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James L. Maher

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LAW AND PRINCIPLE

By

James L. Maher

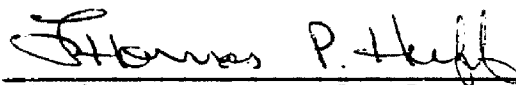
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The purpose of this thesis is constructing a workable philosophical justification for judicial decision-making within a liberal political framework. The thesis begins with an historical evaluation of the law-morals separability thesis through the natural law and positivist traditions, then advocates the acceptance of Ronald Dworkin's later position, with some significant additions. After showing the exemplification of the theory advocated here in case law, the thesis concludes by placing itself within the liberal political tradition and defending against the critical theorists' tradition and the charge of absolutism and nihilism.

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## INTRODUCTION

This thesis begins with an examination of how the relation between what the law is and what it ought to be has been viewed in the natural law and positivist traditions. The law-morals separability thesis is often held pivotal in understanding the difference between these traditions. This topic is also an excellent preface to the substantive issues of law addressed here. The thesis first considers the natural law theory of St. Thomas Aquinas, as Thomas is the archetype for all subsequent natural law theories. After addressing a common misinterpretation of Thomas' work, the thesis turns to H.L.A. Hart's criticism of Blackstonian natural law.<sup>1</sup> The "methodological natural law" theory of David A.J. Richards is next outlined as an example of a combination of natural law and positivist positions. After rejecting Richards' position as unsatisfactory, the thesis next focuses on Ronald Dworkin's "naturalist" approach to law and maintains that Dworkin provides the conception of law best able to account for the true nature of judicial decision making, while remaining faithful to those ideals which do or should animate the law. The thesis next suggests an addition to Dworkin's theory based on a principled manner of discourse, the contention being that this addition further strengthens Dworkin's analysis. Chapter One then concludes with a return to Thomas to show how



natural law is similar to the position developed here.

Chapter Two then outlines two cases from different substantive areas of law to exemplify the type of legal justification advocated here. Griswold v. Connecticut,<sup>2</sup> the well-known contraceptive case, is used as an example of principled decision making in constitutional law, while MacPherson v. Buick,<sup>3</sup> is the example from tort law.

Chapter Three concludes the thesis by placing the conception of judicial decision developed here within the liberal legal tradition. After explaining what liberalism is, the argument here is defended against the critical theorists, who attack traditional liberalism at its roots. The thesis then concludes with a defense of the liberal position developed here against absolutism and nihilism.

## CHAPTER I

"The debate between natural law theory and legal positivism is as ancient as philosophical thought about law and its fundamental moral purposes. In general, the debate centers on the answer to the simple question: Must a law, in order to be a law, be morally justified?"<sup>4</sup>

The natural law tradition generally answers this question in the affirmative. A.P. d'Entreaves stated: "The close association of morals and law is the distinguishing mark of natural law theory throughout its long history. The very enunciation of natural law is a moral proposition."<sup>5</sup>

It is instructive to look first at St. Thomas Aquinas and his definition of eternal law. In Question 91, Art. I of the Summa Theologica, Thomas states:

. . . a law is nothing else but a dictate of practical reason emanating from the ruler who governs a perfect community . . . [t]he whole community of the universe is governed by Divine Reason. Wherefore the very idea of government of things in God the Ruler of the universe, has the nature of a law. And since the Divine Reason's conception of things is not subject to time but is eternal . . . therefore it is that this kind of law must be called eternal.<sup>6</sup>

Thomas had perhaps the most elaborate metaphysical development of natural law. For Thomas, natural law involved an interpretation of man's nature and his relation to God. Natural law was conceived as closely tied to the eternal Divine order which brought all things into being.

Thomas believed that all things partake of the eternal law and "from its being imprinted on them, they derive their respective inclinations to their proper acts and ends."<sup>7</sup> Man participates in the Eternal Reason in recognizing the natural inclination to his proper act and end. "This participation of the eternal law in the rational creature is called the natural law."<sup>8</sup> Thus, natural law is man's participation in eternal law.

The light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light. It is therefore evident that the natural law is nothing else than the rational creature's participation of the eternal law.<sup>9</sup>

Thomas, therefore, does not see natural law as something totally different from the eternal law, but as "nothing but a participation thereof."<sup>10</sup>

Thomas is sometimes accused of confusion regarding the is/ought distinction, i.e., of not understanding the difference between law and morality. d'Entreaves argues, however, that the entire history of natural law involved ". . . painstaking efforts to delimit the two spheres and to get to the core of their difference."<sup>11</sup> That Thomas clearly understood this difference is shown by his analysis of human law.

". . . from the precepts of the natural law, as from

general and indemonstrable principles . . . human reason needs to proceed to the more particular determinations, devised by human reason, are called human laws . . . ."12 In Question 95, Article I, Thomas says that human laws were necessary to keep depraved people restrained from evil by use of force and fear, both to leave others in peace and to eventually become virtuous through practice, i.e., to act out of choice instead of fear. "Therefore, in order that man might have peace and virtue, it was necessary for laws to be framed."13 In Article II, Thomas quotes Augustine with approval and makes an addition: "'that which is not just seems to be no law at all'" Wherefore the force of a law depends on the extent of its justice."14 These Articles show human law is a human invention created to restrain wrongdoers. The force of a human law depends on its being a just law. Human law, therefore, is not equated with justice or morality. The fact of a human law does not mean that the law is, ipso facto, just.

In Question 96, Thomas addressed the power of human law. In Article I, Thomas says the end of law is the common good and, therefore, "human laws should be proportionate to the common good."15 The common good, according to Thomas, is complex and cannot be determined by a single consideration. "Wherefore laws should take account of many

things, as to persons, as to matters, and as to times. Because the community of the state is composed of many persons; and its good is procured by many actions."<sup>16</sup> Human law, Thomas maintains, is formed for community and not individual action. With regard to the degree of certainty possible, he says that it is wrong to seek the same degree of certainty in all things. "Consequently in contingent matters, such as natural and human things, it is enough for a thing to be certain, as being true in the greater number of instances, though at times and less frequently it fails."<sup>17</sup> Thus, human law is designed to bring about the common good, taking many considerations into account, and will sometimes, perhaps even often, be mistaken.

In Question 91, Art. II, Thomas discusses whether it is proper for human law to "repress all vices." Men differ greatly in their degree of "virtue" and human law is framed for a wide variety of humans. Therefore, "human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices . . . chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and such like."<sup>18</sup> Thus Thomas shows his belief in the difference between human law and morality and his conception of the limited role of law in acting out the

moral life.

Human law, for Thomas, also differs from both natural law and eternal law: "The natural law is a participation in us of the eternal law: While human law falls short of the eternal law."<sup>19</sup> Human law, it is seen, has a limited function in Thomas' philosophy of law.

Now Augustine says (*de Lib. Arb.* i5): "The law which is formed for the government of states, allows and leaves unpunished many things that are punished by Divine providence. Nor, if this law does not attempt to do everything, is this a reason why it should be blamed for what it does. Wherefore, too, human law does not prohibit everything that is forbidden by the natural law."<sup>20</sup>

In Question 96, Art. 4, Thomas addressed the question of whether human law binds a man in conscience. Thomas states that laws are either just or unjust and, if just, bind one in conscience, with the power of the eternal law. Such laws are "legal laws."<sup>21</sup> Thomas then divides unjust laws into two categories: those opposed to human good, and those opposed to Divine good. Those laws opposed to human good might be burdensome, against the common good, might go beyond a law giver's power, might impose unequal burdens, etc. "The like are acts of violence rather than laws; because Augustine says (*De Lib. Arb.* i.5), 'a law that is not just, seems to be no law at all.' Wherefore such laws do not bind in conscience, except perhaps in order to avoid

scandal or disturbance . . . ."22 Thomas uses idolatry as an example of a law opposed to the Divine good. "Laws of this kind must nowise be observed, because, as stated in Acts V.29, 'we ought to obey God rather than men.'"23

That Thomas saw human law as very distinct from morality is shown by his statements regarding enforcement of unjust laws: "The power that man holds from God does not extend to this: wherefore neither in such matters is man bound to obey the law, provided he avoid giving scandal or inflicting a more grievous hurt."24 Thomas was careful to show that what is the law is not necessarily what ought to be the law. A law opposed to human good, an unjust law, is "an act of violence," and is not law. The only reasons which Thomas gives for obeying an unjust law are avoidance of scandal or causing a greater hurt through disobedience. The second kind of unjust laws, those against the Divine good, should never be obeyed, as they are directly opposed to the laws of God and, for Thomas, would involve peril of one's soul.

The Scholastic natural law tradition, therefore, as exemplified by Thomas, had a clear grasp of the difference between "legal conformity and the moral value of action"25 and foreshadowed a distinction between the moral and legal spheres. While Thomas and the Schoolmen may have unduly

stressed the moral aspect of law or the legal aspect of morals, they were well aware that there were differences between them.<sup>26</sup>

H.L.A. Hart, in his well known article "Positivism and the Separation of Law and Morals,"<sup>27</sup> makes a compelling case for the positivist insistence on the separation of law and morals. Bentham and Austin, Hart begins, constantly insisted on the need to distinguish law as it is from law as it ought to be. The Utilitarian movement stood for all the principles of liberalism in law and government, such as liberty of speech and press, the right of association, the need to make laws widely known and published before they were enforced, and the principle of no criminal liability without fault.<sup>28</sup> Hart cautions against taking the simplicity of the Utilitarians for superficiality and uses Bentham on slavery as an example. Bentham said the issue was not one of whether slaves can reason, but simply whether they suffer.<sup>29</sup> Once it is acknowledged that the Utilitarians worked for a better society and better laws, then it is possible to turn to the separation of law and morals they advocated in the proper light.

Austin believed God's commands were fundamental principles of morality, with utility as an index. Bentham insisted on the distinction between law as it is and ought



to be, though for him the distinction was based solely on the principle of utility and not on belief in God. Austin and Bentham formulated the separation doctrine as an answer to Blackstone's position, which they found confused and misleading. They interpreted Blackstone as saying that a human law which conflicts with Divine law is simply not a law. Thus, Blackstone, according to their criticism, acknowledged no separation of law and morals.

Hart argues that it was their intention to enable people to see the issues brought out by the existence of morally bad laws and to understand the authority of a legal order.<sup>30</sup> Bentham, in particular, thought that two errors, both in Blackstone, were created by the failure to separate law and morals. The first error consists in someone saying "This ought not to be law, therefore it is not and I can disregard it." The peril of this approach he saw as anarchy, i.e., that law and its authority are negated by a person's conceptions of what the law ought to be. The second error, even more evident in Blackstone, is to say "This is the law, therefore it is what it ought to be." The danger here is a very conservative view, permitting existing law to replace morality as the final test of conduct and so escape criticism.<sup>31</sup>

Thus the positivists saw the distinction between law

and morals as a way of assuring the criticism of the law. They saw themselves as reacting against two negative implications of Blackstone's work, namely the tendency toward anarchy on one hand and conservatism on the other.

Later in his article, Hart turns to a discussion of the argument that positivism aided the horrors of the Nazi regime by advocating subservience to "mere law" and the failure of the German legal system to protest against the wrongs they were required to act out in the name of law. He argues that this post war insistence on joining law and morals overlooks precisely the point Bentham and Austin were making about the separation required to enable criticism of morally evil laws. Hart argues persuasively that it is an enormous overvaluation of the bare fact that a rule of law is valid to think that this is conclusive as to the question of whether this law should be obeyed. "Surely the truly liberal answer to any sinister use of the slogan 'law is law' or of the distinction between law and morals is, 'Very well, but that does not conclude the question. Law is not morality; Do not let it supplant morality.'"<sup>32</sup>

Hart thus relies on the purpose of the positivist distinction between law and morals to show that it is a fundamental misunderstanding of positivism to blame it for aiding the rise of the Nazis to power. Hart does not

dispute, however, that such misunderstanding may have somehow provided support for the rise of totalitarianism.

Hart next turns to an evaluation of a trial of a war criminal after the war. The example he uses is a woman who wished to be rid of her husband and turned him in to the authorities for insulting remarks he made about Hitler while home on leave from the German army.<sup>33</sup> The husband was arrested and sentenced to death, though he was actually sent to the front. A court of appeals found her guilty of procuring the deprivation of her husband's liberty, even though he was sentenced by a court for violating a statute, since the statute "was contrary to the sound conscience and sense of justice of all decent human beings."<sup>34</sup> Though this was hailed as a triumph of natural law, Hart thinks it an unwise decision. He advocates the introduction of a law, which the State would admit to be retrospective, as the lesser of two evils: leaving her unpunished or enacting retrospective criminal legislation. Although both the natural law and positivist approaches lead to the same result (punishing the woman), Hart sees the vice of the Blackstone natural law approach as a lack of candor and a romantic optimism which conceals the difficult nature of the moral choice involved. To say, with the Blackstone natural law interpretation, that the Law of the Reich was not law is certainly philosophi-

cally confusing and not accepted by most people. How is it not law? The Utilitarian approach has the benefit of clarity by holding that "laws may be law, but too evil to be obeyed."<sup>35</sup> Hart's argument is well-reasoned and persuasive. He squarely faces the tough issue of the necessity of making an undesirable moral choice with clarity, versus an interpretation which introduces more problems than it solves.

A persuasive point in Hart's analysis is his argument that the distinction between law as it is and ought to be need not involve adopting a subjectivistic, relativistic or noncognitive stand on moral values and judgments. First, the Utilitarians themselves did not accept a subjectivistic view. Hart argues that the positivist distinction has been confused with noncognitivism. A noncognitive moral theory holds that statements of fact (what is the case) belong to a radically different category than value statements (what ought to be the case). Basically, statements of what is are statements of fact and can be argued for in a rational way, while statements of value are non-cognitive and cannot be argued for rationally like statements of fact. We must add a non-cognitive statement to a statement of fact to equal an "ought."<sup>36</sup> This is subjectivistic or relativistic because moral judgments are not rationally discoverable or deba-

table. "They are 'fiats of the will,' expressions of 'emotions,' 'preferences' or 'attitudes.'"<sup>37</sup>

Opposed to this view is the belief that is/ought, fact/value distinctions are wrong. This entails, Hart says, the belief that moral values are imposed on us by the character of our world and are not just emotion, feelings, attitudes, etc. Moral argument is not therefore reduced to shouting commands or expressing feelings or emotions, but involves a process whereby the parties acknowledge after examination and reflection "that an initially disputed case falls within the ambit of a vaguely apprehended principle," as cognitive or rational as any other disputed classification of particulars.<sup>38</sup>

If the second view were accepted, this would not change the function of the distinction between the law as it is and ought to be. Morally bad laws would still be laws and demonstrating something morally desirable would not make it law. Therefore, Hart argues, whether one accepts a subjectivist view of the nature of moral judgment or accepts the view that values are imposed by the character of the world makes little difference. This can be true in a narrow sense for the distinction between the law as it is and ought to be, but the difference is important in a broader sense, as will be brought out later in this thesis. Consider now an

attempted further development of the positivist's position by David A.J. Richards.

David A.J. Richards in "Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication,"<sup>39</sup> gives a general defense of Hart's positivist theory. He makes an exception, however, for constitutional law, which he acknowledges may be better explained by a quasi natural law theory of legal reasoning.

Richards begins by saying natural law has insisted on a conceptual link between law and morals and positivism has insisted on their conceptual separability. He states that legal positivism's insistence on the law-morals separability thesis is the sounder position. Richards notes that the separability thesis is different from the idea of some legal positivists, notably Hans Kelsen, that the legal system cannot logically be the subject of moral criticism. Richards thinks Kelsen's position is false and mentions Bentham's insistence that the separation of law and morals would facilitate criticism. Richards also distinguishes the separability thesis from the institutional claim of some positivists that a judge cannot invoke moral standards as extra-legal norms unless those moral standards play a role in the legal system, i.e., unless the judge is "invited" to develop moral standards.<sup>40</sup> One can accept the separability thesis,

Richards argues, and reject this institutional claim. A judge could appeal to extralegal standards "as part of the judicial function of doing justice" or "the moral duties of a judge" may require an appeal to extralegal standards.<sup>41</sup> All Richards means is that judges can appeal outside the moral norms of the institution. However, he does not here provide any justification for such an appeal, nor is he able to within the positivist conception.

Richards then makes an argument for what he calls "methodological natural law,"<sup>42</sup> based on the empirical observation of a substantial interconnection between legal and moral concepts in many concrete legal institutions. Methodological natural law is a tool for examining the moral conceptions that underlie our institutions. Richards calls it a natural law theory because: (1) the focus is on the moral dimension of laws, unlike legal positivism which tries to characterize only the pure legal element in law; and (2) the moral principles, on which the theoretical account may rest, are objective principles of moral reasonableness, similar to those which natural law theory traditionally used to assess legal systems.<sup>43</sup>

In The Moral Criticism of Law,<sup>44</sup> Richards expands his view by saying the purposes of methodological natural law theory are both descriptive and critical. By descriptive

Richards means that the meaning and purposes of moral ideas present in legal institutions will be brought out. The second aspect is that "the moral analysis will provide a critical moral point of view form which legal doctrines may be assessed and appropriate reforms suggested."<sup>45</sup>

Richards concludes the article by saying that it is proper to focus on areas where law and morals systematically interconnect, especially constitutional law, to show the working out of his theory. When one does this, Richards maintains, it is clear that methodological natural law gets at a truth in the natural law conception, without actually being a natural law position.<sup>46</sup> It does this by permitting the law to draw upon morals when, but only when, the law does interconnect with morality. Richards uses the First Amendment as an example of this interconnection of law and morality.

Richards claims his position shares a fundamental kinship with positivism because: "At bottom, the concern of both approaches is the same: how may the philosophical arts of critical self-consciousness clarify and guide the enlightened moral criticism of law?"<sup>47</sup> The problem with Richards' position is that, while he is right that the moral criticism of law is the purpose of both positivism and natural law theory, one must adopt a moral foundationalism



for such moral criticism to be effective. Adopting such a position will inevitably lead Richards to cross over into a real natural law position.

To restate, Richards is correct to focus on "the moral analysis of concrete legal institutions and issues,"<sup>48</sup> but it is philosophically unsatisfying to use moral principles as if they were universal natural law principles which everyone accepted and not state the basis or foundation for using such principles. Richards tries to avoid these difficulties with natural law by interjecting specific moral conceptions to be used for moral analysis and criticism. He then acts as if the moral theory were there, first to be found in, for example, the First Amendment, and secondly that this moral conception, once found, could then be used to criticize the implementation or acting out of such a principle.<sup>49</sup> An obvious and serious danger in this approach is exposed when we recognize that talk about "the central moral value of the First Amendment,"<sup>50</sup> as if this value were clearly one thing as opposed to another, does not acknowledge that one brings a moral conception of the world to bear in this evaluation.

In summary, it seems that Richards is attempting to claim a value neutrality by acting as if the values being used were implicit in past judicial tradition and practice

and that this presence, in and of itself, is enough to compel us to continue to apply these principles. This seems just plain mistaken. Even if we could identify the moral values behind specific constitutional provisions, and this is granting a lot, we will still need to determine whether these values were worth preserving and fostering.

Constitutional adjudication is not a mechanical act and should not be treated like one. Let us turn now to Ronald Dworkin for an analysis of the problems with Richards' position.

Dworkin's reply to Richards is in Taking Rights Seriously<sup>51</sup> and a more recent paper where he further develops his "naturalist" position. Dworkin begins by saying that Richards agrees that principles play an important role in determining what the law is on some matter, but Richards believes that traditional legal positivism "which insists that what the law is is just a matter of fact, is nevertheless sound."<sup>52</sup> Positivism, Richards argues, can admit the role of principles of law because the question of what role these principles play in the legal system is a question of fact and how the principles are applied in each case is "a matter of ordinary professional judgment."<sup>53</sup> Dworkin quotes Richards' argument as follows:

Legal principles are, after all, legal; in order to be binding, they must be implicit in past judicial tradition and practice, inferable by the usual methods of legal reasoning by

analogy . . . . Legal principles, like legal rules, depend at bottom on an issue of fact, that is, the critical attitudes of judges.<sup>54</sup>

Dworkin disagrees, first, that the identification of legal ideas is simply a matter of ordinary fact. Most principles judges cite are controversial, at least as to weight, and "many appeals to principle are appeals to principles which have not been the subject of any established judicial practice at all."<sup>55</sup> Dworkin states that one can make persuasive arguments to adopt one theory of law as superior to another when theories conflict. These arguments, however, must go beyond the limits which a positivist conception is ready to accept as proper, in that they must taken into account arguments from normative political theory. Indeed, Dworkin claims that a person's theory of law will include almost all the political and moral principles to which he subscribes, so these will all play a role in the justification of the legal system.<sup>56</sup>

By "implicit" Richards does not mean, Dworkin argues, that there must be a tradition of actually citing these principles or that these principles follow deductively from precedents, since these are both clearly false. The practice of justification does not always use principles previously cited and deductive logic plays little or no role in judicial decision making.<sup>57</sup> Dworkin concludes that he does

not actually know the way that Richards means that principles must be implicit in past judicial tradition and practice, but suggests Richards may be adopting a view similar to that of Rolf Sartorius, who holds that one purported theory of explanation will always provide a better fit with the data of a particular case based on "canons of explanation used in the sciences, and judges do and should choose that theory."<sup>58</sup> Dworkin admits that he used to hold a view very similar to this, but came to reject it. He then states a central element of his concern with the sort of position Richards and the positivists advance:

I do not think that there are agreed criteria of superior theoretical explanation even in the case of scientific explanation, and experience shows that in the case of law one account is often preferred to another on reasons that cannot realistically be understood as reducible to the relative number of earlier decisions explained, or the simplicity or elegance of the explanation . . . . If judges did decide cases by citing canons of theory construction, counting the number of precedents explained by competing hypotheses, and contrasting the theoretical elegance of these hypotheses, we might at last have a genuine example of "mechanical" decision making . . . supposed to be derogatory in law, though not . . . in other fields where a moral dimension is lacking, like engineering.<sup>59</sup>

Sartorius' position, then, is self-deceptive, as it would have us believe that judges were just "following procedures," as it were, instead of making moral choices. Dworkin's position here has an existential dimension in

that, in Sartre's words, Sartorius is choosing not to choose. That is, he is acting as if the morality of the particular person did not play a role and that the judge is just a sort of neutral instrument through which the various factors are funneled. The danger here is the loss of a moral dimension through a kind of self-delusion. Whenever the moral dimension is lost, the real risk is that of a wasted life, of leading a life which is not "well lived," as Socrates meant this, where one lives in a moral vacuum.

Richards insists the principles implicit in past traditions and practices must be a matter of fact in order to resist the view that law is always morally sound and the counterpart, that morally evil laws are not laws, i.e., the traditional positivist distinction between what the law is and ought to be. Richards, Dworkin asserts, sees only two alternatives: (1) the positivist claim that it is always a question of fact that the law is; or (2) the extreme natural law position, which maintains that there can be no difference between principles of law and principles of morality. Dworkin rightly rejects this false dichotomy.

What the law requires may depend on "what background morality requires,"<sup>60</sup> so it is not merely a question of fact. Dworkin uses as examples: instances where the legislature puts moral tests into legal rules; cases where

the legislature says nothing about its intent; when specific legal principles embodying moral concepts are decisive of a legal issue; and when the question at issue is what principles are decisive. However, from the position that morality is rightly considered part of the law, it does not follow "either that the law is always morally right, or that what is morally right is always the law, even in hard cases."<sup>61</sup>

Dworkin does adopt the position that legal principles are always moral principles in form, though they need not always be sound or correct moral principles. By moral, Dworkin means that the principles in legal arguments "make claims about the rights and duties of citizens and other legal people rather than stating, for example, prudential judgments or historical generalizations."<sup>62</sup> Thus, Dworkin recognizes and acknowledges the human element of making a "claim" and of then providing the best possible justification for that claim, consistent with the background and institutional history of the area.

In summary, Dworkin accepts the law-morals separability thesis, in that he believes the law is not always moral and morality is not always law. Dworkin does believe, however, that legal principles are always moral principles in that they invoke a statement of value about that principle.

These claims would be provided with a foundation by the political morality of the judge, all things considered, consistent with the history and tradition of the right which went before. This leads me to Dworkin's later, more developed presentation of these issues.

Dworkin gives a more detailed version of his natural law position in a recent article, "'Natural' Law Revisited."<sup>63</sup> He begins by saying that any theory which makes the content of law sometimes depend on the answer to some moral question is a natural law theory. Dworkin acknowledges he is a natural law theorist in this sense and then defends this position, which he calls "naturalism." Naturalism holds that judges should decide hard cases in the following way: "by trying to find the best justification they can find, in principles of political morality, for the structure as a whole, from the most profound constitutional rules and arrangements to the details of, for example, the private law of tort or contract."<sup>64</sup> This is a principled approach, since any attempted justification will have to address the question of the best justification and must also state these principles as precisely as possible. Dworkin's judge, working within this system, is able to provide only a partial justification--as opposed to the full justification of Hercules in the "Hard Cases" section--since he is only

human. This description of partial justification is important, however, because it helps define the consistency required of a judge. "A judge should regard the law he mines and studies as embedded in a much larger system."<sup>65</sup> It is always relevant, therefore, for the judge to look further and ask whether his judgments are consistent with the whole system of law. This is a natural law theory, since each judge's decision about what past law requires will be tempered by his own political morality, i.e., the best political justification of that law.

Dworkin gives an example of what he calls extending a discipline into the future by examining its past in an analogy to the literary process. Imagine being handed the first few chapters of A Christmas Carol and being told to add a chapter to the novel, with the directions to make the best novel possible. When done, it is sent to another person with the same directions, etc. The writer will be faced with a sense of interpretation which Dworkin thinks is analogous to the naturalist judge. In making this the best possible novel, one must be respectful to what is already there in the text, i.e., one must not follow an interpretation ruled out by the text.

Dworkin then supposes two possible interpretations of Scrooge. The first is that he is inherently wicked, an



example of the degradation of which human nature is capable. The second is Scrooge as inherently good, but progressively corrupted by false values and the perverse demands of high Capitalist Society.<sup>66</sup> The interpretation adopted will make an enormous difference how the work continues. The aim is to create the best novel one can, while still making it a single work of art, i.e., to respect the text and not interpret the character in a way which it rules out. If the text is blatantly inconsistent with one interpretation, this alternative is ruled out. If the text is equally consistent with both, one can choose. You will then choose the one, Dworkin says, that makes the work more significant or otherwise better, depending on your own experience with people like Scrooge. Dworkin then raises the crucial question-- what if you believe one interpretation is better than the other, you agree with it, think it is a more profound insight into human nature, etc., but this will be inconsistent with more things in the text, i.e., more things will be regarded as mistakes under this interpretation? You must then ask which interpretation makes the work better on the whole--it is not simply a mechanical matter of choosing the interpretation which brings out fewer "mistakes," since the less favored interpretation may well be a less revealing picture of human nature.<sup>67,68</sup>

Dworkin thus believes that a judge should decide new cases in the spirit of a novelist in a chain writing a fresh chapter. One does not have a clean slate, but is required to go on as before. "The best interpretation of past judicial decisions is the interpretation that shows these in the best light . . . politically, as coming as close to the correct ideals of a just legal system as possible."<sup>69</sup>

Dworkin is concerned with the possibility of subjectivism, of letting the judge's personal evaluation be the sole criterion for decision. But Naturalism, as he conceives it, only allows a limited use of a judge's beliefs of what political and personal rights people have "naturally," i.e., apart from the law. The "brute facts of legal history"<sup>70</sup> will limit discretion and assure that the judge's beliefs are not the only test of law. If the judge uses too much discretion, there will be too little integration, too much legal history will have to be viewed as accidental. An Agatha Christie mystery can't be made into a philosophical exploration of death, for example, even if the latter were a more desirable enterprise.

The judge has an obligation to continue the past, not invent a better one. Showing history as incoherent or an unprincipled chaos does not provide the best possible justification for a legal decision. This does not rule out,

however, a dramatic reinterpretation, such as the one given negligence law in MacPerhson v. Buick by Justice Cardozo, which unifies what went before and shows prior decisions in a clearer light.<sup>71</sup>

Though judges can have different conceptions of what counts as a fit, the essential thing is to address these questions in a principled way. This, indeed, is what naturalism demands. Dworkin is concerned to give us a "working style of interpretation,"<sup>72</sup> because interpretation cannot be mechanical. One must have principles as guides, but there is a distinction between fit and substantive justice. Detailing of the requirements of substantive justice is impossible and deceptive. Dworkin requires judges to reflect "on the full set of the substantive and procedural political rights of citizens a just legal system must respect and serve."<sup>73</sup>

The rest of Dworkin's article is interesting and persuasive, but can be given short summary for purposes of the discussion here. Dworkin looks at various challenges to naturalism and essentially deals quite effectively with them. He rejects subjectivism by rejecting the "demonstrability thesis." He argues naturalism is not undemocratic because democracy requires the law be as principled and coherent as possible. Naturalism also best

respects the right of each person to be treated by his government as an equal, a right crucial to democracy.<sup>75</sup> Against the instrumentalist claim that naturalism is "crazy" for being tied to the past, Dworkin argues "it is unfair to reach a decision which offends the best interpretation of the past."<sup>76</sup> He states in clear and powerful terms that naturalism best brings out issues of political morality which need to be addressed, using the example of slavery. Does a slaveholder have the right to enforcement of the constitutional system on his behalf, e.g., to keep his slaves imprisoned at home? A naturalist judge might think he does not because no one can have a right to the equal benefit of wicked laws. "In that case you would decide against the slaveowners if you could, because the underlying reason for your concern with the past, which is people's abstract rights to institutional consistency, would have exhausted its power."<sup>77</sup> Dworkin seems to say that when the abstract rights run out, one is then left to rely on the best possible justification, which would take into account the right to a public order which treats all people as equals. Finally, Dworkin concludes this section by stating it does not matter if one uses naturalist, traditional natural law or positivist terminology in not upholding the rights of slaveholders. "For the important issue is not what you say, but what you do."<sup>78</sup> I take this as consistent with

Richards' position that the purpose of both natural law and positivism is to be able to criticize the law. In spite of their differences, both Dworkin and Richards share this fundamental insight.

Dworkin concludes the article by addressing the two ideals of our political system. One is an external ideal, that of a perfectly just and effective system. This is a challenge to legislation, political will and the community's sense of justice. The second ideal is internal, that of itself made pure. This is the challenge to adjudication, to make the standards which govern our lives articulate, coherent and effective. People will disagree about which of these ideals should have precedence, but this is inevitable whenever a community recognizes people "have rights beyond the strict and narrow limits within which everyone agrees what these rights are."<sup>79</sup> Naturalism seems the best method for providing principled justification, even if it will sometimes create controversy and small confusions, because "naturalism at least takes the actual political order, properly interpreted, as the common standard, so that citizens are encouraged to put to themselves the same questions that officials who adjudicate their disputes will ask in judging them."<sup>80</sup> Dworkin believes we should strive for these ideals and says the courts play an indispensable part in our

actions--the courts are the forum for the internal ideal of making the standards which govern our lives articulate, coherent and effective.

Dworkin's position is compelling for several reasons. First, it allows for the bringing in of "values." "Values" is, of course, an all inclusive word, i.e., it can be used by subjectivists or absolutists. "Value" is used here in the sense of a principle that can be raised and debated in a principled manner. For example, one can say that people have a right to equal respect and concern or have a right to be treated as ends in themselves and not as means to some end. One would then point to situations where this right is not respected, e.g., slavery or sexual abuse, and point to the results. The results might be very low conception of self worth, wide-spread pain and suffering, guilt on the oppressor's part, etc. Using this method, one points to the things one is speaking on behalf of, testifies on their behalf and then appeals to the common experience of the listener. Some of the best examples of this method of discourse come from the New Testament. For example, when Jesus is approached by the rich man in Matthew 19:16-22, he is asked what must be done to have eternal life. Jesus gives him a list of six commandments, what the law requires. When the rich man answers that he follows all these and asks

what he still lacks, Jesus tells him to sell all he has and give the money to the poor and follow him. "But when the young man heard that he went away sorrowful: for he had great possessions."<sup>81</sup> This passage is very instructive. Jesus appealed first to the law and secondly to a principle not in the law. He answered the young man's questions in a principled way, even if the advice was very difficult to follow. I quoted the last verse of their encounter because it shows that it is always a possibility with this method of argument that the listener will not be convinced. One can testify to one's own experience, point to the sources of the experience, appeal to commonality and the listener may still not be convinced--he can still walk away. Dworkin's explanation allows for this sort of experience because the political morality of a judge, all things considered, is used in reaching a justification for particular decisions. This allows for dialogue and a principled approach to these issues of value, using the method of testimony and appeal.<sup>82</sup>

One also needs to reject, as Dworkin argues, the demonstrability thesis in moral matters. It is perhaps enough to say that the thesis itself is undemonstrable and therefore fails under its own criteria. In summary, the use of "values" is essential in legal justification, and Dworkin's position provides a principled approach which

argues for these values, while clearly acknowledging they are not absolute.

Dworkin's method, combined with that of testimony and appeal, brings value decisions out front, that is, it does not hide behind a belief that the values are somehow neutrally in the system calling only for the use of "prudential judgment" in their application, a la Richards. Richards' position is mistaken, though it is a common conception of the way legal decisions are made. In addition to being misleading, it can be a dangerous position because it does not acknowledge the personal involvement of the decision maker. It can lead to an amoral, mechanical view of the law, which is simply contrary to the reality of the involvement of the decision maker.

Kierkegaard emphasized this existential aspect of life against Hegel's "pure thought." Kierkegaard's criticism of the tendency toward abstraction is applicable to Richards' theory of judicial decision making. "In Greece, as in the youth of philosophy generally, it was found difficult to win through to the abstract and to leave existence, which always gives the particular; in modern times, on the other hand, it has become difficult to reach existence. The process of abstraction is easy enough for us, but we also desert existence more and more, and the realm of pure thought is



the extreme limit of such desertion. In Greece, philosophizing was a mode of action, and the philosopher was therefore an existing individual."<sup>83</sup> Dworkin's approach is more honest in acknowledging legal reasoning as a "mode of action" and the judge as an "existing" individual confronted with difficult moral decisions.

Finally, the naturalist/testimony and appeal position is better able to give an account of the force behind the law. It is better able to speak up on behalf of those things which give life to the law, which brought the law into being. It seems to belittle rights to say that we ultimately have them only because they were written into the U.S. Constitution or they are part of our legal inheritance, etc. When one thinks of the freedoms of speech, religion and press or the equal protection clause, one does not think of a document, a lifeless piece of paper.

It is essential to address the things which gave rise to the document, the force behind our still accepting it, if we are to have a faithful application of these rights in the future. This might mean looking at the conditions existing in England at the time of the American Revolution. A look at the abuses of the English system will indicate why the Framers insisted on rights having force against the state. It would also mean giving examples where people were not treated with equal respect and concern and making appeals to

the commonality of the listeners. This approach would rely on the Constitutional provisions, explicit and implicit, would recognize that a court can get around, or indeed throw out, provisions when the life has gone out of them, when they cease to be living ideas. Keeping this force alive means being faithful both to the history and tradition of the Constitution and to the things themselves, i.e., that which gave power to the ideas which gave rise to the Constitution. This is the idea of values coming from the world which Hart made reference to in claiming that a subjectivist position did not make a difference in the application of the law-morals separability thesis. In his limited context, I agree, but when one looks at the broader context of the law as only alive because of the force behind it, I think one's philosophy becomes vitally important and subjectivism is an unacceptable alternative.

It is important to note a vital similarity in St. Thomas' work and the position this thesis develops. If one leaves out Thomas' metaphysics, natural law can mean something like testimony and appeal. While a Thomist might argue that natural law is based on the word of God as reflected in man's reason, this thesis argues for an acknowledgement of the forces which animate the law and for testimony on their behalf. Though there are serious and

important differences between the positions, they share a fundamental insight in that they both see judicial decision-making as a process informed by extra-legal concerns. They both require fidelity to those extra-legal concerns, thereby avoiding an anchorless, subjective stand. They both view the law as more than "fiats of the will" and exercises of raw power. They share a fundamental concern with the correct application of law, i.e., that the law be properly administered in individual cases. Finally, they share a commonality of purpose in being true to the "things themselves." If, that is, law is a reflection of reality "out there," however dimly or vaguely it is perceived, one must at all times strive to give a true interpretation of these things. Thus, even though a naturalist/principled analysis would not meet the metaphysical standard of proof which a traditional natural law theorist might require, Thomas' position is critically similar in its faithfulness to principle and those things which animate the principles.

In summary of this chapter, the law-morals separability thesis can and should be accepted. Traditional natural law, as exemplified in Thomas, has not denied this distinction. Dworkin, is right, however, that legal principles are moral statements in form, in that they make claims about rights and values, i.e., they require a "claimer." One must be

careful not to fall into subjectivism and the method of testimony and appeal, with the support of the Constitutional materials, avoids this. Therefore, the law-morals separability thesis need not lead to an abandonment of a naturalist position. Indeed, it seems that any legal position becomes incoherent without adopting such a naturalist foundation.

The naturalist model Dworkin proposes provides a good starting framework for a theory of law which can be most faithful to those things which sustain us. There is, of course, no certainty that a judge working in such a manner will be a better judge. He could be demented, create decisions most people disagree with, or simply abuse his power. However, this is always true of a judge, even a traditional positivist. Naturalism at least has the benefit of putting the decisions out front, "so that citizens are encouraged to put to themselves the same questions that officials who adjudicate their disputes will ask in judging them."<sup>84</sup> It is perhaps true that one cannot ask more of any legal system.

At this point in the thesis it is important to demonstrate just how the position advocated here works in practice. It is the purpose of the next chapter to show this practical application, through the use of case law.

## CHAPTER II

It is important that one actually show the working out of a legal theory in concrete terms, i.e., in case law. The areas of constitutional law and tort both offer excellent examples of the application and use of a broad naturalist/principled discourse approach to judicial decision-making. The right of privacy, specifically Griswold v. Connecticut, is a good example of the working out of constitutional law theory, while product liability law, specifically MacPherson v. Buick, shows how naturalist principles operate in the tort area. Griswold will be examined first, as constitutional law is a clearer example of the working out of principle in the law since constitutional law is generally based on principle, unlike the common law (case law) tradition inherited from England. The MacPherson case will then be analyzed as an example from the common law tradition.

The first case addressed to show the working out of a broad naturalist/principled legal analysis is Griswold v. Connecticut. Griswold involves the constitutionality of two Connecticut state statutes. The first statute made it a crime for any person to use any drug or article to prevent conception. The second statute prohibited any person from giving information, medical advice or counseling regarding

the use of contraceptives. Appellant Griswold was Executive Director of the Planned Parenthood League of Connecticut. Dr. Buxton, a licensed physician and Medical Director for the Planned Parenthood League, is also an appellant in this case, as he prescribed the contraceptive devices to the couple involved in this case. The lower court found both appellants guilty as accessories and fined them \$100 each. The couple who sought contraceptives through Planned Parenthood were married. The Court allowed the appellants standing to raise the constitutional rights of the married couple and quickly turned to the merits of the case.

Justice Douglas, writing the majority opinion, begins with the statement that the court is not a "super-legislature" which evaluates the worth of economic, business or social laws. The Connecticut law, however, is different, as it involves the intimate relations of a husband and wife. J. Douglas then turns to the First Amendment and lists numerous ways in which "the State may not . . . contract the spectrum of available knowledge."<sup>85</sup> He lists several instances where the Court has protected "peripheral rights" in order to secure specific rights. He then states: "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."<sup>86</sup> These guarantees, J. Douglas

maintains, create "zones of privacy." Though Justice Douglas places a strong emphasis on the right of privacy as found in the First, Fourth and Fifth Amendments, he also mentions the Third and Ninth Amendments as creating such zones of privacy.

The Connecticut statutes, Douglas argues, impinge on the marriage relationship, which is "within the zone of privacy created by several fundamental constitutional guarantees."<sup>87</sup> Douglas strikes the statutes down as unnecessarily broad and invading the areas of protected freedoms. Enforcement, Douglas contends, would involve searching a married couple's bedroom, an idea which "is repulsive to the notions of privacy surrounding the marriage relationship."<sup>88</sup>

It is a generous evaluation of Douglas' opinion to say it is unclear. It is frankly baffling exactly on what the decision turns. He mentions six amendments and does not explicitly say which amendment or argument is determinative. The "penumbras, formed by emanations" language is often attacked as oracular in nature or even nonsensical. At one point Justice Douglas cites six cases as precedent and says "These cases bear witness that the right of privacy which presses for recognition here is a legitimate one."<sup>89</sup> The key to this opinion, it is clear, is his belief that the marriage relationship lies within the zone of privacy

created by several fundamental constitutional rights. Though there is not much substance to Douglas' opinion, or what is substantive is at least confusing, he does write well, particularly in the last paragraph of the opinion:

We deal with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>90</sup>

The first concurring opinion was written by Justice Arthur Goldberg, joined by Chief Justice Earl Warren and Justice William Brennan. It is a long and complex opinion, but important to this thesis.

Justice Goldberg begins with the statement that liberty is not confined to the specific terms of the Bill of Rights, but protects fundamental personal rights, including the right of marital privacy, equal protection and the right to pursue an occupation, which are not explicitly in the Constitution. He relies on precedent, i.e., former U.S. Supreme Court decisions, and refers to the Ninth Amendment. He quotes from an earlier Supreme Court case, Snyder v. Massachusetts,<sup>91</sup> as follows: "The Court stated many years ago that the Due Process Clause protects those liberties



that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"<sup>92</sup> This is an argument from both precedent (former case law) and history and tradition.

J. Goldberg then turns to the Ninth Amendment and addresses at length the intent of the Framers, particularly Madison, with regard to its enactment. The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Amendment was the work of Madison and, Goldberg argues, was designed to address the fear that a bill of specifically enumerated rights could not be sufficiently broad to protect all the essential rights and the specific mention of certain rights might be seen as a denial that other rights were also protected.<sup>93</sup>

J. Goldberg then quotes Justice Story, from his Commentaries on the Constitution of the United States (1891), as a sort of history or tradition of interpretation regarding the Ninth Amendment. J. Goldberg summarizes by saying: "These statements of Madison and Story make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people."<sup>93</sup>

Justice Goldberg next turns to an historical analysis

of the Ninth Amendment. While the Ninth Amendment has not often been relied on by the Court, it has been part of the Constitution since 1791, is intended to have weight, and should be given effect.

To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and give it no effect whatsoever.<sup>95</sup>

Justice Goldberg again refers to the intent of the Framers that there exist fundamental rights not specifically enumerated and the Bill of Rights is not exhaustive of those rights. The Supreme Court has often held that the Fifth and Fourteenth Amendments protect certain fundamental liberties from infringement by both federal and state government. Goldberg's use of the Ninth Amendment, therefore, merely "serves to support what this Court has been doing in protecting fundamental rights."<sup>96</sup>

Goldberg also answers Black's charge, in a dissenting opinion, that his Ninth Amendment analysis turns "somersaults with history."<sup>97</sup> J. Goldberg argues he is being faithful to history. Though the Ninth Amendment originally was concerned only with restrictions on federal power, the Fourteenth Amendment prohibits states as well from abridging fundamental personal liberties. "And, the

Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement."<sup>98</sup> He summarizes with the statement that the Ninth Amendment "simply lends strong support" to the view that the "liberty" interests protected by the Constitution are broader than those listed in the Bill of Rights.<sup>99</sup>

The argument now takes an interesting turn. J. Goldberg addresses the charge of subjectivism, i.e., the claim that his interpretation would leave judges "at large to decide cases in light of their personal and private notions."<sup>100</sup> In answering this charge, he refers to several important statements by the Supreme Court regarding the sources of its holdings affecting fundamental rights. This is an argument based in precedent and an attempt to show the principles underlying this series of cases. In speaking of judges, J. Goldberg states:

They must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . ." Powell v. Alabama, 287 U.S. 45, 67. "Liberty" also "gains content from the limitation of . . .

specific [constitutional] guarantees" and "from experience with the requirements of a free society." Poe v. Ullman, 367 U.S. 497, 517.<sup>101</sup>

Justice Goldberg is criticized by Justice Black in dissent because use of this terminology and tradition will require "judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary."<sup>102</sup> Justice Black's criticism of Goldberg's analysis will be addressed later in this paper.

J. Goldberg further says that privacy is a fundamental personal right which, again quoting Poe, arises "from the totality of the constitutional scheme under which we live."<sup>103</sup> He quotes Justice Brandeis, from Olmstead v. United States,<sup>104</sup> on the principles underlying the constitution's guarantees of privacy, to the effect that the makers of the constitution "conferred, as against the Government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men."<sup>105</sup>

Justice Goldberg cites Meyer v. Nebraska,<sup>106</sup> Pierce v. Society of Sisters,<sup>107</sup> and Prince v. Massachusetts,<sup>108</sup> in support of the position that the Court's decisions "have respected the private realm of family life which the State cannot enter."<sup>109</sup> The Connecticut statutes, he points out, seek to regulate a vital and sensitive area of privacy, viz., marital sexual relations and home life. "Of this

whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."<sup>110</sup> This is an appeal to commonality, as no authority is cited for this position. Goldberg states it as a given that nothing is more intimate between married people than sexual relations.

He speaks of the "entire fabric of the Constitution,"<sup>111</sup> demonstrating that marital privacy is a fundamental right. He then makes a personal statement which again involves testimony as to the force of the right of privacy in marriage and an implicit appeal to the commonality of the reader: "Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection."<sup>112</sup> Justice Goldberg could develop this aspect of his argument more fully by addressing the sanctity of marriage on a more personal level and appealing to the commonality of the listener. It should be noted, however, that such an approach is implicit in his argument, as Goldberg is acknowledging his position as an existing individual who is asked to evaluate a law which is said to encroach upon a constitutionality protected fundamental right. He acknowledges the "I," the existing individual, who is forced to take a stand on an issue, here the decision regarding the

Connecticut statutes, based on the best possible information he can gather. This acknowledgement of the human existential perspective is, I believe, essential to honest and effective judicial decision making and contrasts markedly with the position that one is just following precedent, i.e., judge as "cog" in a mechanical process which need only be set in motion by earlier decisions. Goldberg's open acknowledgement of his involvement in the issue he is deciding is honest and important in avoiding both a mechanical jurisprudential approach and a "sub specie alternatus" viewpoint, both of which see the issue as patently clear and requiring no "messy" human decision making.

Justice Goldberg further argues that letting the Connecticut statutes stand would permit "experimentation by the states in the area of the fundamental personal rights of its citizens."<sup>113</sup> The State, Goldberg argues, does not have this power. He then uses an analogy to the State decreeing that all married couples be sterilized after having two children. Even though the law might be thought "silly" (the words used in dissent by J. Stewart), it would not be subject to constitutional challenge as the Constitution does not specifically prevent the government from abridging the marital right to bear children and raise a family. "If upon a showing of a slender basis of rationality, a law outlawing

voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid."<sup>114</sup> J. Goldberg, of course, thinks both laws represent an unconstitutional intrusion on the right of marital privacy.

Since the Connecticut statutes impose upon a fundamental personal right, Goldberg argues, the state must prove a "compelling state interest" to justify the law. A showing of a mere "rational relation" of the law to the desired result is not enough to pass constitutional requirements. This is a reliance on precedent and past decisions affecting the constitution. Connecticut argues there is a rational relation between the law and its desired result (prevention of extra-marital affairs). However, even this burden is not met by the state. The statute is unnecessarily broad and intrudes on the privacy of all married couples. The State's interest in safeguarding marital fidelity could be served more effectively by a more precisely drafted statute. J. Goldberg cites NAACP v. Button,<sup>115</sup> for the principle that: "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."<sup>116</sup> Since the statute is unnecessarily broad, it cannot stand.

J. Goldberg concludes his opinion by distinguishing his position from the proper regulation of sexual promiscuity or

misconduct. Again quoting from Poe, J. Goldberg approves: "It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy."<sup>117</sup>

J. Goldberg's opinion is a good example of a principled judicial decision of the type argued for here. He repeatedly relies on precedent, i.e., judicial tradition, and the intent of the Framers, i.e., Constitutional tradition. He addresses the criticism that his position is subjective and adopts an existential perspective in openly acknowledging his involvement as decision maker. He testifies regarding the sanctity of marital privacy from this "I" perspective. He also fruitfully uses analogy at one point in the opinion. The opinion is a fine example of the best possible justification, all things considered, for reaching a judicial decision.

The second concurring opinion was written by Justice Harlan. J. Harlan agrees with the judgment, but for different reasons. He sees the proper question as "whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates



basic values "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325."<sup>118</sup> J. Harlan believes that it does and that one need not even refer to any specific right in the Bill of Rights, or "any of their radiations."<sup>119</sup> He then makes the now famous remark: "The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom."<sup>120</sup>

Justice Harlan then takes issue with the position of dissenting Justices Black and Stewart, who advocate an "incorporation" approach to constitutional law. First of all, Harlan claims, there are no historical grounds for adopting an incorporation position. Secondly, it is an illusion to believe that limiting the content of Fourteenth Amendment due process to the protection of rights found only in the Bill of Rights will confine judges to "interpreting" specific constitutional provisions and restrain injection of their own ideas of constitutional right and wrong into the "vague contours of the Due Process Clause."<sup>121</sup>

This is an insightful observation by J. Harlan. He believes in "judicial self restraint," but thinks Black's suggested formula for achieving it "is more hollow than real."<sup>122</sup> This is because "'Specific' provisions of the Constitution, no less than "due process," lend themselves as readily to "personal" interpretations by judges whose constitutional outlook is simply to keep the Constitution in

supposed 'tune with the times.'"<sup>123</sup> Thus Harlan wisely rejects any mechanical or "neutral" theory of judicial decision making. Harlan's position is that it is impossible to avoid injecting personal interpretations into constitutional analysis. It is certainly impossible to avoid personal opinions by claiming to "interpret" the Bill of Rights by means of an incorporation approach. This is further acknowledgment of an existential perspective, i.e., one which openly acknowledges the limited perspective of the existing individual as the basis for judicial decision making.

On the other hand, J. Harlan is not advocating a relativistic approach to law, i.e., where law is dictated merely by the personal, subjective opinions of judges. He believes in judicial self-restraint, which can only be brought about by: (1) continual insistence upon respect for the teachings of history; (2) solid recognition of the basic values which underlie our society; and (3) appreciation of the importance of federalism and separation of powers in establishing and fostering freedom in American.<sup>124</sup>

J. Harlan admits that adherence to these principles will not do away with differences of interpretation regarding the Constitution. Nor, he adds, should it attempt to do so. Continued recognition of these principles will, however, "go farther toward keeping most judges from

roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause."<sup>125</sup>

J. Harlan advocates a principled approach based on respect for our history, values and political heritage. This principled approach allows for the use of testimony and appeal and is amenable to a naturalist interpretation. It does not attempt to decide cases by fiat, but leaves room for disagreement and principled debate over these important issues. The restraints placed on the judges will, however, keep them from roaming wherever they please in search of a rationale. Just as importantly, Harlan charges Justice Black with holding a self-deceptive position. The decision maker/observer is always bound up with what is being understood. The key to judicial restraint is an openness, sensitivity and faithfulness to those things which animate the law. It is this faithfulness to the most significant and widest possible justification for decision making which leads to the best possible judgment, all things considered.<sup>126</sup>

Justice Black wrote a long dissent, which can be distilled for purposes of this paper. He begins by saying that "evil qualities" in a law do not make it

unconstitutional.<sup>127</sup> This gist of J. Black's "incorporation" approach to constitutional law is that the Fourteenth Amendment incorporates into law only the "specific" provisions of the Bill of Rights. "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."<sup>128</sup> J. Black disagrees with Justices Harlan and Goldberg and posits that neither the Due Process clause nor the Ninth Amendment could ever be a proper basis for invalidating the Connecticut statutes. He accuses them of using the power of the Court "to invalidate any legislative act which the judges find irrational, unreasonable or offensive."<sup>129</sup>

Justice Black next lists the "catchwords and catch phrases" which judges have used to strike down laws "which offend their notions of natural justice."<sup>130</sup> He sees the Court as giving itself the power to invalidate all state laws it deems "to be arbitrary, capricious, unreasonable, or oppressive, or on this Court's belief that a particular state law under scrutiny has no "rational or justifying" purpose, or is offensive to a "sense of fairness and justice."<sup>131</sup> Black saw any theory based on "natural justice" as requiring judges to make a totally subjective decision, i.e., as deciding the constitutionality of a law "on

the basis of their own appraisal of what laws are unwise or unnecessary."<sup>132</sup> He goes on to point out that no specific Constitutional provision gives this "supervisory veto" over legislative policy decisions. He then makes a statement which advocates a universal constitutional imprimatur for legislative decisions: "perhaps it is not too much to say that no legislative body ever does pass laws without believing that they will accomplish a sane, rational, wise and justifiable purpose."<sup>133</sup> That is, since there is always a rational legislative intent, and legislative intent is determinative of the constitutionality of a state statute, all legislative actions pass constitutional muster.

J. Black sees practically any judicial invalidation of legislative actions as "natural law due process philosophy."<sup>134</sup> The Court, Justice Black believes, only measures constitutionality by its own personal standards and then applies words like "arbitrary, capricious, unreasonable, accomplishes no justifiable purpose," etc., to cover up the personal nature of these decisions. J. Black uses a quotation from a treatise by Justice Learned Hand, which he adopts without reservation:

Judges are seldom content merely to annul the particular solution before them; they do not, indeed they may not, say that taking all things into consideration, the legislators' solution is too strong for the judicial stomach. On the contrary, they wrap up their veto in a protective veil of adjectives such as 'arbitrary,' 'artificial,' 'normal,' 'reasonable,'

'inherent,' 'fundamental,' or 'essential,' whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision.<sup>135</sup>

Black uses this quotation as an appeal to precedent, or at least to a well known legal scholar, in support of his position.

Black further says the intent of the Framers was not to give the federal courts power to recommend or veto bad or unwise congressional legislation. In support of this position he cites extensively from The Records of the Federal Convention of 1787.<sup>136</sup>

J. Black next turns to criticize Goldberg's argument that judges need not use their "personal and private notions" in striking down state legislation. Black concludes such personal justifications cannot be validated for the following reasons: (1) the Court cannot take Gallup polls; (2) there is no modern scientific way to determine "what traditions are rooted in the 'collective conscience of our people'"; (3) the Framers did not intend the Ninth Amendment to give the federal judiciary veto power over state legislation; (4) the history of the Ninth Amendment shows its intent was to limit, not broaden, federal powers; (5) the "broad unlimited power" to hold laws unconstitutional because offensive is not based on the Constitution, but is

"bestowed on the Court by the Court"; and (6) the power the Court has given itself makes the "Court's members a day-to-day constitutional convention."<sup>137</sup>

J. Black accuses the Court of "Lochnerizing" and taking over the proper role of the legislature "to invalidate statutes because of application of 'natural law' deemed to be above and undefined by the Constitution is . . . [to] roam at will in the limitless area of their own beliefs as to reasonableness . . . ." <sup>138</sup>

Justice Black again quotes Judge Learned Hand regarding invalidating "offensive" legislation: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."<sup>139</sup> He then concludes his opinion with the statement that the Connecticut statutes are "not forbidden by any provision of the Federal Constitution as that Constitution was written . . .",<sup>140</sup> for which reason he would uphold their constitutionality.

The final opinion in the case is written by Justice Potter Stewart and adds little to Black's analysis. He begins by calling the Connecticut statutes an "uncommonly silly law," "unwise" and "asinine."<sup>141</sup> However, the statutes do not violate the Federal Constitution. He finds no "general right of privacy" in: (1) the Bill of Rights; (2)

any part of the Constitution; (3) any case ever decided by the Court.<sup>142</sup> He concludes by saying the Court should subordinate its personal views and own ideas of proper legislation, while allowing the people to follow the proper constitutional procedure for removing laws from the books, viz., persuading their elected representatives to repeal the law.<sup>143</sup>

What is disturbing about both Black's and Stewart's analysis is the continual insistence on judicial interpretation as clearly black and white. The judge either looks at the specific words of the Constitution itself and uses these as the only basis for a decision, or the judge falls into mere personal preference, i.e., subjectivistic/relativistic decisions. One either follows the letter of the Constitution or is adrift, anchorless, without principle, in a sea of possible personal preferences.

This is a false dichotomy, with serious inherent flaws. Though some of the problems with this approach were outlined earlier in this paper, it is important that the inherent dangers be understood. First, this position constitutes a denial of the basic human situation, i.e., of the heuristic task of interpreting even the basically "clear" things in life. Secondly, it is a failure to acknowledge the fundamental insight that we do not control language and cannot delimit rigid parameters within which language is forced to



fit and give its meaning. In the essays "Poetically Man Dwells"<sup>144</sup> and "Language,"<sup>145</sup> Martin Heidegger develops the conception of "the true relation of dominance between language and man. For, strictly, it is language that speaks."<sup>146</sup> Heidegger develops the idea that language leads man around by the nose. We do not control the way even contemporary utterances come to have meaning or the many variations and interpretations possible. When one tries to limit the "intent of the Framers" to explicit words written over two-hundred years ago, the problem is compounded many times over. A third serious problem with Black's analysis is the tendency to put oneself in the position of having the "one true interpretation" of the Constitution. This authoritarian approach to the Constitution leaves no room for debate or principled analysis. The corresponding danger is, of course, that one has adopted a position, based on an interpretation of the Constitution, while believing that one is only following the "true" constitutional interpretation which is, in Black's view, ultimately not an "interpretation" at all. The fourth problem with the Black/Stewart analysis is that it adopts the entire fact/value dichotomy mentioned earlier in this paper. Facts are graspable and understandable, they have substance and solidity, while values are fleeting and are merely

expressions of personal preferences. This program would deny the values underlying the specific amendments in the Constitution and treat the words, what is really "there," as a given. No inquiry into "mushy" values is allowed, as all that is certain are the explicit words as given. The danger here, as stated earlier, is the total loss of spirit which animates and gives continued force to the Constitution. If the Constitution is to remain a vital document, continued acknowledgement of the values which gave rise to it and of the forces which give rise to the values, is essential. Finally, Black's approach is an example of modern man's desire to be in control, to have the parameters of relevance and significance within one's direction. If one need not engage in serious debate and effort in order to determine what the true values in the Constitution are and how to be most true to them, i.e., if this is merely mechanical, then judges are in "control" of constitutional analysis. Heidegger also offers valuable insight into this drive to control in his essay "The Question Concerning Technology."

Black himself says we have no scientific means to determine the traditions rooted in the people's collective conscience.<sup>147</sup> This is a reflection of the desire for control and certainty which would gladly do away with the human decision maker for the promise of knowing, without

question, that the proper decision was reached.

The second area of case law examined here is tort law, specifically MacPherson v. Buick. It raises interesting additional issues, as the principles in a common law area, such as torts, are not as explicit as in a constitutional case. This thesis, therefore, first looks to two authorities in tort law, viz., William Prosser and Clarence Morris, for statements of some of the principles underlying the law of torts. The thesis then outlines Judge Cardozo's opinion.

First of all, it will be helpful to outline some general principles, cited by Prosser, which affect tort liability. A tort is, in simple terms, a civil wrong. The person who has been injured (plaintiff) brings an action (lawsuit) against the person who has "wronged" him (defendant). A common tort situation would involve a personal injury resulting from a car accident. If the injured party sued the driver of the other vehicle for negligence, this would be a tort action.

It is a fundamental principle of tort law that the fact a plaintiff has suffered a loss is not, in and of itself, a sufficient reason to make the defendant liable for the loss. Prosser cites several factors affecting tort liability, including: (1) the moral aspect of defendant's conduct, i.e., "no liability without fault" (though this has changed

somewhat in recent strict liability actions); (2) historical development (new social ideas); (3) convenience of administration ("floodgates" argument, e.g., no liability for cruel words, jostling in public, etc.); (4) capacity to bear loss (finding a reason to shift loss to defendant who can better bear it); and (5) preventing future harm and punishing wrongdoers (punitive damages). Prosser also refers to the motive of the defendant and says it is often determinative whether the "social value of the objective is sufficient to outweigh the gravity of the interference."<sup>149</sup> Finally, Prosser's view is of the "law of torts as battlefield of the conflict between capital and labor . . . and others who have conflicting claims in the economic struggle."<sup>150</sup>

Clarence Morris<sup>151</sup> gives a similar, though less detailed, analysis of the principles underlying the law of torts. Morris is concerned to stress the relation of "tort law and the common good." He sees the central problem of most tort cases as "whether plaintiff or defendant should bear a loss,"<sup>152</sup> and lists his basic axiom as follows: "A loss should lie where it has happened to fall unless some affirmative public good will result from shifting it."<sup>153</sup> Morris is against the use of public power unless such legal intervention will advance the "public good." A shift is

justified only when affirmative policy reasons can be given for requiring the defendant to bear a loss."<sup>154</sup>

These are commonly viewed as the underlying principles of the law of tort, even if not made explicit in individual cases. The leading case of MacPherson v. Buick provides an excellent illustration of the application of some of these principles.

MacPherson v. Buick is a landmark case in the law of torts. The fact situation of the case is as follows: Buick Motor Co., the defendant, is an auto manufacturer. Buick sold a car to a retail dealer, which the dealer resold to MacPherson, the plaintiff. While plaintiff was driving the car, one of the wheels suddenly collapsed, throwing MacPherson out of the car and injuring him. The wheel collapsed because it was made of defective wood and its spokes crumbled into fragments. Buick did not make the wheel, but bought it from another manufacturer. The evidence indicated, however, that the defects were discoverable by reasonable inspection, and that such an inspection was not made. There was no claim the defendant willfully concealed or even knew of the defect. The defendant is thus not charged with fraud, but negligence. "The question to be determined is whether the defendant owed a duty of care and vigilance to anyone but the immediate purchaser."<sup>155</sup>

A little background on this issue is important in understanding the context of J. Cardozo's decision. In Winterbottom v. Wright,<sup>156</sup> the Court of Exchequer held that the breach of a contract to keep a mailcoach in repair after it was sold did not give rise to a cause of action, in contract or tort, on behalf of a passenger in the coach who was injured when it collapsed. This case was generally interpreted to mean there was no liability for a contracting party to one with whom he was not in a relationship of "privity." This meant that an original seller of goods was not liable for damages caused by their defects to anyone but the immediate buyer. Several reasons were advanced for this position.

One was that the seller's misconduct was not the cause of the damage to the consumer in a legal sense, because no such harm was to be anticipated from any defects in the goods, and there was an intervening resale by a responsible party, which 'insulated the negligence of the manufacturer' . . . . A second reason, which was typical of the social viewpoint of the nineteenth century, was that it would place too heavy a burden upon manufacturers and sellers to hold them responsible to hundreds of persons at a distance whose identity they could not even know, and that it was better to let the consumer suffer.<sup>157</sup>

The courts created several exceptions to Winterbottom, the most important of which held a seller liable to third persons for the sale of an article "imminently" or "inherently" dangerous to human safety. J. Cardozo in his

opinion in MacPherson focuses on Thomas v. Winchester,<sup>158</sup> a leading case, which allowed a customer to recover damages from the manufacturer/seller of a falsely labeled poison, even though the sale was made by a druggist in between the original seller and customer. The rationale for the holding in Thomas, according to J. Cardozo, was that a falsely labeled poison is likely to injure anyone who receives it and there is a duty to avoid the injury because the danger is foreseeable. The Court cited cases where manufacturers were not subject to a duty absent contract and distinguished these cases on the basis that the manufacturer's negligence was not likely to result in harm to any but an immediate purchaser.

Cardozo spends a paragraph on subsequent cases which give a "narrow construction" of the principle of Thomas and then turns to those cases which "evinced a more liberal spirit."<sup>159</sup> The first case in the latter category is Devlin v. Smith,<sup>160</sup> which involved the defendant's construction of a scaffold for a painter. When the painter's employees were injured due to its collapse, the defendant contractor was held to owe them a duty, irrespective of his contract with their employer, to build the scaffold with care, since he knew the scaffold would be used by the workmen and also knew the scaffold was dangerous if improperly constructed. In

Statler v. Ray Mfg. Co.,<sup>161</sup> the defendant manufactured a large coffee urn which was installed in a restaurant. The urn exploded when used, injuring the plaintiff. The Court held the manufacturer liable.

J. Cardozo acknowledges that Devlin and Statler may have extended the rule of Thomas. "If so, this court is committed to the extension."<sup>162</sup> Cardozo rejected the "restricted meaning" of "inherently dangerous" as something whose usual function is to injure or destroy. A scaffold, while not inherently destructive, becomes such if imperfectly constructed and "A large coffee urn may have within itself, if negligently made, the potency of danger, yet no one thing of it as an implement whose normal function is destruction."<sup>163</sup>

Cardozo thus acknowledges his commitment to the extension of Thomas, as evidenced in Devlin and Statler. This is an extension of protection to the consumer/user, not part of the prior law. Cardozo also refers to this movement as "the trend of judicial thought."<sup>164</sup>

In addition to the change in the meaning of a "thing of danger," i.e., reasonably certain to place life and limb in peril when negligently made, the element of contract or privity is also changed. "If to the element of danger there is added knowledge that the thing will be used by persons other



than the purchaser, and used without new tests, then irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."<sup>165</sup> In addition, the Court added a requirement of the manufacturer's knowledge of probable danger. "The presence of a known danger, attendant upon a known use, makes vigilance a duty."<sup>166</sup> Finally, the obligation of the manufacturer does not arise from contract: "We have put the source of the obligation where it ought to be. We have put its source in the law."<sup>167</sup>

Cardozo is saying the obligation of the manufacturer is so important that it cannot rest on a contractual basis alone, but deserves a stronger foundation in the law. It is Cardozo's point that the Court ought to extend such protection to consumers/users, by law, and J. Cardozo does so.

At a later point in his argument, Cardozo points out the nature of an auto gives warning of probable danger if it is defectively constructed. MacPherson's car was designed to go fifty miles an hour and, without sound wheels, injury was almost certain. He then analogizes the case to a defective railroad engine and concludes they are equally things of danger. In declining to follow Winterbottom, J. Cardozo commented: "Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The

principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be."<sup>168</sup>

Several points are important in this statement. First is Cardozo's distinguishing the precedent of Winterbottom. This shows the case to be of a different type and past judicial history is not merely being discarded. The second important point is Cardozo's adherence to principle, which he says does not change. This establishes continuity, within a decision which looks revolutionary. It is an attempt to show the order and fidelity to principle which underlies MacPherson. Finally, Cardozo states the things subject to the principle depend upon social progress. In summary, the three important steps in Cardozo's analysis are: (1) distinction; (2) faithful adherence to principle; and (3) social progress.

Cardozo makes use of a second analogy in his justification for the MacPherson decision:

There is nothing anomalous in a rule which imposes upon A, who has contracted with B, a duty to C and D and others according as he knows or does not know that the subject matter of the contract is intended for their use . . . if A leases a building to be used by the lessee at once as a place of entertainment . . . injury to persons other than the lessee is to be foreseen, and foresight of the consequences involves the creation of a duty.<sup>169</sup>

This is a good analogy, as it draws upon a different substantive area of law (property) to show foreseeability involves the creation of a duty.

Cardozo concludes the opinion by holding Buick Motor Co. liable to MacPherson because, as a manufacturer of autos, it was responsible for the finished product and is not absolved from the duty of inspection and testing of component parts. Buick should not have relied on the skill of the wheel manufacturer, but has a higher duty of care and inspection to the user.

MacPherson v. Buick is a good example of a principled approach to legal reasoning for several reasons. First, Cardozo openly acknowledges that he is committed to extending protection to plaintiffs and holding manufacturers liable for their products. Citing case law which tended to broaden the definition of inherently dangerous, he refers to "trends of judicial thought." Cardozo also acknowledges such an important obligation should be enforced by law and not depend on a contractual relation analysis. The basis of this "ought" is never made explicit by Cardozo, but seems rather to be between the lines of the opinion. It is the weakest aspect of the opinion that Cardozo does not develop more policy behind the decision. The use of principled discourse might allow an appeal to commonality regarding who

should be liable and whether it is fair that defendant Buick Motor Co. be or not be liable in this situation. Again, I believe this underlies Cardozo's analysis, but it is never made explicit in the opinion. For example, Cardozo could have explicitly appealed to the commonality of the reader, by asking whether it is just that MacPherson bear the responsibility for the original condition of the wheels on his car. This might involve an explicit economic analysis, or a moral claim regarding the appropriateness of loss shifting. It might also require an investigation of why it is appropriate to hold manufacturer's responsible for their products. Though this part of the opinion could be more explicit, Cardozo does responsibly articulate the principles underlying tort law, as illustrated by Prosser and Morris, and apply them with good judgment and sensitivity.

Cardozo's distinguishing of cases, his stated adherence to established principle and his concern with developing a legal system responsive to the needs of a changing society are strong points in this opinion and constitute open acknowledgement of the sources and bases for his decision. Cardozo is concerned with the best possible justification, all things considered, for his decision and clarifies the principles he is following.

His concern is to draw upon all previous case law and

put it into a coherent framework. He clearly does not want the law to appear as unprincipled chaos, but rather wants his "chapter" of the novel to fit into the structure as a whole, i.e., to actually be a novel. In this way, Cardozo can reinterpret what has gone before and influence what comes after. Such a principled approach to decision making is well within the framework proposed earlier in this paper.

It is illustrative to read the dissenting opinion in MacPherson by Chief Justice Willard Bartlett. Judge Bartlett stated:

I think that these rulings . . . extend the liability of the vendor of a manufactured article further than any case which has yet received the sanction of this court . . . . I do not see how we can uphold the judgment in the present case without overruling what has been so often said by this court and other courts of like authority in reference to the absence of any liability for negligence on the part of the original vendor of an ordinary carriage to anyone except his immediate vendee.<sup>170</sup>

It is, of course, just such rigid adherence to precedent that Cardozo and a principled approach to law avoid. It is this sort of supposedly "neutral" following of precedent that can be most dangerous because it is self-deceptive in refusing to acknowledge both the social view which is being reinforced through law and the participation of the decision maker himself in the result. The social view the dissenting opinion would reinforce is that the manufacturer

cannot be burdened with the expense of paying for injuries to those with whom there is no direct contractual relationship. The participation of the decision maker is as human being (or as close as a lawyer can come to being human), who is faced with prior decisions, a present case, personal preferences, policy arguments, equitable concerns, political history, moral tradition, constitutional background, etc. The judge's hands are not tied and he should not act as if they are. This is not, of course, to say precedent can be thrown out the window with each case before the bench. It is to affirm, however, that although Judge Bartlett's opinion would have the reader believe he is just following proper procedures, judicial decision making is not, and should not be, a mechanical process.

Chapter III now places this thesis within the liberal judicial tradition and defends it against an important new legal tradition, the "critical theorists." The chapter then concludes with some thoughts on the ultimate import of any theory of judicial decision making.

### CHAPTER III

It is important to note that Dworkin's naturalist approach and the principled discourse method of legal justification are well within the liberal political orientation and the liberal judicial tradition. Liberalism is used here as that political and legal philosophy which is distinguished by a firm line of demarcation between the private and public realms.<sup>171</sup>

Liberals conceive public institutions as the only authority which may legitimately proscribe individual action. Traditionally a liberal government is seen to endorse no specific theory of what is good for individuals in their private lives. "The theory of the good espoused by Liberalism is that the state should not endorse any particular theory of the good."<sup>172</sup> Liberal legal theorists have built theories of judicial decision-making consistent with the public/private realm distinction. Though liberal theorists may differ on details regarding the working out of a liberal jurisprudence,

They share fundamental beliefs: the idea that rational decision does guide judicial discretion, that pre-existing rules and principles can be applied to a new situation in a disciplined manner, that individual choices can be made (and indeed are desirable), that reason is powerful, and that analysis is possible.<sup>173</sup>

Underlying liberalism's position of not advocating any

specific theory of the good are, of course, substantive liberal ideals. Liberalism generally maintains that treating individuals with equal respect and concern requires free choice by individuals. Only if individuals are treated as being capable of free choice in matters of private morality are they being treated as equals. Consider the following two statements:

liberalism insists that government must treat people as equals in the following sense. It must impose no sacrifice or constraint upon any citizen in virtue of an argument that the citizen could not accept without abandoning his sense of his equal worth . . . . So liberalism as based on equality justifies the traditional liberal principle that government should not enforce private morality.<sup>174</sup>

a liberal state must be neutral on what may be called the question of the good life. The constitutive morality of liberalism--its requirement that people be treated with equal respect and concern--presupposes that many conflicting and even incommensurable conceptions of what is good in life may be fully compatible with free, autonomous, and rational action. A liberal state allows these conceptions to compete with and to accommodate each other within institutions or arrangements that are fair or neutral among them.<sup>175</sup>

John Rawls' A Theory of Justice is, of course, foundational in presenting the ideas underlying treating persons with equal respect and concern. His view of these issues is most evident in his definition of primary goods as things persons would want whatever else they would want.

The position on judicial interpretations proposed in



this thesis is consistent with liberalism as outlined above, though it involves explicit recognition of the deeper substantive values of liberalism which sometimes go unrecognized by liberals themselves. It is contended, moreover, that this position is not subject to the critical theorists' charges of formalism, objectivism and instrumentalism, which might be leveled at any liberalism which fails to acknowledge its substantive ideals.

The "radical critique" of liberal theories of judicial decision-making attacks liberalism at its foundations.<sup>176</sup> This paper will focus on the work of Robert Unger, a major figure in the critical legal studies movement and Professor of Law at Harvard University.

Unger believes that two basic concerns characterize the critical legal studies tradition. The first is a critique of formalism and objectivism. In its extreme form, formalism proposes a deductive or quasi-deductive method for attaining determinate solutions to particular legal problems, i.e., "the search for a method of deduction from a gapless system of rules."<sup>177</sup> However, this conception of formalism is the limiting case and a "straw man." The real meaning of formalism which Unger seeks to counter "is a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly

contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical or visionary."<sup>178</sup> The formalism Unger describes "characteristically invokes impersonal purposes, policies and principles as an indispensable component of legal reasoning."<sup>179</sup> This is the neutrality which traditional liberals often seek to try to provide.

Formalism's second major thesis, as outlined by Unger, is that "legal doctrine" is only realizable through an essentially apolitical analysis. Unger defines legal doctrine as a form of conceptual practice with two characteristics: (1) "the willingness to work from the institutionally defined materials of a given collective tradition"; and (2) "the claim to speak authoritatively within this tradition . . . to affect the application of state power."<sup>180</sup> Unger restates this second thesis as the belief in a fundamental difference between law making and law application, with legislation "guided only by the looser rationality of ideological conflict."<sup>181</sup>

Unger next defines objectivism, the second liberal principle which the critical legal studies movement attempts to discredit. Objectivism is "the belief that the authoritative legal materials--the system of statutes, cases and accepted legal ideas--embody and sustain a defensible scheme

of human association. They display, though always imperfectly, an intelligible moral order."<sup>182</sup> Alternatively the system is viewed as the result of constraints, such as economic efficiency, which have a normative force when combined with human desires. Objectivism rejects the view that laws are "merely the outcome of contingent power struggles or of practical pressures lacking in rightful authority."<sup>183</sup>

The modern lawyer, Unger argues, can't keep his formalist perspective without maintaining the objectivist assumptions. Formalism presupposes objectivism. One can't switch from speaking of legislative interest group politics to invoking impersonal purpose, policy or principle in a judicial setting. If one invokes formalistic principles, Unger argues, these come from either: (1) a moral or practical order exhibited by the materials themselves; or (2) a normative theory extrinsic to the law. If the latter is true, then, even if the foundation were established independently of the law, many areas of law would be viewed as "mistakes," as varying from much accepted legal precedent. Unger claims this would cause the destruction of an essential part of the "formalist creed," viz., the contrast of doctrine with ideology and political prophecy. The formalist would thus be transformed into "a practitioner of the free-wheeling criticism of established arrangements and

received ideas."<sup>184</sup>

Unger advocates the abandonment of objectivism and the adoption of an "heroic" approach. This can be done by "carrying over to the interpretation of rights the same shameless talk about interest groups that is thought permissible in a legislative setting."<sup>185</sup> Unger uses the example of a statute which represented a victory for sheep herders over cattlemen. This statute "would be applied, strategically, to advance the former's aims and to confirm the latter's defeat."<sup>186</sup>

This liberal understanding of doctrine and formalism needs to be abandoned, according to Unger, and legal reasoning viewed as an extension of legislative struggle. This conception of legal "analysis" would dramatically alter the way we look at rights. "The security of rights, so important to the idea of legality, would fall hostage to the context-specific calculations of effect."<sup>187</sup>

Unger ends his argument by noting that a second characteristic theme of leftist movements in modern legal thought is "the purely instrumental use of legal practice and legal doctrine to advance leftist aims."<sup>188</sup> The connection between these themes, i.e., the skeptical critique and the "strategic militancy" is negative because it is "almost entirely limited to the claim that nothing in the nature of

law or in the conceptual structure of legal thought . . . constitutes a true obstacle to the advancement of leftist aims."<sup>189</sup>

Unger's challenges to liberalism and liberal legal theory relate directly to the program of this paper and must therefore be addressed. A traditional liberal legal theorist, including Rawls to a certain extent, holds a position which could be called neutrality liberalism. It is important to acknowledge the considerable force of Unger's critique against this strand of liberal thought. Rawls, for example, speaks of "primary goods" as goods which cut across all social classes. They are neutral, in that they represent things that all people want, regardless of whatever else they want. This conception of primary good subjects Rawls' view to the charge of formalism, because he believes the neutral or impersonal nature of primary goods is fundamental to his liberal theory. Indeed, any liberalism which seeks to invoke impersonal or neutral principles, purposes or policies, or governmental instrument, will be subject to Unger's formalist critique. Unger is also correct in maintaining that traditional liberal formalism presupposes objectivism. A neutral formalist principle, such as Rawls' conception of primary goods, presupposes that the political order is an intelligible moral order.

Unger's critique of neutrality liberalism does not have the same force against the conception of liberal decision-making advocated here, which might be called naturalism liberalism. The use of testimony and appeal and the acknowledgement of the sources which animate the law substantially enriches the liberal justification of the legal system. That is, the position of legal decision-making developed here is not open to the same formalist or objectivist charges, because the focus here is not on the neutral or impersonal nature of the purposes, policies and principles appealed to. Rather, the emphasis is on what liberal values are to be found by a living, existing decision maker. This is anything but impersonal, as the involvement and participation of the individual is decisive, and it is not neutral, in an empty sense, because the law is seen to have force and meaning only through the participation and involvement of the decision-maker. The position developed in this paper thus constitutes a defense of a naturalistic liberalism. This thesis shows this position to be vital, adaptable and workable. The analysis of Justice Cardozo in MacPherson v. Buick shows how a principled, concerned approach to law can show the system to be "a defensible scheme of human association." Griswold v. Connecticut also shows the respect for fundamental rights and the

sensitivity inherent in the liberal view of legal justification.

With regard to Unger's claim that one cannot adopt formalism without objectivism, it is possible to acknowledge the role and force interest groups play in legislative settings and the outside forces which could and sometimes do influence judges. This does not mean, however, that all judicial decision making is determined by the pressures and competition of special interest groups. In addition, it does not mean that what is the case is necessarily what ought to be the case.

Unger sets up a false dichotomy in saying that formalist principles must be founded either in an order exhibited by the materials themselves, or an extrinsic normative theory. The best possible political justification, all things considered, would be true to the materials themselves and their historical background. While it might indeed also draw from a normative theory, this would not necessarily be extrinsic to the law. The liberal theorist's use of a normative theory does not transform him into a "free-wheeling" critic of legal tradition. The judge is bound by the tradition as a whole and the constraint of creating a "coherent novel." If a decision or series of decisions create too many "mistakes," then the law will be unprincipled, result

oriented law. This, however, would be a malfunction or aberration in the system and not established practice. Naturalistic liberalism still maintains a strong distinction between "doctrine" and "political prophecy." It is just that Unger, with his view of the decadence of capitalistic, neutrality liberalism, is unable to see the possibility of a liberal decision-making which is adaptable and vital in the way the conception of judicial decision proposed here would require.

One final concern needs to be addressed in this thesis relating to the possible charge of subjectivism being leveled against the liberal judicial program outlined herein. "Subjectivism" refers to the belief that all decisions are merely personal preferences and that there are no norms whatsoever which can be appealed to for guidance. It is the belief that there is no truth, that one opinion is as good as any other and that there is, in principle, no possible way to discriminate between conflicting views, other than by personal preference. Thus, there exists, ultimately, only opinion and not knowledge. The importance of defending against subjectivism can be seen by reference to Justice Black's dissenting opinion in Griswold. Black quotes J. Learned Hand's "Platonic Guardian" terminology and adopts a theory which admits of only two possible alter-



natives: literalism or subjectivism. Thus, Justice Black would attack the program of this thesis as subjective and mere personal opinion. In addition to the criticisms of Black's position listed earlier in this paper,<sup>190</sup> his belief that all non-literal judicial interpretation is mere opinion shows his own position as nihilistic. Since very few jurists can accept Black's literalist position, his charge that any other position is subjective must be examined and the nihilistic character of his own thought must be brought out. Perhaps reference to an old friend from the history of philosophy can supply a useful setting for discussion of these last important issues.

Plato's Republic<sup>191</sup> is, first of all and largely in Book I, a conceptual investigation into the nature of justice. Secondly, it is an attempt to work out the ideal state, to see what the form of such a state would be like. The Republic marks the watershed of Plato's development and is the best expression of his ideas on justice.

The dialogue begins with a superficial discussion with Cephalus and Polemarchus on the nature of justice. Cephalus essentially defines justice as luxury, while Polymarchus defines it as giving to others what they are owed. Socrates refutes both of these definitions. The discussion begins in earnest with the appearance of Thracymachus, who enters the

dialogue at 336b. Thracymacus is described as "a wild beast about to spring," and advances on Socrates and his company "as if to tear us to pieces." He is also compared to a wolf<sup>192</sup> as Socrates refers to an old Greek proverb which had it that if a wolf sees you first, you go dumb. These bestial references are to the uncivilized conduct and beliefs of Thracymacus and bring the element of strength forward at an early stage. After some initial banter about his not wanting to follow Socrates' procedures, Thracymacus is pressed to give his definition of justice. "Listen then," said he. I say that the just is nothing else than the advantage of the stronger."<sup>193</sup> Several points are noteworthy about Thracymacus' statement. First, his "listen then" has a ring of "now here this," i.e., of a pronouncement from the Oracle at Delphi. Secondly, his statement that justice is "nothing else" than the stronger's interest is of the same oracular nature. This is further borne out by Thracymacus' entire manner throughout the course of the dialogue.

At 339a Socrates states he does not know whether Thracymacus is right, but will attempt to find out. At 340a Cleitophon uses the words "bear witness." This switch to legal language is suggestive of a trial motif and could be a reference to Socrates' trial. Grube puts the dramatic

setting of the dialogue at 411 B.C. This places the dialogue in the closing years of the war with Sparta, which Athens was losing and likely ultimately to lose. It was a time of turmoil and decline, the war would soon be over (in 405 B.C.) and the Thirty Tyrants installed. The dialogue takes place in Piraeus, a port city of Athens and a center of resistance to tyranny. Polemarchus was put to death by the Thirty Tyrants and Socrates was implicated in their actions and later put to death by the restored democracy. These details help focus what is at issue in the Republic, viz., what justice really is, in the face of real tyranny. Two of the participants in the theoretical discussion will be put to death by this tyranny. Plato is giving Thracymacus' argument its due force. Indeed, the best proof that Thracymacus is right, is that Socrates is put to death. If justice is the interest of the stronger, then government is always an instrument of someone, i.e., the people in power. Of course, legislation does get passed this way, bills get through Houses of Congress because of power, etc. Although Thracymacus' definition is true, as evidenced by the prosecution and death of Socrates, it is also false, Plato shows, because of these very barbarous acts.

Thracymacus speaks for an entire epoch of Athenian history. As was clearly manifested by Cleon, Pericles, the

Thirty Tyrants and the restored democracy, there is no real justice. Justice and power both change. There was no belief in an external standard by which to judge truth. This extreme form of moral relativism, the belief that there are no real values and no distinction among values, is a form of nihilism. For if all values are merely subjective, i.e., merely the opinions of individuals, then every opinion is "true." However, if every opinion is true, then distinctions are no longer possible. Truth and falsity have no more meaning and all values are equally true and equally false. This is nihilism, pure and simple.

Thracymacus is thus seen to be a pure empiricist. The only real things are facts, what people actually do, and one is never justified by an appeal to the ideal, i.e., in Unger's sense, a disinterested principle, policy or purpose. Plato, however, shows the inherent flaw in refusing to acknowledge the ideal. Thracymacus says the best city is the most completely unjust city.<sup>194</sup> He moves, that is, from a statement on general practice to a generalization about human nature. This is using human nature as a ground of inference for a moral claim, i.e., of letting what is the case determine what ought to be the case. Socrates' purpose, in the remaining nine books of the Republic, is to show that practice is not a good indicator of either truth

or justice. The critical move Thracymacus makes is the movement from general practice (what is) to what is natural (what ought to be). Socrates sees this "naturalistic" argument as false and dangerous.

Though it is the enterprise of Books Two through Ten of the Republic to show how the is/ought fit together, i.e., how the ideal can incorporate the actual, some general observations can be made regarding the danger, as Plato perceived it, with Thracymacus' position. The inherent danger is that nihilism or moral scepticism can be and has turned into a thoughtless absolutism under the right circumstances. Justice is the advantage of the stronger, the argument goes, and this ought to be the case. Thus, description is turned into prescription and the actual is elevated to the status of the ideal.

Black's theory of judicial decision-making is thus shown to be problematical. If literalism is rejected (as it is by practically every jurist but Justice Black), the only alternative he allows is subjectivism. This leads to nihilism for the reasons outlined above. The result is that Black's position essentially maintains: "I have the truth, even if not acknowledged by any other legal theorist." His position must be rejected as both literalism and subjectivism lead to unacceptable consequences.

The liberal approach to judicial decision making argued for here avoids these old and well recognized problems of subjectivism and nihilism. It does so by fidelity to principle of the use of testimony and appeal. Absolutism is avoided by asserting certain principled positions with a foundation in testimony and appeal. The liberal conception advanced here acknowledges the importance of the ideal. As such, it is not an instrumental view of legal interpretation. There are real values in the world and these need to be argued for and sustained through use of the best possible political justification, all things considered. These values have different weight, which must again be argued for in a principled way. Truth and the right result, therefore, take on a role of vital importance. There is something of great significance at stake in reaching a proper decision. Since the instrumental view of law is rejected, justice is not merely what the people who make the decisions, i.e., the people in power, decide. Justice is more than the interests of the stronger. Justice involves a search, not an exercise in raw power. It is evident, therefore, that this thesis' position avoids the problem of absolutism/nihilism. In so doing, it is shown to be logically consistent, thus avoiding the problems with Thracymacus' position.

plato showed the practical dangers of a failure to

account for the ideal and the importance of responsibly accounting for the ideal in a clear, principled manner. Liberalism's belief in rational decision making, the application of pre-existing rules and principles to new situations in a disciplined manner, and the importance of individual choice and the power of reason and analysis, make it a defensible and proper framework for judicial decision making. For if Plato teaches us two lessons in the Republic, they could be stated: underneath every nihilist is a possible tyrant; and exercises of raw power, in legal guise, indicate how little justice is in justice, when justice is what justice does.

NOTES

<sup>1</sup>In dealing with both the natural law and positivist traditions, I will try to focus on the things which united the advocates of the various positions and not on the nuances or differences within them. This a "concession to the shortness of life," as Justice Holmes would say, as the multiplicity and variety of thought in these rich traditions is impossible to examine adequately within the scope of this thesis.

<sup>2</sup>381 U.S. 479 (1965).

<sup>3</sup>217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>4</sup>Richards, Rules, Policies and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication, 11 Ga. L. Rev. 1069 (1977).

<sup>5</sup>A. d'Entreves, Natural Law, An Historical Survey (1965) at 80.

<sup>6</sup>St. Thomas Aquinas, "Question 91," Treatise on Law (Summa Theologica, Questions 90-97), at 12-13.

<sup>7</sup>Id. at 15.

<sup>8</sup>Id.

<sup>9</sup>Id.

<sup>10</sup>Id.

<sup>11</sup>A. d'Entreves at 84.

<sup>12</sup>T. Aquinas at 18.



<sup>13</sup>Id. at 75.

<sup>14</sup>Id. at 78.

<sup>15</sup>Id. at 88.

<sup>16</sup>Id.

<sup>17</sup>Id.

<sup>18</sup>Id. at 92.

<sup>19</sup>Id.

<sup>20</sup>Id.

<sup>21</sup>Id. at 96.

<sup>22</sup>Id. at 97.

<sup>23</sup>Id.

<sup>24</sup>Id.

<sup>25</sup>A. d'Entreves at 94.

<sup>26</sup>Id. at 91.

<sup>27</sup>Hart, Positivism and the Separation of Law and  
Morals, 71 Harv. L. Rev. 593 (1958).

<sup>28</sup>Id. at 595.

<sup>29</sup>Id. at 596.

<sup>30</sup>Id. at 597-98.

<sup>31</sup>Note that it is Blackstone's conception of natural law which is thus open to the positivist attack and not Thomas' position. The mere fact of a law, for Thomas, is not justification for that law's existence, nor can the authority of law be questioned just because of personal

disagreement with that law. Thomas thus avoids the danger of both anarchy and conservatism by his clearly distinguishing human law and justice or morality.

<sup>32</sup>Hart at 618.

<sup>33</sup>Id. at 618.

<sup>34</sup>Id. at 619.

<sup>35</sup>Id. at 620.

<sup>36</sup>Id. at 624-25.

<sup>37</sup>Id. at 626.

<sup>38</sup>Id.

<sup>39</sup>Richards, Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication, 11 Ga. L. Rev. 1069 (1977).

<sup>40</sup>Id. at 1112.

<sup>41</sup>Id.

<sup>42</sup>Id.

<sup>43</sup>Id. at 1113.

<sup>44</sup>Richards, The Moral Criticism of Law, (1977).

<sup>45</sup>Id. at 33.

<sup>46</sup>Richards seems to view Ronald Dworkin's position in Taking Rights Seriously as crossing over a line into a natural law position which Richards does not want to follow.

<sup>47</sup>Id. at 35.

<sup>48</sup>Id. at 33.

<sup>49</sup>Id. at 59.

<sup>50</sup>Id. at 71.

<sup>51</sup>R. Dworkin, Taking Rights Seriously (1977).

<sup>52</sup>Id. at 339.

<sup>53</sup>Id.

<sup>54</sup>Id.

<sup>55</sup>Id. at 65.

<sup>56</sup>Id. at 68.

<sup>57</sup>Id. at 340.

<sup>58</sup>Id. at 341.

<sup>59</sup>Id.

<sup>60</sup>Id. at 342.

<sup>61</sup>Id.

<sup>62</sup>Id. at 343 (emphasis added).

<sup>63</sup>Dworkin, "Natural" Law Revisited, 34 Fla. L. Rev. 165 (1982).

<sup>64</sup>Id. at 165.

<sup>65</sup>Id. at 166.

<sup>66</sup>Id. at 167.

<sup>67</sup>Id. at 168.

<sup>68</sup>Dworkin's analysis is a fleshing out of the position he advocates against Richards on p. 342 of Taking Rights Seriously. There he speaks of the "threshold adequacy of fit" and choosing the morally soundest justification from those that meet the fit.

<sup>69</sup>Dworkin, "Natural" Law Revisited, 34 Fla. L. Rev. at

168.

<sup>70</sup>Id. at 169.

<sup>71</sup>Id.

<sup>72</sup>Id. at 173.

<sup>73</sup>Id.

<sup>74</sup>Id. at 175.

<sup>75</sup>Id. at 180.

<sup>76</sup>Id. at 182.

<sup>77</sup>Id. at 186-87.

<sup>78</sup>Id. at 187.

<sup>79</sup>Id.

<sup>80</sup>Id.

<sup>81</sup>Matthew 19:22, King James Version.

<sup>82</sup>Note that this brings out the main problem with John Hart Ely's rejection of natural law in Democracy and Distrust. Ely discards natural law, saying that it is too vague and can be used to support any cause. He argues that if it is made more specific it is objectionable and not widely accepted. He concludes that we can reason about ethical issues, but because this is not the same thing as discovering "absolute ethical truth," "we're where we were." (Democracy and Distrust, p. 54). It is not true, however, that the result of ethical discourse is to end up where one started. This will be the case if one views absolutes as

the only form of moral proposition natural law can find acceptable. This, however, is not the case with Dworkin's position or with the example of testimony and appeal outlined here.

<sup>83</sup>S. Kierkegaard, Concluding Unscientific Postscript (1941) at 295.

<sup>84</sup>Dworkin, "Natural" Law Revisited, 34 Fla. L. Rev. at 187.

<sup>85</sup>Griswold, 381 U.S. at 482.

<sup>86</sup>Id. at 484.

<sup>87</sup>Id. at 485.

<sup>88</sup>Id. at 486.

<sup>89</sup>Id. at 485.

<sup>90</sup>Id. at 406.

<sup>91</sup>291 U.S. 97, 105 (1934).

<sup>92</sup>Griswold, 381 U.S. at 487.

<sup>93</sup>Id. at 488-89.

<sup>94</sup>Id. at 490.

<sup>95</sup>Id. at 492-93, 520.

<sup>96</sup>Id. at 493.

<sup>97</sup>Id. at 493, 529.

<sup>98</sup>Id. at 493.

<sup>99</sup>Id.

<sup>100</sup>Id.

- 101 Id. at 493, 494.
- 102 Id. at 511, 512.
- 103 Id. at 494.
- 104 277 U.S. 438, 478 (19 ).
- 105 Griswold, 381 U.S. at 494.
- 106 262 U.S. 390 (1923).
- 107 268 U.S. 510 (1925).
- 108 321 U.S. 158 (1944).
- 109 Griswold, 381 U.S. at 495.
- 110 Id.
- 111 Id.
- 112 Id. at 496.
- 113 Id.
- 114 Id. at 497.
- 115 371 U.S. 415, 438 (1962).
- 116 Griswold, 381 U.S. at 498.
- 117 Id. at 499.
- 118 Id. at 500.
- 119 Id.
- 120 Id.
- 121 Id. at 501.
- 122 Id.
- 123 Id.
- 124 Id.

125 Id. at 502.

126 J. White also concurs in the judgment in a separate opinion. His opinion, however, generally holds that there has been no showing that the Connecticut ban on the use of contraceptives by married persons affects illicit sexual relationships. He would hold the statutes unconstitutional because they are too broad and deprive persons of liberty without due process. Id. at 506, 507.

127 Id. at 507.

128 Id. at 510.

129 Id. at 511.

130 Id.

131 Id.

132 Id. at 512.

133 Id. at 513.

134 Id. at 515.

135 Id. at 513 (emphasis added).

136 Id. at 514.

137 Id. at 519-20.

138 Id. at 525-26.

139 Id. at 526-27.

140 Id. at 527.

141 Id.

142 Id. at 530.

- 143 Id. at 531.
- 144 Martin Heidegger, "Poetically Man Dwells," in A. Hofstadter, Poetry, Language, Thought (tr. 1971).
- 145 Id., M. Heidegger, "Language."
- 146 Id., M. Heidegger, "Poetically Man Dwells," at 216.
- 147 Griswold, 381 U.S. at 519.
- 148 W. Prosser, Handbook of the Law of Torts (1964).
- 149 Id. at 26.
- 150 Id.
- 151 C. Morris, Morris on Torts (1980).
- 152 Id. at 7.
- 153 Id. at 17.
- 154 Id. at 8
- 155 MacPherson, 217 N.Y. at 385.
- 156 10 M & W 109, 152 Eng. Rep. 402 (1842).
- 157 W. Prosser, supra note 148, at 659.
- 158 6 N.Y. 397 (1852).
- 159 MacPherson, 217 N.Y. at 386.
- 160 9 N.Y. 470 (1882).
- 161 195 N.Y. 478, 88 N.E. 1063 (1909).
- 162 MacPherson, 217 N.Y. at 387.
- 163 Id.
- 164 Id.
- 165 Id. at 389.



166 Id. at 390.

167 Id.

168 Id. at 391.

169 Id. at 393-94.

170 Id. at 396.

171 See, e.g., J. Rawls, A Theory of Justice (1971) and R. Dworkin, "Liberalism" in Public and Private Morality (1978).

172 Murray, The Role of Analogy in Legal Reasoning, 29 U.C.L.A.L. Rev. 865 (1982).

173 Id.

174 R. Dworkin, "Neutrality, Equality, and Liberalism," Liberalism Reconsidered (1983) at 3.

175 M. Sagoff, "Liberalism and Law," Liberalism Reconsidered (1983) at 12.

176 See, e.g., D. Kairys, ed., The Politics of Law: A Progressive Critique (1982); Trubek, Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law, 11 L. and Soc. Rev. 527 (1977) and Gross, Theory of Judicial Reasoning: Toward a Reconstruction, 66 Ky. L.J. 801 (1977-78).

177 Unger, The Critical Legal Studies Movement, 96 Harv. L. Rev. 561, 564 (1983).

178 Id.

179 Id.

180 Id. at 565.

181 Id.

182 Id.

183 Id.

184 Id. at 566.

185 Id.

186 Id.

187 Id.

188 Id.

189 Id. at 567.

190 See text supra pp. 54-56.

191 Plato, The Republic, translated by G.M.A. Grube  
(1974).

192 Id. at 336d.

193 Id. at 338c.

194 Id. at 351b.

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