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Judicial Philosophy 2022: Ethics & Professionalism in Appellate Decision-Making

Verónica Gonzales-Zamora

University of New Mexico - School of Law

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JUDICIAL PHILOSOPHY 2022: ETHICS & PROFESSIONALISM IN APPELLATE DECISION-MAKING



March 25, 2022
Virtual Continuing Legal Education Program
University of New Mexico School of Law

Panelists: Justice Julie Vargas
Justice Richard Bosson (ret.)
Judge Jane Yohalem
Judge M. Monica Zamora (ret.)
Judge Michael Bustamante (ret.)
Chief Appellate Attorney Aletheia Allen

Moderator: Assistant Prof. Verónica C. Gonzales-Zamora

JUDICIAL PHILOSOPHY 2022: ETHICS & PROFESSIONALISM IN APPELLATE DECISION-MAKING

PRESENTATION OBJECTIVES

1. Learn about various approaches to judicial philosophy, decision-making, and law-making.
2. Understand how personal philosophies impact error-correcting, interpretation of statutes and regulations, public policy determinations, and common law development functions of the court.
3. Understand the ethical implications and challenges of serving on the intermediate court of appeals and court of last resort in New Mexico and in multi-judge panels.
4. Understand how collegiality among judges, staff, law clerks, and appellate practitioners impacts appellate decision-making.

MATERIALS REFERENCED

1. Hon. David M. Ebel, *So—What’s Your Judicial Philosophy?* 20(1) LITIGATION FALL 3-4, 56-58 (1993) 2
2. Hon. Harris L. Hartz, *How Do Judges Think?* 91 DENV. U L. REV. 575 (2014)8
3. American Bar Ass’n Commission on the 21st Century Judiciary, *Principles and Conclusions*, in JUSTICE IN JEOPARDY: REPORT (2003).17
4. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-406 (1950). 21
5. Hon. Albert Tate, Jr., *The Law-Making Function of the Judge*, 28 LA. L. REV. 211 (1968)35
6. Joel Cohen, *Why Do We Silence Brightest Minds on Bench?* ALBUQUERQUE JOURNAL, Nov. 19, 2014, at A9. 61
7. Gerald R. Ferrer & Mystica Alexander, *Appellate Judges and Philosophical Theories: Judicial Philosophy or Mere Coincidence*, 14 RICH. J.L. & PUB. INT. 561 (2011) . . . 63

FURTHER RESOURCES

Hon. Robert Henry, *Do Judges Think? Comments on Several Papers Presented at the Duke Law Journal’s Conference on Measuring Judges and Justice*, 58 DUKE L.J. 1703 (2009), available at <https://scholarship.law.duke.edu/dlj/vol58/iss7/18/>.

HON. RICHARD A. POSNER, *HOW JUDGES THINK* (Harvard University Press 2008), available at <https://www.hup.harvard.edu/catalog.php?isbn=9780674048065>.



From the Bench

So—What's Your Judicial Philosophy?

So—what's your judicial philosophy? I am asked this question often enough that sometimes I feel I need a pat answer. There are so many options: liberal, conservative, activist, non-activist, legal realist, deconstructionist, Holmesian pragmatist, strict constructionist. The list is endless. The problem is that these conventional labels fail to address the most important issue of all in assessing a judge: Is he or she fair?

When people try to characterize a judge, they usually have in mind the familiar political categories—liberal and conservative. For a federal judge, the analysis often does not go much beyond the political philosophy of the president who appointed that judge. This trend toward political pigeonholing has worsened since the Bork and Thomas confirmation hearings. Because those hearings were so ideological, much of the public has come to believe that judging must be a political, result-driven process, in which a pre-existing philosophy often dictates the outcome.

I disagree. It seems to me that the proper way to evaluate a judge is to consider whether he or she is fair, evenhanded, and principled without regard to what political constituency may benefit or suffer from case outcomes. Justice would be better served if judges were evaluated more on that basis than on the basis of political labels.

In discussing the process of deciding cases, I can draw only upon my own experiences. There doubtless are other approaches that have been used successfully by other judges. My objective

by David M. Ebel

Judge, United States Court of Appeals for the Tenth Circuit

is to simply describe an approach that seems to work for me.

So what is my "judicial philosophy"? It is nothing more complicated than trying to decide each case with impartiality, according to established legal principles where possible, and using logic and appropriate policies underlying the relevant law to fill in the gaps. This approach has two bedrock principles: (1) a preeminent allegiance to objectivity and (2) a belief that a careful application of the pertinent law, tempered by consideration of such law's *raison d'être*, can yield a principled decision not based on a judge's personal political views or philosophy.

At the core of this approach is a belief that justice should be objective and evenhanded. Anyone who comes before a judge should know that the case will be evaluated fairly on its own legal merits—regardless of whether the party or the conduct under scrutiny happens to hold a favored position in the judge's personal value system. Justice is compromised whenever she peeks under her blindfold, whether it is to notice race or other personal characteristics irrelevant to the case or whether it is to track the political and social view of the judge.

Of course, no judge lives in a vacuum. No one can unlearn or disavow a lifetime of values when elevated to the

bench. But a judge can be aware of his or her predominant biases and should—by a deliberate act of will—seek to isolate personal ideology from the decision-making process.

Some may say this is impossible. I concede that it can never be achieved to perfection, but that ought to be the ideal. It should always be a conscious objective in deciding cases. A recovering alcoholic makes a conscious decision each day not to drink—that is, to isolate personal desire so that it does not control conduct. It should not be more difficult for a judge to isolate personal political and social views when deciding cases. It boils down to a matter of will—and integrity.

Let me offer an example. Before joining the bench, I expressed my personal opposition to the death penalty. Yet I knew that as a judge I would review death penalty cases. I also knew that I would be required to apply the law, and not my own views, in deciding such cases. Death penalty cases thus offered a clear test of my ability to subordinate my own views to principled decision making.

Thus far, I have voted four times on cases involving the death penalty. Three times I voted to uphold the sentence. Once I voted to reverse. In each instance, I tried to let the result be determined by an analysis of prevailing legal principles. These were not easy votes, but I have drawn from them a conviction that a judge can isolate even strongly held views in deciding cases in a principled and objective way.

In our elected branches of government—Congress and the executive branch—we want leaders with a political or social agenda. That is not only acceptable, but desirable, because the constitutional functions of those branches are to establish and implement social policy. We can throw the rascals out of office periodically if we come to disagree with their agendas or visions.

The courts obviously have a different role. Those who look to the judiciary as the primary engine for social change misperceive both the constitutional structure of our government and the fundamental tenets of a democracy. The unique task reserved for judges is to resolve actual cases, specific controversies between parties. When opposing parties come forward to put their cases on the scales of justice, the last thing our government should provide to them is a biased judge—or one with a secret (or not so secret) agenda that may affect the result. Bias should be unacceptable in any form, whether it is directed at one of the parties personally, whether it is directed for or against the type of claim one of the parties asserts, or whether it stems from an underlying social agenda. The parties' arguments are what should be weighed on the scales of justice—and not the thumb of the judge.

As a practicing lawyer, I twice experienced what it was like to have a case before a judge who appeared to be predisposed toward a particular result. They were the two worst experiences of my professional career. My consolation is the other side of the coin: For more than twenty years, I litigated cases in courts throughout this country, and these were the only two instances where I felt the judge was not trying to be objective and impartial.

In one of the cases, the judge's biases favored my client. We won hands down. I believe we should have won on the merits anyway, but I could never be absolutely sure that that was the reason for the decision. In the other case, I suspected that the judge had predetermined a result against my client because of the judge's own sense of proper social policy. We settled before the full damage could be done.

Both experiences were equally unpleasant. In each, I felt we were merely engaged in a charade to construct a facade of legitimacy for what was actually a preordained outcome.

The parties' legal rights seemed little more than minor obstacles in the courts' rush to judgment. In the case where my client appeared to be the victim of the judge's bias, I kept remembering the old western movie where a posse had seized a person suspected of cattle rustling. The posse assured the hapless prisoner's wife that he would get a fair trial before he was hanged.

Scrupulous Impartiality

Partly because of these two experiences, I decided that if I were ever a judge, my primary objective would be to try to decide cases with scrupulous impartiality. During cocktail chatter and in other equally ill-informed contexts, I have heard myself sometimes referred to as a liberal (when I have had to apply liberal laws) and sometimes as a conservative (when I have had to apply conservative law). Both labels reveal a lack of understanding of what I am about. Lawyers who practice before me seem to know better. Periodically, the *Almanac of the Federal Judiciary* asks lawyers how they would describe the federal judges before whom they practice. In the latest edition, I was described as impartial, "non-doctrinaire," "unbiased," and "not ideological." That confirms to me that I am doing my job.

After impartiality, the second principle of my "judicial philosophy" is this: The individual predilection of a judge can best be contained by paying careful attention to the *process* for deciding cases. When the process of decision is approached step-by-step, guided by well-established judicial precepts for decision making, a result usually can be reached without consulting the judge's political or social views.

The question of how cases are decided—that is, what process yields the result—has long been an interest of mine. One of my earliest anxieties when I was approached about being a judge was whether it would be hard to decide cases. I knew that the cases that arrive at a federal court of appeals have already been through the district court. It seemed that most litigants would not carry their dispute to the court of appeals unless both sides felt they had pretty good arguments. Would the opposing arguments be so well balanced that the cases would be impossible to decide in any principled way?

My unease heightened when I walked

into my chambers for the first time. Perched on the transom above the door leading to my predecessor's office, I discovered a well-worn penny. Had I stumbled upon the secret mechanism by which cases are decided?

I have now been on the bench five years. During that time, I have voted to resolve more than 2,000 cases on the merits. Many of these cases were difficult; the conflicting arguments were nearly in equipoise. What is interesting, however, is that, although many cases involved close issues on which reasonable judges could differ, only four or five left me in significant personal doubt about my own vote by the time a result was finally issued.

I have observed that appellate decision making is like a journey. The judge starts with the record. Statutory language, precedent, constitutional principles, procedural rules, and rules of construction are sign posts that indicate where the road leads. Following such principled guideposts, a judge should be willing to accept whatever destination is at the end of the road. If the destination is unappealing, it is largely up to the democratically elected branches of government to change the road. The primary job of the court is simply to ensure that the guideposts—the rules—are followed and that the journey is not a sham. If a judge becomes too passionate about the *result* of a particular case, it impairs his or her ability to be a faithful guardian of the *process*. Over the past two hundred years, the judicial process has served us well; if it is compromised, we will have lost far more than we could ever gain through any ideologically driven set of decisions.

I pick up each new case with anticipation because I do not know how it will be resolved. I often lean one way and then the other as I consider the sequence of arguments presented in the briefs. By the time I arrive at oral argument (in cases that *are* actually argued), I have read the briefs and key precedents; considered the difficult issues with my law clerks; and tried to see how the case fits into the matrix of applicable legal principles. Despite such preparation, oral argument frequently makes an impact. Finally, I also want to hear from my colleagues on the panel before I settle into a decision. During this journey, I gradually develop

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From the Bench

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a sense of confidence in the correctness of a particular decision. Somehow, the process works.

I am not saying that a judge does not exercise judgment, make choices, or examine policies underpinning the law. We do that all the time. Sometimes, a guidepost is missing. We have to choose between conflicting legal principles; we have to decide whether, and how, to extend a principle into a new area; we have to give content to some of the very broad phrases that appear in the Constitution and in certain legislation; and we continually must evaluate the importance of factual differences that may distinguish a case from precedent. For these tasks and the many others requiring judicial judgment, we must consult policy: legislative policies underlying ambiguous statutes, historic policies underlying the great and general clauses in the Constitution, and even public policies underlying the common law. But, nowhere in these exercises of judgment do I see an invitation for a judge to look to his or her own *personal* policies and social agenda.

If a judge is prepared to proceed step-by-step along the journey of decision, judgments and choices are more easily confined by legal principles than would be true if the approach were to select a preferred result first and then to work backward, constructing an analysis supporting the result. If a judge respects the integrity of the decision-making process, the result usually will take care of itself.

Why am I so concerned about the *process* when it is the *result* that seems to matter most to the actual litigants and often to society at large? As a lawyer, I certainly never had a client more concerned about the reasoning than about the result reached in the particular case. Even landmark decisions from the United States Supreme Court are popularly known for their result rather than their logic.

The answer is that the process is critically important. It can significantly determine the result. Focusing on the

process does not disregard result; it simply directs attention upstream. No result can be considered fair if it was not reached in a principled manner. Moreover, only through principled decision making can courts achieve consistency in the results reached by a diverse group of judges. Such consistency and predictability are important for people to manage their lives and business affairs, and consistency is greatly enhanced when results flow from established principles and processes rather than from the whims or ideology of individual judges.

There also is this: Principled decision making is essential to the preservation of the authority of the courts. Judges' decisions are accepted because of the institutional premise that judges apply the law, rather than making it. If the courts become just another political branch, it will be hard to explain why the executive or legislative branches should defer to our judgments. They, after all, have a much better claim to the role of policymakers than do we.

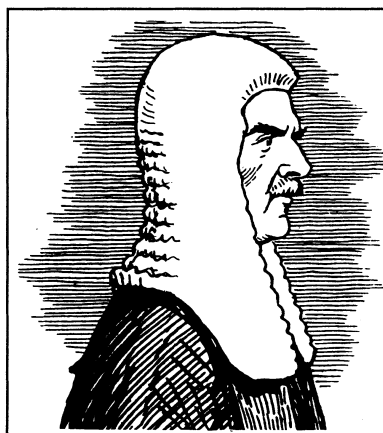
There also is a pragmatic reason why judges should focus on the process rather than the result. Judges are well equipped to decide individual cases; our training suits us to conduct legal reasoning and analysis. However, we are ill equipped to evaluate broader societal consequences. Regardless of litigants' rhetoric, we need to remember that what they are really arguing about are only their own individual interests. We lack the staff and the data-gathering mechanisms that the other branches of government have. We thus are handicapped in evaluating the political or economic impact of our decisions on society at large. It is futile to be preoccupied with the societal impacts of our decisions, because we cannot gauge them with any real accuracy.

The issue of judicial philosophy and the attendant debate about the proper role of judges in charting the political and social course of our country have been in the news recently as Court-watchers, historians, and journalists have struggled to evaluate our most recently retired Supreme Court Justice—Byron R. White.

I had the privilege of clerking for Justice White during the 1965–66 Term of Court. He was, during that year, the epitome of a judge practicing principled decision making. He had a clear vision: He believed that the role of the

judicial branch is to decide cases in an objective and principled way, and that the other branches of government primarily set the political and social agenda for the country. Time and again, I watched him travel the kind of road toward decision I have described—starting with the record, applying the time-honored precepts of interpretation and decision making, and accepting whatever result followed. More than once, I suspect, he might have voted differently if the issue had been presented to him as a legislator.

During that year, I never saw Justice White skew or distort a fact, or give an intellectually clever but fanciful and strained interpretation of the law, simply to reach a particular result. I never, ever, heard him even hint of the possibility that the analysis might follow,



rather than precede, the decision. The reasoning set forth in Justice White's opinions, at least during the year I observed him, accurately described the process that led to the result. I suspect that Justice White had an inherent understanding of the risk that philosophy could turn into ideology and that ideology is the natural enemy of objectivity and fairness. At the core, he was pragmatic. He had little difficulty limiting a line of cases when they began to diverge from reality or when they led the Court into an area that he did not perceive as properly judicial in nature.

I simply disagree with several recent writers in the national press that, in my opinion, misunderstand Justice White's approach to his office as a Justice of the United States Supreme Court. Professor Alan Dershowitz wrote a syndicated article that concluded that Justice White "leaves no judicial legacy," that

he made "little impact," and that there was "no consistent thread to his opinions." Jeff Rosen, writing in the *New Republic*, accused Justice White of having "intelligence without vision."

It is not my purpose here to rebut these evaluations on a detailed basis. Nor is it my purpose to argue that Justice White (or, indeed, any other Justice) is free from some legitimate criticism over the course of a long career. However—to say that Justice White left no judicial legacy or that he was not generally consistent or that he lacked vision is just plain nonsense. Those who want to present the judicial process in a political light will be frustrated in trying to catalogue the *results* of Justice White's cases into a coherent *political* scheme. But the *processes* by which Justice White decided those cases were coherent and can be placed into a consistent *legal* scheme.

As a former law clerk and long-time follower of his opinions, I think that the overarching legacy Justice White has left for his country is a vision of principled decision making. Results were important, but the Justice was also a strong believer in preserving the integrity of the judicial process. One can draw from his opinions the message, indeed the admonition, that if justice is merely a surrogate for the political process, if reasoning is really only rationalization, and if fairness to individual litigants can be sacrificed for the perceived national good, then justice isn't justice at all. It becomes a charade, euphemistically clothed as "vision" or "judicial philosophy."

Several months ago, Justice White delivered a eulogy for Judge Alfred A. Arraj, who was an outstanding federal judge in the District of Colorado. In his public comments, Justice White succinctly summarized, I think, his vision about the judiciary. He said, "If there is one thing important to the judicial system, it's the notion that you are going to get a square deal with that judge." A square deal means that the case will be decided objectively and with integrity, on its own merits and not for political reasons. That, said Justice White, is exactly what "the framers had in mind when they created a federal judiciary." There you have it—a vision and a judicial philosophy. It cannot be called conservative, or liberal, or activist, or deconstructionist, or any of the other labels that journalists and scholars like

to use. It can only be called "fair" and "principled." To my way of thinking, that's a pretty good judicial philosophy.

A postscript: I watched with interest the confirmation proceedings of Justice Ruth Bader Ginsburg, who now occupies the seat on the Supreme Court that Justice White held for 31 years. When she was nominated, she referred to certain views of Chief Justice Rehnquist and Justice Oliver Wendell Holmes that she said were consistent with her own. To Chief Justice Rehnquist she attributed the guidance that "[a] judge is bound to decide each case fairly in a court with the relevant facts and the applicable law even when the decision is not [as he put it], what the home town wants." In speaking of Justice Oliver Wendell Holmes, she drew from a paper published by New York University Law Professor Burt Neuborne, who summarized Justice Holmes's judicial philosophy as follows:

When a modern constitutional judge is confronted with a hard case, Holmes is at her side with three gentle reminders: first, intellectual honesty about the available policy choices; second, disciplined self-restraint in respecting the majority's policy choices; and third, principled commitment to defense of individual autonomy even in the face of majority action.

To those remarks, she added only an "amen." These references suggest that Judge Ginsburg too is committed to principled decision making. And to that I add my own "amen." □

Private Jury Trial

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involvement with the case. Experts presented what were essentially lectures on their findings, with little involvement from attorneys. Cross-examination, of course, followed the traditional question-and-answer format, and an overall time limit per witness was imposed.

We found that presenting some or all of the direct testimony in narrative form could cut the time for a witness's

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How Do Judges Think

Harris L. Hartz

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HOW DO JUDGES THINK?

JUDGE HARRIS L HARTZ[†]

This Essay is a sequel, or perhaps a concurrence, to one by my former colleague Robert Henry with the much more clever title, “Do Judges Think?”¹ That essay was responding to studies by social scientists purporting to show that a judge’s decisions could be predicted by demographic data such as age, gender, religion, party affiliation, and law school.

The judges with whom I associate do not believe those studies. The studies are hard to reconcile with the day-to-day experience of changing our minds about how to decide a case. We read a persuasive appellee’s brief after being convinced of the need for reversal by the appellant’s brief; we read some more case law, a treatise, or even a persuasive law review article (occasionally); and we actually listen to our colleagues.

The image of the judge conveyed by such studies is of a willful, power-seeking person intent on imposing on society the judge’s personal view of good policy. My image of my colleagues during my tenure on both a state and a federal intermediate appellate court is quite different. The work of an intermediate appellate judge is a fascinating, challenging task far removed from any sense of power. It would be remarkable if that were not so. After all, what judge is as impotent as an intermediate appellate judge? We cannot find facts, and we are not the last word on the law. Attorneys understand this. One judge I know was nominated for a newly available position on an intermediate appellate court while his trial-court nomination was pending; he told me that the lawyers in his hometown who had been trying to ingratiate themselves after the announcement of the trial-court nomination suddenly lost interest after he was nominated for the appellate court.

I suspect that most intermediate appellate judges enjoy the work primarily because it provides a marvelous opportunity to tackle puzzles and tell stories. I am indebted for this observation to two acquaintances. One is my son Andrew. Not long after I had been appointed to the state court, Andrew, a six-year-old who perhaps had been watching too many detective shows, greeted me on my arrival home by asking, “Did you solve any cases today?” Over the years, the more I have thought about his question, the more I think it captures the essence of my work.

[†] Judge, United States Court of Appeals for the Tenth Circuit.

1. Robert Henry, *Do Judges Think? Comments on Several Papers Presented at the Duke Law Journal’s Conference on Measuring Judges and Justice*, 58 DUKE L.J. 1703 (2009).

The other contributor is Ninth Circuit Judge Susan Graber, who has been one of my favorite people ever since we studied together for the New Mexico bar exam. She once told me that her ambition had been to be a novelist, but coming up with plots was too difficult. "Now I have the perfect job," she told me. "All I have to do is write the last chapter."

Perhaps nonjudicial readers are skeptical. The judges they have met have strong personalities; they are not shrinking violets who try to avoid the exercise of power. Repeated judicial expressions of "*Moi?*" will never convince such a reader of my description of judges. So in this Essay I will take a different tack. I will not expound on the superiority of judges as people; only a few of us believe that anyway. I will simply point out that some of the traditions—well-known but little-discussed—that govern how judges go about their work make it much less likely that they will engage in the "policy" maneuvers that characterize what are known as the political branches: the legislature and the executive.

I am not going to try to tell you that judges do not make law. Whenever a court resolves an issue that was up in the air, it makes law. But process is important. And the process by which judges make law is quite unlike how the political branches make law. Judicial decision-making has many components. I will focus on only two: the traditions of consistency and neutral principles.

In the political branches, consistency may be considered a virtue, but it is a minor virtue. What is most important to constituents is that a political figure have the "correct" position *now*. Perhaps they can have more confidence in a candidate who has taken that "correct" position for a long time, but they view a recent switch to that position as a sign of gaining wisdom more than as a failure to play by the rules. A perfect consistency is less likely to be praised than to be condemned as displaying inflexibility and a failure to perceive the new realities.

In particular, consistency in process is not highly valued in the rough-and-tumble of politics. Whether a position is considered correct is almost always solely a function of the ultimate result, not the propriety of the procedure by which it was reached. The public is generally most interested in whose ox is being gored, not what weapon is employed in the goring. Failure to vigorously enforce the law is reprehensible when the failure is by a member of the opposing party but understandable, even laudable, when it is the failure of a member of one's own. Failure to obey procedural niceties is always worse when the failure is by one's political opponents. Consider Senate filibusters. Some would say that a senator's attitude depends largely upon whether the senator's party is in the majority in that body.

I am not saying that the political branches are bad. Results matter. Even highly intelligent, well-informed people are "result oriented." When was the last time you read a newspaper editorial condemning the

result of a judicial opinion but saying that the judges' decision was correct on the law? (I actually recall reading one in the *Albuquerque Journal*, whose editor is a law-school graduate.)

Judges certainly are born with the same instincts. But they perform in a system that frowns on being result-oriented. By tradition, a judge is expected to be consistent. (Note, by the way, that I am distinguishing between a judge and a court. It is more common for a court to be inconsistent than for a judge to be. The court, of course, can change direction as a result of a change in membership, with no individual member having changed his or her mind.)

Look at the ways in which the system encourages judicial consistency. First, the judiciary has a great institutional memory. Judicial decisions are published, and readily accessible, if not widely read. If a judge is inconsistent, the judge has no place to hide. When a judge's rulings on whether a party has standing to sue depends on the judge's sympathy with the party's cause, the world knows. This is less a feature of life for trial judges. I recall one judge who would, for example, overrule an objection to a question posed to a character witness but later in the same trial sustain an objection to the same question posed to a different character witness. We joked that the judge wanted to make sure that he got it right at least once. The judge's inconsistency was buried, though, because few would order a trial transcript and read it. In contrast, it is hard for appellate judges to cover their tracks.

Strengthening this constraint on the exercise of judicial power is the tradition that appellate judges write opinions explaining their decisions. An inconsistent member of the political branches may never be questioned about an inconsistency or, when questioned, may well be able to evade the question, as by changing the subject—instead of explaining her view on filibusters, the Senator may argue the merits of the proposed legislation being filibustered. Judges do not have that luxury. Readers can search the opinions for inconsistencies. And usually such a search is unnecessary. Tradition instructs that an opinion must not only provide the rationale for the result but must also summarize the losing parties' arguments (often at the outset of the discussion), which are likely to rely on any prior decision that appears inconsistent with the opinion. Most people, and that includes judges, care sufficiently about their reputations that they will accept an unpleasant result rather than expose themselves as irrational. We all recognize that any judge of sufficiently long tenure will have said things that others will find irrationally inconsistent; but I submit that the frequency of such irrational inconsistencies is much lower than it would be in the absence of the tradition of written explanatory opinions.

It is easy to overlook the importance of the role of consistency in judicial decision-making. But its application is ubiquitous. Some applications may seem mundane. In deciding whether a party has adequately

preserved an argument for appeal, we need to compare the case to others where we have found or not found preservation. Some are more profound: When is a dispute about official conduct a political question, one beyond the competence of courts to decide? Judges should not examine only the conduct of officials with whom they disagree.

Because of the mandate of consistency, the motives that led to creation of a doctrine are irrelevant when it comes time to apply it. One of my favorite examples is the creation of the legal fiction that a suit for injunctive relief against unconstitutional action by a state official is not a suit against the state itself because if the official was acting unconstitutionally, he or she was not acting for the state.² The doctrine is often invoked on behalf of the less fortunate in society. It was enunciated by the Supreme Court, however, to permit a railroad to challenge state regulations.³

The mandate of consistency is the source of one of the great challenges in writing opinions. Judges need to speak in terms of general principles, so their decisions do not appear ad hoc. But they do not want to speak with such generality that their words will come back to haunt them when a case arises with a different twist. A judge must balance the need to give principled guidance against the risk of stating a rule so broadly that a future case will compel the judge to write something inconsistent with that rule. One might think that the more experienced the judge, the more comfortable the judge will be in writing broadly. After all, over the course of years the judge will gain expertise in a particular subject matter and can write broadly with confidence. Sometimes that is true. At least equally often, however, experience teaches the judge that it is impossible for the human mind to anticipate all the variety of life and that judges should write with some modesty.

I learned that lesson early in my career. When I joined the New Mexico Court of Appeals, the court had to deal with three significantly different workers' compensation statutes. The old law had been "reformed," and the reform had been significantly revised shortly thereafter. A recurring question was which law applied. I was assigned a case raising the question and resolved to settle the matter once and for all. I read every relevant published opinion in the state and decided that the courts had always applied the law in effect on the date that the worker's cause of action accrued. I circulated an opinion saying so. One of the members of the panel was the senior judge on the court. He insisted that I preface

2. See *Ex parte Young*, 209 U.S. 123, 159–60 (1908) ("If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.").

3. See generally Barry Friedman, *The Story of Ex parte Young: Once Controversial, Now Canon*, in *FEDERAL COURT STORIES* 247 (Vicki C. Jackson & Judith Resnik eds., 2010).

this statement of the general rule with the language, “in the absence of . . . compelling reasons to the contrary.”⁴ I remember thinking what a wimp he was, unwilling to take a firm stand. Although I included in the opinion the reasoning that persuaded me of the correctness of the general rule, I caved and included the escape-hatch language.⁵ Lucky for me. Less than two years later I proudly wrote that “compelling reasons” required applying a statute whose effective date was after the worker’s cause of action accrued.⁶ The senior judge was also on the latter panel, but he was too much of a gentleman to say, “I told you so.”

Now to the second constraint on judicial decision-making—the tradition that judges should apply neutral principles. Yes, as conceded above, judges make law. I know of no other way to describe a judicial decision that resolves a previously undecided legal question. But judges are less willful about it than those in the political branches of government. They invest less ego, or at least less policy-making ego.

The reasons for this are subtle. Every judge I have known is quite aware that he or she was not elected or appointed to decide the specific case at issue in a particular way. Maybe those who put the judge in office expected a favorable response on a few issues, but most matters a judge ends up deciding were simply not on the radar screen at the outset of the judge’s term. As a result, most judges wonder from time to time what gives them the authority, the power, to determine what the law should be in a particular case. Why should my particular policy preferences be “the law” when there is no reason to believe that the public at large or the people to whom I “owe” my office share those preferences?

To avoid these self-doubts about legitimacy, judges look for neutral principles. I use this term to refer to methods of resolving cases—under the common law, statutes, or the Constitution—that do not require the judge to examine his or her personal preferences about what the best result would be. To some, maybe many or even most, the enterprise of finding such neutral principles may seem doomed to failure. But there has actually been great progress in recent decades.

Take the brilliant little book by Professor Melvin Eisenberg, *The Nature of the Common Law*.⁷ This is not the place, and there is insufficient space, to summarize what the book expounds. I know of no judge, however, who has read the book and does not think that it provides the proper methodology for judges to do their common-law work without relying on their personal social-policy preferences. This is not to say that the book makes common law adjudication a mechanical process of applying algorithms. I recall vigorously dissenting from an opinion of a

4. *Jojola v. Aetna Life & Cas.*, 782 P.2d 395, 397 (N.M. Ct. App. 1989).

5. *Id.*

6. *See Lucero v. Yellow Freight Sys., Inc.*, 818 P.2d 863, 866 (N.M. Ct. App. 1991).

7. MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* (1988).

colleague of mine on the state court who shared my enthusiasm for the Eisenberg book. But at least we had a common framework to start from. We could debate the issue without resorting to the fallback position of, because “that’s the way, uh-huh uh-huh, I like it.”⁸

And much of the best work on statutory interpretation has been written since I became a judge. I would not say that there is a consensus on how to construe statutes. But there have certainly been developments that have achieved near-unanimous support. For example, there is much greater care in the use of legislative history, particularly floor debates. And I am optimistic that the recent book by Justice Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*,⁹ will lead to more intelligent use of canons of interpretation (I wish the book had been available twenty years ago).

The ongoing debate on the gamut of interpretative issues—from the proper use, if any, of the absurdity doctrine to discerning the purpose of a statute and the propriety of assuming that the purpose has no bounds (is a statute an arrow or a vector?¹⁰)—is all about developing neutral principles, that is, deciding how to read a statute without just saying, “I would like it to mean thus and so.” We are improving what I would call the common law of statutory interpretation. Scholars and judges produce new insights that gradually gain traction and eventually are widely recognized as the best interpretative approach. Again, neutral principles will not eliminate the need for discernment and judgment. But they provide judges with a framework for adjudication that bears little resemblance to decision-making within the political branches. No executive or legislator wastes time asking, “Who am I to decide what the law should be?”

Alas, what about constitutional interpretation? There are deep divisions in that area, and cynics (perhaps rightly so, although I dissent on this point) view our highest court as acting pretty much like a political branch. To a large extent, however, differences on the Supreme Court reflect differences on what neutral principles to apply, such as the level of generality with which to read constitutional provisions. Perhaps Justices select their neutral principles with a view to particular results. But once those principles have been selected, the Justice is stuck with them. The principles will regularly, and in important ways (though perhaps not often), demand results from which the Justice would personally recoil.

My purpose here has not been to belittle judges. To say that they do not exercise the sort of raw power exercised by the political branches is not to say that their work is inconsequential. On the contrary. What jus-

8. KC AND THE SUNSHINE BAND, *THAT’S THE WAY (I LIKE IT)* (TK Records 1975).

9. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

10. See Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994).

tice would there be in a society whose members could not resort to the resolution of disputes by a tribunal that must apply neutral principles in a consistent manner? Judges take considerable pride in their work. It's just that they do not see their important work as being of the same nature as the important work of the other branches of government.

AMERICAN BAR ASSOCIATION
COMMISSION ON THE 21ST CENTURY JUDICIARY

PRINCIPLES AND CONCLUSIONS
AUGUST 2003

I. ENDURING PRINCIPLES

- A. Judges should uphold the law.
- B. Judges should be independent.
- C. Judges should be impartial.
- D. Judges should possess the appropriate temperament and character.
- E. Judges should possess the appropriate capabilities and credentials.
- F. Judges and the Judiciary should have the confidence of the public.
- G. The judicial system should be diverse and reflective of the society it serves.
- H. Judges should be constrained to perform their duties in a manner that justifies public faith and confidence in the courts.

II. PRESERVING THE JUDICIARY'S INSTITUTIONAL LEGITIMACY

A. Judicial Qualifications, Training and Evaluation

- States should establish credible, neutral, non-partisan and diverse deliberative bodies to assess the qualifications of all judicial aspirants so as to limit the candidate pool to those who are well qualified.
- The judicial branch should take primary responsibility for providing continuing judicial education, that continuing judicial education should be required for all judges, and that state appropriations should be sufficient to provide adequate funding for continuing judicial education programs.
- Congress should fully fund the State Justice Institute.
- States should fully fund the National Center for State Courts.
- States should develop judicial evaluation programs to assess the performance of all sitting judges.

B. Judicial Ethics and Discipline

- The American Bar Association should undertake a comprehensive review of the Model Code of Judicial Conduct.
- The codes of judicial conduct should be actively enforced.

C. Diversification of the Justice System

- Members of the legal profession should expand their use of training and recruitment programs to encourage lawyers who reflect diversity to join their firms, they should include them fully in firm life, and they should prepare them for pursuing careers on the bench following their years in practice.

- Courts should promote a representative work force and diverse court appointments.
- Courts should act aggressively to ensure that language barriers do not limit access to the justice system.
- Courts should have in place formal policies and processes for handling allegations of bias.
- Information regarding diversity should be shared among the courts in a state and among the states.
- Measures should be adopted to improve and expand jury pool representation.

D. Improving Court-Community Relationships

- Courts should take steps to promote public understanding of and confidence in the courts among jurors, witnesses and litigants.
- Courts should engage and collaborate with the communities of which they are a part, by hosting trips to courthouses and by judges and court administrators speaking in schools and other community settings.
- The continuation of problem-solving courts as a means to promote public confidence in the courts.

III. IMPROVING JUDICIAL SELECTION

A. The preferred system of state court judicial selection is a commission-based appointive system, with the following components:

- The governor should appoint judges from a pool of judicial aspirants whose qualifications have been reviewed and approved by a credible, neutral, non-partisan, diverse deliberative body or commission.
- Judicial appointees should serve until a specified age. Judges so appointed should not be subject to reselection processes, and should be entitled to retirement benefits upon completion of judicial service.
- Judges should not otherwise be subject to reselection, nonetheless remain subject to regular judicial performance evaluations and disciplinary processes that include removal for misconduct.

B. Alternative Recommendations on Systems of Judicial Selection

- For states that cannot abandon the judicial reselection process altogether, judges should be subject to reappointment by a credible, neutral, non-partisan, diverse deliberative body.
- For states that cannot abandon judicial elections altogether, elections should be employed only at the point of initial selection.
- For states that retain judicial elections as a means of reselection, judges should stand for retention election, rather than run in contested elections.
- For states that retain contested judicial elections as a means to select or reselect judges, all such elections should be non-partisan and conducted in a non-partisan manner.

- For states that continue to employ judicial elections as a means of judicial reselection, judicial terms should be as long as possible.
- For states that use elections to select or reselect judges, states should provide the electorate with voter guides on the candidate(s).
- For states that use elections to select or reselect judges, state bars or other appropriate entities should initiate a dialogue among affected interests, in an effort to deescalate the contributions arms race in judicial campaigns.
- For states that use elections to select or reselect judges, state bars or other appropriate entities should reach out to candidates and affected interests, in an effort to establish voluntary guidelines on judicial campaign conduct.
- For states that do not abandon contested elections at the point of initial selection or reselection, states should create systems of public financing for appellate court elections.
- For states that retain contested judicial elections and do not adopt systems of public financing, states should impose limits on contributions to judicial candidates.

IV. PROMOTING AN INDEPENDENT JUDICIAL BRANCH THAT WORKS EFFECTIVELY WITH THE POLITICAL BRANCHES OF GOVERNMENT

- Standards for minimum funding of judicial systems should be established.
- The judiciary's budget should be segregated from that of the political branches, and it should be presented to the legislature for approval with a minimum of non-transferable line itemization.
- States should create independent commissions to establish judicial salaries.
- States should create opportunities for regular meetings among representatives from all three branches of government to promote inter-branch communication as a means to avoid unnecessary confrontations on such issues as court funding, judicial salaries, and structural reform of courts.

4-1-1950

Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed

Karl N. Llewellyn

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REMARKS ON THE THEORY OF APPELLATE DECISION AND THE RULES OR CANONS ABOUT HOW STATUTES ARE TO BE CONSTRUED

KARL N. LLEWELLYN *

I

One does not progress far into legal life without learning that there is no single right and accurate way of reading one case, or of reading a bunch of cases. For

(1) Impeccable and correct doctrine makes clear that a case "holds" with authority only so much of what the opinion says as is absolutely necessary to sustain the judgment. Anything else is unnecessary and "distinguishable" and noncontrolling for the future. Indeed, if the judgment rests on two, three or four rulings, any of them can be rightly and righteously knocked out, for the future, as being thus "unnecessary." Moreover, any distinction on the facts is rightly and righteously a reason for distinguishing and therefore disregarding the prior alleged holding. But

(2) Doctrine equally impeccable and correct makes clear that a case "holds" with authority the rule on which the court there chose to rest the judgment; more, that that rule covers, with full authority, cases which are plainly distinguishable on their facts and their issue, whenever the reason for the rule extends to cover them. Indeed, it is unnecessary for a rule or principle to have led to the decision in the prior case, or even to have been phrased therein, in order to be seen as controlling in the new case: (a) "We there said . . ." (b) "That case necessarily decided . . ."

These divergent and indeed conflicting correct ways of handling or reading a single prior case as one "determines" what it authoritatively holds, have their counterparts in regard to the authority of a series or body of cases. Thus

(1) It is correct to see that "That rule is too well settled in this jurisdiction to be disturbed"; and so to apply it to a wholly novel circumstance. But

(2) It is no less correct to see that "The rule has never been extended to a case like the present"; and so to refuse to apply it: "We here limit the rule." Again,

(3) It is no less correct to look over the prior "applications" of "the rule" and rework them into a wholly new formulation of "the true rule" or

* Betts Professor of Jurisprudence, Columbia University School of Law; author, numerous books and law review articles; draftsman, various uniform commercial acts; chief reporter, Uniform Commercial Code. The "Thrust and Parry" is in good part the work of Charles Driscoll.

"true principle" which knocks out some of the prior cases as simply "mis-applications" and then builds up the others.

In the work of a single opinion-day I have observed 26 different, describable ways in which one of our best state courts handled its own prior cases, repeatedly using three to six different ways within a single opinion.

What is important is that *all* 26 ways (plus a dozen others which happened not to be in use that day) are correct. They represent not "evasion," but sound use, application and development of precedent. They represent not "departure from," but sound continuation of, our system of precedent as it has come down to us. The major defect in that system is a mistaken idea which many lawyers have about it—to wit, the idea that the cases themselves and in themselves, plus the correct rules on how to handle cases, provide one single correct answer to a disputed issue of law. In fact the available correct answers are two, three, or ten. The question is: *Which* of the available correct answers will the court *select*—and *why*? For since there is always more than one available correct answer, the court always has to select.

True, the selection is frequently almost automatic. The type of distinction or expansion which is always *technically* available may be psychologically or sociologically unavailable. This may be because of (a) the current tradition of the court or because of (b) the current temper of the court or because of (c) the sense of the situation as the court sees that sense. (There are other possible reasons a-plenty, but these three are the most frequent and commonly the most weighty.)

The *current tradition* of the court is a matter of period-style in the craft of judging. In 1820-1850 our courts felt in general a freedom and duty to move in the manner typified in our thought by Mansfield and Marshall. "Precedent" guided, but "principle" controlled; and nothing was good "Principle" which did not look like wisdom-in-result for the welfare of All-of-us. In 1880-1910, on the other hand, our courts felt in general a prime duty to order within the law and a duty to resist any "outside" influence. "Precedent" was to control, not merely to guide; "Principle" was to be tested by whether it made for order in the law, not by whether it made wisdom-in-result. "Legal" Principle could not be subjected to "political" tests; even legislation was resisted as disturbing. Since 1920 the earlier style (the "Grand Style") has been working its way back into general use by our courts, though the language of the opinions moves still dominantly (though waningly) in the style (the "Formal Style") of the late 19th Century. In any particular court what needs study is how far along the process has gotten. The best material for study is the latest volume of reports, read in sequence from page 1 through to the end: the current mine-run of the work.

The *current temper* of the court is reflected in the same material, and represents the court's tradition as modified by its personnel. For it is plain

that the two earlier period-styles represent also two eternal types of human being. There is the man who loves creativeness, who can without loss of sleep combine risk-taking with responsibility, who sees and feels institutions as things built and to be built to serve functions, and who sees the functions as vital and law as a tool to be eternally reoriented to justice and to general welfare. There is the other man who loves order, who finds risk uncomfortable and has seen so much irresponsible or unwise innovation that responsibility to him means caution, who sees and feels institutions as the tested, slow-built ways which for all their faults are man's sole safeguard against relapse into barbarism, and who regards reorientation of the law in our polity as essentially committed to the legislature. Commonly a man of such temper has also a craftsman's pride in clean craftsman's work, and commonly he does not view with too much sympathy any ill-done legislative job of attempted reorientation.¹ Judges, like other men, range up and down the scale between the extremes of either type of temper, and in this aspect (as in the aspect of intellectual power and acumen or of personal force or persuasiveness) the constellation of the personnel on a particular bench at a particular time plays its important part in urging the court toward a more literal or a more creative selection among the available accepted and correct "ways" of handling precedent.

More vital, if possible, than either of the above is *the sense of the situation as seen by the court*. Thus in the very heyday of the formal period our courts moved into tremendous creative expansion of precedent in regard to the labor injunction and the due process clause. What they saw as sense to be achieved, and desperately needed, there broke through all trammels of the current period-style. Whereas the most creative-minded court working in the most creative period-style will happily and literally apply a formula without discussion, and even with relief, if the formula makes sense and yields justice in the situation and the case.

So strongly does the felt sense of the situation and the case affect the court's choice of techniques for reading or interpreting and then applying the authorities that one may fairly lay down certain generalizations:

A. In some six appealed cases out of ten the court feels this sense so clearly that lining up the authorities comes close to being an automatic job. *In the very process of reading an authority* a distinction leaps to the eye, and that is "all" that that case holds; or the language of another authority (whether or not "really" in point) shines forth as "clearly stating the true rule." Trouble comes when the cases do not line up this clearly and semi-

1. Intellectually, this last attitude is at odds with the idea that reorientation is for the legislature. Emotionally, it is not. Apart from the rather general resistance to change which normally companions orderliness of mind, there is a legitimate feeling that within a team team-play is called for, that it is passing the buck to thrust onto a court the labor of making a legislative job make sense and become workable.

automatically, when they therefore call for intellectual labor, even at times for a conclusion that the law as given will not allow the sensible result to be reached. Or trouble comes when the sense of the situation is not clear.

B. Technical leeways correctly available when the sense of the situation and the case call for their use cease to be correctly available *unless used in furtherance of what the court sees as such sense*. There is here in our system of precedent an element of uprightness, or conscience, of judicial responsibility; and motive becomes a factor in determining what techniques are correct and right. Today, in contrast with 1890, it may be fairly stated that even the literal application of a thoroughly established rule is not correct in a case or situation in which that application does not make sense unless the court in honest conscience feels forced by its office to make the application.

C. Collateral to B, but deserving of separate statement, is the proposition that *the greater the felt need, because of felt sense, the wider is the leeway correctly and properly available in reshaping an authority or the authorities*. What is both proper and to be expected in an extreme case would become abuse and judicial usurpation if made daily practice in the mine-run of cases. All courts worthy of their office feel this in their bones, as being inherent in our system of precedent. They show the feeling in their work. Where differences appear is where they should appear: in divergent sizings up of what is sense, and of how great the need may be in any situation.

One last thing remains to be said about "sense."

There is a sense of *the type of situation* to be contrasted with the sense of *a particular controversy between particular litigants*. Which of these aspects of sense a court responds to more strongly makes a tremendous difference. Response primarily to the sense of the particular controversy is, in the first place, dangerous because a particular controversy may not be typical, and because it is hard to disentangle general sense from personalities and from "fireside" equities. Such response is dangerous in the second place because it leads readily to finding an out *for this case only*—and that leads to a complicating multiplicity of refinement and distinction, as also to repeated resort to analogies unthought through and unfortunate of extension. This is what the proverb seeks to say: "Hard cases make bad law."

If on the other hand the type of situation is in the forefront of attention, a solving rule comes in for much more thoughtful testing and study. Rules are thrust toward reasonable simplicity, and made with broader vision. Moreover, the idiosyncracies of the particular case and its possible emotional deflections are set for judgment against a broader picture which gives a fair chance that accidental sympathy is not mistaken for long-range justice for all. And one runs a better chance of skirting the incidence of the other proverb: "Bad law makes hard cases."

On the case-law side, I repeat, we ought all thus to be familiar with

the fact that the right doctrine and going practice of our highest courts leave them a very real leeway within which (a) to narrow or avoid what seem today to have been unfortunate prior phrasings or even rulings; or (b), on the other hand, to pick up, develop, expand what seem today to have been fortunate prior rulings or even phrasings.

It is silly, I repeat, to think of use of this leeway as involving "twisting" of precedent. The very phrase presupposes the thing which is not and which has never been. The phrase presupposes that there was in the precedent under consideration some one and single meaning. The whole experience of our case-law shows that that assumption is false. It is, instead, the business of the courts to use the precedents constantly to make the law always a *little* better, to correct old mistakes, to recorrect mistaken or ill-advised attempts at correction—but always within limits severely set not only by the precedents, but equally by the traditions of right conduct in judicial office.

What we need to see now is that all of this is paralleled, in regard to statutes, because of (1) the power of the legislature both to choose policy and to select measures; and (2) the necessity that the legislature shall, in so doing, use language—language fixed in particular words; and (3) the continuing duty of the courts to make sense, under and within the law.

For just as prior courts can have been skillful or unskillful, clear or unclear, wise or unwise, so can legislatures. And just as prior courts have been looking at only a single piece of our whole law at a time, so have legislatures.

But a court must strive to make sense *as a whole* out of our law *as a whole*. It must, to use Frank's figure,² take the music of any statute as written by the legislature; it must take the text of the play as written by the legislature. But there are many ways to play that music, to play that play, and a court's duty is to play it well, and in harmony with the other music of the legal system.

Hence, in the field of statutory construction also, there are "correct," unchallengeable rules of "how to read" which lead in happily variant directions.

This must be so until courts recognize that here, as in case-law, the real guide is Sense-for-All-of-Us. It must be so, so long as we and the courts pretend that there has been only one single correct answer possible. Until we give up that foolish pretense there must be a set of mutually contradictory *correct* rules on How to Construe Statutes: either set available as duty and sense may require.

Until then, also, the problem will recur in statutory construction as in the handling of case-law: *Which* of the technically correct answers (a) *should* be given; (b) *will* be given—and Why?

And everything said above about the temper of the court, the temper

2. Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COL. L. REV. 1259 (1947).

of the court's tradition, the sense of the situation and the case, applies here as well.

Thus in the period of the Grand Style of case-law statutes were construed "freely" to implement their purpose, the court commonly accepting the legislature's choice of policy and setting to work to implement it. (Criminal statutes and, to some extent, statutes on procedure, were exceptions.) Whereas in the Formal Period statutes tended to be limited or even eviscerated by wooden and literal reading, in a sort of long-drawn battle between a balky, stiff-necked, wrong-headed court and a legislature which had only words with which to drive that court. Today the courts have regained, in the main, a cheerful acceptance of legislative choice of policy, but they are still hampered to some extent in carrying such policies forward by the Formal Period's insistence on precise language.

II

One last thing is to be noted:

If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense.

If a statute is to be merged into a going system of law, moreover, the court must do the merging, and must in so doing take account of the policy of the statute—or else substitute its own version of such policy. Creative reshaping of the net result is thus inevitable.

But the policy of a statute is of two wholly different kinds—each kind somewhat limited in effect by the statute's choice of measures, and by the statute's choice of fixed language. On the one hand there are the ideas consciously before the draftsmen, the committee, the legislature: a known evil to be cured, a known goal to be attained, a deliberate choice of one line of approach rather than another. Here talk of "intent" is reasonably realistic; committee reports, legislative debate, historical knowledge of contemporary thinking or campaigning which points up the evil or the goal can have significance.

But on the other hand—and increasingly as a statute gains in age—its language is called upon to deal with circumstances utterly un contemplated at the time of its passage. Here the quest is not properly for the sense originally intended by the statute, for the sense sought originally to be *put into it*, but rather for the sense which *can be quarried out of it* in the light of the new situation. Broad purposes can indeed reach far beyond details known or knowable at the time of drafting. A "dangerous weapon" statute of 1840 can include tommy guns, tear gas or atomic bombs. "Vehicle," in a statute of 1840, can properly be read, when sense so suggests, to include an automobile, or a hydroplane that lacks wheels. But for all that, the sound quest does not

run primarily in terms of historical intent. It runs in terms of what the words can be made to bear, in making sense in the light of the unforeseen.

III

When it comes to presenting a proposed construction in court, there is an accepted conventional vocabulary. As in argument over points of case-law, the accepted convention still, unhappily requires discussion as if only one single correct meaning could exist. Hence there are two opposing canons on almost every point. An arranged selection is appended. Every lawyer must be familiar with them all: they are still needed tools of argument. At least as early as Fortescue the general picture was clear, on this, to any eye which would see.

Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon: The good sense of the situation and a *simple* construction of the available language to achieve that sense, *by tenable means, out of the statutory language*.

CANONS OF CONSTRUCTION

Statutory interpretation still speaks a diplomatic tongue. Here is some of the technical framework for maneuver.

| THRUST | BUT | PARRY |
|--|-----|--|
| 1. A statute cannot go beyond its text. ³ | | 1. To effect its purpose a statute may be implemented beyond its text. ⁴ |
| 2. Statutes in derogation of the common law will not be extended by construction. ⁵ | | 2. Such acts will be liberally construed if their nature is remedial. ⁶ |
| 3. Statutes are to be read in the light of the common law and a statute affirming a common law rule is to be construed in accordance with the common law. ⁷ | | 3. The common law gives way to a statute which is in consistent with it and when a statute is designed as a revision of a whole body of law applicable to a given subject it supersedes the common law. ⁸ |

3. First National Bank v. DeBerriz, 87 W. Va. 477, 105 S.E. 900 (1921); SUTHERLAND, STATUTORY CONSTRUCTION § 388 (2d ed. 1904); 59 C.J., Statutes, § 575 (1932).

4. Dooley v. Penn. R.R., 250 Fed. 142 (D. Minn. 1918); 59 C.J., Statutes § 575 (1932).

5. Devers v. City of Scranton, 308 Pa. 13, 161 Atl. 540 (1932); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 113 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION § 573 (2d ed. 1904); 25 R.C.L., Statutes § 281 (1919).

6. Becker v. Brown, 65 Neb. 264, 91 N.W. 178 (1902); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 113 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION §§ 573-75 (2d ed. 1904); 59 C.J., Statutes § 657 (1932).

7. Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898); 25 R.C.L., Statutes § 280 (1919).

8. Hamilton v. Rathbone, 175 U.S. 414, 20 Sup. Ct. 155, 44 L. Ed. 219 (1899); State v. Lewis, 142 N.C. 626, 55 S.E. 600 (1906); 25 R.C.L., Statutes §§ 280, 289 (1919).

4. Where a foreign statute which has received construction has been adopted, previous construction is adopted too.⁹

4. It may be rejected where there is conflict with the obvious meaning of the statute or where the foreign decisions are unsatisfactory in reasoning or where the foreign interpretation is not in harmony with the spirit or policy of the laws of the adopting state.¹⁰

5. Where various states have already adopted the statute, the parent state is followed.¹¹

5. Where interpretations of other states are inharmonious, there is no such restraint.¹²

6. Statutes *in pari materia* must be construed together.¹³

6. A statute is not *in pari materia* if its scope and aim are distinct or where a legislative design to depart from the general purpose or policy of previous enactments may be apparent.¹⁴

7. A statute imposing a new penalty or forfeiture, or a new liability or disability, or creating a new right of action will not be construed as having a retroactive effect.¹⁵

7. Remedial statutes are to be liberally construed and if a retroactive interpretation will promote the ends of justice, they should receive such construction.¹⁶

8. Where design has been distinctly stated no place is left for construction.¹⁷

8. Courts have the power to inquire into real—as distinct from ostensible—purpose.¹⁸

9. Freese v. Tripp, 70 Ill. 496 (1873); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 176 (2d ed. 1911); 59 C.J., *Statutes*, §§ 614, 627 (1932); 25 R.C.L., *Statutes* § 294 (1919).

10. Bowers v. Smith, 111 Mo. 45, 20 S.W. 101 (1892); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 176 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION § 404 (2d ed. 1904); 59 C.J., *Statutes* § 628 (1932).

11. Burnside v. Wand, 170 Mo. 531, 71 S.W. 337 (1902).

12. State v. Campbell, 73 Kan. 688, 85 Pac. 784 (1906).

13. Milner v. Gibson, 249 Ky. 594, 61 S.W.2d 273 (1933); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 104 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION §§ 443-48 (2d ed. 1904); 25 R.C.L., *Statutes* § 285 (1919).

14. Wheelock v. Myers, 64 Kan. 47, 67 Pac. 632 (1902); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 104 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION § 449 (2d ed. 1904); 59 C.J., *Statutes* § 620 (1932).

15. Keeley v. Great Northern Ry., 139 Wis. 448, 121 N.W. 167 (1909); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 119 (2d ed. 1911).

16. Falls v. Key, 278 S.W. 893 (Tex. Civ. App. 1925); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 120 (2d ed. 1911).

17. Federoff v. Birks Bros., 75 Cal. App. 345, 242 Pac. 885 (1925); SUTHERLAND, STATUTORY CONSTRUCTION § 358 (2d ed. 1904); 59 C.J., *Statutes* § 570 (1932).

18. Coulter v. Pool, 187 Cal. 181, 201 Pac. 120 (1921); 59 C.J., *Statutes* § 570 (1932).

9. Definitions and rules of construction contained in an interpretation clause are part of the law and binding.¹⁹

10. A statutory provision requiring liberal construction does not mean disregard of unequivocal requirements of the statute.²¹

11. Titles do not control meaning; preambles do not expand scope; section headings do not change language.²³

12. If language is plain and unambiguous it must be given effect.²⁵

13. Words and phrases which have received judicial construction before enactment are to be understood according to that construction.²⁷

9. Definitions and rules of construction in a statute will not be extended beyond their necessary import nor allowed to defeat intention otherwise manifested.²⁰

10. Where a rule of construction is provided within the statute itself the rule should be applied.²²

11. The title may be consulted as a guide when there is doubt or obscurity in the body; preambles may be consulted to determine rationale, and thus the true construction of terms; section headings may be looked upon as part of the statute itself.²⁴

12. Not when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose.²⁶

13. Not if the statute clearly requires them to have a different meaning.²⁸

19. *Smith v. State*, 28 Ind. 321 (1867); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 89 (2d ed. 1911); 59 C.J., *Statutes* § 567 (1932).

20. *In re Bissell*, 245 App. Div. 395, 282 N.Y. Supp. 983 (4th Dep't 1935); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 89 (2d ed. 1911); 59 C.J., *Statutes* § 566 (1932).

21. *Los Angeles County v. Payne*, 82 Cal. App. 210, 255 Pac. 281 (1927); SUTHERLAND, STATUTORY CONSTRUCTION § 360 (2d ed. 1904); 59 C.J., *Statutes* § 567 (1932).

22. *State ex rel. Triay v. Burr*, 79 Fla. 290, 84 So. 61 (1920); SUTHERLAND, STATUTORY CONSTRUCTION § 360 (2d ed. 1904); 59 C.J., *Statutes* § 567 (1932).

23. *Westbrook v. McDonald*, 184 Ark. 740, 44 S.W. 2d 331 (1931); *Huntworth v. Tanner*, 87 Wash. 670, 152 Pac. 523 (1915); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS §§ 83-85 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION §§ 339-42 (2d ed. 1904); 59 C.J., *Statutes* § 599 (1932); 25 R.C.L., *Statutes* §§ 266-267 (1919).

24. *Brown v. Robinson*, 275 Mass. 55, 175 N.E. 269 (1931); *Gulley v. Jackson*, 165 Miss. 103, 145 So. 905 (1933); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS §§ 83-85 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION §§ 339-42 (2d ed. 1904); 59 C.J., *Statutes* §§ 598-99 (1932); 25 R.C.L., *Statutes* §§ 266, 267 (1919).

25. *Newhall v. Sanger*, 92 U.S. 761, 23 L. Ed. 769 (1875); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 51 (2d ed. 1911); 59 C.J., *Statutes* § 569 (1932); 25 R.C.L., *Statutes* §§ 213, 225 (1919).

26. *Clark v. Murray*, 141 Kan. 533, 41 P.2d 1042 (1935); SUTHERLAND, STATUTORY CONSTRUCTION § 363 (2d ed. 1904); 59 C.J., *Statutes* § 573 (1932); 25 R.C.L., *Statutes* §§ 214, 257 (1919).

27. *Scholze v. Sholze*, 2 Tenn. App. 80 (M.S. 1925); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 65 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION § 363 (2d ed. 1904).

28. *Dixon v. Robbins*, 246 N.Y. 169, 158 N.E. 63 (1927); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 65 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION § 363 (2d ed. 1904).

14. After enactment, judicial decision upon interpretation of particular terms and phrases controls.²⁹

15. Words are to be taken in their ordinary meaning unless they are technical terms or words of art.³¹

16. Every word and clause must be given effect.³³

17. The same language used repeatedly in the same connection is presumed to bear the same meaning throughout the statute.³⁵

18. Words are to be interpreted according to the proper grammatical effect of their arrangement within the statute.³⁷

19. Exceptions not made cannot be read.³⁹

14. Practical construction by executive officers is strong evidence of true meaning.³⁰

15. Popular words may bear a technical meaning and technical words may have a popular signification and they should be so construed, as to agree with evident intention or to make the statute operative.³²

16. If inadvertently inserted or if repugnant to the rest of the statute, they may be rejected as surplusage.³⁴

17. This presumption will be disregarded where it is necessary to assign different meanings to make the statute consistent.³⁶

18. Rules of grammar will be disregarded where strict adherence would defeat purpose.³⁸

19. The letter is only the "bark." Whatever is within the reason of the law is within the law itself.⁴⁰

29. *Eau Claire National Bank v. Benson*, 106 Wis. 624, 82 N.W. 604 (1900); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 93 (2d ed. 1911).

30. *State ex rel. Bashford v. Frear*, 138 Wis. 536, 120 N.W. 216 (1909); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 94 (2d ed. 1911); 25 R.C.L., *Statutes* § 274 (1919).

31. *Hawley Coal Co. v. Bruce*, 252 Ky. 455, 67 S.W.2d 703 (1934); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 63 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION, §§ 390, 393 (2d ed. 1904); 59 C.J., *Statutes*, §§ 577, 578 (1932).

32. *Robinson v. Varnell*, 16 Tex. 382 (1856); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 63 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION § 395 (2d ed. 1904); 59 C.J., *Statutes* §§ 577, 578 (1932).

33. *In re Terry's Estate*, 218 N.Y. 218, 112 N.E. 931 (1916); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 60 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION § 380 (2d ed. 1904).

34. *United States v. York*, 131 Fed. 323 (C.C.S.D.N.Y. 1904); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 60 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION §§ 384 (2d ed. 1904).

35. *Spring Canyon Coal Co. v. Industrial Comm'n*, 74 Utah 103, 277 Pac. 206 (1929); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 53 (2d ed. 1911).

36. *State v. Knowles*, 90 Md. 646, 45 Atl. 877 (1900); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 53 (2d ed. 1911).

37. *Harris v. Commonwealth*, 142 Va. 620, 128 S.E. 578 (1925); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 55 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION § 408 (2d ed. 1904).

38. *Fisher v. Connard*, 100 Pa. 63 (1882); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 55 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION § 409 (2d ed. 1904).

39. *Lima v. Cemetery Ass'n*, 42 Ohio St. 128 (1884); 25 R.C.L., *Statutes* § 230 (1919).

40. *Flynn v. Prudential Ins. Co.*, 207 N.Y. 315, 100 N.E. 794 (1913); 59 C.J., *Statutes* § 573 (1932).

20. Expression of one thing excludes another.⁴¹

21. General terms are to receive a general construction.⁴²

22. It is a general rule of construction that where general words follow an enumeration they are to be held as applying only to persons and things of the same general kind or class specifically mentioned (*ejusdem generis*).⁴³

23. Qualifying or limiting words or clauses are to be referred to the next preceding antecedent.⁴⁴

24. Punctuation will govern when a statute is open to two constructions.⁴⁵

20. The language may fairly comprehend many different cases where some only are expressly mentioned by way of example.⁴⁶

21. They may be limited by specific terms with which they are associated or by the scope and purpose of the statute.⁴⁷

22. General words must operate on something. Further, *ejusdem generis* is only an aid in getting the meaning and does not warrant confining the operations of a statute within narrower limits than were intended.⁴⁸

23. Not when evident sense and meaning require a different construction.⁴⁹

24. Punctuation marks will not control the plain and evident meaning of language.⁵⁰

41. *Detroit v. Redford Twp.*, 253 Mich. 453, 235 N.W. 217 (1931); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 72 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION §§ 491-94 (2d ed. 1904).

42. *Springer v. Philippine Islands*, 277 U.S. 189, 48 Sup. Ct. 480, 72 L. Ed. 845 (1928); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 72 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION § 495 (2d ed. 1904).

43. *De Witt v. San Francisco*, 2 Cal. 289 (1852); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 68 (2d ed. 1911); 59 C.J., *Statutes* § 580 (1932).

44. *People ex rel. Krause v. Harrison*, 191 Ill. 257, 61 N.E. 99 (1901); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 69 (1911); SUTHERLAND, STATUTORY CONSTRUCTION § 347 (2d ed. 1904).

45. *Hull Hospital v. Wheeler*, 216 Iowa 1394, 250 N.W. 637 (1933); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 71 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION §§ 422-34 (2d ed. 1904); 59 C.J., *Statutes* § 581 (1932); 25 R.C.L., *Statutes* § 240 (1919).

46. *Texas v. United States*, 292 U.S. 522, 54 Sup. Ct. 819, 78 L. Ed. 1402 (1934); *Grosjean v. American Paint Works*, 160 So. 449 (La. App. 1935); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 71 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION §§ 437-41 (2d ed. 1904); 59 C.J., *Statutes* § 581 (1932); 25 R.C.L., *Statutes* § 240 (1919).

47. *Dunn v. Bryan*, 77 Utah 604, 299 Pac. 253 (1931); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 73 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION §§ 420, 421 (2d ed. 1904); 59 C.J., *Statutes* § 583 (1932).

48. *Myer v. Ada County*, 50 Idaho 39, 293 Pac. 322 (1930); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 73 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION §§ 420, 421 (2d ed. 1904); 59 C.J., *Statutes* § 583 (1932).

49. *United States v. Marshall Field & Co.*, 18 C.C.P.A. 228 (1930); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 88 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION § 361 (2d ed. 1904); 59 C.J., *Statutes* § 590 (1932).

50. *State v. Baird*, 36 Ariz. 531, 288 Pac. 1 (1930); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 87 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION § 361 (2d ed. 1904); 59 C.J., *Statutes* § 590 (1932).

25. It must be assumed that language has been chosen with due regard to grammatical propriety and is not interchangeable on mere conjecture.⁵¹

26. There is a distinction between words of permission and mandatory words.⁵²

27. A proviso qualifies the provision immediately preceding.⁵³

28. When the enacting clause is general, a proviso is construed strictly.⁵⁴

25. "And" and "or" may be read interchangeably whenever the change is necessary to give the statute sense and effect.⁵⁵

26. Words imparting permission may be read as mandatory and words imparting command may be read as permissive when such construction is made necessary by evident intention or by the rights of the public.⁵⁶

27. It may clearly be intended to have a wider scope.⁵⁷

28. Not when it is necessary to extend the proviso to persons or cases which come within its equity.⁵⁸

51. *Hines v. Mills*, 187 Ark. 465, 60 S.W.2d 181 (1933); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 75 (2d ed. 1911).

52. *Fulghum v. Bleakley*, 177 S.C. 286, 181 S.E. 30 (1935); SUTHERLAND, STATUTORY CONSTRUCTION § 397 (2d ed. 1904); 25 R.C.L., *Statutes* § 226 (1919).

53. *Koch & Dryfus v. Bridges*, 45 Miss. 247 (1871); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 150 (2d ed. 1911).

54. *Jennings v. Suggs*, 180 Ga. 141, 178 S.E. 282 (1935); *Ewing v. Union Central Bank*, 254 Ky. 623, 72 S.W.2d 4 (1934); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 151 (2d ed. 1911); 59 C.J., *Statutes* § 631 (1932).

55. *State ex rel. Higgs v. Summers*, 118 Neb. 189, 223 N.W. 957 (1929); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 130 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION § 352 (2d ed. 1904); 59 C.J., *Statutes* § 640 (1932).

56. *Reuter v. San Mateo County*, 220 Cal. 314, 30 P.2d 417 (1934); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 130 (2d ed. 1911).

57. *Montgomery v. Martin*, 294 Pa. 25, 143 Atl. 505 (1928); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 131 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION § 322 (2d ed. 1904).

58. *Forscht v. Green*, 53 Pa. 138 (1866); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 131 (2d ed. 1911).

11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

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THE LAW-MAKING FUNCTION OF THE JUDGE*

Albert Tate, Jr.**

Law students are no longer surprised by an admission that our judges sometimes create law-rules as well as apply them. Indeed, perhaps law schools overrate the influence of social policy upon the decisional process. The settled rule governs almost all the area of everyday law practice, and the vast mill-run of litigation neither requires nor allows much free play of judicial discretion. In the trial court only the rare case involves the uncertain rule rather than the uncertain application of a rule itself indisputable. Even in the appellate courts, which decide the borderline litigation of many law practices and of many trial courts, only a small minority¹ of cases involve respectable discretion to select the decisive law-rule.

My remarks concern the law-making function of the appellate judge, but they must be viewed in this context. To single out this limited judicial role must necessarily overemphasize its quantitative importance. Nor at this late date can novelty of theme enhance any discussion of rule-creation by judges.² What, then, may justify yet another glance at this now familiar text?

Over the past thirteen years of experience as a state appellate judge I have come to see that law-improvement functions are an inescapable part of the duties of an appellate court. Though they be minor quantitatively, these functions are quali-

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** Presiding Judge, Louisiana Court of Appeal, Third Circuit, on leave of absence to serve as Professor of Law, Louisiana State University Law School, 1967-68. The writer is indebted for research and editorial assistance to A. Lynn Wright, II, law clerk to the Third Circuit 1966-67, member of the Calcasieu and Orleans Bars.

1. Commencing with an estimate of CARDOZO, *THE GROWTH OF THE LAW* 60 (1924), somewhat corroborated by similar estimates from other sources, LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 25 (1960) and Clark & Trubek, *The Creative Role of the Judge*, 71 *YALE L.J.* 255, 256 (1961), the currently fashionable guess is that perhaps 10 percent of the caseload of major appellate courts permit choice of the applicable law-rule in accordance with the social value of those rules permissibly applicable. Cf., e.g., Friendly, *Reactions of a Lawyer Newly Become Judge*, 71 *YALE L.J.* 218, 222 (1961).

2. See, e.g., Symposium, *The Changing Role of the Judiciary in the Development of Law*, 61 *COLUM. L. REV.* 761-955 (1961), as well as sources cited in note 1 *supra*.

tatively important, for they aid the law to keep alive and current and responsive to the changing needs of our society. The subject of judicial creativity has become a sensitive subject during these same years, when the national Supreme Court's recent constitutional rulings, unpopular with many as to substantive result, have been attacked as unwarranted judicial legislation. My hope is that by discussion of the judicial law-choosing role in its more humdrum day-to-day aspects—as it affects a state appellate court disposing of its ever increasing docket of mostly private disputes—we may note that law-creation functions performed by appellate courts are not exercised in derogation of the paramount law-making power vested in the legislatures but rather as a necessary supplement to it.

Let me at the outset repeat the usual disclaimers. The proper function of the courts is to adjudicate, not to legislate; the legislature is and must be the ultimate and paramount source of law. Inevitably, however, the adjudicative process in American jurisdictions requires that on occasion the courts create or modify a general rule in order to decide a dispute pending before the courts. Indeed, historically, our Constitution and customs envisage that the courts will perform law revision and law adaptation functions in order to maintain the coherency and currency of the law. Nevertheless, in the small proportion of cases in which judicial law-creation is appropriate, such power must be exercised subject to traditional restraints and more to accord with the reasoned development of pre-existing doctrine than to express any personal philosophy of the judges.

In further preliminary, we will limit the ambit of our discussion. We will not now consider the various philosophical concepts which divide legal philosophers. We will instead accept as our present working definition that the law is simply the rules of substance or procedure by which the courts decide cases before them.³ Thus, for present purposes we will assume that law-rules formulated by judicial decisions represent judicial law-making, disregarding the civilian concept that judicial decisions are only interpretations and that law results from legislation alone.⁴ Also, we will focus our view on private law—the judicial law-making responsibility arising from the decision

3. GRAY, *THE NATURE AND SOURCES OF THE LAW* 84 (2d ed. 1921; Beacon Press reprint, 1963).

4. See sources cited in Tate, *Techniques of Judicial Interpretation in Louisiana*, 22 *LA. L. REV.* 727 (1962).

of disputes between private persons to settle private rights and liabilities. By doing so, we will attempt to avoid the emotion-charged atmosphere surrounding the duty of the courts to decide public-law questions of policy and constitutional interpretation. Our concern will thus be with the courts' law-making function in the development of the "lawyer's law" of the quiet law libraries, not the "political law" of the bustling legislature or of the strident street corners.

I

Before we generalize about judicial law-making, it may be well to illustrate one of the aspects of the problem by a specific example.

When I was a member of the old Louisiana First Circuit, in 1957, we were faced in *Alexander v. General Acc. Fire & Life Assur. Corp.*⁵ with an issue never before explicitly decided by any previous Louisiana decision—the standard of care owed by a host to a social guest injured through some defect of the host's premises (in this case a carelessly attached runner-rug in a dark hall). No statute of our legislature directly regulated the matter. The only legislation applicable was our Civil Code's general provision obliging those who cause damage through "fault" to pay for it.⁶

Under the common law of England and the court-made law of most American jurisdictions, a host generally owes to a social guest only the duty to warn him of latent dangers the host actually knows about.⁷ This is to be contrasted with the care required of the host for almost all other invitees, to whom his duty includes an affirmative responsibility to warn of or to correct latent defects which are reasonably discoverable—in short, to take reasonable precautions against undue risk of reasonably foreseeable harm, the usual duty owed in most areas of negligence law. The courts of other states had applied this common-law social-guest rule over a current of dissent. Some tort scholars felt that the host should owe the guest in his home the same duty not to injure him negligently through premise defects as he admittedly owed to business callers—or for that

5. 98 So.2d 730 (La. App. 1st Cir. 1957).

6. LA. CIVIL CODE art. 2315 (1870).

7. PROSSER, TORTS § 60, at 387-88 (3d ed. 1964); Annot., 25 A.L.R.2d 598 (1952).

matter, to the social guest himself for negligently inflicted injuries not caused by defective premises.⁸

In 1957, then, this question of law, the duty of a host to a social guest for premise defects, came before our court for decision in the *Alexander* case. Even though there were no Louisiana statutes or decisions to guide us, we as a court nevertheless had to decide the case. To do so, of course, we had to select and apply some rule of law based upon no previous Louisiana authority and to set this forth in a reasoned opinion to be published. We could not, for instance, withhold action indefinitely until the legislature might act on the question, if ever.

In this situation, should we, in selecting the law-rule to apply, choose the old English common-law rule followed by most American jurisdictions? If we did, should we do so without consideration of whether it was better than the ordinary-care rule preferred by many scholars, simply because most other American courts had chosen the English rule to apply? Or should we instead choose from the two law-rules that one which we thought to be the fairer and more socially useful, the more consistent with the general body of tort law and with standards of behavior and social expectations in twentieth-century America?

As my loaded questions suggest, our court did not select the preponderant English-American social guest rule. We felt that the rule recommended by some modern scholars to be the better, and the one more consistent with the general body of Louisiana law and the general social conditions of today. A few years later, our State Supreme Court approved and applied the social guest standard adopted in the *Alexander* case.⁹

But the story is not ended yet. A further development with regard to our social-guest law-rule exemplifies that the scope of judicial law-making is always subject to oversight and review by the legislature.

Following our 1957 decision in *Alexander*, there was no legislative reaction. However, in *Daire v. Southern Farm Bureau*

8. As in the cases of food furnished the guest or driving the guest to and from the host's home. See authorities discussed and cited in *Alexander v. General Acc. Fire & Life Assur. Corp.*, 98 So.2d 730 (La. App. 1st Cir. 1957); and in PROSSER, TORTS §§ 60, 61 (3d ed. 1964).

9. *Foggin v. General Guar. Ins. Co.*, 250 La. 347, 195 So.2d 636 (1967). See also Comment, 27 LA. L. REV. 796 (1967).

*Cas. Ins. Co.*¹⁰ in 1962, the Louisiana Third Circuit, upon which I was then sitting, held a host camp owner's liability insurer liable to a social guest for a fall resulting from a defective condition of a fishing camp porch. It was indeed a close question; an invitation to a hunting and fishing camp does not carry with it the same assurance of the safety of the premises as could be expected from an invitation to a home. Nevertheless, a majority of our court felt that the hazard in question, producing a really serious injury, was unreasonable in view of its concealment from ordinary observation. We therefore affirmed recovery. In the next regular session of the legislature, a statute was enacted to provide that no owner or occupant of property was under any duty to keep premises safe for use "by others for hunting, fishing, camping, hiking, sight-seeing, or boating," and also that by any permission given to others "to enter the premises for such recreational purposes he [the owner] does not thereby extend any assurance that the premises are safe . . ."¹¹ Thus, the legislature overruled our social-guest law-rule insofar as it applied to non-commercial recreational premises.

We might well conclude from this prompt legislative reaction that, while the legislature disapproved of the *Daire* fishing-camp application of the *Alexander* rule, it did approve and accept *Alexander's* general rule that a host owed ordinary care to a social guest in usual circumstances. The legislative inactivity following the 1957 *Alexander* decision, as contrasted with the prompt legislative reaction to the 1962 *Daire* holding, lends further support to this thesis.

These theoretical deductions are of course largely imaginary. Although the deductions possess an element of general plausibility, the truth of the matter, almost certainly, is that few if any of the 150 legislators serving in 1957 or at any of the subsequent sessions had heard of either the *Alexander* or the *Daire* decisions. With the many other more important public questions and the hundreds and hundreds of legislative bills and resolutions for them to consider and dispose of, the rather rare plight of the injured social guest or of his host was simply not grave enough to occupy much if any of the attention of any but a few. The legislature's prompt reaction to *Daire* resulted from a collision with the interests of hunting groups and the politically

10. 143 So.2d 389 (La. App. 3d Cir. 1962).

11. LA. R.S. 9:2791 (Supp. 1966). The enactment excluded commercial enterprises from those exempted from liability for premise defect.

articulate farm bureau, who immediately secured legislative revision, rather than from any programmed scanning of the advance sheets by busy legislators to note judicial decisions needing legislative correction. I do not say this in any demeaning vein, for almost all legislation results from the push of interests adversely affected by current conditions.¹² The observation is made simply to keep in perspective the milieu within which legislative oversight of appellate jurisprudence takes place. Simultaneously, we do emphasize that the legislature through its policy deciding primacy may simply overrule the rare case where a judicially created rule or its application is sufficiently displeasing or important to warrant legislative attention.

II

Let us now consider more closely the function of our court in selecting the law-rule to apply in *Alexander*.

As an appellate court, our role was to decide this pending litigation by a written reasoned opinion. We need now do no more than note briefly the function of the reasoned opinion to assure that legal disputes of similarly situated interests are decided in accordance with consistent principles. But the requirement of a reasoned opinion had as its consequence that our court in *Alexander* could not simply decide for the plaintiff or for the defendant without stating the legal reasons for the result. Our duty thus required us to formulate a law-rule for the result we reached, even though no previous Louisiana case and no Louisiana statute provided us with one for mechanical application.

Consider further the resultant implication that, as with all appellate opinions in Louisiana, our eventual decision and our reasoning in *Alexander* would be published in the *Southern Reporter*. Of course, this must be to guide litigants and the trial courts within the reviewing jurisdiction that the same appellate court will ordinarily decide a similar question similarly should it be brought before that court in the future. Based upon this expectation, lawyers will advise clients in the regulation of their affairs and in the disposition of unlitigated disputes. Based upon it, trial courts will decide them. The bulk of these trial decisions will not result in any appeal; in the event of appeal, it is most probable that the same appellate court will

12. See, e.g., Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749 (1965).

not see fit to re-examine and change the law-rule created by its own precedent.

I mention these obvious circumstances to emphasize again what all lawyers know and what few laymen can deny: That the ordinary and customary operation of our judicial process requires the courts on occasion to create law-rules where needed to decide the case, and that these law-rules operate with prospective effect to regulate the clashes of similar interests in the future, in much the same manner (although more limited in scope) as does a new statute.

In choosing or creating the law-rule to apply, few, it seems to me, will suggest that the choice or creation should be exercised by logic or deduction or jurisdiction-counting alone. I suppose almost all will agree that, where the judge is given discretion to select or devise the law-rule to apply, the rule's practical wisdom, general fairness, and future usefulness to society are considerations which should influence the judge,¹³ albeit the judge's discretion is circumscribed by the usual necessity that the new rule be an extension generally consistent with pre-existing legal doctrine, as well as by traditional limitations upon the judiciary's exercise of its historic law-making powers.

In Louisiana, our Civil Code specifically authorizes the courts to do so. Article 21¹⁴ provides: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is made to natural law and reason, or received usages, where positive law is silent." To the same effect, but perhaps more explicit, is a provision of the Swiss Civil Code: "The statute governs all the matters within the letter or spirit of any of its provisions. In the absence of any applicable statutory provisions, the judge shall decide according to customary law, and in its absence according to rules he would enact as a legislator. In this he shall follow the established doctrine and decisional law."¹⁵ Even without such legislative mandate, I suggest, courts do or should follow this approach in devising the law-rule by which to decide the unprovided-for case.

13. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 102-41 (1921); GÉNY, *METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW* (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE INSTITUTE) (1963), summarized and reviewed in Tate, *Book Review*, 25 *LA. L. REV.* 577 (1956).

14. *LA. CIVIL CODE* (1870).

15. *SWISS CIVIL CODE* art. 1 (1907).

III

Judicial creation of a law-rule is obviously necessary to decide a question not provided for by legislation. Closely akin to this situation, but much more common, is the duty thrust upon the courts by the volume of new legislation to synthesize it within the body of pre-existing law.

Where legislation represents a fully integrated and comprehensive scheme of regulation, such as the Uniform Commercial Code, the courts cannot and should not weigh policy considerations or use creative interpretation in the application of the statutory command. But much legislation is piecemeal, sometimes hastily or inadvertently drafted, often without consideration of competing or overlapping or inconsistent enactments. In these instances, the courts must perform, and the legislature intends for them to do so, the function of integrating the interpretation of the statute into the general body of the law, or coordinating its principle with others applicable, and of limiting the statute or extending it according to its intended purpose (for the literal words often permit either broad or narrow applications, the circumference of the statute not being discernible from the words themselves).¹⁶ The courts are thus contemplated as a complementary law-making institute to rationalize isolated statutes in accord with their intended purpose and to permit them to serve as reasoned principle within a coherent and intelligible framework of general law.

An example given by one observer is the married women's emancipation acts of many jurisdictions.¹⁷ Although usually the statute itself merely granted married women the right to sue and be sued and to own and convey property, the incidental results of this change of status forced the courts to reconsider and redetermine the tort liability of the spouses to each other as well as to third persons for the other spouse's torts, as well as other law-rules in other areas of law not ostensibly affected by the sparse terms of the emancipation act itself.

16. See Breitel, *The Courts and Law Making*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW* 1 (Paulsen ed. 1959); Professor Hart's "comment" on the Breitel paper, *id.* at 40-48; Cohen, *Judicial "Legisputation" and the Dimensions of Legislative Meaning*, 36 *IND. L.J.* 414 (1961).

17. Landis, *Statutes and the Sources of Law*, in *HARVARD ESSAYS* 223-24 (1934). Dean Landis' other illustrations concern general law changes resulting from specific enactment relating to inheritance-by-illegitimates, wrongful deaths, and trade union statutes.

A recent Louisiana example leaps to mind. In 1960, the legislature revised Article 2103 of our Civil Code.¹⁸ The specific intent solely expressed by the Louisiana State Law Institute recommendation with the 1960 amendment was "to provide a substantive law base for the enforcement of contribution among joint tortfeasors" and to overrule prior jurisprudence to the contrary.¹⁹

In the application of the new statute a host of issues arose for which the statutory provisions furnished no guide. Some of them involved a conflict between the new statute and principles established by prior legislation not necessarily intended to be affected by the new statute. For instance, by a former statutory provision interspousal immunity is established, so that neither spouse can sue the other. Did the new contribution statute permit, in a wife's suit against a tortfeasor, such defendant to demand contribution from the husband (on the ground that the wife's injuries were produced by the husband's contributing fault as a joint tortfeasor), thus permitting the wife to recover indirectly from her husband what she was directly prohibited by the earlier statute from recovering?²⁰ Again, a statutory provision of the workmen's compensation statute exempts an employer from non-compensation (e.g., tort) liability to an employee injured in an employment accident. Does it likewise still apply so as to exempt the employer when he is called upon, under the provisions of the new statute, as a joint tortfeasor solidarily bound to contribute to recovery against another tortfeasor liable to his workman's survivors in tort.²¹ Or, if one tortfeasor attempts to implead another party as joint tortfeasor by third-party demand as authorized by the new statute, can that third-party defendant plead a release between it and the plaintiff as freeing it from the obligation of contribution, thus relying upon prior statutes providing, as between claimant and codebtor, for the claimant's obligation to deduct the part formerly owed by a released codebtor (and does this "part" refer to the monetary amount or to the fractional proportion)?²²

18. La. Acts 1960, No. 30.

19. La. Civil Code Ann. art. 2103, reporter's note at 85 (West Supp. 1966). See also Comment, *Contribution Among Joint Tortfeasors*, 22 LA. L. REV. 818 (1962) and Comment, *Contribution Among Joint Tortfeasors: Louisiana's Past, Present and Future*, 37 TUL. L. REV. 525 (1963).

20. *Smith v. Southern Farm Bureau Cas. Ins. Co.*, 247 La. 695, 174 So.2d 122 (1965), reversing 164 So.2d 647 (La. App. 3d Cir. 1964).

21. *Hebert v. Blankenship*, 187 So.2d 798 (La. App. 3d Cir. 1966).

22. *Harvey v. Travelers Ins. Co.*, 163 So.2d 915 (La. App. 3d Cir. 1964).

Again, with regard to suits instituted prior to the effective date of the new contribution statute, are the rights created by the new statute substantive or procedural,²³ or is this material,²⁴ with regard to the retroactivity or not in application of the new statute?

I sat as a member of the court called upon to decide these sometimes complex questions arising from the collision of the concepts of the new statute with those provided by former legislation. If the new enactment had clearly been intended to govern, of course there was no problem—we were simply to apply the later legislation. However, there was no legislative indication that the new statute should supersede the earlier legislative principles not directly within its scope. We would abdicate the judicial function by simply applying the later legislation on some mechanical rule that the latest enactment must always supersede all earlier statutes even arguably affected, without attaching any relevance to whether this later enactment was really intended to apply.

And I should at this point state that the legislative "intent" or its absence was in the instances noted largely imaginary—for (and we were fortunate to have a Law Institute recommendation specifically ascribing legislative purpose, unlike for the bulk of legislation) it was quite obvious that, in furnishing the new principle that one joint tortfeasor is allowed a substantive base to enforce contribution from another, the legislature had not remotely contemplated the surrounding questions which arose when the new principle was to be introduced into the context of pre-existing law. In such instances, the legislature must expect the courts to formulate the synthesizing rules, by which the new legislative principle will, in coordination and harmony with prior laws, serve socially useful aims consistent so far as possible with related legal doctrine. In so doing, it is the courts which will make the policy-determinations as to which of the legislative principles shall be accorded priority, and it is the courts which must create from the competing statutes that new law-rule which will synthesize what in the *court's* judgment is the wisest rule to apply in the penumbra area created by the overlapping of the statutory principles.

23. *Brown v. New Amsterdam Cas. Co.*, 136 So.2d 283 (La. App. 3d Cir. 1961), *cert. granted*.

24. *Brown v. New Amsterdam Cas. Co.*, 243 La. 271, 142 So.2d 796 (1962), *reversing* 136 So.2d 283 (La. App. 3d Cir. 1961).

IV

Many observers believe that additionally, as a constitutionally contemplated judicial responsibility, the courts must exercise a law-revision function more general and more pervasive than those so far illustrated.²⁵

In his classic work, *The Nature of the Judicial Process*, Cardozo quoted Professor Arthur Corbin, a distinguished scholar, as follows: "It is the function of courts to keep the doctrines up to date with the *mores* by continual restatement and by giving them a continually new content. This is judicial legislation, and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives a judicial office its highest honor; and no brave and honest judge shirks the duty or fears the peril."²⁶

Cardozo continued: "You may say that there is no assurance that judges will interpret the *mores* of their day more wisely and truly than other men. I am not disposed to deny this, but in my view it is quite beside the point. The point is rather that this power of interpretation must be lodged somewhere, and the custom of the constitution has lodged it in the judges. If they are to fulfill their function as judges, it could hardly be lodged elsewhere. The recognition of this power and duty to shape the law in conformity with the customary morality is something far removed from the destruction of all rules and substitution in every instance of the individual sense of justice The form and structure of the organism are fixed. The cells in which there is motion do not change the proportions of the mass. Insignificant is the power of innovation of any judge, when compared with the bulk and pressure of the rules that hedge him on every side. Innovate, however, to some extent, he must, for with new conditions there must be new rules."²⁷

Especially in the area of private law, over the decades the legislatures have been content for the courts to perform their traditional judicial function to modify and revise law concepts

25. See, e.g., Breitel, *The Courts and Law Making*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW* 1 (Paulsen ed. 1959); Keeton, *Judicial Law Reform—A Perspective on the Performance of Appellate Courts*, 44 *TEXAS L. REV.* 1254 (1966); Schaefer, *Precedent and Policy* (1956), reprinted in 34 *U. CHI. L. REV.* 3 (1966).

26. Cardozo, *The Nature of the Judicial Process* 135 (1921), quoting from 29 *YALE L.J.* 771 (1920).

27. *Id.* 135-37.

and applications to suit the changing conditions of newer times. The legislature could not, practically, perform such a function itself, with its limited time and facilities. Indeed, some observers have pointed out that legislation is often a later attempt to generalize the regulation of social disputes which had first emerged in litigation initially decided by courts alone—that legislation is as much a reaction to judicial decision, as judicial decisions are to legislation, with the courts often providing the first initiative toward principled regulation of a social situation through piecemeal case-by-case improvisation resolving the early varied facets of the emerging problems.²⁸ Of course, as the legislative treatment of our Third Circuit decision in *Daire* illustrates, judicial law-making is subject to veto or modification by the legislature. The legislature's primacy in law-making must always be recognized, even though the courts do perform important subsidiary and complementary law-making duties.

V

Perhaps a detailed case-study of this general law-revision function in operation may illustrate that it is not usurpatory of the legislature's power but rather supplementary to it and a necessary consequence of the judicial function in contemporary America.

Of the many examples of continuous judicial revision to keep the law useful and fair as applied to current conditions, to me one of the most illustrative for Louisiana is the treatment by our State Supreme Court of the "assured clear distance" rule.²⁹ In *Louisiana Power & Light Co. v. Saia*,³⁰ that court in 1937 affirmed the dismissal of a suit which alleged that the plaintiff's truck had run into an unlighted truck and trailer parked on the public highway on a dark night. The court held

28. Gellhorn, *The Legislative and the Administrative Response*, 17 VAND. L. REV. 91, 96-97 (1963); Landis, *Statutes and the Sources of Law*, in HARVARD ESSAYS 213, at 230 (1934).

29. *The Work of the Louisiana Supreme Court for the 1958-59 Term—Torts*, 19 LA. L. REV. 338 (1959); *for the 1956-57 Term*, 18 LA. L. REV. 68 (1957); *for the 1953-54 Term*, 17 LA. L. REV. 345 (1957). In these commentaries, Professor Malone suggests that we should frankly realize that the old "assured clear distance" rule has been modified to reflect modern conditions, so that "the duty could not be appropriately described as one merely obliging the driver to maintain such control and speed as will enable him to bring his car to a reasonable stop if faced with a sudden obstruction in his path of travel."

30. 188 La. 358, 177 So. 238 (1937).

that at night "the driver of an automobile is guilty of negligence in driving at a rate of speed greater than that in which he could stop within the range of his vision."³¹ The only statute relied upon by the court was the provision requiring that every vehicle operated on the public highways after dark be equipped with headlights sufficient to render clearly discernible any person on the highway for a distance of 200 feet ahead.³² The court felt that the plaintiff's negligence was not excused by the defendant's failure to comply with another statutory provision prohibiting the parking of an obstructing vehicle on the highway after dark without appropriate signal lights.³³

Nevertheless, just twelve years later, in *Dodge v. Bituminous Cas. Corp.*,³⁴ the same court found an oncoming night motorist free of negligence when he did not see the defendant's unlighted parked truck until he was too close to avoid colliding with it, because his visibility ahead was disturbed by the burning lights of oncoming traffic. Without referring to the statutory headlight-provision relied upon in *Saia*, the court simply stated that the parking of the defendant's truck on the highway, without lights or signals in violation of the statutory provision brushed aside by *Saia*, was "the proximate cause of the collision."³⁵ As the court's summary in the opinion of statutory history illustrates, there had been no intervening change in the substance of the statutory regulation since the *Saia* decision.³⁶ The majority opinion stated, incidentally, that in the absence of express statute "the court may adopt theoretical standards from common sense experience for the insuring of the safety of the road."³⁷ A dissent in *Dodge* noted that the holding was at variance with the court's 1937 decision in *Saia*, which was neither discussed nor even cited in *Dodge's* majority opinion. The dissent also pointed out that there were no exceptional circumstances as in *Gaiennie v. Cooperative Prod. Co.*,³⁸ which ten years earlier had established an exception to the harsh application of the "assured clear distance" rule enunciated by *Saia*.

31. *Id.* at 361, 177 So. at 239.

32. La. Acts 1932, No. 21, § 9(g)(1), (12). These are the predecessor provisions of those enacted by La. Acts 1962, No. 310.

33. La. Acts 1932, No. 21, § 3(rule 15). The equivalent provision is now found in La. R.S. 32-141 (1950), as reenacted by La. Acts 1932, No. 310.

34. 214 La. 1031, 39 So.2d 720 (1949).

35. *Id.* at 1039, 39 So.2d at 723.

36. *Id.* at 1038, 39 So.2d at 722-23.

37. *Id.* at 1038, 39 So.2d at 723.

38. 196 La. 417, 199 So. 377 (1940).

And so it continued, with the most recent expressions of our Supreme Court holding flatly that "a motorist traveling by night is not charged with the duty of guarding against striking an unexpected or unusual obstruction, which he had no reason to anticipate he would encounter on the highway."³⁹ For this reason, these Supreme Court opinions and numerous intermediate court opinions⁴⁰ have held night motorists who run into obstructing vehicles parked unlighted upon the highway to be free of contributory negligence, despite the night motorists' failure to slow when their powers of perception are disturbed by the lights of oncoming traffic.

With regard to the two most recent opinions of the Supreme Court, *Suire v. Winters* (1957)⁴¹ and *Vowell v. Manufacturers Cas. Ins. Co.* (1956),⁴² no change of substance in the statutory provisions in effect at the time of the *Saia* decision in 1937 had taken place in the interval.⁴³ What has changed are the context social conditions, especially the conditions of travel at night. With better highways and with better vehicles, it became safe to drive at higher speeds. It became more dangerous to obstruct normal night traffic by darkened obstacles. For instance, while earlier statutes of 1870⁴⁴ and 1914⁴⁵ had provided nominal misdemeanor penalties for blocking a road, our Criminal Code of 1942 provided for imprisonment of up to 15 years for the intentional obstruction of a highway foreseeably endangering human life.⁴⁶ Thus, under more modern conditions, night motorists are to a large extent entitled to assume that other persons will not criminally obstruct the highway by unlighted vehicles and cause such a great hazard to the ordinary traffic of the present day.

39. *Suire v. Winters*, 233 La. 585, 97 So.2d 404, 408 (1957); *Vowell v. Manufacturers Cas. Ins. Co.*, 229 La. 798, 808-09, 86 So.2d 909, 913 (1956).

40. *Arnold v. Grain Dealers Mut. Ins. Co.*, 190 So.2d 261 (La. App. 4th Cir. 1966); *Woods v. Employers Liab. Assur. Corp.*, 172 So.2d 100 (La. App. 1st Cir. 1965), *cert. denied*; *Edwards v. Trahan*, 168 So.2d 365 (La. App. 3d Cir. 1964); *Graham v. Hartford Acc. & Indem. Co.*, 159 So.2d 333 (La. App. 2d Cir. 1963), *cert. denied*; *Mose v. Insurance Co. of State of Pennsylvania*, 134 So.2d 312 (La. App. 3d Cir. 1961), *cert. denied*; *Fontenot v. LaFleur*, 124 So.2d 607 (La. App. 3d Cir. 1960), *cert. denied*.

41. 233 La. 585, 97 So.2d 404 (1957).

42. 229 La. 798, 86 So.2d 909 (1956).

43. The statutory provisions in effect at the time of these decisions are found in LA. R.S. 32:241 (1950) (no obstructing at night without signal lights) and LA. R.S. 32:290, 301 (1950) (vehicles operated at night to be equipped with headlights making discernible a person 200 feet ahead).

44. LA. R.S. § 3379 (1870).

45. La. Acts 1914, No. 240.

46. La. Acts No. 43, § 1 (art. 96); LA. R.S. 14:86 (1950).

The erosion of the "assured clear distance" rule was accomplished by conscientious judges of our Supreme Court and of our lower courts who realized that the old rule applied literally was no longer a practical or a fair regulation of the nighttime speed of modern drivers of modern cars on modern highways. The judges faced up to the circumstances that a negligence rule designed mainly for regulation of forty-mile-an-hour traffic on gravel roads was not a sound basis for deciding the rights of drivers and passengers several decades later, under the vastly changed conditions of later times. They therefore modified the previous law-rule they had applied, so as to base the standard of care exacted of the nighttime driver not on a mechanical rule but instead upon the particular circumstances, the apparent risk, and the driver's opportunity to deal with it. This, I might add, is paralleled by similar erosion of the "assured clear distance" rule in many other American jurisdictions.⁴⁷

VI

Before we leave our discussion of the treatment by the Louisiana courts of the "assured clear distance" rule we should analyze the relationship of the court decisions to relevant legislation.

The courts were deciding whether either or both vehicle operators were at fault in a nighttime rear-end collision, in order to determine pecuniary liability for the damages sustained. The courts cited provisions of the highway regulatory acts which prohibited parking at night on the highway without lights or which required headlights of a certain efficiency for vehicles operated at night; but in truth the courts were not enforcing these legislative provisions. Rather, they were performing their function to allocate civil liability for fault under the entirely separate and distinct provision of our Civil Code obliging those who caused damage through "*fault*" to pay for it.⁴⁸

The provisions of the highway regulatory acts do not provide that persons who obstruct the highway by parking an unlighted vehicle upon it at night are liable for damages to other vehicles which ran into the darkened obstacles.⁴⁹ Likewise, the provision that vehicles must be operated on the highway at

47. Prosser, Torts § 37, at 211 (3d ed. 1964).

48. LA. CIVIL CODE art. 2315 (1870).

49. See, e.g., one of the substantially similar provisions of the successive statutes, LA. R.S. 32:241 (1950).

nighttime with headlights of a given visibility does not provide that a driver who fails to observe an object in his path within the requisite distance of visibility is or is not at fault.⁵⁰ The only sanction specifically provided for violations of the motor vehicle regulatory act is a criminal penalty of minor fine or imprisonment.⁵¹ Nevertheless, by a process of analogy, the courts deduced from the highway regulatory acts a standard of conduct, a law-rule for decision, by which to determine private disputes as to who should pay between those who collide on the highways at night. We must emphasize, however, that it was not a legislative rule but rather a court-made rule of law which was used to decide the question of who should pay for damages caused by these collisions. No legislative act provided that a violation should be any indicia of civil liability or have the effect of barring recovery, although the courts reasonably concluded that a legislative regulation designed to assure highway safety indicated a standard of conduct required by ordinary care in usual circumstances.

Thus, quite often statutes are generalizations which the legislature intends for the courts to extend and complete insofar as they may afford principles for the determination of civil litigation in the different contexts of varying facts and later times. The highway regulatory acts provide explicit commands to police agencies to prevent cars parking or driving at night without adequate lights. The acts do not, however, provide explicit commands to the courts to allocate civil liability for accidents resulting from failure to obey the highway regulations. The legislature did not, for instance, provide that no one parking on the highway at night without lights could recover damages for injuries thereby caused; if it had, judicial inquiry as to an obstructor's fault barring recovery would be barred. However, rather than specifying myriad factual situations in which violation might or might not be fault for purposes of determining any post-accident civil liability, the legislature instead left this function to be performed by the courts in their historic duty to particularize legislative generalizations.

Again, in determining the tort liability of the various litigants, the sole legislative standard provided was that he who caused damage through "fault" should pay for it. By the use of

50. See LA. R.S. 32:290, 301 (1950).

51. *Id.* 32:57; see former law, *id.* 32:361-62, and La. Acts 1832, No. 21, § 13.

this general term "fault," the legislature delegated to the courts the duty to develop a series of standards for the more particularized and varied type-situations of everyday life and, further, the function of individualizing these applications to the countless gradations and permutations of event and conduct which can be expected in a living society which must also inevitably change with the decades. Emphasizing again, therefore, that the courts must enforce the explicit command of statutes in order to accomplish their intended purpose, we must also point out that quite often the statute does not so much as command but suggest. The legislative suggestion, moreover, may intentionally invite the courts to fashion the more particularized law-rules used to decide the various type-situations of civil litigation. It may contemplate that the courts will individualize the application of the legislative standard in accordance with exceptional unforeseen circumstance and that the courts will harmonize the application of the statutory principles to accord with the social and jurisprudential context of the times in which subsequent litigation may arise.

VII

Is it ever proper for a court to ignore the express words of a statute seemingly applicable?

Let me reiterate once again, before we embark upon this sensitive topic, that the courts must acknowledge without reservation the legislature's paramount control of law-making and policy-decision. Whether the judges personally agree or disagree with legislation, they must enforce it according to its purpose. Under the guise of interpretation, they should not thwart the legislative aims because they disfavor them. In legal history, unfortunate instances may be found where by literal mechanical application of precise statutory language hostile judges thwarted the statutory purpose.⁵² But these instances also indicate that legislators, in passing a statute, do not intend to enact words merely but, more, the principles enclosed in those words.

Holmes has somewhere said that words are the skins of ideas. It is these ideas which the legislature intends to put into effect; the words are merely auxiliaries used for that purpose. Thus, when application of literal wording leads to an absurd or

52. Frank, *Words and Music, Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947).

unreasonable result, the literal application has been disregarded by Louisiana courts, because, in the words of Justice Martin in an 1840 decision, "even where a law is clear and unambiguous, the letter may be disregarded with the honest intention of seeking its spirit."⁵³ We know that this principle of interpretation must be used sparingly. It does illustrate, however, that the sanctity of legislation does not attach to the word-formula used but rather to the regulatory principle expressed by those words. The essential authority of legislation derives not from the printing of words on paper; it proceeds rather from its enactment as the will of the people adopted by the people's legislators chosen for that purpose. In applying legislation, the courts do so in accord with the legislative purpose and in order thus to carry out the represented will of the people.

Legislation is enacted to regulate the social and legal environment of a living society. As Géný points out, to apply it to unforeseen or substantially changed conditions of other times, even though the original statutory purpose is no longer served, is to apply mechanically an abstract formula which no longer represents the will of the legislature.⁵⁴ Thus, our Louisiana Civil Code provides that "Law is a solemn expression of legislative will."⁵⁵ Although our Code likewise states that "when a law is clear and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing its spirit,"⁵⁶ the principle thus codified is not, as Planiol notes, intended to require mechanical application of the rigid word-text of a statute to situations not foreseen by the legislature, since "the cause of the law ceasing, the law ceases."⁵⁷ Further, as earlier noted, our Civil Code expressly provides that "In all civil matters, where there is no express law [*i.e.*, no enactment of the legislative will intended expressly to apply], the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is made to natural law and reason, or received usages, where positive law is silent."⁵⁸ (Emphasis added.)

53. *Ardry v. Ardry*, 16 La. 264, 268 (1840).

54. GÉNY, *METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW* (TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) §§ 51-59, 92-108 (1963).

55. LA. CIVIL CODE art. 1 (1870).

56. *Id.* art. 13.

57. 1 PLANIOL; *CIVIL LAW TREATISE* (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) Nos. 216, 217, 224, 224A (1959). The maxim translated in the text is quoted in Planiol as "*Cessante causa legis, cessat lex.*" See, *e.g.*, *State ex rel. Thompson v. Department of City Civil Service* 214 La. 683, 38 So.2d 385 (syllabus 2) (1948).

58. LA. CIVIL CODE art. 21 (1870).

In essence, then, the words of legislation contain a principle of regulation intended by the legislators to apply to contemplated norms of their own and succeeding times. But if there is a substantial change in the social conditions the statute is designed to regulate, the mechanical adjudication by reference to the statute's literal wording alone may, under the changed conditions, amount to an irresponsible application of a legal rule devised neither by legislative intention nor by the deciding court.

Early in my judicial career occurred what to me still is a dramatic illustration of responsible judicial craftsmanship in failing to apply the literal wording of a statute when to do so would accomplish an unjust result never intended by any legislature. In *Mooney v. American Automobile Ins. Co.*⁵⁹ the issue was whether a motorist was contributorily negligent for passing to the *right* of another vehicle going in the same direction on a four-lane highway. The overtaken vehicle veered to its own right and collided with the plaintiff. The plaintiff was charged with contributory negligence because the passing provision of the highway regulatory act then in effect stated that an overtaking vehicle was to pass "to the *left*" of an overtaken vehicle.⁶⁰

Although under its express wording the statute seemed to prohibit passing to the *right* on any state highway, our court held that the enactment did not apply to four-lane highways (such as that on which the 1953 accident had occurred), but only to the *two-lane* highways in existence at the time the statutory provision was adopted in 1938. The organ of our court who recommended the opinion's adoption was Judge Robert Ellis of the First Circuit, in my opinion a great and imaginative judge. Judge Ellis pointed out that to apply this 1938 provision forbidding passing on the *right* to the four- and eight-lane highways of the Nineteen Fifties could greatly impair the usefulness of these arteries designed to transport heavy traffic volume quickly—a slow-moving vehicle in the inside, or left, lane, for instance, could stop traffic in all other lanes proceeding in the same direction if the slow vehicle slowed and stopped for a left turn. In the *Mooney* case, therefore, the passing motorist was held free of negligence in passing, despite his violation of the literal prohibition of the statute forbidding *any* passing on the right.

59. 81 So.2d 625 (La. App. 1st Cir. 1955).

60. LA. R.S. 32:233A (1950).

This illustration of judicial discrimination as to whether or not to apply a statute—by deciding that a statutory rule had been limited or modified through the changed circumstances of another day — is not advanced to suggest that all legislation should be deemed valid for its own decade only, nor that the courts should ignore the express command of statutory words just because the social conditions change. Usually, an express statutory provision is designed to and does regulate not only present day conditions but also the societal conditions of the indefinite future, until the legislature itself may repeal it, so that the courts cannot ignore the statute's express command. Nevertheless, the *Mooney* case may illustrate the all-important principle that the function of the courts is to enforce the legislative purpose, not mechanically to apply printed words because they are in a statute book. *Mooney's* limitation of an obsolescent statute's effect to its intended legislative purpose may also serve to illustrate the function of the courts to adapt both legislative and judge-made law to changing conditions of society, so that the law-rules may continue to serve their functional purpose. Just as out-of-date cases may be reinterpreted to accord with a changed social context, so may the word-rule expressed by an out-of-date statute be reinterpreted and limited so as to conform to its original functional intent.

VIII

These remarks have touched upon a few of the more obvious aspects of the law-making function of our courts. The specific illustrations from the work of Louisiana state appellate courts are designed to illustrate that usual and routine performance of this function is a necessary and traditional part of the judicial duty to decide cases fairly and according to law.

However, our concentration upon the law-making responsibility of the courts does have the demerit of overemphasizing its importance as a factor which influences our society. In the first place, clear provisions of statutory law, unquestionably applied and obeyed, undoubtedly represent the customary form of governmental direction, without any intervention of the courts. Likewise, great areas of our social and economic life are affected by the interpretations and applications of executive departments and administrative agencies, usually obeyed as valid regulation without questioning in or by the courts. As

Cardozo remarked, "unnumbered human beings . . . go from birth to death, . . . and not once do they appeal to judges to mark the boundaries between right and wrong."⁶¹ In the full picture of the division of the policy-deciding function among the organs of government, law-making by the courts plays a small role indeed.

IX

I will conclude with the realization that a comprehensive and more rounded discussion of judicial law-making should include many other aspects of the subject.

I have not discussed, for instance, the inherent institutional and political limitations to law-making by courts, nor touched on appropriate standards for the exercise of their undoubted power to overrule their prior decisions where current needs greatly outweigh the valued stability of legal precept.⁶² I have not noted the stabilizing influence of doctrine,⁶³ which generally confines judicial law-making to incremental changes only.⁶⁴ I have not referred to responsible views suggesting that judicial self-restraint in law-making is especially appropriate with regard to issues of pronounced change in public policy that should preferably be decided by the legislature.⁶⁵ Neither have I mentioned the view that the courts should to some extent disguise exercise of their undoubted law-making so as not to weaken the popular half-myth that judges only interpret and do not create law,⁶⁶ nor the opposing argument that the law's self-respect and the democratic ideal demand that there be open responsibility for the exercise of discretionary power by officials of the people.⁶⁷

61. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 130 (1921).

62. *Id.* at 112-14, 146-66; LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); SCHAEFFER, *PRECEDENT AND POLICY* (1956); Friedmann, *Legal Philosophy and Judicial Lawmaking*, 61 COLUM. L. REV. 821 (1961).

63. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962).

64. Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis?*, 2 L. IN TRANS. Q. 134 (1965).

65. Bennett & Quade, *The Court as a Legislator: A Crucial Symptom*, 10 ST. LOUIS U.L.J. 92 (1965); Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749 (1965); McWhinney, *The Supreme Court and the Dilemma of Judicial Policy-Making*, 39 MINN. L. REV. 837 (1955).

66. Mishkin, *The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 62-70 (1965).

67. See, e.g., Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 237 (1965).

X

A comprehensive discussion of the question should also include discussion of the practical reasons why the legislature shares law-making responsibility with the court for the development and reform of law.⁶⁸ The schedule of a normal legislative session is harried and crowded. The state legislators are usually part-time public servants, underpaid for the substantial time they must devote to the governmental and private interests of their constituents. Most legislative sessions take place within a period limited in time. Not only must many legislative bills be considered, but during the same crowded time the legislator must attend to constituent-errands and to at least some of the duties of his regular occupation. In Louisiana, for instance, in the last three regular sessions of 1962, 1964, and 1966, at each session over 1,500 bills were introduced and well over 500 laws were enacted⁶⁹—all during the harried period of 60 days, during which of necessity the legislative preoccupation must be directed more to issues of public policy, state taxation, and economic regulation than to minor reforms of private law.

With some understanding of this actual legislative milieu, the unreality of the charge of judicial usurpation made by critics of creative court law-making becomes apparent. The legislature makes little effort to correlate present enactments within the entire body of the law. For one reason, it has no time to do so. For another, it fully expects and relies upon the courts to perform their historic mission of synthesizing and harmonizing the fragments of piecemeal legislation into the mosaic of the general body of the law. The law-making function of the court is

68. Breitel, *The Courts and Law Making*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW* 1 (Paulsen ed. 1959); Peck, *The Role of the Courts and the Legislature in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963). See also Friendly, *The Gap in Law Making—Judges Who Can't and Legislatures Who Won't*, 63 COLUM. L. REV. 787 (1963).

69. By letter of March 29, 1967, to the writer (a copy of which is on file with the *Louisiana Law Review*), Honorable Wade O. Martin, Jr., Secretary of State of Louisiana, furnished the following statistics from the records of his office concerning the regular legislative sessions of 1962, 1964, and 1966:

Bills introduced were as follows:

| 1962 | | 1964 | | 1966 | |
|--------|-------|--------|-------|--------|-------|
| House | 1,278 | House | 1,251 | House | 1,202 |
| Senate | 306 | Senate | 406 | Senate | 345 |

Bills enacted were as follows:

| 1962 | 1964 | 1966 |
|------|------|------|
| 549 | 565 | 577 |

cooperative with the legislature, complementary to its work; the courts are not in any sense a competitive law-making institution. Understanding the legislative process in its actual environment, it is unrealistic to attribute to legislative inaction any approval of the multitudinous facets of the law as they exist prior to judicial decision: the inaction much more often stems from a lack of time for detail-changing or from the clogging of the legislative process through pressures requiring priority attention.

With the consent of the legislatures, the American courts have always exercised the responsibility to revise and accommodate private law where needed to adjust it to the legal and social environments of the times. To defer their performance of this duty on the sole excuse that the legislature alone is charged with law-change and will do so if dissatisfied with the law as it is, is an unrealistic excuse for shirking this traditional duty of the judiciary; it is also an historically unsound view of the separation of powers. Further, the judicial exercise of this law-revision responsibility is subject to oversight and review by the legislature (save perhaps where constitutional questions are concerned). If dissatisfied with any court-made law-change, the legislature can assert its primacy and can overrule or modify the judicial decision by statute — and, as studies have illustrated,⁷⁰ the legislatures have done just that when displeased with judicial innovations or interpretations in the law.

XI

In a day when there is an outcry against judicial legislation by many sincere elements of our population, as well as by some irresponsible extremists, it is important for us to recognize and restate the obvious truth that the courts do possess and should exercise law-making responsibilities.

By frank recognition that judicial creativity is an essential component of the process of deciding cases, we may perhaps find courage to correct the misinformation on the subject of many of the lay public. Misled by Francis Bacon's half-truth, "Judges ought to remember that their office is . . . to interpret law, and

70. Stempf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. PUB. L. 377 (1965); Comment, *DUKE L.J.* 888 (1964).

not to make law."⁷¹ and by several generations of oversimplifying high school civics teachers, multitudes of our citizenry have come to believe that it is somehow improper for judges to admit to law-innovation, law-choice, or law-revision. Unjust criticism by the lay public and trust-eroding cynicism may perhaps best be healed by open recognition that the courts do perform, and always have, a day-to-day law-adaptation function as a necessary part of their traditional decisional process.

In deference to prevalent if erroneous sentiments, conscientious and sincere judges may question their own law-making power. Historically, however, the circumscribed law-making functions normal to the judicial branch have been considered a supplement to, not an invasion of, the legislature's work. Our judges must not shirk the hard choice of values sometimes imposed upon them by their duty to maintain the law's regularity and order and sense by creative revision and adjustment within the limited area where appropriate. If the courts will not perform this duty, the legislatures cannot—and the reasoned development of the law and its ability to serve current needs must suffer.

71. BACON'S ESSAYS, the essay *Of Judicature*.

Why do we silence brightest minds on bench?

Think of all the insight we lose by pretending that judges do not have opinions on the topics before them

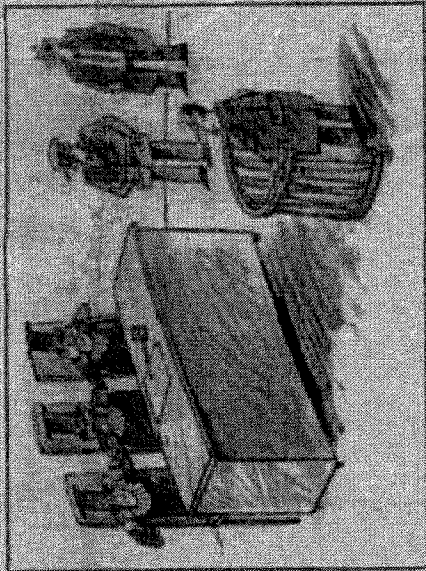
BY JOEL COHEN
THE PHILADELPHIA AQUARIUM

We suffer from a naive conviction that judges are supposed to be completely objective. We somehow believe that they come to the bench — to the antiseptic veneer of a courtroom — stripped of any biases, any prejudices and any idiosyncratic views of how society should work. One supposes that, in Thomas More's "Utopia," judicial robots could apply the law without fear or favor and justice could be meted out as the blindfolded lady who holds the scales in her hand does, impervious to that which swirls about her.

Judges, frankly, are not blind to the world. Indeed, our great jurist Benjamin N. Cardozo acknowledged the unthinkable nearly 100 years ago: "The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass judges by." Nor should we want them to.

We actually want judges who live lives, who read newspapers, who participate in legal and ethical extrajudicial activities. In other words, we want judges who have come to know about life and who are willing to acknowledge that their experiences and influences may inform the way in which they look at the litigations before them. Don't we want judges who, at least sometimes, use their judicial authority (albeit within the dictates of the law) with compassion to improve life for both the rich and poor, the haves and the have-nots?

John Adams told us that we want "a government of laws and not of men" — probably the touchstone of judicial independence. Of course we want judges to apply the law but, completely consistent with the need for judicial independence, we don't want them to pretend they are hermits unencumbered



by thought or experience. Rather, shouldn't we want our judges to give voice to the law, fully recognizing that their voices are different one from the other and their differences are often based on their disparate human experience? We don't want a choir with voices that are all the same.

Don't we want judges who are independent and who are able to consider (and perhaps discard) their outside influences while being faithful to the law? Isn't that why our Constitution gives federal judges life tenure — so that they can make decisions without fear of reprisal or punishment? Judges should not — must not — be forced to render unpopular decisions in an atmosphere where a media frenzy could cause them to be removed from the bench.

We can all agree that a judge should not speak publicly about a case before her and should not use her judicial robes to garner favor. But why can't a judge tell the public what she thinks? Why would we deprive ourselves of contributions from some of the most brilliant minds in our society merely because they serve our society in judicial robes?

Speaking out does not mean a judge won't be able to apply the law. Aren't we all past the stage where we question whether a black judge can

decide a civil rights issue, a gay judge a same-sex marriage case, a Jewish judge a plot to bomb the World Trade Center, or a Catholic judge an abortion case? Judges are trained to, and mostly do, rein in their "priors" — to coin a phrase from one of America's most outspokenly thoughtful judges, Richard Posner of the U.S. Court of Appeals for the Seventh Circuit. Are Justice Antonin Scalia, Justice Ruth Bader Ginsburg or, for that matter, Judge Posner any less independent because they speak out on public issues, often so provocatively? In fact, are there any judges more independent than they are?

And here is the flip side. What could we possibly gain — as lawyer or litigant — by pretending a judge does not have an opinion on a topic before her? Wouldn't we rather know what that opinion is so we can assemble the tools to challenge the judge's beliefs, to address the judge on her own terms?

Our canons of judicial ethics tell us judges can write, teach and participate in law-related activities, but with limitations not imposed on the rest of us — with even more stringent limitations on what they can say in the non-law-related milieu. These restrictions are not imposed on politicians, whether in office or out, and they (yes, with judicial checks and balances) make our laws. Why then, should our canons of judicial ethics require judges — those who are not beholden to other branches of the government — to remain mute unless speaking through the lens of a decision or dissent? And does the veil of secrecy surrounding judges — and judging — actually help anyone?

Isn't it time to look at our rules of judicial ethics and consider why they are in effect, why we insist on trying to muzzle some of the best and brightest minds rather than allowing them to speak freely on the issues of the day, as long as it doesn't interfere with the propriety of their judging?

Joel Cohen, *Why Do We Silence Brightest Minds on Bench?* Albuquerque Journal, Nov. 19, 2014, at A9

ARTICLES

APPELLATE JUDGES AND PHILOSOPHICAL THEORIES: JUDICIAL PHILOSOPHY OR MERE COINCIDENCE?

Gerald R. Ferrera^{*} & Mystica Alexander^{**}

*"The kind of inquiry that would contribute most to understanding and evaluating a [judicial] nomination is...discussion first, of the nominee's broad judicial philosophy and, second, of her views on particular constitutional issues."*¹

— Elena Kagan, Supreme Court Justice

I. INTRODUCTION

She is much too liberal, too conservative, a judicial activist, a strict constructionist: all are characterizations used to explain and discover a judge's judicial philosophy, an endeavor discussed above by now-Supreme Court Justice Elena Kagan. A judge's opinions often serve as fodder for court observers and commentators as they attempt to cull a general picture of the judge's constitutional values from the text. Underpinning this process are various philosophical theories adopted by judges that contribute to their judicial beliefs.

This paper suggests that judicial opinions often reflect a judge's position on what is ethical and useful in the real world of constitutional values. It further suggests that an appreciation of legal philosophical theory assists one in understanding the ethical and public policy dimensions of a court's opinion. Do judges' opinions parallel philosophical theories constructed by

^{*} Gregory H. Adamian Professor of Law, Bentley University, Waltham, MA.

^{**} Senior Lecturer of Law, Bentley University, Waltham, MA. The authors acknowledge and thank Jonathan J. Darrow, Senior Research Consultant, and Anirudh Goyal, Research Assistant, for their efforts and assistance in preparing this paper.

1. Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 935 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1995)).

philosophers or is any apparent relationship mere coincidence? This paper suggests the former—that a judge’s belief system, education, and experiences² include the adoption of judicial philosophies, the expression of which can be found in his or her written opinions.

Samuel D. Warren and Louis D. Brandeis observed that “[p]olitical, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society.”³ Justice Brandeis was right to recognize the “eternal youth” of the common law as it evolves to satisfy societal needs. Judicial philosophy often embraces an ethical and social dimension in its analysis, representative of the law’s “eternal youth.” To better understand a judge’s judicial philosophy it is useful to appreciate how appellate judges often construct legal arguments by following a legal philosophical theory. The purpose of investigating a judge’s judicial philosophy is not necessarily to focus on one theory as it applies to the resolution of a legal dispute, but rather to contextualize the influence of theory as it exists on a continuum of both past and future development.

This paper introduces theories of justice created by prominent philosophers and explains how they relate to jurisprudential analysis. It further argues that the process of understanding legal analysis should include an appreciation of the ethical theories that underlie the judicial resolution of legal issues. Ronald Dworkin reminds us that “[l]awsuits matter in another way that cannot be measured in money or even liberty. There is inevitably a moral dimension to an action at law, and so a standing risk of a distinct form of public injustice.”⁴ This proposition is useful to the study of resolutions to a legal dispute. The “moral dimension” of a case relevant to this judicial analysis is best explored by extrapolating any salient “ethical dilemmas” from the facts of the case.

How does one identify ethical dilemmas? While there are a number of useful methods, one of the more common is “stakeholder analysis.” Stakeholder analysis starts with an examination of the parties affected by the decision in the case. For example, if the case involves corporate entities, “stakeholders” would include the employees, suppliers, stockholders, customers, lender banks, corporate boards and executives, and any other

2. James Barron, *A New York Bloc on the Supreme Court*, N.Y. TIMES, May 12, 2010, at A1 (noting that if Elena Kagan were confirmed the court would, for the first time in its history, contain four judges born in New York City).

3. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

4. RONALD DWORKIN, *LAW’S EMPIRE* 1 (Harvard Univ. Press 1995) (1986) (emphasis added).

communities affected by the corporation's operation. If the stakeholders are unjustly deprived of moral or legal rights there is an "ethical dilemma" to be resolved by the courts.

A. Resolution of an Ethical Dilemma

Once critics of judicial philosophy discover these ethical dilemmas they should attempt to resolve them. This is a significant challenge since often stakeholders may have to endure giving up rights for the common good. This tension is exemplified in cases that examine eminent domain, a government taking of private property with "just compensation."⁵ The private property owner may be convinced the taking was unjust and the compensation inadequate. So it is important to recognize the impossibility of a decision equitable to all stakeholders.

A number of prominent ethicists have created various methods and ethical theories that are useful in discussing and resolving judicial disputes. The ancient Greeks, philosophers of the Enlightenment, and contemporary philosophers have all written about ethical theories. The selected theories discussed in this paper are selected from among many, with no attempt to exhaust the field.⁶ The paper discusses how such theories apply to an understanding of our jurisprudence and provides a better appreciation of a judge's judicial philosophy. It is important to note that a judge may utilize many judicial philosophies in deciding a case and, depending on the nature of a dispute, adopt various philosophical theories in developing his or her legal argument.

Legal scholars should be acquainted with the predominant philosophers who have formulated the moral and ethical foundations of our contemporary judicial thinking. Legal scholars and judges who continue to influence our jurisprudence and public policy should understand the relationship of law to moral and ethical reasoning.

B. IS PHILOSOPHICAL THEORY RELEVANT TO OUR JURISPRUDENCE?

Since appellate court cases decide litigants' rights and obligations, it is informative to understand the courts' substantive findings, including the moral and ethical underpinnings of a judge's reasoning. The legal academy generally avoids this process, content with an explanation of substantive and procedural analysis. If the academy argues and debates contemporary legal

5. U.S. CONST. amend. V.

6. See, e.g., THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (Jules Coleman & Scott Shapiro eds., 2002).

issues without an appreciation of the philosophy that supports the courts' rationales, it will be difficult to fully recognize and understand the jurisprudential theory that shapes the legal landscape.

Critics of contemporary court decisions should understand and relate to ethical theory found in natural law, legal positivism, utilitarianism, legal realism, and social relativism. This process has been referred to as "ethical legalism"⁷ and should be useful in understanding the relationship between law and ethics. What theories of justice are currently forming our contemporary notions of due process, equal protection, and equal opportunity? Jurisprudential analysis should engage in a resolution of that inquiry using deontological and teleological ethical theories used in court decisions.

This paper selects for discussion classical and contemporary philosophers and legal scholars who have contributed to current judicial thinking. There are others whose theories have made significant contributions to jurisprudence that are not mentioned in the text. The selection is based on those philosophers and scholars most often discussed in contemporary legal literature. Part II introduces prominent philosophers who have added to our jurisprudence. A more exhaustive review of their philosophy is beyond the scope of this paper and is available in copious encyclopedic works. Part III applies the theories discussed to a recent reverse discrimination Supreme Court case⁸ that illustrates how judges follow a particular judicial philosophy. This paper argues that judges often referred to by jurisprudential labels are following ethical theories inherent in their thought processes that contribute to their jurisprudential analysis. Part IV argues that an understanding of legal philosophical theory is necessary to identify a judge's judicial philosophy and should be useful in clarifying the oversimplification and often misleading characterization of a judge as being either liberal or conservative. Furthermore, it asserts that an understanding of how a court adopts a legal philosophy in deciding a case is useful in appreciating the moral and ethical dimensions of a decision.

7. Gerald R. Ferrera, *Ethics in Legal Education: An Augmentation of Legal Realism*, 36 AM. J. JURIS. 39, 52-53 (1991).

8. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

II. PHILOSOPHICAL THEORIES OF LAW

A. NATURAL LAW — Thomas Aquinas (1226-1274)

Natural law first appears in Cicero's explanation of the Greek Stoic philosophers who emphasized virtue, morals and ethics⁹ as appropriate guiding principles of behavior. Starting with Homer, Greek philosophers developed their theory of natural law in an attempt to explain the human conditions that are subject to nature's laws.¹⁰ The Greek philosophers deferred to the cosmic order of things and reconciled "fate" as following the laws of nature and order in the universe.¹¹

From the Romans, who adopted the Greek culture, up to the time of Thomas Aquinas, there existed various theories of the Greek version of natural law.¹² However, Aquinas, in his *Summa Theologiae*, developed natural law as God's guiding Providence, establishing God as the center of all order.¹³ Aquinas argued:

Among all others, the rational creature is subject to divine providence in the most excellent way, insofar as it partakes of a share of providence, being provident both for itself and for others. Thus it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end. This participation of the eternal law in the rational creature is called natural law.¹⁴

In order to best appreciate Aquinas's theory of natural law one should start with his understanding of human nature. In Question 75 in the *Summa* he states: "We shall treat first of the nature of man, and secondly of his origin."¹⁵ He refers to Dionysius, who stated that "three things are to be found in spiritual substances — essence, power, and operation...."¹⁶ Aquinas argues the soul is "the form of a body."¹⁷ His position is that "the nature of the species belongs [to] what the definition signifies; and in natural things the definition

9. See LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 39–40 (1987) (presenting an analysis of legal positivism and natural law).

10. See ALF ROSS, *ON LAW AND JUSTICE* 228–29 (3d ed. 2007).

11. Roscoe Pound, *Law and Morals*, 1 J. SOC. FORCES 350, 351 (1923) ("All discussion of . . . the relation of jurisprudence to ethics, goes back to the Greek thinkers . . .").

12. See generally Edward J. Damich, *The Essence of Law According to Thomas Aquinas*, 30 AM. J. JURIS. 79, 79 (1985) (arguing that for Aquinas an unjust law may have some legal attributes but does not have all the definitional elements and is not really a law).

13. Patrick Halligan, *The Environmental Policy of Saint Thomas Aquinas*, 19 ENVTL. L. 767 (1989) (arguing that Aquinas would not have given nonhuman creatures juridical standing to sue).

14. THOMAS AQUINAS, *SUMMA THEOLOGICA* 997 (Fathers of the English Dominican Province trans., 1915) (1274).

15. *Id.* at pt. I, q. 75.

16. *Id.*

17. *Id.* at pt. I, q. 75, art. 5.

does not signify the form only, but the form and the matter.”¹⁸ His treatise on natural law is found in the *Summa*, Questions 90 to 108. Aquinas begins with a definition of law as “a rule and measure of acts, whereby man is induced to act or is restrained from acting... the rule and measure of human acts is the reason, which is the first principle of human acts...law is something pertaining to reason.”¹⁹ A principal contribution of Aquinas’s theory on natural law is its reference to reason and the common good.²⁰ From Aquinas’s theological perspective he views man as a composition of body and soul capable of sensorial perceptions and argues that natural law was discernible by all.²¹ Reason, assisted by Revelation, became the human expression of God’s eternal law. Aquinas states that “[t]he natural law is promulgated by the very fact that God instilled it into man’s mind so as to be known by him naturally.”²²

The Catholic Church continues to adopt Aquinas’s natural law as its philosophical doctrine.²³ However, apart from its theological foundation in Catholic doctrine, natural law after Aquinas began to decline.²⁴ The Enlightenment philosophers — Hobbes,²⁵ Locke,²⁶ Rousseau²⁷ and Kant²⁸ — all made references to natural law, although within different constructs, as

18. *Id.* at pt. I, q. 75, art. 4.

19. *Id.* at pt. I-II, q. 90, art. 1.

20. *Id.* at pt. I-II, q. 90, art. 3 (“A law, properly speaking, regards first and foremost the order to the common good.”).

21. See SAMUEL WELLS & BEN QUASH, INTRODUCING CHRISTIAN ETHICS 91 (2010).

22. *Id.* at pt. I-II, q. 90, art. 4.

23. See POPE JOHN PAUL II, VERITATIS SPLENDOR 71 (Vatican trans., St. Paul Books & Media 1993) (explaining the foundations of Catholic moral theology and asserting “the immutability of the natural law itself, and thus the existence of ‘objective norms of morality’”).

24. Charles E. Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539, 559 (1989) (“Application of the natural law is not limited to those who accept Catholic teaching.”).

25. See THOMAS HOBBS, LEVIATHAN 189 (Penguin Books 1968) (1651) (expressing the sentiment that natural law can be known through reason and that the individual has a natural right to preserve his or her own life). For a further explanation of Hobbes’ view of natural law, see NORBERTO BOBBIO, THOMAS HOBBS AND THE NATURAL LAW TRADITION (Daniela Gobeth trans., 1993); see also John Gahbauer, *Natural Law Theory Through the Eyes of Hobbes, Grotius and Pufendorf*, 2 EUDAIMONIA: GEO. PHIL. REV. 38, 39 (2005) (concluding that “there is little concordance as to what constitutes the natural law”).

26. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 264 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690) (The law of nature “willeth [sic] the peace and preservation of all mankind.”). For an analysis of Locke’s view of natural law, see Steven Forde, *Natural Law, Theology, and Morality in Locke*, 45 AM. J. POL. SCI. 396 (2001) (exploring Locke’s position that morality is grounded in natural law).

27. See JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 9 (G.D.H. Cole trans., E.P. Dutton & Co. 1950) (1762) (“[R]enunciation [of liberty] is incompatible with man’s nature.”).

28. See, e.g., Jerome B. Schneewind, *Kant and Natural Law Ethics*, 104 ETHICS 53 (1993) (explaining the relationship between Kant’s moral philosophy and natural law interpretation of morality).

promulgations of the natural order. Contemporary defenders of natural law, within a jurisprudential context, view it as an assertion that “law is a part of ethics.”²⁹

Indeed, natural law principles are used to infuse ethical concepts into legal analysis.³⁰ The Greeks and Romans used natural law as an objective standard that measured civil laws. What are the objective ethical standards of justice?³¹ Consider the following objective legal standards of our common law such as “due care” in a negligence suit, “good faith” in a contracts claim, “reasonable care,” “due process of law” and “equality” that all have their origin in natural law theory. It is of interest to note that the Framers of the United States Constitution did not define many of our cherished notions of equality, due process and freedom of speech. A natural law proponent would argue they are inherent in our reasoning process based on our natural desire for justice.

Roscoe Pound, in his *Introduction to the Philosophy of Law* stated:

It was not that natural law expressed the nature of man [...] [Here he differs from Aquinas.] [R]ather it expressed the nature of government. One form of this variant was due to our doctrine that the common law of England was in force only so far as applicable to our conditions and our institutions. The attempt to put this doctrine philosophically regards an ideal form of the received common law as natural law and takes natural law to be a body of deductions from or implications of American institutions or the nature of our polity.³²

One could argue the common law has incorporated natural law principles such as “good faith” in a contract, “due care” and “reasonable care” in a negligence suit, and the notion that individuals are protected by the Bill of Rights.

John Finnis,³³ in his *Natural Law and Natural Rights*, argues that positive laws ought to conform to objective normative principles of natural law.³⁴ Finnis suggests that we are led to an understanding of the objective normative

29. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (Oxford Univ. Press 1980) (describing natural rights as having their foundation in natural law).

30. David O. Brink, *Legal Positivism and Natural Law Reconsidered Again*, 2 CANADIAN J. L. & JURIS. 171 (1989) (suggesting that “we should distinguish, within legal philosophy, between theories of *legal validity* . . . and theories of *adjudication* . . .”); Igor Grazin, *Natural Law as a Forum of Legal Studies*, 37 AM. J. JURIS. 1 (1992); Patrick Halligan, *The Environmental Policy of Saint Thomas Aquinas*, 19 ENVTL. L. 767 (1989).

31. R. George Wright, *Legal Obligation and the Natural Law*, 23 GA. L. REV. 997, 1011 (1989) (“What humans ought to do, what they are morally bound to do, flows from their distinctive nature.”); Rice, *supra* note 24, at 559.

32. ROSCOE POUND, *INTRODUCTION TO THE PHILOSOPHY OF LAW* 50 (Yale Univ. Press 1922).

33. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980). For a critique of Finnis, see Anthony J. Lisska, *Finnis and Veatch on Natural Law in Aristotle and Aquinas*, 36 AM. J. JURIS. 55 (1991) (critiquing Finnis’s natural law ethics); Valerie Kerruish, *Philosophical Retreat: A Criticism of John Finnis’ Theory of Natural Law*, 15 U. W. AUSTRALIA L. REV. 224 (1983); Ian Duncanson, *Finnis and the Politics of Natural Law*, 19 U. W. AUSTRALIA L. REV. 239 (1989).

34. See Lisska, *supra* note 33, at 60–61.

principles not by rigorous differential analysis but rather by “careful reflection, or meditation, directly to an awareness of self-evident, indemonstrable truths.”³⁵ Finnis and Aquinas regard the principles of natural law as self-evident. Lloyd L. Weinreb, in his *Natural Law & Justice*, agrees but finds that Finnis’s “extract[ion] of Aquinas’s doctrine of natural law from its context and treat[ment] [of] it as separable from the idea of a universal order according to the Eternal Law of God not only radically distorts Aquinas’s philosophy as a whole but misconceives the doctrine of natural law itself.”³⁶ He explains that deontologically there is an argument that “[l]aw’s very nature... impresses on it a minimum moral content.”³⁷ Whatever that “minimum moral content” might be determines the natural law advocates’ position that unjust laws need not be obeyed.³⁸

It is important to note that one need not have a religious belief to be a natural law proponent.³⁹ Robert George, another contemporary proponent of the natural law, posed the following question during a scholarly lecture: “[C]an a natural law... provide the basis for a regime of human rights law without consensus on the existence and nature of God and the role of God in human affairs?”⁴⁰ In response, George goes on to say: “In my view, anybody who acknowledges the human capacities for reason and freedom has good grounds for affirming human dignity and basic human rights.”⁴¹

The critical doctrine of natural law is the principle that our positive law must comply with objective standards of fundamental rights that assure equality for all. Humankind has an absolute dignity that natural law recognizes and protects. Indeed, in his *Letter from Birmingham Jail*, Reverend Martin Luther King, Jr. invoked the natural law:

How does one determine whether a law is just or unjust? A just law is a man made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust.⁴²

35. WEINREB, *supra* note 9, at 109.

36. *Id.*

37. *Id.* at 101.

38. *Id.*

39. See, e.g., Lloyd L. Weinreb, *The Case for Natural Law Reexamined*, 38 AM. J. JURIS. 1 (1993); Jerome B. Schneewind, *Kant and Natural Law Ethics*, 104 ETHICS 53 (1993); R. George Wright, *Legal Obligation and the Natural Law*, 23 GA. L. REV. 997 (1989).

40. Robert George, *Natural Law*, 31 HARV. J. L. & PUB. POL’Y 171, 182 (2008).

41. *Id.*

42. MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM JAIL (Apr. 16, 1963), *reprinted in* 26 U.C. DAVIS L. REV. 835, 840 (1993).

We see natural law sentiments invoked in judicial decisions as well. The ruling that privacy is a fundamental implied constitutional right found in the Ninth Amendment is an example of a natural law theory.⁴³ More recently, the Court in *McDonald v. City of Chicago* upheld the right to bear arms as a fundamental right “necessary to our system of ordered liberty.”⁴⁴ Responding to Justice Breyer’s concern in his dissenting opinion that applying this right to state and local gun control laws would necessarily limit the “legislative freedom of the State,”⁴⁵ Justice Alito, writing for the majority, reiterated the Court’s earlier pronouncement that “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.”⁴⁶ It is of interest to recognize the use of natural law principles by both a reputedly liberal Justice (Breyer) and a reputedly conservative Justice (Alito). Concepts of “freedom” and “the enshrinement of constitutional rights” are inherently reasonable theories necessary for a just society.⁴⁷

B. LEGAL POSITIVISM — John Austin (1790-1854)

*“The matter of jurisprudence is positive law.”*⁴⁸

— John Austin, *Lectures on Jurisprudence*

John Austin, the founder of legal positivism, was the Chair of Jurisprudence at the University College London.⁴⁹ During his tenure as Chair, Austin published his lectures under the title of *The Province of Jurisprudence Determined*. Austin’s theory of legal positivism is useful in critical legal thinking as a reminder that law is not wholly dependant on a system of morality, but rather on a combination of utilitarian rights, duties, and obligations.⁵⁰ However, Austin does not deny that law can be analyzed from a moral perspective. In fact, Austin stressed just the opposite and insisted that law has a moral perspective.⁵¹

43. See *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

44. 130 S. Ct. 3020, 3042 (2010).

45. *Id.* at 3050.

46. *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008)).

47. *McDonald*, 130 S. Ct. at 3050 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008)).

48. 1 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* 88 (Robert Campbell ed., 3d ed. 1869).

49. See Stanley L. Paulson, *The Theory of Public Law in Germany 1914-1945*, 25 OXFORD J. LEGAL STUD. 525, 525 (2005).

50. Luke Robinson, *Moral Principles Are Not Moral Laws*, 2 J. ETHICS & SOC. PHIL. 3 (2008); Margot Stubbs, *Feminism and Legal Positivism*, 3 AUSTRALIAN J. L. & SOC’Y 63 (1986).

51. See DAVID LYONS, *ETHICS AND THE RULE OF LAW* 7 (1984); Carlos Santiago Nino, *Positivism and Communitarianism: Between Human Rights and Democracy*, 7 RATIO JURIS 14 (1994); Deryck Beyleveld & Roger Brownsword, *The Practical Difference Between Natural Law Theory and Legal Positivism*, 5 OXFORD J. LEGAL STUD. 1 (1985); H. Hamner Hill, *H.L.A. Hart’s Hermeneutic Positivism: On Some Methodological Difficulties in the Concept of Law*, 3 CANADIAN J. L. & JURIS. 113 (1990).

Austin divided the laws that guide human behavior into (1) divine law, (2) positive law and (3) positive morality.⁵² Divine law would include Revealed Law established by God.⁵³ Positive law is created by the sovereign of a community, such as a legislative body.⁵⁴ Positive morality would include positive laws and contemporary attitudes.⁵⁵ Positive law is judged to be moral or immoral depending on how it serves the welfare of others.⁵⁶ Austin admits to an objective morality founded in a theological conception of Divine Law.⁵⁷ He believed that all laws are coercive commands that must serve the general welfare. According to Roscoe Pound, Austin defines a right as “a ‘faculty’ residing in a determinate person by virtue of a given rule of law which avails against and answers to a duty lying on some other person.”⁵⁸

H. L. A. Hart formulated in his *The Concept of Law* the most widely accepted theory of Austin’s positive law.⁵⁹ Hart views law as social facts formed by individuals who internalize a standard and thereby create a rule.⁶⁰ Hart believes that moral obligations are determined by socially accepted rules.⁶¹ Hart makes a distinction between primary and secondary rules wherein the former create rights and duties, while the latter establish how and by whom primary rules may be enacted, amended or extinguished.⁶² Both Austin and Hart view law as a social phenomenon subject to empirical analysis.⁶³ Writing for the majority in *Citizens United v. Federal Election Commission*, Justice Kennedy ruled that “[t]here is simply no support for the

52. 2 JOHN AUSTIN, *supra* note 48, at 175–76.

53. *Id.* at 294

54. *Id.* at 337

55. Hill, *supra* note 51, at 115 (arguing “that moderate externalism cannot bear the weight that Hart places upon it”); David Dyzenhaus, *Why Positivism is Authoritarian*, 37 AM. J. JURIS. 83 (1992).

56. Hill, *supra* note 51, at X.

57. 2 JOHN AUSTIN, *supra* note 48, at 175–76.

58. Roscoe Pound, *Fifty Years of Jurisprudence*, 50 HARV. L. REV. 557, 571 (1937); *see also* LYONS, *supra* note 51, at 7.

59. H.L.A. HART, *THE CONCEPT OF LAW* (1961); *see also* *THE AUTONOMY OF THE LAW, ESSAYS ON LEGAL POSITIVISM* (Robert George ed., 1999) (exploring the current state of legal positivism in a series of essays written by leading contemporary philosophers of the law); LYONS, *supra* note 51, at 51; Rosina L. Hunt, *Natural Law v. Positive Law: Interpreting Morality*, 28 NEW ENG. L. REV. 231 (1993).

60. William C. Starr, *Law and Morality in H.L.A. Hart’s Legal Philosophy*, 67 MARQ. L. REV. 673, 682 (1984) (“Hart holds that law is an instrument of social control.”); Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart and Sacks*, 29 ARIZ. L. REV. 413 (1987).

61. *See* Starr, *supra* note 60, at 681.

62. Wellman, *supra* note 60, at 474 (“Dworkin’s kinship with Hart . . . implies that the Legal Process tradition is more vital than has commonly been supposed.”).

63. *See generally* David Dyzenhaus, *Why Positivism is Authoritarian*, 37 AM. J. JURIS. 83 (1992) (arguing that contemporary positivists collaborate in an authoritarian political project); Deryck Beyleveld & Roger Brownsword, *The Practical Difference Between Natural Law Theory and Legal Positivism*, 5 OXFORD J. LEGAL STUD. 1, 9 (1985) (“Revelation, Austin holds, is an incomplete guide to the will of God, utility is no index of it, and appeals to conscience are a cloak for superstition and ignorance.”); Margot Stubbs, *Feminism and Legal Positivism*, 3 AUSTRALIAN J. L. & SOC’Y 63 (1986); Pound, *supra* note 58.

view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations.”⁶⁴ Quoting from the dissent in *United States v. Automobile Workers*, Justice Kennedy states:

Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important—vitally important—that all channels of communications be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.⁶⁵

Hart’s version of positive law would argue that we have a moral obligation based on the Constitution to include all political points of view in the election process.

C. UTILITARIANISM — John Stuart Mill (1806-1873)

*“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”*⁶⁶

— John Stuart Mill, *On Liberty*

John Stuart Mill was one of the most influential philosophers in England during the nineteenth century.⁶⁷ Mill was an empiricist and would accept and believe a proposition only if it could be experienced.⁶⁸ One could trace the logic of the American legal realism movement to his theory of utilitarianism. Ronald Dworkin, in his text *Taking Rights Seriously*, states that Mill “deploys a pessimistic theory of human nature, emphasizes the value of cultural and historical constraints on egotism, and insists on the role of the state in educating its citizens away from individual appetites and toward social conscience.”⁶⁹ David Lyons, in his text *Ethics and the Rule of Law*, argues that Mill attempted to reconcile moral rights as the principle of justice on utilitarian grounds.⁷⁰ Professor Lyons states “the idea that people have natural rights can be understood apart from dubious ideas about ‘self-evidence.’... [A moral right is one] that does not depend for its existence (as some legal rights

64. 130 S. Ct. 876, 906 (2010).

65. *Id.* at 901 (quoting *U.S. v. Int’l Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting)).

66. JOHN STUART MILL, *ON LIBERTY* 6 (Longmans, Green, & Co. 1913).

67. Fred Wilson, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *John Stuart Mill* (Edward N. Zalta ed., 2009), available at <http://plato.stanford.edu/entries/mill/>.

68. *See id.*

69. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 260 (1978).

70. LYONS, *supra* note 51, at 128.

seem to do) on some sort of social recognition or enforcement.”⁷¹ Utilitarian ethics, according to Mill, establish principles of justice as “moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life.”⁷² Holly Smith Goldman asserts that utilitarianism

identifies effects on human welfare as the criterion to use in assessing social phenomena... [and] presents us with a single rule which covers all decision-making... [and] promises to provide us with a precise formula for making decisions... by a process of calculating the effect on human welfare which is relatively invulnerable to the whims and biases of all-too-human decision makers.⁷³

This “single rule” is the utilitarian principle of the greatest good for the greatest number, which contemplates a grand scheme of benevolence and seeks out the greater happiness of the stakeholders.⁷⁴ Utilitarianism may be analyzed by dividing its theory into two principles: act-utilitarianism and rule-utilitarianism.

Act-utilitarianism considers the net happiness for all the stakeholders.⁷⁵ It has been criticized as an ethical theory that may justify violating a person’s rights for the long-range benefit and happiness of society.⁷⁶ Act-utilitarianism is a teleological ethical theory that is more concerned with the consequences of the act on society, than with the morality of the act itself.⁷⁷ An example of this is section 230 of the Communications Decency Act, which grants federal immunity from liability to a provider of an interactive web site for content posted by an outsider.⁷⁸ The Supreme Court took a utilitarian approach in *United States v. American Library Ass’n*, holding that federal legislation requiring libraries to utilize Internet filtering software as a prerequisite to receiving federal funding did not violate patrons’ First Amendment rights.⁷⁹ Writing for the plurality, Justice Rehnquist stated that “the government has broad discretion to make content-based judgments in deciding what private

71. See *id.*; see also Marco J. Jimenez, *The Value of a Promise: A Utilitarian Approach to Contract Law Remedies*, 56 UCLA L. REV. 59, 126 (2008) (“[T]he utilitarian approach helps reconcile consequentialism and nonconsequentialism within contract law by maximizing efficiency through the mechanism of promise keeping.”).

72. JOHN STUART MILL, *UTILITARIANISM* 75 (Forgotten Books 2008).

73. Holly Smith Goldman, *Rawls and Utilitarianism*, in JOHN RAWLS’ *THEORY OF SOCIAL JUSTICE: AN INTRODUCTION* 346–47 (Gene Blocker & Elizabeth H. Smith eds., 1980).

74. See *id.* at 346.

75. See Internet Encyclopedia of Philosophy, Ethics, <http://www.iep.utm.edu/ethics/> (last visited Mar. 23 2011).

76. *Id.*

77. See *id.*

78. 47 U.S.C. § 230(c) (2011).

79. *United States v. Am. Library Ass’n*, 539 U.S. 194, 214 (2002) (plurality opinion).

speech to make available to the public.”⁸⁰ In a decision some say “undermines the court’s landmark ruling in *Miranda v. Arizona*, which has helped preserve the constitutional right to remain silent for more than four decades,”⁸¹ the Supreme Court held in *Berghuis v. Thompkins* “an accused who wants to invoke his or her right to remain silent [must] do so unambiguously.”⁸² The Court found that when the defendant responded to a detective’s question after a three hour interrogation during which he primarily remained silent, that response was a sufficient waiver of his right to remain silent.⁸³ Seemingly adopting a utilitarian approach that focuses on the benefit to society, Justice Kennedy writing for the majority stated: “A requirement of an unambiguous invocation of Miranda rights results in an objective inquiry that ‘avoid[s] difficulties of proof and... provide[s] guidance to officers’ on how to proceed in the face of ambiguity.”⁸⁴

Rule-utilitarianism relies on case precedent but allows for judicial review authorizing the overruling of a law that is no longer effective. It is yoked to tradition and less concerned with subjective personal judgments.⁸⁵ Although not based on the formal principles of Kant’s “categorical imperatives,” it does rely on empirical consequences that are often aimed at the long-range benefit to society.⁸⁶ According to both act and rule utilitarianism the good consequences of the act must be the happiness of society for it to be ethical.⁸⁷

D. LEGAL REALISM — Justice O. W. Holmes, Jr. (1841-1935)

*“The real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire.”*⁸⁸

— Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*

80. *Id.* at 204.

81. Steven Shapiro, *The Thompkins Decision: A Threat to Civil Liberties*, WALL ST. J., June 8, 2010, at A19.

82. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010).

83. *Id.*

84. *Id.* (quoting *Davis v. United States*, 512 U.S. 452, 458–59 (1994)).

85. See Andrew R. Strauss, Note, *Losing Sight of the Utilitarian Forest for the Retributivist Trees: An Analysis of the Role of Public Opinion in a Utilitarian Model of Punishment*, 23 CARDOZO L. REV. 1549, 1563–64 (2002).

86. *Id.* at 1563 (citing Marcia Baron, *Kantian Ethics*, in THREE METHODS OF ETHICS: A DEBATE 3 (1997)); see also *infra* Part II.E.

87. M. Francis Reeves, *Ethical Theories: Tools for Decision Making* 31, 38, 40, app. 22 (unpublished notes).

88. OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 210, 238 (1920).

Justice Holmes is considered to be the founder of legal realism.⁸⁹ Holmes rejected legal fundamentalism that used the rule of law as an objective standard of jurisprudence. Legal realism is a method of analyzing a transaction and allowing the facts to dictate their own rules rather than imposing external regulations.⁹⁰ William L. Twining of the University argues that legal realism affected social change and legal reform by appealing to values that are not found in appellate court decisions or other material traditionally used in law school education.⁹¹ Karl N. Llewellyn believes that legal realism was not an ideology or coherent legal philosophy but rather a method or technique, which could be used by legal scholars regardless of their philosophy.⁹² This notion of legal realism as a method or technique to assist one in understanding the value orientation of a legal decision is a viable option to scholars who are concerned with the philosophical implications of decisional law.⁹³ Roscoe Pound, a legal realist and the founder of sociological jurisprudence, suggested as early as 1910 that law professors should be students of sociology, economics and politics to remedy the backwardness of law in meeting social problems.⁹⁴ Current law school curricula follow that counsel with their many diverse elective courses and legal movements in such areas as Law & Society, Technology & Law, Law & Economics, Protecting the Environment, and Feminist Studies.

What eventually emerged from the legal realism movement was a belief that law is political and involved with social phenomena.⁹⁵ One can look to the Supreme Court's decision in *Massachusetts v. EPA* to find evidence of

89. See Thomas A. Reed, *Holmes and the Paths of the Law*, 37 AM. J. LEGAL HIST. 273, 301 (1993) ("To talk of reasoning from behind 'the veil of ignorance' would have been for Holmes to talk nonsense. People are social creatures, marked by sex, race, intellectual capacity. To decide without reference to oneself, or to our culture's place in history, was to Holmes absurd, misguided and arrogant . . .").

90. N.E.H. Hull, *Some Realism About the Llewellyn-Pound Exchange Over Realism: The Newly Uncovered Private Correspondence, 1927-1931*, 1987 WIS. L. REV. 921, 966 (1987).

91. See WILLIAM L. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 5-7 (1973).

92. KARL N. LLEWELLYN, THE COMMON LAW TRADITION DECIDING APPEALS 510 app. B (1960).

93. Bruce W. Brower, *Dispositional Ethical Realism*, 103 ETHICS 221, 222 (1993) ("Dispositional ethical realism is the view that ethical properties are specified by empirically discoverable, reductive accounts that treat moral properties as . . . dependent on evaluators' responses or dispositions to respond.").

94. See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 35-36 (1910).

95. See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 524 (1990) ("The truth about legal realism for lawyers mandates that legal ethics acknowledge the distinction that lawyers have to shape the . . . legal rules Legal ethics owes the profession and society a credible account of how that distinction should be exercised."); see also Jeffrey Goldsworthy, *Realism About the High Court*, 18 FED. L. REV. 27, 39 (1988) ("[I]f people are told that the Court has never been, and cannot be, apolitical . . . then many will conclude that 'anything goes' — the only question being whether the judges' politics are to be 'conservative' or 'progressive', a question to be settled (as it is now in the United States) at the time of their appointment."); Allan Ides, *Realism, Rationality and Justice Byron White: Three Easy Cases*, 1994 B.Y.U. L. REV. 283, 283-86; John O. McGinnis & Michael Rappaport, *David Souter's Bad Constitutional History*, WALL ST. J., June 14, 2010, at A15 ("A judge, [Souter] said, must determine which of the conflicting constitutional values should become our fundamental law by taking account of new social realities.").

legal realism.⁹⁶ In that case the Court recognized Massachusetts' right to sue the EPA over the negative impact of global warming on the state.⁹⁷ The Supreme Court determined that The Clean Air Act "authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a 'judgment' that such emissions contribute to climate change."⁹⁸ Recognizing that "[a] well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere,"⁹⁹ Justice Stevens concluded that "[the] EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore 'arbitrary, capricious... or otherwise not in accordance with law.'"¹⁰⁰ The Court's reliance on other disciplines, in this case evidence from the scientific community, as a means to resolve a legal dispute is a hallmark of legal realism.

The Court also adopted a legal realist approach in *Bilski v. Kappos*.¹⁰¹ In affirming the patentability of business methods, the Court recognized that "times change [and] [t]echnology and other innovations progress in unexpected ways."¹⁰² Quoting the Court's decision in *Diamond v. Chakrabarty*, the Court went on to state that "[a] categorical rule denying patent protection for 'inventions in areas not contemplated by Congress... would frustrate the purposes of patent law.'"¹⁰³ The legal realists were interdisciplinary and their legal casebooks acknowledged the reliance on history, economics, sociology and psychiatry as relevant to legal education.¹⁰⁴ As technology and business methods continue to co-evolve, courts can be expected to modify rules of law based on the theory of legal realism, such as by integrating science with traditional legal syllogism when resolving disputes.

96. See *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

97. *Id.* at 505.

98. *Id.* at 528.

99. *Id.* at 504–05 (2007).

100. *Id.* at 534.

101. See 130 S. Ct. 3218 (2010).

102. *Id.* at 3227.

103. *Id.* (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980)).

104. See LAURA KALMAN, *LEGAL REALISM AT YALE 1927–1960*, at 4 (1986). The guidelines established for business schools by the American Association of Collegiate Schools of Business have adopted a similar interdisciplinary attitude toward business education.

E. THE CATEGORICAL IMPERATIVES — Immanuel Kant (1724-1804)

*“Enlightenment is man’s emergence from his self-incurred immaturity.... For enlightenment of this kind; all that is needed is freedom. And the freedom in question is the most innocuous form of all: freedom to make public use of one’s reason in all matters.”*¹⁰⁵

— Immanuel Kant, *Was ist Aufklärung* [*What is Enlightenment?*]

Kant is considered by many authorities as the most prominent philosopher of his generation, and he wrote extensively about morals and ethics. With respect to ethics he is best known for his “categorical imperatives.”¹⁰⁶ For example: “I ought never to act except in such a way that I can also will that my maxim should become a universal law.”¹⁰⁷ One could paraphrase that to mean: What if everyone did what I am about to do? What would be the result of my conduct on society?

Another of his famous categorical imperatives is: “Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means.”¹⁰⁸ This means that an act should be moral or ethical as an end in itself and not merely as a means to accomplish an ulterior motive. Kant’s moral philosophy is a deontological theory.¹⁰⁹ One could say that deontology demands that we follow a duty arising from a contract or a relationship that obligates a certain course of action. Kant’s categorical imperatives are useful in case analyses based on violated contract or fiduciary relationships. The law of contracts and torts relies on duties imposed by law, with a Kantian obligation to obey their dictates. In *United States v. Philip Morris USA* the DC Circuit affirmed a district court ruling that leading tobacco companies had committed fraud

105. Immanuel Kant, *An Answer to the Question: “What is Enlightenment?”* in KANT: POLITICAL WRITINGS 54–55 (Hans Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 1970).

106. See Internet Encyclopedia of Philosophy, Kant, <http://www.iep.utm.edu/kantmeta> (last visited Mar. 23, 2011).

107. IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 14 (James W. Ellington trans., Hackett Publishing Co. 3d ed. 1993).

108. *Id.* at 36.

109. See Larry Alexander & Michael Moore, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *Deontological Ethics* (Edward N. Zalta ed., 2008), available at <http://plato.stanford.edu/entries/ethics-deontological/> (noting that:

The word deontology derives from the Greek words for duty (deon) and science (or study) of (logos). In contemporary moral philosophy, deontology is one of those kinds of normative theories regarding which choices are morally required, forbidden, or permitted. In other words, deontology falls within the domain of moral theories that guide and assess our choices of what we ought to do (deontic theories)).

against the general public for several decades.¹¹⁰ In reaching his conclusion, District Court Judge Kessler held, in part:

[I]t is absurd to believe that the highly-ranked representatives and agents of these corporations and entities had no knowledge that their public statements were false and fraudulent. The Findings of Fact are replete with examples of C.E.O.s, Vice-Presidents, and Directors of Research and Development, as well as the Defendants' lawyers, making statements which were inconsistent with the internal knowledge and practice of the corporation itself.¹¹¹

Judge Kessler's holding adopts Kant's categorical imperative of "truth telling" expressed as: "I ought never to act except in such a way that I can also will that my maxim should become a universal law."¹¹² The record clearly indicates that the Philip Morris executives violated that imperative.

F. THE ORIGINAL POSITION — John Rawls (1921 – 2002)

*"A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled."*¹¹³

— John Rawls, *A Theory of Justice*

John Rawls's *A Theory of Justice* established a renaissance in political theory.¹¹⁴ His analysis of justice is useful to a discussion of ethics and how it applies to contemporary decisional law, and his criticism of our notions of liberty and equality has been widely discussed in law review literature.¹¹⁵

110. 566 F.3d 1095, 1127 (D.C. Cir. 2009).

111. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 853 (D.D.C. 2006).

112. Immanuel Kant, *Groundwork of the Metaphysic of Morals* 70 (H.J. Paton ed., HarperCollins 2009) (1785).

113. JOHN RAWLS, *A THEORY OF JUSTICE* 235 (Oxford Univ. Press 1971).

114. See Victoria Meikle, Book Review, 36 MCGILL L. J. 692 (1991) (reviewing CHANDRAN KUKATHAS & PHILIP PETTIT, *RAWLS "A THEORY OF JUSTICE" AND ITS CRITICS* (1990)) (providing a critique of Rawls' contractarian argument).

115. See, e.g., Michael P. Zuckert, *The New Rawls and Constitutional Theory: Does It Really Taste That Much Better?*, 11 CONST. COMMENT. 227, 227–28 (1994); Rex Martin, *Rawls's New Theory of Justice*, 69 CHI.-KENT L. REV. 737 (1994); S. A. Lloyd, *Relativizing Rawls*, 69 CHI.-KENT L. REV. 709 (1994); Stephen M. Griffin, *Political Philosophy Versus Political Theory: The Case of Rawls*, 69 CHI.-KENT L. REV. 691 (1994); Joan A. Pisarchik, *A Rawlsian Analysis of the Immigration Act of 1990*, 6 GEO. IMMIGR. L. J. 721, 731 (1992) ("[I]mmigrants are generally those who are worst off because they have the fewest social and economic rights. They are the recipients of unequal treatment and such unequal treatment is allowable in a Rawlsian framework only if . . . the least advantaged members of society benefit.").

Legal scholars would do well to expose themselves to his ideas as an approach to understanding our legal system in a new light, one that is especially sensitive to minority interests.

In *A Theory of Justice*, Rawls writes:

During much of modern moral philosophy the predominant systematic theory has been some form of utilitarianism. One reason for this is that it has been espoused by a long line of brilliant writers who have built up a body of thought truly impressive in its scope and refinement.... Those who criticized them... failed... to construct a workable and systematic moral conception to oppose it... What I have attempted to do is to generalize and carry to a higher order of abstraction the traditional theory of the social contract.... The theory that results is highly Kantian in nature.¹¹⁶

Rawls posits relationships between individuals and the community and develops two principles of justice that he believes would be applied by people in “the original position” (*i.e.*, a group of people who are unaware of their social status in society and come together to form a social contract).¹¹⁷

He defines the “original position” as a community that would apply “principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association.”¹¹⁸ Rawls uses the original position as a hypothetical situation where

no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like. The principles of justice are chosen behind a veil of ignorance.... Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain.¹¹⁹

Rawls argues that two principles of justice would be chosen by those in the original position.¹²⁰ First, the Equal Liberty Principle: “[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.”¹²¹ Notice how this differs from a utilitarian position of “the greater good for the greater number” that necessitates the “lesser number” will not be granted “equal rights.” Many case decisions and legislative laws adopt the utilitarian theory and sacrifice minority interests.¹²²

116. RAWLS, *supra* note 113, at vii–viii.

117. Leif Wenar, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *John Rawls* (Edward N. Zalta ed., 2008), available at <http://plato.stanford.edu/entries/rawls/>.

118. *Id.* at 11.

119. *Id.* at 12.

120. *Id.*

121. *Id.*

122. See *supra* notes 102–122 and accompanying text.

Second, the Democratic Equality Principle: “[S]ocial and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.”¹²³

Rawls would insist that equality and freedom are the two basic political principles that must be applied by those who deliberate in the original position behind a veil of ignorance and establish contractual rules for their public institutions and individual welfare. Members of his hypothetical group would not need to reject their personal beliefs and values providing their credence to a personal philosophy; moral standards or religious beliefs are not imposed on others.¹²⁴ Judicial philosophy that argues for affirmative action would support a Rawlsian theory. Cases such as *Regents of the University of California v. Bakke*¹²⁵ and *Grutter v. Bollinger*,¹²⁶ which uphold affirmative action policies in institutes of higher education, illustrate judicial adoption of Rawls’ philosophical principles of equal liberty and democratic equality.

G. PRIMA FACIE DUTIES — W.D. Ross (1877-1971)

*“Our duty, then, is not to do certain things which will produce certain results. Our acts, at any rate our acts of special obligation, are not right because they will produce certain results — which is the view common to all forms of utilitarianism.”*¹²⁷

— William David Ross, *The Right and the Good*

W.D. Ross was a “moral intuitionist” who established prima facie duties that are generally binding, irrespective of their results, based on a moral obligation to perform.¹²⁸ For instance he stated, “[u]nless stronger moral obligations override, one ought to keep a promise.”¹²⁹ He argues, however, that it is more important that our duties fit the facts than Kant’s absolute obligation to always tell the truth regardless of the consequences.¹³⁰ Ross states that in exceptional cases “the consequences of fulfilling a promise...

123. *Id.*

124. See LYONS, *supra* note 51, at 190.

125. 438 U.S. 265, 318 (1978) (holding that the use of race as a criterion for admission at higher education institutions is permissible).

126. 539 U.S. 306, 341 (2003) (“[I]n the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School’s race-conscious admissions program does not unduly harm nonminority applicants.”).

127. WILLIAM DAVID ROSS, *THE RIGHT AND THE GOOD* 46 (1930).

128. Jan Garrett, *A Simple and Usable (Although Incomplete) Ethical Theory Based on the Ethics of W.D. Ross*, W. KY. UNIV. (Aug. 10, 2004), <http://www.wku.edu/~jan.garrett/ethics/rossethc.htm>.

129. *Id.*

130. ROSS, *supra* note 127, at 18–19.

would be so disastrous to others that we judge it right not to do so.”¹³¹ From a legal perspective his “promise keeping” duty is useful in developing legal arguments based on contractual obligations or implied tortious duties. Of special interest is his insistence that “[t]he moral order... is just as much part of the fundamental nature of the universe... as is the spatial or numerical structure expressed in the axioms of geometry or arithmetic.”¹³² This proposal compels Ross to develop his ethical theory on the basis of conflicting duties that often create ethical dilemmas that can always be resolved because one of his *prima facie* duties has preference over another. Selecting the most important duty is his way of resolving an ethical dilemma.

Since our judiciary is often called upon to resolve cases where the facts create conflicting duties, for instance in employment disparate-treatment (the employer’s implied duty not to engage in intentional discrimination) and disparate-impact (the employer’s implied duty prohibiting unintentional discrimination),¹³³ it is useful to review Ross’s *prima facie* duties as obligations implied as promises and observe how our jurisprudence often reflects a Rossian ethical theory.¹³⁴

Ross argues that an actual duty is accompanied by a moral duty to perform and he provides a list of *prima facie* duties to be used as guidelines in resolving ethical dilemmas.¹³⁵ Courts often apply these duties when confronted with a dispute, thereby adopting moral obligations into our jurisprudence.

The first duty, of fidelity, relates to promise keeping that may be contractual, express or implied, under the circumstances.¹³⁶ From a legal perspective one can trace contractual duties from the contract terms and conditions and implied duties from a fiduciary relationship¹³⁷ or from duties implied under tort law. Court decisions that discuss duties expressed or implied in law are following Ross’s notion of *prima facie* duties of fidelity as obligations to keep and perform promises. Next, the duty of reparation is

131. *Id.* at 18.

132. *Id.* at 29–30.

133. *See infra* Part III.

134. ROSS, *supra* note 127, at 46–47.

135. *Id.*

136. *Id.* at 21.

137. In 1939 the Supreme Court of Delaware in *Guth v. Loft* ruled that corporate directors owe the fiduciary duties of care and loyalty to the corporation and its shareholders. 5 A.2d 503, 510 (Del. 1939). These fiduciary duties continue to be recognized by the courts. *See, e.g.,* *Brown v. Brewer*, 2010 U.S. Dist. LEXIS 60863, at *8 (C.D. Cal. June 17, 2010) (“[A]ll directors and officers of a corporation owe their shareholders fiduciary duties of loyalty and care.”).

a duty to compensate for injuries done to others.¹³⁸ Contract and tort damages are based on the defendant's duty to compensate the aggrieved plaintiff for loss resulting from the wrongful acts or omissions of the defendant.¹³⁹ When a court awards punitive damages, it is engaging in providing compensation to the plaintiff based on the *prima facie* duty of reparation for the defendant's egregious harmful conduct.¹⁴⁰ The duty of gratitude is founded on an obligation when granted a benefit, individual or social, without cost, and has relevance to a philanthropic undertaking, including the tax advantages attributable to non-profit corporations.¹⁴¹ The non-profit entity, in return for the tax advantage provided by the state, has a duty to perform a social service to the public. Our common law of negligence is based on the duty of non-maleficence—not to harm others.¹⁴² This obligation is resolved by the courts¹⁴³ where a duty to perform carefully has been unintentionally violated resulting in injury to the defendant.

Duty to prevent harm. One could argue that statutes such as Title VII of the Civil Rights Act¹⁴⁴ that prohibit employment discrimination utilize this duty to prevent harm to the employee. With the duty of beneficence,¹⁴⁵ Ross is concerned with a duty to enhance the well-being of others. Statutory laws often follow that precept in an attempt to remedy a social malady.¹⁴⁶ The duty of self-improvement¹⁴⁷ relates to laws that obligate individuals to help themselves, such as probation and compulsory driver's education in driving under the influence cases. Ross's duty of justice¹⁴⁸ makes for an interesting comparison with Rawls's Equal Liberty Principle. Ross, along with Rawls, finds a social duty to distribute societal benefits fairly. The federal tax code

138. WILLIAM DAVID ROSS, *FOUNDATIONS OF ETHICS* 289 (Clarendon Press 1949).

139. *See, e.g.*, U.C.C. §§ 2-702 (sellers' remedies for breach), 2-711 (buyers' remedies for breach) (2004).

140. *See Williams v. Philip Morris, Inc.*, 176 P.3d 1255, 1258 (Or. 2008). The Oregon Supreme Court upheld a \$79.5 million award against the cigarette manufacturer.

141. ROSS, *supra* note 127, at 21–27; *see* 26 U.S.C. § 501(c)(3) (2006).

142. ROSS, *supra* note 127, at 21, 26.

143. *See, e.g.*, *Wyeth v. Levine*, 129 S. Ct. 1187, 1204 (2009) (upholding a decision of the Vermont Supreme Court that allowed a plaintiff to recover from a drug manufacturer for an inadequate warning label).

144. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

145. ROSS, *supra* note 127, at 21.

146. *See, e.g.*, 26 U.S.C. § 213 (2006) (authorizing a tax deduction for medical and dental expenses).

147. ROSS, *supra* note 127, at 21.

148. *Id.* at 23.

contains provisions that follow this duty.¹⁴⁹ The Patient Protection and Affordable Care Act¹⁵⁰ is based on a duty to distribute health care to all as a precept of social justice.

A judge's application of Ross's prima facie duties to a case relates to his or her subsequent characterization as being liberal or conservative, a judicial activist or a strict constructionist. Ross provides useful guidelines in analyzing a case from a philosophical and ethical perspective.

III. PHILOSOPHICAL THEORY AND *RICCI V. DEStEFANO*

*"Learned Hand, who was one of America's best and most famous judges, said he feared a lawsuit more than death or taxes.... People often stand to gain or lose more by one judge's nod than they could by any general act of Congress or Parliament."*¹⁵¹

— Ronald Dworkin, *Law's Empire*

In *Law's Empire*, Ronald Dworkin sets the stage for the development of judicial philosophy by indicating the power of the judiciary over the average person's life. How judges decide cases and use this power involves their background, personal experience and philosophy. Supreme Court decisions reflect not only how the institution has functioned throughout American history but also how jurists think.¹⁵²

A. Philosophical Analysis of *Ricci v. DeStefano*

The facts of the case disclose a New Haven, Connecticut, firefighter exam used to fill vacant lieutenant and captain positions.¹⁵³ The results of the exam indicated that white candidates scored higher than minority candidates, and the City decided to disregard the results based on statistical racial disparity.¹⁵⁴ White and Hispanic firefighters who passed the exam sued the City when it refused to certify the test results, alleging that such actions discriminated against them based on their race in violation of Title VII of the Civil Rights Act of 1964.¹⁵⁵

149. One such provision is the Earned Income Tax Credit offered to low to moderate income families to either offset a tax liability or generate a refund. See 26 U.S.C. § 32 (2006).

150. Pub. L. No. 111-148, 124 Stat. 119 (2010).

151. DWORKIN, *supra* note 4, at 1.

152. Justice Holmes' essay *The Path of the Law*, written while he was a member of the Supreme Judicial Court of Massachusetts, emphasized legal study as the prediction of a judge's decision. *Id.* at 461.

153. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664 (2009).

154. *Id.*

155. *Id.* See also Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified

The City responded that had it certified the test results it could be accused of adopting a practice having a disparate impact on minority firefighters.¹⁵⁶ The district court granted summary judgment for the defendants and the Second Circuit affirmed.¹⁵⁷ The Supreme Court disagreed with the lower courts and held that in disregarding the tests results the City intentionally discriminated against the plaintiffs in violation of Title VII.¹⁵⁸

Justice Kennedy delivered the opinion of the Court joined by Chief Justice Roberts and Justices Scalia, Thomas and Alito.¹⁵⁹ Justice Ginsberg filed a dissenting opinion joined by Justices Stevens, Souter and Breyer.¹⁶⁰ Of interest is that the so-called conservative block joined Justice Kennedy, and the liberal block joined Justice Ginsburg in her dissent.

The theories presented above provide insight into the judicial reasoning employed by the opinion writers in this case. Writing for the majority, Justice Kennedy expresses the following view of Title VII:

As enacted in 1964, Title VII's principal nondiscrimination provision held employers liable only for disparate treatment. That section retains its original wording today. It makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."¹⁶¹

The opinion goes on to explain the nature of disparate impact discrimination. "The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact."¹⁶² The Court recognized this prohibition in *Griggs v. Duke Power Co.*¹⁶³ and Congress later codified it in the Civil Rights Act of 1991.¹⁶⁴ "Under the disparate-impact statute, a plaintiff establishes a prima facie violation by showing that an employer uses 'a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.'"¹⁶⁵

as amended at 42 U.S.C. §§ 2000e to 2000e-17).

156. 129 S. Ct. at 2664.

157. *Id.*

158. *Id.*

159. *Id.* at 2663.

160. *Id.*

161. *Id.* at 2672.

162. *Id.*

163. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

164. Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074 (codified as amended in 42 U.S.C. § 2000e-2(k) (2011)).

165. 129 S. Ct. at 2673 (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006)).

Natural law. Recognizing that the Court should interpret statutory law to give effect to both disparate treatment and disparate impact concerns, Justice Kennedy stated:

The purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color. In searching for a standard that strikes a more appropriate balance, we note that this Court has considered cases similar to this one, albeit in the context of the Equal Protection Clause of the Fourteenth Amendment. The Court has held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a strong basis in evidence that the remedial actions were necessary.¹⁶⁶

This reference to the Equal Protection Clause in establishing a standard when disparate-impact and disparate-treatment are in conflict is of interest when searching for a judicial philosophy supporting the Court's position. The Bill of Rights is the foundation for developing government equality and freedoms based on a natural law theory of objective fundamental rights. The notion of applying the Equal Protection Clause as a remedy for past racial discrimination as the Court did in *Ricci* also appeals to a sense of fairness when there is empirical evidence to support the injustice of race discrimination. Natural law principles found in the Bill of Rights protect individuals from injustices including racial discrimination that violate human dignity and the common good.¹⁶⁷ Justice Scalia, concurring in *Ricci*, states: "Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection? The question is not an easy one."¹⁶⁸ The Court continues to be conscious of a potential conflict between Title VII and its implementation by an employer that could violate the Equal Protection Clause. This constitutional guarantee has its roots in the natural law principal of fairness as part of our social contract and a conservative justice would be reluctant to read into that clause a guarantee of equal protection.

In Roscoe Pound's *Introduction to the Philosophy of Law*, he states that "natural law [should] [express] the nature of government."¹⁶⁹ One could argue the nature of government is to provide equal protection of the law including preventing employment discrimination on the basis of race and color. Professor Pound further states that natural law principles are

166. *Id.* at 2675 (internal quotations omitted).

167. See AQUINAS, *supra* note 14, at 995 ("A law . . . regards . . . the order to the common good.").

168. *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

169. POUND, *supra* note 32, at 50.

“protected by the Bill of Rights.”¹⁷⁰ The philosophical theory underlying the Equal Protection clause is a natural law principle obligating an employer to equally treat employees in a fair and equitable manner. Justice Ginsburg’s dissenting opinion stated in part:

In construing Title VII,... equal protection doctrine is of limited utility. The Equal Protection Clause, this Court has held, prohibits only intentional discrimination; it does not have a disparate-impact component.... Title VII, in contrast, aims to eliminate all forms of employment discrimination, unintentional as well as deliberate. Until today... this Court has never questioned the constitutionality of the disparate-impact component of Title VII, and for good reason. By instructing employers to avoid needlessly exclusionary selection processes, Title VII’s disparate-impact provision calls for a “race-neutral means to increase minority... participation” — something this Court’s equal protection precedents also encourage.... Observance of Title VII’s disparate-impact provision... calls for no racial preference, absolute or otherwise. The very purpose of the provision is to ensure that individuals are hired and promoted based on qualifications manifestly necessary to successful performance of the job in question, qualifications that do not screen out members of any race.¹⁷¹

Justice Ginsburg builds her argument on the legal theory that disparate-impact (unintentional discrimination) is not inconsistent with the constitutionality of Title VII and its very purpose calls for no racial preference. Its purpose is to assure that “individuals are hired and promoted based on qualifications... necessary to successful performance of the job in question.”¹⁷² The very essence of natural law would support the “no racial preference, absolute or otherwise” holding of Justice Ginsburg’s argument.¹⁷³ Lon Fuller would agree with Justice Ginsburg’s dissent as consistent with his position that the natural law’s essential function is to “achiev[e] a certain kind of order... through subjecting people’s conduct to the guidance of general rules by which they may themselves orient their behavior....”¹⁷⁴ The dissent relies on natural law insofar as it provides rules (*i.e.* Title VII) that require employers to behave in a manner that will achieve social justice.¹⁷⁵

Legal Positivism. Contemporary scholars continue to explore legal positivism. Professor Brian Bix of the University of Minnesota School of Law summarizes this theory as follows: “[i]n simple terms, legal positivism is built around the belief, the assumption or the dogma that the question of

170. ROSCOE POUND, *NEW PATHS OF THE LAW* 13 (Univ. Neb. Press 1950).

171. *Ricci*, 129 S. Ct. at 2700-01 (Ginsburg, J., dissenting) (citations omitted).

172. *Id.* at 2701.

173. *Id.*

174. Lon L. Fuller, *A Reply to Professors Cohen and Dworkin*, 10 VILL. L. REV. 655, 657 (1965).

175. *Ricci*, 129 S. Ct. at 2689-2710 (Ginsburg J., dissenting).

what is the law is separate from (and must be kept separate from) the question of what the law should be.”¹⁷⁶ Bix quotes Austin for further support:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.¹⁷⁷

When Congress enacted Title VII it recognized the social problem of discrimination and stated the prohibition creating a legal and moral duty based on the social phenomenon of race discrimination in the workplace.¹⁷⁸ Professor H.L.A. Hart in his text, *The Concept of Law*, argues that facts may internalize a standard and thereby create a rule.¹⁷⁹ In her dissent, Justice Ginsburg maintains that the plaintiffs have a right to sympathy, but not to relief under the law.¹⁸⁰ Justice Alito responds, seemingly adopting the notion of legal positivism in his concurrence:

The dissent grants that petitioners’ situation is “unfortunate” and that they “understandably attract this Court’s sympathy.” But “sympathy” is not what petitioners have a right to demand. What they have a right to demand is evenhanded enforcement of the law—of Title VII’s prohibition against discrimination based on race. And that is what, until today’s decision, has been denied them.¹⁸¹

Justice Alito’s conclusion illustrates that the legal positivist notion of unbiased enforcement of the law prohibits reverse discrimination and those scoring highest on the test should not be discriminated against simply because they are not in the minority.

Utilitarianism. In John Stuart Mill’s *Utilitarianism*, he argues that moral rules are “essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life....”¹⁸² Title VII is an example of “act-utilitarianism” that concerns itself with the net happiness for all the stakeholders for the long-term benefit and happiness of society. It recognizes, as a teleological theory, that the consequences of the act may not benefit all parties. Mill asserts:

176. BRIAN BIX, JURISPRUDENCE THEORY AND CONTEXT 35–36 (5th ed. 2009) (quoting JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 157 (1832)).

177. *Id.*

178. See generally S. REP. NO. 88-872 (1964), reprinted in 1964 U.S.C.A.A.N. 2355.

179. See *supra* note 58 and accompanying text.

180. Ricci v. DeStefano, 129 S. Ct. 2658, 2690 (2009) (Ginsburg, J., dissenting).

181. *Id.* at 2689 (Alito, J., concurring).

182. JOHN STUART MILL, UTILITARIANISM 87 (Forgotten Books 1925) (1863).

Act utilitarianism is contextual in nature. It is sometimes called “situational ethics.” On an act by act basis consider all the alternatives and choose the action that will produce the most happiness for all the stakeholders in the future. You count as one equally with others. Everyone impartially has equal weight. It does not mean everyone will be happy with your decision.¹⁸³

In her dissent, Justice Ginsburg acknowledges that allowing the City to disregard the test results would negatively impact some of the parties.¹⁸⁴ She states: “The white firefighters who scored high on New Haven’s promotional exam understandably attract this Court’s sympathy. But they had no vested right to promotion.”¹⁸⁵ Adopting a utilitarian approach, Justice Ginsburg seemingly concludes the greatest good to be that which results from disregarding the promotional exams despite the detriment to those who scored the highest on the exam.

In adopting a utilitarian approach, Justice Ginsburg reminds us that “[e]thics is not a matter of rigid rule keeping. It is rather a matter of being flexible in real situations and using your reason to maximize net long-range happiness for everyone.”¹⁸⁶ In this case, to ignore the existence of disparate impact concerns would adversely affect minority candidates in a field where there has been a long history of discrimination in the workplace.

Legal Realism. Justice Holmes once stated that “[t]he real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire,” a classic expression of legal realism relevant to the philosophy supporting Title VII.¹⁸⁷ The civil rights movement identified employment discrimination as a social evil needing legal reform.¹⁸⁸ Legal realism recognized that law is political and the social phenomenon of employment discrimination mandated social change to enhance the constitutional value of equal protection under law.¹⁸⁹

In both Justice Alito’s concurrence and Justice Ginsburg’s dissent there is mention of what role, if any, the mayor’s political motivation to cater to a segment of his constituency may have impacted the city’s decision to disregard the test results. In her dissent, Justice Ginsburg observes:

As courts have recognized, “[p]oliticians routinely respond to bad press... but it is not a violation of Title VII to take advantage of a situation to gain political favor.” The real issue then, is not whether the mayor and his staff were

183. Reeves, *supra* note 87, at 38.

184. 129 S. Ct. at 2690 (Ginsburg, J., dissenting).

185. *Id.*

186. Reeves, *supra* note 87, at 38.

187. COLLECTED LEGAL PAPERS, *supra* note 92, at 210, 238.

188. See generally 118 CONG. REC. 1817 (1972).

189. *Ricci*, 129 S. Ct. at 2687–88 (Alito, J., concurring).

politically motivated; it is whether their attempt to score political points was legitimate (*i.e.*, nondiscriminatory). Were they seeking to exclude white firefighters from promotion... or did they realize, at least belatedly, that their tests could be toppled in a disparate- impact suit?¹⁹⁰

Justice Ginsburg's acknowledgement of the possible role of politics in decision making with regard to enforcement of Title VII supports the legal realist's view of using law as a means of achieving social results.

Immanuel Kant. Kant's categorical imperatives support Title VII. He stated to "always use humanity... never merely as a means, but at the same time as an end."¹⁹¹ Kant would not agree with a workplace practice that discriminated on the basis of race as a means to placate other workers. Contemporary Kantian philosophers have expressed it this way:

Man's moral title to external freedom thus carries with it a correlative duty to respect the same right in others. And since men cannot be relied upon to observe this duty voluntarily, it must be enforced. This is the function of the Law and the office of the State which enforces those duties all men must observe so that each can enjoy the greatest external liberty compatible with the like liberty of everyone else.¹⁹²

In upholding the rights of the high scoring white and Hispanic firefighters, Justice Kennedy adopts this theory as expressed in the majority decision in *Ricci*:

[The district court] ruled that respondents' "motivation to avoid making promotions based on a test with a racially disparate impact... does not, as a matter of law, constitute discriminatory intent" under Title VII." And the Government makes a similar argument in this Court. It contends that the "structure of Title VII belies any claim that an employer's intent to comply with Title VII's disparate-impact provisions constitutes prohibited discrimination on the basis of race.".... But both of those statements turn upon the City's objective—avoiding disparate-impact liability—while ignoring the City's conduct in the name of reaching that objective. Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white.¹⁹³

In his concurrence, Justice Scalia appears to be utilizing Kant's categorical imperative of treating individuals as ends in themselves. He states: "[T]he Government must treat citizens as individuals, not as simply components of

190. *Id.* at 2709 (Ginsburg, J., dissenting) (quoting *Henry v. Jones*, 507 F.3d 558, 567 (7th Cir. 2007)).

191. JENS TIMMERMANN, KANT'S GROUNDWORK OF THE METAPHYSIC OF MORALS 96 (2007).

192. Gunnar Beck, *Immanuel Kant's Theory of Rights*, 19 *RATIO JURIS* 371, 375 (2006).

193. *Ricci*, 129 S. Ct. at 2671, 2673–74 (quoting *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 160 (D. Conn. 2006)).

a racial, religious, sexual or national class.”¹⁹⁴ Enforcement of the disparate impact guidelines in this context would, in Scalia’s view, amount to unprotected reverse discrimination.

John Rawls Theory of Justice: Rawls’s original position theory, in which judgments are made behind a veil of ignorance, imagines a group of people coming together to form a social contract unaware of their social status in society.¹⁹⁵ Rawls states: “First of all, no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength and the like.”¹⁹⁶ In that arrangement members in the group would not know their race and would be in agreement with a law such as Title VII that prohibits workplace discrimination.¹⁹⁷ His “equal liberty principle” that “[e]ach person is to have an equal right to the most extensive basic liberty compatible with similar liberty for others”¹⁹⁸ would support the value of Title VII legislation.¹⁹⁹ Further, his “democratic equality principle” that “[s]ocial and economic inequalities are to be arranged so that they are... to the greatest benefit of the least advantaged”²⁰⁰ is a philosophical theory that justifies Title VII. Justice Ginsberg states in her dissent:

The Court’s recitation of the facts leaves out important parts of the story. Firefighting is a profession in which the legacy of racial discrimination casts an especially long shadow. In extending Title VII to state and local government employers in 1972, Congress took note of a U.S. Commission on Civil Rights (USCCR) report finding racial discrimination in municipal employment even “more pervasive than in the private sector.” According to the report, overt racism was partly to blame, but so too was a failure on the part of municipal employers to apply merit-based employment principles. In making hiring and promotion decisions, public employers often “rel[ie]d on criteria unrelated to job performance,” including nepotism or political patronage. Such flawed selection methods served to entrench preexisting racial hierarchies. The USCCR report singled out police and fire departments for having “[b]arriers to equal employment... greater... than in any other area of State or local government,” with African-Americans “hold[ing] almost no positions in the officer ranks.”²⁰¹

194. *Id.* at 2682 (Scalia, J. concurring) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

195. *See supra* notes 120–22 and accompanying text.

196. RAWLS, *supra* note 116, at 137.

197. *See* MICHAEL J. SANDEL, JUSTICE: WHAT’S THE RIGHT THING TO DO? 153 (2009) (“Underlying the device of the veil of ignorance is a moral argument that can be presented independent of the thought experiment. Its main idea is that . . . opportunity should not be based on factors that are arbitrary from a moral point of view.”).

198. RAWLS, *supra* note 113, at 60.

199. *Id.* at 61.

200. *Id.* at 83.

201. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2690–91 (2009) (Ginsburg, J., dissenting) (quoting H.R. Rep.

The “important parts of the story” that Justice Ginsburg recites in her dissenting opinion are supportive of the Rawlsian Equal Liberty Principal.²⁰² Of interest is that the development of her argument is based on a historical and contemporary racial segregation in the public employment sector. Her jurisprudence reflects the philosophical theory of Rawls’s *Theory of Justice* that “[e]ach person is to have an equal right to the most extensive basic liberty compatible with similar liberty for others.”²⁰³

W.D. Ross’s Prima Facie Duties. Ross’s duty to society would include a duty of justice to distribute the benefits of society in a fair manner.²⁰⁴ The strategy behind a standardized test for firefighters seeking the positions of lieutenants and captains is based on a fair distribution of these positions according to competency levels rather than race preference. The majority opinion, written by Justice Kennedy, did not find in the record evidence of the questions being unrelated to the job and held, under the “strong basis in evidence rule” that the City did not offer sufficient evidence to rescind the test results.²⁰⁵ One could argue that the examination constituted an implied promise to award the jobs to those who passed the exam and this created a prima facie “duty of fidelity” because the candidates relied upon the City’s offer. Justice Ginsburg’s dissent stated: “In making hiring and promotion decisions, public employers often ‘rel[ie]d on criteria unrelated to job performance,’ including nepotism or political patronage.... Such flawed selection methods served to entrench preexisting racial hierarchies.”²⁰⁶ Ross’s position that in exceptional cases “the consequences of fulfilling a promise... would be so disastrous to others that we judge it right not to do so”²⁰⁷ would support Justice Ginsburg’s dissent assuming this is an exceptional case based on historical evidence of race discrimination. The manner in which a judge interprets the evidence of a case will indicate a philosophical orientation that is always fact sensitive.

IV. CONCLUSION

Jurisprudence, as the philosophy of the law, plays an important role in understanding how a court resolves a dispute. A court’s decision often reflects a legal philosophy that is useful in understanding and contextualizing a judge’s

No. 92–238 (1972), reprinted in 1972 U.S.C.C.A.N. 2137, 2152, and in 118 CONG. REC. 1817).

202. *Id.*

203. RAWLS, *supra* note 113, at 60.

204. ROSS, *supra* note 127, at 26–27.

205. 129 S. Ct. at 2681.

206. *Id.* at 2690 (Ginsburg, J., dissenting) (emphasis added).

207. ROSS, *supra* note 127, at 18.

decision-making methods. By analyzing a decision from a legal philosophical perspective, one better understands the judge's judicial philosophy, which is more useful than a superficial classification of "liberal" or "conservative" orientation. Constitutional values can be defended from the perspective of many legal philosophical theories, and judges and legislatures often utilize different philosophies for different purposes. It is important to recognize that a judge's decision will often adopt various legal philosophical theories, and conservative and liberal judges may follow principles established by different philosophers and judicial theorists. Recognizing a legal philosophical theory reflected in a judicial opinion provides an insightful perspective that exceeds the bare judicial argument stated in the decision. Comprehending the legal philosophy in a judge's decision provides a clearer understanding of the opinion and renders a more meaningful debate of the issues.