JUDICIAL PHILOSOPHY FOR THOUGHTFUL POLITICIANS AND BUSINESS LEADERS

WINSTON P. NAGAN[1]
SAMANTHA MANAUSA[2]

CONTENTS

I. INTRODUCTION 2
II. JUDICIAL PHILOSOPHY AND THE DEVELOPMENT OF LEGAL THOUGHT IN THE UNITED STATES 2
III. JUDICIAL PHILOSOPHY AND THE CONCERN FOR WHAT EXACTLY THE LAW "IS" 4
IV. JUDICIAL PHILOSOPHY: THE POLITICAL CONTEXT OF APPOINTMENTS 5
A. *PRINCIPLE OF INSTITUTIONAL COMPETENCE* 6
B. *INSTITUTIONAL COMPETENCE AND THE PRINCIPLES OF NATURAL JUSTICE* 6
C. *LIBERTY, EQUALITY, AND DEMOCRACY* 7
D. *CRAFT SKILLS FOR DEVELOPING LEGAL RESTRAINT AND AVOIDING JUDICIAL IMPOTENCE* 8
E. *INSTITUTIONAL COMPETENCE AND THE ISSUE OF NATIONAL SECURITY* 9
V. THE IMPLICIT JUDICIAL PHILOSOPHY OF THE JUDGE 12
A. *INFLUENCE OF CULTURE, CONFESSIONAL OUTLOOK, CLASS, AND CRISIS* 12
B. *FACTORS OF IDENTITY, TEMPERAMENT, PERSONALITY, THE RIGHT TO PRIVACY, AND PERSONAL MORALITY: THE CONSTITUTION AND THE NINTH AMENDMENT* 13
C. *CAPITAL PUNISHMENT AND FUNDAMENTAL LAW* 15
VI. IMPLICIT JUDICIAL PHILOSOPHY: CONSERVATIVE, MODERATE, AND LIBERAL PERSPECTIVES 16
VII. JUDICIAL PHILOSOPHY AND LAWYERING 17
A. *THE CONTEXT OF THE LEGAL PROCESS* 17
B. *JUDICIAL PHILOSOPHY: MULTIPLE AND CONFLICTING LAWYER ROLES* 18
C. *UNPOPULAR ISSUES OF ADVOCACY: REPRESENTING THE "BAD MAN"* 19
D. *THE "BAD MAN" AS THE ULTIMATE CONSUMER OF LAW: HOW JUDGES CHANGE LAW IN MOLECULAR WAYS* 21
E. *ILLUSTRATIONS OF JUDGE-MADE LAW AS COMMON SENSE MOLECULAR CHANGE* 23
F. *HOW JUDGES MAKING LAW IN A MOLECULAR FASHION CREATED MODERN COMMERCIAL LAW* 24
G. *FROM COMMERCIAL RIGHTS TO VOTING RIGHTS* 24
H. *JUDICIAL PHILOSOPHY AND THE BOUNDARIES OF INTERNATIONAL AND COMPARATIVE LAW* 25
I. *THE VALUE AND RELEVANCE OF THE SOURCES OF INTERNATIONAL AND COMPARATIVE LAW* 27
J. *THE LIVING LAW IN A CULTURE OF PLURALISM* 28

[1] Samuel T. Dell Research Scholar Professor of Law Emeritus, University of Florida Levin College of Law; Chairperson, Board of Trustees, World Academy of Art and Science.
[2] B.A., Political Science and Religion, University of Florida; Junior Fellow, World Academy of Art and Science.

K. CONSTITUTIONAL LAW AS A PROCESS OF DEMOCRATIC EDUCATION 30
VIII. CONVENTIONAL LEGAL THEORY, JUDICIAL PHILOSOPHY, AND THE INFLUENCE OF MODERN SCIENCE 31
IX. JUDICIAL PHILOSOPHY AS A SYSTEM OF INQUIRY 34
X. LAW, POWER, AND BUSINESS 35
XI. CORPORATE RESPONSIBILITY AND LEGAL VALUES 35
XII. CONCLUSION 36

I. INTRODUCTION

One of the most important connections between legal theory and economic theory is owed to the foundations of modern American jurisprudence. Today, the dominant economic theory is called *economic neoliberalism*, which is grounded in the principle of the pursuit of economic self-interest. In the late nineteenth century, Supreme Court Justice Oliver Wendell Holmes examined the question of what law really "is." His answer was that the best way to look at the issue is from the point of view of "bad man."[3] The bad man is partly a consumer of the law and he wants to know whether his lawyer will represent his self-interest. It was a short step for economists to use the bad man's self-interest as the cornerstone of an economic theory based on self-interest. In this sense, the economic man has only his own interest in mind as a consumer. Behind this insight was Holmes' idea of separating law from morality and values.[4] The only real value of concern to the bad man was his economic self-interest. Thus, modern political economy finds its roots in the jurisprudential idea of the role of the bad man in the definition of law.

II. JUDICIAL PHILOSOPHY AND THE DEVELOPMENT OF LEGAL THOUGHT IN THE UNITED STATES

The nineteenth century was an age of discovery in the development of American law. During this period, American law developed an identity and a coherence, which consolidated the Rule of Law foundation, democratic character, and economic success of the American political experiment. Judges were largely responsible for the creation of a legal culture informed by a contentious judicial philosophy. Indeed, judges in the United States provided an impressive professional and scholarly foundation for an articulate judicial philosophy. Justice John Marshall, the most influential Chief Justice of the nineteenth century, established the enduring principle of judicial review, which carved out a distinctive and vital role for the law in the development of the Constitution and the values that inspired it.[5] This principle is the basis of the supremacy of law and a cornerstone of democracy and political economy. Chief Justice Marshall was the architect of the principle, which he formulated in the great case of *Marbury v. Madison*.[6] Since *Marbury*, the supremacy of law has profoundly influenced modern constitutional systems around the world.

---

[3] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).
[4] *Id.*
[5] *See* Robert M. Casale, Esq., *Revisiting One of the Law's Great Fallacies: Marbury v. Madison*, 89 CONN. B.J. 62 (2015) (acknowledging that "*Marbury v. Madison* is Chief Justice John Marshall's seminal decision establishing the doctrine of judicial review--the power of the Supreme Court to decide the meaning of the Constitution and to strike down laws that contravene that meaning").
[6] Marbury v. Madison, 5 U.S. 137 (1803).

Supreme Court Justice Joseph Story provided a strong scholastic foundation for the development of American law in practice. Story was particularly skilled in developing methods of practical reason, which he effectively applied to complex and concrete cases. Story's judicial philosophy influenced legal developments for a generation, and he continues to be influential into the present day. Story best illustrated his own judicial philosophy in his magisterial work on private international law, *Commentaries on the Conflict of Laws* (1834).[7] A critical component of Story's judicial philosophy was his challenge to both judges and lawyers to think and reason at the highest levels of professional competence. This field of law was crucial to the development of political economy in the United States.

Story also brought a prospective vision to American law, especially in the development of commercial law in the federal courts. He was instrumental in developing law as the foundation for a practical national commercial market. The Supreme Court's use of law to support national economic integration effectively facilitated the development of the most powerful and prosperous state in the world. That development also created the problem of the concentration of economic power, which required a form of legal balancing to ensure that economic prosperity did not produce a business culture bent on destroying economic competition. Thus, the development of judicial review was complemented by the legal reconstruction of the United States as a political and economic union. The judicial philosophy that fueled these developments was significantly influenced by the principles of reason and rationality associated with Natural Law. Justices Marshall and Story gave the concept of judicial philosophy a compelling intellectual pedigree that has provided both insight and challenges to judges, lawyers, and other stakeholders impacted by the law.

As the United States moved into the industrial age of modern science and technology, conflict emerged in the law about judicial objectivity in the uses of Natural Law. If the Republic was ordained by God and Natural Law was God's revelation to judges, then God's footprint would inform the case law. Since case law generates winners and losers, a skepticism developed that God might favor the rich and the powerful. The reaction was an indication of the growing influence of scientific thinking. In the history of American thought, this reaction came to be known as "the revolt against formalism."[8]

The new scientific skepticism about law was centralized around the concern about whether judges were using a judicial philosophy of Natural Law to justify their political preferences: does the Natural Law version of judicial philosophy introduce too much subjectivity into the law, especially constitutional law? The ostensible conflict between religion and science (or between idealism and realism) remains one of the most contentious issues in the American political economy. Justice Oliver Wendell Holmes, a leader in the "revolt against formalism," developed a judicial philosophy vastly different than those of Justices Marshall and Story. Like his predecessors, Holmes made judicial philosophy a matter of both theoretical and practical importance. In *The Path of the Law*, one of the most influential pieces on judicial philosophy, Justice Holmes wrote: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[9] In this suggestive statement, Holmes made judges, and by implication judicial philosophy, the center of professional and intellectual concern. Holmes'

---

[7] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1st ed. 1834). This book was a powerful expression of the intellectual force of American judicial philosophy and is still cited as authoritative in foreign courts.

[8] *See* Michael P. Schutt, *Oliver Wendell Holmes and the Decline of the American Lawyer: Social Engineering, Religion, and the Search for Professional Identity*, 30 RUTGERS L.J. 143, 156 (1998).

[9] Holmes, *supra* note 1, at 460-61.

insight has enjoyed considerable durability. Holmes drew attention to the role of judges in the law, the role of lawyers in general, and the concern for appropriate roles of institutional competence in governance. Holmes' emphasis is largely influenced by the principle that law emerges from identifiable and finite institutions of governance.

Holmes' view is seen as a form of positivism, a view of law largely influenced by developments in modern science. An important and vital offshoot of the development of the American view of law was pragmatism. Holmes was a leading pragmatist and positivist in his time. Judicial philosophy, like positivism, was similarly influenced by developments in modern science. Pragmatism became a virtual public philosophy of the United States, and continues to influence the political and legal culture of the nation. Not only are the insights of judges critical to the American form of government and the central role of constitutional adjudication, but their insights are also of profound theoretical importance to modern forms of democratic governance based on the Rule of Law. Pragmatism was an ally of progressive capitalism.

III. JUDICIAL PHILOSOPHY AND THE CONCERN FOR WHAT EXACTLY THE LAW "IS"

It may be of some value for us to step back for a moment to appreciate the nature of judicial philosophy and the issue of what law *is*. We begin with a basic and disarmingly simple question implicit in judicial philosophy: *What is law?* Of course, everyone wants to know what law *is.* The citizen wants the law to be objectively ascertainable and accessible; the practical reason for this is that without knowledge of the law, interests and basic rights may be disparaged or destroyed. When we act in society, we tacitly have a sense that we are either acting within the law or our actions are protected by the law. When we probe the question of *what is law?* in the context of judicial philosophy, the focus is on the proper scope, limits, and boundaries of law. This focus is a question about whether the boundaries of law, like the other boundaries of social and political experience, are contingent and possibly indeterminate.

The dilemma is about whether law or the role of judges should be conditioned by *logical* analysis or by analysis influenced by social and historical experience. The former approach implies that law's boundaries are objective and precise, while the latter implies that those boundaries are fluid and porous. Judges and the larger social universe have a keen interest in what law "is." To know this is to understand its limits or boundaries. This is no simple matter. The questions of what the law *is* and what its boundaries are generate a well-known dilemma for practical, judge-made law. As suggested earlier, this dilemma has confronted many of the great judges in legal history. Justice Holmes maintained that the life of the law was not logic but experience. Although he was highly skilled in the development of traditional legal arguments using logic as a tool of analysis, he was skeptical of the ability of logic to always produce predictable answers to legal problems. In a moment of candor, Holmes admitted that he could give any conclusion a logical form. What Holmes was getting at was that judges who are *self-aware* of the professional importance of judicial philosophy would doubtless appreciate the salience of examining self-consciously the premises from which logical analysis has developed. In *The Nature of the Judicial Process*, Justice Benjamin Cardozo gave a sharper focus to Holmes' insight about logic and experiencing by suggesting that from a judicial point of view, law never "is," it is always "about to be."[10] Holmes suggested that an excessive preoccupation with certitude was an illusion, and in the political give-

[10] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 126 (Yale Univ. Press 1921).

and-take of social life, comfortable repose was not the destiny of humankind.[11] This was a sobering challenge to the conventional wisdom and clichés about law, tradition, and stability.

Both natural law and positivism are deeply connected to American judicial philosophy. An illustration of the practical importance of these contentious perspectives of judicial philosophy may be seen in the opinions of Justices Felix Frankfurter and Hugo Black in *Adamson v. California*.[12] In this case, Frankfurter argued that the due process clause had "an independent potency" of its own, which is unconstrained or extended by the Bill of Rights.[13] Judges have the task in particular cases of determining whether procedures used by government "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples."[14] Behind this idea was the task of judicial philosophy to identify and declare "accepted notions of justice."[15] Thus, for Frankfurter, and many Justices on the Court, the natural law tradition had practical currency. The most obvious markers of legal philosophy are rooted in religion and science. Religion is identified with natural law whereas science is identified with positivism. Justice Black saw Frankfurter's view as a revival of natural law, which was largely discredited in light of the judicial philosophy of positivism. For Black, this meant that the Fourteenth Amendment, according to the exact text, required the application of the entire Bill of Rights to the states.[16] Positivism is scientific and requires objectivity. The most objective aspect of interpretation, according to Black, would be to stick fully to the entire text of the Bill of Rights.[17] In short, Black found that objectivity would give us a far more liberal view of the Bill of Rights than would Frankfurter's concept of natural law.

From the *Adamson* case we see that the concerns raised by eminent judges about the foundations of judicial philosophy capture one of the most important insights into the responsibilities as well as the challenges of judge-made law.[18] Judge-made law in effect grapples with the problem of conserving the value of stability in social relations while simultaneously being receptive to the claims that social reality is not static but dynamic. Law in practice must be sensibly receptive to this social reality. Therefore, the judging role confronts the challenge of mediating between the valued elements of tradition and the valued elements of ordered, rational, often microscopic change. This is a role that requires a professional understanding of judicial philosophy, legal culture, and a self-awareness of one's *implicit* judicial philosophy, which a jurist brings to the judicial role. This awareness is a critical aspect of the political-economic theory of American culture.

IV. JUDICIAL PHILOSOPHY: THE POLITICAL CONTEXT OF APPOINTMENTS

When judicial nominations are made, particularly to positions of high office, the supremacy of law as declared by the judges becomes an issue of particular importance to politicians. The judicial philosophy of a nominee, therefore, should be carefully examined. Judicial philosophy is not a matter confined narrowly to the judge's self-definition of "judging." A number of other stakeholders will be interested in this precise question since adjudication by implication also

[11] Holmes, *supra* note 1, at 465.
[12] Adamson v. California, 332 U.S. 46 (1947).
[13] *Id.* at 66 (Frankfurter, J., concurring).
[14] *Id.* at 67 (Frankfurter, J., concurring).
[15] *Id.* at 68 (Frankfurter, J., concurring).
[16] *Id.* at 71-72 (Black, J., dissenting).
[17] *Id.* at 89 (Black, J., dissenting).
[18] *See generally id.*

defines the appropriate roles or spheres of competence of other important players in the dynamics of modern governance. For example, as mandated by the United States Constitution, the Senate must give its advice and consent to federal judicial appointments, including to the Supreme Court.[19] Regarding Supreme Court appointments, a considerable factor is that the only forum with the competence to review what the Supreme Court has done is the Supreme Court itself. The supremacy of law in historical experience has, in fact, been both a majestic force for democratic governance as well as a force which has somewhat diminished the promise of democracy under the rule of law.

Naturally, when politicians consider nominating and appointing a judge, they want to know whether the candidate has a judicial philosophy, and, if so, what exactly that philosophy is. The politicians want to know what the boundaries are between law as declared by judges and law as made by legislators. Moreover, if the executive makes the nomination to a judicial position, the executive itself will be concerned about an implicit jurisprudence of the nominee concerning the scope and boundaries of executive competence. Thus, the executive will be particularly interested in judicial appointments, which it believes will respect the proper sphere of executive competence in the discharge of the nominee's prospective role as a judicial officer. The question of "what is law?" for the benefit of the practically-minded jurist and politician may be stated more precisely: "what is the appropriate role for a judge?" This question implies that judges have institutional limitations to their roles in the consideration of what is deemed to be appropriate. A judicial appointment will have largescale implications for political economy.

A. Principle of Institutional Competence

What aspect of judicial philosophy informs the role of a judge? This question requires an understanding of the *appropriateness* of the proper role of the judge; it also requires an explanation of the appropriate role of the judge in the broader framework of governance and operational constitutional order. The shorthand version of this basic question is that it requires understanding of a principle of institutional competence. In the processes of modern governance, judicial competence is delimited, in part, by other concurrent or sequential competences of other institutions of government (executive, administrative, and legislative). In contemporary adjudication, judges are not simply applying what the sovereign wants. Indeed, judges are often uncertain about where sovereign authority reposes in specific cases. The principle of the supremacy of law requires judges to sort out a complex bundle of intersecting dynamic institutional powers that characterize the constitution of authority in modern political society. To use a philosophical metaphor, they have to "let the fly out of the bottle." That is to say, they must clarify the specific competence and issue and resolve it, "the fly," which is embedded in the confusion of flies in a "fly bottle."

B. Institutional Competence and the Principles of Natural Justice

The complexity of defining the appropriate role of the judge mandates an appreciation of the scope of that role in the light of the boundaries or limits of other appropriate roles within the process of governance. To ask the question "what is the appropriate role of the judge?" is to ask the extent to which the judge's role is defined by objectively ascertainable indicators. The principle of institutional competence facilitates the development of objective indicators in practical

adjudication. However, there is another critical, but difficult, indicator of the appropriate judging role. That indicator is the expectation that the "subjects of the law hold for a basic sense of justice. In short, the principle of institutional competence should be construed to be compatible in general with society's expectation of justice. The relevant inquiry focuses, therefore, on the "indicators" of justice. In short, this means that the judicial role ensures at minimum that citizens receive equal access to justice, equal protection of the law, and adjudication that is independent and impartial.

There are ancient prescriptions of justice which still guide modern adjudication: *audi alteram partem* (the other side must as well be heard or presented); and *nemo judex in sua causa* (no judge should adjudicate his own cause). These principles of justice are among values that pervade the precise concern about the allocation of institutional competence in adjudication. These maxims of justice implicate the rudiments of equality and liberty. They also implicate the principle of impartiality and the principle of judicial independence. No principles of justice are more important to the idea of justice than the liberty of access, the presentation of the other side, and the idea of independence and impartiality in adjudication. These principles are often described as principles of natural justice. Thus, the values and moral precepts embedded in any articulate notion of judicial philosophy must also be a part of the calculus of informed adjudication. In short, the principle of institutional competence is pervaded by the principle of justice.

The principle of justice as we understand it today also crystalizes around the principles of freedom (liberty), equality, and dignity, which likewise incorporates the notion of respect. The ancient principle of *audi alteram partem*, which requires that the other side be heard, is also a principle of empowerment; it incorporates the right of equal access to justice as a liberty and equality interest. Thus, from time immemorial, equality and liberty have been complementary interests. Equality enhances liberty by the principle of non-discriminatory inclusiveness regarding the reach of liberty. Liberty is a central concern of political economy. In thoughtful judicial philosophy, the values of liberty and equality are indispensable and complimentary to each other and to a proper understanding of the foundational principles of justice and democracy under the rule of law. Thus, politicians should be particularly interested in the judicial philosophy of a nominee in terms of that nominee's commitment to the principles of justice underlying the further principles of institutional competence in the discharge of the judicial role.

C. Liberty, Equality, and Democracy

Justice Steven Breyer, in his book *Active Liberty: Interpreting Our Democratic Constitution* (2006), draws attention to the importance of the interdependence of liberty and equality.[20] Justice Breyer reminds us that when we disparage equality we in fact undermine liberty as a basis for democratic values;[21] conversely, when we undermine liberty, we disparage equality.[22] Like the expansive boundaries of property (intellectual or otherwise), the boundaries of liberty and equality are evolving. These constitutional principles, he believes, are the balanced values of our constitutional system, which seeks to reconcile the rule of law with the principle of democracy.[23] Law must protect and defend expectations about basic rights and duties and

[20] *See generally* STEVEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (Vintage Books 2006).
[21] *Id.* at 8 (asserting that a democratic government inherently protects personal liberty and insists that the law respect each individual equally).
[22] *Id.*
[23] *Id.* at 31–32.

recognize that expectations about rights and duties also have a dynamic aspect to them. In short, to reify expectations unsupported by the conditions in social process invites conflict, generates insecurity, and undermines those precise expectations of stability which law must secure, as we saw in *Dredd Scott* and *Plessy*.[24] These values are inherent in the phrase "equal justice under law." It symbolizes adjudication before the Supreme Court. The idea of justice is fundamental to the rule of law. The judicial role thus assumes sensitivity to the basic principles of justice, which includes impartiality and independence as well as economic fairness.

The judicial role must concurrently account for the appropriate role of the legislative branch of government and the imperatives of democratic decision-making, which give the legislature a significant imprimatur of authority. Another specialized branch of institutional competence lies in the function of executive decision-making. The executive also carries a strong imprimatur of legitimacy in a system like the United States; the direct election of the president assures the executive branch of government an important level of deference from the other branches of government.[25]

D. Craft Skills for Developing Legal Restraint and Avoiding Judicial Impotence

Modern systems of governance have established complex systems of administrative decision-making. Frequently administrative decision-making is based on technical expertise and high levels of professional specialization. Foundational problems frequently emerge about the proper scope and role of each branch of government. Often judges must mediate between the appropriate spheres of authority of the other branches of governance, including the court's own authority and jurisdiction. This requires that judges understand the distinct spheres of institutional authority, and must mediate conflicts of competence with great prudence and technical skill. They must understand the complex authority structures underpinning each branch of government, as well as the interrelationships within and between them. They must also understand the technical efficacy and specialist decision-making functions characteristic of each branch of government. In doing this, judges must also present a measure of self-restraint in the discharge of the judicial function or role.

At the end of the day, judge-made law is based on reason, and reason is the basis of its ultimate authority to declare the law. In discharging the judicial role, the element of restraint, the technical skill of reasoned exposition, the power of careful analysis, and the constraining force of case-specific facts inform the calculus of judicial self-restraint. The specific issues, which thoughtful politicians would carefully want to consider, are the nominee's approach to the deference accorded legislative, executive, administrative, and (in appropriate spheres) private sector decision-making. Self-restraint does not mean judicial "impotence." It cannot mean that the court will be seen as quietly simply being impotent on the fundamental precepts of justice. The court's essential legitimacy springs from these ideas.

The discipline of legal reasoning includes the reality of case-specific facts held to the doctrine of precedent, the character of precedent, and deference due to prior adjudication, i.e. the deference due to the doctrine of *stare decisis*. This doctrine has a different strength for lower court

---

[24] *See* Dredd Scott v. Sandford, 60 U.S. 393 (1857); *see also* Plessy v. Ferguson, 163 U.S. 537 (1896).

[25] Winston P. Nagan & Aitza M. Haddad, *Sovereignty in Theory and Practice*, 13 SAN DIEGO INT'L L.J. 429, 490 (2012), https://scholarship.law.ufl.edu/facultypub/293/ (discussing the deference afforded to the executive branch under the unitary executive theory).

judges than it has for the justices of the Supreme Court. The justices have the power to reject prior decisions, begging the question: how will this power actually be exercised? Will the court remain faithful to the most foundational principles of justice in exercising this great power? Judges should respect precedent but avoid the idea that nothing can ever be done for the first time.

E. Institutional Competence and the Issue of National Security

A nominee's judicial philosophy will also reflect a particular attitude towards the separation of powers and the court's role in defining those boundaries. The historic American legal issue has been whether we should strengthen federal authority at the expense of state authority, or vice versa. The issue with state's rights has been the abuse of the civil rights of minorities. Thus, the protection of individual rights has often fallen to federal authority involving the executive, the Congress, and the Supreme Court itself. During the post-World War II period, Congress expressed concerns about the scope of executive power, in particular, the power to conduct de facto wars abroad.[26] When the U.S. commenced its War on Terror, the executive made far-reaching claim to constitutional powers, which administration officials believe have been inappropriately preempted by Congress in the past.[27]

The 9/11 terror attack raised a critical issue about the separation of powers and the rule of law foundations of American democracy. Prior to 9/11, Chief Justice Rehnquist had sagely warned the profession and the public that in the future, national security issues would pose difficult questions for the judiciary.[28] The Chief Justice quoted the ancient roman maxim that in time of war the law is silent: *inter arma silent leges*.[29] The late Chief Justice suggested that it is "neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peace time, but it is... likely that more attention will be paid by the courts to the basis of the government's claims of a necessity as a basis for curtailing civil liberty. The laws thus will not be silent during time of war, but they will speak with a somewhat different voice."[30] Both judges and senators should be particularly interested in exactly what the late Chief Justice meant by the notion that the courts would speak with a *somewhat different voice*, and how exactly the courts will review claims to set aside constitutional rights based on necessity. A central issue with the War on Terror is that it is not the type of war that might have been envisioned by the drafters of the Constitution or even by Chief Justice Rehnquist when he wrote the book quoted above. The War on Terror uses the term "war," but it does not follow the normal conditions of a conventional war. The most challenging aspect of this war is that it could be construed as a war of indefinite

---

[26] S. Res. 85, 91st Cong., 115 CONG. REC.17,245 (1969) (Senate resolution declaring that a commitment of U.S. armed forces may arise "only from affirmative action taken by the executive *and* legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both House of Congress specifically providing for such commitment") (emphasis added).

[27] *See* Winston P. Nagan & Craig Hamer, *Patriotism, Nationalism, and the War on Terror: A Mild Plea in Avoidance*, 56 FLA. REV. 934, 934–35 nn.6-9 (2004) (explaining that the Patriot Act used "far-reaching provisions" to justify the restrictions "on the liberties of American citizens as well as the human rights of aliens").

[28] WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 222–25 (1998) (Justice Rehnquist recognized that "[i]n wartime, reason and history both suggest that the [balance between freedom and order] shifts to some degree in favor of order," and that the laws will "not be silent in times of war, but they will speak with a somewhat different voice.").

[29] Davis G. Savage, *Historically, Laws Bend in Time of War, Rehnquist Says*, L.A. TIMES (June 15, 2002), https://www.latimes.com/archives/la-xpm-2002-jun-15-na-rehnquist15-story.html.

[30] REHNQUIST, *supra* note 26, at 224–25.

duration.[31] Thus, claims to expropriate extreme emergency powers must envision the possibility that if these claims are uncritically honored, there would be a series depreciation of the Constitution itself.

The Bybee Torture Memo (Memorandum for Alberto R. Gonzales, Counsel to the President) made the case that the law relating to the use of torture would be so narrowly construed as to effectively make torture a permissible strategy by the executive in the War on Terror.[32] Although the executive has since repudiated this memorandum, other factors have emerged involving extra legal claims by the executive because of the continuing War on Terror.[33] Among the most high visibility issues is the claimed competence to spy on U.S. citizens without any external or objective assessment or appraisal. The Bybee Torture Memo is important because even if its claims regarding torture have been repudiated, it makes a strong case that the power given to the president as Commander-in-Chief permits a virtual suspension of much of the Constitution itself.[34] In short, the central elements of democratic decision-making that require appropriate levels of transparency, accountability, and responsibility ae issues that may now be compromised. This issue has assumed critical importance for the constitutional rule of law foundations of the United States. The judicial philosophy of practicing judges is thus vital to the role of an independent and impartial judiciary in the context of expansive claims to national security competence by the executive.

A judicial philosophy must, therefore, give a coherent account of the justification of self-limitation in exercising the institutional competence of a judge, keeping in mind the fundamental principles of justice that partly define the role. A factor in the calculus of restraint is the level of restraint of the other branches of government. At times, it is the extreme acts of the other branches of government that makes the Court appear to be stretching the boundaries of restraint in defense of the Constitution. Judicial self-restraint depreciates the Court's own foundation of authority when it abdicates or compromises the core principles of justice, which must inform its role in adjudication. In short, self-restraint is no justification for undermining the expectation of justice in the judicial role and the animating judicial philosophy, which guides its task. Judicial self-restraint is an important factor in a system based on the separation of powers, democratic principles, and the supremacy of law.

In evaluating nominees to the Court, a frequent tool is the assessment of the nominee's record of constitutional interpretation made in past decisions. In fact, judicial philosophy may be expressed in the very task of interpretation. A particular form of interpretation may inform a philosophy. One view is that the Constitution be interpreted in accord with the original intent of those who wrote it.[35] Another view is that it be interpreted according to the exact words of its text,

---

[31] *See* Winston P. Nagan & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT'L L., 375–438 (2004).

[32] Memorandum from Jay S. Bybee, Dep't of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C §§2340-2340A (Aug. 1, 2002), at 1-2, available at http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf (concluding that 18 U.S.C. § 2340-2340A only prohibits the most extreme acts of torture).

[33] Linda Carter, *Torture and the War on Terror: The Need for Consistent Definitions and Legal Remedies*, 6 J. NAT'L SECURITY L. & POL'Y 291, 291 (concluding that the United States has made progress on undoing the harm of the legal interpretations of the Bush administration such as the McCain Amendment prohibiting cruel, inhuman, or degrading treatment or punishment and President Obama's renunciation of certain interrogation techniques, but that the legal remedies for torture within the United States remain limited).

[34] Julie Mertus & Lisa Davis, *Citizenship and Location in a World of Torture*, 10 CUNY L. REV 411, 417 (claiming that after intense international and national pressure the Bybee torture definition was reconsidered and rescinded).

[35] BRANDON J. MURILL, CONG. RESEARCH SERV., R45129, MODES OF CONGRESSIONAL INTERPRETATION 2 (2018).

regardless of the level of generality that those words inspire.[36] A further component of such interpretation could be the assumption that the instrument requiring interpretation includes an explicit or implicit purpose and the only justifiable construction and interpretation is consistent with those purposes, and therefore meets an assumption of coherence and practical reason. These questions of interpretation are incredibly complex.

The constitutional system of the United States codifies many general values and moral precepts such as liberty, equality, due process, cruel and unusual punishment, and others, and it is clear that the framers of the Constitution deliberately chose very general moral precepts as operative constitutional language. To give these terms their fullest meaning that the words can bear would provide a very broad vision of the values in the Constitution. On the other hand, there are judges who insist that the Constitution be interpreted as the framers might have understood it with the ostensibly frozen meanings of the 18th century.[37] In short, judicial appointment is a high stakes issue because of politics, judicial precedent, reconstructions of history, and conflicting theories of interpretation.[38] Judicial philosophy as currently understood suggests either a broad reading of the critical precepts in the Constitution, since these terms permit expansive ideas about what rights are and how they should be secured; it alternatively suggests that the Constitution provides a modest exception to the idea that the sovereign is the true lawgiver an the courts must do what the sovereign wants.[39] The idea, therefore, insists on the narrowest possible construction of the precise words in the Constitution.[40] It also requires the development of particular standards of interpretation to justify narrow construction. This perspective implicates the question of equating sovereign with majority rule, a perspective tending to be hostile to the rights of minorities and to individuals. It may also distort the problem of managing power and its potential abuses, and the appropriate role of the court in the precise question of balancing and limiting the concentration of political power and the salience of liberty to business.

Dworkin has stated: "The bare statement that a judge should enforce 'the law' when dealing with clauses that are so abstract tells us nothing: the crucial question is how a judge should decide **[**the case**]**."[41] The central problem of interpretation often overlooked by judges and politicians is that a constitution's first and foremost function is that it must manage conflict. Constitutions are largely developed out of contexts of conflict and often reflect unresolved tensions that are better resolved through the political or judicial process and the private sector than through brute force. This means that a constitution must consistently be construed in the first place not to reify expectations, or to grandiosely imagine them. Interpretation must construe the constitution within the framework of the expectations of the body politic, which requires balancing conflict against both stability and change. The process incorporates ideas of judicial philosophy and the judicial role. To reify the past may produce conflict. To discard the past may also produce conflict. The first point about the management of claims involving the most fundamental values of the society

[36] *Id.* at 5.
[37] *Id.* at 7–8.
[38] Ryan W. Scott & David R. Straus*, Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1870–71 (2008). *See also* Edward H. Levi, *The Nature of Judicial Reasoning,* 32 U. CHI. L. REV. 395, 404 (discussing judicial interpretation and precedent); Eric Foner, *The Supreme Court and the History of Reconstruction-- and Vice-Versa*, 112 COLUM. L. REV. 1585, 1591–92 (2012) (discussing an example of how judges' interpretations can be based on faulty history).
[39] BRANDON J. MURILL, CONG. RESEARCH SERV., R45129, MODES OF CONGRESSIONAL INTERPRETATION 2 (2018). *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 36–37 (Oxford Univ. Press, 2010).
[40] Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT'L L. 142 (2004).
[41] Ronald Dworkin, *Judge Roberts on Trial,* N.Y. REVIEW OF BOOKS, Oct. 20, 2005 at 3.

is to assure the target audience, the consumers of the law, that decisions that allocate their basic rights and obligations are broadly consistent with the values that sustain the peace and promote the promise of equal respect and dignity for all. In short, due deference is accorded the principle of justice. The judicial role requires courage and not restraint when it comes to the protection of rights, which undermine the principle of justice and dignity. In short, self-restraint should not be self-inflicted impotence in the courts in defense of the Constitution itself.

V. THE IMPLICIT JUDICIAL PHILOSOPHY OF THE JUDGE

A. Influence of Culture, Confessional Outlook, Class, and Crisis

The implicit judicial philosophy of the judge will influence the judge's approach to the concept of judicial self-restraint, the principle of institutional competence, and the principles of justice. A controversial issue involved in self-restraint is the realism that judges come to the judging role with not only a professional sense of the judicial philosophy and role, but also with the implicit judicial philosophy of the jurist. Those in the executive and legislative branches may well hold real concerns regarding the appointment of judges because they cannot determine effectively the nominee's implicit judicial philosophy, The concern is that the unexpressed but real implicit judicial philosophy of the judge may be the critical indicator of whether the judge will respect the obligation vested in the judicial office. One of the important questions raised by a nominee's implicit judicial philosophy is the question of what deeper psychosocial factors may well influence a judge's concept of judicial philosophy and the appropriate judicial role.[42] In general these factors might include the judge's cultural background. For example, if the judge comes from the culture of a minority group, will those cultural experiences subtly influence the judge's sensitivity to cultural pluralism in matters which implicate the clash of cultural values in the courts? A further factor may be the matter of the judge's social class or stratification. Will a judge from an upper socio-economic class be insensitive to claims that emerge from a different social class from his own? Will that judge be sensitive, perhaps excessively so, to the problems that emerge from a social class with which he most intensely identifies because of family ties and class background?

Another factor may simply be how a judge will perform under conditions of extreme urgency. Judges generally are at their best when they have time to deliberate and consider arguments and effective reviews of the sources of the law. However, many cases involve decision making under pressure (death penalty stays, right to life/right to die issues, issues of national emergency or security). Thus, the implicit judicial philosophy of a judge may well be influenced by how that personality manages problems under circumstances of extreme stress. The current drift toward a national security state or form of governance makes the issue of "crisis" and the role of courts important.

---

[42] *See* Timothy J. Capurso, *How Judges Judge: Theories on Judicial Decision Making*, 29 UNIV. BALT. L. REV. 5, 7 (1998).

B. Factors of Identity, Temperament, Personality, The Right to Privacy, and Personal Morality: The Constitution and the Ninth Amendment

Further factors which might influence the implicit judicial philosophy of a judge are the inevitable indicators of temperament and personality.[43] These indicators may reflect strongly held beliefs, prejudices, and moral sentiment. Personal questions of morality often implicate rights that may predate the Bill of Rights. When questions of fundamental morality are considered, we confront a distinctly contemporary problem. Today, humanity is organized around the state, which now holds more concentrated power than in all of human history. This means that the state has immense power to do good as well as evil deeds. At the other end of state power is the individual. State power pits the collective, which is immensely powerful, against the individual, who is immensely vulnerable. The power of the state to intervene in matters of great moral sensitivity for individuals and for civil society would be unconstrained but for the importance of the rule of law.

The stakeholders of civil society will want to know where a judge stands on certain important moral issues of great sensitivity to the individual. Individuals will doubtless have great fears that the sphere of the collective will destroy their individuality, their sense of intimacy, and the core components of their essential identity. These issues are not hypothetical; they give us a clue about how the judge will decide a certain set of facts involving human individuality. They will likewise reveal that judge's beliefs regarding the proper extent of governmental involvement in sensitive moral issues. What should government decide and what should be left to civil society? Therefore, it is crucial that a judge's implicit moral compass be evaluated as a matter of concern to the thoughtful politician. Recent history has demonstrated that an unlimited state and government is a lethal threat to the human condition. The limitation of powers that the Founding Fathers considered is wisdom for the ages. These issues are of concern to business freedoms as well.

Civil society functions crucially as an arena for the exercise of liberty and for basic rights, which the Ninth Amendment sagely reminds us are left to the people. In discharging the judicial function, a judge, being unselfconscious of these matters, may find that a decision is driven less by the objective expectations embedded in the law than in an unreflective sense of what is right and wrong. This is most visibly demonstrated in cases of abortion, the right to life and to a decent existence, and to cases touching on sensitive issues of sexual morality in a world of sexual pluralism. It can also be seen in cases centralized around deeply held prejudices about the status of "others" with whom we do not have an intuitive identification. Business and class are important here. An important consideration underlying many of these issues is the scope of liberty and the nature of "respect," and whether issues like the ones raised in cases like *Roe v. Wade* should be governmentally regulated and controlled or left to the individual, the family, the church, or a section of civil society.[44] Neither the courts nor the Constitution answer these moral questions directly. The public discourse about this important case often reflects a belief that the Court "favors" abortion, that the Court has taken a position on an important moral issue which indicates that the concept of "life" is not seen to be a constitutional value.[45]

---

[43] *Id.* at 6–7.

[44] 410 U.S. 113 (1973). *See generally* Molly E. Carter**,** *Regulating Abortion Through Direct Democracy: The Liberty of All Versus the Moral Code of the Majority***,** 91 B.U. L. REV. 305 (2011) (discussing different ways that abortion rights can be implemented).

[45]*See* Brendon F. Pons, *The Law and Philosophy of Personhood: Where Should South Dakota Abortion Law Go from Here?*, 58 S.D. L. REV. 119**,** 127–28, 132 (2013).

In actuality, the Court has not taken any specific moral position on these matters. What the Court has done is highlight an inevitable characteristic of American democracy: fundamental values are often in ostensible conflict. Some of these values may be resolved by different forms of intervention, including judicial settlement, but many must be left to civil society to work through. The fact that the Constitution draws a line with regard to what a state should punish by criminal law does not suggest that the Court has taken a side on the precise moral issue that the state wants to punish. What the Court effectively has done is to say that some rights are left to the people to work through within the processes of non-coercive civil society. The Court's jurisprudence in this area may also be read as providing an allocation of competence to civil society. Here, the decision-making actors may be spouses, lovers and intimates, or of institutions specialized to rectitude, such as religious or secular social support networks. These networks constitute the civil society of "We the people." The challenge here is that certain rights—such as the right to privacy—are not explicitly written in to the language of the Constitution and cannot be relied on to support cases like *Roe v. Wade* and the line of cases on which it was based.[46] These cases are constitutional precedents which affirm the role of forming moral values and principles within the framework of non-coercive society.

In *Griswold v. Connecticut*, Justice William O. Douglas noted that the right to associate, along with several others, is not explicitly mentioned in the Constitution or the Bill of Rights.[47] However, he saw that the court's prior precedents affirmed these peripheral rights as *critical* for securing the basic rights explicitly delineated in the Constitution.[48] Justice Douglas concluded that the right to privacy was a most central form of association involving intimacy to a virtually sacred degree.[49] As applied to the marriage of a couple, Justice Douglas characterized such association as one of noble purpose.[50] What he meant was that marital intimacy (and possibly human intimacy) are matters central to humanity and human identity. Thus, the expression of human intimacy is a matter of noble purpose. Expanding on this analysis, Justice Arthur Goldberg drew specific attention to the importance of the fundamental rights of association reserved to the people.[51] He maintained that "the language and the history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights protected from government infringement" in addition to the first eight Constitutional amendments.[52] Recall that the Ninth Amendment reads as follows: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[53]

Justice Joseph Story gave us a clear insight into what the Founding Fathers intended by putting the Ninth Amendment into the Constitution, arguing the following:

> In regard to . . . . [a] suggestion, that the affirmance of certain rights might disparage others, or might lead to argumentative implications in favor of other powers, it might be sufficient to say that such a course of reasoning could never be sustained upon any solid basis . . . . But a conclusive answer is, that such an attempt may be

[46] *Roe*, 410 U.S. at 151; 16B C.J.S. *Constitutional Law*§1164 (2019).
[47] 381 U.S. 479, 483 (1965).
[48] *Id*. at 482-83.
[49] *Id*. at 485-86.
[50] *Id*. at 486.
[51] *Id*. at 492–93 (Goldberg, J., concurring)
[52] *Id.* at 488.
[53] U.S. CONST. amend. IX.

> interdicted (as it has been) by a positive declaration in such a bill of rights that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people.[54]

When the wisdom of the Ninth Amendment is read in relation to the Declaration of Independence and the concept of "We the people," it becomes clear that constitutional interpretation should be a shield for the protection of civil society. Civil society and limited government go hand-in-hand; government cannot monopolize every question of moral sensibility or business practice, because in doing so it would promote tyranny and repression. It is, therefore, important that many matters of moral sensibility, including matters of deep interpersonal intimacy, be left to civil society to work out without the brute instrument of state violence and coercion. It would, therefore, be important for the legislative branch to carefully consider the role of the Constitution in the protection of civil society. It is clear that without the rights of association and privacy (and without the shield of the Ninth Amendment), the people will be servants to government rather than its rightful owners. Indeed, business freedoms would be largely diminished.

We may, therefore, conclude that if civil society means anything, it is that certain rights are reserved to "We the people." Here individuals may have different views about how public they want their intimate lives to be, or how much control they want to have over their most intimate decisions regarding affective ties and family relationships. The Constitution recognizes that the citizen has a right to make decisions on matters that are personal and intimate which must be resolved outside the framework of crude state coercion. This boundary is not unlimited and must take into account other important values. However, all of this must be done within a framework of reason and rationality. This is important to political economy as well.

C. Capital Punishment and Fundamental Law

Capital punishment has proven to be an issue of high moral sensitivity and ambiguity. This issue clearly tests a judge's views on the scope of the right to life and the nature of the institution of punishment itself. It is often the case that people intuitively feel, especially in death penalty cases, that retribution is a critical standard of punishment for the expiation of the victim, the victimizer, and the community. Still others may hold equally strong beliefs in redemption and forgiveness. Many people believe the right to life is an absolute but fail to consider the problems posed by legal and moral absolutism. For example, the right to life might be limited by the right to self-defense. It is often the case that the people who support the criminalization of abortion precisely because of right-to-life absolutism give very little thought to the problems of war, revolution, or social responsibility for collective health and wellbeing.

No contemporary problem has so colored the authority of the Supreme Court as that of the scope of the Court's reviewing competence over death penalty decisions in state courts.[55] The death penalty is one of the most politically charged and exploited issues in American politics and often one of the most over-simplified; the discourse is often boiled down as follows: if one is *against* the death penalty, one is *for* crime. This is a siren call that has poisoned American politics and eroded its moral sensibility. The Court took an important step in declaring the death penalty

---

[54] *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 626-27 (William S. Hein, eds., 5th ed. 1994).

[55] *See* Gregg v. Georgia, 428 U.S. 153 (1976); Atkins v. Virgina, 536 U.S. 304 (2002); Madison v. Alabama, 139 S. Ct. 718 (2019).

almost completely unconstitutional,[56] and that retreat has quite simply led to a juridical and moral quagmire. From time to time, justices have expressed revulsion towards what has taken place in some state court proceedings surrounding the issue of the death penalty.[57] The Court as a whole has remained virtually immune to the opinions of juris consults who have demonstrated that the inevitability of caprice and mistake pervades the institution of capital punishment; many researchers have demonstrated the frequency of wrongful executions of innocents, and still others have highlighted that racial considerations are omnipresent in death penalty decisions. Some elected politicians have called a halt to executions in their states because of the ubiquity of mistake and bias. At one point, the Court went so far as to approve the execution of juveniles[58] and mentally disabled defendants.[59] Indeed, it took a specific communication from President George W. Bush to inform the Court that there were no objections from the executive branch for the Court to consider a decision in the International Court of Justice (ICJ) about breaches of consular rights of aliens who are on death row throughout the United States.[60]

To take issue with the death penalty is not a simultaneous endorsement of crime. It is, in fact, an endorsement of the principle of justice that the innocent should not be punished in the hope that the guilty might be eliminated as well. The principle of institutional deference to states' rights should not shield local authorities from the principles of justice that support the supremacy of law. It would be appropriate for a nominee to federal court to clarify his view on capital punishment as a principle of justice.

VI. IMPLICIT JUDICIAL PHILOSOPHY: CONSERVATIVE, MODERATE, AND LIBERAL PERSPECTIVES

Implicit judicial philosophy is sometimes collapsed into a discourse about the alleged political ideology of judges, i.e. whether he is conservative, moderate, or liberal. Concerns about political ideology implicate the foundations of justice in impartiality and independence. It may be the case that some judges are attracted to law because they see in it an element of stability, which gives them comfort and security. Such judges tend to be conservative in their political ideologies. Their conservatism indicates a stronger commitment to following rules and principles, sometimes without regard to consequences. On the other hand, there may be judges whose personality types incline them towards so-called liberalism. It may be that these judges see change as important and thus view rules and principles as becoming guides for managing an inevitable human dilemma—that what we call stable may ultimately be a special case of the unstable. The incertitude of predicting the future may represent a challenge to the security of some judges, or alternatively a challenge to the insecurity of others. In short, law will reflect both the certitude and the incertitude of human experience, and the implicit philosophy of any given judge will reflect that judge's impatience with certitude and acceptance of change (or vice versa).

These perspectives are not obvious in the established or conventional forms of judicial philosophy, but they may be very important in determining how the conventional forms of judicial

[56] *See* Furman v. Georgia, 408 U.S. 238, 240 (1972).
[57] *See* Rudolph v. Alabama, 375 U.S. 889, 889-91 (1963) (Goldberg, J., dissenting); Kyles v. Whitley, 514 U.S. 419, 456-60 (1995) (Stevens, J., dissenting); Glossip v. Gross, 135 S. Ct. 2726, 2761, 2775-78 (2015) (Breyer, J., dissenting).
[58] *See* Stanford v. Kentucky**,** 492 U.S. 361 (1989).
[59] *See* Penry v. Lynaugh, 492 U.S. 302 (1989).
[60] *See* Memorandum from President George W. Bush to Attorney Gen. (Feb. 28, 2005), App. to Pet. for Cert. 187a.

philosophy are used in specific circumstances. It is in those circumstances that the implicit judicial philosophy of a jurist may carry great weight if not self-consciously examined. These issues vex the senators who must provide appropriate advice and consent to judicial appointments in the United States. This partly explains the extensive hearings utilized by senators to explore the suitability of a nominee for the Supreme Court. These senators are practical jurists, whether trained or not. *They understand the brute realism of such legal philosophers as John Chipman Grey, who once suggested that the real lawgiver in the United States is the institution, which has the final word on what the Constitution means*.[61] *That institution, according to Grey, was composed of several old men, some conceivably of limited intelligence*.[62] As we know today, the Court now includes some ladies of obvious intelligence.

It is probable that the sometimes arduous process of finding and confirming a judicial nomination includes a search for each potential jurist's implicit judicial philosophy. This may be discerned (at least partly) from an individual's personality and temperament, which can represent an unconscious but real commitment to particular values. Thus, implicit judicial philosophy is closely linked to concerns about the appropriate scope of the judicial role as well as the practical institutional reality within which judges must work. A focus on judicial roles is perhaps a more flexible technique for getting at the general question of the appropriate boundaries and limits of the law. Every outcome of judge-made law must have a juridical character to it; it cannot trespass upon the institutional competence of other branches of authority unless authorized by the law itself. Stability and innovation require this in business as well.

VII. JUDICIAL PHILOSOPHY AND LAWYERING

A. The Context of the Legal Process

Judicial philosophy must account for the relevant institutional context, which it seeks to describe and justify. That context includes the legal profession itself. In short, lawyers are a critical part of what an articulate philosophy ultimately means. As a practical matter, lawyers are critically interested in what the law is because often they are paid by clients to perform this service as advocates. The question "what is law?" seems disarmingly simple but is, in reality, quite complex: each actor in the legal process may have an individualized approach to the question, which in turn produces an individualized response to that question. One important area of complexity is the role of judges; the question requires theoretical contemplation, an extraordinary level of self-examination and introspection, as well as the operational requirement that decisions are made and justified according to some construction of the Constitution. Justice Holmes reminded us of the salience of these issues for judge-made law.[63]

These issues are obvious in the conventional jurisprudential discourse when theorists seek to answer the question "what is law?" This simple question implicates a host of tangential concerns, such as the need to distinguish what is *not* law from what is properly called law; the appropriate justification of law; and the practical importance of law concerning matters such as global peace, security, prosperity, and justice. Contestations between legal practitioners before the courts are often actually contestations about the appropriate boundaries of what counts or should count as law. One side may be in the business of pushing the boundary; the other side may be in

[61] JOHN C. GREY, THE NATURE AND SOURCES OF THE LAW 164 (1909).
[62] *Id.* at 82.
[63] Oliver Wendell Holmes, *Codes and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870).

the business of narrowing it. Judges are given the task of determining, against the background of all the indicators, how to adjudicate what those proper boundaries are as a matter of law. Lawyers in litigation roles are, therefore, not simply representing clients; they are manipulating the boundaries of law by either broadening or narrowing their reach. This has both political and economic consequences. When layers are nominated to judicial office and must have those appointments confirmed politically, their experience in litigation and the adversarial process will invariably come to light, and politicians will question whether the lawyer, as an advocate, is also an advocate transcending the interest of the client. In short, what is the implicit lawyer philosophy of the practitioner? That implicit philosophy will be appraised against that lawyer's capacity to remain impartial and neutral as a judge.

It becomes apparent, therefore, that judicial philosophy in context involves not only judges, but also claimants and advocates. Without a claimant willing to claim and a lawyer willing to represent those claims in the courts, the courts have no reason to exist. Thus, a judicial philosophy must be sensitive to the proper rights and obligations of the ultimate consumer of law: the citizen. It is the citizen's demand on the legal system that provides the challenge required for change or for the perpetuation of tradition. Without the claimant, society would be static and law would be largely irrelevant. Judicial philosophy must, therefore, give a proper account of lawyers and clients. Senators who confirm nominations are representatives of citizens, the consumers of law. Note that the citizens of the United States may not "consume" the law as one might in a market system, but rather are governed, regulated, and afforded rights by the law. The use of the term "consumer of the law" is merely a reflection of the position and resulting perspective of citizens in the Declaration of Independence as "we the people."

B. Judicial Philosophy: Multiple and Conflicting Lawyer Roles

When lawyers talk loosely about the practice of law, they may not fully appreciate the role of the practice of law in providing judicial philosophy with its living, dynamic element. The true context of practical judicial philosophy is the practice of law before the courts. Simply put, the courts respond to problems presented by lawyers. In this sense, judicial philosophy is partly a commonsense response to human problems that emerge from society and require judicial settlement. An important insight into judicial philosophy is that through complex procedures it must identify and sharpen problems for judicial intervention. Those problems invariably involve conflicts about the allocation of human values. These problems are in effect claims that often require decision-making about society's most fundamental value conflicts, often concerning the relationship between law, morality, and business. Judicial philosophy thus responds to the problem of how a community should respond to problems, and what the community can learn from how it has responded to problems in the past. Judicial philosophy focuses on these kinds of "responses" or "interventions" as social forms of decision-making (or, more generally for lawyers, judicial settlement).

When the jurisprudence behind judicial philosophy is done with skill, it channels a powerful conversation—frequently through rigorous debate—which not only anticipates the structure and process of these kinds of community responses, but also projects itself in advance of the actual practice of law. Legal theory has developed elaborate classifications of the diverse forms of decision-making and seeks to clarify the structure and method of decision-making as a response to conflicts about claims and demands for values.[64] For example, many modern procedural systems

[64] WINSTON P. NAGAN, NEW DICTIONARY OF THE HISTORY OF IDEAS 1244 (Maryanne Horowitz eds., Vol. 3, 2005).

stipulate that to invoke the public power for civil law purposes, the claimant must simply indicate in the pleadings a short, plain statement of the claim indicating why the claimant is entitled to relief.[65] They also often stipulate that procedural systems must strive to be quick, cheap, and fair.

Most ancient and modern procedural systems permit the presentation of claims or forms of action, which may imply a change or modification of preexisting law. These claims are normally challenged at the threshold of legal proceedings, which helps to avoid undue expenditure, delay, and effort in litigating a case only to find that the grounds for liability are wrong. Federal Rule of Civil Procedure 12(b)(6) permits a defendant to challenge the legal sufficiency of a claim at the threshold of the lawsuit.[66] This gives courts an opportunity to examine the question of whether a claim is vested with an appropriate juridical character so that a decision on the merits may be warranted. In short, the legal system builds into itself procedures to protect itself and the public from groundless claims, and to ensure that good claims might be carefully tested before the proceedings fully commence. The rules of procedure are not meant to be political, but they are meant to be part of the practical application of an effective judicial philosophy in the service of the public. The Supreme Court has used the Constitution to significantly support this contention. A critical question here is the appropriate scope of justice entitled to the consumer when there is actionable wrongdoing affecting a large aggregate of individuals in relatively small ways.[67] Should these limitations be necessarily constrained by the Fourteenth Amendment, or should they be constrained by more flexible methods of construction, interpretation, and prescription of procedural rules? Class-actions are major issues of interpretation for business and law.

In reality, the problems to which law responds are conflicts about claims or demands for values. These conflicts reflect the difference between what claimants have and what they want. Law, in the professional sense, is a distinctive and highly specialized form of decision-making which response in general to these conflicts between what people have and what they want. Although law is professionally discrete, it clearly has functional ties to other forms of authoritative and controlling decision-making in the public order. The most obvious classifications of decision-making reflect conventionally understood forms of the separation of powers in modern governance: executive, administrative, legislative, as well as judicial decision-making.

C. Unpopular Issues of Advocacy: Representing the "Bad Man"

Judicial nominations are often drawn from the universe of practicing lawyers or qualified academic specialists. Academic scholarship may be quite different from the scholarship required for judging or effective advocacy. A professor who is sometimes involved in actual litigation or counseling may also present views that are quite different from what he would present if he were a judge. Similarly, the practical advocate may have to manage a similar level of dexterity in the actual practice of effective advocacy before the courts. These complexities may prove to be fatal to the nominee if the nomination process is politically charged. A person nominated for a high-level position may have gotten there because of extraordinary professional skills. That person may well have argued positions that were diametrically-opposed before the courts and found success. From the lawyer's perspective, he may well see the role here not as representing a contradiction at all. A legal truth is not a religious truth. However, understanding this insight into lawyers' roles and judicial philosophy may be very problematic in a politically charged partisan environment.

---

[65] FED. R. CIV. P. 8.
[66] FED. R. CIV. P. 12.
[67] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2546 (2011).

For example, during the dark days of the McCarthy era, Justice Felix Frankfurter castigated the legal profession for giving a "miserable account of itself."[68] Lawyers during the McCarthy period were uneasy about representing unpopular political clients. A central concern arising from this time in American history is the professional obligation of those in the legal profession to undertake unpopular or politically incorrect cases.[69] It is clear that sometimes what is legally virtuous may be politically abused. For example, a lawyer representing a client in a McCarthy-type hearing—which may represent an act of professional courage—may be regarded and presented in some political circles as an act lacking in patriotism.

Why does judicial philosophy matter to the ordinary practitioner functioning as an advocate, or, more broadly, the ordinary citizen whose rights and duties are managed while that citizen is something of a bystander? The short answer is that the practitioner and the citizen generally know nothing about legal theory. They would not likely recognize the names of key legal theorists. However, ordinary practitioners, like ordinary citizens, do hold a kind of implicit legal philosophy. They hold expectations about law, about their rights and duties, and about their sense of justice.

Frequently, the legal philosophy of the practitioner is expressed in only partly understood perceptions of lawyer roles. The public has a sense, although imperfect, of what it thinks lawyer roles are or should be. In fact, lawyer roles themselves are a complex matter about which legal theory has a great deal to say. It is apparent that lawyer roles often represent divergent views on the scope and character of professional obligations and professional ethics. Since lawyer roles may become an important matter for consideration in the political process of confirming a judicial appointment, it is important to better understand the relationship between judicial philosophy and lawyer roles.[70]

Theory and practice often use the problem (the claim for some valued thing) as the beginning point of practical legal inquiry. The problem of problems has been inadequately addressed by an articulate judicial philosophy. Yet, it would be apparent that a problem is a critical element of the perspective of a claimant; it is a perspective of demand. The legal profession would effectively be obsolete without people demanding anything. Therefore, we immediately appreciate the perspective of the individual whose claims will be informed by the dynamics of identification as well as the prospect of stability and change in their general expectations in the community. The judicial concern with what a problem is can be tied to evolving ideas of the judicial role, with developments coming from various versions of critical legal theory, including feminist legal theory, critical race theory, latcrit theory, and others.[71] The shift in emphasis stemming from these developments will influence the orientation of an articulate judicial philosophy. This orientation will be careful to account for the perspectives of the actual subjects of law involved in the claiming process and litigation.

The act of claiming is subjective to a claimant. As a perspective of demand, claiming comes with the perspective of identity and the expectations of the consumer of law. By retraining the focal lens of judicial philosophy in this way, we now begin to see how judicial philosophy might develop an important discourse, with so-called postmodern conceptions of general legal theory. Approaching judicial philosophy from this standpoint, scholars specializing in these areas have

---

[68] JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 254 (2d ed. 1976) (quoting Frankfurter, J.).
[69] Rebecca Roiphe, *Redefining Professionalism*, 26 U. FLA. J.L. & PUB. POL'Y 193, 255 (2015).
[70] WINSTON P. NAGAN, NEW DICTIONARY OF THE HISTORY OF IDEAS 1244 (Maryanne Horowitz eds., Vol. 3, 2005).
[71] *Id.*

sought to bring a critical eye to an appraisal of the scope, function, and objectives of contemporary law. Thus, postmodern theory has provoked a wide-ranging and compelling discourse about the role of law as an instrument of disguised repression and the possibility of law as an instrument of emancipation and equity. Judicial philosophy thus has many stakeholders, including theorists, judges, practitioners, politicians, officials, citizens, and more. Justice Holmes introduced a critical insight into judicial philosophy when he suggested that the most practical way to look at law was from the point of view of the "bad man."[72] If fundamental or human rights mean anything, it would be that law must be a vehicle for protecting the rights of the "bad man."

The discourse that thoughtful judicial philosophy creates, promotes, and critically appraises or defends is of vital importance to the role of law in the defense of public order. Judicial philosophy poses both of these questions: what kind of law and public order is it that we promote and defend, and what should it be? When the Senate considers a candidate for the Supreme Court, it must put these questions to the nominee during its search and inquiry. These questions are of major public concern, as they are implicated in the process of recruiting for a lifelong job appointment. It will be obvious that the values that justify both law and the public order are matters of vigorous controversy and contestation. The values involved in this kind of conversation, including those preferred by law at all levels, are an important indicator of the nature and quality of social organization and what social organization means for the prospect of equality, freedom, respect, and social progress. In this sense, we have described the challenges to judicial philosophy and the rule of law. The rule of law and its underlying judicial philosophy are of the most profound importance, because they symbolize the concept of constructing and maintaining structures of constitutional governance at all levels. They assume that governance must be subject to law governed by reason; it is the rule of law writ large.

D. The "Bad Man" as the Ultimate Consumer of Law: How Judges Change Law in Molecular Ways

The public philosophy about the law is that judges find and declare the law, but they never make it. The public also assumes that judges find the law within a universe of legal rules that exist in books in the library. Somehow, it even assumes sometimes that judges are in the business of finding and declaring law in a way that is immune to the living context of civil society and the broader operations of governance. In this section, we examine judicial philosophy's relation to civil society, focusing specifically on its role in both the conversation on the rules governing society and its role in actually changing those rules.

The courts are a branch of the government. At times, courts may seem remote from society. Courts, in fact, are an integral part of the social process and are often the critical bridge between civil society and the exercise of official power. Civil society is mentioned in the Declaration of Independence; it is the concept of "We the people." This concept is meant to provide the foundation of authority for the Constitution itself. As such, judicial philosophy must take into account not only the legal profession as a whole, but also civil society, which it ultimately serves. This insight directs our attention to an important range of players implicit in "We the people": the individuals and groups who constitute civil society. The stake of advocates and claimants in judicial philosophy is not simply a matter of abstract theory; a judicial philosophy that ignores the "legal" status or existence of those who constitute civil society ultimately denies them access to practical rights and duties, stripping them of their legal personhood.

---

[72] Holmes, *supra* note 1, at 459.

Citizens are deeply concerned that judicial philosophy is sensitive to their basic rights to existence as persons, to their citizenship, and to their human dignity. Their stake is important and interesting. It is at this level (the functional repository of law) wherein the cultural and social rules and norms that later become formalized into expectations about constitutional and public order are created. It may be noted that our most important legal institutions have been created by the civil society generating social rules, from conflicts about those social rules, and from developing legal rules through the ordinary processes of adjudication. The most famous of these developments is, of course, the development of our commercial law. It is, however, an important idea that law be sensitive to the perspectives of ordinary individuals and does not simply exist for state officials or a monopoly of these officials.

Justice Holmes offered a significant contribution to judicial philosophy: he suggested that the most practical way to look at law is to look at it from the point of view of the "bad man."[73] Human beings are not necessarily gender-specific and/or bad. Nevertheless, human beings do hold perspectives that are good and bad. To look at Holmes' "bad man" is to look at law from the point of view of individuals, bearing in mind their identities, demands, claims, and expectations. This vantage point is critical to the modern understanding of law, but it is one of the least jurisprudentially-developed areas. It is the individual relationships, micro-social relationships (such as affective relationships, friendship circles, and small-group relationships) and non-state group ties which generate much of an individual's normative and anthropomorphic experience. This is the glue of social collaboration and the dynamic component of conflict and change in society. Here is a core challenge to law: how does law manage collaboration, tradition, and stability, and when must tradition give way to change? In this context, at the back of judicial philosophy is the constant reminder that judges are not legislators who make law in a molar fashion. Judges make law in a miniscule, molecular manner.

These points about tradition, change, and molecular law-making are well reflected in important decisions of ordinary courts in the common law tradition. This particular area is one that generates misunderstandings by both politicians and jurists. Politicians insist that the only power judges have is to declare what the law is. The assumption, of course, is that what they call the law is already clearly defined. If this were the case, it would be problematic, for there would be no need for litigation and appeals. This is a necessary predicate to *clarify* and declare what the law is. Moreover, an important factor in this process is to ensure, however imperfectly, that the decisions of the courts are not far removed from the fundamental expectations that the consumers of law have a right to expect from the court. Judges often proclaim publicly that they only the declare the law. In fact, they either confirm the expectations of the past, or they have to modify (or even fully change) those expectations because it is unclear or far removed from social reality. Judges, in effect, are trying to provide the best calculation of how law meets the expectations of its consumers about stability without reification and change without revolution. These expectations must also be rooted in and reconcilable with fundamental conceptions of justice, decency, and dignity. In this sense, judges are engaged in a limited or microscopic form of law-making, but as Holmes pointed out, this is molecular stuff.[74]

---

[73] *Id*. at 466.

[74] S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917).

E. Illustrations of Judge-Made Law as Common Sense Molecular Change

The common law tradition is not, and never has been, a frozen or static entity of doctrine or tradition. It is hostile to largescale efforts toward change. In the common law tradition, change is deliberate, slow, and evolutionary. It is an almost natural, *common sense* process. Indeed, a truly brilliant aspect of the common law approach (including constitutional law) is that it is grounded in specifics and in common sense. For example, the Supreme Court of California decided the well-known case *Marvin v. Marvin*, 18 Cal. 3d 660 (Cal. 1978).[75] The case concerned the problem of whether a cohabitation relationship between consenting couples could generate legally enforceable rights and obligations.[76] The Court gave judicial notice to the fact that those cohabitation relationships were now a conventional part of the sociological landscape of California.[77] The Court, therefore, considered it appropriate to enforce the otherwise legitimate expectations resulting from a termination of that relationship.[78] Clearly, the Court was sensitive to the problem that a decision to deny the plaintiff's rights in that case would not be consistent with the stability of expectation that the consumers of law might expect from it.

A further illustration of this kind of molecular law-making is evident in the New York case *Rosenstiel v. Rosenstiel*, 21 A.D.2d 635, 638 (N.Y. App. Div. 1964).[79] In this case, the New York Court of Appeals upheld a Mexican divorce of convenience of two New York domiciliaries.[80] One of the factors the court considered was the vast number of New Yorkers who had availed themselves of the Mexican divorce process to end their New York marriages.[81] The court considered the possibility that the non-recognition of the Mexican divorce in the *Rosenstiel* case could result in vast numbers of New York families having their family ties put at risk, and their children possibility being regarded as illegitimate offspring.[82] These illustrations are relatively ordinary cases which come before the courts and which require the judges to mediate and often integrate complex values relating to individual rights and duties and their impacts upon the larger framework of stability in expectation, which society demands from an effective and functional legal system.

The multiple orientations that a sharp judicial philosophy brings to experience provides insight, profound challenges, and a deepening awareness that the boundaries of law themselves are expansive and challenging. Judicial philosophical sensitivity encourages a broader level of enlightenment about the proper role of law in clarifying the critical content of value and moral prescriptions and their appropriate scope and reach in maintaining a democratic culture based on the rule of law. Debates and discourses about judicial philosophy improve our professional understanding of such basic matters as the nature of community, the character of authority and coercion, the normative foundation of values, as well as the fundamental value commitments characterized as "morality." It is widely conceded that morality and the structure of its value processes, however broadly or narrowly understood, act as cement, adhering individual and collective identity to concepts of culture and society. In the real world of cultural and political diversity, conflicts about the scope and ubiquity of moral experience involve deep social cleavages

[75] Marvin v. Marvin, 18 Cal. 3d 660, 660, 557 P.2d 106 (1976).
[76] *Id*. at 664.
[77] *Id*. at 674.
[78] *Id*. at 684.
[79] Rosenstiel v. Rosenstiel, 21 A.D.2d 635, 638, 253 N.Y.S.2d 206 (1964), *aff'd*, 16 N.Y.2d 64, 209 N.E.2d 709 (1965).
[80] *Id*. at 635.
[81] *Id*. at 638.
[82] Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 71, 209 N.E.2d 709, 711 (1965).

about the priority to be given to different versions of value and morality. At a general level, an articulate judicial philosophy asks a question of theoretical and practical salience about the possibility of moral universalism and the reality of moral pluralism. In a global community, which seeks to identify certain moral constants which imply universal solidarity and the unity of human identity, there also exists the reality of human diversity, which stakes a powerful claim for the tolerance of difference. The political and legal culture of the United States is largely pluralistic.

F. How Judges Making Law in a Molecular Fashion Created Modern Commercial Law

To know what the law "is" requires an examination of its boundaries and a determination of how those boundaries ae objectively defined. The question of the boundaries of law touch on the judicial role in terms of whether and how those boundaries are to be broadened. Sometimes the period of incubation may involve millennia and sometimes the changes may be dramatic. Perhaps the best illustration of the way in which the boundaries of law have been expanded is in the area of commercial law. We know that the historical roots of the modern law of sales are to be found in the Roman law that codified sales in Digest XVIII (i) and (ii).[83] The Roman Law of Sales was developed by an important legal official, the Praetor, who carefully observed what was actually happening in terms of the sale of goods in the Roman commercial marketplace.[84] In the 18th century, Lord Mansfield, a jurist well-educated in Roman law, also observed the actual practices of the sale of goods in English and Scottish markets.[85] His observations helped him construct a highly developed law merchant in English case law. When parliament promulgated the Sale of Goods Act in 1893, it was simply codifying judge-made law, which in this context was based on the actual practical experience of buyers and sellers of goods in the market.[86]

This history influenced the development and eventual adoption of the Uniform Sales Act in the United States. Later, as the sale of goods became far more refined and complex, Professor Karl Llewelyn, the drafter of the Uniform Commercial Code, took his cue from history.[87] The Uniform Commercial Code was, in fact, driven by business practices in the market. The sale of goods was influenced by Roman law, common law, civil law, as well as by modern practice and technological innovation. The law of sales as comparative law became a major aspect of international law when the global community developed the International Convention on the Sale of Goods.[88] We, therefore, see that the boundaries of law involve multiple systems and various levels of development. The International Convention is, of course, U.S. law. It is evident from this illustration that judge-made law requires a sensitivity to phenomena like social rules and social practice, or commercial law and commercial practice.

G. From Commercial Rights to Voting Rights

The general professional conversation about the scope and relevance of judicial philosophy frequently seeks to broaden the boundaries of what counts as law. This conversation also includes an implicit concern for access to justice, demanding sensitivity to a larger universe of participants

---

[83] Charles Henry Monroe, The Roman Law of Sale with Modern Illustrations, 2.15.8, The Digest of Justinian, Vol. 1.
[84] *Id*.
[85] *See* WILLIAM MURRAY, 1ST EARL OF MANSFEILD, World Heritage Encyclopedia (database updated Oct. 2019).
[86] FRANK NEWBOLT, THE SALE OF GOODS ACT, 1893: WITH NOTES, 1, (1894).
[87] Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541 (2000).
[88] *See generally* U.N. CONV. ON CONT. FOR THE INT'L SALE OF GOODS (2010).

who are the subjects of law. The ideological pressures of democratic entitlement and the association of human rights with democratic rule of law values have inspired the broadening of the boundaries of law. Thus, judicial philosophy has been partly responsible for asking critical normative questions about participation in law and governance. Participation includes a normative implication that broader participation in the processes of law improves the authoritative foundations of law itself. The principles of liberty and equality are critical to democratic participation in governance. The Court understood this when it sought to establish the constitutional principle that voting was a fundamental right. Recent decisions made by the Court might be seen as a retreat from the full extent of this basic right for the citizen. A critical question for a nominee to the Court is whether that nominee still believes that the Court has an important role in fully protecting the voting rights of citizens from political manipulation and cynical depreciation.

The political implications of broadening the boundaries of law, with attendant justifications of coherent theory, have emphasized the claim in modern jurisprudence that historically marginal, racial, economic, or gender classes be included in the range of participants who are the appropriate subjects of law. This kind of claim reproduces a judicial philosophy that seeks to resist the normative implications of cultural and economic dominance. Cases like *Fuentes v. Shevin*, 407 U.S. 67 (1972) and others in the area of commercial law sought to use constitutional standards to protect the economically vulnerable debtor.[89] The voting rights cases touch directly on the empowerment of individuals in the political sphere. Without judicial intervention, political interests could freeze the political process to ensure selective inclusion in and inappropriate exclusion from the exercise of the right to vote. Thus, articulate judicial philosophy has often sought to develop practices consistent with the passive virtues of the least dangerous branch of government, and at the same time has been able to intervene in a limited way to make the political system effective, legitimate, and just. The Court has, in effect, played a role in molecular social progress and in advancing an appropriate understanding of the relationship of law and legal processes to political economy and change.

Advances in theory facilitate the general understanding of the relationship of law to socioeconomic interests as well as the relationship of law to the broader social process and the complex of social statuses defined by the processes of power and political economy. Thus, judicial philosophy partakes of critical social appraisal using the normative yardsticks generated by human rights and social progressivism. The contemporary indicators of commercial activity, basic rights, and social progressivism are reflected in the legal philosophy of cultural diversity and the normative mandate of multicultural tolerance that are often promoted as indicators of evolving standards of justice and decency.

H. Judicial Philosophy and the Boundaries of International and Comparative Law

A technical question has emerged about whether it is ultimately appropriate for an Article III judge to use international law and/or comparative law as a reference for constitutional interpretation. In some judicial circles, there is unease about the extent to which American law should be influenced by external sources of law. As a matter of policy, it may be that some judges hold an implicit jurisprudence of nativism and parochialism and, therefore, would be hostile to contaminating American law with external sources. Others will find in these sources a wellspring of rich thought and normative guidance, particularly in cases where the broad language of the

[89] Fuentes v. Shevin, 407 U.S. 67, 96, 92 S. Ct. 1983, 2002, 32 L. Ed. 2d 556 (1972).

Constitution generates ambiguity, logical circularity, or even apparent contradiction; they might likewise find that the well-developed path of international and/or comparative law is a better tool for limiting judicial discretion than is the pretense that judges are making law according to tradition, when in fact they are reading their own political convictions into the law.

We must first acknowledge that the history of American law was never parochial, and for good reason: as a new state, the United States wanted to establish that it could honor its international legal obligations. The courts played a major role in developing international law from American point of view, which simultaneously left a strong American imprint on international law in general. In the area of international constitutional law, there is hardly a modern constitution (including the United Nations Charter) that does not have the footprint of the American constitutional experience. Recall that the greatest works concerning the law of multi-state problems (private international law) were the product of some of the greatest American jurists, including the aforementioned Justices Marshall, Story, Holmes, and Cardozo.

The routine way in which the rules of private international law have developed so that our courts will adopt as a rule of decision the law of a foreign court in appropriate cases involves, in all probability, thousands of recorded cases. In short, our courts have been applying international and/or comparative law since the founding of the Republic and have often exported United States law abroad as well. The central practical truth about law in a multi-state or transnational environment is that the domestic courts are one of the most important instruments for settling disputes. As Holmes once stated in *Natural Law*, if we did not creatively construct rights that vested across state and national lines, "a dog will fight for his bone."[90] From a policy point of view, the domestic courts of the United States are functioning in a world that is largely still decentralized. In this world, it is important for powerful and developed rule of law democracies to use the law for the protection of legal expectations within and across group lines. This is what rule of law means for the consumer.

As a technical matter, an Article III court is one of limited jurisdiction. It functions on common law rules of pleasing and procedure that are articulated in the Federal Rules of Civil Procedure. The rules of venue and jurisdiction have been important throughout history in understanding what cases might be tried before the ordinary courts of the land, including the federal courts. According to the law of venue, all actions in common law courts were considered "local actions."[91] The common law courts evolved their laws of venue and jurisdiction to cover the social and commercial reality that litigants were involved in problems that were not exclusively "local." They solved this problem by creating a technical concept known as the "transitory cause of action."[92] This development meant that an action which arose in another place could be litigated before a common law court if that cause of action was characterized as transitory, and jurisdiction could be established over the defendant. Thus, the courts could take account of transitory causes of action involving the laws of other countries, other states, and other nation-states. This meant that both foreign law and international law could be litigated appropriately in ordinary common law courts. Although the federal courts have limited jurisdiction, the courts have historically determined that international law is part of a limited jurisdiction generated by federal common law. In addition, federal courts apply transitory causes of action in certain common law cases where they are vested with diversity of citizenship jurisdiction. In short, the federal courts have historically applied comparative and/or international law in the normal business of litigation.

---

[90] Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918).
[91] *Local Actions in The Federal Courts*, 70 HARV. L. REV. 708, 709 (1957).
[92] *Id.*

The current challenge for federal courts is to understand the scope of international law in light of an articulate judicial philosophy. International law and comparative law are dynamic sources; this means that there will be some broadening of the boundaries of the law in the courts and it will be appropriate that judges exercise caution over how this process develops. In the contemporary period, it is noteworthy that United States precedents, including precedents of the Supreme Court, are widely referred to abroad. In fact, the distinguished Constitutional Court of South Africa routinely permits United States cases to be argued the Court as persuasive sources of constitutional adjudication[93]. No one can doubt that today international law and comparative law are among the most important sources of insight into the development of the law both in the United States and abroad.[94] We, therefore, note an obvious challenge: the broadening of the boundaries of judicial philosophy invigorates the interest in the creation, application, and enforcement of the law, not only within the sovereign boundaries of the state but outside of the state paradigm. For example, why are such fields as "public" and "private" international law possible? Do our legal theories give us an adequate explanation of what international law really is and how it is normally justified?

If international law is not really the law of hierarchical sovereign states, but a more complex interplay of state and non-state participants, do we need a better theory to explore the reality and justification of international law as law when its structure branches off into so many trajectories? We must ask whether individuals have rights and obligations directly under international law, and whether the United Nations or European Union are considered juridical persons under international law.[95] Theoretical advances in jurisprudence suggest that we cannot make sense out of the historical distinction between public and private international law unless we first recognize that these subjects are indispensable and complementary components of a broader concept of public order, which incorporates the entire world community: a public order beyond the state, or, more precisely, a *world public order.*

I. The Value and Relevance of the Sources of International and Comparative Law

Judicial philosophy must not only ask philosophical questions about the nature of public and private international law. It must also consider the appropriateness of the highly developed sources of international law. For example, treaties are a major source of international law. They are recognized in the Constitution as having the status of binding federal law. Other areas of international law are more challenging. For example, the Supreme Court has found that the use of customary international law is an important mechanism for protecting rights under international law in our domestic courts.[96] Rules generated from practical experience in the international environment may be recognized by the courts of the juris consults as sources of law. These rules are seen to have the character of *opinion juris sive necessitates*.[97] Courts have to determine whether such rules have necessary jural qualities to make them binding rules and appropriate sources of law.[98]

---

[93] *South African Constitutional Court Cases in English*, LIBRARY OF CONG., (June 9, 2015) https://www.loc.gov/law/help/constitutional-court-cases/southafrica.php.
[94] *Id.*
[95] Jay M. Zitter, Annotation, *Construction and Application of Convention on Privileges and Immunities of the United Nations*, *21 U.S.T. 1418*, 53 A.L.R. Fed. 2d 239 (2019).
[96] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 747 (2004).
[97] *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1252 (11th Cir. 2012).
[98] *Id.*

As explored above, judicial philosophy suggests that judges make law in a molecular, and not a molar, manner. Molecular judicial decision-making is characteristic of judicial philosophy at the international level as well. More generally, the rules are understood as a kind of functional *lex lata*, or for the softer version of the social rule, a kind of *de lege ferenda*. From a practical perspective, the official sources of international law explicitly recognize custom as an accepted source of international law.[99] According to Restatement 3d of the Foreign Relations of the United States § 102, included along with custom are other non-state sources such a "general principles recognized as law and teachings of the most highly qualified publicists." These "publicists," who are clearly non-state players, generate expectations that reinforce the creation of socially acceptable rules as law. Finally, an official source codified in the Statute of the International Court of Justice is the principle that cases may be decided according to generally accepted understandings *ex aequo et bono*. To appreciate the global system of public order, legal theory must provide adequate tools to understand how law in the public order is prescribed, applied, and enforced. Legal theory must also account for the expectation that the ground rules of world public order are not value-free but reflect important, specific values to which the world public order is explicitly committed.

J. The Living Law in a Culture of Pluralism

The American legal tradition has long recognized that Native Americans have legal rights. The specific question of the rights of conquered people, often referred to as indigenous people, has invariably become an important matter in broadening the boundaries of law. What we understand about indigenous peoples' rights comes from legal theorists and legal anthropologists. They have demonstrated factually that so-called non-state indigenous groups do have indigenous legal systems with rights and obligations and therefore their rights and interests ought not to be consigned to a legal vacuum. Legal anthropologists have long considered that peoples living in non-state forms of social organization do have "law." That law is discernable with proper tools of inquiry; it can be appropriately identified, described, and appraised using methods and forms of investigation important to scientific inquiry in the social and behavioral sciences.

One of the most important studies done in the United States involved a collaboration between the distinguished anthropologist Adamson Hoebel and the equally-distinguished commercial law scholar Karl Llewelyn. In a ground-breaking work entitled *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (1973), the two scholars demonstrated that the Cheyenne, a nation without a state in the conventional sense, had a fully developed system of law with identifiable rules, structures of authority, and appropriate elements of coercion.[100] They also discovered a profoundly interesting aspect of the Cheyenne political process: although there was no written constitution, there was a living constitution. Within this system, the living constitution codified established customs about who was authorized to allocate the core authoritative decision-making competence and about how authoritative and lawful decisions were to be made in the community. Therefore, *Cheyenne Way* established that a non-state group could have a constitution without it being formally written.

Similarly, the anthropologist Bronislaw Malinowski authored a path-forging work entitled *Crime and Custom in a Savage Society* (1926) in which he demonstrated that within the framework of give-and-take and basic human interaction, there were culturally sanctioned rules that reflected

---

[99] Howard S. Schrader, *Custom and General Principles as Sources of International Law in American Federal Courts*, 82 COLUM. L. REV. 751, 754 (1982).

[100] K. N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (6th prtg. 1973).

precisely on matters such as rights and duties and protected social needs.[101] It is worth noting that Malinowski achieved this work quite independently of the influence of the analytical jurist Wesley Newcomb Hohfeld. Hoebel later developed this particular approach from Malinowski with greater precision in *The Law of Primitive Man* (1955).[102] Particularly striking about this work was Hoebel's application and extension of Hohfeld's fundamental legal conceptions to the law of so-called primitive man.[103] Since Hohfeld had anticipated ordinary language analysis as applied to law, he was able to take the ordinary notion of a "right" and spell out a complex web of relationships involving jural correlatives and opposites.[104] Hohfeld's work has been the cornerstone of modern analytical jurisprudence, an approach to law that has sought to separate the law from other phenomena in appropriately styled law or law properly "so called." However, Hohfeld's scheme was also used to establish rules and precepts that permeate the social universe of non-state social groups.[105] In these contexts, we may find the "law" using the proper tools of focus, effective inquiry, appropriate description, and skilled analysis. Even in societies without a so-called rule of recognition and appropriate foci, methods of description and analysis will disclose social groups with law. Thus, the ubiquity of law in the form of rules and precepts holds much wider currency in human experience and human interaction at every level of society.

Studies of the law of the gypsies, like Walter O. Weyrauch's book *Gypsy Law* (2001), show a remarkably resilient and officious legal system operating within the shadows of a developed legal order.[106] Jewish law has survived and, indeed, has evolved in a period of over two-thousand years when the Jewish people had no "home" and were consigned to a diasporic existence in which they were a permanent minority.[107] When Eugene Ehrlich coined the phrase "the living law," his statement could be regarded as strange only because of the fabricated dominance of state and sovereign absolutism characteristic of the nineteenth and twentieth centuries.[108] The notion of a living law is remarkable because it has resisted state legal absolutism, and it has flourished. Moreover, it is remarkable because it is to be found not only in situations where obvious subgroups are identified, but it is an intrinsic component of social organization in its widest possible reach. More than that, the very idea of a living law attests to the dynamism and the vibrancy of the deep structure of social organization even in situations of extreme repression. This too is quite simply an indicator of judicial philosophy.

In exploring the broader implications of Professor H.L.A Hart's identification of the ordinary language analysis version of analytical positivism, we suggest that there are implications in this insight of normative significance. One of the important foundations of human rights, as a jurisprudentially justifiable aspect of law, is the possibility that the roots of social rules and precepts may indeed reflect the deep microstructure of moral experience. If social rules and precepts are functions of human interaction on a face-to-face micro-level within society, and if these rules reflect deeply rooted expectations about the production and distribution of desired

---

[101] BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1st ed. 1926).
[102] E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS (1st ed. 1954).
[103] *Id.* at 47-52.
[104] *See* David Frydrych, *Hohfeld vs. The Legal Realists*, 24 LEGAL THEORY 291, 293 (2018) (discussing Hohfeld's theory of legal relationships).
[105] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913).
[106] WALTER O. WEYRAUCH, GYPSY LAW ROMANI LEGAL TRADITIONS AND CULTURE (Berkeley: University of California Press 2001).
[107] Oren Gross, *Venerate, Amend . . . and Violate*, 46 ARIZ. ST. L.J. 1151, 1161-62 (2014).
[108] EUGENE EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 493 (Cambridge: Harvard University Press, 1936).

values, then these rules implicate moral experience at its most elementary level. The study of human beings in micro-social relationships may tell us a great deal about the identification of the cultural rules that form patterns of cultural behavior and a great deal about the origin of the value preferences and moral rules that are embedded in the deep structure of social relations and psychological experience. The Constitution is not a corpse preserved in formaldehyde since its creation in the eighteenth century. It is an instrument reflecting the living law and the living expectations of all the people of the United States. When all of us have passed on, the Constitution will continue to be a living inspiration for the generations of the future. It symbolizes the living law and the living dynamism of the American experience. That experiences places value on the subjects of constitutional law as critical resources for promoting and defending its values. Among those subjects are those who stake claims for value in civil society.

K. Constitutional Law as a Process of Democratic Education

According to general education theory, one of the most important ways in which a child learns is through the recognition of problems.[109] The child that does not recognize a problem will not begin the process of thinking about the problem, and that child's learning potential will be limited. Within the legal system, we see that the law's role is rather passive. It is the *problem* to which law must respond that is critical. Thus, law must have the relevant cognitive problem-recognition skills built into its professionalism. If the practitioner is very good, he or she will anticipate or predict the problem. Law will thus be a problem-oriented discipline that demands ongoing learning from its practitioners. However, law does not stop there. It must also respond to the problem that it recognizes, which requires problem-solving skills. In this sense, judicial philosophy in its most effective form is a process of learning. The cases are the deposit of their experience, representing what we have learned about human experience over time or at least an important slice of that experience. It will be readily apparent that the lens or focus of judicial philosophy itself requires complexity in shaping its orientation to problems, solutions, and decision-making. From a scholarly perspective, legal orientation does seem to implicate how we observe and make sense of complex social and psychological phenomena; this involves the processes of cognition, learning, and understanding. One of the great virtues of the legal profession is that professional competence invariably improves with age, and learning stops only in the case of death or other disaster.

Cognition implicates an orientation that develops thinking, learning, and critical skills of both exploration and contemplation. This focus may also develop the applicative and manipulative aspects of intervention in understanding how those who are involved in lawyer roles respond to problems that emerge from society, and which of those problems are amenable to settlement. Therefore, we may see in the notion of judicial philosophy some elements that touch on the fundamentals of cognition, learning, and intelligence when we recognize that society, however organized, must in some degree develop decision-making structures of authority and control to respond to problems that emerge from the give-and-take of social life. Managing and solving problems requires intellectual skills of learning, cognition, and application. Thus, a value of an articulate judicial philosophy is that it requires an orientation to the issue of problems in fact, of problem development and prediction, and of problem solutions to critical issues in the give-and-take of social life.

---

[109] Craig Peyton Gaumer, *Punishment for Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problem of Hate Crimes*, 39 S.D. L. REV. 1, 44 (1994).

If the human faculty of decision-making or choice invariably responds to human problems, and if responses to human problems are an inevitable element of problem-solving, we tease out an interesting critical and obvious aspect of human experience. Human beings function through the channel of personality. Indeed, the human being—the self—is defined by the structure of personality, which influences adaptation, learning, and action. Inherent in personality is the faculty of choosing the circumstances of interaction and intervention for the needs and qualifications of the self. Judicial philosophy is an integral part of human communication in the public order. Of course, it expresses most effectively through the traditional channel of the judicial personality. In short, inherent in being "human" is the capacity to make decisions face-to-face and in other micro-social relations within the broader cultural environment. The judicial personality is charged with making decisions implicating all levels of law in society.

The informed and advanced discussion about theory, judicial or otherwise, also partakes of an important inquiry into the processes and methods of thinking inherent in the structure of decision-making itself. The important theoretical work on judicial decision-making has sought to understand the role and function of both the internal precepts of law as well as the broader contextual reality of law-making, which might influence how decisions are made and how they might be concretely improved. For example, important discourses influenced by positivism as well as language sensitive philosophical analysis has compelled us to think more carefully about words that are ubiquitous in law and whose meaning is often ambiguous. It was Hohfeld's salient contribution to the discourse of law, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1917) which was first able to precisely discern the nuanced specific meanings incorporated in such ordinary legal terms as rights, duties, privileges, powers, immunities, liabilities, disabilities, and others.[110] Similarly, phrases and sentences often come in conventional prescriptive forms such as precedents, rules, principles, standards, doctrines, and even high-level abstractions of policy value and morality. These forms of communication are relevant to both the internal as well as the external aspects of law. Such forms of expression are critically important as they lend precise meaning to legal discourse, and they also give us important insights into decision-making in general.

Judicial philosophy, a focus on the external aspect of decision-making, implicates the relevance of contextual factors to decision-making. More than that, they have often focused specifically on the conditions which not only inspire problems to which decision makers respond, but even more specifically on the conditions of decision-making itself. Thus, they ask what personality factors, factors of social class or stratification, factors of cultural orientation or gender, or factors of exceptional exigency (such as the context of crisis) might also influence the actual process of decision and choice. Both of these internal and external factors may actually influence each other in the decision-making process. If precepts have to be construed and interpreted, these factors may influence the character of construction and interpretation, as well as the frameworks of justification invoked to support it.

VIII. CONVENTIONAL LEGAL THEORY, JUDICIAL PHILOSOPHY, AND THE INFLUENCE OF MODERN SCIENCE

We live in an age that is dramatically influenced by scientific and technological progress. Science is itself a paradigm of thinking. Indeed, scientific thinking has tended to dominate the

[110] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1917).

general world of conventional legal theory. The scientific attitude has left a powerful imprint on law and on judicial philosophy. Science in general is not law, but it has a powerful influence on how law is made, understood, and what its boundaries are. In this sense, judicial philosophy must account for science in framing the discourse about the boundaries of law. First, there is the scientific influence on the discourse and language of law. This influences judicial philosophy as a discrete discipline. Jurists often refer to this discourse as involving the "internal" aspects of law. Here legal language comes in specific forms such as rules, precedents, and rights. Second, there is the impact of the advances in science and technology on adjudication and lawyering in general. This may involve technological advances redefining "law" jobs. For example, developments in computer systems has significantly influenced law in the area of computer technology.[111] Science and technology may also influence law from an external point of view. For example, weapons of mass destruction in international law may have a significant impact on the nature, scope, and efficacy of the rules regarding the law of war.[112] Scientific advances concerning such issues as stem cell research, cloning, brain research, and more quite simply challenge the boundaries of law as conventionally understood.

Since the time of the nineteenth century theorist John Austin, modern jurisprudence has insisted that legal theory is a science, and as such, it would have to distinguish between descriptive/analytical models of what law is from the normative discourse that is concerned with what law ought to be.[113] Austin's concern with the precision of language and communication deeply influenced modern law, and analytical jurisprudence (which he inspired) has a powerful hold over how today's legal practitioners think about law.[114] Analytical jurisprudence is influenced by Hohfeld's dissection of the notion of the "legal right."[115] Hohfeld's work was largely a response to the concern that legal discourse was chaotic and logically unscientific.[116] He used the concept of a legal right to develop a precise taxonomy of legal language that influenced and continues to influence generations of lawyers.[117] He demonstrated that the word "right" had a meaning in the narrow sense, but it was also used erroneously to describe other distinctive forms of legal obligation or entitlement.[118] For example, the term also made reference to precise legal relationships involving powers, immunities, liabilities, and privileges formed in terms of legal opposites and correlatives (right/no right; right/duty).[119] Hohfeld's analysis was used widely in the restatements of the American Law Institute.[120]

In the twentieth century, Austin's ordinary language analysis influenced the most important contribution of the Oxford School of Jurisprudence represented by such theorists as H.L.A. Hart

---

[111] Ray Worthy Campbell, *The End of Law Schools: Legal Education in the Era of Legal Service Businesses*, 85 MISS. L.J. 1, 66 (2016).
[112] David P. Fidler, *International Law and Weapons of Mass Destruction: End of the Arms Control Approach?* 14 DUKE J. COMP. & INT'L L. 39, 42 (2004).
[113] Andrew Halpin, *Austin's Methodology? His Bequest to Jurisprudence*, 70 CAMBRIDGE L.J. 175, 192 (2011).
[114] *See* Neil Duxbury, *English Jurisprudence Between Austin and Hart*, 91 VA. L. REV. 1, 5 (2005).
[115] Marco Jimenez, *Distributive Justice and Contract Law: A Hohfeldian Analysis. (Wesley Newcomb Hohfeld)*, 43 FLA. ST. U. L. REV. 1265, 1276 (2016).
[116] Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 544 (2005).
[117] *Id.*
[118] David Frydrych, *Hohfeld vs. The Legal Realists*, 24 LEGAL THEORY 291, 293-94 (2018).
[119] *Id.*
[120] Kristen David Adams, *The American Law Institute: Justice Cardozo's Ministry of Justice?*, 32 S. ILL. U. L.J. 173, 200-01 (2007).

and A.M. Honore.[121] A critical element of their version of analytical jurisprudence was to uncover the "ordinary" language, the precise conventional form of language, used by lawyers.[122] In *The Concept of Law* (1962), Hart defined law as a complex system of rules.[123] He identified for the purposes of constructing a defensible analytical model of law a concept of law as defined by a union of rules having primary and secondary characteristics.[124] One of the most important insights in Hart's work was his identification of primary rules, which have certain characteristics of law but also existed before the existence of the state.[125] Primary rules seem to have the characteristics of customary law. Modern legal philosophy would see such law as a kind of *lex imperfecta*.

The importance of Hart's insight was that he recognized that rules created by custom would have efficacy as custom, which is an outcome of a pattern of social cultural practices in a given social group. In this view, custom may not be law in a conventional sense (as being identified with the state). Custom is a law that exists behaviorally and comes in the communicative form as "rules." The implication of this view is that social organization is infected with rules, which may be recreated or reproduced in selective slices as positive law. The inevitable question becomes: what is the status of the unselected and evolving parts of custom? Hart's insight has not been fully explored by positivists because of their focus of analytical attention on criteria that would objectively indicate or identify what law actually is. Indeed, the positivists lack a concern with possible jural currency of social rules. Presumably, a particular focus on social rules as a legitimate part of jurisprudential inquiry might be seen as inviting chaos into an elegantly described and generally applicable description of any articulate legal order. Hart's critical insight into the nature of rules in law and social organization is that rules are ubiquitous in both law and society. When rules function outside the framework of the state, or without the specific midwifery of a secondary rule of recognition, some component or element of law in social relations is seen at whatever level of abstraction that attention is focused. This could include customary law as observed by indigenous people and other social subgroups with strong patterns of identity, which keep them distinct although they may exist politically as part of a larger social group (such as the state).

As earlier suggested, Hart developed his model of rules by applying the ordinary language analysis version of analytical positivism developed by Austin at Oxford.[126] The idea that rules are critical to human communication systems in law and society provided an important insight into the cultural ubiquity of social rules. However, Hart's model did not develop a particular interest in the broader implications of social rules, other than to identify their nearly universal centrality to both communication and social organization.[127] Thus, Hart's model does not explore the discrete juridical character of rule systems within culture, which do not meet the pedigree test but do have functional juridical qualities.

Hart's real contribution is the use of ordinary language analysis as a communications lens, which has challenged modern theory to provide a deeper capacity for understanding the broader relevance of social rules and practices to the public order and legal development which law defends

---

[121] Winston P. Nagan & Craig Hammer, *Communications Theory and World Public Order: The Anthropomorphic, Jurisprudential Foundations of International Human Rights*, 47 VA. J. INT'L L. 725, 767 (2007).
[122] Andrew Summers, *Common-Sense Causation in the Law*, 38 OXFORD J. LEGAL STUD. 793, 797 (2018).
[123] H. L. A. HART, THE CONCEPT OF LAW 28 (Penelope A. Bulloch & Joseph Raz eds., Clarendon Press 3rd ed. 2012) (1961).
[124] *Id.* at 81.
[125] *Id.* at 91.
[126] Nagan & Hammer, *supra* note 58.
[127] *Cf.* Brian Slattery, *Three Concepts of Law: The Ambiguous Legacy of H.L.A. Hart*, 61 SASK. L. REV. 323, 328 (1998) (discussing the primacy of communication and social control in Hart's model).

and promotes in the common interest.[128] The challenge, in effect, means that Austin's ordinary language analysis and Hart's application of this to law inspires the need for a more refined communications theory, which might account for a broader framework of legal phenomena critical to human perspectives and to the definition of human dignity. Social rules matter in the real world and are a critical part of jurisprudential interest. It will be obvious that Hart's insight has important implications for the development of legal theory and for deepening our understanding of the challenge of legal and political pluralism. The most important challenge to thoughtful judicial philosophy is the point at which "social" rules are given a judicial value within the framework of judge-made law.

IX. JUDICIAL PHILOSOPHY AS A SYSTEM OF INQUIRY

Recall that Justice Holmes concluded that the life of law was a matter of experience,[129] and that Justice Cardozo thought that law, with its effort to project its force and influence into the future, was always "about to be,"[130] making it somewhat contingent. Implicit in these insights is that judicial philosophy must also be, in modest part, a system of inquiry. With appropriate tools and reliable foci, we may more accurately observe human beings acting in micro-social situations and also observe the living generation of precepts, understandings, and expectations that emerge in turn from the dynamics of changing identity. We may also articulate claims and demands for things that people value and want. This living process, it may be assumed, will generate patterns of social practice. These patterns are often psychologically internalized or symbolized as appropriately-formed signs of meaning and understanding. Patterns evolve into practice, practice generates identifiable expectations, and expectations tend to be refined in human communication systems through the agency of signs and symbols. We begin to discern precedents (prior incidents), rules, principles, standards, doctrines, and more generally, norms about basic values for which deviance is rarely tolerated. From this perspective, jurisprudence becomes sensitive to the idea that meaningful focus requires a more refined understanding of the human communications process by which signs and symbols are transmitted through culturally and technologically developed channels. We also begin to isolate, examine, and evaluate the ground rules of the deep structure of moral and legal experience.

If what we call "law" ultimately is rooted in the perspectives of individuals who constitute an aggregate, and if individuals and aggregates themselves are interacting across individual and group lines, the critical insight remains in the social rules and precepts reflected in the complex signs and symbols of communication. These signs and symbols are to be found in the perspectives and operations of human beings involved in interaction with each other within groups and across group lines. Consequently, an important reason for justifying the jurisprudential foundations of human rights law is rooted in the following:

(1) Perspectives of human beings and the central things critical to one's self-awareness, such as one's identity;
(2) The things critical to one's wellbeing such as the capacity to state valid claims to the moral, psychological, economic and political values that give one a valid stake in the community;
(3) Expectations about one's place in society secured by tradition, sensitive to contemporary contingency, and rooted as well in an approved and secure prospect for the future.

---

[128] Nagan & Hammer, *supra* note 58, at 801 n.198.
[129] OLIVER WENDELL HOLMES, JR., THE COMMON LAW, 3 (Harvard Univ. Press 2000) (1881).
[130] CARDOZO, *supra* note 8, at 126.

From this point of view, judicial philosophy as a theory of inquiry has a good deal to say about what is understood as "human rights" and "human dignity." This and other fields of inquiry are socially responsible, intellectually interesting, and fall within the broad outlines of the evolving judicial philosophy of our time. Consider Professor Dworkin's perspective that a central concern of modern jurisprudence is that individual rights matter.[131] He has maintained that one of the tasks of jurisprudence is to ensure that as a matter of political morality, individual rights are taken seriously.[132] Perhaps we might add a gloss to Professor Dworkin's powerful insight as an important task of contemporary jurisprudence: human rights must be taken seriously as well. In fact, human rights are a critical complement to the moral foundations of Professor Dworkin's own theory of rights.[133]

X. LAW, POWER, AND BUSINESS

One of the most important issues for jurisprudence and economics is the control and regulation of power in both public and private spheres. Neoliberal political economy extends the power of the private sector. Without the restraint of law, private power could be abused just as public power may be abused without the restraint of law. Thus, we find that a central flaw in the philosophy of economic liberalization from a lawyer's point of view is the principle that liberalization if unconstrained will result in a license for the liberalizer and oppression for the victim. A specific problem with socialist regimes is that the government can abuse its power of control. The concentration of power does not necessarily mean that everyone shares in it; such a belief is typified by the myth: "*dictatorship of the proletariat"*. In practice, the proletariats likely will be disempowered by the internal elites who manage the power of the state, according to their own interests.[134]

XI. CORPORATE RESPONSIBILITY AND LEGAL VALUES

One of the most important issues that impact upon the law, both nationally and internationally, is the scope and reach of private corporate power. To a significant degree, the regulation of corporations by law is considerably weakened. This permits corporations to function in a relatively unregulated environment and profit with a minimum degree of corporate responsibility. The law is required to provide prudent regulation on corporations at all levels to enhance corporate accountability, both nationally and globally. What follows is an illustration of the problem from the 2013 article *The Right Development: Importance of Human and Social Capital as Human Rights Issues* which concerns the pollution of the Amazon by Texaco/Chevron:

Here the company was both negligent and venal in its casual and colossal pollution from its oil extracting operations. It fought tooth and nail to prevent itself from being accountable. Its practice included bribes and other forms of corruption. Eventually, an Ecuadorian Court found them liable for the pollution in the amount of some nineteen billion dollars. The company is still trying to fight the judgment. We could provide scores of examples where corporate operations involve the support of practices which violate human rights. I will not mention the role of the private sector in the globalized drug industry or practices of sex trafficking. There are criminal for-

---

[131] RONALD DWORKIN, A MATTER OF PRINCIPLE 31 (Harvard Univ. Press 1985).
[132] *Id.* at 71.
[133] *Id.* at 11.
[134] *See* Winston P. Nagan, *The Right to Development: Importance of Human and Social Capital as Human Rights Issues*, 1 CADMUS J. 24, 46 (2013) (discussing the flaw in economic liberalization philosophy).

profit activities. Currently, there is a strong body of evidence that suggests that corporate malfeasance, negligence, or greed, has had a great deal to do with the current recession. This has raised the question of an economic theory that may more critically examine and appropriately contextualize the structure and function of corporate enterprise in global society. Among the suggestions for reform are the following:

- Limit the power of top executives and financial decision-makers who may have the power to use the corporation for inappropriate ends and for personal gain;
- Allow institutional investors, such as pension fund managers, to nominate independent directors to the boards of the corporations in which they are major investors;
- Implement an aggressive program to make employees at all levels stakeholders in the corporation itself, thus giving them an interest in the success of the corporation; corporations may achieve this awarding stock options to employees as bonuses or rewards for excellent company performance;
- Give blue and white-collar employees a direct voice in corporate decision-making to represent the perspectives of professional and non-professional employees in the business to improve the objectivity and quality of corporate decision-making;
- Reduce salary packages and stock options for top-level executives to avoid artificial inflation of the company's share price; stock options may remain part of an executive incentive package, but the corporation should limit their magnitude to protect and enhance corporation interest.[135]

XII. CONCLUSION

The great theoretical questions about what law is, its relationship to society, tradition, order, civility, power, justice, authority, and moral order, in both the present and the future, are doubtless matters of compelling intellectual and professional responsibility. That legal theory is contentious and continuously being reconfigured in a wide-ranging discourse seems to validate it as a subject of compelling academic and professional importance. As theory, methods, and procedures advance, reliable knowledge about law is generated. The constant revelation is that the more we know about law, the more we will discover how little we know about law, and consequently how much there still is to know. Judges, like all people, come with all the complex professional training and skills, as well as psychological predispositions and drives. Some of these are instinctual or unconscious, some are moved by rational ego demands, and some are prone to contemplation and deep moral maturity. It would, therefore, be appropriate that an articulate judicial philosophy permit the jurist to cultivate habits of self-awareness. The Socratic dictum "know thyself" should be a central question of judicial philosophy concerning every judge.

For judges to engage in this exercise is a signal of maturity and a capacity for thoughtful deliberation and decision. It is a legitimate inquiry when elected politicians nominate and appoint judges that they consider not only the articulate philosophy of the judge, but also the judge's implicit philosophy. The fact that a judge may implicitly hold to beliefs that are different from the established expectations of the law as objectively and reasonably distilled should be no disqualification to high judicial office. All human beings have an implicit philosophy. The current fashion is to do whatever possible to hide that philosophy, not because of dishonesty, but because it might be politically abused. It would be far better if these matters were brought out into the open

[135] *Id.* at 42-43 (discussing pollution of the Amazon by Chevron).

and judiciously appraised against a nominee's own sense of the difference between private prejudice, private motives, and the public objects of decision that must guide choice in the public interest.

It is far easier to manage one's basic feelings, instincts, and beliefs if externalized rather than suppressed and voided in public discourse. What we have the right to expect from judges is that they have a duty to self-examine themselves in the making of public choice and that they can account for their predilections and still make sound, mature decisions affecting their fellow citizens. It is very critical that judges divest themselves of as much preconceived ideology as possible. As individuals, there are things in the Constitution that judges may not like, such as liberty or equality. However, these principles are at the heart of the constitutional promise of respect and dignity for all citizens, so strategies that diminish liberty and equality simply diminish the Constitution. Liberty does not mean the license to oppress others. Equality does not mean a depreciation of individual worth and achievement. When these concepts are used to empower "We the people," they ensure the success of the American experiment with a government of the people, for the people, and by the people. More than that, these concepts give a meaning to the principles of impartiality and independence that secure the supremacy of law and the foundation of democracy.

Thus, the supremacy of law in the United States political system is impatient with judicial activism unless it is invoked to resist the abuse of power, be it economic or political. A similar disquiet occurs when excessive judicial restraint seems to support or condone tyranny of the powerful regardless of whether the victims are social preferred or politically despised.