. The fact is that pitifully little of significance has been contributed by judges regarding the nature of their endeavor, and, I might add that which is written by those who are not judges is too often a confident caricature rather than a seer's vision of the judicial process of the Supreme Court [Of Law and Men 32 (1956)].

Of course, Justice Barak sees his effort in Judicial Discretion as an attempt to remedy the situation regarding that discretion which "remains mired in the realm of the unknown, enveloped by shrouds of mystery, with even its philosophical foundations unclear." He pays homage, however, to Cardozo's work as the cornerstone for any understanding of judicial discretion.

Joseph R. Grodin, a former Justice of the California State Supreme Court in Pursuit of Justice: Reflections of a State Supreme Court Justice, reflects on the issue of whether judges make law or not. He queries:

---


Id. at 137.

Id.


Id. at 3.

Id. at 4.

Id. at 3.

Id. at 6.

Grodin, supra note 5. Justice Grodin was removed from the bench in 1986 together with
What exactly is the relationship between the judge and the law? Is it like the relationship of a mathematician to the principles of geometry, reasoning deductively from established axioms and postulates to solve an individual problem? Is it like that of a construction contractor to an architect, faithfully implementing plans and specifications? Is a judge like a baseball referee, calling the strikes and balls as he sees them? Or is he more like a great chef, consulting a recipe for guidance but contributing his own creativity to the final product? Is he like an author in a cooperative writing project, or perhaps like a painter who works on a portion of a mural? Is a judge a bureaucrat, a legislator, a village elder? Does a good judge, a judge who conducts himself as we expect a judge to do, simply apply rules made by others, or does he somehow have a hand (or a heart or a mind) in the process?”

Grodin is skeptical about whether most judges, in the process of deciding cases, rely upon the theories or models advanced by philosophers of law. None of such theories or models provide the kind of comprehensive explanation needed to deal with all the data:

Listen carefully, I say, to the insights that the legal philosophers offer, but beware the claim that any particular insight will explain all we need to know. Perhaps some day a legal Einstein will develop a unified field theory that is sufficiently comprehensive to describe all that judges do and at the same time sufficiently specific to be meaningful; but I am not holding my breath.

In the meantime, Grodin affirms the usefulness of an eclectic approach to theorizing about judicial decision-making, making use of the variety of models which shed light on what the judge does, viz., the judge as geometrist, builder, bureaucrat, chef, referee, artist, village elder, and legislator. These models “have some descriptive, as well as prescriptive, force as applied to some of the things that some judges do some of the time, though none of them serves to capture the entirety of the judicial role.”

In the last two decades there has been a fascination with judicial decision-making. This has been prompted by the political battle over appropriate candidates for the federal judiciary, especially the candidates for the United States Supreme Court, and the ensuing scholarly debates about originalist versus non-originalist, interpretivist versus non-interpretivist, activist versus restraint theories of Constitutional adjudication.

Yet there have been very few legal books or treatises like Benjamin

---

Chief Justice Rose Bird and Justice Cruz Reynoso in the wake of a judicial retention election campaign which focused unfavorable attention on the death penalty decisions of those justices.

14 Id. at 133.
15 Id. at 144.
16 Id. at 161.
17 Id.
Cardozo’s to tackle systematically the analysis and explanation of the phenomenon of judicial decision-making. And even Cardozo’s work was not in the nature of a magnum opus, but was based on the Storrs Lectures he delivered at Yale University. This seventy-year-old work has stood the test of time; it is still hearkened to as a classic statement of what it is that judges do when they decide cases. It has also been the constant authority and inspiration for subsequent studies on the nature of the judicial decision-making process.

Yet despite Cardozo’s achievement, he has been seen as subordinate to the figure of Oliver Wendell Holmes, Jr. It is not that anything of a scholarly nature written by Holmes could match Cardozo’s self-reflective studies of the judicial decision-making process. The influence of Holmes as the giant forbear in American jurisprudence perdures, as Richard Posner’s recent testimonial evidences. Holmes’ judicial opinions on the Massachusetts Supreme Judicial Court and on the United States Supreme Court provide the grist for such reverence and awe accorded Justice Holmes. By many accounts, from those of various ideological stripes, Holmes was masterful and impressive as a judge. His aphoristic wisdom, however, can be no substitute for the careful and self-reflective exposition of a Cardozo. Both Holmes and Cardozo were sitting judges, besides their scholarly interests and endeavors. Holmes was a law professor at Harvard for but one semester. Though an occasional lecturer in academic settings, Cardozo never was on a law faculty. Yet however great the merits of Holmes’ The Common Law, however indebted Cardozo might be to Holmes’ seminal thinking as scholar and judge, Benjamin Nathan Cardozo’s longevity as the respected authority on the judicial process perdures.

The Successors to Cardozo

More recent attempts to deal with the phenomenon of judicial decision-making have approached the topic from the lawyer’s side, as it were. Edward H. Levi’s An Introduction to Legal Reasoning achieved the kind of acclaim accorded Cardozo’s The Nature of the Judicial Process among members of the legal academy. Together with Cardozo’s book, Levi’s little volume has served as standard fare in law schools as a resource for students struggling to “learn to think like lawyers.” Levi’s illustration of judicial decision-making as rooted in the method of analogy,

---

although accorded the status of a legal classic in American jurisprudence, has been observed to be rather jejune and lacking in substance by some critics. Of course, Levi’s object was to focus on merely one dimension of legal reasoning as displayed in decided cases.

In 1960 Karl Llewellyn’s *The Common Law Tradition: Deciding Appeals*, compared to Levi’s small monograph, offered more substantial fare from one of the credited progenitors of the legal realist “school” of thought. Llewellyn, like Levi, was concerned with examining judicial decisions to enable lawyers, specifically, those engaged in appellate advocacy, to determine how courts would rule or decide in future cases. Lawyers could learn to read the opinions and the rules of reckonability articulated therein by the judges (who called upon wisdom, reason and situation-sense), in order to predict what the court would do in the advocates’ own particular cases. Llewellyn sang the song of reason to refute the critics who charged that the legal realist tradition undermined any certitude in or reliance upon judicial decision-making. He attempted to establish his thesis regarding the reckonability of appellate decision-making through an examination of the whole line of cases decided by outstanding tribunals during any one term.

The careers of both Edward H. Levi and Karl N. Llewellyn may be appropriately characterized as “academic.” But of course, Levi was Attorney General of the United States for some time, and both he and Llewellyn had some experience in the private practice of law. Llewellyn’s work on the Uniform Commercial Code bespeaks his own experience beyond the ivory towers of legal academe. Unlike Cardozo or Holmes, however, neither was a judge. But even though the focus of their study was on legal reasoning as it related to the study and practice of law, they had to work with and explain what the judges said and did in deciding cases. Their work presupposed that thinking like a lawyer required an appreciation of what it meant to think like a judge.

Current studies of judicial decision-making include Ronald Dworkin’s *Law’s Empire*, which is a major treatise in American jurisprudence and, as is typical of American jurisprudential thinking, is focused on the adjudication of cases, statutes, and the Constitution; Aharon Barak’s *Judicial Discretion*, which was originally published in Hebrew in 1987 as *Shikul Daat Shiputy*; and Joseph R. Grodin’s *In Pursuit of Justice: Reflections of a State Supreme Court Justice*. Grodin’s and Barak’s work has been noted above. Among these authors, only Barak and Grodin have been judges. Barak currently sits on the Supreme Court of Israel and has been

---

4. Grodin, supra note 5.
on the faculty and also dean of the Hebrew University Law School. Grodin is a former justice of the California Supreme Court and currently a professor of law at Hastings College of Law of the University of California. Dworkin, an academic of national and international renown, has not sat on the bench, except in the person of his hypothetical Judge Hercules.

John W. Cooley's *Appellate Advocacy Manual* and Robert E. Keeton's *Judging* are recent publications intended for use in law school courses. Cooley's book could be characterized as an updated version of Karl Llewellyn's *The Common Law Tradition: Deciding Appeals*; but it is less a treatise and more the manual, a how-to-do-it book, with the incorporation of practical exercises to be done by the students. Cooley, a practicing attorney and law teacher, with an expertise in alternative dispute resolution, has provided a non-traditional approach to appellate advocacy, one going beyond the doctrinal preoccupations of a Karl Llewellyn. He focuses on the multifaceted functions of the practitioner advocate, subjecting the concept of legal argument and rhetoric to a cross-disciplinary assessment and evaluation in the light of new cognitive theories premised on notions of left-brain and right-brain thinking, whole brain thinking, etc. In his Chapter Two on The Thinking Function, Cooley states: "In short, judges maintain a holistic approach to problem-solving. In this respect, lawyers have much to learn from judges. To be effective as problem-solvers, lawyers must think more like judges". The goal of appellate lawyers, after all, notes Cooley, is really to think like judges.

Unlike Cooley, Keeton, the Langdell Professor Emeritus of Harvard Law School, known as one of the scholarly legal authorities in the area of tort law, has of late ascended to the bench. Keeton, the judge, has provided a combined treatise and casebook for use in law school courses on judging, with a special focus on judicial decision-making in the area of torts.

A survey of casebooks, treatises, and other texts available for law school instruction reveals what everyone involved in legal education is aware of and has been aware of throughout the last century and most of American legal education—there has been little or nothing on the art or skill or doctrine of judging. There have been no manuals on judicial decision-making. Some might argue that there is no market for such a course in the law school curriculum, whether for the curriculum for the J.D. degree or for the higher graduate law degrees. The job market for prospective judges is so limited and uncertain because of the few positions available either through an elective or appointive system that law students have

---

27 Cooley, supra note 25, § 2:27.
not been and are not now interested in the niceties of judicial decision-making. It may be that approaching the phenomenon of judging from the lawyer's side, as it were, in courses in trial practice and appellate advocacy, or in some of the other more traditional doctrinal analysis courses is sufficient for the purposes of knowing what it is that judges do to and for lawyers and their clients. It is no doubt ironic, that the gist of study in law schools, which still sees the Langdellian insight playing itself out in the major preoccupation with appellate court decisions, is unwilling to examine, analyze, and evaluate the phenomenon of judicial decision-making. Maybe that is because at least for almost all judicial positions today only lawyers qualify, and that what judges really do is what lawyers do. To think like a lawyer is to think like a judge is to think like a lawyer is to. . . . A rose is a rose is a rose. . . . One might well understand then why law schools might not have such courses on judging.

And I suppose that understanding would likewise embrace why, only up until recently, no formalized programs of instruction for judges were provided. Judicial education has now achieved some professional status, nationally via the National Judicial College, and on the local scene through judicial conferences. Just as practicing attorneys today need their continuing legal education, so judges likewise need to be updated in their profession. Yet, such judicial education programs have not done justice to addressing the "foundational" issues of the task of judicial decision-making, what it is that judges are supposed to do when they decide cases.

Professor, now Judge, Robert E. Keeton, undaunted by the common wisdom in academia regarding judging, has provided a traditional law school resource for a law school course in judging. He concludes a description of the course for which he has written the text and gathered the illustrative cases and other materials:

A central premise of this course is that, whether or not you are a judge or ever expect to be one, it makes a difference (both to your professional development and to the quality of the legal system) how well you understand judging in our legal system and what you believe about commitment to professionalism and method in judging.**

Will Keeton's course catch on? Does it have any hope of being mandated or required of law students? Will it be relegated to a long list of electives in the contemporary law school curriculum? Will it be a resource for judicial education courses, especially for those newly elected or appointed to a judiciary, whether at the trial or appellate levels? Is Robert Keeton's book on judicial decision-making too much the work of a career law professor who only late in life sits on the bench, but with too much of the scholar's agenda? We reserve judgment on all of these matters.

** Keeton, supra note 26, at 261.
The most recent entry into the discussion of judicial decision-making comes from another legal scholar who sits on the Seventh Circuit Court of Appeals, Richard A. Posner. His jurisprudence of adjudication is situated in a much wider-ranging discussion of what he calls the "wholesale" issues of jurisprudence. Unlike Cardozo, Levi, Llewellyn, Barak, Grodin, and Keeton, Posner indulges himself more overtly and explicitly in philosophical concerns. The kinship with his fellow academic, Ronald Dworkin, is duly noted, a kinship not in conclusions or method, but rather in the importance of doing some kind of a philosophy of law not merely to satisfy the philosophers or those of an academic propensity, but to lay the "foundation" for what it means to practice law and to judge cases. As Posner queries:

What is law? A system of rules? Of rules plus judicial discretion? Of principles? Or is it just organized public opinion? Is it a thing, entity, or concept at all—and if not, does this make the original question ("What is law?") meaningless? Where does law come from? Can there be law without lawyers and judges? Is there progress in law? How do we know when a legal question has been answered correctly? What is "knowledge" of law knowledge of? What conditions are necessary or sufficient to make law objective? Should law even try to be objective?

And on and on he continues to query in his latest opus, The Problems of Jurisprudence. Staking out his claim, Posner opts for a jurisprudence based on the philosophy of pragmatism (but not solely thereon) with the intent to "demythologize the law without either denigrating or diabolizing it". Prior to ascending the bench as a federal judge, this outspoken law professor had not been bashful about suggesting how judges ought to go about deciding cases in the light of his jurisprudence of law and economics. Now, after some time on the bench, he has become fascinated about the issue of the objectivity of the process of adjudication.

Posner finds in the person of Justice Oliver Wendell Holmes, Jr., the inspiration for his new jurisprudential pragmatism which provides a middle ground from which to assess the workings of bench and bar. The jurisprudence of critical legal studies and the feminist critique on the left, and legal positivism or legal realism on the right, and the variety of other forms of jurisprudential thinking which find themselves on both the left and the right at the same time (e.g., proponents of law and economics of both a liberal and a conservative stripe) must yield to a pragmatism reliant upon the methods of analytic philosophy to guide a never-ending, never-resolvable critique of American law. Posner's pragmatic manifesto

---

30 Id. at 1.
31 Id. at xii.
focuses on the two major preoccupations of the American legal establishment: "the autonomy of legal reasoning as a methodology of decision making" and objectivity as the goal of the legal enterprise (i.e., "that persons with different political or ideological commitments can nevertheless be brought to agree on the answer to even the most testing, the most politically charged, legal question"). The autonomy and objectivity of the law are in need of demythologization and not in need of the attempts at retreading being mounted by those characterized by Posner as "neo-traditionalists" who do not fully appreciate the implications of the decline of law as an autonomous discipline. As Posner contends:

Lawyers and judges are seen to be muddling through, struggling with questions that often cannot be resolved other than by the lights of the decision maker's personal values and preferences, constituting a social vision that may be in irreconcilable conflict with other people's equally plausible social visions.

The traditional modes of analysis sought to be redeemed by the neo-traditionalists will not work since traditional foundations have been undermined. As Posner insists: "Today we are all skeptics".

CARDozo, DWorkIN, BARak, Keeton, POSNER:

A Variety of Perspectives

All of these recent forays into the domain of judicial decision-making provide some substantial corroboration to Cardozo's convictions that judicial decision-making is a phenomenon whose "foundations" are not readily or easily amenable to explicitation, at least not to an explicitation that commands a consensus or a universal assent. This is a good place to return to Justice Cardozo's query about what it is that judges do when they decide cases and the proportions in which sources of information like logic, historical precedent, custom, and social welfare may appropriately be relied on. All the elements involved in judge-made law (in particular common law cases)—logic, historical tradition, custom, and common standards of justice and morals reflective of the social welfare—are brought together in varying proportions not by fate or chance, but by "[s]ome principle, however unavowed and inarticulate and subconscious." A judge chooses the proportions of the elements on the basis of considerations and motives, some of which are determined at a sub-conscious level. Any attempts at analyzing and evaluating judicial decisions

---

33 Id. at 454.
34 Id. at 453.
35 Cardozo, supra note 2, at 11.
have to take account of "inherited instincts, traditional beliefs, acquired convictions." This must be the setting for articulating the guidelines for judging; we recognize that no matter how diligently we strive for objectivity in our efforts to explain the judicial process, we are limited by our own eyes. The most we can hope to achieve, according to Cardozo, is a kind of subjective objectivity, if you will.

Cardozo contends that when no decisive precedent (a common law case or cases) is available to guide the judge in adjudicating a new situation, the judge must create a new judgment which will serve eventually as precedent from which new principles and norms will be derived to shape future judicial decisions.

In so-called "serious business" cases, where precedents are available but not clearly applicable to a case at hand, the judge must extract from the precedents the underlying principle or ratio decidendi and then must determine the path or direction along which the principle is to move and develop. He states:

The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the mores of the day; and this I will call the method of sociology.

The method of philosophy or rule of analogy may not clearly establish the path or direction of a principle. One principle or precedent, if pushed to its logical extreme, may point to one conclusion. But a conflicting principle or precedent, if pushed to its extreme, may point to another conclusion. How is the judge to resolve such a conflict? He will have to take account of the other elements: history, custom, social utility, some sentiment of justice, or a semi-intuitive apprehension of what direction the spirit of the law might require. Which method of the four methods required for judging will predominate in any particular case will depend on the circumstances, "upon intuitions of convenience or fitness too subtle to be formulated, too imponderable to be valued, too volatile to be localized or even fully apprehended." Where custom overlaps into the mores of the time, i.e., into customary morality, the methods of tradition and sociology will be at a point of contact. The method of sociology or of the power of social justice is premised on the fact that the final cause or end of law is the welfare of society. This fourth method provides law for the gaps, provides for interstitial law-making to ensure that social needs and

---

86 Id. at 12.
87 Id. at 30-31.
88 Id. at 58.
values are being served. The good of the collective body based on the
notion of expediency or prudence and the social utility established by
standards of right and wrong (including the mores of the community, reli-
gion, ethics, and the social sense of justice) are embraced within the
fourth method. This method of sociology accords the judge a range of
choice limited, however, by relevant precedent, custom and the practice
of other judges. Nonetheless the judge's choice must be objective and not
subjective, i.e., it must be in accord with reason and justice, conforming
to the accepted standards of the community.

Thus, logic, history, custom, utility, accepted standards of right con-
duct are the elements or "forces" which shape the growth and develop-
ment of the law. Which of the elements will dominate in any one case will
depend on a comparative analysis and evaluation of the social interests at
stake which will call for weighing and balancing. The ultimate criterion
by which the judge will know when one interest outweighs another is ex-
perience, study and reflection, viz., life itself.

Regarding the sources of guidance which the judge must take account
of in deciding cases, it is important to note what Cardozo says about
human reason and conscience as legal authority to be used by the judge.
He notes:

I am not concerned to vindicate the accuracy of the nomenclature by
which the dictates of reason and conscience which the judge is under a duty
to obey are given the name of law before he has embodied them in a judg-
ment and set the *imprimatur* of the law upon them. I shall not be troubled
if we say with Austin and Holland and Gray and many others that till then
they are moral precepts, and nothing more. Such verbal disputations do not
greatly interest me. What really matters is this, that the judge is under a
duty, within the limits of his power of innovation, to maintain a relation
between law and morals, between the precepts of jurisprudence and those of
reason and good conscience.39

And apropos of judicial discretion and the judge's obligations to prin-
ciple, Cardozo notes:

[The judge] is to draw his inspiration from consecrated principles. He is not
to yield to spasmodic sentiment, to vague and unregulated benevolence. He
is to exercise a discretion informed by tradition, methodized by analogy,
disciplined by system, and subordinated to "the primordial necessity of or-
der in the social life." Wide enough in all conscience is the field of discre-
ption that remains.40

Cardozo concludes his lectures on the nature of the judicial process
by noting that the unique subjective objectivity which characterizes judi-

39 *Id.* at 133.
40 *Id.* at 141.
cial decision-making can explain the differences among judges in deciding cases. But the eccentricities of judges as played out in their use of the four methods noted above will balance each other out in the long run.

Ronald Dworkin has argued against the notion of judicial discretion, contending it is incompatible with what the judge's job entails. Without discounting the appreciation of the judge as lawmaker, Dworkin argues against judicial discretion in the strong sense in the so-called "hard" cases. He rejects both conventionalist and pragmatist conceptions of law. According to a conventionalist theory or concept of law, when a judge comes to decision about a matter for which there are no warrants in the law, for which past judicial decisions have not provided, the judge must then fall back upon discretionary justifications for decision, which may involve some notion or ideal of justice, the general interest of society, or some other kind of justification. According to a pragmatist conception of law, in the "hard" cases a judge may proceed to decision according to what the judge believes to be appropriate for establishing or maintaining the best political community.

According to Dworkin, in the hard cases, the judge is bound by the concept of law as integrity to decide matters in accord with a coherent set of principles of justice and fairness and procedural due process. "Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community." He insists that in most hard cases there are "right" answers to be determined by judicial decision in accord with rights and responsibilities flowing from past political decisions. These rights and responsibilities count as legal, not just when they are explicitly found in past political decisions, but also when they follow from the principles of personal and political morality which are presupposed in the explicit decisions as justifications for the same. Judicial decisions are thus based on principles and arguments from principle and not goal-oriented policies.

The principles of integrity, justice, fairness, procedural due process, and other "higher-order" principles will insure judicial decisions that both fit past political practice and at the same time provide the best overall justification of the same. Such principles of personal and political morality, for Dworkin, are the stuff of which judicial decision-making is made. But the arguments for integrity in adjudication are not premised on first principles of political morality; law as integrity does not purport

---

41 DWORKIN, supra note 22, Chs. 4, 5, 7.
42 Id. at 255.
43 Id. at viii, 96.
44 Id. Ch. 7.
to rest on an abstract and timeless political morality. But it rests on the principles of the political morality of our own political culture.

In any case, although integrity in adjudication precludes judicial discretion in the strong sense in the "hard" cases or even the "very hard" cases while requiring a "right" or "correct" answer, there may be differences of opinions between judges about what the "right" answer is.

Judges will have different ideas of fairness, about the role each citizen's opinion should ideally play in the state's decision about which principles of justice to enforce through its central police power. They will have different higher-level opinions about the best resolution of conflicts between these two political ideals.

The personal and political moral principles operative in Dworkin's schema are seen as having operative force not merely in the so-called "hard" cases, but also in the "easy" cases. The concept of law as integrity "explains and justifies easy cases as well as hard ones; it also shows why they are easy." Easy cases are merely special cases of hard ones. They are cases which do not require asking questions for which the answers are already known.

In basic disagreement with Dworkin's analysis and explanation of judicial decision-making in the hard cases, Aharon Barak argues that judicial discretion is inevitable and necessary in judicial decision-making in the hard cases. He defines the hard case as one in which two or more lawful possibilities exist regarding the disposition of a legal matter. The hard cases do not have any right answers, not even in the Dworkinian sense. Judicial discretion means that the judge is free to choose among several lawful alternatives, alternatives which are designated as lawful insofar as they would fall within a zone of reasonableness measured by what would be acceptable in the legal community. In being free to choose, the judge is not obligated or required to decide in a certain way. This notion of discretion in the strong sense characterizes the judge as lawmaker in his or her own right, exercising a lawmaking function which is seen as required in a democratic polity and not in contradiction thereof. The nature of law itself in its various aspects—principles, policies, standards, and rules of interpretation—demand such a judicial function. Easy cases are those which entail a mental component of thought, balancing, and weighing and the complexity of the interpretive process. But easy cases do not require discretion, nor do intermediate cases. Barak

45 Id. at 216.
46 Id. at 250.
47 Id. at 266.
48 BARAK, supra note 8.
49 Id. at 10-12.
50 Id. at 36-39.
refers to intermediate cases to designate cases which raise the prospect of being included in the category of hard cases, but after careful examination and assessment are found to require only one answer and thus fall within the embrace of the easy case category.\textsuperscript{51} Thus, Barak can be seen as taking the middle ground between a position negating discretion in the strong sense in all adjudication, and those who would argue for judicial discretion in all cases.

Yet discretion, even in the hard cases, is circumscribed by procedural fairness and substantive reasonableness which provide some limits on the judicial exercise of freedom in choosing among a number of possible lawful alternatives.\textsuperscript{52} In this sense, discretion is not absolute, but limited. Judicial discretion can be exercised in three different areas: choosing from among a set of facts those which are deemed essential for the decision; choosing from among different methods of applying a given norm to a given set of facts; and choosing the norm from several normative possibilities for the case at hand. Barak insists that it is really only in the third instance, using judicial discretion to pick the norm for the decision, that judicial discretion is judicial lawmaking, establishing a precedent of general applicability.\textsuperscript{53}

According to Barak the judge has the duty to exercise his discretion reasonably.\textsuperscript{54} He must not exercise it in an arbitrary manner, such as by making a determination through the flip of a coin. And among alternative options for discretionary choice, he should choose the best alternative. Barak recognizes that the “reasonable judge” standard for the use of judicial discretion will allow for differences of opinion regarding what the best alternative is. Yet ultimately where the reasonableness standard yields no clear best alternative, the judge is free to choose. As Barak puts it:

In the hard cases, therefore, when the objective standards are of no help, the decision is made by the judge himself, as the product of his personal experience and his worldview as a judge. His judicial philosophy may be the compass that directs him in solving the difficult problem with which he is faced. Indeed, in the hard cases this is the most practical thing the judge has. . . . Thus in the hard cases, the final decision depends to a large extent on the judge’s judicial philosophy, on his approach to the judicial function, and on his judicial worldview.\textsuperscript{55}

The judge’s conception of the judicial function has to be in accord with what is acceptable to the legal community.\textsuperscript{56} The judge’s worldview

\textsuperscript{51} Id. at 39.
\textsuperscript{52} Id. at 22-27.
\textsuperscript{53} Id. at 94.
\textsuperscript{54} Id. at 115 ff.
\textsuperscript{55} Id. at 124.
\textsuperscript{56} Id. at 123 ff.
is based on his human experience and on the social principles and policies underlying his conception of the judicial function. The subjective prism which is the ultimate criterion for judicial discretion has an “objectivity” guaranteed by the acceptable values of the society, its fundamental values, the articles of faith of the nation. And although judicial intuition is one of the dimensions involved in the exercise of discretion, the discretion must nonetheless be expressed in rational thought.

The two most recent entries into the sparse library which explores the phenomenon of judicial decision-making, Keeton’s Judging and Posner’s The Problems of Jurisprudence, will conclude this collection of brief summary accounts of what it is that judges do when they decide cases. Keeton’s introduction to judicial decision-making is straightforward and uncomplicated in its theoretical distillation of the “essence” of adjudication. For Keeton, judging is choice. Choice is power. Power in itself is neither good nor bad, but power as allocated and used can be for good or ill. Judicial decision-making is judicial choice which is reasoned, involving a reasoning which is deductive, informative (inductive) and analogizing. Judges make law and they do so on value-based reasoning. Judges are obliged to apply the authoritative legal sources of the community (constitutions, statutes, precedents, not only in their explicit mandates, but in the manifestations of principle and policy found in the authoritative sources). When there is a lack of clear guidance in the legal authorities, the judge must make choices involving candid disclosure of the reasons for such choices.

The range of choice available to the judge in resolving issues of law and fact in adjudication is circumscribed. “Judges are not free to make choices expressing their own personal values. Their professional obligation is one of reasoned choice—or as it is often described—principled adjudication.” Adjudication must conform to principles which are consistent with a community’s standards. Those principles are either explicit or implicit in authoritative sources of law. Where the guidance provided to the judge by the authoritative sources of law is incomplete or ambiguous and the judge must decide, the judge has to provide a candid disclosure of the reasons for the choice.

Reasoned principled judicial choice is not, for all of that, value-free. “No ruling on an issue of law is value-free.” Whether or not the value implications or consequences of judicial decision are formally taken into account, they are present nonetheless. “[L]egal decisionmaking inevitably

---

57 Keeton, supra note 26.
58 Posner, supra note 29.
59 Keeton, supra note 26, Ch. 1.
60 Id. at 19.
61 Id. at 20.
involves moral choice." Yet, "judges are not free to make choices on the basis of personal moral views that they perceive to be in conflict with the moral views expressed or implied in the authoritative declarations" which guide their choices.

Richard A. Posner's position on judicial decision-making is situated in his argument for a pragmatic jurisprudence, a pragmatic philosophy of law, "a functional, policy-saturated, nonlegalistic, naturalistic, and skeptical, but decidedly not cynical, conception of the legal process." Posner purports to take a mediating position between two groups of thinkers, the skeptics and the legalists. The skeptics denote those who view the "law as politics, or law as the will of the stronger, or law as the activity of licensed professionals." The legalists include those who view the law as "an objective entity and autonomous discipline." As Posner puts it:

The brand of pragmatism that I like emphasizes the scientific virtues (open-minded, no-nonsense inquiry), elevates the process of inquiry over the results of inquiry, prefers ferment to stasis, dislikes distinctions that make no practical difference—in other words, dislikes "metaphysics"—is doubtful of finding "objective truth" in any area of inquiry, is uninterested in creating an adequate philosophical foundation for its thought and action, likes experimentation, likes to kick sacred cows, and—within the bounds of prudence—prefers shaping the future to maintaining continuity with the past. So I am speaking of an attitude rather than a dogma; an attitude whose "common denominator" is "a future-oriented instrumentalism that tries to deploy thought as a weapon to enable more effective action."

The concept of law that emerges from Posner's pragmatic jurisprudence has significant normative implications for judicial decision-making. First, "legal reasoning" is not some unique, autonomous method of reasoning. When lawyers and judges do what they do, they use simple logic and the common forms of practical reason used by anybody else in managing their everyday affairs.

Second, the justification of legal decisions, i.e., "demonstrating" that the decision rendered is correct, is often impossible. "[L]egal rules are often vague, open-ended, tenuously grounded, highly contestable, and not only alterable but frequently altered. From the judge's standpoint they are more like guides or practices than like orders." The authority of

---

62 Id.
63 Id.
64 POSNER, supra note 29, at 26.
65 Id. at 25.
66 Id.
67 Id. at 28.
68 Id. at 459-60.
69 Id. at 455.
judicial precedent, even when the precedent speaks clearly to a matter under deliberation, is ultimately grounded in political "force" rather than in epistemic entailment. "Often the judge will have no choice but to reason to the outcome by nonlegal methods from nonlegal materials, and sometimes he will have to set inarticulable intuition against legal arguments."70

Third, difficult cases can be decided objectively only rarely, if by objectivity is meant something more than reasonableness. "[T]he judge's proper aim in difficult cases is a reasonable result rather than a demonstrably right one."71 Objectivity attributed to legal decisions is "cultural and political rather than epistemic."72

Fourth, change in the law comes about not through a rational process but by a kind of conversion experience. "Many changes of legal doctrine owe nothing either to analogies . . . or to logically or empirically powerful arguments or evidence. Instead they are the result of gestalt switches or religious-type conversions."73

Fifth, law has to be seen primarily as an activity or enterprise, rather than as a concept. There are no a priori principles which fix the boundaries for appropriate legal argument. There are no moral "reals" available to decide difficult legal cases. At the same time there is no body of positive law which preexists judicial decision-making wherein judges modify, extend, and reject the "sovereign's" command. "The line between positive law and natural law is no longer interesting or important and the concepts themselves are jejune."74

Judges make rather than find law, and they use as inputs both the rules laid down by legislatures and previous courts ("positive law") and their own ethical and policy preferences. These preferences are all that remains of "natural law," now that so many of us have lost confidence that nature constitutes a normative order.75

"[N]atural law as a system of thought that generates definite answers to difficult moral and legal questions is hopeless in a society that is morally heterogeneous, as ours is."76

Sixth, it is no longer useful to speak of law as interpretive. Logic does not determine correct interpretations. "Law as currently conceived in the academy and the judiciary has too theocratic a cast. There is too much emphasis on authority, certitude, rhetoric, and tradition, too little on con-

70 Id. at 456.
71 Id. at 26.
72 Id.
73 Id. at 456.
74 Id. at 460.
75 Id. at 457.
76 Id. at 457-58.
sequences and on social-scientific techniques for measuring consequences.’’ Decision-making revolves about assessing the consequences of alternative decisions; only in this sense does the concept of interpretation make sense. “The consequences of law are what are least well known about law. The profession’s indifference to studies that cast doubt on the lawyer’s faith in the expressive, symbolic, and norm-reinforcing consequences of law is appalling.”

Seventh, there are no overarching concepts of justice to provide direction to the legal enterprise. “Corrective justice,” “distributive justice,” “wealth maximization,” “justice as fairness,” “natural law” in their “strong” versions are not adequate to the task.

And finally, eighth, law is functional and not symbolic or expressive. It is not addressed to the soul or mind of humanity. Its concept of human activity is behaviorist. “It has yet to be shown that law changes people’s attitudes toward compliance with social norms, as distinct from altering their incentives.”

Judge Posner traces his “pragmatist manifesto” to the inspiration and insight of two outstanding predecessors, Justices Holmes and Cardozo. Justice Holmes has been once again accorded Olympian status with the admiring accolades of Posner who has himself made a mark as influential jurisprude, although less universally reverenced among the legal establishment than either Holmes or Cardozo. And Justice Cardozo, though of less stature than Holmes in the estimate of Posner, is regarded as the “canonical expositor” of the “judicial faith” of an authentic legal pragmatism in the tradition of Oliver Wendell Holmes and John Dewey. Posner affirms Cardozo’s The Nature of the Judicial Process as the “canonical exposition” of legal pragmatism.

A Limited Assessment of the Authorities Surveyed

It is not our intent to do a comprehensive critical analysis or evaluation of each of the authorities so briefly summarized above. Nor, consequently, is it our intention to mount a detailed comparative analysis and evaluation of the variety of perspectives offered regarding judicial decision-making. The summary overviews presented above, of their very nature, do not lend themselves to such critical treatment here. And in any case, it is important to note that the summaries of those authorities do not adequately reflect the complexity and subtlety of their explicitation

---

77 Id. at 465.
78 Id. at 468.
79 Id. at 460.
80 Id.
82 Id. at viii-ix.
of the phenomenon of judicial decision-making. Rather, our purpose has been to gather together those key attempts to address the issue of what it is that judges do when they decide cases, appreciating the core of conviction and agreement held in common, with a view to suggesting a perhaps more enlightened and fruitful horizon for exploring both the "mystery" and the mundane of adjudication.

The above summaries of the various "theories" of judicial decision-making do not encompass the concrete cases, i.e., judicial decisions and opinions, used to illustrate and thus to validate or verify the rules or principles of adjudication advanced by the various authors. Such practical illustrations provide the experiential data base for "theorizing" about decision-making. Any jurisprudential theorizing about adjudication presupposes a casuistic praxis, a case methodology. The perdurance of the inspiration of the Langdellian case method in legal education is perennial testimony to that. The dialectical complementarity of theoria and praxis is as essential in the realm of jurisprudence and the other human sciences (economics, political science, psychology, sociology, etc.) as in that of the so-called natural or "hard" sciences. Nonetheless, we here prescind from a consideration of concrete cases and how they might validate or verify the criteria or norms of adjudication articulated by the authorities cited here. This precision is consistent with the intent expressed above to merely suggest here a more adequate context or horizon for "theorizing" about judicial decision-making.

The methodological approaches of all the authorities cited above can be fairly identified and placed squarely within the category of "jurisprudence" in its broadest connotations. The authors are not narrowly confined solely to the law on the books or the law in the cases, in what might be perhaps unfairly and stereotypically characterized as a purely positivist articulation of the law. Rather, the human capacity to be "reasonable" as manifested in a variety of disciplines (ethics, logic, history, sociology, politics, etc.) is characteristic of their attempts to delineate what goes into judicial decision-making. The jurisprudential methodology manifest in these authorities goes beyond a merely descriptive criteriology to one of significant normative import, viz., how judges should or ought to decide cases. And although some of the authorities would include ethics as merely one cognitive element among several others (logic, history, sociology, anthropology, psychology), the purpose of a jurisprudence of adjudication would be firmly founded on the normative, prescriptive criteria for what judicial decision-making should be.

The normative criteriological concern of a jurisprudence of adjudication, as well as that of the law in general, has been and continues to be problematic because of the positivist contention that the law as a discipline is autonomous, any normative criteria for which have to be established from within the law itself. Law and ethics, law and morality, in this
positivist perspective, are two separate realities. The law, precisely as law, is not subject to the normative requirements of ethical principles. How the phenomenon of adjudication is cast in such a conceptual framework is problematic for the so-called “hard” cases that present themselves for decision where what the law is or what the law requires is not clear or is ambiguous or is even non-existent. Those who advance a strong positivist position on the law may nonetheless concede the necessity of judicial discretion to decide the hard cases. In any case, those espousing such a positivist jurisprudence will argue against the legitimacy of so-called norms or principles of personal or political morality or any other higher order principles as normative criteria for determining what the law is or for deciding cases in accord with the law.

Yet our authorities concede the need for articulating some kinds of norms or principles of personal and political morality or higher order principles, using Dworkin’s terminology, to fully explain the phenomenon of judicial decision-making. Whether such normative criteria are only operative in the “hard,” “very hard,” or “serious business” cases or whether in fact they serve even as “foundational” presuppositions in the deciding of all cases, including the “easy” ones, may be controverted. Aside from the normative impact of such ethical (or moral) principles, the authorities we have studied indicate the importance and necessity of relying upon a variety of sources such as ethics and sociology and history and custom as rich cognitive resources for deciding cases. Of course, there are divergent views regarding the legitimacy of the use of traditionally regarded “non-legal” resources (such as economics, sociology, social theory, political philosophy, and ethics) in the deciding of cases.

Yet the problems of jurisprudence, judicial decision-making among them, are ultimately philosophical problems. The “very hard,” “hard,” “difficult,” “serious business” cases push us beyond the self-evident “legal” criteria readily available for handling the “easy” cases towards the problematic, elusive “non-legal” criteria beyond our immediate grasp, those “foundational” criteria of practical reason which underlie all that is part of the total human project and not merely the creative human endeavor to establish the law, the legal process, and the legal system. I have already stated elsewhere that, in my opinion, jurisprudence is that branch of philosophical/theological knowledge which evaluates human-made law

---

48 Dworkin, supra note 22; Barak, supra note 8.
50 Cardozo, supra note 2, at 21.
51 Barak, supra note 8, at 36.
from an ethical or moral perspective. I do not propose to make the case for or to defend this affirmation here. Such a view, however, of the jurisprudential would not be acceptable for many. To assert that jurisprudence is a study of what the law is and should or ought to be may appear to be too pretentious and perhaps even ridiculous from the standpoint of those who are the practitioners of the law, lawyers and judges. Furthermore, to assert that the law stands ultimately or foundationally under the judgment of ethics, whether philosophical ethics (moral philosophy) or even theological ethics (religious ethics, moral theology) or philosophico-theological ethics (divine faith and human reason), may not be particularly significant or especially noteworthy in that all the rest of human endeavor (and the decision-making inherent therein) is also subject to ethical scrutiny. Nonetheless, the continuing interaction of law and ethics, as well as that of law and religion (and religious ethics), points to an on-going human experience which reflects the historical growth and development of the law throughout the centuries, at least in the purview of many in the Judaeo-Christian Western legal tradition.

In any case, even those who would recognize the interstitial function of philosophical ethics (personal and political moral principles) where the law fails or is unclear might be reluctant to agree with the jurisprudential thesis I advocate about the ethical “foundations” of jurisprudence, and in specific, the ethical “foundations” of a jurisprudence of adjudication.

Of course to assert my “bias” in doing jurisprudence raises the more crucial issue about the possibility of “doing ethics” at all. Ethics (moral philosophy), as one subdivision or branch of the philosophical enterprise [which embraces the philosophy of the human person (rational psychology), the philosophy of the world (cosmology), the philosophy of being (metaphysics), the philosophy of God (natural theology or theodicy), the philosophy of knowledge (epistemology)], can be characterized as equally as futile or frustrating as the rest of the philosophical enterprise. Religious ethics (theological ethics, moral theology) has generated and continues to generate a whole host of issues for public discourse about law and legal system in a religiously and ethically pluralistic society whose Constitution provides for the institutional separation of Church and State, if not of religion and society. Those who reject the philosophical ethical enterprise as futile, as providing no useful guidance of an objective kind for public moral discourse, may be even more skeptical of the religionists’ insistence on the sure guidance provided by religious belief for law and legal system. There are, of course, some who subscribe to religious ethics

---

as providing the sole sure guidance for life in a political society because of secular philosophy's innate incapacity to achieve the objective of truth in human affairs because of the depravity of human nature and human reason.

To many, philosophy and theology would be the least useful disciplines to incorporate into any theory of judicial decision-making, let alone to suggest that they might serve as the ultimate "foundation" or normative "ground" for the enterprise of law and, specifically, for the task of judicial decision-making. Yet Joseph Vining recognizes the basic affinity that exists between religion and law:

I want to raise the possibility that the practice of law today is most like the practice of theology. If the traveler were to say, "I do not know what the practice of law is, tell me what it is like, or a branch of. Is it physical science? social science? the practice of history? literary criticism? the writing of literature itself?" The answer may in fact be theology.

Vining queries whether doing theology serves an effective metaphor by which to speak about what it is that lawyers do. Contending that the metaphor speaks to the legal profession, he argues, and so would I, that the practice of theology can serve as an effective model for reflecting on and evaluating what it is that lawyers do when they practice law.

The parallels between the practice of law and the practice of theology are too striking for the lawyer not to see. They are also comforting, which makes them easier to see. For lawyers are required by the customs of the profession in which they are imperceptibly trained from the first day of law school, as well as by its discipline, to behave in ways that any adult, self-respecting, and free man must think either offensive or mad. If the lay citizen faces a dilemma in obeying what he is told is the law, lawyers face it even more. They are taught that they must be more obedient than other citizens, and this is reinforced by etiquette. They stand when an individual in a special robe enters the room where they are to do law, and takes a seat on a raised dais. They stand when that individual leaves the room. The architecture of the room and of the building containing the room is designed to produce respect, even awe. They are punished for anything resembling contempt in their gesture or phrasing, and say, "Yes, your Honor," when reprimanded. They accept reprimand and correction given in a tone that only children experience outside the courtroom. They address this person to whom they speak, who issues reprimands, corrections, and statements that must be obeyed, with an ancient title, a title of the kind otherwise eliminated from American mouths, beginning with the word "Your" and followed by a word which might be Excellency, Majesty, Reverence, or Grace. In the case at hand, it is Honor. Even the most prominent lawyers appearing before the Supreme Court speak in tones of deference and in

elaborate circumlocutions which hide the fact that they are instructing, guiding, or disagreeing with the justices before them; the most careless, ill-informed, foolish, or malicious questions are treated with an elaborate show of seriousness. If lawyers lose the habit of self-effacement and self-abasement they lose credibility and the ear of the judge to whom they are speaking, who turns away if he is not treated with the respect he thinks his due. Lawyers engage in overt and elaborate supplication, as does almost no one else in modern society. They begin, “May it please the court,” and in the end they “pray” for relief. And everything they say must be backed by authority. Indeed, they do best if they say a thing not in their own words but in the form of a quotation from an authority, as if the ultimate end of and best demonstration of obedience and self-abasement is to eliminate themselves from view. Despite the seriousness of it all, which bespeaks a conviction that what they decide to say matters, and despite the heat of the argument the words they speak are never claimed to be their own. (And when a man in robes speaks he will say “We” or much more often “The law” or “This Court,” referring not to himself or himself and his colleagues but to the Court speaking over time.) When they get down to business, after their forms of greeting and stationing themselves and in between their modes of address and before their prayers, what do lawyers do? They hurl quotations at each other.  

Of course the word “theology” is in general a pejorative term among many in intellectual circles, to be consigned to the oblivion of words such as “metaphysics” and perhaps even “jurisprudence” where such a jurisprudence would presume to move beyond the realm of the “strictly legal.” We shall not pursue Vining’s provocative thesis here other than to suggest that the metaphor of philosophy might easily be substituted for that of theology to serve equally well to make Vining’s point. The substitution would be even more apropos if we were willing to concede that even philosophy can indulge a reasoned and reasonable quest for the Ultimate Reality.

The mundane, common, or banal aspects of the nature of the judicial process, like those aspects of so much of all the other activities characteristic of human beings, can generate a taken-for-granted, uncritical, unproblematic assessment of what it is that judges do when they decide cases. These mundane aspects can serve to mask the deeper reality present in what would otherwise appear to be the mundane. The so-called “easy” cases presented for judicial decision can be seen in some respects as appropriately exhibiting the mundane.

The category of “easy” has been used to designate those cases presented on appeal for adjudication, which are able to be disposed of by panels of judges who are in basic agreement about the disposition of the case after careful consideration of the complexity of the matters being

* * *

Id. at 188-89.
adjudicated. Perhaps the *per curiam* opinion might best represent this category of judicial decision. It must be noted, however, that even the "easy" cases, thus determined, would require a process of human decision-making other than that typified by a model of artificial intelligence. A "mechanical" jurisprudence, if you will, is not what deciding "easy" cases is about.

The category of "easy" cases, like that of "hard" cases or Barak's suggested category of "intermediate" cases (those which might appear initially to be "hard," but after appropriate analysis and evaluation are ultimately relegated to the "easy" category), are designations for judicial decision-making at the intermediate appellate or supreme appellate level of adjudication. Of all the cases appealed to higher courts, very many, if not most, might readily fall into the "easy" classification. The "hard" cases, generating majority opinions with dissents, would represent a small percentage of the total number of cases taken on appeal, prescinding from the perhaps inordinate number of hard cases involving the constitutional adjudication of both State supreme courts and the United States Supreme Court.

Observers of the legal scene would have us note that many disputes, are never actually litigated in the courts. And for the small percentage of disputes actually litigated at the trial court level, only a small percentage would be brought to an appellate court. It would not be unfair to characterize all these cases not litigated or not appealed (even if litigated) as falling in the category of "easy" cases or the mundane.

We note that the American jurisprudence of judicial decision-making has focused its attention and concern on appellate tribunals' decisions, to the sorry neglect of the decision-making issues confronting the trial court judge. It is well to recall how small a percentage of the cases decided at the trial court level fall within the ambit of interest of those who study adjudication as confined solely to the appellate tribunal.

The "hard," "very hard," or "serious business" cases, which have traditionally generated the concern about what judges do and are supposed to do when they decide cases, are thus only a small percentage of the total number of cases to reach the courts, and an even smaller percentage of the total number of disputes which never even make it to the formal litigative stage in the judicial process.

It is the "hard" cases that generate the difficulty of explaining what it is that judges "should" do to decide them aright, often when the matters for adjudication appear to admit of several reasonable alternatives for disposition. It is at this fringe area that issues about the so-called

---

*Barak, supra* note 8, at 39.

*Id.* at 41-42.
subjective factors of judging arise, the politics of judging, the judges’ own personal proclivities and ideologies as a basis for decision in the face of no clear mandate provided by the law for the disposition of the cases. The judge as legislator, as lawmaker, as more than interpreter, is confronted most pointedly here. And the legitimacy of judicial “discretion” in its strong sense arises as an issue. Is the judge “free” to do whatever she wants?

It is the “hard” case—the unusual, the uncommon, out-of-the-ordinary, non-mundane—that generates an uneasiness and reticence in articulating what the judge should do in deciding the matter. It is the hard case which points to unusual, uncommon, out-of-the-ordinary criteria to provide guidance for the judge. The hard case provokes an awareness or consciousness of criteria beyond the law, perhaps criteria beyond the law that are even “ultimate” or “foundational,” not only for the “hard” case, but even those cases of the mundane.

It is the hard case which propels the judge beyond the law, strictly speaking, to what may be regarded as metalaw, with a consequent realization that even the easy case in its mundane aspects implicates the metalegal (or the supramundane). As noted above in regard to Dworkin’s jurisprudence of adjudication, easy cases are merely special cases of hard ones, in the sense that they are cases which do not require asking questions for which the answers are already known.9 In Dworkin’s scheme of things, the principle of law as integrity is as much operative in the easy cases, in that it “explains” and “justifies” them, as in the hard ones, but in a manner of “ease.” The principle of integrity in the easy case is taken for granted, presupposed, not consciously adverted to—the supramundane hidden in the mundane, if you will.

Judicial decision-making, in both its mundane and supramundane aspects, is revealed by a jurisprudence of adjudication to be rooted in the mystery, the subjectivity, the personhood of the human-being-in-the-world who is that “problem” which encroaches on its own data.4 Such a jurisprudence, such a methodology, which as I noted above has its foundations in philosophy and/or theology, is not a projection or imposition upon the data of concern, but rather a method of understanding and knowing required by the ultimate nature of the data. It differs in its method from the kind of publicness and objectivity which can characterize a lot of the natural or hard sciences’ so-called “scientific” method. It differs too from the empirical methodology which, to a greater or lesser extent, can characterize some aspects of the “soft” or “softer” sciences (the social) such as political science, anthropology, sociology, psychology,

---

9 DWORKIN, supra note 22, at 266.

ECONOMICS—All recent spinoffs of the philosophy of the Enlightenment in the wake of the worship of Scientific Method and its principles of quantitative measurement, replication, and verification. Yet, as with all efforts at human understanding and knowledge, even the hard and soft and softer sciences must yield at various points, but especially at the edges, to the ineffable, mysterious dimensions of human experience.

The myth of the “hard” sciences has been in process of being debunked for some time now. Black holes and big bangs and quarks and neutrinos in their own way bespeak the “ideologies,” values or beliefs of their proponents. The hard scientists share now what has always been part of the discomfiture of the social scientist, the psychologist, the sociologist, the economist. Neither the data of the micro-world (microscope) nor that of the macro (telescope) can ever fully escape the plight of the “microscopist” or “telescopist” who is that “problem” which encroaches on its own data. Philosophy or theology and physics or mathematics may be at either end of the spectrum, but nonetheless still on the spectrum of what is ultimately the humanum. The mundane and the supramundane are co-constitutive aspects of all of reality.

A MORE ENLIGHTENED AND FRUITFUL HORIZON

The best efforts to explicitate what judicial decision-making involves or requires or implies in terms of norms or criteria—to explain what it is that judges do when they decide cases—are put to the test by the “hard,” “very hard,” “borderline,” or “serious business” cases. The ineffable or mysterious nature of judicial decision-making is there revealed in the search of the human subject for sure guidance in the data of reality which are ultimately beyond the style and method of the natural sciences as popularly or stereotypically conceived, or ultimately beyond the epistemological, hermeneutical, semantic grasp of a purely rational analytic. Despite Richard A. Posner’s rejection of “foundational” thinking about moral “reals” as a futile and frustrating exercise,** in its attempt to determine universal criteria of objectivity upon which to anchor judicial decision-making and also to critically evaluate the same, I affirm the need to recognize the ethical values and principles which provide the foundations undergirding the phenomenon of law, legal system, and, in particular, adjudication. The ethical foundations of judicial decision-making are thus affirmed as not merely or purely the result of subjective (i.e., non-objective) determination. Nor are those foundations to be described as purely conventional, merely reflective of the mores established via societal conventions. Rather, the ethical foundations asserted are those required by or demanded by the reality of life, the moral “reals” required by the

** See Posner, supra note 29, at 459-60.
humanum and within the grasp of practical reason.

Judicial decision-making is a human activity, requiring a self-consciousness and self-awareness peculiar to humans engaged in a human project wherein the humans themselves are the "problems" which encroach on their own data. All the authorities we have surveyed acknowledge in some fashion the ultimate criteria for judging to be found in the human subject, if not in practical reason in its various manifestations (logic, analogy, intuition, affective knowledge, etc.) then also in the passion, instinct, and belief which characterizes the humanum, even in its subconscious or unconscious manifestations. They are also aware of the great difficulty of establishing or justifying the objectivity of judicial decisions in the "hard" cases, premised on the judge's exercise of practical reason and the affective choice of values. An inability to "prove" or to agree upon any primordial or higher order principles or norms as a foundation for judicial decisionmaking has fostered a preoccupation with the procedural aspects of the judicial process. This is consistent with the American jurisprudential preoccupation with justice as procedural due process instead of justice as substantive due process. Also the perennial attraction among most legal academics for legal positivism, legal realism, law and economics, critical legal studies, or legal pragmatism, as the preferred philosophical foundation for analyzing and evaluating the law and legal system, is understandable if ethical pluralism is perceived as justifying an ethical skepticism or vacuum which precludes the possibility of any meaningful public discourse or societal consensus based on higher order, ethical principles. If ethical pluralism is not a sign of the vitality of the never-ending search for the truth of what the humanum requires, but rather a dead end, then a hermeneutic based on a coherence theory of epistemology would be the best we can do, with a constant need to critically analyze and evaluate judicial decision-making from the standpoint of the current socio-political-cultural values whose ultimate truth or validity would remain forever beyond the pale of objective determination.

I want to argue, however, for a theory of judicial decision-making which is premised on the conviction/intuition/faith/belief that the human community has access to a moral order which can be understood and known objectively, not in an a priori deductivist way, but through a process of human discernment (both cognitive and affective) which can critically assess biases, prejudices, feelings, emotions, attitudes, instincts, desires, customs, mores, habits of thinking and of acting, intuitions, understandings, concepts, and judgments. This is not to imply that the hard cases in judicial decision-making, any more than the hard cases in ethical decision-making, will be easy. The hard cases will continue to be hard, will necessitate a deciding of cases where reasonable judges may differ in their decisions. Nonetheless I want to argue for an objective morality or ethics as grounding ultimately what the judicial office requires in
deciding cases.

Conclusions deduced *a priori* from universal, inflexible principles have not been the story of the development of the common law, any more than they have been the story of the development of ethics. The life of the law has not been logic, but experience. The use of principled discretion has been essential (*a sine qua non*) for good judging. Reasoned decisions have never been value-free. Judges have always had to rely upon their own experience of law and the legal system, their judicial worldview, but founded upon the moral and political philosophy reflective of and acceptable to the community.

Judicial decision-making is therefore not merely legal decision-making but ultimately and essentially an expression of ethical decision-making. Judicial impartiality, judgment according to the law (whether cases, statutes, or constitution), objective judgment and judicial opinion in justification of judgment are all ultimately grounded upon the deeper "objectivity" founded upon the *humanum* and its purposes. Thinking like lawyers is thinking like judges is thinking like human beings, and deciding matters of human import accordingly.

The fundamental ethical principles or fundamental normative criteria underlying law, legal system, and judicial decision-making are the fundamental principles or norms underlying the human project, the life of humanity. Judicial decision-making is founded or grounded ultimately on objective ethical principles. I do not intend to make the case to justify the jurisprudential thesis which has been asserted here. But John Finnis has made a valiant attempt to do so.

*John Finnis*

John Finnis' *Natural Law and Natural Rights* is the only contemporary attempt to provide a systematic account of the ethical foundations of the enterprise of law.99 A brief overview of his work can serve to stimulate a more enlightened and fruitful horizon for assessing and evaluating the phenomenon of judicial decision-making. Unlike his American dialogue partner at Oxford University, Ronald Dworkin, whose philosophy of law is firmly anchored about a jurisprudence of adjudication, Finnis has little to say explicitly addressing adjudication and the process of deciding cases. In Posner's language, Finnis is unabashedly immersed in the "wholesale" issues of jurisprudence.77 In the core of his book, Finnis intends to sketch what the textbook taxonomists would label an "ethics," a "political philosophy," and a "philosophy of law" or "jurisprudence." We may

---

accept the labels, as a scholarly convenience, but not the implication that the "disciplines" they identify are really distinct and can safely be pursued apart. 88

While recognizing his indebtedness to the "classical" tradition in natural law theorizing, to Plato, Aristotle, Aquinas, Leo Strauss, and Germain Grisez, Finnis affirms that the case he makes for natural law and natural rights must stand or fall on its own merits, on the reasonableness of the arguments advanced, and not on the basis of the pronouncements of extrinsic authorities. Finnis, however, casts his discourse in the milieu in which he has been bred, viz., "analytical jurisprudence," in an effort to reach his fellow jurisprudes, H.L.A. Hart, Neil MacCormick, and Joseph Raz.

The appeal to reason to establish that there are "human goods that can be secured only through the institutions of human law" and to "show how and on what conditions such institutions are justified and the ways in which they can be (and often are) defective" 89 is intended by Finnis to avoid the charges traditionally leveled at jurisprudential theories judged to be defective because of an a priori deductivism or the naturalistic fallacy. The appeal to reason is not a call to a theoretical knowledge involving a methodology akin to mathematics or geometry. Nor is it an appeal to empirical method as exemplified in the so-called hard sciences. The appeal to reason is a value-laden discourse appropriate to the human capacity for practical reasonableness (the Aristotelian phronesis) which provides wisdom for human decision and action of an objective kind. As Finnis insists:

By "practical," here as throughout this book, I do not mean "workable" as opposed to unworkable, efficient as opposed to inefficient; I mean "with a view to decision and action." Practical thought is thinking about what (one ought) to do. Practical reasonableness is reasonableness in deciding, in adopting commitments, in choosing and executing projects, and in general in acting. Practical philosophy is a disciplined and critical reflection on the goods that can be realized in human action and the requirements of practical reasonableness. 100

For Finnis the foundational principles of natural law embrace three categories: a set of basic practical principles, a set of basic methodological requirements of practical reasonableness, and a set of general moral standards. 101 There is a kind of hierarchical or logical ordering or prioritizing evident in Finnis' schema, in that there is an ongoing interrelationship

88 FINNIS, supra note 96, at v.
89 Id. at 3.
100 Id. at 12.
101 Id. at 23.
being played out between the various sets of principles so that the set of
general moral standards is "derived" via practical reason in accord with
the set of basic practical principles and the set of basic methodological
requirements of practical reasonableness. The process of "derivation,"
though a mode of deductive reasoning characterizing the work of practical
reason in establishing the basic principles or substratum of natural law, is
not the sole manner of proceeding of practical wisdom, which must take
account of history, custom, and all the variety of data of human experi-
ence to articulate concrete rules of morality, laws, and legal institutions.

Finnis' tri-partite designation of the principles of natural law pro-
vides the foundation not merely for moral philosophy or ethics as a study
of individual conduct, but has implications for political philosophy, juris-
prudence, concrete political action, adjudication and the lives of citizens.

[Those principles justify the exercise of authority in community. They re-
quire, too, that that authority be exercised, in most circumstances, accord-
ing to the manner conveniently labelled the Rule of Law, and with due re-
spect for the human rights which embody the requirements of justice, and
for the purpose of promoting a common good in which such respect for
rights is a component. 102

Finnis contends that there are seven basic forms of human good or
value which are the foundation for human flourishing or well-being: life,
knowledge, play, aesthetic experience, sociability (friendship), practical
reasonableness, and "religion." Seven basic principles of practical reason
affirm these basic forms of human flourishing as goods to be pursued or
realized. 103 These foundational or first principles of natural law indicating
that these basic goods are to be pursued and realized are in themselves
pre-moral principles, though serving as the ultimate foundation for mo-
rality or ethical rules. Finnis contends that these seven goods are basic in
the sense that they are irreducible. Other human goods are reducible to
some one or a combination of the basic forms of human good. The seven
basic practical principles are not provable or demonstrable; they are self-
evident and indemonstrable. The self-evidence of the basic goods or val-
ues means that they are not deduced or otherwise inferred from a fact or
set of facts. Finnis further argues that each of the basic forms of good is
equally important, that there is no objective hierarchy among these basic
values. Thus all seven of the basic goods are constitutive of human flour-
ishing or well-being, though the manner in which they will be appropri-
ated in individual lives will be determined in accord with other criteria of
practical reason and human freedom and individual temperament and
personality.

102 Id.
103 Id. at Chs. III, IV.
The seven basic practical principles are not restricted by Finnis to certain formulations. For example, in dealing with the basic value of knowledge, he concedes that "knowledge is something good to have" or a like formulation will suffice. The formulation is an expression of an understanding of a value which provides a starting-point for reasoning about what to do. Basic practical principles do not function in the same way as do rules. The characteristic of a basic practical principle is that it provides an orientation for practical reasoning. It can be "instantiated" rather than "applied" in many more specific principles of practical reason. It suggests new horizons for assessing human action. It does not really need to be explicitly formulated as a presupposition or premise in the actual process of practical reasoning. Each of the seven basic values or goods might thus be indicated in a basic practical principle:

Finnis attempts to delineate what each of the basic forms of good embraces. It is helpful here to make a summary note of that. The basic value of life is seen as embracing the drive for self-preservation, all the aspects of vitality which enable a human being to achieve self-determination, bodily (including cerebral) health, freedom from pain, and perhaps may include the transmission of life by the procreation of children. Knowledge as a basic good is characterized as knowledge for its own sake and not merely as an instrumental or utilitarian value. The basic good of play is its own intrinsic value as essential to human culture. The good of aesthetic experience embraces the activity and passivity of the experience of the beautiful. The good of sociability includes the minimum of peace and harmony, the various forms of human community, and the beauty of full friendship. The basic value of practical reasonableness delineates the basic good of the use of human intelligence in deciding what to do, how to live, how to achieve human flourishing. Finally, "religion" is that basic good which identifies a concern with the transcendent or an order beyond each and every person, a concern with the origins of the order of the cosmos and of human freedom and human reason, even when that concern eventuates in agnosticism or atheism.

Although Finnis insists that there is no objective hierarchy among the seven basic forms or goods of human flourishing, the good of practical reasonableness serves a special function in the making of intelligent decisions about one's commitments, projects, and activities. The seven basic goods offer an inexhaustible variety of options to persons. How persons will choose or decide to participate in those basic goods (What is to be done? What may be left undone? What is not to be done?) will be guided

104 Id. at 63.
106 Id. at 85-90.
by the good of practical reasonableness, "which is participated in precisely by shaping one's participation in the other basic goods."¹⁰⁷

Finnis then purports to establish nine basic methodological requirements of practical reasonableness.¹⁰⁸ Like the seven basic practical principles, each of these requirements is fundamental, underived, and irreducible. Yet all nine of these requirements are "interrelated and capable of being regarded as aspects one of another."¹⁰⁹ These requirements are principles of method in practical reasoning. "Each of these requirements concerns what one must do, or think, or be if one is to participate in the basic value of practical reasonableness."¹¹⁰ These foundational principles of natural law serve as a bridge, if you will, between the pre-moral seven basic practical principles and the set of general moral standards included in the principles of natural law. The nine basic requirements are the methodological criteria for working out moral principles and rules from the first (pre-moral) basic practical principles on the seven basic goods of moral flourishing. The "product" of the nine basic requirements of practical reasonableness is morality.

A brief summary of the nine basic requirements follows. The first requirement of practical reasonableness is that one have a rational, coherent plan of life. The second requirement is that one have no arbitrary preferences among the seven basic values; "there must be no leaving out of account, or arbitrary discounting or exaggeration, of any of the basic human values"¹¹¹ in one's commitment to a coherent plan of life. The third is that one have no arbitrary preferences among persons; "this third requirement remains a pungent critique of selfishness, special pleading, double standards, hypocrisy, indifference to the good of others whom one could easily help. . . and all the other manifold forms of egoistic and group bias."¹¹² The fourth requirement is that one be detached from the specific and limited projects one has undertaken in life, with an openness to all the basic forms of good in the changing circumstances of one's lifetime. The fifth is that one maintain fidelity to one's general commitments; "having made one's general commitments one must not abandon them lightly."¹¹³ The sixth requirement is that consequences are relevant in making choices, but of a limited relevance. "One's actions should be judged by their effectiveness, by their fitness for their purpose, by their

¹⁰⁷ Id. at 100.
¹⁰⁸ Id. at Ch. V.
¹⁰⁹ Id. at 105.
¹¹⁰ Id. at 102.
¹¹¹ Id. at 105.
¹¹² Id. at 107.
¹¹³ Id. at 110.
utility, their consequences . . ;”114 but “[a]s a general strategy of moral reasoning, utilitarianism or consequentialism is irrational.”115 The seventh requirement is that there must be respect for every basic good or value in every act chosen; “[t]o choose an act which in itself simply (or primarily) damages a basic good is thereby to engage oneself will-nilly (but directly) in an act of opposition to an incommensurable value.”116 The eighth is that one must favor and foster the common good of one’s communities; “[v]ery many, perhaps even most, of our concrete moral responsibilities, obligations, and duties have their basis in the eighth requirement.”117 The concrete implications of the eighth basic requirement of practical reasonableness are the requirements of justice. Finally, the ninth requirement is that one must act in accord with one’s conscience.

It is not until Chapter X of his book118 that Finnis finally gets to the law and legal system, after an extensive ground-laying, some of which we have summarized here and some of which we will merely note here by way of chapter headings and subheadings. His Chapter VI on Community, Communities, and Common Good119 deals with 1. Reasonableness and self-interest; 2. Types of unifying relationship; 3. “Business” community and “play” community; 4. Friendship; 5. “Communism” and “subsidiarity”; 6. Complete community; 7. The existence of a community; 8. The common good.


In Chapter X on Law, John Finnis exemplifies a jurisprudence “to explain certain human institutions by showing how they are responses to the basic requirements of practical reasonableness.”123 He lists the five

114 Id. at 111.
115 Id. at 112.
116 Id. at 120.
117 Id. at 125.
118 Id. at 260-96.
119 Id. at 134-60.
120 Id. at 161-97.
121 Id. at 198-230.
122 Id. at 231-59.
123 Id. at 265.
main characteristics or five main formal features which are distinctive of a legal order. These five features are a “set,” i.e., “characteristically but not invariably found together.”¹²⁴ The first main feature is that the law regulates its own creation; a legal circle exists:

[...]

The second main feature is the primary working postulate of legal thinking: legal rules and legal institutions are valid if they are validly created, and once validly created they shall remain in effect until they cease, either according to their terms or according to some valid act or some valid rule of repeal. The third main feature is that rules of law also regulate the conditions under which private individuals can modify the effects of rules of law upon themselves or other individuals. The fourth feature is that legal thinking brings precision and predictability into the order of human interactions by treating past acts (enactment, adjudication, the exercise of public or private “powers”) “as giving, now, sufficient and exclusionary reason for acting in a way then ‘provided for’.”¹²⁵ The fifth feature is the legal technique of a fictitious working postulate of “no gaps” in the law; there is a legal answer or remedy for every legal problem.

Finnis’ list of the five main features of a legal order is recognized by him as an incomplete account of those features in that it lacks any systematic detail of the relation between the five formal features and the requirements of justice and the common good (in accord with the eighth basic methodological requirement of practical reasonableness). Yet the development of such a systematic account of the relation between the five features and the requirements of justice and the common good can best occur, contends Finnis, by considering those conditions under which a legal system or legal order is thought to be working well. The Rule of Law is “the name commonly given to the state of affairs in which a legal system is legally in good shape.”¹²⁷

A legal system exemplifies the Rule of Law to the extent (it is a matter of degree in respect of each item of the list) that (i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; that (iii) its rules are promulgated, (iv) clear, and (v) coherent one with another; that (vi) its rules are sufficiently stable to allow people to be

¹²⁴ Id. at 267.
¹²⁵ Id. at 268.
¹²⁶ Id. at 269.
¹²⁷ Id. at 270.
These eight "desiderata" are not merely a set of rules as meaning-contents. Rather they involve qualities of institutions and processes. Promulgation requires not merely clear and legible copies of laws and decrees, but a professional class of lawyers who are competent and available to the public. Coherence requires not merely internal logic in the drafting of laws, but a judiciary skilled in the reconciliation of conflicting rules. Finnis notes that historical experience has provided additional desiderata concerning the institutional aspects of the Rule of Law: the openness of court proceedings, the power of judicial review, the accessibility of the courts to all, especially the poor. The more the eight desiderata of the Rule of Law are implemented or fulfilled, the more the five formal features of the law are instantiated in the legal order. The fundamental purpose of the desiderata is to safeguard and protect individuals from being manipulated or exploited by the authorities and the legal system; in this sense the Rule of Law is one of the requirements of justice or fairness.

Yet, there are limits on the Rule of Law. It might be abused in the service of tyrannical governments, although the desiderata themselves are rationally pointed towards the values of reciprocity between authority and subject, and fairness and respect for persons. But besides, the Rule of Law does not guarantee or ensure every aspect of the common good of the community, let alone the substance of the common good. According to Finnis, the common good has at least three senses, the third of which is commonly intended in his jurisprudence:

[T]here is a "common good" for human beings, inasmuch as life, knowledge, play, aesthetic experience, friendship, religion, and freedom in practical reasonableness are good for any and every person. And each of these human values is itself a "common good" inasmuch as it can be participated in by an inexhaustible number of persons in an inexhaustible variety of ways or on an inexhaustible variety of occasions. These two senses of "common good" are to be distinguished from a third, from which, however, they are not radically separate. This third sense of "common good" is the one commonly intended throughout this book, and it is: a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or

---

128 Id. at 270-71.
negatively) in a community.129

And finally, sometimes the Rule of Law and constitutional government will be best served by a departure from their requirements, where adherence to the same would have the effect of undermining the values to be secured by the Rule of Law and constitutional government. A written or unwritten constitution cannot be allowed to be defeated by what it says or fails to say. Finnis insists:

The practical corollary is the judicially recognized principle that a written constitution is not a suicide pact, and that its terms must be both restrained and amplified by the “implicit” prohibitions and authorizations necessary to prevent its exploitation by those devoted to its overthrow.130

Having provided an account of the five main features of a legal order and the eight desiderata of the Rule of Law, Finnis proceeds to a definition of the law in its primary or focal meaning, a multi-faceted conception “reflectively constructed by tracing the implications of certain requirements of practical reason, given certain basic values and certain empirical features of persons and their communities.”131 The term “law” refers primarily to

rules made, in accordance with regulative legal rules, by a determinate and effective authority (itself identified and, standardly, constituted as an institution by legal rules) for a “complete” community, and buttressed by sanctions in accordance with the rule-guided stipulations of adjudicative institutions, this ensemble of rules and institutions being directed to reasonably resolving any of the community’s co-ordination problems (and to ratifying, tolerating, regulating, or overriding co-ordination solutions from any other institutions or sources of norms) for the common good of that community, according to a manner and form itself adapted to that common good by features of specificity, minimization of arbitrariness, and maintenance of a quality of reciprocity between the subjects of the law both amongst themselves and in their relations with the lawful authorities.132

Law in its focal or primary meaning is “positive” law, law posited by humanity for the sake of humanity, for the state of affairs of the political community.

This conception of law is not a univocal one. Other senses of the term “law” would only be analogous to Finnis’ focal meaning of the term. Thus Finnis affirms that “natural law”—“the set of principles of practical rea-

129 Id. at 155.
130 Id. at 275.
131 Id. at 277.
132 Id. at 276-77.
sonableness in ordering human life and human community"—is only "law" analogously in relation to his focal use of the term. But that does not mean that the principles of natural law (a set of basic practical principles, a set of basic methodological requirements of practical reasonableness, and a set of general moral standards) are not essential criteria or norms for lawmaking, for enacting and adjudicating laws, for creating and applying and interpreting legal rules.

Thus, "positive" law in its focal meaning is derived from natural law (those fundamental principles of practical reason, including a set of general moral standards or fundamental ethical principles). The manner or mode of "derivation" spelled out in the classical tradition, e.g., in Aquinas, distinguished between those particular human laws derived from natural law in a manner similar to the deduction of demonstrative "conclusions" from general principles and those other laws or legal rules derived from natural law in a manner akin to the "determinations" or "implementations" of general directives.

To illustrate, the law of murder can be characterized as a prohibition against the intentional killing of human beings, except in self-defense. Such a law can be seen as the equivalent of the moral or ethical principle or rule prohibiting the same conduct. Thus there is the ethical principle against murder and the law against murder. Just as the ethical principle itself might be characterized as a conclusion or requirement derived from the basic principle that human life is a good, in combination with the seventh basic requirement of practical reasonableness that one should never act in such a way as to directly contravene one of the basic goods (life), so also one might characterize the human-made law against murder as such a conclusion. Such a law against murder would be seen as not merely a positive law, but also as having part of its force from the natural law itself (as required by the basic principles of practical reasonableness).

Human-made laws derived from the natural law in the mode of "determinations" or "implementations" would be seen as having their force solely from human law in that the natural law would not be seen as requiring them precisely as conclusions demonstrated, as it were, or deduced from the principles of practical reason. Examples of such laws would be the rules of the road for traffic regulation and the law regarding the regulation of private property. Whether the speed limit for automobile traffic should be sixty-five miles per hour or seventy, whether the cars should proceed down the right-side or the left-side of the road is not something which is intrinsically required by natural law principles. Nor

135 Id. at 280.
134 Id. at 281, 284.
133 Id. at 281.
136 Id. at 284-86.
are the minutiae of the rules regarding the passage of title to property. Such specifications or determinations need to be made by the lawmakers exercising their authority in a fashion which can be truly designated as arbitrary (in its root sense as choice). The legislators exercise their free choice in making those determinations. Such laws, then, might be characterized as purely positive laws, with the proviso, however, that they must nonetheless still comply with natural law principles, and must still be measured by the principles of practical reason. But they would differ significantly from such laws as the law against murder.

Regarding particular laws or rules derived from natural law principles as "conclusions," Finnis concedes

some parts of a legal system commonly do, and certainly should, consist of rules and principles closely corresponding to requirements of practical reason which themselves are conclusions directly from the combination of a particular basic value (e.g. life) with one or more of those nine basic "methodological" requirements of practical reasonableness.137

Yet the transposition or translation of moral or ethical precepts or rules into their legal counterparts is not as simple as one might think.138 The law of murder, for example, is cast not in the language of moral discourse: "Do not kill," "Persons shall not kill," or "Killing is prohibited."139 Rather the drafters of laws avoid the use of normative discourse in preference to the indicative proposition: "Any person who kills . . . shall be guilty of an offence."140 The legal rendering of the social order in laws proceeds in a way calculated to ensure its effectiveness and enforcement. The focus of the professional draftsperson is on the "legally constructed version of social order"141 and not on the commonsensical, the sociological, or the ethical, all of which are nonetheless important and essential for the legal order.

According to Finnis, lawmakers, not only legislators but also common law judges, take certain "basic legal norms" for granted in their task of defining criminal offenses, torts, contracts, etc. These "basic legal norms" of law-abiding citizens, for example, would be: "Do not commit offences," "abstain from torts," "perform contracts," "pay debts," "discharge liabilities," "fulfill obligations," etc.142 Although unstated in the lawmakers' "definitions" or laws, these norms underlie them.

But the lawmakers' task of definition also has its own unique principles. The reasonable legislator's principles for lawmaking are the eight

137 Id. at 282.
138 Id. at 282-83.
139 Id. at 282.
140 Id.
141 Id. at 283.
142 Id. at 286.
desiderata of the Rule of Law and a multitude of other substantive principles “related, some very closely, others more remotely, some invariably and others contingently,” to the (seven) basic principles and the (nine) basic methodological requirements of practical reason. Some of the multitude of other substantive principles would be a set of general principles of law (to be noted shortly). These general principles of law or basic norms for the legislator have, according to Finnis, not received the direct and systematic inquiry of lawyers that they have deserved. Rather the inquiry of lawyers has been directed towards the task of the judge at common law as legislator or lawmaker, with a focus on the rules for the interpretation and application of statutes and judicial precedent. Finnis characterizes the principles for the task of judicial lawmaking as second-order, “in that they concern the interpretation and application of other rules or principles whose existence they presuppose.” These second-order principles thus do not directly address the concern of legislators whose task as lawmakers differs significantly from that of judges. Yet, contends Finnis, the second-order principles directive of the judicial lawmaking function, provide a basis for the articulation of first-order principles for the guidance of legislators, since “the second-order principles are themselves mostly crystallizations or versions (adapted to their second-order role) of ‘first-order’ principles which ought to guide even a ‘sovereign legislature’ in its acts of enactment.”

Finnis then states thirteen general principles of law available in first-order form to guide the legislator:

(i) compulsory acquisition of property rights to be compensated, in respect of damnum emergens (actual losses) if not of lucrum cessans (loss of expected profits), (ii) no liability for unintentional injury, without fault; (iii) no criminal liability without mens rea; (iv) estoppel (nemo contra factum proprium venire potest); (v) no judicial aid to one who pleads his own wrong (he who seeks equity must do equity); (vi) no aid to abuse of rights; (vii) fraud unravels everything; (viii) profits received without justification and at the expense of another must be restored; (ix) pacta sunt servanda (contracts are to be performed); (x) relative freedom to change existing patterns of legal relationships by agreement; (xi) in assessments of the legal effects of purported acts-in-the-law, the weak to be protected against their weaknesses; (xii) disputes not to be resolved without giving both sides an opportunity to be heard; (xiii) no one to be allowed to judge his own cause.

These principles of law are truly “principles” in that they “justify” rather

---

143 Id.
144 Id. at 287.
145 Id.
146 Id. at 288.
than "require" specific rules and determinations.\textsuperscript{147} And their application is "qualified" by other similar principles.\textsuperscript{148} In addition, "any of them may on occasion be outweighed and overridden (which is not the same as violated, amended, or repealed) by other important components of the common good, other principles of justice."\textsuperscript{149} Of course it must be remembered that there are certain norms of justice which must never be overridden or outweighed in that they provide for human rights which are absolutely inviolable. In any case, these general principles of law are operative over vast ranges of legislative options or determinations in the pursuit of specific social goods.

Finnis contends that these thirteen general principles of law, which guide the lawmaking of the reasonable legislator, can be fairly characterized as part of the natural law, as foundational principles of the natural law. Finnis had earlier established a tri-partite categorization of natural law principles, which we noted above,\textsuperscript{150} consisting of the seven basic principles of practical reason, the nine basic methodological requirements of practical reasonableness, and a set of general moral standards (foundational moral principles). These thirteen general principles can be seen as part of that set of general moral standards embraced by the term "principles of natural law," like the general moral standard prohibiting the killing of innocent human beings, except in self-defense. In assessing the thirteen general principles he lists, Finnis observes:

They are not themselves first principles of practical reason, and some of them contain elements contingent upon the existence of certain social institutions (e.g. courts). But they are so closely related to the first principles in combination with the basic methodological requirements of practical reasoning that they should be regarded as derivable by reasoning from natural law, and thus, in a sense, a part of the natural law. At the same time, they are essentially principles for systems of positive law, and are in fact to be found in virtually all such systems. Hence they are the (or part of the) \textit{jus gentium} in the sense explained \ldots by Aquinas \ldots. The essence of Aquinas's concept of \textit{jus gentium} is that the principles of \textit{jus gentium} are part of the natural law by their mode of derivation (by deduction, not \textit{determinatio}), and at the same time part of positive human law by their mode of promulgation.\textsuperscript{151}

Finnis' focal meaning of the law, "positive" law, is concrete proof of his own contention that the tradition of natural law thinking and theorizing has not as its purpose the minimization of the range and determini-

\textsuperscript{147} Id.  
\textsuperscript{148} Id.  
\textsuperscript{149} Id.  
\textsuperscript{150} See supra note 101.  
\textsuperscript{151} Id. at 296.
nacy of “positive” law or the sufficiency of “positive” resources for the resolution of legal problems. The foundational principles of natural law in no way provide easily derivable or quick answers for the “determinations” of particular rules, laws, legal institutions and procedures. The second mode of deriving particular laws from the natural law principles, viz., “determination”, involves a complex process of interacting principles of law, generating a rich and variant range of competing choices of means to end. It points to the need for authority as a reasonable requirement for settling upon appropriate determinations of laws and institutions. Finnis affirms: “it is thus authority, not simply reasoning, that settles most practical questions in the life of a community,” provided, however that an authoritative “determination” of a particular law or rule is in accord with the basic requirements of practical reasonableness. The reasonableness of such an authoritative determination, however, need not require that it be the kind of determination that one personally would have chosen as reasonable.

In concluding his chapter on law, Finnis notes that it has been his concern to show that the act of “positing” law (whether judicially or legislatively or otherwise) is an act which can and should be guided by “moral” principles and rules; that those moral norms are a matter of objective reasonableness, not of whim, convention, or mere “decision”; and that those same moral norms justify (a) the very institution of positive law, (b) the main institutions, techniques, and modalities within that tradition (e.g. separation of powers), and (c) the main institutions regulated and sustained by law (e.g. government, contract, property, marriage, and criminal liability). What truly characterizes the tradition is that it is not content merely to observe the historical or sociological fact that “morality” thus affects “law,” but instead seeks to determine what the requirements of practical reasonableness really are, so as to afford a rational basis for the activities of legislators, judges, and citizens.

The attempt to provide here some taste of the ambitious and prodigious analytic efforts of John Finnis as an illustration of a more enlightened and fruitful horizon for explicitating what it is that judges do when they decide cases might prove counterproductive, especially to an American audience. A work, like Finnis’, does not lend itself to an initial warm reception in American legal circles. Oliver Wendell Holmes’ aphorism—“The life of the law has not been logic: it has been experience”—speaks overwhelmingly more persuasively to the American “psyche” than the labored efforts to lay the foundational, complex net-

182 Id. at 289.
183 Id. at 290.
work of principles and rules of law and legal system. American jurisprudence has, until recently, been uniquely, and traditionally, undisturbed by a lack of foundational thinking, rational consistency and coherence, or a systematic holistic analysis in its approach to the law, which in the American fashion is typically dealt with on an ad hoc basis, case by case. The wholesale issues of jurisprudence, up until recently, have not generally fascinated the American legal community or the academy. On the other hand, some of the resistance to Finnis' approach could represent a legitimate objection to an overly rational epistemological approach which at times can lend itself to the stereotyping of natural law thinking or naturalist ethics as rationalistic or deductivistic.

And yet, since 1961 with the publication of H.L.A. Hart's *The Concept of Law*, there has been a new openness to and a revived interest in the kind of theoretical efforts to provide a foundational or philosophical systematic account of law, legal reasoning, and legal system. The last three decades in the Anglo-American legal community have witnessed a burgeoning jurisprudential literature, a rich and luxuriant testimony to contemporary efforts to dialogue on the significance of the legal enterprise, from construction to re-construction to de-construction. The American scene has produced a rich harvest of jurisprudential thinkers: Lon Fuller, John Rawls, Ronald Dworkin, Roberto Unger, George Anastaplo, Harold Berman, Philip Soper, Joseph Vining, Robert Rodes, Catharine MacKinnon, Richard Posner and many others. A multiplicity of methods and concepts in jurisprudential thinking abounds—analytical, sociological, naturalist, legal realist,

---

law and economics, critical legal studies, feminist jurisprudence, pragmatic—and sometimes to the chagrin of the participants in the dialogue who yearn for a common public discourse and the possibility of a societal consensus. The attempts at jurisprudential dialogue can become frustrating and extremely tiresome in the face of basic disagreements on foundations or foundational principles or on the ultimate criteria or norms for the legal enterprise and whether such criteria can ever be established with any meaningful sense of the term “objectivity.” Yet even “deconstructionist” hermeneutics has contributed to the dialogue on the meaning of law, despite the fact that a radical assertion of deconstructionism may be fairly characterized as an exercise in futility, in anarchy, leading nowhere and destroying the last vestiges of the Western legal tradition’s wedding to Aristotle’s practical reason.

But why should the jurisprudence of the enterprise of law, involving, as it does, controversial philosophical issues, whether of the wholesale or retail kind, be exempt from the epistemological difficulties associated with all the forms of philosophical discourse? For that matter, the lack of consensus in jurisprudential thinking merely reflects the lack of public consensus underlying the public debate and dialogue in political society as a whole on matters of public policy and law. We live in a society whose public moral tradition or consensus has been eroded in the course of fostering the toleration of ethical and religious diversity with its attendant, consequent privatization of morality and religion. The extreme emphasis on the according of legal protection to individual citizens’ rights and liberties in an ethically and religiously pluralistic society has engendered a challenge for the political community’s preservation of the values represented by the notion of the common good or commonweal and the public virtue of the citizen. Robert Bellah, Alasdair MacIntyre, and others have noted the need to renew or reestablish a public discourse for public debate, discussion, and dialogue built around or on a societal consensus or public morality. In the absence of such, in the absence of the prospect for civilized discourse among citizens about public virtue and the commonweal, the alternatives appear limited to shouting matches, interest group lobbying, and power politics.

In the meantime, jurisprudential thinking and theorizing about the enterprise of law and about judicial decision-making needs to be fostered and favored as something more than futile efforts in the face of no firm foundational principles. It is essential for all the participants in the dialogue to keep talking to each other and to the community. This rests on

---

the deep-seated conviction, already noted above, that the ultimate values, goods, or ends of human flourishing can be affirmed with some objectivity by the human community as the foundational principles for the creation and development of human institutions such as human-made laws and legal institutions. John Finnis can serve as a mentor in the jurisprudential dialogue.

Yet a more enlightened and fruitful horizon for doing jurisprudence, and in particular for analyzing and evaluating what judges do when they decide cases, requires more than the kind of theorizing characteristic of Finnis and others noted here. An essential complementary approach in the dialogue requires a special focus on casuistry, on the method of deciding cases that has characterized the history and tradition of the common law. In a manner most dear to the American legal tradition, concrete cases, concrete case analyses, the deciding of concrete cases can serve to provide a surer way to consensus about foundational principles among the participants in the dialogue on the jurisprudence of the legal enterprise. This all too obvious starting point for jurisprudential theorizing on the judicial function, especially in the American context with its preoccupation with adjudication as a key element in the philosophy of law, has ironically not been all that obvious a fruitful horizon for explaining what it is that judges do when they decide cases. Two ethicists, however, have rendered a landmark service to lawyers and judges, in addition to moralists or ethicists, in their historical study of moral reasoning, specifically moral casuistry, the deciding of cases. We will only briefly note their contribution here.

**Albert R. Jonsen and Stephen Toulmin**

Jonsen and Toulmin co-authored *The Abuse of Casuistry: A History of Moral Reasoning* (1988), a ground-breaking historical study of the origins and development of ethical case analysis with its significant implications for the doing of contemporary ethics. They were prompted to undertake a reconsideration of "the older 'case methods' of confessional and pastoral theology, which relied on Aristotle's analysis of moral practice in the *Nicomachean Ethics*" after having sat together from 1975 to 1978 as members of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. That Commission had been established by the United States Congress in 1974. An outcome of its work was a "casuistry" or "moral taxonomy" for the determination of acceptable and non-acceptable ways of experimenting on human subjects

---


172 Id. at vii.
in biomedical or behavioral research. Jonsen and Toulmin, in reflecting on the Commission's work, noted that there was a basic agreement among the members in casuistic analysis and the conclusions thereof, but no agreement on the foundations or theories of ethics regarding basic rules or principles, whether characterized as consequentialist or deontological or whatever. As they put it:

Members of the commission were largely in agreement about their specific practical recommendations; they agreed what it was they agreed about; but the one thing they could not agree on was why they agreed about it. So long as the debate stayed on the level of particular judgments, the eleven commissioners saw things in much the same way. The moment it soared to the level of “principles,” they went their separate ways. Instead of securely established universal principles, in which they had unqualified confidence, giving them intellectual grounding for particular judgments about specific kinds of cases, it was the other way around.

The *locus of certitude* in the commissioners' discussions did not lie in an agreed set of intrinsically convincing general rules or principles, as they shared no commitment to any such body of agreed principles. Rather, it lay in a shared perception of what was *specifically* at stake in particular kinds of human situations.\(^{173}\)

Surveying and examining a casuistic literature, which until this day has not been exposed to the light of English translation, and which, since Blaise Pascal's attack on casuistry as the worst form of Jesuitry, has been deemed of little repute in the Enlightenment-influenced approach to ethics and meta-ethics, Jonsen and Toulmin have revealed a gold mine of material to substantiate their conviction that good casuistry is essential for doing ethics, that good casuistry is essential to fundamental ethical theorizing. At their hands, casuistry has been rehabilitated. Of course, as they concede, there is good casuistry and bad casuistry. Casuistry can be and has been and is subject to abuse or misuse. But its abuse cannot overcome its virtue in its appropriate use. So Jonsen and Toulmin conclude.

Law, medicine, and public administration are those contemporary areas of human endeavor in which the effective resolution of cases for decision exemplify the essentials of the casuistic method in ethics as revealed in its historical development. The diagnosis and treatment of medical cases in clinical practice, prescinding from the ethical issues also generated in that context, exemplifies the kind of practical knowledge or reason or wisdom which characterizes the practice of medicine. The common law of deciding cases (the adjudication of disputes), prescinding from the historical perspective which at one time characterized a casuistry which did not delineate between the ethical, the legal, and the political, exem-

\(^{173}\) *Id.* at 18.
plifies the virtue of casuistry. Such contemporary casuistries validate the conviction that ethical case analysis continues to make sense and ought not be relegated to the status of a historical museum piece. In fact, Jonsen and Toulmin argue that the most effective way to resolve societal controversies involving law and public policy on such issues as abortion and euthanasia, in a political community with a pluralism of different ethical and religious perspectives, will be through an ethical analysis and discourse which exhibits the best of the casuistic tradition.

The best of the casuistic tradition, during the so-called period of "high casuistry," the work of casuists who were often themselves also theologians and jurisprudents, yields a structure and method of enduring relevance to contemporary times. The casuists did not articulate a theory of casuistry. They worked as practitioners of "moral" medicine, as physicians of souls, who relied upon theoretical presuppositions of theology, a limited doctrine of natural law with its general principles of morality, a doctrine of conscience dealing with the general principles and their relation to concrete moral choices, and a doctrine of circumstances providing categories of exceptions and excuses to the obligations imposed by general principles. Yet the casuists never brought these basic elements or presuppositions together in any overarching theory. But their practice in analyzing cases of conscience provides a basis for inferring a theory about their methodology, although they themselves never purported to articulate or formulate such an explicit methodology. Jonsen and Toulmin note six steps in casuistic methodology, six significant features of casuistry.

The first feature is the use of "paradigm cases" and analogy in an orderly moral taxonomy. In dealing with the general principle against killing, a series of cases would begin with the most extreme cases serving as the paradigm, e.g., a direct attack against an innocent bystander. Such cases would illustrate "the most manifest breaches of the general principle, taken in its most obvious meaning." Such paradigms would represent both an "intrinsic and extrinsic certitude." There would be a universal consensus that the act under consideration was a moral offense. Then the succeeding cases proposed would move away from the paradigms through the introduction of a variety of circumstances and motives which would make the moral assessment of the acts in question less certain. Thus in dealing with the prohibition of killing under the Fifth Commandment of the Decalogue, questions would be posed regarding the imposition of the death penalty by judges, tyrannicide, whether justifiable self-defense includes killing to protect one's family or property or honor.

174 Id. at 250.
175 Id. at 251-57.
176 Id. at 252.
177 Id.
The second feature of classical casuistry is the use of moral maxims or aphorisms in moral argument. In dealing with the self-defense exception to the prohibition against killing, one might turn to such maxims as "force may be repulsed by force" and "defense measured to the need of the occasion."\textsuperscript{178} Whether citations from Scripture or Roman law or canon law or theologians, such sayings were "the bread and butter of moral instruction in the Middle Ages and Renaissance."\textsuperscript{179} They were significant elements in the structuring of moral argument by the casuists, although casuists seldom went about proving or demonstrating their truth.

The third feature of casuistry is the consideration of cases in their circumstances of time, place, and person. The traditional categories of "who, what, where, when, why, how and by what means"\textsuperscript{180} raised questions of progressively greater difficulty in the more complicated cases succeeding the paradigm cases. For example, was killing in self-defense justified in circumstances where one might extricate oneself from danger without taking the life of one's assailant? Was there a significant moral distinction in killing another in the heat of passion as opposed to killing another in cold blood?

The fourth feature of casuistry is that the resolution of or answers to the cases posed are characterized by certain notes of probability, such as "certain," more or less "probable," "thinly probable," or "hardly probable." These notes represented the casuists' judgment about the weight and persuasiveness of the arguments used to advocate an opinion. "Least susceptible of being argued against were the paradigm cases; the further one moved away from the paradigm, the more arguable—in terms of pro and con—the case became."\textsuperscript{181}

The fifth feature of casuistry is the cumulative argument used to justify the opinion regarding the case. Casuists in general make rather short arguments, incorporating a variety of reasons to support their conclusions: Scriptural texts, canon law, the virtues of charity or justice or prudence. They make no attempt to bring these reasons together in any coherent argument. Jonsen and Toulmin observe:

There is little resemblance to those forms of moral reasoning that seek to "deduce" a particular conclusion from a moral principle that serves as a universal premise. Rather, casuistical argument resembles the rhetorical and commonsense discourse that piles up many kinds of argument in hopes of showing the favored position in a good light. The "weight" of a casuistical opinion came from the accumulation of reasons rather than from the logical

\textsuperscript{178} Id. at 253.  
\textsuperscript{179} Id.  
\textsuperscript{180} Id.  
\textsuperscript{181} Id. at 254.
Finally, the sixth feature of casuistry is that the casuists always conclude their analysis of a case with a practical resolution to guide human conduct regarding the matter dealt with, e.g., it is morally permissible to act in this way or that. Such resolutions were always noted as “more or less probable.”

Given these six significant features of casuistry, Jonsen and Toulmin formulate their own definition of casuistry as being

the analysis of moral issues, using procedures of reasoning based on paradigms and analogies, leading to the formulation of expert opinions about the existence and stringency of particular moral obligations, framed in terms of rules or maxims that are general but not universal or invariable, since they hold good with certainty only in the typical conditions of the agent and circumstances of action.\textsuperscript{183}

And they contend that casuistic analysis of moral problems of public policy characterizes the contemporary approach to resolving such matters. And this is appropriate discourse in the debate or dialogue about such matters in that universal ethical principles and general ethical theories in themselves do not generate or “‘entail’ the correctness or incorrectness of particular judgments about specific practical problems.”\textsuperscript{184} This is the case in the non-paradigmatic situations, the marginal and ambiguous situations which are in controversy. In any case, in a society where ethical and religious pluralism reigns, universal ethical principles and general ethical theories are themselves the subjects of controversy. “So long as we place primary importance on people’s public pronouncements of universal moral principle, or to their abstract and general philosophical theories, the contemporary ethical debate may appear pure Babel.”\textsuperscript{185}

Jonsen and Toulmin do not denigrate the efforts of moralists or ethicists who are about developing general, abstract theories of moral philosophy or who attempt to articulate foundational or general principles in a systematic account of ethical thought and reflection. They merely seek to redress the balance in approaches to concrete ethical issues, which for too long has been influenced by ethical theoreticians whose penchant for putting ethics on a sound scientific footing (metaethics) has lost sight of ethics as practice. Jonsen and Toulmin often hearken to the “paradigms” of clinical medical practice and the practice of judges in the common law tradition of adjudicating cases to make their point about the necessity of ethical casuistry. Regarding the limited scope for universal, invariable

\textsuperscript{183} Id. at 256.
\textsuperscript{184} Id. at 257.
\textsuperscript{185} Id. at 285.
\textsuperscript{186} Id. at 265.
generalizations in casuistry, they note:

If “high casuists” hesitated to universalize their judgments, or to say “never” when it was more correct to say either “well, hardly ever” or “never, in any circumstances we have yet considered,” they were acting like Supreme Court justices who eschew obiter dicta and refuse to present opinions going beyond the facts of the immediate case, for fear that they may prejudice (“prejudge”) issues that may yet arise in some future case, the detailed facts of which are not yet available for their consideration. . . . in practical morals as in common law the best we can do in the way of generalizing judgments is to formulate rules or maxims that are general in form but limited in practical scope: recognizing that these can be applied without question only in cases that are close enough to the “paradigm cases” in terms of which they were defined.196

The casuistry of judges and medical doctors serves as a touchstone for the casuistry of ethicists.

In fair turn, however, the casuistry of ethicists may be paradigmatic for those who theorize about what judges do when they decide cases. Jonsen and Toulmin’s pointing to common law judging as a model for ethical casuistry can be turned about to the profit of the jurisprudence of adjudication. Lawyers, judges, jurisprudents can learn from Jonsen and Toulmin’s study how to better proceed to articulate the task of judicial decision-making, an enterprise whose roots are historically interconnected with ethical casuistry.

Jonsen and Toulmin’s study notes the disastrous influence of Enlightenment thinking on the doing of ethics. The kind of theoretical a priori, deductive mode of doing ethics which has dominated scholarly activity, with a consequent disregard of analyzing and resolving concrete ethical problems or cases, has had an unfortunate spillover effect on jurisprudential thinking and theorizing about law and judicial decision-making. Deductive/metaethical styles of ethical analysis has perpetuated an unbalanced view of the ethical enterprise which does not resonate with the casuistic orientation of jurisprudential thinkers. Jonsen and Toulmin’s view of ethics, with ethical case analysis as a sine qua non, cannot help but facilitate and foster a fruitful dialogue between law and ethics. The positivist orientation of much of Anglo-American jurisprudence has seen itself as in direct opposition to much of what would have been considered general ethical theories or general ethical principles derived in a deductivist mode of logic. The new horizon for ethics provided by the study of Jonsen and Toulmin will remedy that disaffection between ethical and jurisprudential thinking and theorizing.

Jonsen and Toulmin’s view of ethics is not incompatible with John

196 Id. at 258.
Finnis' ethics. As noted above, foundational or fundamental ethical theory and general principles are not, in Jonsen and Toulmin's judgment, unimportant for the ethical enterprise. *Theoria* and *praxis* are co-constitutive elements in doing ethics. Finnis himself, in his elaboration of the implications of the foundational basic principles and basic requirements of practical reasonableness, exhibits the features of casuistic analysis, which are the hallmarks of practical reason. Furthermore, Jonsen and Toulmin's perspective will also facilitate the recognition of foundational ethical principles as legitimate resources for jurisprudential thinking.

Both Jonsen and Toulmin, with their ethical casuistry, and Finnis, with his ethical theory firmly anchored in the basic principles affirming the basic goods of human flourishing, can work together towards facilitating a better articulated version of law and legal system and judicial decision-making. From above, as it were, with Finnis and from below with Jonsen and Toulmin, a complementary convergence of resources provides a more enlightened and fruitful horizon for a jurisprudence of judicial decision-making. Of the two resources, Jonsen and Toulmin offer a more attractive and effective approach for a society as ethically and religiously diverse as ours; we proceed via agreement on concrete cases to articulate an underlying rationale for judicial decision-making. At the same time we follow Finnis' lead in beginning to engage in an approach to judicial decision-making which will achieve what Philip Soper and Robert Bellah see as essential to do in our polity, in our political society, viz., to talk about the goals of human living in our communities, to address the ends or purposes of human endeavors. We need to talk about these things as the foundation for all else we do and say as we currently find ourselves polarized and divided along interest group and lobbying lines. It would be refreshing and stimulating if our political discourse were in some manner to take explicit account of the purposes or ends of human existence. We might not agree on what those purposes might be, but at least we would have begun a conversation with each other which could excite and inspire.

The enterprise of law is purposive. It serves the needs and desires of the human community consistent with what is good for human flourishing. The political debates and public discourse in a political community at some point have to take account of the ultimate human values to be served in accord with practical reason. Such a discourse has proven to be very difficult, even problematic, in a society as ethically and religiously pluralistic as ours has become. The Judaeo-Christian heritage underlying our political, social, and cultural institutions has become subject to ongoing controversy in the face of continual litigation involving the religion

---

clauses of the First Amendment of the United States Constitution. As Harold Berman has contended, the Western legal tradition is in crisis, not merely a crisis in legal philosophy, but a crisis in law itself:

Today those beliefs or postulates—such as the structural integrity of law, its ongoingness, its religious roots, its transcendent qualities—are rapidly disappearing, not only from the minds of philosophers, not only from the minds of lawmakers, judges, lawyers, law teachers, and other members of the legal profession, but from the consciousness of the vast majority of citizens, the people as a whole; and more than that, they are disappearing from the law itself. The law is becoming more fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency or continuity. Thus the historical soil of the Western legal tradition is being washed away in the twentieth century, and the tradition itself is threatened with collapse.  

After having articulated the crisis in the Western legal tradition, Berman calls for a more adequate social theory of law to meet the challenges posed by the crisis. The first task for such a theory of law is to avoid the overly simplified analysis of law that has characterized the Marxist and the Weberian approaches. It has to take account of the interaction of spirit and matter, of ideas and experience, in its definition and analysis of law. It has to be founded on an integrative jurisprudence, a jurisprudence which draws together the three traditional schools of jurisprudence—"the political school (positivism), the moral school (natural-law theory), and the historical school (historical jurisprudence)."  

The second task of a social theory of law for today is to adopt a historiography which is appropriate to legal history instead of one geared to economic history, or the history of philosophy, or some other kind. Such a historiography, Berman asserts,

would lead to a general social theory that sees Western history not primarily as a series of transitions from feudalism to capitalism to socialism but rather as a series of transitions from plural corporate groups within an overarching ecclesiastical unity to national states within an overarching but invisible religious and cultural unity, and then to national states without an overarching Western unity, seeking new forms of unity on a world scale.  

The final task for a social theory of law would be one to move beyond the study of the Western legal tradition, beyond the study of Western legal institutions and laws, in order to engage non-Western legal systems and traditions. There must be a meeting, a dialogue between Western and

---

190 Id. at 44.
191 Id. at 44-45.
non-Western law. There must be the development of a common legal language for all of the peoples of this planet. Berman insists that only in that direction is there a way out of the crisis of the Western legal tradition in the late twentieth century.

Berman enlarges and expands our horizons about the enterprise of law, moves us beyond our comfortable categories to see anew the significance of public discourse and dialogue moving towards a public moral consensus as a foundation for law and legal system. The Berman theses help us as citizens to place our own personal legal concerns in a perspective that takes account of the communitarian implications of all that we do. Berman points us to the need for a deeper dialogue about those beliefs, desires, fears, repressions and dreams which are rooted in the Western legal tradition, but too often overlooked in our absorption with legal doctrines, legal institutions, and legal systems. He leads us to a sense of responsibility for the commonweal not only of our own nation, but for that of all the nations, the world community, citizens of planet earth.

And Berman's call to address the crisis in the Western legal tradition is anchored firmly on the institutional separation of Church and State, itself one of the later revolutionary watersheds of that tradition, together with (paradoxically) the principal affirmation that

law and religion are two different but interrelated aspects, two dimensions of social experience—in all societies, but especially in Western society, and still more especially in American society today. Despite the tensions between them, one cannot flourish without the other. Law without (what I call) religion degenerates into a mechanical legalism. Religion without (what I call) law loses its social effectiveness.192

In fact, the Western legal tradition has been characterized by the ongoing interaction and tension between law, "the structures and processes of allocation of rights and duties in a society," and religion, "society's intuitions of and commitments to the ultimate meaning and purpose of life."193 Of course, an ever greater and more divergent religious pluralism increases the tension and makes the dialogue about public virtue or public morality much more difficult. Kent Greenawalt's recent work in this area illustrates how difficult it is to justify the use of and the reliance upon explicitly religious resources in a political society which affirms the institutional separation of Church and State.194

Whether the return to Aristotle and the concept of practical reason can provide a surer method for restoring or rejuvenating public discourse about matters involving the commonweal of political society remains to

---

193 Id. at 12.
194 KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).
be seen. But there are many in this ethically diverse culture who will find it difficult to subscribe to practical reason as the source of ethical wisdom for law and public policy.

Nonetheless, despite the difficulties inherent in a dialogue about the ultimate values or ends of human wellbeing in a political community, such a dialogue is crucial for establishing and verifying the grounds or foundational principles for law, legal system, and, in particular, judicial decision-making. Casuistic ethics analysis presupposes ethical theories, general ethical principles, paradigmatic cases, ethical maxims, the reasonableness of rhetorical argument as “persuasive.” The methodological elements in ethical case analysis presuppose basic resources or foundational principles for the resolution of cases. Disagreements about how to explain such presuppositions ought not preclude the recognition of their necessity for resolving ethical cases. Disagreements about how to explain the foundational presuppositions (ethical and non-ethical) of judicial decision-making ought not preclude the recognition of their necessity for adjudicating or deciding cases.

CONCLUSION

This study has attempted to provide a brief overview of the earlier classic account of judging cases as articulated by Cardozo, and of some more recent and current efforts to explain what it is that judges do when they decide cases. This brief survey has shown how difficult a task it has been for judges and lawyers to adequately explain judicial decision-making and how divergent are the perspectives on such decision-making among those doing a jurisprudence of adjudication. With but a preliminary, limited assessment of prior efforts to explain what judges do in deciding cases, we have suggested a more enlightened and fruitful horizon for doing such a jurisprudence. An adequate jurisprudence of adjudication, we have urged, must be premised on the great affinity which exists between the disciplines of ethics and of law, both of which are in the domain of “practical reason.” Whether the contributions of John Finnis or of Albert Jonsen and Stephen Toulmin will serve to provide such a horizon for a jurisprudence of adjudication is, of course, subject to dialogue, discussion, or disagreement. In any case, it seems clear that the judge’s task of deciding cases is in need of further scholarly investigation and evaluation.

Judges, lawyers, both practitioners and scholars, and other interested participants in the dialogue need to intensify the project of studying what it is judges do when they decide cases. This study should be, we realize now ever more profoundly, interdisciplinary in nature, involving economics, political science, sociology, anthropology, psychology, the humanities, philosophy, ethics, and religion. It cannot be, nor has it truly ever been,
narrowly focused on merely legal materials. A comparative analysis and evaluation of moral casuistry and legal casuistry should be a significant and key element in any such study. Decision-making in other contexts can provide useful data for judicial decision-making. But there is the need to situate the study of adjudication in the much broader context of jurisprudence or philosophy of law. The crucial criteria for the critical evaluation of law and the judges’ deciding of cases will be the foundational principles (both ethical and non-ethical) of practical reason. Thus, interdisciplinary approaches will be anchored critically on such principles.

There is a need to restructure old programs and establish new programs for the education of judges newly arrived on the bench and for those who have been judges for some years; these introductory and continuing education kinds of programs, however, need to devote more time to a substantial study of the judicial decision-making process itself. Though not professional philosophers of law or jurisprudents, though not professional legal academics, judges as practitioners of the art and science of judicial casuistry need to be aware of the ultimate criteriological issues to be faced in deciding the “hard” cases in whatever substantive areas of the law.

The public too, the citizenry, needs to become more aware of what it is that judges do when they decide cases. Judicial opinions are not drafted merely for the litigants and their lawyers in the case at hand, nor for prospective litigants and their lawyers. They speak to the public, to all the people. But the discussion and study of U.S. Constitutional adjudication should not preempt the interest and concern of the public regarding the judicial decision-making process. There is a need for educating the public about adjudication at all levels of the judiciary, not merely at the highest level appellate courts.

Finally, the future of the courts has to be addressed in a contemporary society where the judiciary has become so overburdened with caseloads and an increasingly complex bureaucratic structure, while legislatures pass innumerable laws and establish ever more complex networks of administrative agencies. Less formal institutions for achieving justice or vindicating rights—arbitration, mediation, conciliation—offer attractive alternatives to adjudication for resolving legal conflicts. These alternative modes of resolving disputes, however, need closer examination and evaluation in the light of a jurisprudence of judicial decision-making.