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Law and Conscience

*Paul V. Niemeyer**

Sir Thomas More agreed to accept appointment as Chancellor of England in 1529 on receipt of the promise that he would not be required to involve himself in the business of Henry VIII's divorce from Catherine of Aragon, a divorce that Henry was attempting to rationalize because his marriage had not produced a male heir. After a divorce was declared by Henry's recently appointed Archbishop of Canterbury and Henry married Anne Boleyn, More failed to attend the wedding. More also refused to swear allegiance to the Act of Succession which declared Henry's first marriage void and legitimized the children of his second marriage as heirs to the throne. Although More was willing to acknowledge that Boleyn was queen, he refused to take an oath because the oath would require him to repudiate the Pope's supremacy in the Church, a position Henry had recently designated for himself in respect to the Church of England. More was tried on perjured testimony for denying Henry's title, convicted, and beheaded.

In his play centered on the trial, Robert Bolt in *A Man for All Seasons*, dramatizing the tension between More's duty to the throne and his obedience to conscience, describes the core role of conscience:

Wolsey: England needs an heir Now explain how you as Councilor of England can obstruct those measures for the sake of your own, private, conscience.

More: Well . . . I believe, when statesmen forsake their own private conscience for the sake of their public duties . . . they lead their country by a short route to chaos.¹

While More thus places conscience at the core of order, he never forsook positive law or his duty to the throne. Indeed, he recognized that not only does conscience inform within the law, but positive law provides a value in the order established. Thus when

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¹ ROBERT BOLT, *A MAN FOR ALL SEASONS* 13 (1962).

More was pressed by Roper to have a betraying "friend" arrested, More observed that, having broken no law, the "friend" should go free even if he was the Devil.

More: What would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that!

More: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.²

The same chaos, predicted by More for the conduct of political affairs without conscience, can be predicted, I respectfully suggest in this essay, for judicial decisionmaking without resort to conscience. This is not to say that decisionmaking can forsake positive law in the name of conscience, but that it is only conscience that can verify and elevate the law. Without the guidance of conscience, pure reason exercised even in the strictest constraints applicable to judicial decisionmaking is given too many alternatives to be guided to "right" solutions. Without suggesting any weakening of the constraints imposed on judges in their decisionmaking function, *i.e.*, to begin with the facts, apply the law as it was intended by the lawmaker, and reason to judgment, I suggest that the judicial process cannot and does not preclude a judge's proper consultation with conscience. Even though the judicial resolution of a case that falls directly under a provision of statutory law may be governed only by the value inherent in the provision, when legislation leaves gaps to be filled by judicial interpretation, a participating value from the judge is introduced. Through application of law to new situations not directly governed by prior law or statute, judicially-made law is developed, and in the absence of responding to what is "right," such decisions neutral to conscience could not be expected to satisfy the human sense of justice. In the absence of conscience, which is a constant anchor in the human makeup which demands that we do what *ought* to be done, law will roam with unguided logic to any num-

2 *Id.* at 38.

ber of possibilities which never can be verified as "right," even though our sense of justice demands only that which is "right."

Yet, there is a wind blowing these days that brings with it the suggestion that any guidance from moral norms or resort to conscience is inappropriate in judicial decisionmaking because such influences introduce the "personal feelings" of judges with their unlimited diversity. The alleged subjectivity of conscience, or of any moral norm that derives from conscience, it is argued, would separate the judicial decisions from the intent of statutes and thus the democratic will and would lead to an unacceptable indeterminacy in the law which seeks predictability.

In his much publicized book, *The Tempting of America*, Judge Robert H. Bork articulates the widely held view, perhaps now representing a trend. He writes, when a judge is "in his robes, [he] must adopt a posture of moral abstention"³ The only value he should bring to the process is constraint, which Bork characterizes as "the morality of the jurist."⁴ Such a limited view of the role of judicial morality derives from the premise that there is no moral reality. Judge Bork states that moral inquiry can never lead to a "universally accepted system" because it never has.⁵ He thus reasons to the conclusion:

Without agreement on the moral final state we do not know where we should be going and hence cannot agree upon the starting place for reasoning. If we have no way of judging rival premises, we have no way of arguing to moral conclusions that should be accepted by all. "In a society where there is no longer a shared conception of the community's good as specified by the good for man, there can no longer either be any very substantial concept of what it is to contribute more or less to the achievement of that good."⁶

Recognizing the same difficulty in utilizing concepts of morality in judicial decisionmaking, Judge Richard A. Posner likewise seems to conclude that there is no moral reality. In his book, *The Problems of Jurisprudence*, Judge Posner states:

The underlying problem of moral objectivity is that there are neither facts to which moral principles correspond (as scientific principles, for example, appear to correspond to things in na-

3 ROBERT H. BORK, *THE TEMPTING OF AMERICA* 259 (1990).

4 *Id.* at 178.

5 *Id.* at 254.

6 *Id.* at 256 (quoting ALASDAIR MACINTRYE, *AFTER VIRTUE* 232 (1984)).

ture) nor a strong tendency for moral principles to converge.⁷

Judge Posner concludes that "the enterprise, now several thousand years old, of establishing the existence and content of a natural law that underwrites positive law is hopeless under the conditions of modern American society."⁸

Judge Bork and Judge Posner are not alone, and their views are shared by a substantial segment of academia, the judiciary, and even Justices on the Supreme Court. Moreover, the argument is not new. Rooted in some of the writings of Justice Oliver Wendell Holmes, who expressed the hope for seeking scientific certainty in the law by resorting only to positive law and reason,⁹ the debate whether morality can have a role in judicial decisionmaking has today reached full bloom. This is witnessed in recent times by the now famous exchange of articles about whether morality has a place in the law, debated by Professor H.L.A. Hart and Professor Lon L. Fuller in the *Harvard Law Review* in 1958.¹⁰ Moreover, as a trend of demanding moral neutrality in the courts continues, it is indeed ironic that simultaneously we witness increasing over-dependence by members of society on the law to provide their only source of moral guidance. The phenomenon is manifested by commonly heard "wisdoms" such as, "If it's not illegal, it's not wrong," or "There's nothing wrong with lying because I wasn't under oath," or "It's okay so long as you're not caught."

One suspects that the movement to moral neutrality in modern jurisprudence is driven not so much by any aversion to morality, but rather by a frustration deriving from the inability to reach agreement on its demands and the suspicion that somehow the morality of lawmakers reflected in legislative enactments is different from that of judicial decisionmakers. An additional underlying motive, which will not be explored further in this essay, may be the intuited idea that any state-sponsored subscription to morality would somehow violate current notions of separation of church and state. Even though theoretical problems persist in the appropriate relation between law and morality, their existence does not mandate the categorical abandonment of moral guidance

7 RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 236 (1990).

8 *Id.* at 235 (citations omitted).

9 See Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457 (1897) (an Address delivered at the dedication of a new building at Boston University School of Law).

10 71 *HARV. L. REV.* 593, 630 (1958).

in the enactment and interpretation of law. Quite the opposite appears to be true. At the most general level, we can never say that the community should embrace law and obey it when the command of the law is inconsistent with or neutral to the community's own moral sense. Those subject to the law demand no less than the harmony of having the law's commands remain consistent with their sense of what "ought to be" and that when they obey the law they are doing the "right thing."

In this brief essay that is intended only to introduce the idea, I suggest that the law, moral codes, and indeed even organized religion all are externalized manifestations, directed to somewhat different ends, that have a common source in conscience. Thus if we were able to recognize and embrace efforts to invoke conscience in judicial decisionmaking, we could bypass the articulated pitfalls of consulting any externalized list of moral norms that so troubles the moral skeptics. This idea, while perhaps not new, must be described only after some preliminary observations about morality and conscience.

The human condition is fundamentally characterized by a state of incompleteness, or call it imperfection, giving human beings choices which, by the exercise of free will, enable them to move closer to or further from what they perceive to be perfect or complete. In this usage, imperfection does not automatically mean flawed, but certainly that perfection is not attained. The gap between perfection and imperfection in the area of human conduct can be narrowed by doing that which "ought to be done." Humankind has a unique ability to perceive notions of perfection and to imagine that if humans were able to become perfect, any need for moral norms or laws would disappear. While that obviously can never occur, our ability to move toward perfection with the exercise of will creates hope that feeds the effort. As we are able to conceive the perfect and measure our shortfall against it, we can also identify and determine the shape of morality's demands.

While perfection is readily conceived about some things, relationships, or conduct, it is more difficult to conceive or describe about others. Our notions about perfection are also distorted by what serves our self interest, by external pressures, and by emotion and physical appetites. Nevertheless, we find it with respect to conduct, to the extent we are humanly able, by asking ourselves, "Without regard to self interest, what is the *right* thing to do; what

ought I to do?" The inquiry of one's inner self is what yields moral norms.

In the same pattern that morality is derived for personal conduct, so too, I submit, is law derived for political relations. Do we ever acknowledge that, when we have adopted a law or made a legal decision, we were trying to prescribe the wrong thing? Such an idea is foreign to the community's idea of law and it would readily reject it. Because any law or legal decision reaches to accomplish the right thing in the given circumstances, law is but the political surrogate of morality, consisting of rules among people in the community consistent with what *ought* to be the order to provide harmony, peace and enhancement of the common good. Undoubtedly, we must be quick to recognize that human-made law, even though we say it usually represents what the lawmaker believes *ought to be* the law, does not purport to be a moral code but only an ordering mechanism which is subject to political pressures, pragmatic conditions, and the imperfections of the lawmakers. The product will always fall short against any measure of perfection. Nevertheless, the adoption of laws, the practice of law, and the application and interpretation of law does contain an aspiration to that which we think is right to satisfy the human sense of justice. The law in its imperfect manifestation thus attempts continuously to move to "*what ought to be*."

If law, whether the enactment, its application and practice, or its interpretation, were not responsive, in each of those aspects, to what is right or what ought to be, it would lose its vitality as a system of acceptable rules among human beings. It would not serve the function of purporting to make up, by legal mandate, for that imperfection that we have about ourselves and our political relationships. To the extent that a community accepts any legal system, the law (and its interpretation) responds to the community's sense of what is right, just, and fair.

To view the particular effort of judges who have developed the common law, we find not surprisingly the same objects of doing what is right, just, and fair. The long history of the common law from the earliest records reveals a progressive movement of substituting legal or equitable solutions that accord with one's sense of right and fairness for solutions attained by force. And what is noteworthy is that the cases, for the most part, do not rely on any externalized code or system of morality, but rather they represent a judge's sense of what is "right" and "just" in the circumstances of the existing law and the facts. Within the con-

straints of *stare decisis* and the limited role of judicial decisionmaking, judges turn to their "guts," their inner "instincts," to verify their decisions. If the question directed to this inner self seeks what is right, fair, or just, it appeals to one's moral sense, centered in conscience. Thus the common law, to the extent it represents a collection of conscience-oriented decisions develops like any system of morality, natural law, and indeed even religion. But the common law is not dependent on a system of morality, or natural law; rather, it is a parallel system aimed at a different purpose, but having emanated from the same source. It is only because of this parallelism that permits us thus to seek justice in the affairs of a secular state and maintain religion separately.

Judge Bork makes a remarkable statement in *The Tempting of America* when he says:

Any lawyer or judge who is honest with himself knows that he often intuits a conclusion and then goes to work to see if legal reasoning supports it. But the original intuition arises out of long familiarity with the structure and processes of law. A judge will have such intuitions in cases where he has not the remotest personal preference about the outcome.¹¹

While Judge Bork seems to be confessing apologetically for this perhaps undisciplined bow to intuition, he may be saying that when judges make legal decisions, they consult their inner sense of what is right and apply it to the framework or a grid of statute, precedent, and facts. The posturing of a question directed to one's inner self in search of the right thing or the just result is, what may be characterized, a consultation with conscience.

Reaching to this inner self, this inner core, which every human being does regularly in the course of making decisions and exercising will, has long been recognized. Augustine described the process as follows:

[D]on't go outside yourself, return into yourself. The dwelling-place of truth is in the inner man. And if you discover your own nature as subject to change, then go beyond that nature. But remember that, when you thus go beyond it, it is the reasoning soul which you go beyond. Press on, therefore, toward the source from which the light of reason itself is kindled.¹²

11 BORK, *supra* note 3, at 71.

12 CHARLES N. COCHRANE, *CHRISTIANITY AND CLASSICAL CULTURE* 409 (1957) (quoting from *DE VERA RELIG.*).

Augustine calls this kindling light "the creative principle" which is eternal, immutable, self-sufficient, the source of all being, of all wisdom and of all perfection.¹³

Moreover, C. S. Lewis, in *The Abolition of Man*, notes that this human aspect, that tells us what "ought" to be and establishes value, has been described to exist by members of all major civilizations, both in the far eastern and western worlds. He describes it:

It is the sole source of all value judgements. If it is rejected, all value is rejected. If any value is retained, it is retained. The effort to refute it and raise a new system of value in its place is self-contradictory. There never has been, and never will be, a radically new judgment of value in the history of the world The human mind has no more power of inventing a new value than of imagining a new primary colour, or, indeed, of creating a new sun and a new sky for it to move in.¹⁴

And it is not surprising that Pope John Paul II describes this inner source of value as conscience. When addressing the youth of America in a speech in Denver, Colorado, on August 14, 1993, admonishing them that the danger of our current scientific society is the want to "manipulate conscience and its demands," the Pope stated:

Conscience is the most secret core and sanctuary of a person where we are alone with God. In the depths of his conscience man detects a law which he does not impose upon himself, but which holds him to obedience.¹⁵

Whatever we call that inner core which responds to the inquiry, "what *ought I* to do," it is simply a matter of convention. Because of the variations of our makeup, when we externalize matters of conscience by descriptions and systems, they begin to appear as different as each person's words. But this is not unlike the variations in description that we give about objects in nature. The core, or the source, however, has the same quality in each of us. To whatever degree it is perceived, it is, for purposes of the law, always ascribed words or language such as justice, equity, reason, fairness, and right—that in the law which directs what we *ought* to do. Since we all seem to share this sense, we would expect some agreement on its manifestations.

13 *Id.*

14 C.S. LEWIS, *THE ABOLITION OF MAN* 56-57 (1947).

15 *Speech To Youth*, N.Y. TIMES, August 15, 1993.

Outside the law, sociological studies have confirmed the reality and uniformity of a moral sense in humans. Professor James Q. Wilson, in *The Moral Sense*, has drawn on a remarkable collection of data and concluded that conscience in each human being is the source of a common moral sense and this moral sense is innate. He states:

We do have a core self, not wholly the product of culture, that includes both a desire to advance our own interests and a capacity to judge disinterestedly how those interests *ought to be* advanced. Our selfish desires and moral capacities are at war with one another, and often the former triumphs over the latter. However great this war may be and no matter how often we submerge our better instincts in favor of our baser ones, we are almost always able, in our calm and disinterested moments, to feel *the tug of our better nature*. In those moments we know the difference between being human and being inhuman.¹⁶

Professor Wilson notes that even at the earliest ages, the moral sense of human beings begins to manifest itself. Observations of children in various cultures have revealed that:

[T]here are some things that young children regard as wrong whether they are middle-class residents of Hyde Park, Illinois, or Hindus living in the Indian village of Bhubaneswar. These include breaking a promise, stealing flowers, kicking a harmless animal, and destroying another's property.¹⁷

And in adults, one aspect of the moral sense, which Wilson describes as innately part of each of us, is a sense of fairness.

It is uncanny how the sociological data which Wilson reports reveals a human sense of fairness that corresponds directly to doctrines in the common law. Wilson found, for instance, that humankind's moral sense of fairness includes aspects of *equity* (in which we hold that "[p]eople who are equal with respect to contributions should be equal with respect to outcomes"), *reciprocity* ("[p]eople who have given something to you are entitled to something back"), and *impartiality* ("[p]eople who judge another person ought to be disinterested, free of favoritism, and observant of rules agreed upon in advance").¹⁸ These demonstrated aspects of the moral sense are manifested, almost with the same words, in the

16 JAMES Q. WILSON, *THE MORAL SENSE* 11 (1993) (emphasis added).

17 *Id.* at 141.

18 *Id.* at 70.

law through concepts such as equity, unjust enrichment, due process, and rule of law. Although it would serve only curiosity to summarize even the major findings of Professor Wilson, it is useful here to include his observation about the history of the moral sense, which also may parallel the history of law:

What is remarkable—indeed, what constitutes the most astonishing thing about the moral development of humanity—has been the slow, uneven, but more or less steady expansion of the idea that the moral sense ought to govern a wide range—perhaps, indeed, the whole range—of human interactions. Our universe has been enlarged.¹⁹

These parallels are not surprising if our moral sense and our law are both manifestations from the same source.

The moral reality, which sociologists have discovered, has been described in the legal context by many, but particularly well by Professor Michael S. Moore in his 1982 landmark article, *Moral Reality*.²⁰ While the scope of this essay unfortunately cannot attempt to synthesize Professor Moore's response to those who would have the law evolve through judicial decisions made in a morally neutral manner, the existence of his studies and their conclusions remains a source of corroboration and comfort. But yet more corroborating and comforting is an actual, but brief, look at cases where judges have appeared to rely on conscience, even when professing not to have done so in their decisionmaking.

In *Matter of Baby M*,²¹ the court appears to have relied on conscience to evaluate whether to enforce a "surrogacy contract," even though it professed to be expressing morally neutral New Jersey public policy. In the case, Mary Beth Whitehead freely agreed, for payment of ten thousand dollars, to be artificially inseminated with the sperm of William Stern, whose own marriage could not produce a baby, to carry the baby to term, and then to deliver the baby to Mr. Stern with no strings attached. In the contract, which had been carefully drafted by attorneys, Whitehead also agreed to facilitate the adoption of the baby by Mrs. Stern so that Mr. and Mrs. Stern would be the baby's sole parents thereafter. As might be expected, however, Whitehead was unwilling

19 *Id.* at 193.

20 See Michael Moore, *Moral Reality*, 1982 WISC. L. REV. 1061; see also Michael Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992) (a recent follow-up article).

21 537 A.2d 1227 (N.J. 1988).

upon delivery of the baby to fracture one of nature's strongest bonds and separate from the baby. She defaulted on the ill-conceived surrogacy contract. While the court set aside the contract and "restore[d] the 'surrogate' as the mother of the child,"²² it rationalized that it was required to reach that conclusion by the public policy that parents raise their own children. There were, however, other rational public policies such as the freedom to make contracts and the right to adopt children in New Jersey, either of which might just as *rationaly* have supported a different result. The court, however, resolved the so-called competing rational considerations by, what I submit, was a resort to conscience. As the court said:

There are, in a civilized society, some things that money cannot buy There are, in short, values that society deems more important than granting to wealth whatever it can buy, be it labor, love, or life.

* * *

The surrogacy contract is based on principles that are directly contrary to the objectives of our laws.²³

Similarly confronted with issues requiring a resort to conscience, the court in *Matter of Karen Quinlan*,²⁴ was faced with the question of whether ending the artificial life-support systems was a rightful matter of self-determination for Karen Quinlan (by her guardian and family) or the taking of the life of another. Quinlan lay in a hopeless, comatose and vegetative state, "having no awareness of anything or anyone around her and existing at a primitive reflex level."²⁵ Although the court professed to be following morally neutral principles, it recited extensively the moral advice received by Quinlan's family, and in the end the court seems to have rested on that advice. In allowing the guardian and the family of Quinlan to remove artificial life-support systems, the court observed that that decision "should be accepted by a society the overwhelming majority of whose members would, we think, in similar circumstances, exercise such a choice in the same way for themselves or for those closest to them."²⁶ The court was not yielding to a majority will on such a personal matter but rather

22 *Id.* at 1234.

23 *Id.* at 1249-50.

24 355 A.2d 647 (N.J. 1971).

25 *Id.* at 655.

26 *Id.* at 664.

appears only to have found corroboration for its individual determination of what was right from society's consensus of conscience.

These cases are representative of situations where the judge's sense of what is "right" were applied to select from equally rational alternatives. Indeed, they reveal that pure reason cannot make judgments. The same type of decisionmaking can be observed in Supreme Court decisions, particularly when the Court imposes limits on constitutional rights. Thus, while the First Amendment secures simply the "freedom of speech," the Supreme Court has limited that right when it is outweighed by the social interest *in order and morality*. The Court stated in *Chaplinsky v. New Hampshire*.²⁷

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem It has been well-observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.²⁸

Similarly, in connection with the Due Process Clause, the Supreme Court has repeatedly instructed that the clause will not protect state action that "offends some principle of *justice* so rooted *in the traditions and conscience of our people* as to be ranked as fundamental."²⁹ If we take the Court at its word about due process, we are instructed that fundamental rights may be equated to those emanating from conscience, so long as it is sufficiently manifested to have become "the conscience of our people."

In recent times the Court protests regularly that it is not applying any moral standard, but even in cases with such statements the decision seems to reach for the moral standard's source. In determining, for instance, what liberties are appropriate and which are licentious, the Court resorts to "the demands of organized society" and "reasoned judgment." In *Planned Parenthood v. Casey*,³⁰ the Court explained, "Our obligation is to define the

27 315 U.S. 568 (1942).

28 *Id.* at 571-572 (quoted approvingly as recently as 1992 in *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538 (1992)).

29 See *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1935) (emphasis added). This has been quoted numerous times since; see, e.g., *Patterson v. New York*, 432 U.S. 197, 202 (1977).

30 112 S. Ct. 2791, 2806 (1992).

liberty of all, not to mandate our own moral code." While no one would suggest that any judge's *personal* moral code should be a factor in decisionmaking, the statement, we can suppose, leaves open the possibility that manifestations of conscience, corroborated by the consensus, is still a viable factor in making constitutional decisions. No other explanation can be given for the Court's decision in *Bowers v. Hardwick*,³¹ where the Court was asked to decide whether Georgia's sodomy statute violated a liberty interest, claimed in homosexual conduct, under the Fourteenth Amendment. Recognizing that it had previously recognized either a liberty interest or a right of privacy in procreation, marriage, contraception, and abortion, and had struck down statutes that regulated them, the Court was faced in *Bowers* with a method for *rationaly* distinguishing Georgia's sodomy statute. Suggesting that it was leaving such moral judgments to the states for determination, and indicating that such rights could not be found in the Constitution's text, the Court nevertheless imposed a moral result *inconsistent* with what a purely rational process would have yielded when it left standing a criminal statute prohibiting sodomy. It explained, "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."³² Chief Justice Burger, concurring in the opinion, however, writes more revealingly:

[T]he proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.³³

If the Court had applied purely rational methods, neutral to any moral judgment, it would have been left with no basis for holding as it did. Yet, because of the Court's recently adopted aversion to relying on conscience, it refused to acknowledge its reliance on conscience in the decision, leaving readers confused about the source of the decision.

31 478 U.S. 186 (1986).

32 478 U.S. at 196.

33 478 U.S. at 196 (Burger, C.J., concurring).

Again, when defining the limits of the Eighth Amendment, which by its terms concededly invokes value judgment, the Court nevertheless did not hesitate to apply a standard that approves *de minimis* force so long as it is "not of the sort repugnant to the conscience of mankind."³⁴ And in a similar vein, when interpreting the limits of the Due Process Clause of the Fifth Amendment, the Court defined the limit as that which violates "fundamental fairness, shocking to the universal sense of justice."³⁵

It would appear that if these cases are at all representative, Professor Graham Walker was on to something when he observed:

Constitutional theory—undoubtedly like all normative political theory—cannot avoid reliance upon moral premises. Moral premises cannot avoid referring to the good (or the right) that they inescapably presuppose. The good cannot successfully actuate moral thinking unless it is perceived to be a real and intrinsically moral good; only such a good allows for satisfactory answers to normative questions.³⁶

While we can *reason* in judicial decisions to results that we reject because they are unjust, the contrary is not true. We do not abandon a just decision because the reason is not apparent. Consultation with conscience yields answers to whether something is right or just, and it is thus more dependable and constrained than resort to pure reason which usually yields more alternatives. Once conscience selects a rational alternative *within the constraints* given a judge, the judge may rationalize the result or even acknowledge, if the judge is ingenuous, that reason cannot fully articulate why the result is just. But this candor is rarely shown. Yet it may have been this very process that prompted Justice Stewart to say about pornography:

I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it, and the motion*

34 *Hudson v. McMillan*, 112 S. Ct. 995, 1000 (1992) (emphasis added).

35 *United States v. Russell*, 411 U.S. 423, 432 (1973). See also, *Rochin v. California*, 342 U.S. 165, 172 (holding that substantive due process prevents the government from engaging in conduct that "shocks the conscience").

36 GRAHAM WALKER, *MORAL FOUNDATIONS OF CONSTITUTIONAL THOUGHT* 13 (1990).

*picture involved in this case is not that.*³⁷

Because resort to conscience selects from rational alternatives, and the opposite cannot be true, decisions based on conscience would likely be more dependable and more readily accepted. It also follows that they will be more, not less, predictable than purely reasoned decisions. While we can never reject the reasoning process—it is the only method we have for conducting analysis—we must recognize its limits. It permits us to get from one point to another in an analysis, but it does not corroborate the original point or the end point. The process may be similar to balancing a checkbook. By the perfectly rational process of lower mathematics, we add and subtract checks from the balance shown in our checkbooks. That the reasoning is perfect, however, does not preclude the question of whether the balance is correct because the beginning balance or any check thereafter may be imperfectly recorded. So it is, I suggest, with the analysis of legal issues that depend solely on the rational process.

Cases are decided from conscience when the judge is able to say that the decision is responsive to the question, "Is this decision the *right* thing to do without regard to self-interest, political or external pressure, or emotion?" Of course, the "right" thing also includes constraint as described by Judge Bork. But within that constraint, the pasture is wide, and only conscience will pick a just road. Even though the judge thus moves inwardly to satisfy the judge's sense of justice, he must by reason and language manifest his findings in a decision. But rather than injecting an externally developed moral norm between the question and the answer, the decision from conscience discovers a legal norm—the holding of the case.

Because no one has the ability to yield decisions of perfection, and foreign influences can never be fully removed from decisionmaking, any one decision cannot be confidently asserted as a right one or as absolutely correct. But when decision after decision is made in response to "what is right," a closer approach to the right is achieved. While the consensus of decisions may be, and should be, consulted to corroborate the next decision, in each case the question must be posed anew, "How is justice achieved?" If we catalog ten such decisions, a hundred decisions,

³⁷ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (citations omitted) (emphasis added).

or a thousand, all in which the decisionmaker consults the inner self, the conscience, without first articulating external norms, a consensus nevertheless emerges in a common law. The repetitive process, perhaps habit, of continuously consulting with conscience and corroborating the result with prior such decisions produces a fabric or a mosaic. Moreover, with increased data and study, the differences among decisions may lessen, although they never disappear. But to that extent, we approximate a conscience of the community, or a consensus.

Thus the discipline of decisionmaking will be improved if recognition of the role of conscience is recognized, and better yet, voiced and reevaluated with each decision. The task may not always be simple and the results may at times look confusing. What did Justice Stewart mean when he said about pornography, "I know it when I see it"? While that might not be recognized as the best method for articulating it, such frustrations from time to time should not discourage the effort.

The alternative can lead only to chaos. It is a deceptive and confusing approach to rely on conscience in making judicial decisions but then attempt to redefine such reliance as the product of reason or a morally neutral principle. When we voice recognition of invocations of conscience and heighten our awareness of the process, decisionmaking will arch closer to what is right without the need of articulating a separate externalized code of moral norms. I submit, let the study of ethics, morality, natural law, and religion run their separate courses. At the end of the day, we may notice that those courses tend to converge with the vast body of law so developed. Indeed, they must, since they all are illuminated by the same conscience.