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Philosophy, Jurisprudence, and Jurisprudential Temperament of Federal Judges*

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I. INTRODUCTION TO PHILOSOPHICAL AND JURISPRUDENTIAL CONCEPTS

After twenty-five years as a judge, I find myself somewhat uncomfortable because I am unable to pigeonhole myself into the fashionable categories used by political scientists, respected law professors, lawyers, and both the print and broadcast media to describe judges. I feel somewhat inadequate because I simply don't know if I am a "liberal," "conservative," "activist," "strict constructionist," "centrist," "moderate," or "Reagan type." Although these expressions are so commonplace that obviously many must have an idea what they mean, I'm not quite sure that these expressions are likely candidates for definitional prizes in explaining what they mean. These descriptions probably originated in the political arena as handy one-word pejoratives, but they surely have caught on and are very much with us today.

I have been a judge-watcher for a long time, and my view has been an unusual one, because it has been from the inside looking both out and up; looking out at fellow appellate judges and looking up to the Supreme Court justices who review our work. I do this watching because my avocation, if you call it that, is studying the judicial process. By this I mean a study of methods—of how courts decide cases; an analysis of decisionmaking as it actually takes place and as it ought to take place. As a long time student who believes he still has a long way to go, I put aside, for our immediate purposes, the substantive law that is the product or result of the process. In these pages, I will content myself only with examining the process itself.

The more I think about the judicial process and one-word labels bandied about to describe those who make the process work, the more I'm convinced that this splash and dash is a very ineffective attempt to cover a very complex individual—today's federal judge. As two digits may not adequately describe a nuclear physics formula, simplistic expressions cannot begin to cover very complicated judicial personalities. I think that this is true when describing any judge, but it's even more so when you describe federal judges, especially federal judges on the appellate hierarchy's two top tiers.

A. Theories of "Liberal" and "Conservative"

If you are comfortable with the most familiar dichotomy—the division between so-called liberal and conservative judges—you have your choice of a number of abstract theories. If you so choose, you can start with the clash between two renowned works of moral and political

philosophy, John Rawls' *A Theory of Justice*¹ and Robert Nozick's *Anarchy, State, and Utopia*.² Rawls expressed his conception of justice in the statement: "All social values—liberty and opportunity, income and wealth, and the bases of self respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage."³ Nozick defended a thesis of the "minimum state," and argued that state intervention is severely limited to the narrow function of protection against force, theft, and fraud, and to the enforcement of contracts. He contended: "The minimal state is the most extensive state that can be justified. Any state more extensive violates people's rights. Yet many persons have put forth reasons purporting to justify a more extensive state."⁴ Perhaps we can say that liberal or activist judges will do what they can to enforce the egalitarian philosophy of Rawls, and that the conservatives will lay back with Nozick, content that the least government is the best government.

Or you can select another method of separating the liberal sheep from the conservative goats by hearkening to the differences between Locke and Hobbes in reconstructions of the state of nature. John Locke's *Second Treatise on Civil Government*⁵ emphasized the natural rights of individuals as to "life, liberty and estate."⁶ He built on English tradition as illustrated by Sir John Fortesque and Coke, the entire emphasis of which had always been on rights of the individual rather than the rights of people considered en masse. Locke believed that the state of nature was an era of "peace, good will, mutual assistance, and preservation" in which the "free, sovereign" individual is already in possession of all valuable rights. Yet from defect of "executive power" the individual is not always able to make his rights good or to determine them accurately with respect to the like rights of his fellows.⁷ Hobbes painted a far different picture of man's state before any government existed. He visualized it as one of "force and fraud," in which "every man is to every man a wolf."⁸ From this we may draw the conclusion that Hobbes traced all rights to government and regarded them simply as implements of public policy. Locke, on the other hand, regarded government as creating no rights, as being strictly fiduciary in character, and as designed to make secure and more readily available rights that antedate government and that would survive it. I think traces of labels of conservative and liberal peek through here.

¹J. RAWLS, *A THEORY OF JUSTICE* (1971).

²R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

³J. RAWLS, *supra* note 1, at 62.

⁴R. NOZICK, *supra* note 2, at 149.

⁵J. LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT* (Everyman's ed. 1924).

⁶*Id.* at 158-59.

⁷*Id.* at 164-65.

⁸T. HOBBS, *LEVIATHAN* c. 13 (1651).

Yet another choice is available—the dichotomy suggested by Alexander M. Bickel in *The Morality of Consent*.⁹ He stated that the liberal and conservative traditions have competed, and still compete, for control of the democratic process and of our constitutional system, and that both have controlled the direction of our judicial policy at one time or another.¹⁰ Bickel, too, referred to John Locke in the context of the social contract theory. He described this tradition as contractarian,¹¹ a tradition that rests on the vision of individual rights that have a clearly defined, independent existence predating society and that are derived from nature and from a natural, if imagined, contract. Society must bend to these rights.

Bickel named the other tradition the Whig tradition, one intimately associated with Edmund Burke.¹² This model rests not on anything that existed prior to society but on flexible, slow-moving, highly political circumstances that emerge as values of society evolve. The task of government, according to this tradition, is to make a peaceable, good, and improving society informed by the current state of values.¹³ In discussing Burke, Bickel stated:

[The rights of man] do not preexist and condition civil society. They are in their totality the right to decent, wise, just, responsive, stable government in the circumstances of a given time and place. Under such a government, a partnership Burke calls it, “the restraints on men, as well as their liberties, are to be reckoned among their rights,” and “all men have equal rights, but not to equal things,” since a leveling egalitarianism, which does not reward merit and ability is harmful to all and is unjust as well.¹⁴

Because all these thoughtful analyses are couched in the abstract, I think that to predict how a judge will decide a case based on a preconceived label is at best a shaky, if not a downright imperfect, diversion. Yet the effort continues unabated, with the main journalistic effort taking the form of a track record tally. It is a quantitative analysis that proceeds by inductive reasoning from decisions made in specific cases that are then generalized into a conclusion. A judge is labeled a liberal, more or less, if he is inclined to favor claims in the following categories: criminal defendants or prisoners (excluding those accused of white collar crimes such as income tax evasion, fraud, embezzlement, or antitrust violations); civil rights claims of women, blacks, Hispanics, and aliens; labor unions and employees in labor-management cases;

⁹A. BICKEL, *THE MORALITY OF CONSENT* (1975).

¹⁰*Id.* at 3.

¹¹*Id.*

¹²*Id.*

¹³*Id.* at 4.

¹⁴*Id.* at 20.

employees in Title VII employment discrimination claims; the insureds as against insurance companies; small businesses against big businesses; tenants in landlord-tenant cases; debtors or bankrupts; buyers of goods rather than sellers; stockholders in stockholder suits; civil antitrust plaintiffs; workers in compensation cases; Social Security disability claimants; the injured or the decedents' estates in automobile cases; patients or clients in professional malpractice cases; the injured in products liability or federal tort claims; section 1983 plaintiffs against local, county, or state government officials; and individuals or citizens' groups against government agencies, but in favor of the government agency in regulation of business cases. The judge is considered a conservative if he is inclined the other way.

I think danger exists in calling the shot either by trying to characterize the judge as an apostle of some philosopher or by running a tab on who won what case on which the judge sat. I think it is far more productive to consider at least three basic concepts that go into the judicial process: legal philosophy, jurisprudence, and jurisprudential temperament. A full discussion of these elements is necessary if we are to find predictability, or what Llewellyn called reckonability,¹⁵ in the law. Some prophetic quality is very much desired in the law. We need predictability so that judges "will find the grounds of decision, counsellors the basis of assured prediction as to the course of decision, and individuals reasonable guidance toward conducting themselves in accordance with the demands of the social order."¹⁶

B. *Legal Philosophy*

Let's start with some definitions. Because these are my own formulations, I will emphasize, with a nod to Felix Cohen, that a definition I give here is either useful or useless. "It is not true or false, any more than a New Year's resolution or an insurance policy."¹⁷ I make a distinction between philosophy of law and *a* philosophy of law. When I speak of philosophy, I am addressing a very broad inquiry into what the relationship between individuals and government ought to be. In this context, the problems of legal philosophy are problems of normative political philosophy. So perceived, philosophy of law deals with the chief ideas that are common to rules and methods of law as legal precepts in the aggregate. Legal philosophy also deals with the various disciplines that bear directly on the wise solution of a galaxy of problems. Legal philosophy inquires into the problems of terminology, legal methods, the role of precedent, statutory interpretation, underlying rationale, the use of different types of authority, the efficacy of various controls and

¹⁵K. LLEWELLYN, *THE COMMON LAW TRADITION* 17 (1960).

¹⁶Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 *TUL. L. REV.* 475, 476 (1933).

¹⁷Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809, 835 (1935).

their operation in diverse factual scenarios, and the basic issues concerning the values that are implemented.

When I speak of *a* legal philosophy, I am addressing the specific answers to these basic inquiries forthcoming from very respectable thinkers, both in academia and on the bench.¹⁸ Each thinker probably articulates or at least demonstrates some particular legal philosophy. Hence, each of their individual solutions to myriad problems of judicial decision-making is what I call *a* legal philosophy.

Decisionmaking in the law is not a science capable of being reduced to a neat formula. Decisionmaking is confusing and complex. It involves concepts that general philosophers have found difficult to explain—volition, will, intention, action, choice, and responsibility. Philosophy of law appears to embrace the same problems present in moral evaluation. It addresses those aspects of human nature implicated in other branches of philosophy; philosophy of mind and of action as well as philosophical psychology, all of which describe the nature and relationship of thought, feeling, and action. Because there are no pat answers, it should be expected that individual thinkers would come up with divergent views. Hence, the institutional imperative for a multijudge court.

Some philosophers, for example, have argued that governments exist only to benefit their citizens—the classic Jeremy Bentham utilitarian theory—and that any governmental action is justified only when, and to the extent that, it contributes to the general well-being. Others argue for a more limited government form. They contend that persons are endowed with rights and that government actions are limited by these rights. This theory states that no action is justifiable if it interferes with these rights, and that governments exist to see that rights are protected and to promote well-being only when doing so does not involve infringement of rights. Most of these philosophers give primacy to the individual, but there are those, especially from ancient societies, as well as the modern fascists and nazis, who give primacy to the state as an end in itself. Legal philosophy concerns an inquiry into what kind of society is best; *a* legal philosophy tells us what kind that is.

It is probably safe to say that most modern legal philosophy descends from Jeremy Bentham's benefit theory or utilitarianism—the goal of

¹⁸Thoughtful answers to this very abstract subject have been offered by a number of reknowned legal thinkers. A somewhat incomplete list of those who have commanded my attention and possibly influenced me over the years includes: John Austin, Jeremy Bentham, Alexander Bickel, Richard Brandt, William J. Brennan, Jr., Benjamin Cardozo, Giorgio del Vecchio, Lord Alfred Denning, Lord Patrick Devlin, Lord Kenneth Diplock, Ronald Dworkin, Jerome Frank, Stanley Fuld, Lon Fuller, Kent Greenawalt, Erwin N. Griswold, Hugo Grotius, Alexander Hamilton, Learned Hand, H.L.A. Hart, Thomas Hobbes, Oliver Wendell Holmes, Jr., David Hume, Thomas Jefferson, Harry W. Jones, Immanuel Kant, Hans Kelsen, Karl Llewellyn, John Locke, John Stuart Mill, Thomas Morawetz, Robert Nozick, Roscoe Pound, John Rawls, Joseph Raz, William H. Rehnquist, Samuel J. Roberts, Alf Ross, Jean-Jacques Rousseau, Rolf Sartorius, Walter V. Schaefer, James Fitzjames Stephen, Roger J. Traynor, G.B. Vico, Richard Wasserstrom, Herbert Wechsler, and Harry Wellington.

morality is to maximize pleasure and minimize pain.¹⁹ The goal is the greatest happiness for the greatest number.²⁰ Bentham's basic concepts have been challenged, to be sure. The principal anti-utilitarian arguments state that other moral goals exist besides pleasure, pain, and happiness, and that, moreover, these factors cannot be quantified. Notwithstanding scholarly criticism of Benthamism, I doubt that any appellate judge ever takes a strong position without sincerely believing that his solution is predicated on some theory of benefit.

Ronald Dworkin and John Rawls emphasize that a theory of rights and liberty is more realistic and accurate than the benefits theory.²¹ Where so many facets of legal philosophy are concerned, oversimplification is a perilous exercise, but I think we can generalize to the extent that two major schools of philosophical thought are popular today. The utilitarian takes it to be a self-evident truth that governments exist to benefit their citizens. I have often quoted Harry W. Jones in this respect: "A legal rule or a legal institution is a *good* rule or institution when—that is, to the extent that—it contributes to the establishment and preservation of a social environment in which the quality of human life can be spirited, improving and unimpaired."²² Liberty is *one* of several benefits to be conferred on persons. The rights theorists believe otherwise. They believe that governments exist to preserve the independence of individuals from unwarranted interference from other individuals and from government itself. Under this theory, at least under that espoused by Dworkin, in exercising rights, liberty is a "trump" over decisions to implement other benefits through law because it can be derived from the moral presumption that each person is to be treated with equal respect and concern.²³ Dworkin teaches that we have inherited a moral commitment to equality, to equal respect and concern for others, which must underlie any allocation of benefits.²⁴

¹⁹See J. BENTHAM, *PRINCIPLES OF MORALS AND LEGISLATION* (Haffner ed. 1970) (rev. ed. 1823).

²⁰*Id.*

²¹See generally R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); J. RAWLS, *supra* note 1.

²²Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1030 (1974).

²³R. DWORKIN, *supra* note 21, at xi-xii. See generally Sartorius, *Dworkin on Rights and Utilitarianism*, 1981 UTAH L. REV. 263.

²⁴See also T. MORAWETZ, *THE PHILOSOPHY OF LAW* 231 (1980):

One's choice between the two theories may depend upon a fundamental intuition of the following kind. The utilitarian gives priority to the notion of benefit. This means that he would find it plausible to explain the attention we give to so-called rights by saying that we respect rights because this is an important way of benefitting those whose rights are respected. The rights theorist puts matters the other way around. His intuition is that we find it plausible to regard persons as being entitled to being benefitted in certain ways only because we have a certain conception of persons as being entitled by right to respect and consideration as ends in themselves.

All philosophers deal with data about what people say and think and what they do. They critically interpret this data by submitting these raw materials to tests of consistency, coherence, and justifiability.²⁵ They test the data by considering both the merits of a particular view of society reflected in a judicial decision (or legislative action) and the role of law that the decision exemplifies. In so doing, the philosopher examines the ethical choice that has been made. When it comes to ethics, a case can be made that legal philosophers, as well as judges, fail to distinguish between their own preferences and the preferences of those affected by the action. A society that never has experienced free speech and self-government may not include aspects of liberty in its notion of welfare. Migrant farm workers, unemployed urban black teenagers, and shack dwellers in Appalachia may enthusiastically prefer a meaningful wage, decent housing, and regular food over an abstract guarantee of free speech, free association, free mobility, and free enterprise. One can argue that these liberty values are primarily middle class values that are fundamental only to that class. "Authorities of either the right or left argue that the right to a job, security from criminal violence, and a more equal distribution of wealth are far more 'fundamental' values of the working class."²⁶ There are preferences in our society, and all judges must recognize this.²⁷

For our purposes, I am limiting theories of the philosophers to the uses to which a legal institution has been or may be put and not to the type of institutions they advocate. I am, therefore, not so much interested in descriptive questions about law as I am about normative questions; about how judges assess laws and legal systems in terms of their purposes and how one can evaluate the performance of judges. The inquiry involves not only metaphysics, or the study of the nature of things, but also the philosophy of language. Additionally, this study depends on the recognition that legal philosophies develop and evolve from judicial resolution of real disputes involving concrete facts.²⁸ Yet though facts be uncontroverted, as we have seen in many constitutional law cases emanating from the federal courts, idiosyncratic notions of ethics run rampant in the process. Each judge is an observer, himself a part of the cosmos he observes, and he has a particular station in it. The functions of the judge's mind and emotions create private perspectives and feelings of wonder, adventure, curiosity, and ultimately,

²⁵*Id.* at 9.

²⁶R. NEELY, *HOW COURTS GOVERN AMERICA* 98 (1981).

²⁷"To the extent, therefore, that courts restrain government involvement with the economy in consonance with 'liberal' middle class values, courts merely force their own values on society. The only answer to this is that the pursuit of middle class values furthers economic development, security, and wealth equality." *Id.*

²⁸Santayana says that a philosopher cannot wish to be deceived: "His philosophy is a declaration of policy in the presence of facts; and therefore his first care must be to ascertain and heartily to acknowledge all such facts as are relevant to his action or sentiment—not less, and not necessarily more." G. SANTAYANA, *REALMS OF BEING* xi (1972).

psychic satisfaction. We all have our minimum beliefs and radical pre-suppositions. All these go into the selection, if not the creation, of the first principle upon which we base our result. Some judges take as first principles nothing more than their accidental prejudices. On this, in constitutional law at least, hangs the distribution of access and power among various groups and institutions. These first principles are what the law of the Constitution is about. "They change over time and develop, and become entrenched as they gather common assent. Beyond them lies policy, and there lie our differences."²⁹

Starting points in legal philosophy as in general philosophy are the universals, first principles of some kind, legal or moral.³⁰ Critical, however, must be the understanding that although a reasoning process is always present, indeed, highly refined, satisfaction with the result is always dependent upon congeniality with the initial proposition of the analysis. The inference proceeds from one "ought to be" to another. In this respect then, legal philosophy is identical with ethical philosophy. We cannot discover an absolute ethical truth, and probably not an absolute legal truth. The closest we can come is where a particular "settled" legal precept forms the initial proposition. Where the analysis proceeds from abstract first principles and not hefty, hearty precedent, less concordance in the result can be expected.

John Hart Ely emphasized that lawyers and judges cannot be the best persons imaginable to tell good moral philosophy from bad. Clergy, novelists, maybe historians, to say nothing of professional moral philosophers, seem more sensible for the job.³¹ I am reminded that some decades past, it was suggested that columnist Walter Lippmann, although not a lawyer, was a fine choice for the Supreme Court. From all this, we can safely conclude that legal philosophy can be perceived as a branch of a subdivision of general philosophy. We may conclude that its study is more practical than theoretical, and that it constitutes a study of general first principles, as distinguished from specific and secondary precepts.

C. *First Principles*

I have suggested elsewhere that the supereminent first principles in the law are five in number: creating and protecting property interests;

²⁹A. BICKEL, *supra* note 9, at 142.

³⁰General philosophy is the study of first principles because such principles do have the quality of universality, and are related to being, knowledge, and operation. Hence, it is generally agreed that philosophy is divided into the theoretical and the practical. Theoretical philosophy covers the first principles of being and knowledge, and, according to Professor Giorgio Del Vecchio, former rector of the University of Rome, it "is subdivided, in its turn, into the following branches: Ontology or Metaphysics, which includes also Philosophy of Religion and Philosophy of History; Gnosiology or Theory of Knowledge, Logic, Psychology and Esthetics. Practical Philosophy studies the first principles of operation, and is divided into Moral Philosophy and Philosophy of Law." G. DEL VECCHIO, *PHILOSOPHY OF LAW* 1 (Martin trans. 1953).

³¹Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 34 (1978).

creating and protecting liberty interests; fulfilling promises; redressing losses caused by breach or fault; and punishing those who wrong the public.³² Because of the nature of federal court cases, the decisions that attract attention and generate comment implicate first principle liberty interests: political liberty, or the right to vote and seek public office; freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold property; and freedom from arbitrary arrest and seizure. Yet the day-by-day work of the federal courts implicates all five supereminent first principles, not in the atmosphere of divided opinions or judicial creativity, but in what Professor Jaffe has described as "the disinterested application of known law."³³ I think I am safe in suggesting that ninety percent of federal court cases come within this category.³⁴

Because these first principles have been common to all legal systems and because they focus on universal legal or moral concepts rather than particulars, we can say that the "big five" form the basis of legal philosophy. They are the fiber and sinew of the theory of law, and we must agree with Holmes that "[t]heory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house."³⁵ Accordingly, this requires that we concentrate not on particular norms of a social order, but on those that are general and common. Legal philosophy possesses a phenomenological and historical character, a kind of juridical history of mankind. Yet very much implicated in legal philosophy is the tension between the empirical reality and the quest for what we consider an ideal truth. Each judge possesses this feeling of and for justice, a very human inclination to seek out and evaluate what the law ought to be in order to attain our personal ideal. Yet this inclination is most subjective and fraught with deontological overtones. Therefore, we can say that legal philosophy acts as a mediator between synthesizing history and speculating about an ideal.

I have dwelt on the theory of legal philosophy at length because what I propose to discuss in the musings that follow are certain concepts that may be different, one to the other, yet they are related to legal philosophy and to each other. I will discuss federal judges not from the standpoint of a label or nickname, but, as stated above, from the standpoint of legal philosophy, jurisprudence, and jurisprudential temperament.

³²Aldisert, *The House of the Law*, 19 LOY. L.A.L. REV. 755, 765 (1986).

³³L. JAFFE, ENGLISH AND AMERICAN JUDGES AS LAWMAKERS 13 (1969).

³⁴It is an educated guess, but other judges and commentators seem to agree. See, e.g., B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 164-66 (1921); Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 YALE L.J. 218, 222-23 (1961); Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 803 n.16 (1961); Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3 (1966).

³⁵O.W. HOLMES, COLLECTED LEGAL PAPERS 200 (1921).

D. Jurisprudence

I perceive jurisprudence as a concept that is separate and apart from legal philosophy. The principles of legal philosophy are the abstract moral and legal principles, or doctrines or conceptions, that I have called first or supereminent principles. Standing by themselves, first principles do not carry the horsepower of legal rules. They do not describe a detailed legal consequence of a detailed set of facts. I perceive jurisprudence as something else, best described as a body of law that has formal features. It is a system of rules, promulgated by those with power and authority, backed by sanctions, and regulating public behavior. In choosing the term "jurisprudence," I am probably influenced by the expression currently in use in France to describe case law—*la jurisprudence*. Although case law in the French civil law tradition does not have the strong bite of precedent present in the common law countries, the name given to French case law nevertheless expresses at least part of what I comprehend. My meaning goes much further. I use jurisprudence to describe a system of obligatory norms, both substantive and procedural, that shape and regulate the life of a people in a given state (and here I use the term, state, in both the international and American sense). Any valid legal rule is a norm if it is considered a command in the John Austin sense.³⁶ Yet this binding quality may also spring from the "will" of parties to a transaction as well as from a legislator or it may emerge from the customs of a people or from a general belief that a norm is a rule expressing the notion that somebody ought to act in a certain way.³⁷

A given jurisprudence may be in effect for a given people at a given period. For example, when we commonly refer to ancient Roman law, West German law, Italian law, British law, Pennsylvania law, or federal law, we are referring to the jurisprudence of a particular system. Moreover, this jurisprudence takes the form of a body of legal precepts more or less defined, the element to which Jeremy Bentham referred when he said that law was an aggregate of legal precepts.³⁸ I suppose we may call jurisprudence the by-laws of a given society or rules that govern a given social order. Jurisprudence is law as it is, not as it ought to be. It is more properly a juridical science than a philosophy.

I find it necessary to distinguish between legal philosophy and jurisprudence. Although these are two important elements that go into the make-up of a judge's personality, this distinction is seldom made today by those who evaluate judges and judging. Yet there are grey areas where the line of demarcation between the two concepts is evanescent, if not nonexistent. Sometimes, when we think we are addressing sub-

³⁶"Every law or rule . . . is a command. Or, rather, laws or rules, properly so called, are a species of command." J. AUSTIN, LECTURES ON JURISPRUDENCE 88 (5th ed. 1885).

³⁷See H. KELSEN, GENERAL THEORY OF LAW AND STATE 30-37 (1945).

³⁸J. BENTHAM, *supra* note 19, at 324.

stantive law, it may be more philosophy than jurisprudence, or maybe a little of both. The concepts are not mutually exclusive. Take, for example, two dimensions of law articulated by Roscoe Pound. In addition to being a legal precept in the aggregate sense, law may be considered as "a body of traditional ideas as to how legal precepts should be interpreted and applied and causes decided, and a traditional technique of developing and applying legal precepts whereby these precepts are eked out, extended, restricted, and adapted to the exigencies of administration of justice."³⁹ Moreover, law may be considered as "a body of philosophical, political, and ethical ideas as to the end of law, and as to what legal precepts should be in view thereof."⁴⁰

If a judge is truly following "a body of traditional ideas," he is probably observing the law as it "is" and not as it "ought to be." If we talk about law as it should be, we are not dealing with juridical science, or what we have been calling jurisprudence. Instead, we have entered the world of philosophical generalities. Immanuel Kant suggested that the distinction existed in two simple Latin words. When we ask *quid jus?* we are seeking some general principle of philosophy to help us decide what the law ought to be. When we ask *quid juris?* we are seeking what already has been established as part of the jurisprudence.⁴¹ From this I think we can say that when we seek that which *must* or *ought to be* in the law, in contrast to that which *is*, we are in the realm of legal philosophy. As I said before, this can be an extremely subjective exercise with deontological overtones. I think we can safely say that when a judge resorts to legal philosophy for assistance, he or she looks at law in its logical universality, seeks its origins, notes the general characteristics of its historical development, and tests it according to very personal ideals of justice, personal ideals that must be drawn from pure reason in order to avoid idiosyncratic arbitrariness.⁴²

But unfortunately the line between what the law *is* and what it *ought to be* is not always a bright one. One legal precept, pushed to the limit of its logic, may point to one result; another precept, followed with like logic, may point with equal certainty to another result. For example, assume the presence of two contradictory legal precepts and that a choice must be made between the two. Where choice of two competing precepts is involved, and often it is, are we faced with a case of what the law *is* or what it *ought to be*? Is the answer found in the jurisprudence, or is a resort to general philosophical principles necessary? Or take the questions posed by Cardozo:

³⁹Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 645 (1923).

⁴⁰*Id.*

⁴¹G. DEL VECCHIO, *supra* note 30, at 2. See I. KANT, *THE PHILOSOPHY OF LAW* 43-46 (Kelley ed. 1974) (Hastie trans. 1887) (2d ed. 1798).

⁴²Ahrens lumped the philosophy of law with natural law stating that it "sets forth the first principles of Law, conceived by reason and founded upon the nature of man considered in itself and in its relationship with the universal order of things." *Quoted in* G. DEL VECCHIO, *supra* note 30, at 4 n.2.

If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?⁴³

E. Jurisprudential Temperament

It is here where that quality which I call jurisprudential temperament, or the judge's intuition, comes into play.⁴⁴ This temperament invariably influences the decision. It inclines the decision one way or another. It is a major determinant of whether the case is controlled by precedent or settled law. That is to say, this temperament determines whether the result is found in the jurisprudence, or whether the result requires a choice between two competing precepts, also in the jurisprudence, or whether the case requires movement to square one—recourse to first principles.⁴⁵ In the federal courts, especially in constitutional law spinoffs in actions brought under 42 U.S.C. § 1983, the judge's view of the role of the court is all-important. There is probably more subjectivity brought into play in these cases, more activity on the intuition scale, than in any other aspect of the law. Much of this problem can be laid at the door of the Supreme Court because it has served up a mishmash that furnishes no identifiable criteria as to what are garden variety common law torts dressed in the tinsel and glitter of fourteenth amendment deprivations and what are truly important and, to use a favorite word,

⁴³B. CARDOZO, *supra* note 34, at 1.

⁴⁴Jurisprudential temperament is not to be confused with the more familiar judicial temperament, the lawyer's evaluation of the judge's demeanor in open court. The lawyer's universal perception of the judge with ideal judicial temperament is the one described by West Virginia Justice Richard Neely: "colorless, odorless, and tasteless." R. NEELY, *supra* note 26, at 213. It is a judge who is always patient and courteous, who never interrupts a lawyer, never asks a question, never raises his voice, never frowns, and always smiles. Under these criteria, Oliver Wendell Holmes, Learned Hand, and Roger J. Traynor would have passed into oblivion. See Aldisert, *What Makes a Good Appellate Judge*, JUDGES J., Spring 1983, at 14 (appellate judges should strive to attain the qualities of: fairness, justness, impartiality; devotion and decisiveness; clear thought and expression; professional literacy; institutional fidelity; and political responsibility).

⁴⁵What Judge Walter V. Schaefer said in a related context closely approximates the judge's intuition thermometer, or what I am describing as jurisprudential temperament:

[M]ost depends upon the judge's unspoken notion as to the function of his court. If he views the role of the court as a passive one, he will be willing to delegate the responsibility for change, and he will not greatly care whether the delegated authority is exercised or not. If he views the court as an instrument of society designed to reflect in its decisions the morality of the community, he will be more likely to look precedent in the teeth and to measure it against the ideals and the aspirations of his time.

Schaefer, *supra* note 34, at 23.

“fundamental” rights. To federal circuit and district judges, this may be what Winston Churchill is reported to have said of a pudding someone served him: it seems to lack a theme.⁴⁶

Yet I hasten to add that federal court decisionmaking is not subjectivity run rampant. In terms of numbers, quite the contrary is true. As I indicated before, most tasks, perhaps eighty to ninety percent, involve a kind of mechanical process: the law and its application alike are clear; or the law is clear and the sole question is its application to the facts.⁴⁷ The results in these cases are often predetermined, some, from the instant the complaint is filed. But where the result is not predetermined and the law is not clear, the courts are faced with what Hart called the “penumbral” cases, where the language of the legislation or the Constitution is intentionally general.⁴⁸ I will address statutory construction in detail later,⁴⁹ but for now we must recognize that some statutory language is inevitably vague because the legislator who can anticipate and decide all the particular cases that will fall under a given statute has yet to be born.

Whether judges must, in certain cases, resort to a penumbral area of the law reflects a value judgment and is indicative of the judge’s jurisprudential temperament. Some judges have lower thresholds than others, and are more inclined to find solace in shades and fringes rather than the black letter law. But when they so function, it means that they have exhausted the guidance that hefty, hearty precedents can give and they feel that they must turn to other resources. These resources are found in the body of first or supereminent principles, legal or moral, that form the body of legal philosophy.⁵⁰ Dworkin suggested that when this occurs, the decision depends “on the judge’s own preferences among a sea of respectable extralegal standards, any one in principle eligible, because if that were the case we could not say that any rules were binding.”⁵¹ In this respect, the nature of the temperament may be reflected by the particular choice of moral values offered by diverse philosophers. Those whom we may call the naturalists will claim that law is best explained by reference to natural moral principles, principles inherent in the notion of an ideal society and the moral potentiality of persons. Yet Austinian positivists will claim that law is best understood formally as a system of orders, commands, or rules enforced by power. Moreover,

⁴⁶Quoted in Fried, *Correspondence: Author’s Reply*, 86 YALE L.J. 573, 584 (1977). A dimension of the jurisprudential temperament encountered in our judges can be illustrated by a playwright’s attribution to Saint Thomas More: “The law, Roper, the law. I know what’s legal, not what’s right. . . . I’m not God. The currents and eddies of right and wrong, which you find such plain-sailing, I can’t navigate, I’m no voyager.” R. BOLT, *A MAN FOR ALL SEASONS* (1966).

⁴⁷See *supra* notes 33-34 and accompanying text.

⁴⁸H.L.A. HART, *THE CONCEPT OF LAW* 121-22 (1961).

⁴⁹See *infra* notes 204-65 and accompanying text.

⁵⁰See *supra* notes 32-43 and accompanying text.

⁵¹R. DWORKIN, *supra* note 21, at 51.

although consistency is required of a legal system, that is to say, stated reasons in the cases must be consistent with legal or moral principles, the collection of private moral decisions by judges need not necessarily be consistent. The judge may pick and choose in various cases among the various philosophies expressed by our writers and judges, one time following a rights theorist, another time, a garden variety Benthamite.

But to understand jurisprudential temperament is to recognize that the judge's initial reaction as to whether a case is controlled by precedent (or by unambiguous statutory language) or comes within what Hart called the penumbral area is itself a gauge of that temperament.⁵² As I said before, we judges have different thresholds, or as Emerson said, "We boil at different degrees."⁵³ What makes a case controversial or difficult at times is precisely this difference. It makes the difference whether a utilitarian weighing of material benefits is preempted by a right. Dworkin offers some advice here. A useful definition of a hard case is one in which existing case law and statutes, the presence of precedents and other immediately relevant rules of decision, tend to generate or fit a result that offends the judge's intuitions about benefit and harm.⁵⁴ These are the intuitions that constitute his temperament. Yet these reactions should not be mechanical, as the label-tossers of "liberal" and "conservative" would have us believe. Neither, however, should they be unpredictable. Our legal system is both a system and a history of reasons; reasons that judges have given for past determinations and reasons that embody many conceptions of human nature. The judge's matured decision must be informed by this history. His own determination of benefit and harm will be informed by consulting the justifications offered by other judges in other relevant opinions. Dworkin described this task as an ideal, and stated that it demands a judicial Hercules.⁵⁵

But alas, we are not all Hercules. Judges are merely human beings. The inflow from the cumulative experience of the judiciary mixes with what is already in the judge's mind. What is already there is an accumulation of personal experience including tendencies, prejudices, and maybe biases. I don't mean conscious biases, but the unconscious ones that any person may have and which the judge cannot eradicate because he does not know they are there. One of these may be a bias in favor of the justice or equity of the particular case and against any precedent

⁵²Lord Denning, a British cousin, tells us exactly where his temperament stands on the gauge:

What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which is not done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both.

Packer v. Packer [1953] All E.R. 127, 129.

⁵³R.W. EMERSON, SOCIETY AND SOLITUDE 92 (1870).

⁵⁴See R. DWORKIN, *supra* note 21, at 89-90.

⁵⁵*Id.* at 125-30.

or law that seems to deny it. This is an example of temperament. When such a feeling dominates, the judge's mental notes may emphasize those facts that he deems to be significant; the insignificant, being omitted, will disappear from his memory. The facts will be molded to fit the justice of the case, what Lord Devlin calls "the *aequum et bonum*,"⁵⁶ and the law will be stretched. Yet another judge may possess the same intensity of justice for the case, but will refuse to stretch the law, and instead state, "We are constrained to hold" In these two cases, the feelings of justice are the same. But disparate jurisprudential temperaments command different results.

Another factor of temperament to be considered is the treadmill upon which United States circuit judges run these days. On my court, each judge was charged with over 300 fully-briefed cases to decide on the merits in fiscal year 1985. In addition, a like number of petitions for rehearing and a like number of procedural motions march into chambers at a grueling one-a-day rate. The judge must possess highly refined administrative talents simply to keep current, let alone to allow time for research and reflection. (Most do have sufficient administrative talents, but some do not and indeed are constantly harried.) We exhibit a wry smile when we read such statements as one emanating from Alexander Bickel: "Judges have, or should have, the *leisure*, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government."⁵⁷

I have emphasized the complexities that abide within concepts of legal philosophy, jurisprudence, and jurisprudential temperament only to illustrate the sophistication of our subject matter. Without purporting to identify certain characteristics of the federal judiciary in order of importance, I start with a matter that has occupied much attention in the press. William French Smith, the first Attorney General in the Ronald Reagan cabinet, made the statement that the administration did not intend to appoint as federal judges those who believed in judicial law-making.⁵⁸ He was not alone in expressing such sentiments, for we often hear that judges are not to make law, but must only interpret it.

II. THE JUDGE AS A LAWMAKER

The subject of judicial lawmaking, therefore, deserves a full treatment. It is relevant when a judge crosses his threshold of settled law or plain meaning in terms of the ongoing debate on the proper judicial exercise of the lawmaking role. Perhaps Richard Nixon brought this question to the forefront of public debate with his stated desire to appoint "strict constructionists" to the federal bench. The discussion, however, of the judge's role as a lawmaker is not new among legal

⁵⁶P. DEVLIN, *THE JUDGE* 84-116 (1974).

⁵⁷A. BICKEL, *THE LEAST DANGEROUS BRANCH* 25-26 (1962) (emphasis added).

⁵⁸Remarks before the Federal Legal Council in Reston, Va., on Oct. 29, 1981, reprinted in *N.Y. Times*, Oct. 30, 1981, at 22, col. 1.

scholars and greatly antedates the recent tempest. For example, John Chipman Gray often quoted Bishop Hoadly's 1717 statement: "Nay, whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is he who is truly the *Law-giver* to all intents and purposes, and not the person who first wrote or spoke them."⁵⁹ Also, latter-day recognitions appear to be far removed from Francis Bacon's admonition: "Judges ought to remember that their office is *jus dicere*, and not *jus dare*, to interpret law, and not to make law, or give law."⁶⁰

A careful inquiry into how a given judge perceives his role as a lawmaker will provide greater insight into his jurisprudential temperament than a resort to adjectival labels of "activist" or "strict constructionist." Jurisprudential temperament is always more important than the more familiar characterization of judicial temperament.⁶¹ A judge's willingness to indulge in judicial lawmaking may be said to vary inversely with a psychology that reflects a sense of limitation and a sparse inclination to act originally or creatively. Similarly, a judge's willingness to rely strictly on precedent also may be said to vary inversely with his acceptance of Professor Harry W. Jones' philosophy that a good rule is measured by the extent to which it contributes to "the establishment and preservation of a social environment in which the quality of human life can be spirited, improving and unimpaired."⁶²

The arguments against judicial lawmaking are formidable. Certain commentators and sections of society argue that a lawmaking court crosses the Rubicon that divides judicial and legislative powers, that when the courts do this they are "sneaking in disguises" as they spin off impressive by-products of ad hoc decisions. Lord Devlin has said that "[p]addling across the Rubicon by individuals in disguise who will be sent back if they proclaim themselves is very different from the bridging of a river by an army in uniforms and with bands playing."⁶³

A. *Theories of Judicial Lawmaking*

In order to lay the groundwork for this discussion, I must first establish the three theories of judicial lawmaking that can be identified:

1. Judges do not create law; they do not "make" law, they merely discover and apply that which has always existed.
2. Judges can and do make law on subjects not covered by

⁵⁹J.C. GRAY, *THE NATURE AND SOURCES OF THE LAW* 120 (1909). Benjamin Hoadly was the notorious Bishop of Bangor whose sermon preached before King George I of England on March 31, 1717, is said to have precipitated the heated theological dispute known as the Bangorian controversy. The above quote, taken from the text of "My Kingdom is Not in This World," shows that the gentlemen of the short robe have sometimes grasped fundamental legal principles better than many lawyers.

⁶⁰F. BACON, *Of Judicature*, in *ESSAYS CIVIL AND MORAL* 58 (Murphy ed. 1876) (1625).

⁶¹See *supra* note 44.

⁶²Jones, *supra* note 22, at 1030.

⁶³P. DEVLIN, *supra* note 56, at 12.

previous decisions, but they cannot unmake old law; they cannot even change an existing rule of judge-made law.

3. Judges can and do make new law, can and do unmake old law, i.e., law previously laid down by themselves or by their judicial predecessors.

The first theory has its roots deep in the history of the common law. Writing in the seventeenth century, Sir William Hale said that decisions of courts cannot

make a law properly so called, for that only the King and Parliament can do; yet they have a great weight and authority in expounding, declaring, and publishing what the law of this Kingdom is, especially when such decisions hold a constancy and congruity with resolutions and decisions of former times, and though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons, as such whatsoever.⁶⁴

Later, Blackstone taught that decisions of courts are evidence of what is common law.⁶⁵ And as late as 1892, Lord Esher said: "There is in fact no such thing as judge-made law, for the judges do not make the law though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable."⁶⁶

These English views found acceptability in the United States as late as the mid-nineteenth century when, in the 1842 case, *Swift v. Tyson*, the Supreme Court stated: "In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws."⁶⁷ Such views, however, were not without substantial critics. For example, Sir George Jessel had remarked:

It must not be forgotten that the rules of courts of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the chancellors who invented them."⁶⁸

Although Blackstone, with his profound influence in Great Britain and early America, proclaimed that judges did not create law but simply discovered something that was already there, or in Holmes' striking

⁶⁴W. HALE, HISTORY OF THE COMMON LAW (1713), quoted in R. CROSS, PRECEDENT IN ENGLISH LAW 26 (3d ed. 1977).

⁶⁵1 W. BLACKSTONE, COMMENTARIES 88-89 (1796).

⁶⁶*Willis v. Baddeley*, [1892] 2 Q.B. 324, 326.

⁶⁷*Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842).

⁶⁸*In re Hallett's Estate*, 13 Ch. D. 696, 710 (1880).

phrase, that was "a brooding omnipresence in the sky,"⁶⁹ it would have taken some persuasion to convince an active English practitioner that judge-made law did not control. He would not begin to think that precepts related to offer and acceptance, liability through fault, contributory negligence, proximate cause, foreseeability, and the like were not the law because they were created by the courts rather than Parliament. Indeed, Blackstone's view would allow the argument that a judgment of the House of Lords was not law because it conflicted with settled principles of common law that were always hanging out there, simply waiting to be discovered. Yet the theory is not without current supporters. We have been told that to claim that courts make law is to assert that courts habitually act unconstitutionally.⁷⁰

But the reality is that law always has been, is, and, according to Jerome Frank, always will be

largely vague and variable. And how could this well be otherwise? The law deals with human relations in their most complicated aspects. The whole confused, shifting helter-skelter of life parades before it—more confused than ever, in our kaleidoscopic age.

Even in a relatively static society, men have never been able to construct a comprehensive, eternized set of rules anticipating all possible legal disputes and settling them in advance. Even in such a social order no one could foresee all the future permutations and combinations of events; situations are bound to occur which were never contemplated when the original rules were made. How much less is such a frozen legal system possible in modern times.⁷¹

Notwithstanding impressions of some modern critics, judicial intervention in the political process of the legislative and executive branches of American government is not a recent phenomenon. The courts' role as a lawmaker boasts a very ancient vintage. Within fourteen years of the Constitution's adoption, a new dimension was added to the judiciary's traditional role of common law dispute settler. Resolving a conflict between a private citizen, one William Marbury, and James Madison, the Secretary of State, the Supreme Court set a precedential stage for a new judicial function—that of interpreter of a written constitution.⁷² The Court allocated to itself a role that still serves, in some quarters, as a source of criticism of the American judicial function today. The Court declared an act of a correlative branch of government unconstitutional, i.e., null and void.⁷³ The Court deigned to tell the executive branch what it could and could not do under the Constitution. Thus,

⁶⁹*Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes J., dissenting).

⁷⁰Zane, *German Legal Philosophy*, 16 MICH. L. REV. 288, 337-38 (1918).

⁷¹J. FRANK, *LAW AND THE MODERN MIND* 6 (1949).

⁷²*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁷³*Id.*

early in our tradition, the judicial branch declared itself the overseer of the executive and legislative branches. *Marbury v. Madison* marked the departure from the traditional dispute-settling role of the courts and the arrival of a new function, that of interpreting a written constitution. Said Chief Justice Marshall: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."⁷⁴ We have seen the Supreme Court, and other courts, develop the interpretive function during the years since *Marbury v. Madison*.⁷⁵ Thus, by 1972, in *Illinois v. City of Milwaukee*,⁷⁶ the Supreme Court emphasized that in the context of state laws, court decisions were laws; similarly, federal common law decisions were laws just as surely as those of statutory origin.⁷⁷

It bears repetition, however, that for ninety percent of his time, the judge is submerged in the disinterested application of known law and that his inclination or disinclination to creativity does not surface. (Nor do the labels "liberal" or "conservative" appear.) In these cases, all that seems to be desired are the virtues of balance, patience, courtesy, and detachment. Lord Devlin has noted:

[L]aw is the gatekeeper of the status quo. There is always a host of new ideas galloping around the outskirts of society's thought. All of them seek admission but each must first win its spurs; the law at first resists, but will submit to a conquerer and become his servant.⁷⁸

Notwithstanding the occasional hue and cry that appears after certain cases, there is generally little public interest in the common law as a whole. When the public becomes interested in an issue, it calls upon the legislature, and leaves the rest to plodding judges.

Examples of judicial lawmaking in traditional "lawyer's law" may be found in abundance. Some are firmly grounded on considerations of public policy. Others embody judicial pronouncements relying on the Cardozo methods of philosophy, evolution, or tradition. To identify but a few: in *Moses v. MacPhellan*,⁷⁹ a case of first impression in 1760,

⁷⁴*Id.* at 177. Thirteen years later the Court extended this constitutional supervision to decisions of state supreme courts. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

⁷⁵Professor Robert A. Leflar relates: "We know that courts make law, in fact, that they have made most of the law that we have. This is the way the common law has always been made" Leflar, *Sources of Judge-Made Law*, 24 OKLA. L. REV. 319, 323-24 (1971). Sir Rupert Cross, quoting Mellish, L.S., suggests that it has not been otherwise in England: "The whole of the rules of equity and nine-tenths of the common law have in fact been made by judges." R. CROSS, *supra* note 64, at 28 (quoting *Allen v. Jackson*, 1 Ch. D. 399, 405 (1875)).

⁷⁶406 U.S. 91 (1972).

⁷⁷*Id.* at 99-100.

⁷⁸P. DEVLIN, *supra* note 56, at 1.

⁷⁹2 Burr. 1005, 96 Eng. Rep. 120 (1760).

the Court of King's Bench allowed plaintiff to recover money obtained by the defendant in a deceitful manner; in 1905, the Supreme Court of Georgia permitted a new action for invasion of privacy,⁸⁰ although in 1902 New York had refused to do so;⁸¹ the Supreme Court has created a wrongful death action for maritime law;⁸² and Massachusetts has announced a common law wrongful death action in tort.⁸³ In 1973, Florida abolished the contributory negligence rule and replaced it with comparative negligence;⁸⁴ California followed suit in 1975.⁸⁵ The "Fall of the Citadel"⁸⁶ in products liability cases and the abrogation of hoary immunity rules⁸⁷ are likewise the products of judicial lawmaking. In 1979, the Supreme Court reaffirmed its 1975 declaration that "[a]dmiralty law is judge-made law to a great extent."⁸⁸

Ample jurisprudential authority supports the lawmaking function of courts that operate in the common law tradition. There appear to be no limits on changing prior judge-made law because, with Cardozo, we have accepted the proposition that

[a] rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the *mores* of the day, may be abrogated by the courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience. . . . This is not usurpation. It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past.⁸⁹

This is a recognition that "the common law, in its eternal youth, grows to meet the demands of society."⁹⁰ At the appellate level, this growth of the law is reflected by overruling a precedent, fashioning a new rule, or extending a new precept to reach a novel issue. All of this is now widely accepted judicial lawmaking.

⁸⁰*Pasevich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

⁸¹*Robertson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).

⁸²*Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

⁸³*Gaudette v. Webb*, 362 Mass. 60, 284 N.E.2d 222 (1972).

⁸⁴*Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

⁸⁵*Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

⁸⁶*See Prosser, The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

⁸⁷*See, e.g., Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (governmental); *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960) (governmental); *Flagiello v. Pennsylvania Hosp.*, 417 Pa. 486, 208 A.2d 193 (1965) (charitable).

⁸⁸*Edmunds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 259 (1979) (citing *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975)); *see also Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963).

⁸⁹B. CARDOZO, *THE GROWTH OF THE LAW* 136-37 (1924).

⁹⁰*Warren & Brandeis, The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

Therefore, the stark reality is that the modern American experience recognizes that the judge can, and indeed must, make law as well as apply it. Were it otherwise, there would be little room for the employment of public policy as a tool in judicial decisionmaking. Yet, there are limits. In 1917, Holmes counseled,

I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here *en bloc*.⁹¹

Whether the courts do or do not make law in the United States was essentially of interest only to legal philosophers until recently. So long as the courts dealt with lawyer's law, it seemed to have been fair game for the courts to spin and weave the law on a case-by-case basis. Lawyers understood this because they did not subscribe to "the lay attitude that the law is definite and certain. That is, the unchanging law is there to be found and followed if a jurist faithful to his oath will only look for it."⁹² It was only when the courts gave new life to the fourteenth amendment and began to move from private law to public law that the hue and cry became strident for a resurrection of junior high school concepts that seem to teach that the legislature makes law, the executive administers it, and the court simply interprets it. Starting in the 1960's, when the Supreme Court began by the process of selective incorporation of the Bill of Rights into the fourteenth amendment to hold the states to higher standards of responsibility to their inhabitants, we began to witness and hear heated public discussions on the jurisprudential temperaments of our judges. We began to chant the litany of the now familiar labels—activists, strict constructionists, liberals, conservatives, and what have you.

B. *New Premises*

Concluding that judges create, as well as discover, law does not really answer the major questions of the judge's role in the judicial process. Nor, I suggest, does it eliminate pigeonholing, or label-affixing, or name-calling. We have to inquire as to what limits, if any, should be imposed on judicial lawmaking. Clearly the venerable formulae of Holmes, interstitial lawmaking, and Cardozo, gap-filling, are not viable today, and really were never quite accurate. Cardozo's decision in

⁹¹*Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

⁹²Day, *Why Judges Must Make Law*, 26 CASE W. RES. L. REV. 563, 564 (1976).

MacPherson v. Buick Motor Co.,⁹³ went far beyond mere gap-filling, and the basic theme of Holmes' *Path of the Law*⁹⁴ was more molar than molecular. When a court abolishes the doctrine of contributory negligence in favor of comparative negligence, or adopts strict products liability and jettisons negligence precepts, as did forty jurisdictions between 1966 and 1979, or abolishes governmental immunity or revolutionizes choice of law doctrine, *lex loci contractus* and *lex loci delictus*, as virtually all our jurisdictions have done since 1954,⁹⁵ we can scarcely pontificate that there are clear limitations to judicial lawmaking today. Rather, I believe we should proceed candidly along a new set of premises. These should include the following:

1. The legislature is the primary source of lawmaking.
2. Where the legislature has not affirmatively acted, the only bounds of judicial lawmaking are limitations imposed by the Constitution.
3. Because of the needs of an organized community, it is desirable to impose restrictions on the *process*, but not on the *scope* of judicial decisions.

The first premise is important. A substantial body of thinking argues that in a representative democracy, lawmaking authority should not extend to judges but should be restricted to legislators who are openly responsible to the electorate. It is hard to quarrel with the proposition that those affected by lawmaking should have the right to endorse or reject the voting record of the lawmaker every two, four, or six years. Moreover, popular control over judge-made law is virtually nonexistent because the subtleties of judicial lawmaking are not easily recognizable by the lay public. Often decisions made in the legal world, revolutionary in form, are hardly noticed outside of it.⁹⁶ Even if the reality of judicial lawmaking were comprehended, when judges are elected, their terms are longer than those of legislators. This diminishes the opportunity for timely and effective action. Although most judges are still elected, some states, New Jersey, for example, mandate lifetime appointments for their judges.⁹⁷ A goodly number of state judges are eventually removed from the political processes by the various retention systems patterned after the Missouri plan, in which an incumbent runs on his own record on a yes or no basis, rather than against a specific opponent.⁹⁸

⁹³217 N.Y. 382, 111 N.E. 1050 (1916).

⁹⁴Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

⁹⁵The landmark case is probably *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954).

⁹⁶E.g., the American cases adopting RESTATEMENT (SECOND) OF TORTS § 402A abolishing the necessity of primary fault in products liability cases. See also *Donaghue v. Stevenson*, [1932] A.C. 562.

⁹⁷N.J. CONST. art. 6, § 6, ¶ 3.

⁹⁸Mo. CONST. art. 5, § 25(G).

Yet another point of view is equally formidable. In an era of positive law, we can probably agree to certain basic concepts: substantive law is that which is promulgated by the sovereign; in the American democracy model the people are sovereign; and the people have delegated lawmaking power to the legislature. Accordingly, we can recognize that even within strictures of the separation of powers, judicial lawmaking is acceptable and legitimate because the courts are merely the subordinates or subjects of the sovereign legislature. What judges have originally granted, their mandate then representing the general approval of the times, can be withdrawn by the judges when they feel that general approval no longer exists. We have a special word for this. We call it "overruling" a past decision. Moreover, if legislative authority disagrees with judicial action, the state and federal legislators can overrule that action by statute.⁹⁹ As the highly pragmatic legal philosopher John Chipman Gray observed, legislative acts are paramount to all other sources of law.¹⁰⁰ Therefore, counteracting the contention that judicial lawmaking evades control by the electorate is the reality that politically responsible legislatures can usually abrogate judge-made law by statutory enactments. Recent examples of this surfaced in the area of sovereign immunity against tort claims. After the Illinois Supreme Court abolished governmental immunity in *Molitor v. Kaneland Community Unit District No. 302*¹⁰¹ in 1959, after California did the same in *Muskopf v. Corning Hospital District*,¹⁰² and after Pennsylvania abolished sovereign immunity in *Mayle v. Pennsylvania Department of Highways*¹⁰³ in 1978, each of the state legislatures passed amendatory statutes.¹⁰⁴

⁹⁹See, e.g., *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 42, 163 N.E.2d 89, 104 (1959) (Davis, J., dissenting), *cert. denied*, 362 U.S. 968 (1960); cf. W. FRIEDMANN, *LEGAL THEORY* 501-03 (5th ed. 1967). See also Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 767-72 (1965).

¹⁰⁰J.C. GRAY, *THE NATURE AND SOURCES OF THE LAW* 124 (2d ed. 1921). John Austin taught that rules judges make "derive their legal force from authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence. For, since the state may reverse the rule which he makes, and yet permits him to enforce them by the power of the political community, its sovereign will 'that his rules shall obtain as law' is clearly evinced by its conduct, though not by its express declaration." J. AUSTIN, *THE PROCESS OF JURISPRUDENCE* 28 (1932).

¹⁰¹18 Ill. 2d 11, 163 N.E.2d 89 (1959).

¹⁰²55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

¹⁰³479 Pa. 384, 388 A.2d 709 (July 14, 1978) prompting swift passage of the Pennsylvania Sovereign Immunity Act, 42 PA. CONS. STAT. § 5110 (effective September 28, 1978) (repealed 1980).

¹⁰⁴See 1963 Cal. Stat. ch. 1715 (codified at CAL. GOV'T CODE §§ 900-935 (West, 1980)); Pub. Act 77-1776, 1971 Ill. Laws 3446 (codified as amended at ILL. ANN. STAT. ch. 127, para. 801 (Smith-Hurd Supp. 1986)); 42 PA. CONS. STAT. § 5110 (1979) (repealed 1980).

There have also been constitutional amendments designed to overrule specific Supreme Court decisions. These include the enactment of the eleventh amendment to the Constitution to overrule specifically the Supreme Court's holding in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (state could be sued by a citizen of another state); the fourteenth amendment response to *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); the sixteenth to *Pollak v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); and the twenty-sixth to *Oregon v. Mitchell*, 400 U.S. 112 (1970). Nevertheless, the disastrous attempt to enact the Equal Rights Amendment in the late 1970's and early 1980's demonstrates how very difficult it is to amend the Constitution.

The other premises limit judicial lawmaking. The first is obvious, and needs no discussion—the Constitution limits both state and federal legislative and judicial lawmaking. John Marshall settled this issue many years ago.¹⁰⁵ The last premise stakes out no bounds on substance, but places an effective halter on the way things are done. I think this can be done legitimately, based on formidable legal and moral principles and traditions, and also effectively, when viewed from the pragmatic side. I propose a model that incorporates certain philosophical bases previously suggested by Ronald Dworkin,¹⁰⁶ Harry H. Wellington,¹⁰⁷ and Herbert Wechsler.¹⁰⁸ It is a model of the decisional process that strips a decision of all *obiter dictum*, and limits the holding to a narrow rule setting forth a detailed legal consequence to a detailed set of facts affecting rights of parties who have appeared before the court and have had the opportunity to vindicate or defend against the specific rights implicated in the decision.

C. Common Law Model

My model follows the common law tradition and resolves to this: legitimate judicial lawmaking knows no express bounds as long as the court operates within the limitations of the Constitution and legal precepts originally produced by judicial creativity. I do not restrict the form of the judicial decision to interstitial activity nor do I relegate the court to a gap-filling role. Clear restrictions, however, are placed on the judicial process. The judiciary is not free, as is the legislature, to decide a case solely on the basis of the good of the collective body or to advance or protect some collective goal of the community as a whole. That process of lawmaking is relegated to the legislative branch and is what I call the collective goal model of lawmaking. The judiciary, however, is free to participate fully in what I call the principled rights model so long as the following mandatory procedures are meticulously observed. First, a court may adjudicate only the rights of the individuals or groups before it who have had a full opportunity to advance or protect some individual, social, or public interest in the subject matter of the litigation. The judiciary may not accept demands that may affect individuals or groups who are not parties to the litigation and therefore are, legally speaking, innocent bystanders. The development of the common law is an incremental process, a sort of connect-the-dots exercise from which broad precepts (principles and doctrines) are eked out from narrow rules emanating from individual cases. The law develops slowly like a coral reef is formed. Lord Wright once put it in a picturesque phrase: “[T]he

¹⁰⁵*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹⁰⁶Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058-62 (1975), reprinted in R. DWORKIN, *supra* note 21, at 81, 82-86 (1977).

¹⁰⁷Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

¹⁰⁸Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

judges proceeded from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point and avoiding the dangers of the open sea"¹⁰⁹

Second, the decision must be based on recognized legal principles or upon reasoning based on some justificatory principles of morality, justice, social policy, or common sense. To this extent, the decision must meet the Wechslerian test "that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."¹¹⁰ "A decision may, in short, be wholly principled and wrong it cannot be unprincipled and right."¹¹¹

Third, any determination of public policy must be based on a concept of morality reasonably calculated to find acceptance in the social group intimately affected by the decision, or if it runs in advance of a consensus, it must meet the criteria of public policy determination, discussed hereinafter.¹¹² The decision cannot legitimately be based on moral principles or ideals held by an individual judge that are not supported by universally held moral or legal principles.

Fourth, the decision must be relatively neutral in the sense that it does not impose special burdens or confer favors on a special interest group unless there are special principled reasons for doing so. Finally, as I shall also discuss later,¹¹³ the judge's "reasoned elaboration" must be fully set out in an opinion. The public is entitled to know not only "the what" of a decision, but also "the why."

To the extent that these restrictions are meticulously observed, the judge can be a law-giver in the true Bishop Hoadly sense.¹¹⁴ Accordingly,

¹⁰⁹Wright, *The Study of Law*, 54 LAW Q. REV. 185, 186 (1938).

¹¹⁰Wechsler, *supra* note 108, at 15.

¹¹¹Address of H. Wechsler, *Toward Neutral Principles, Revisited*, Federal Appellate Judges' Conference, Federal Judicial Center, Washington, D.C. (March 12, 1975) *reprinted in* R. ALDISERT, *THE JUDICIAL PROCESS* 543, 545 (1976).

¹¹²*See infra* notes 180-84 and accompanying text.

¹¹³*See infra* notes 185-289 and accompanying text.

¹¹⁴*See supra* note 59. However, even the true law-giver is well advised to heed the advice of Dean Erwin N. Griswold:

Though it is clear that judges do "make law," and have to do so, it remains the fact that this is, at its best, an understanding process, not an emotional one, a self-effacing process, not a means of vindicating "absolute convictions." It is a process requiring great intellectual power, an open and inquiring and resouceful mind, and often courage, especially intellectual courage, and the power to rise above oneself. Even more than intellectual acumen, it requires intellectual detachment and disinterestedness, rare qualities approached only through constant awareness of their elusiveness, and constant striving to attain them. If one regarded himself as having a special mission to fulfill, or if he were quite largely the prisoner of his absolute convictions, he would not meet the highest standards of judicial performance. When decisions are too much result-oriented, the law and the public are not well served.

Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 94 (1960). At bottom, then, what probably must keep judicial lawmaking in bounds is a sense of restraint. Judge Jack G. Day has suggested that "[a] judge consciously sensitive to his creative duty, and its limitations, is more apt to be conscious of his obligation to fulfill the duty with restraint." Day, *supra* note 92, at 593.

I have no difficulty in concluding that judicial lawmaking is a traditional aspect of American jurisprudence. Born in the English common law tradition, absorbed in both the colonial and our early state systems, nourished by the original landmark cases interpreting the Constitution, and freely developed through the years, it is a legitimate function of the courts. Judicial lawmaking is also the function of the courts where the judge's jurisprudential temperament is most keenly involved. Having said this, I add a most important caveat: judicial lawmaking is usually only a by-product of a decision reached in an actual case or controversy. It is a secondary process, and thus differs from laws that emanate from the legislature where the promulgation is the product, not the by-product, where it is the primary, and not the secondary, function of the lawmaking organ.

In constitutional law, however, the federal court has an even more heightened role, for here the judiciary is not a mere delegate of the sovereign legislature. Here, not the Congress, not the Executive, but the federal court is the sovereign. The awesome importance of a court of appeals panel decision on constitutional law, therefore, cannot be over-emphasized.¹¹⁵ More often than not, a decision by a majority of a three-judge panel is usually final; a decision by the Supreme Court is always so. And it is here that what I have termed jurisprudential temperament, a willingness to resort to first principles, is most vividly illuminated.

III. THE JUDGE AS A DECLARER OF PUBLIC POLICY

Recent criticism of federal judges—whether as lawmakers or as interpreters of constitutional or statutory law—has been particularly strong where judges have based decisions on considerations of public policy. Such decisions generate controversy on both political and institutional grounds. Public policy issues more readily inspire the familiar political science labels of “liberal” or “conservative;” judicial declarations of public policy thus more easily provoke criticism from a political, rather than a jurisprudential, perspective. Other critics argue from an institutional perspective, contending that articulating policies for the public interest is the task of the state and national legislatures rather than the federal judiciary. Judges who seek to advance the common good expressly through policy making are accordingly pilloried as “unrestrained” or “activist.” This controversial aspect of the judicial process demonstrates the interplay in the trichotomy of legal philosophy, jurisprudence, and jurisprudential temperament.

In light of such criticism, Roger J. Traynor has admonished us not to “be misled by the half-truth that policy is a matter for [only] the legislators to decide.”¹¹⁶ The courts are continually called upon to weigh

¹¹⁵Aldisert, *supra* note 32, at 798.

¹¹⁶Traynor, *Reasoning in a Circle of Law*, 56 VA. L. REV. 739, 749 (1970).

considerations of public policy when adding to the content of the common law, filling in statutory gaps left by an inattentive, divided, or politically sensitive legislature, and applying constitutional precepts to changing and novel circumstances. In all these aspects of the judicial process, considerations of policy may be appropriate or even decisive. David A.J. Richards emphasized the same point, noting that policy considerations underpin even the threshold doctrines of justiciability.¹¹⁷

These American authorities have rejected sentiments voiced by English judges of an earlier era: that "public policy is a very unruly horse and when once you get astride it you never know where it will carry you;"¹¹⁸ and that judges are more to be trusted as interpreters of the law than as expounders of public policy.¹¹⁹ The venerable Lord Denning has applied the modern view in his discussion of the measure of damages in a tort case:

At bottom, I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of *duty*, they do it as a matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds to the *damages* recoverable—saying that they are, or are not, too remote—they do it as a matter of policy so as to limit the liability of the defendant.¹²⁰

Judge James D. Hopkins was similarly realistic in declaring that among the several devices available as bases for decisions—such as maxims, doctrines, precedents, statutes—public policy is primary. The other grounds for a judicial decision must yield to the declaration of public policy, once that policy is ascertained.¹²¹

Although much of the controversy concerning judicial implementation of public policy is of recent vintage, the practice itself is well established in common law adjudication. As early as 1881, Holmes wrote in *The Common Law*:

¹¹⁷[T]he proper ends of adjudication surely at least sometimes include policies. For example, the many discretionary rules of standing, ripeness, mootness, and the like clearly rest in part on policies of conserving judicial resources, a social policy of maximum output from limited inputs. Even aside from the problematics of the proper weight of principle and policy in understanding these rules, many cases of adjudication on the merits clearly invoke policies, as in many cases of statutory construction. Even where there is no clear legislative intent, courts invoke policy considerations *sua sponte* in order to effectuate a sensible legislative result; the burgeoning area of federal common law is one example.

Richards, *Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GA. L. REV. 1069, 1097-98 (1977).

¹¹⁸*Richardson v. Mellish*, 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (1824) (Burrough, J.).

¹¹⁹*In re Mirams*, [1891] 1 Q.B. 594, 595.

¹²⁰*Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.*, [1973] Q.B. 27.

¹²¹*Hopkins, Public Policy and the Formation of a Rule of Law*, 37 BROOKLYN L. REV. 323, 323 (1971).

The very considerations which judges most rarely mention and always with an apology are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient to the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.¹²²

The importance of these considerations to judicial decisionmaking notwithstanding, it is well to remember that judges are far more constrained than legislators in fashioning or declaring public policy. Dean Harry H. Wellington offers the thoughtful assertion "that when a court justifies a common law (as distinguished from a statutory or constitutional) rule with a policy, it is proceeding in a fashion recognized as legitimate only if two conditions are met: The policy must be widely regarded as socially desirable and it must be relatively neutral."¹²³ This presents the obvious question as to how may, indeed, how can, a court determine whether a policy is socially desirable? Wellington recommended that in fashioning common law on public policy grounds, the court first look

to the corpus of law—decisional, enacted and constitutional—to determine whether relevant policies have received legal recognition

In determining the extent of a policy's social desirability, a court should examine such things as political platforms, and take seriously—for this purpose—campaign promises and political speeches. The media is a source of evidence and so too are public opinion polls. Books and articles in professional journals, legislative hearings and reports, and the reports of special committees and institutes are all evidence.¹²⁴

The sound requirement of neutrality extends to constitutional and statutory interpretation as well as common law adjudication. The principle of neutrality demands that judges who are intentionally shielded from the pressures of interest groups by the structure of American government should not justify their rulings by accepting the demands of one interest group at the expense of another not party to the litigation.¹²⁵ Herbert Wechsler bore the brunt of much criticism, which I think was unfounded and undeserved, for his 1959 Holmes lecture at Harvard, *Toward Neutral*

¹²²O.W. HOLMES, *THE COMMON LAW* 31-32 (Howe ed. 1963) (1881).

¹²³Wellington, *supra* note 107, at 236.

¹²⁴*Id.* at 236-37.

¹²⁵*Id.* at 238.

Principles of Constitutional Law.¹²⁶ Commenting in 1975 on the criticism, he reasserted the importance of the principle of neutrality,¹²⁷ the major components of which have recently been summarized:

Judges must decide all the issues in a case on the basis of general principles that have legal relevance; the principles must be ones the judges would be willing to apply to the other situations that they reach; and the opinion justifying the decision should contain a full statement of those principles.¹²⁸

This, I suggest, is the jurisprudential equivalent of Immanuel Kant's categorical imperative: "Act as if the maxim of your action were to become through your will a universal law of nature."¹²⁹

The essence of neutrality is the quality of evenhandedness, a recognition that whatever influence special interests may have in legislative decisionmaking, the imposition of special burdens or favors on a particular group has no place in adjudication absent special, principled reasons for doing so. Special interest decisionmaking is for the legislative branch only; statutes are the products of a series of marginal adjustments and compromises among various semi-independent groups.¹³⁰ Politics is the art of the possible while legislation is the art of accommodation. The possible is conditioned by the ballot box; accommodation can only compensate the "innocent." The judiciary is not as restrained by or susceptible to the interests of the electorate, nor does it have available to it the legislature's largesse.¹³¹ Judges as well as legislators can learn what is widely regarded as being desirable by identifying, isolating, and then weighing the same factors legislators would take into account. But because judges can eschew parochial and partisan factors, they are theoretically and actually able to make a decision on a relatively neutral basis of principles and rights.

Assuming the essential element of neutrality, we now must turn to a broader canvass of the relevant factors relating to policy declaration. How is the judge to ascertain the public interest, and the policies that

¹²⁶Wechsler, *supra* note 108.

¹²⁷The central thought is surely that the principle once formulated must be tested by the adequacy of its derivation from its sources and its implications with respect to other situations that the principle, if evenly applied, will comprehend. Unless those implications are acceptable the principle surely must be reformulated or withdrawn.

H. Wechsler, Remarks at Federal Appellate Judges' Conference, Federal Judicial Center, Washington D.C. (March 12, 1975), *reprinted in* R. ALDISERT, *THE JUDICIAL PROCESS* 543 (1976).

¹²⁸Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 990 (1978).

¹²⁹I. KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 89 (Paton trans. 1964) (1785).

¹³⁰See M. SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* 29 (1966).

¹³¹Wellington, *supra* note 107, at 241.

will advance it? Dean Eugene V. Rostow has addressed this problem as a search for the "common morality of society."¹³² Wolfgang Friedmann believed it necessary to identify the collective judgment in terms of basic norms of the community's common life. He suggested that a primary source of information would be the general state of contemporary legislative policy, but the judge should also turn to the state of organization in the society in which he lives, make note of the groupings and pulls of the major social forces of his society, be aware of society's pluralistic aspects, and recognize the state of modern science.¹³³

H.L.A. Hart also discussed the importance of ascertaining the conventional morality of an actual social group, referring to "standards of conduct which are widely shared in a particular society, and are to be contrasted with the moral principles or moral ideals which may govern an individual's life, but which he does not share with any considerable number of those with whom he lives."¹³⁴ Perhaps this is the most critical aspect of our inquiry. The judge must screen out personal bias, passion, and prejudice, and attempt always to distinguish between a personal cultivated taste and general notions of moral obligation. These standards of conduct reflect an obligation to respect rules of society. They are, in Hart's formulation, primary rules of obligation because of "the serious social pressure by which they are supported, and by the considerable sacrifice of individual interest or inclination which compliance with them involves."¹³⁵ Wellington said that the way in which one learns about the conventional morality of society "is to live in it, become sensitive to it, experience widely, read extensively, and ruminate, reflect, and analyze situations that seem to call moral obligations into play."¹³⁶

The line of inquiry proposed by Rostow, Friedman, Hart, and others is similar to that proposed by Wellington to determine what is "socially desirable" for common law adjudication.¹³⁷ Yet the attempt to base a decision on social consensus is fraught with peril and, in the interpretation of constitutional precepts, may be inappropriate.¹³⁸ A classic example

¹³²Rostow described this common morality as a blend of custom and conviction, of reason and feeling, of experience and prejudice. . . . in the life of the law, especially in a common law country, the customs, the common views, and the habitual patterns of the people's behavior properly count for much All movements of law reform seek to carry out certain social judgments as to what is fair and just in the conduct of society.

Rostow, *The Enforcement of Morals*, 1960 *CAMB. L.J.* 174, 197.

¹³³Friedmann, *Legal Philosophy and Judicial Lawmaking*, 61 *COLUM. L. REV.* 821, 843-45 (1961).

¹³⁴H.L.A. HART, *supra* note 48, at 165.

¹³⁵*Id.*

¹³⁶Wellington, *supra* note 107, at 246.

¹³⁷See *supra* notes 123-24 and accompanying text.

¹³⁸Louis Jaffe once inquired:

How does one isolate and discover a consensus on a question so abstruse as a fundamental right? The public may value a right and yet not believe it to be fundamental. The public may hold that the rights of parents are fundamental and yet have no view whether they include sending a child to a private school.

of judges mistaking the public consensus is the position perennially espoused by Justices William J. Brennan, Jr., and Thurgood Marshall in the death penalty cases. Their concurring opinions in *Furman v. Georgia*¹³⁹ argued that the death penalty was unconstitutional "cruel and unusual punishment" because it was out of step with contemporary community values.¹⁴⁰ Yet the rush of state legislatures to impose the death penalty since their 1972 statements shows a clarity of community reaction completely opposite to their statements.¹⁴¹ The judge's tendency to find society's values in his own is a constant danger. Much adjudication in the federal courts, especially in constitutional interpretations based on concepts of public policy, moral standards, and public welfare is little more than a conscious or unconscious imposition of a judge's personal values. Many of us who purport to be objective in identifying community values, and sincerely so, are actually intent on attaining immediate social ends that we conceive as personal moral imperatives.

To some extent, adherence to the principle of neutrality in judicial decisionmaking provides a check against the temptation to substitute personal for social values.¹⁴² Similarly, a consideration of those first principles of legal philosophy may place a particular issue of public concern in a broader, more principled context and may force us to recognize any inconsistencies between our intuitive moral values and the more general philosophy of law to which we may subscribe.¹⁴³

There may be a profound ambiguity in the public conscience; it may profess to entertain a traditional ideal but be reluctant to act upon it. In such a situation might we not say that the judge will be free to follow either the traditional ideal or the existing practice, depending upon the reaction of his own conscience? And in many cases will it not be true that there has been no general thinking on the issue?

Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 994 (1967).

¹³⁹*Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁴⁰*Id.* at 295-300 (Brennan, J., concurring); *id.* at 360-69 (Marshall, J., concurring).

¹⁴¹Moreover, a Gallup Poll taken in November 1985 disclosed that three out of four Americans favored the death penalty, seventeen percent opposed it, and eight percent were undecided. N.Y. Times, Nov. 28, 1985, at 20, col. 3.

¹⁴²Professor Kent Greenawalt has observed:

Serious moral choices typically involve some conflict between an action that would serve one's narrow self-interest and an action that would satisfy responsibilities toward others. The dangers of bias are extreme; either we value too highly our own interest or over-compensate and undervalue it. The discipline of imagining similar situations in which we are not involved or play a different role more nearly enables us to place appropriate values on competing considerations.

Greenawalt, *supra* note 128, at 997.

¹⁴³The search for general principles can also affect our judgment in another way. We may discover that some of our intuitive moral views are not consistent with other intuitive views or with generalized principles to which we subscribe. As we test our intuitive reactions to particular situations against our accepted principles, both may give a little, until we arrive at what John Rawls calls a "reflective equilibrium," in which our sense of right for particular issues matches our principles.

Id.

The threshold at which judges are willing to act in disregard or contravention of prevailing social norms, the extent to which they are willing to confront the "antimajoritarian difficulty,"¹⁴⁴ is an important component of their jurisprudential temperament. In those instances in which social consensus is asserted as an appropriate basis for judicial declarations of public policy, how should a judge reconcile what Lon Fuller called the "inner voice of conscience"¹⁴⁵ with prevailing community standards?

In seeking an answer, I first distinguish between circumstances where there is a consensus and where there is not. We should agree that free societies will change because it is their nature to do so. New ideas can gather strength in the social or intellectual "marketplace" and can become the consensus. When these ideas are admitted and so absorbed, the legal system should expand to hold them. Conversely, the legal system should contract to squeeze out old policies that have lost the consensus they once obtained. The expansion or contraction by the legal system to accomplish this goal is what we call judicially-declared public policy. So perceived, social consensus demands sympathy from the court. Where the legislature has not acted and seemingly does not so intend to act, the courts not only have the authority, but possibly the duty, to keep pace with the change in consensus. Often this judicial action is necessary because the executive or legislative leadership has shirked its responsibility.

This does not mean, however, that the judge must act only when public opinion discloses a majoritarian viewpoint, even a substantial one. Had the Supreme Court waited for public consensus we never would have had *Brown v. Board of Education*;¹⁴⁶ there was no national consensus for the compulsory integration of the public school system in 1954.

¹⁴⁴Professor Laurence Tribe contends this problem is inherent in constitutional government:

Whether imposed by unelected judges or by elected officials conscientious and daring enough to defy popular will in order to do what they believe the Constitution requires, choices to ignore the majority's inclinations in the name of a higher source of law invariably raise questions of legitimacy in a nation that traces power to the people's will. . . . In its most basic form, the question in such cases is why a nation that rests legality on the consent of the governed would choose to constitute its political life in terms of commitments to an original agreement—made by the people, binding on their children, and deliberately structured so as to be difficult to change. Since that question would arise, albeit less dramatically, even without the institution of judicial review, its answer must be sought at a level more fundamental than is customary in discussions of why judges, appointed for life, should wield great power. For even without such judges, it must be stressed, lawmakers and administrators sworn to uphold the Constitution must from time to time ask themselves, if they take their oath seriously, why its message should be heeded over the voices of their constituents.

L. TRIBE, CONSTITUTIONAL LAW 9-10 (1978).

¹⁴⁵Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 635 (1958).

¹⁴⁶349 U.S. 294 (1955).

There are times that call for judicial intervention or, more properly, judicial operation, in advance of the consensus. Hence, the judge may properly outrun the consensus. But, in doing so, he must tread more delicately. He must, first and foremost, convey the distinct impression and appearance of impartiality. Second, the judge must in fact be impartial and independent in both the decisionmaking process and the process of justification. Third, the judge must fulfill the obligations of neutrality and what may be called both justice *in rem*, a social desirability that is based on some preeminent moral principle, and also justice *in personam*, justice between the parties to the suit. Fourth, the first principle of the reasoning process that starts the march to the specific conclusion (or declaration of public policy) must be a concept universally held and uniformly respected. The first principle must be related to at least one of what I have previously described as supereminent principles of the law: creating and protecting property interests; creating and protecting liberty interests; fulfilling promises; redressing losses caused by breach or fault; or punishing those who wrong the public.¹⁴⁷ Finally, all the relevant private, social, public, and governmental interests must be identified and evaluated. They must be variously compared, evaluated, accepted, rejected, tailored, adjusted, and, if necessary, subjected to judicial compromise.

IV. CONSTITUTIONAL LAW INTERPRETATION

Closely associated with the lawmaking function of the courts, and concededly a primary basis of criticism of the federal courts, is the use of constitutional interpretation to alter social and political, as well as juridical, customs and traditions. Our remarkable Constitution is unique. British Prime Minister William Gladstone described our Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man."¹⁴⁸ Yet the Constitution is a "most wonderful work" because it is more a moral statement than a set of positive law norms, more a declaration of rights than a set of by-laws for society. The United States Constitution sets forth a frame of government that the courts must interpret constantly to accommodate the changes in community moral standards. The Constitution descends from the Magna Carta and the English Declaration and Bill of Rights of 1688 and 1689, and contains certain fundamental principles of right and justice. These principles are entitled to prevail of their own intrinsic excellence, regardless of the interpretations of those who dominate government at any particular period and regardless of those who wield the physical resources of the community.¹⁴⁹

¹⁴⁷See *supra* note 32 and accompanying text.

¹⁴⁸Quoted in J. LIEBERMAN, MILESTONES! 25 (1976).

¹⁴⁹See E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 4 (1976).

A. John Marshall

Interpretations by prominent legal philosophers on the bench have charted the course of this nation. Among these was John Marshall, who came to the Supreme Court not only at the right time, but whose long tenure justifies his paramount place in our history. If Marshall had proclaimed only the decision in *Marbury v. Madison*,¹⁵⁰ he still would be remembered. Marshall, however, wrote for the Court in *Fletcher v. Peck*,¹⁵¹ *Dartmouth College v. Woodward*,¹⁵² *McCulloch v. Maryland*,¹⁵³ *Cohens v. Virginia*,¹⁵⁴ *Gibbons v. Ogden*,¹⁵⁵ and *Osborn v. Bank of the United States*.¹⁵⁶ Jethro K. Lieberman succinctly has described the leadership of Marshall in these cases: "These seven decisions made the Union that the Civil War preserved. It was a breathtaking, prodigious achievement. The majestic sweep of his opinions gave flesh and blood to the Constitutional skeleton."¹⁵⁷

B. The Warren Court

Marshall steered toward one goal—his grand vision for a unified, federalized nation. His domination of the Court was perhaps matched by only one other influence in our judicial history—the justices of the Warren Court with their grand vision for an egalitarian society.¹⁵⁸ *Brown v. Board of Education*¹⁵⁹ was the overture, trumpeting stirring notes of the Warren Court's theme for this country. Recognizing that the theme would first produce massive discord, and realizing that the *Brown* decision could not be immediately enforced, a year after the initial decision, the Court announced the "with all deliberate speed" formula.¹⁶⁰

¹⁵⁰5 U.S. (1 Cranch) 137 (1803).

¹⁵¹10 U.S. (6 Cranch) 87 (1810). The Court held that the Georgia legislature could not revoke a land grant, even if fraud were involved, because that revocation would violate the contracts clause of the Constitution.

¹⁵²17 U.S. (4 Wheat.) 518 (1819). An act of the New Hampshire legislature altering the charter of Dartmouth College, without the consent of the college, unconstitutionally impaired the obligation of the charter.

¹⁵³17 U.S. (4 Wheat.) 316 (1819). Pursuant to the supremacy clause, the Court prohibited Maryland from taxing a duly authorized branch of the Bank of the United States.

¹⁵⁴19 U.S. (6 Wheat.) 264 (1821). In *Cohens*, the Court discussed the reach of its appellate jurisdiction and held that it had jurisdiction over the question of whether a state could ignore an act of Congress if the act was repugnant to state law.

¹⁵⁵22 U.S. (9 Wheat.) 1 (1824). The Court held that the act of the New York legislature granting to Robert Fulton the exclusive navigation of all waters within the state was repugnant to the commerce clause.

¹⁵⁶22 U.S. (9 Wheat.) 738 (1824). The Court held that federal circuit courts had jurisdiction of suits by and against the Bank and could prevent states from infringing on the operation of the Bank through the passage of laws prohibited by the supremacy clause.

¹⁵⁷J. LIEBERMAN, *supra* note 148, at 61.

¹⁵⁸See Kurland, *Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143 (1964).

¹⁵⁹347 U.S. 483 (1954).

¹⁶⁰*Brown v. Board of Education*, 349 U.S. 294, 301 (1955).

Shortly, a full orchestration of our society set in: the Court outlawed bible reading and all other religious activities in public schools;¹⁶¹ ordered reapportionment of the House of Representatives, of both houses of state legislatures, and of local governments on a one-man, one-vote basis;¹⁶² reformed numerous aspects of state and federal criminal procedure, extensively enhancing the rights of the accused, including juvenile offenders;¹⁶³ made wire-tapping and eavesdropping subject to the fourth amendment's prohibition against unreasonable searches and seizures, and held that evidence obtained in violation of that prohibition may not be admitted in state or federal trials;¹⁶⁴ and laid down a comprehensive set of rules governing the admissibility of confessions and the conduct of police toward persons arrested.¹⁶⁵ The Warren Court greatly expanded the concept of state action under the fourteenth amendment, thus enabling the federal courts and Congress to reach out and prohibit private discriminations.¹⁶⁶ The Court also limited the power of state and federal governments to forbid the use of birth-control devices;¹⁶⁷ to restrict travel;¹⁶⁸ to expatriate naturalized or native-born citizens;¹⁶⁹ to deny employment to persons whose associations were deemed subversive;¹⁷⁰ and to apply the laws of defamation.¹⁷¹ Egalitarianism was the watchword and accompanying themes enlarged the dominion of law and centralized

¹⁶¹See, e.g., *District of Abington v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

¹⁶²See, e.g., *Avery v. Midland County*, 390 U.S. 474 (1968); *Lucas v. Forty-fourth General Assembly*, 377 U.S. 713 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁶³See, e.g., *Bloom v. Illinois*, 391 U.S. 194 (1968); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Mempa v. Rhay*, 389 U.S. 128 (1967); *In re Gault*, 387 U.S. 1 (1967); *Anders v. California*, 386 U.S. 738 (1967); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Brady v. Maryland*, 373 U.S. 83 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁶⁴*Lee v. Florida*, 392 U.S. 378 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41 (1967); *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹⁶⁵*Orozco v. Texas*, 394 U.S. 324 (1969); *Mathis v. United States*, 391 U.S. 1 (1968); *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁶⁶See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *United States v. Guest*, 383 U.S. 745 (1966); *Evans v. Newton*, 382 U.S. 296 (1966).

¹⁶⁷*Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁶⁸*Aptheker v. Secretary of State*, 378 U.S. 500 (1964). *But cf.* *Zemel v. Rusk*, 381 U.S. 1 (1965).

¹⁶⁹See, e.g., *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Schneider v. Rusk*, 377 U.S. 163 (1964).

¹⁷⁰See, e.g., *United States v. Robel*, 389 U.S. 258 (1967); *Whitehill v. Elkins*, 389 U.S. 54 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

¹⁷¹See, e.g., *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Eckley Newspaper Corp. v. Hanks*, 389 U.S. 81 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

the law-giving function in national institutions, including the federal courts.

Notwithstanding the great progress made under the equal protection and due process clauses, the country paid a price. In the minds of many people, the federal courts represented the ultimate relief from every social, political, or economic ill. Heightened expectations became commonplace and still are present today. These expectations are chiefly responsible for the litigation explosion in the federal courts and are the source of great disappointment to many in our society who rap at our courthouse doors and often leave in dejected spirits because they do not quite understand that many limitations on our activity exist. Three quarters of a century ago, Roscoe Pound sounded a warning:

[W]hen men demand much of law, when they seek to devolve upon it the entire burden of social control, when they seek to make it do the work of the home and of the church, enforcement of law comes to involve many difficulties. . . . The purposes of the legal order are [then] not all upon the surface and it may be that many whose nature is by no means anti-social are out of accord with some or many of these purposes. . . . [It is then that] we begin to hear complaint that laws are not enforced and the forgotten problem of the limitations upon effective legal action once more becomes acute.¹⁷²

C. Universal Principles

Constitutional interpretation draws essentially on universal principles. At times there appears to be a clash between two sets of ethics—denominated by Max Weber as an ethics of responsibility and an ethics of conscience. Weber stated that the ethics of responsibility require accepting unpleasant truths, the limits of knowledge and of human nature, the costs of actions, and sometimes the cost of refusing to take action. The ethics of conscience require reminding humankind of its moral duty to live up to its highest potentiality and restrain from acting solely out of expedient or base motives.¹⁷³ Clearly, those societies function best in which the practitioners of the ethics of responsibility and of conscience are at least well-matched.¹⁷⁴

At other times, the collision occurs in the disagreement over interpreting the Constitution as a moral statement. The Benthamites exalt the goal of morality by maximizing pleasure and minimizing pain, thereby conferring a benefit on society. They advocate pleasure and pain as the common denominator of all morally relevant experiences. Even the Benthamites will disagree among themselves, however, as to what constitutes

¹⁷²Pound, *Address Before the Pennsylvania Bar Association*, 22 PA. BAR ASS'N REP. 221 (1916).

¹⁷³M. WEBER, *ON LAW IN ECONOMY AND SOCIETY* (Rheinstein ed. 1954) (2d ed. 1925).

¹⁷⁴See Epstein, *True Virtue*, N.Y. Times, Nov. 24, 1985, § 6 (Magazine), at 96.

pleasure and pain. Our sordid history in race relations attests to that disagreement. What is deemed a long-awaited benefit to the blacks may come with great pain to the multitude of red-necks.

Beyond intramural skirmishes among the utilitarians is the rights theorists' approach to the moral values contained in the Constitution. The rights theorists argue that life is more than pleasure, happiness, and the avoidance of pain. The right to liberty, for example, is paramount. According to this view, the benefit of liberty has priority over all material benefits. The ever-present dilemma is to determine what things are benefits and how much divergence exists after we identify these things. When it comes to public affairs, Rawls argued that considerations of liberty must be "prior in lexical ordering" to conditions of social welfare.¹⁷⁵ I think this means that no matter how abundant and equitable the distribution of material comforts may be, the most extensive liberty that is possible for all members of society cannot be overridden. The problem that emerges is obvious. Is this philosophy shared by those members of society presently deprived of material, as distinguished from theoretical, benefits, and thus deprived of decent food, shelter, health care, and job opportunities? If these persons had their druthers, would they reject all these creature comforts for abstract freedoms of speech, assembly, and religion, and other tangible aspects of liberty? As I inquired earlier,¹⁷⁶ are these strictly middle class values, or are they universally shared? In this context, the clash between adherents to the benefit and rights theories, rather than the simplistic labels of "liberal," "conservative," or "moderate," characterizes much of our present constitutional law litigation.

Perhaps more obvious are the strident clangs in criminal procedure that loudly broadcast divergent philosophies on how to balance properly the interests set forth in the Bill of Rights. Herbert Packer suggested that judges appear to adopt one of two theoretical positions. Packer called the first position the "crime control" model.¹⁷⁷ The goal of this model is to streamline the arrest and processing of offenders so that crime is deterred through efficient enforcement. The second category, the "due process" model,¹⁷⁸ places special emphasis on the need to control governmental interference in individuals' lives. This model posits that abuse is frequent in law enforcement, thus necessitating tight guidelines regulating the use of confessions and the conduct of searches and arrests, providing for the availability of counsel, and protecting against self-incrimination. Certainly, the so-called "conservatives" seem to adhere to the "crime control" model, and the "liberals" to the "due process" model.

¹⁷⁵J. RAWLS, *supra* note 1, at 40-45, 60-65.

¹⁷⁶See *supra* notes 26-27 and accompanying text.

¹⁷⁷H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 153-73 (1968).

¹⁷⁸*Id.* at 153-58, 163-73.

Recourse to universal principles inclines a judge's decision one way or another, depending upon the jurisprudential temperament of the judge, but this recourse cannot demean the importance of precedents. Judges always use precedents in the publicly stated reasoned elaboration set forth to justify their constitutional decisions. The reliance on precedent is a process that is as delicate as it is fraught with responsibility, because in recent years settled disciplines of state law have been superseded by newly fashioned constitutional precepts. This paradigm of judicial creativity churns out new jurisprudence in which the temperament of the judge draws upon a subjective legal philosophy to declare what the law ought to be. If I were to attempt to generalize, I should say that the major question in the controversial constitutional law cases is not new. It is that posed by Heraclitus: "The major problem of human society is to combine that degree of liberty without which law is tyranny, with that degree of law without which liberty becomes license."¹⁷⁹

D. Public Opinion

At any given time a body of beliefs exists, convictions, sentiments, accepted principles, or firmly-rooted prejudices, which, taken together, make up the public opinion of an era, or what may be called the reigning or predominating current of opinion. Sir Robert Peel was more cynical than accurate in 1820 when he described public opinion as "the tone of England—of that great compound of folly, weakness, prejudice, wrong feeling, right feeling, obstinacy, and newspaper paragraphs"¹⁸⁰ As the public has opinions and beliefs, so do judges. Moreover, the whole body of beliefs existing at any given time generally may be traced to certain fundamental assumptions that, whether they are true or false, are believed by judges (and the public) to be true with such confidence that these beliefs hardly appear to bear the character of assumptions.

These currents that influence both court decisions and legislation acquire their force and volume only by degrees, and are in their turn liable to be checked or superseded by other and adverse currents, which themselves gain strength only after a lapse of time. We, however, cannot talk of a prevalent belief or opinion as "being in the air" or "brooding in the sky." Rarely does a widespread conviction spring up spontaneously among the multitude. John Stuart Mill was absolutely right, I think, when he said: "The initiation of all wise and noble things, comes and must come, from individuals; generally at first from some one individual."¹⁸¹ The discoverer of the new conception, or some follower who has embraced it with enthusiasm, preaches it to his friends or disciples, often in a classroom, or expresses it either in a professional or popular journal, and they who hear and read become impressed with its im-

¹⁷⁹Aldisert, *supra* note 32, at 771.

¹⁸⁰Quoted in A.V. DICEY, *LAW AND PUBLIC OPINION IN ENGLAND* 20 n.1 (1985).

¹⁸¹J.S. MILL, *ON LIBERTY* 119 (1849).

portance and its truth, and gradually a whole new school accepts a new creed. When the apostles are either persons endowed with special ability or, what is quite as likely, are persons who are deemed free of a bias, whether moral or intellectual, they loom in fashioning public opinion and influencing judicial decisions. We have seen this phenomenon in many branches of substantive law—Williston influencing contract law, Prosser with torts, Beale and later Reese and Leflar formulating conflicts of law theories, and Wright, Wechsler, and Hart developing procedures and court jurisdiction concepts, to name but a few.

When constitutional law is involved, this phenomenon assumes *a fortiori* proportions. An entire school of constitutional law philosophy that has emerged essentially from articles published in the Ivy League law reviews and books has settled successfully in federal court opinions.¹⁸² Whatever we may do in cases involving other legal disciplines, when it comes to constitutional law, I do not think we follow the approach Judge Joseph C. Hutcheson, Jr. once refreshingly described:

I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.¹⁸³

Nor do we follow the example of Rabelais' famed Judge Bridlegoose:

[H]aving well and exactly seen, surveyed, overlooked, reviewed, recognized, read and read over again, turned and tossed about, seriously perused and examined the preparatories, productions, evidences, proofs, allegations, depositions, cross, speeches, contradictions . . . and other such confects and spiceries, both at the one and the other side, as a good judge ought to do, I posit on the end of the table in my closet all the pokes and bags of the defendant—that being done I thereafter lay down upon the other end of the same table the bags and satchels of the plaintiff [and then I roll the dice,] little small dice [when

¹⁸²See this influence as reflected in citations of the works of Alexander Bickel in *Anderson v. Celebrezze*, 460 U.S. 780, 790 n.11, 805 (1983) and *New York v. Ferber*, 458 U.S. 747, 768 n.22 (1982); John Hart Ely in *City of Cleburne v. Cleburne Living Center, Inc.*, 105 S. Ct. 3249, 3256 n.10 (1985) and *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985); Yale Kamisar in *United States v. Leon*, 468 U.S. 897, 916 n.14 (1984) and *Gerstein v. Pugh*, 430 U.S. 103, 119 (1975); Laurence Tribe in *Hayfield N. R.R. Co. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 627 n.5 (1984) and *Washington v. General Motors Corp.*, 406 U.S. 109, 112 (1972); and Herbert Wechsler in *Franchise Tax Bd. v. Construction Laborers Trust for S. Cal.*, 463 U.S. 1, 9 (1983) and *Lemon v. Kurtzman*, 411 U.S. 192, 207 (1973).

¹⁸³Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929).

there are many bags and] other large, great dice, fair and goodly ones [when there are fewer bags.]¹⁸⁴

On the contrary, I believe that with decisionmaking in constitutional law every rule of conduct must, whether or not the judge perceives the fact, rest on some general universal principle; some moral principle, personally and subjectively held by the judge; some conception of proper community moral standards, if you will, about which he feels strongly enough to reduce that conception to constitutional efficacy. It is more often than not a phenomenon of "Have opinion, need case."

E. "Federal Courtization" of Society

At times new waves of belief or opinion drown the substantive law previously established by court decision or by the legislature, in most cases the state legislature, but occasionally Congress. In the process, the jurisprudence, whether termed positive or substantive law, is replaced with newly-minted constitutional dogma. This process properly can be called the modern "federal courtization" or the "constitutionalization" of our society. A case can be made that the extent to which this federalization occurs varies proportionately with the judges' personal beliefs or opinions relating to the trust or distrust of the public, of state and federal officials, and state and federal legislators. Implicated here are several interrelated universal principles of political science and general philosophy.

The most primitive of these principles, and perhaps the most anchored in the political science bedrock, is the centuries-old clash between the Hamiltonian and Jeffersonian views of democracy. Thomas Jefferson unquestionably lost this battle in the federal courts in the past fifty, if not one hundred, years. With one major exception, the trend has been toward federal domination over states' rights either by determinations that Congress has pre-empted a field of activity through the commerce clause¹⁸⁵ or, more recently, by reliance on section five of the fourteenth amendment,¹⁸⁶ or by determinations that particular state action somehow violates the Constitution.¹⁸⁷ The sop to states' rights occurred in 1938 with *Erie Railroad Co. v. Tompkins*,¹⁸⁸ in which the Supreme Court declared that state law should control in diversity cases.

¹⁸⁴*Id.* at 277-78 (footnote omitted) (quoting 2 F. RABELAIS, GARGANTUA AND PANTAGRUEL 39-40 (Everyman's ed. 1929) (1532)).

¹⁸⁵*See, e.g.,* Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959) (mud flaps cases).

¹⁸⁶*See* the paradigmatic case of Katzenbach v. Morgan, 384 U.S. 641 (1966).

¹⁸⁷*See, e.g.,* Philadelphia v. New Jersey, 437 U.S. 617 (1978) (commerce clause); Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978) (privileges and immunities clause); Miranda v. Arizona, 384 U.S. 436 (1966) (fifth amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (due process clause; fourth amendment); Wolf v. Colorado, 338 U.S. 25 (1948) (due process clause); Shelley v. Kraemer, 334 U.S. 1 (1948) (equal protection clause).

¹⁸⁸304 U.S. 64 (1938).

I find in many of us the "philosopher king" syndrome to which Learned Hand once made reference.¹⁸⁹ A philosopher king is akin to what Joseph Epstein recently described as a "virtucrat": "The virtucrat is certain he has virtue on his side. The virtue being laid claim to is public virtue; it is the virtue that comes from the certainty that one's own opinions are the only correct opinions. The virtucrat is a prig, but a prig in the realm of opinion."¹⁹⁰ I find this attitude somewhat pervasive among federal judges and content myself with only reporting its existence without either endorsing it or disapproving it. Yet we must recall what the distinguished political scientist, Robert Dahl, has said: "After twenty-five centuries, almost the only people who seem to be convinced of the advantage of being ruled by philosopher-kings are . . . a few philosophers."¹⁹¹ Yet the philosopher-king mentality has an extremely respectable pedigree. For example, we can trace the mentality to Plato, who taught that in the state three classes are distinguished: that of the wise, destined to dominate; that of the warriors, who must defend the social order; and that of the artisans and farmers, who must feed society.¹⁹² I hasten to add that most federal judges do not consider themselves warriors, artisans, or farmers. In ancient times, in the Orient, the supreme object of intellectual activity was religion; in Greece, it was philosophy; and in Rome, it was law. Federal judges seem to be more philosophers than lawyers, to use a kind expression; more autocrats of the intellect, to be unkind. Some examples of this tendency follow.

F. Distrust of State Institutions

Reflected in the opinions of certain federal judges, I see a philosophy of hauteur, if not deep distrust of state law, state courts, state government, and state and locally elected officials. In discussing the Burger Court in 1978, John Hart Ely commented:

The current Court's constitutional jurisprudence is . . . not content with limiting its intervention to disputes with respect to which there exist special reasons for supposing that elected officials cannot be trusted—those involving the constriction of the political process or the victimization of politically defenseless minorities. Instead, it importantly involves the Court in the merits of the policy or ethical judgment sought to be overturned, measuring those merits against some set of "fundamental" value judgments. This is not by any means an orientation original to the Burger Court. It plainly marked the work of the Court that decided *Lochner v. New York* and its 200-case progeny.¹⁹³

¹⁸⁹L. HAND, THE BILL OF RIGHTS 73-74 (1958).

¹⁹⁰Epstein, *supra* note 174, at 90.

¹⁹¹R. DAHL, DEMOCRACY IN THE UNITED STATES 24 (3d ed. 1967).

¹⁹²PLATO, THE REPUBLIC, Bk. III.

¹⁹³Ely, *supra* note 31, at 15 (footnote omitted).

I neither endorse nor inveigh against this concept of political science. I state only that this attitude of personal-concepts-of-ethics-equals-constitutional-law not only does exist, but is extremely alive and flourishing.

This is a classic example of the nonapplicability of the labels "liberal" and "conservative." As a result, although the federal courts are charged with the evolution and application of society's fundamental principles, the major problem is to decide what elevates a garden variety, run-of-the-mill value or principle to the exalted status of "fundamental." Ely suggested, and I agree completely, that although the judge or commentator in question may be talking in terms of some "objective," non-personal method of identification, what he is likely really to be "discovering," whether or not he is fully aware of it, are his own values.¹⁹⁴ In any event, I do not think you can be a true liberal or populist, in the traditional political sense, and decry the presence of politics in the basic schema of the republic. Traditionally, the call of the liberal has been "The people, yes!" Yet under the guise of the first amendment, some judges seem hell-bent on taking politics out of politics.

For example, in *Elrod v. Burns*,¹⁹⁵ the Court found to be taboo the 200-year-old practice of firing by the victorious party those political supporters of the losers. Society long has recognized that patronage in employment played a significant role in democratizing American politics and that before such practice fully developed, an "aristocratic" class dominated political affairs, a tendency that persisted in areas where patronage did not become prevalent.¹⁹⁶ Yet notwithstanding Holmes' admonition that "[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it,"¹⁹⁷ certain judges obviously adhered to the philosophy that the lifeblood of political party strength is very tainted and that the first amendment will cleanse it all. The Chief Justice of the West Virginia Supreme Court has commented:

In elected politics, the legislature and executive take idealistic, energetic, ambitious young men and turn them into whores in five years; the judiciary takes good, old, tired, experienced whores and turns them into virgins in five years. The men are not the source of either transformation—they are of the same type, particularly since judges are either graduates or rejects of politics. The decisive factor is the institution—whether the exact same creatures are quartered in the local house of ill fame or in the Temple of the Vestal Virgins.¹⁹⁸

¹⁹⁴*Id.* at 16.

¹⁹⁵427 U.S. 347 (1976).

¹⁹⁶See authorities cited in *Elrod v. Burns*, 427 U.S. 347, 378-79 (1976) (Powell, J., dissenting).

¹⁹⁷*Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

¹⁹⁸R. NEELY, *supra* note 26, at 190.

As a result, the philosophy "To the victor belongs the spoils" has given way to "If you are independently wealthy or can muscle enough Political Action Committee money to buy TV time and street workers, you, too, can be the victor."

I think that the same philosophy, to a reduced extent, underlies the demise of the law of defamation as to public persons. The Court discarded more than 200 years of protecting either a property or a liberty interest, as the case may be, in one's reputation in *New York Times v. Sullivan*.¹⁹⁹ The formidable scholarship that underlies these two landmark cases was not drawn from orthodox American jurisprudence. The decisions emerged from first principles of philosophical universality as expressed in personal values.

Similarly, the demeaning of state legal remedies caused by an expansive stretch of constitutional dogma in cases brought under 42 U.S.C. § 1983 has occurred. The Court has elevated the traditional tort concepts of assault and battery and at least gross, if not ordinary, negligence to a constitutional dimension when state action is found. Notwithstanding that many of such cases ordinarily would have been brought in state small claims courts, they now are elevated to the exalted level of "federal cases" and enjoy the full panoply of judge, jury, and ceremony instead of the more traditional atmosphere of television's "The People's Court."

In addition to a lack of confidence in state remedies, some judges have expressed a kindred philosophy in a stated distrust of state courts. In *Stone v. Powell*,²⁰⁰ the majority enunciated the following philosophy:

The argument is that state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the rule, and the oversight jurisdiction of this Court on certiorari is an inadequate safeguard. The principal rationale for this view emphasizes the broad differences in the respective institutional settings within which federal judges and state judges operate. Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.²⁰¹

One of the dissents expressed a universal principle diametrically opposed: "State judges popularly elected may have difficulty resisting popular pressures not experienced by federal judges given lifetime tenure designed to immunize them from such influences. . . ." ²⁰² Which represents the

¹⁹⁹376 U.S. 254 (1964).

²⁰⁰428 U.S. 465 (1976).

²⁰¹*Id.* at 493-94 n.5.

²⁰²*Id.* at 525 (Brennan, J., dissenting).

“liberal” view and which the “conservative?” Would a populist devotee, generally considered a liberal, argue against adjudication by judges who are popularly elected?

G. Civil Law/Criminal Law Dichotomy

Yet the personal beliefs and opinions of individual judges reflect an intricacy much more sophisticated than a mere distrust of states. It is more than a simple antipathy toward, to use the pejorative, “states’ rights.” It goes further than a preference for individual rights as against the state. The problem is much more complex. Over the years in my own court, I have seen judges who will stretch the fourteenth amendment to its outer limits in order to grant relief to a plaintiff in a civil action against state officials. I find in these colleagues an antipathy toward the school boards, university and college administrators, hospital superintendents, wardens, governors, mayors, and other local, county, and state officials. I use the word “antipathy” purposely because in many cases these judges do not evaluate the case on the basis that the plaintiff has met his burden; they proceed to decide in favor of the individual against the social order on little more than a *prima facie* case. These judges are willing to “constitutionalize” the most mundane aspect of government administration simply because they disagree with the administrative action taken by the official. Often, in essence, these judges merely disagree with the exercise of broad administrative discretion. The disagreement should not be the test for a fourteenth amendment violation, yet the annotations to 42 U.S.C. § 1983 show hundreds of cases where this has occurred. These civil cases are examples of the judges’ jurisprudential temperaments disclosing a highly developed Platonic complex.²⁰³

Yet some of these same judges hold different philosophical beliefs and opinions in criminal cases involving the interaction between the fourteenth amendment and the defendant. These judges who insist that government officials dot every *i* and cross every *t* in the civil administration of justice do not seem to hold police, district attorneys, government prosecutors, and trial judges to the same exacting standards in criminal cases. Perhaps the reasons can be found in the background and experience of federal judges. Many previously served as government prosecutors. Many emerge from law firms that never have represented defendants in criminal cases. Many are very concerned about crime in the streets (often the sidewalks and streets surrounding a federal courthouse located in a metropolitan area are not safe after nightfall). Whatever the reasons, many judicial “libertarians” in civil cases are to the far right of old Justice McReynolds in criminal cases. This, of course, is another reason why simplistic labels of “liberal” or “conservative” should not be attached to federal judges.

²⁰³See *supra* notes 189-92 and accompanying text.

V. STATUTORY CONSTRUCTION

Were I to identify one single phenomenon to illustrate the distinction between the contemporary judicial process and the process that Cardozo described over a half century ago,²⁰⁴ the phenomenon would be that statutes have replaced case law as the major source of the American legal precept. Somewhat paradoxically, as the courts have enlarged their lawmaking roles, so too have the legislatures enacted laws vesting the courts with greater responsibilities. At times the growth in statutory law—individual statutes as well as comprehensive codes—has seemed exponential. Simultaneously, the courts must interpret volumes of exasperatingly detailed regulations promulgated by the executive branch. And where the legislature or the executive has not acted, prestigious private organizations such as the American Bar Association and the American Law Institute have proposed voluminous codes of substantive and procedural law.²⁰⁵ Although not possessing the sanctions of positive law, these codes have exerted a potent, often persuasive, effect on the state and federal judiciaries.

This proliferation of state and federal statutes has increased the burdens on the judiciary. Not all statutes contain the specificity of the Internal Revenue Code. Much statutory language is obscure, which is in part traceable to the requirement that statutes speak in general terms, but which more often seems to be the result of legislative inability to reach meaningful compromises on detailed subjects. Frequently, for political reasons, the legislature abdicates the responsibility for making law to the courts.²⁰⁶ The general vagueness of many statutes and the wide

²⁰⁴B. CARDOZO, *supra* note 34.

²⁰⁵See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1986) (includes chapters on: Appellate Review of Sentences; Criminal Appeals; The Defense Function; Discovery & Procedure Before Trial; Electronic Surveillance; Fair Trial & Free Press; Joinder & Severance; Pleas of Guilty; Postconviction Remedies; Pretrial Release; The Prosecution Function; Providing Defense Services; Sentencing Alternatives & Procedures: Special Functions of the Trial Judge; Trial by Jury; and The Urban Police Function). See also RESTATEMENTS OF AGENCY; CONFLICTS OF LAW; CONTRACTS; FOREIGN RELATIONS; JUDGMENTS; PROPERTY; RESTITUTION; SECURITY; TORTS; and TRUSTS. See also FEDERAL SECURITIES CODE (1978); MODEL LAND DEVELOPMENT CODE (1975); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1975); MODEL PENAL CODE (1962).

²⁰⁶See C. McGowan, Congress and the Courts 8-9 (1976) (University of Chicago Law School monograph of address given by Judge McGowan at University of Chicago Law School Annual Dinner, Apr. 17, 1975):

The pattern taking shape appears to be that of a Congress intent upon bringing federal power to bear in an ever-widening range of human affairs, but having no better answer for the monitoring, supervision, and enforcement of that power than the employment of the federal courts to these ends. That is conceivably one way to govern the country, and perhaps we of the federal courts should be flattered by this seeming mark of confidence in our capacities. I suggest, however, that it was not in this way, or such heavy involvement in tasks of this nature, that the federal courts achieved such prestige and popular

scope allowed for their interpretation encourages an arbitrariness in reaching decisions that only an allegiance to justice can allay.

A statute is basically a legal precept, the law's statement of a standard of conduct. In Roscoe Pound's formulation, legal precepts compose "the body of authoritative materials, and the authoritative gradation of the materials, wherein judges are to find the grounds of decision, counsellors the basis of assured prediction as to the course of decision, and individuals reasonable guidance toward conducting themselves in accordance with the demands of the social order."²⁰⁷ Whether legal precepts emerge as by-products of court decisions or constitute deliberate products of the legislature, the courts should accord both types of precepts identical or similar treatment, whenever possible, in the twin processes of reaching and justifying a judicial decision.

A. *Three Problems of Statutory Interpretation*

An analysis of interpreting statutory precepts involves three separate problems:

- (1) The problem of language analysis in the strict sense—the presence of an unclear norm;
- (2) the problem of lacunae—of the nonexistent norm; and
- (3) the problem of evolution—of the norm whose meaning changes while its text remains constant, thus bringing into tension the original intent and the ongoing history theories of interpretation.²⁰⁸

Although the first problem, the task of analyzing language, receives the most judicial attention, I will address briefly the problem of the norm whose meaning changes. This became the subject of much public controversy when, in 1985, Attorney General Edwin Meese III publicly criticized Supreme Court justices for failing to interpret the Constitution in accordance with the intent of the drafters and instead substituting

acceptance as they may now enjoy.

... A recurring phenomenon is for the legislative branch, in addressing itself to major areas of public concern, to finesse hard choices of policy, likely to tie up elected legislators representing differing interests in knots of controversy and resulting inaction. Instead, it makes broad delegations of authority to department heads or newly-created commissions to make those choices in the form of implementing regulations. In order to assure that such regulations are carefully scrutinized for conformity to the dimly ascertainable Congressional intentions, judicial review is provided by reference to variously articulated standards such as arbitrariness, rational basis, or, God help us, substantial evidentiary support in the record.

²⁰⁷Pound, *supra* note 16, at 476.

²⁰⁸R. Aldisert, *Hard Core Judicial Process Problems Facing Judges in the 80's* (monograph for Appellate Judges Seminars, 1982).

the judges' idiosyncratic political science and moral philosophies.²⁰⁹ Justices William J. Brennan, Jr., and John Paul Stevens leaped into public print arguing that judges were not required to rely on the original intent theory insofar as the Constitution was concerned.²¹⁰ Attorney General Meese, of course, put his finger on the serious question of how federal judges should determine public policy. Probably he was correct in suggesting that many decisions do not meet the standards of social desirability and neutrality previously discussed in these pages. The justices, however, were surely right in saying that insofar as interpreting the Constitution is concerned, unlike interpreting statutes and contracts, judges are not bound by the original intent theory of adjudication.

Because the Constitution is a moral statement more than a set of by-laws, conditions in the nation that have occurred since its ratification should be extremely relevant to its interpretation. These changing conditions allow federal judges to reject the original intent theory of interpretation and use instead a continuing or ongoing history theory, thus permitting the Constitution to reflect the prevailing temper of the country. In *Furman v. Georgia*,²¹¹ the death penalty case, the various opinions relied on the ongoing history technique to demonstrate that the eighth amendment's proscription of cruel and unusual punishment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice,"²¹² and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."²¹³ As Holmes reminded us:

The life of the law has not been logic; it has been experience. The felt necessities of the times, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.²¹⁴

B. The Unclear Norm

Passing from the problem of the norm whose meaning changes, I turn now to the first problem of statutory construction, the task of analyzing words, phrases, sentences, and paragraphs to ascertain what

²⁰⁹E. Meese, Speech to the American Bar Association (London, July 17, 1985), reported in N.Y. Times, July 18, 1985, at 7, col. 1.

²¹⁰W. Brennan, Speech before a Seminar at Georgetown University (Oct. 12, 1985), reported in N.Y. Times, Oct. 13, 1985, at 1, col. 1; J. Stevens, Remarks before a Luncheon of the Federal Bar Association (Chicago, Oct. 23, 1985), reported in N.Y. Times, Oct. 26, 1985, at 1, col. 1.

²¹¹408 U.S. 238 (1972).

²¹²*Id.* at 242 (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)) (Douglas J., concurring).

²¹³*Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)) (Douglas J., concurring).

²¹⁴O.W. HOLMES, *supra* note 122, at 1.

is meant by an unclear norm. This approach assumes that Congress intended to address the relevant factual scenario at issue, but did so in unclear language. To interpret ambiguities, judges (and some legislatures) first created "canons of construction" to apply to statutory precepts but not to judicially-created precepts. These canons evidence a methodology of the judicial process peculiarly applicable to statutory precepts. They were devised because statutory law, unlike case law, usually has no accompanying *ratio decidendi* to assist in later interpretations. Yet the problem is that every canon seems to have its antinomy. By 1950, most canons were so enervated by contradictions that Karl Llewellyn's taxonomic treatment deftly eviscerated them for all practical purposes.²¹⁵ Today, whenever I encounter the use of a canon even in the opinions of my most distinguished judicial colleagues, I am tempted to smile because Llewellyn has convinced me that for every thrust there is an equally important parry. For every court that says, "A statute cannot go beyond its text," another court may say, "To effect its purpose a statute may be implemented beyond its text." Similarly, we see juxtaposed: "If language is plain and unambiguous it must be given effect" with "not when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose;" "Every word and clause must be given effect" with "If inadvertently inserted or if repugnant to the rest of the statute, they may be rejected as surplusage;" and, finally, "Expression of one thing excludes another" with "The language may fairly comprehend many different cases when some only are expressly mentioned by way of example."

By 1899, Holmes lamented that courts did not inquire what the legislature meant but only what the statute meant.²¹⁶ He would not voice this complaint today, for although contemporary courts are fond of stating that "[t]he starting point in every case involving the construction of a statute is the language itself,"²¹⁷ methodology now abjures a strictly semantic approach. Judges have played with the Mischief Rule of *Heydon's Case*,²¹⁸ the Golden Rule,²¹⁹ and the Literal Rule.²²⁰ Judges even have dallied with what American jurisprudence has called the "Plain Meaning Rule":

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional

²¹⁵Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

²¹⁶Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

²¹⁷*International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 558 (1979) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)).

²¹⁸30 Co. 7a, 76 Eng. Rep. 637 (Ex. 1584).

²¹⁹See, e.g., *River Wear Comm'rs v. Adamson*, [1876-77] 2 A.C. 743, 764-65.

²²⁰See, e.g., *Vacher & Sons, Ltd. v. London Soc'y of Compositors*, [1913] A.C. 107, 121-22 (Lord Atkinson).

authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.²²¹

Impressive authorities have warned judges not to depend too much on the actual language of a statute. Cardozo wrote that "[w]hen things are called by the same name it is easy for the mind to slide into an assumption that the verbal identity is accompanied in all its sequences by identity of meaning."²²² Holmes told us: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."²²³ Learned Hand said that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."²²⁴ Lord Denning likewise has described a transition from 19th century "strict constructionists" to 20th century "intention" seekers: "The strict constructionists go by the letter of the document. The 'intention seekers' go by the purpose or intent of the makers of it."²²⁵

Today current wisdom requires judges to ascertain the legislative intent,²²⁶ a task somewhat akin to pinpointing the intent of a testator or the intent of disputing parties to a contract. Proper judicial construction, in the modern view, requires recognition and implementation of the underlying legislative purpose; and the judge, the theory holds, must accommodate the societal claims and demands reflected in that purpose.²²⁷ To accomplish this task, as Justice Roger J. Traynor put it,

²²¹*Caminetti v. United States*, 242 U.S. 470, 485 (1917) (Day, J.) (citations omitted); see *Hamilton v. Rathbone*, 175 U.S. 414, 419-21 (1899) (Brown, J.).

²²²*Lowden v. Northwestern Nat'l Bank & Trust Co.*, 298 U.S. 160, 165 (1936).

²²³*Towne v. Eisner*, 245 U.S. 418, 425 (1918).

²²⁴*Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).

²²⁵A. DENNING, *THE DISCIPLINE OF THE LAW* 4 (1979).

²²⁶See *Brown v. General Servs. Admin.*, 425 U.S. 820, 825 (1976) ("Congress simply failed explicitly to describe § 717's [of the Civil Rights Act of 1964] position in the constellation of antidiscrimination law. We must, therefore, infer congressional intent in less obvious ways."); *United States v. Bornstein*, 423 U.S. 303, 309-10 (1976) ("There is no indication that Congress gave any thought to the question But the absence of specific legislative history in no way modifies the conventional judicial duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question.").

²²⁷See *Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 9-10 (1976); see also Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 520-23 (1948); Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1316-17 (1975).

we need “literate, not literal” judges,²²⁸ lest a court make a construction within the statute’s letter, but beyond its intent.²²⁹

The difference between the majority and dissenting opinions in the affirmative action case of *United Steelworkers of America v. Weber*²³⁰ graphically demonstrates the clash between the majority’s reliance on legislative intent and the dissent’s reliance on the statutory language. The relevant statute, 42 U.S.C. § 20003-2(d), provides:

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.²³¹

The majority reasoned:

Respondent argues that Congress intended in Title VII to prohibit all race-conscious affirmative action plans. Respondent’s argument rests upon a literal interpretation . . . of the Act.

Respondent’s argument is not without force. . . . [B]ut respondent’s reliance upon a literal construction . . . is misplaced. It is a “familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.” . . . The prohibition against racial discrimination in . . . Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose.²³²

The dissent took a diametrically opposed view:

When Congress enacted Title VII after long study and searching debate, it produced a statute of extraordinary clarity, which speaks directly to the issue we consider in this case. . . .

Often we have difficulty interpreting statutes either because of imprecise drafting or because legislative compromises have produced genuine ambiguities. But here there is no lack of clarity, no ambiguity. . . .

Oddly, the Court seizes upon the very clarity of the statute

²²⁸Traynor, *supra* note 116, at 749.

²²⁹*See, e.g.,* *Muniz v. Hoffman*, 422 U.S. 454, 469 (1975); *United Housing Found. v. Forman*, 421 U.S. 837, 848-49 (1975); *Philbrook v. Glodgett*, 421 U.S. 707, 713-14 (1975); *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 628 (1975).

²³⁰443 U.S. 193 (1979).

²³¹42 U.S.C. § 2000e-2d (1970).

²³²443 U.S. at 201 (citations omitted).

almost as a justification for evading the unavoidable impact of its language.²³³

Although this case was brought under Title VII of the Civil Rights Act of 1964,²³⁴ the equal protection clause presents the nagging question: If you find support for equality under the Constitution, can you claim support for inequality under the same Constitution?

The current approach to statutory application demonstrates a fundamental difference in the process employed today from the process of fifty years ago. Today, what the legislature has said is not as important as what it supposedly intended. This approach is perhaps a combination of all three factors I have discussed in these pages—legal philosophy, jurisprudence, and jurisprudential temperament. Some judges look for ambiguities simply to achieve a result deemed desirable. They believe that the law “ought to be” somewhat different than that set forth in plain statutory language. In such cases the judge’s temperament supplies the willpower and his subjective philosophy, the answer. And usually some fragment of legislative history is exalted to justify a conclusion that the legislative intent was at odds with precise statutory language. Such judicial activity may run afoul of the allocation of legislative competence. In the end, words must be taken for what they say and what the legislature intended to achieve, and not what their interpreter would like them to say. The statute is the master and not the servant of the judgment.

Another cause of this problem lies in the language of the jurisprudence as enacted by the legislative body. With the demise of the patronage system, the lack of discipline in national political parties, and the replacement thereof with the high-pressure influence of special interest groups and political action committees, statutes frequently are enacted that contain deliberate ambiguities. The congressional eye often is not focused on the national interest or a particular public policy so much as it is on the very pragmatic consideration: How will the statutory language affect my constituency? Will I be hurt or helped by it? Can I get away with an adequate explanation back home? As a result, that statutory language is often deliberately enigmatic and unintelligible. Hammered out in committee compromise, the language is often designed to mean all things to all people, with Congress recognizing that in the end the federal courts must interpret the statute. When that interpretation emerges from the courts, the legislator is in the position to tell complaining constituents that the problem with the bill was not with the

²³³*Id.* at 216-17 (Burger, C.J., dissenting).

²³⁴Pub. L. No. 88-352, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1982)).

action of Congress, but the action of federal judges in interpreting it. It's a "fault is in the stars" philosophy.²³⁵

Whatever the reasons, judicial statutory interpretation is much different today than it was a half century ago. The words of a statute will be respected, it is true, but legislative intentions will be investigated and given equal, if not superior, respect. Less attention is now paid to the familiar teachings of a past era: "If the language be clear it is conclusive. There can be no construction where there is nothing to construe."²³⁶ "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning."²³⁷

Still, the name given to an act by way of designation or description, or the report which accompanies it, cannot change the plain import of its words. . . . In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.²³⁸

But, perhaps, it is well that judges no longer follow the rigid semantic approach, because in the common law tradition a rule from case law is never considered *in vacuo*. The reason for the rule is always considered. No one said it better than Karl Llewellyn: "the rule follows where its reason leads; where the reason stops, there stops the rule."²³⁹

Yet, when all is said, it is difficult to lay down comprehensive guidelines of modern statutory construction. Perhaps the reason is found in a 1984 statement of the Supreme Court: "Generalities about statutory construction help us little. They are not rules of law but merely axioms of experience. They do not solve the special difficulties in construing a

²³⁵Judge Richard Neely of the West Virginia Supreme Court, a former state legislator, is more blunt:

[A] legislature is *designed* to do nothing, with emphasis appropriately placed on the word "designed." The value of an institution whose primary attribute is inertia to politicians who wish to keep their jobs is that a majority of bills will die from inactivity; that then permits legislators to be "in favor" of a great deal of legislation without ever being required to vote on it. When constituents seek to hold a legislator responsible for the failure of a particular bill, he can say, plausibly, that it was assigned to a committee on which he did not serve and that he was unable to shake the bill out of that committee. If he has foreseen positive constituent interest, he can produce letters from the committee chairman in answer to his excited plea to report the legislation to the floor; correspondence of this sort is the stock in trade of legislators. Notwithstanding the earnest correspondence, it is quite possible that when the legislator and committee chairman were having a drink before dinner, the legislator indicated his personal desire to kill the bill in spite of the facade of excited correspondence.

R. NEELY, *supra* note 26, at 55.

²³⁶*United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1868).

²³⁷*Caminetti v. United States*, 242 U.S. 470, 490 (1917).

²³⁸*Id.*

²³⁹K. LLEWELLYN, *THE BRAMBLE BUSH* 157-58 (1960).

particular statute. The variables render every problem of statutory construction unique."²⁴⁰

Nevertheless, this can be said: the purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute appear to be the major aids in considering statutory precepts today.²⁴¹ A popular cynicism overstates "that only when legislative history is doubtful do you go to the statute."²⁴² Perhaps the reason for this aphorism is that recourse to legislative history is a favorite pastime of federal courts. Judges may use this approach because the federal judges have found it to be a useful technique, and also because the *Congressional Record* and committee reports are usually available. The practice is, however, open to criticism.²⁴³ With typical incisiveness, Professor Leflar has observed:

I think that it was Chief Justice Hingham . . . who said that the devil himself "knoweth not the mind of man." It is difficult to discover intent; and when you cannot discover with any authority the state of mind of one man, the process of discovering the states of mind, the intents of 535 men, who make up the Federal Congress, becomes an extremely difficult matter.²⁴⁴

Contemporary recourse to legislative history to divine the intent of the legislature is a relatively new development. Not practiced even a half century ago, this technique is a unique American methodology not followed in England.²⁴⁵ As Lord Denning tells us:

But oddly enough the Judges cannot look at what the responsible Minister said to Parliament—at the object of the Statute as he explained it to the House—or to the meaning of the words as he understood them. Hansard [British version of the *Congressional Record*] is for the Judges a closed book. But not for you [lawyers]. You can read what was said in the House and adopt it as part of your argument—so long as you do not acknowledge the source. The writers of law books can go further. They can

²⁴⁰Weinberger v. Rossi, 456 U.S. 25, 28 (1982) (quoting *United States v. Universal Corp.*, 344 U.S. 218, 221 (1952) (citations omitted)).

²⁴¹*United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941), cited in *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 313 (1978).

²⁴²Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947).

²⁴³Compare the opinion for the Supreme Court in *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-36 (1974), with dissenting opinion of Mr. Justice Douglas, *id.* at 167-80, and the opinion of the district court, 383 F. Supp. 510, 520-30 (E.D. Pa. 1974).

²⁴⁴Remarks by Robert A. Leflar to Federal Appellate Judges' Conference, Federal Judicial Center, Washington, D.C. (May 13, 1975), reprinted in R. ALDISERT, *THE JUDICIAL PROCESS* 179 (1976).

²⁴⁵See, e.g., *Assam Railways & Trading Co., Ltd. v. Commissioners of Inland Revenue*, [1935] A.C. 445; see also C. ALLEN, *LAW IN THE MAKING* 479-504 (5th ed. 1951).

give the very words from Hansard with chapter and verse. You can read the whole to the Judges.²⁴⁶

As early as 1769, the English would say, "The sense and meaning of an Act of Parliament must be collected from what it says when passed into a law; and not from the history of changes it underwent in the house where it took its rise. That history is not known to the other house or to the sovereign."²⁴⁷ Justice Frankfurter suggested that the recourse to reliance on legislative history was gradual.²⁴⁸ Holmes gingerly approached this judicial technique, observing that "it is a delicate business to base speculations about the purposes or construction of a statute upon the vicissitudes of its passage;"²⁴⁹ and he once referred to earlier bills relating to a statute under review with the reservation, "If it be legitimate to look at them"²⁵⁰ A serious question exists as to whether the concerns expressed in 1953 by Mr. Justice Jackson have ever been answered:

I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute.²⁵¹

Recourse to legislative history, however, will continue to be an important aspect of statutory interpretation because located there, more often than in the statutory language itself, judges of differing philosophies will find authority to justify their desired conclusions. Some statement of a representative or senator, or some excerpt from a committee report written by the congressional staff will serve as the necessary talisman. Such recourse may be truly validated only when it is recognized that the history is used as a factor in inductive reasoning to reach a conclusion. Congressman *A* said so and Congressmen *B* said so, and from these facts judges can conclude that the majority of the Senate and the House felt similarly. Obviously, such a generalization is valid only to the extent

²⁴⁶A. DENNING, *supra* note 225, at 10 (citing Bradford City Council v. Lord Commission (July 1978) (unreported)).

²⁴⁷Frankfurter, *supra* note 242, at 541.

²⁴⁸*Id.* at 542-43.

²⁴⁹Pine Hill Coal Co. v. United States, 259 U.S. 191, 196 (1922).

²⁵⁰Davis v. Pringle, 268 U.S. 315, 378 (1925).

²⁵¹United States v. Public Utilities Comm'n, 345 U.S. 295, 319 (1953) (Jackson, J., concurring); *see also* his opinion in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-97 (1952).

that the statements appeared in sufficient number or were cloaked with sufficient authority to permit the generalization. Otherwise, we are confronted with the material fallacy known as the Converse Fallacy of Accident. Also called the fallacy of selected instances or hasty generalization, this fallacy attempts to establish a generalization by the simple enumeration of instances without obtaining a representative number. A conclusion is derived before all the particular instances have been taken into consideration.

Irrespective of the use of legislative history to learn the congressional intent, or of lengthy semantic excursions into the dictionary to ascertain the statute's literal or plain meaning, the importance of statutory precept in today's judicial process cannot be overemphasized. The process is more sophisticated and complex, and requires the most careful attention of the legislature as well as the bench and bar.

C. *The Lacunae or Nonexistent Norm*

To be sure, it is often difficult to interpret that which the legislature intended to say, to interpret what may be called the unclear norm. Equally important is how to apply a statute to an aspect of a relevant problem when obviously, although covered by the statute, the specific problem clearly never occurred to the legislature at the time of the statute's enactment. This problem is not the problem of the unclear norm, but the problem of lacunae, of the nonexistent norm. Decades ago John Chipman Gray recognized the lacunae as a very serious problem:

The fact is that the difficulties of so-called interpretation arise when the legislation has had no meaning at all; when the question which is raised in the statute never occurred to it; when the question is not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.²⁵²

Plowden, in his note in *Eyston v. Studd*²⁵³ in 1574, made an observation that is in striking anticipation of modern principles of discerning the equity of a statute:

And in order to form a right judgment when the letter of a statute is restrained, and when enlarged, by equity, it is a good way, when you peruse a statute, to suppose that the lawmaker is present, and that you have asked him the question you want to know touching the equity; then you must give yourself an answer as you imagine he would have done, if he had been present. . . . And if the lawmaker would have followed

²⁵²J.C. GRAY, *supra* note 100, at 172-73.

²⁵³2 Plowd. 463 (1574).

the equity, notwithstanding the words of the law . . . you may safely do the like.²⁵⁴

Referring to Plowden, Lord Denning has written:

Put into the homely metaphor it is this: A judge should ask himself the question: If the makers of the Act had themselves come across this muck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.²⁵⁵

The civil law experience assumes that situations will occur that were not contemplated by the legislative draftsmen, and that they made adequate provisions for these occurrences. Perhaps the most well known model is the Swiss Civil Code of 1907:

Where no provision [in the Code] is applicable, the judge shall decide according to the existing Customary Law and, in default thereof, according to the rules which he would lay down if he had himself to act as legislator. Herein he must be guided by approved legal doctrine and case law.²⁵⁶

But still another dimension of this problem is where the court finds a lacunae when there is no evidence that Congress left the matter open. An example can be found in *J.I. Case Co. v. Borak*²⁵⁷ and its progeny and the relatively new practice of finding implied causes of action where the statute is silent. This federal court innovation marks a drastic departure from the general presumption that in statute law there is at least a presumption that on the topic it is dealing with, Congress said all that it wanted to say. But the discovery, if not the fabrication, of implied federal causes of action represents activity by judges described by Lord Devlin as "moths outside a lighted window, . . . irresistibly attracted by what they see within as the vast unused potentiality of judicial lawmaking."²⁵⁸ In *Cort v. Ash*,²⁵⁹ the Supreme Court interpreted a federal criminal statute prohibiting corporations from making certain types of contributions in connection with a presidential election. The Court found that the language itself did not authorize, and Congress

²⁵⁴Quoted in W. FRIEDMANN, *supra* note 99, at 453.

²⁵⁵A. DENNING, *supra* note 225, at 12 (citing *Seaford Court Estates Ltd. v. Asher*, [1949] 2 K.B. 481).

²⁵⁶SCHWEIZERISCHES ZIVILGESETZBUCH (CODE CIVIL SUISSE) (CODICE CIVILE SUIZZERO) § 1 (1907) (Williams trans. 1925). Similar provisions are found in the AUSTRIAN GENERAL CIVIL CODE OF 1811 (ALGEMEINES BUERGERLICHES GESETZBUCH § 7 (1811)); the SPANISH CIVIL CODE OF 1899 (CODIGO CIVIL ESPANOL § 6 (1899)); the ITALIAN CIVIL CODE (CODICE CIVILE ch. 2, § 12 (1942)); and the IRAQI CIVIL CODE OF 1951 art. I, §§ 1-3 (1951). See also *Crocker v. Boeing Co.*, 662 F.2d 975, 1000 (3d Cir. 1981) (Aldisert, J., dissenting).

²⁵⁷377 U.S. 476 (1964).

²⁵⁸P. DEVLIN, *supra* note 56, at 8.

²⁵⁹422 U.S. 66 (1975).

did not intend to so authorize, a shareholder to bring a private cause of action against a transgressing corporation. The Court developed four factors to use in determining whether a statute authorizes such a cause of action.²⁶⁰

Therein lies the problem. The factors identified by the Court leave more than enough maneuvering room for a judge to decide the issue either way, and the courts have done just that. There has not been much predictability to the cases. Some decisions have found no implied cause of action.²⁶¹ Others have swung in the other direction.²⁶² Relying on legislative history as an indication of whether a private cause of action is permitted once again involves all the dangers of drawing conclusions from bits and pieces of legislative history. The cases are in disarray, because the Supreme Court and other federal courts departed from traditional legal principles to achieve a result-oriented conclusion.

Courts seem to have ignored the reality that Congress knows when it wants to provide a cause of action and knows how to say it. Congress has proved this time and again since *J.I. Case Co. v. Borak* appeared on the scene.²⁶³ The best (and the worst) that can be said for fabricating implied causes of action is that the judicial practitioners come in all stripes, in all economic and philosophical hues. Regardless of the label attached to a judge, a judge cannot circumvent a clear authorization of a cause of action.

At bottom always is the task of divining the intent of the legislature. "When a judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks right,"²⁶⁴ Learned Hand once observed. "Nobody does this exactly right; great judges do it better than the rest of us. It is necessary that someone shall do it, if we are to realize the hope that we can collectively rule ourselves."²⁶⁵

VI. THE NECESSITY FOR REASONED ELABORATION

Irrespective of the philosophy held by a particular judge or court majority, it is a categorical imperative that when universal principles are used to blaze new legal trails, there must be a reasoned elaboration for

²⁶⁰*Id.* at 78.

²⁶¹*See, e.g.,* Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Santa Fe Indus. v. Green, 430 U.S. 462 (1977); Piper v. Chris Craft Indus., 430 U.S. 1 (1977).

²⁶²*See, e.g.,* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982); Cannon v. University of Chicago, 441 U.S. 677 (1979).

²⁶³*See, e.g.,* Right to Financial Privacy Act of 1978, 12 U.S.C. § 3417 (1982); Consumer Credit Protection Act of 1968, 15 U.S.C. § 1693m (1982); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (1982); National Gas Pipeline Safety Act of 1968, 49 U.S.C. § 1686 (1982).

²⁶⁴L. HAND, THE SPIRIT OF LIBERTY 108 (2d ed. 1954).

²⁶⁵*Id.* at 109-10.

the decision. As I stated before, the public is entitled to know not only "the what" of a decision, but also "the why."²⁶⁶ Appellate judicial decisions of precedential or institutional value are not majestic enough to stand unless supported by reason. To use Herbert Wechsler's formulation, these decisions must be principled, that is, resting "with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."²⁶⁷ In twenty-five years as a judge, I have gone through the experience of making a decision, but when it came down to preparing the public justification for it, I was unable to prepare a reasoned discourse. It simply would not wash. Being required to write an opinion buttressed me against myself.²⁶⁸ Restraints of reason tend to insure the independence of a judge, to liberate him from the demands and fears—dogmatic, arbitrary, irrational, self-centered, or group-centered—that so often enchain other public officials and academic commentators.

Yet some major cases, or to use Holmes' formulation, lawmaking of molar proportions, have come down without supporting reasons. What then sets in is a sort of incestuous inbreeding in which no reason is given for subsequent cases except for a citation to the precedent or its progeny. I think that the application of the Bill of Rights against the states by way of the doctrine of selective incorporation into the fourteenth amendment, and especially the first amendment, illustrates my point. Another excellent example is the seminal case that led to the present generous interpretation of the first amendment, both in the speech and religion clauses.²⁶⁹ I choose this as an example deliberately because I heartily endorse most of the present ramifications of this incorporation.

My analysis begins with the first amendment's mandate that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."²⁷⁰ Decades of Supreme Court case law make it clear that the first amendment mandate is no longer limited to statutes enacted by Congress. The fourteenth amendment does not explicitly incorporate the first within its language:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property,

²⁶⁶See *supra* notes 110-12 and accompanying text.

²⁶⁷H. WECHSLER, *PRINCIPLES, POLICIES AND FUNDAMENTAL LAW* 21 (1961).

²⁶⁸I was buttressed against what Bickel described as a judge's own natural tendency "to give way before waves of feeling and opinion that may be as momentary as they are momentarily overwhelming." A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 82 (1978).

²⁶⁹See *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986) (Aldisert, C.J., plurality opinion).

²⁷⁰U.S. CONST. amend. I.

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²⁷¹

Notwithstanding language expressly limiting the first amendment's application to acts of Congress, there is legislative history in the adoption of the fourteenth amendment to suggest that the intention of Congress was that the entire federal Bill of Rights was to be enforced by the states,²⁷² a view tenaciously defended by Justice Hugo Black.²⁷³ Militating against this was the 1833 opinion by the venerable John Marshall in *Barron v. Baltimore*,²⁷⁴ stating that the Bill of Rights applied only to the federal government. The Constitution, he said, "was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states."²⁷⁵ John Marshall's opinion, of course, came down before passage of the fourteenth amendment. We know now that the first amendment "is made obligatory on the States by the Fourteenth" amendment.²⁷⁶ The reasons for its incorporation into the fourteenth amendment are somewhat shrouded, and do not surface readily in Supreme Court opinions.

Perhaps a reasoned elaboration has never been set forth. In the parlance of Greco-Roman rhetoricians, we are given much *petitio principii* and very little *confirmatio*. For example, *Gitlow v. New York*,²⁷⁷ often cited as the seminal case incorporating the free speech clause, involved a conviction under the New York Criminal Anarchy Act.²⁷⁸ The Court ruled that the Act did not violate the substance of the first amendment. In doing so the court begged the question, substituted assumption for reason, and a conclusion for the point of beginning:

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.²⁷⁹

Notwithstanding this scanty, if not ephemeral, explanation, we do recognize and reiterate that such incorporation has taken place, and enthusiastically agree that "this freedom is an inestimable privilege in a free government."²⁸⁰

²⁷¹U.S. CONST. amend. XIV, § 1.

²⁷²See generally Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

²⁷³See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250, 268 (1952) (Black, J., dissenting).

²⁷⁴32 U.S. (7 Peters) 243 (1833).

²⁷⁵*Id.* at 247.

²⁷⁶*Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964) (Black, J., concurring).

²⁷⁷268 U.S. 652 (1925).

²⁷⁸N.Y. CONSOL. LAWS ch. 40 (1909).

²⁷⁹*Gitlow*, 268 U.S. at 666.

²⁸⁰*Id.* at 667.

Nevertheless, the present sweep of first amendment law is anchored on an assumption, and not upon reasoned elaboration.²⁸¹ How much more legitimate it would have been had this been supported by some reference to the fourteenth amendment's legislative history. Congressmen John A. Bingham of Ohio and Thaddeus Stevens of Pennsylvania, and Senators Jacob Howard of Michigan and Lyman Trumbull of Illinois led the fight for the fourteenth amendment.²⁸² Bingham specifically said that he intended to overturn the precedent set by John Marshall's opinion in *Barron v. Baltimore*.²⁸³ Senator Howard, in discussing the rights embodied in the first eight amendments, said:

[T]hese are secured to citizens solely as citizens of the United States, . . . they do not operate in the slightest degree as restraints or prohibitions upon state legislation. . . . The great object of the first section of this amendment is, therefore to restrain the power of the states and compel them at all times to respect these fundamental rights.²⁸⁴

But the Court has never accepted this legislative history. Instead, in 1937 it adopted a doctrine that has become known as "selective incorporation," a doctrine that has never been supported by convincing reasoned elaboration. Speaking through Justice Cardozo, the Court decided, without supporting legislative history, that it must be left to the Court to determine in each case "those fundamental principles of liberty and justice which lie at the base of our civil and political institutions."²⁸⁵ In *Palko v. Connecticut*,²⁸⁶ the Court found that double jeopardy was not to be included among those fundamental rights, saying that this concept, like the right of trial by jury and to a grand jury, "may have value and importance. Even so, they are not at the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"²⁸⁷ The entire incorporation process, whether by judicial fiat as in the first amendment case in 1925,²⁸⁸ or based on the litany of incorporations of other amendments in the 1960's and 1970's, is not taken from our jurisprudence. Rather, they are merely expressions of various legal philosophies held at different times by

²⁸¹Dean Erwin Griswold has commented, "I shall never understand how the First Amendment 'is made obligatory in the States by the Fourteenth.' I have the feeling that this will go down as one of the greatest ipse dixits in Supreme Court history." Griswold, *The Judicial Process*, 31 FED. BAR J. 309, 315 (1972).

²⁸²J. LIEBERMAN, *supra* note 148, at 167.

²⁸³32 U.S. (7 Pet.) 243 (1833). Congressman Bingham's remarks were made on February 27, 1866. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1865-66).

²⁸⁴CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1865-66).

²⁸⁵*Palko v. Connecticut*, 302 U.S. 319 (1937).

²⁸⁶*Id.*

²⁸⁷*Id.* at 325.

²⁸⁸*Gitlow v. New York*, 268 U.S. 652 (1925).

different judges.²⁸⁹ They expressed the judges' views of what the law should be, a classic example of deontology, the theory of moral obligation or a statement of that which ought to be.

VII. CONCLUSION

I end as I began. As a long time judge-watcher, I believe that attaching one word labels to federal judges is a mighty inexact pastime. Ninety percent of the cases that come before us are rather simple matters implicating issues where the law and its application alike are plain or where the rule of law is certain and the application alone doubtful.²⁹⁰ Jurisprudence controls such cases. The particular jurisprudential temperament of the judge and his or her legal philosophy do not figure largely in affecting the outcome. In the remaining ten percent of the cases, in Cardozo's words, a decision one way or the other "will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law."²⁹¹ It is in these cases where the judge's complex personality comes under examination and dissection. Perhaps two anecdotes relating to games show the mix of legal philosophy, jurisprudence, and jurisprudential temperament that I have been discussing in these pages. The first comes from Professor Maurice Rosenberg, himself a long time judge-watcher:

[There is] the well-known fable that has three baseball umpires arguing about how they distinguish balls from strikes during the game. The first one says: "It's simple. I call 'em as I see 'em." The second one snorts: "Huh! I call 'em as they are!" And the third one ends the debate with: "They ain't nothin' til I call 'em!"²⁹²

The other anecdote comes from Learned Hand:

What are you to do when the meaning remains uncertain? Then, if the situation is not too bad, we say that we make a "just" interpretation. Remember what Justice Holmes said about "justice." I don't know what you think about him, but on the whole he was to me the master craftsman certainly of our time; and he said: "I hate justice," which he didn't quite mean. What he did mean was this. I remember I was once with him; it was a Saturday when the Court was to confer. It was before we had a motor car, and we jogged along in an old coupe. When we

²⁸⁹Significantly, two of the rights deemed not "at the very essence of a scheme of ordered liberty" by Cardozo in *Palko*, have subsequently qualified as such. See *Benton v. Maryland*, 395 U.S. 784 (1969) (right against double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right of trial by jury).

²⁹⁰See Aldisert, *supra* note 32, at 763.

²⁹¹B. CARDOZO, *supra* note 34, at 164.

²⁹²Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 640 (1971).

got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: "Well, sir, goodbye. Do justice!" He turned quite sharply and he said: "Come here, come here." I answered: "Oh, I know, I know." He replied: "That is not my job. My job is to play the game according to the rules."²⁹³

Our judges run the gamut from playing the game according to the rules to making up the rules as we play the game.

²⁹³Hand, *A Personal Confession*, Continuing Legal Education for Professional Competence and Responsibility (the Report on the Arden House Conference, December 16-19, 1958) at 116-23, reprinted in R. ALDISERT, *supra* note 111, at 184-85.

