

"DISCOVERY" IN JUDICIAL DECISION-MAKING

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This dissertation is my own work.

Abstract

This dissertation is an analysis of "discovery" in judicial decision-making. I discuss four types of "discovery": (1) legal justification as "discovery", (2) insights as "discovery", (3) general problem-solving strategies as "discovery", and (4) "discovery" as a method of expression and persuasion.

Chapter One reviews the conventional jurisprudential literature on "discovery". It begins with the American legal realists' explanation of "hunching" in judicial decision-making and then traces how "discovery" and justification have come to be considered distinct processes. The realists' and legal positivists' conflicting opinions concerning the nature of "discovery" are presented and I conclude that the only way to settle the conflict is to study "discovery" in detail.

Chapter Two begins with a critical evaluation of the analogy between science and law that Neil MacCormick draws between scientific testing and legal justification. The chapter ends by identifying elements in legal justification that play a role in discovery. In particular, the legal syllogism and the requirements of coherence and consistency play roles in the process of discovery in judicial decision-making.

In an effort to examine "discovery" in more detail than that found in conventional jurisprudence literature, Chapter Three introduces the work of Bernard Lonergan on insight in other fields. I present his approach to studying human knowing and his account of insight in theoretical and practical problem-solving.

Then, in Chapters Four and Five, I use Lonergan's method and his analysis of insight to study "discovery" in theoretical and practical problem-solving in judicial decision-making. I conclude that not only does insight play a key role in interpreting situations and discovering solutions to legal problems, but insight plays a crucial role in testing interpretations and evaluating courses of action.

Chapter Six is a portrait of two general forms of "discovery" in judicial decision-making. I use Garret Barden's work to present the application of posited law and the process of reaching equitable judgments as specialized methods of "discovery" in decision-making.

Chapter Seven is an analysis of "discovery" in the form of a method of expression and a technique of persuasion in Madame Justice Bertha Wilson's opinion in R v Morgentaler.

Finally, I suggest that "discovery" plays a far greater role in judicial decision-making than is currently acknowledged by legal theorists.

TABLE OF CONTENTS

Preface

Chapter One:

The Problematic Nature of Discovery and Justification in Legal Theory

1. Introduction	1
2. The American Legal Realists	
(1) The Response to Formalism	2
(2) The Judging Process	9
(a) Hunches and Intuitions	14
(b) The Judging Process and Logic	18
(3) Conclusion	22
3. Searching For The Clear Distinction Between Discovery and Justification	
(1) Richard Wasserstrom	26
(2) Neil MacCormick	37
(3) Zenon Bankowski	44
4. Conclusion	50

Chapter Two:

The Analogy Between Science and Law

1. Introduction	63
2. Legal Justification	65
3. Popper's Model of Science	67
4. The Analogy Between Science and Law	
(1) Scientific Testing/Legal Justification	76

(a)	Hypotheses/Rulings	77
(b)	Predictions/Consequences	78
(c)	Hypotheses/Rulings Must Make Sense in the System	79
(d)	Hypotheses/Rulings Must Make Sense in the World	79
(2)	The Clear Distinction between Discovery and Justification	81
5.	Problems with the Analogy Between Science and Law	82
(a)	Hypotheses/Rulings	82
(b)	Predictions/Consequences	84
(c)	Hypotheses/Rulings Must Make Sense in the System	86
(d)	Hypotheses/Rulings Must Make Sense in the World	88
6.	Re-considering The Analogy Between Science and Law	92
(1)	Connections Between Discovery and Justification	94
(2)	"Justification" in The Process of Discovery	99
7.	Conclusion	105

Chapter Three:

Bernard Lonergan on Insight in Theoretical and Practical Reasoning

1.	Introduction	106
2.	Insight as an Act of Discovery or Invention in Solving Problems and Answering Questions	114
3.	Insight in Theoretical and Practical Reasoning	119
4.	Lonergan's Method of Examining Theoretical and Practical Reasoning	130

5. The Elements of Theoretical and Practical Reasoning	135
6. Conclusion	141

Chapter Four:

"Discovery" in Theoretical Problem-Solving

1. Introduction	142
2. Theoretical Problem-Solving	148
3. The Understanding Phase in Theoretical Problem-Solving	
(1) Introduction	151
(2) Elements in The Understanding Phase	
(a) Sense-experience	153
(b) Wondering, Puzzling and Asking What-questions	154
(c) Direct Insight: The Act of Discovery in The Understanding Phase	161
(d) Formulation or Expression	173
4. The Testing Phase in Theoretical Problem-Solving	
(1) Introduction	179
(2) Elements in The Testing Phase	
(a) Is-questions	181
(b) Reflective Insight: The Act of Discovery in The Testing Phase	182
(c) Judgments of Fact	194
5. Conclusion	201

Chapter Five:

"Discovery" in Practical Problem-Solving

1. Introduction	203
2. Practical Reasoning	205
3. The Understanding Phase in Practical Problem-Solving	
(1) Elements in The Understanding Phase	
(a) Wondering and Puzzling about What to do?	209
(b) Practical Insight: The Act of Discovery in The Understanding Phase	210
(c) Proposed Courses of Action	213
4. The Testing Phase in Solving Practical Problems	
(1) Introduction	216
(2) Elements in The Testing Phase	
(a) Is-questions	218
(b) Practical Reflective Insight: The Act of Discovery in The Testing Phase	221
(c) Judgments of Value	223
5. Decision/Choice	227
6. Conclusion	229

Chapter Six:

General Methods of "Discovery" or Problem-Solving

1. Introduction	230
2. General Methods of Judicial Decision-Making	
(a) Applying Posited Law	234
(b) Discovering Equitable Judgments	238
3. Conclusion	241

Chapter Seven:

The Form of "Discovery" in R v Morgentaler

1. Introduction	242
2. Theoretical Problem-Solving as a Form of Expression	
(1) Interpreting the Problem	249
(2) Devising a Strategy or Method of Problem-Solving	
(a) Narrowing the Search	251
(b) Discovering the Method or Strategy to Discover the Definition or Interpretation of the Right to Liberty	253
(c) Searching for the Purpose of the Charter	254
(d) Discovering the Purpose of the Right to Liberty	257
(e) Searching for the Purpose of the Right to Liberty in the Context of the Abortion Issue	262
(3) Discovering the Solution to the Abstract Constitutional Problem	266
3. Theoretical Problem-Solving as a Method of Persuasion	
(1) Introduction	268
(2) Shaping the Reader's Problem-Solving Process	275
(a) The Use of Questions and Answers to Lead the Reader to Accept Wilson's Interpretation of the Problem	275
(b) The Use of Questions and Definitions to Persuade the Reader to Accept Wilson's Definition or Interpretation of the Right to Liberty	278
(3) Exploiting the Relationship Between Questions and Answers	
(a) What-questions and Definitions/Interpretations	283
(b) Is-questions and Judgments of Fact	284

Chapter Eight:

Conclusion

289

Appendix: R v Morgentaler

296

Bibliography

308

Preface

This dissertation is an inquiry into what is often called "discovery" in judicial decision-making. Many legal theorists may consider this topic to be relatively unimportant compared to the process of legal justification. The author of a recent PhD dissertation (soon to be published) captures this point of view when he states that "Justification dominates (is at the centre of) the structure of judicial activity in the application of law."¹ Some modern legal theorists go even further and claim that "discovery" cannot, and should not, be studied by legal theorists.

Questions about "discovery" in judicial decision-making have been obscured and suppressed in a number of ways. In an effort to reconcile a debate between legal formalists and American Legal Realists concerning the nature of legal reasoning, modern legal theorists have drawn a clear separation between the processes of discovery and justification and have characterized "discovery" as an essentially arbitrary, irrational, and unconscious activity. By contrast, they portray justification as a rational and logical process. The exercise of drawing analogies between science and law in terms of testing and justification has also helped bolster the significance of justification relative to discovery in the legal context.

¹ J. Bengoetxea, Edinburgh University PhD thesis, 1989, 29.

Further, accepting the process of justification as the solution to the key political concern of many legal theorists - how to constrain judicial decision-making in a liberal democracy - has directed the attention of theorists toward examining justification rather than "discovery". Finally, questions about "discovery" have been suppressed inasmuch as the methods of persuasion used by judges have not been examined in terms of how judges lead and guide their audience to discoveries.

However, in my opinion, "discovery" in legal decision-making is worthy of investigation. The legal decision-making process is an interesting topic in its own right. There is also the possibility that the specific questions and answers of judges that precede the public exposition or justification of a decision play a more significant role in legal decisions than is currently acknowledged by legal theorists. And perhaps, as the legal realists argue, understanding the decision-making process will help judges reach wise decisions and lead to more open and candid legal reports. But these issues cannot be addressed unless "discovery" in legal decision-making is examined and understood.

Hence this thesis is an effort to analyse the nature of "discovery" in judicial decision-making. I begin by reviewing the few places in the conventional jurisprudence literature where "discovery" is discussed. Then I turn to the work of scholars in other fields, especially that of

Bernard Lonergan, in order to understand the nature of
"discovery" in more detail.

Chapter One

The Problematic Nature of Discovery and Justification in Legal Theory

1. Introduction

Modern legal theorists distinguish between two quite separate processes in the judicial decision process - the process of discovering or reaching decisions and the process of justifying them. They portray the process of discovery as essentially irrational and arbitrary. In contrast, the process of justification is presented as rational and logical. The aim of this chapter is to trace how discovery and justification have come to be considered as separate processes. I also raise questions about whether the clear distinction between discovery and justification can be maintained and whether the process of discovery is irrational and arbitrary. I conclude the chapter by suggesting that these questions can be answered by investigating the nature of discovery and testing in decision-making.

2. The American Legal Realists

(1) The Response to Formalism

Among legal theorists, the legal realists came the closest to identifying the process of discovery in the judging process when they wrote about "puzzling" and "brooding" which led to "hunches" or "intuitions". Their use of judges' reports about how they reached their decisions can be considered an attempt to create an approach to studying mental activities involved in decision-making. The American Legal Realists, especially Jerome Frank and John Dewey, stated that activities such as puzzling and brooding preceded the hunches and intuitions which led to judgments that were subsequently presented in the appropriate form as ratiocinations to or justifications of the decision. Moreover, the realists also raised many other interesting questions about other elements in the judging process such as the influence of a judge's personality, bias, prejudice, and logic in decision-making.

The work of the realists can be understood as a critique of legal formalism where this is taken to imply that judges use deductive techniques to decide cases, that judges' legal opinions are accurate descriptions of how judges reach decisions, and that legal certainty and predictability are ideals that judges should strive to

reach. Consequently, many legal theorists have understood the work of Frank and Dewey as a response to legal formalism and have stressed the role of the legal realists in this debate.

Legal realists such as Holmes, Llewellyn, Frank, and Dewey criticized the decisions of judges who were committed to a deductive or quasi-deductive method of deciding cases. In their opinion, to decide cases logically would be equivalent to mechanical decision-making and would lead to undesirable results. Frank wrote that

...law is dealt with [by the formalists] as if it were settled once and for all; its rules are supposed to operate impartially, inflexibly: justice must be uniform and unswerving. In other words, the stress is on generalizations, not on concrete happenings; on averages, not on details. Little allowance can be made for justice in the particular case: thus the law is written and thus it must be applied. Novelty and creativeness must not be permitted. Adaptation of the rules to peculiar individual circumstances is frowned upon. Discretion in the judge must be avoided for fear that it would lead to dangerous arbitrariness. Individualization of controversies, response to the unique human facts of the particular case, would make

the law uncertain, unpredictable.¹

In Dewey's opinion, the belief that "ready-made antecedent universal principles"² are a key part of reasoning is the chief obstacle to the type of thinking required for intelligent social reforms and social advance by using law.

Realists also rejected the claim that formalism was a correct description of legal decision-making. Many legal realists criticized theorists who described the judging process as deductive or quasi-deductive. Such formal descriptions³ of legal reasoning were thought not only to misrepresent the judging process and promote the illusion and myth of legal certainty, but also to mask judges' biases and prejudices that can affect their work. Holmes, for example, describes the major factors in the judging process which are not examined by legal formalists and asserts that the logical form has had a limited function in decision-making. For Holmes,

The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the

¹ J. Frank, Law and the Modern Mind, (London: Stevens & Sons, 1949), 118-119.

² J. Dewey, "Logical Method and Law", 10 The Cornell Law Quarterly, 27.

³ These descriptions were formal in the sense of (1) passing tests of validity and (2) having a universal form.

prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which law shall be governed.⁴

Holmes also sums up the legal realists' criticisms of the use of the logical form to present legal decisions insofar as the logical form masks other elements in the decision-making process. In his opinion,

The fallacy of the logical form... flatters that longing for certainty and repose which is in every human mind. But certainty generally is an illusion and repose not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and the very root and nerve of the whole proceeding. You can give any conclusion a logical form.⁵

The point is that different logical justifications could be used to justify conflicting outcomes. Hence the indeterminacy of formal decision-making leaves open the question of substantive elements being the real determinants of the decision.

According to Frank, how a judge reaches a decision was

⁴. O.W. Holmes, The Common Law, (Boston: 1881), 1.

⁵ O.W. Holmes, "The Path of Law", (1987) 10 Harvard Law Review, 466.

described by the formalists as "the judge begins with some rule or principle of law as his premise, applies this premise to the facts, and thus arrives at his decision."⁶ For Frank, this description was "a dogma based on inadequate observation" and was closely tied to illusions and myths such as legal certainty, predictability, and the claim that law is completely settled. He also thought the formalists ignored the critical role of the judge or jury as a fact-finder and that a multitude of elusive factors are involved in fact-finding which gave the judge or jury a creative role and made it hard to predict what a judge or jury will decide.

Frank believed that the dogma or illusion of predictability and legal certainty can lead to numerous harmful consequences such as disrespect for law, a wasteful technique of circumlocution that turns "lawyers into a profession of rationalizers who appear to laymen like a guild of professional hypocrites".⁷ In addition, such beliefs result in concealing rather than disclosing what the law is and attempting to mechanize law and "reduce it to formulae in which human beings are treated like identical mathematical entities".⁸ The clear thinking of judges is hampered because they are compelled to "shove

⁶ Law and The Modern Mind, 101.

⁷ ibid., 118.

⁸ ibid., 118.

their thoughts into traditional forms, thus impeding spontaneity and the quick running of ideas, tempting lazy judges to avoid creative thinking and, instead, to find "platitudes that will serve in the place of robust cerebration."⁹

Dewey claimed that mechanical logic and abstract forms in written legal decisions are used to assume that a decision is impersonal, objective, and rational, and give an illusion of certitude which masks the vital process of reaching a decision. He also thinks that the desire for maximum possible stability and regularity of expectation in legal decisions conflicts with practical realities and results in increased practical uncertainty and social instability. In addition, understanding and portraying rules as immutable, antecedent, and necessary sanctifies old rules and decisions, widens the gap between social conditions and the principles used by the court, breeds irritation and disrespect for law, and contributes to alliances between the judiciary and entrenched interests.

Both Frank and Dewey agree that judgments are neither dictated by legal rules and principles nor reached according to syllogistic reasoning. In Frank's opinion, rules and principles "...do not and cannot completely control his mental operations and it is therefore

⁹ *ibid.*, 130.

unfortunate that either the judge or the lawyers interested in his decision should accept them as the full equivalent of that decision."¹⁰

¹⁰ *ibid.*, 131.

(2) The Judging Process

The legal realists, especially Frank and Dewey, not only criticized the formalists' decisions, descriptions of judging, and their ideals; they also developed a constructive programme. They believed that, by understanding the judging process, the multiplicity of factors that affect decision-making could be identified and that undesirable elements such as bias and prejudice could be controlled. The results of this part of their project were obtained by examining what they considered the "actual judging process" in law and in this work they were aided by studies about the judging process completed by psychologists.

The person who wrote most comprehensively about the judging process was Jerome Frank. His goals were to reform some trial methods that in his opinion were "hopelessly antiquated"¹¹ and to "inject more reason and more justice into its daily workings" by examining the "non-rational" and "non-idealistic" elements in court-house government. He wanted judges to recognize and to acknowledge the necessary existence of human and personal elements¹² in themselves in order to address the possible effects of biases and prejudices when hearing law suits. Frank

¹¹ ibid., xxv.

¹² ibid., 138.

believed that wise decisions would be achieved through self-knowledge. According to Frank, a judge, like everyone, will have habits and pre-judgments since "interests, points of view, and preferences are the essence of living."¹³ In addition, a judge will have acquired social value judgments and many unavoidable idiosyncratic "leanings of the mind", uniquely personal prejudices which may be unconscious and may interfere with a judge's fairness at a trial. Frank believes that "to recognize the existence of such prejudices is the part of wisdom"¹⁴ and that "The concealment of the human element in the judicial process allows that element to operate in an exaggerated manner..."¹⁵ For Frank, "...the judge, through self-scrutiny, can and should prevent the operation of this class of biases."¹⁶ This type of self-knowledge is especially important and needed in a judge, according to Frank, because a judge is peculiarly exposed to emotional influences in a court room.

Frank is also convinced that judges can perform their job of balancing conflicting human interests and determining which of several opposing individual claims the law should

¹³ ibid., xix.

¹⁴ ibid., xx.

¹⁵ ibid., xx.

¹⁶ ibid., xx.

favour in order to promote social well-being¹⁷ if they have accurate knowledge of the methods they employ to reach decisions. He asserts that, to do their job well, judges need as clear a consciousness of their purpose as possible and that "the pretence, self-delusion that when they are creating they are borrowing,"¹⁸ or merely applying the commands given by an external authority cannot but diminish their efficiency. Moreover, they must learn the virtue, the power and practical worth of self-authority and not rely on a non-existent guide.¹⁹ To reach this end he wants to disclose, not conceal, the process of exercising discretion, applying abstract rules in cases, and making law. Moreover, Frank claims that "If every judicial opinion contained a clear exposition of all the actual grounds of the decision, the tyrants, the bigots, the dishonest men on the bench would lose their disguises and become known for what they are"²⁰ since "The honest, well-trained judge with the completest possible knowledge of the character of his powers and of his own prejudices and weaknesses is the best guaranty of justice."²¹

Frank presents his analysis of the judging process as an

¹⁷ ibid., 21.

¹⁸. ibid., 121.

¹⁹ ibid., 121.

²⁰ ibid., 138.

²¹ ibid., 138.

alternative to the formalists' methods of decision-making and understanding of the judging process. The foundation of his position is his method of studying the judging process. His approach was to ask judges how they reached their decisions. Evidence for his results were the self-reports of judges such as Judge Hutcheson, who describe how they reach their decisions. His method was neither grounded on assumptions about the role of logic nor guided by values such as legal certainty or predictability. Dewey, like Frank, claims he studies how people think, rather than simply considering "the relations of consistent implication which subsist between the propositions in which his finally approved conclusions are set forth..."²²

The legal realists also used the results of psychologists who studied decision-making in other fields to guide and to support their own analyses of the judging process in law. For example, Llewellyn wrote that psychologists say that a person reaches a decision either by

...sudden intuition - a leap to some result that eased the tension; or else it was one of successive mental experiments as imagination developed and passed in review various possibilities until one or more turned up which had appeal. In any ordinary case a reasoned justification for the result represented a subsequent job, testing the decision against experience and

²² *ibid.*, 18.

against acceptability, buttressing it and making it persuasive to self and others.²³

Frank believed that the process of judging was the same for lawyers, judges, and "people of ordinary affairs". He says that according to psychologists the process of judging ...seldom begins with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it. If he cannot, to his satisfaction, find proper arguments to link up his conclusion with premises which he finds acceptable, he will, unless he is arbitrary or mad, reject the conclusion and seek another.²⁴

Frank calls this method of reasoning backward reasoning. According to Frank, judges also arrive at their judgments in this way. In marked contrast to formalists' descriptions of deductive legal reasoning, Frank's position is that judgments "in most cases are worked out backward from conclusions tentatively formulated."²⁵

Dewey claims that, although mathematicians, farmers,

²³ K. Llewellyn, The Common Law Tradition, (Boston: Little, Brown, 1961), 11.

²⁴ Law and The Modern Mind, 100.

²⁵ ibid., 101.

lawyers, and merchants deal with different subjects and materials, the course of the operation and the form of the procedure to investigate, accept, reject, and justify their conclusions are similar. Dewey's description of thinking resembles Frank's analysis of the judging process in that the starting points of the judging process are questions about particular concrete cases. Dewey writes that "...thinking actually sets out from a more or less confused situation, which is vague and ambiguous with respect to the conclusion it indicates, and that the formation of both major premise and minor proceed tentatively and correlatively in the course of analysis of this situation and of prior rules."²⁶

(a) Hunches and Intuitions

For Frank, the most significant element in the judging process is the hunch or intuition of the judge. Frank quotes from Judge Hutcheson's self-analysis of the role hunches play in reaching a decision to a court case. Judge Hutcheson says he puzzles over all the available material and broods over the issue and waits for the feeling or hunch which is "that intuitive flash of understanding that makes the jump-spark connection between question and decision."²⁷ For Hutcheson, the hunch depends on intuition

²⁶ "Logical Method and Law", 23.

²⁷ Law and The Modern Mind, 103.

because he thinks that "The vital motivating impulse for the decision is an intuitive sense of what is right or wrong in the particular case..."²⁸ In Frank's opinion, examining the process of hunching in reaching decisions is important to understanding the legal process because "If the law consists of decisions of the judges and if those decisions are based on the judge's hunches, then the way in which the judge gets his hunches is the key to the judicial process. Whatever produces the hunches makes the law."²⁹ Frank identifies the hunch producers as the rules and principles of law, political, economic, and moral prejudices of the judge, and the judge's personality and entire life-history which reflect his temperament, education, environment, and personal traits.

Frank and Dewey examined hunches in relation to other elements which constitute the judging process. A hunch is an answer to the question "What is the just solution to this particular case?" In the context of distinguishing between the activity of reaching a decision or making a judgment, its written presentation, and its justification, Frank quotes Hutcheson to illustrate and affirm the distinction between the activity of hunching and the written presentation of a decision. Hutcheson separated hunching from the judgment, decision or the solution itself

²⁸ *ibid.*, 104.

²⁹ *ibid.*, 103.

and also distinguished between the judgment itself and its exposition - the apologia or ratiocination for that judgment in which the judge explains and encases the judgment. Judge Hutcheson states that once he has reached a judgment, he

...enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics. Accordingly, he passes in review all of the rules, principles, legal categories, and concepts which he may find useful, directly or by analogy, so as to select from them those which in his opinion will justify his desired result.³⁰

Like Frank, Dewey distinguishes between reaching a decision or solution and the presentation of the decision, but uses the term "search and discovery" when he describes the process of reaching a decision. Dewey contrasts "search and discovery" with exposition. He calls arriving at a conclusion "search and discovery" since "the situation as it exists is more or less doubtful, indeterminate, and problematic with respect to what it signifies."³¹ Search and discovery "unfolds itself gradually and is susceptible of dramatic surprise..."³² In contrast to "search and

³⁰ *ibid.*, 104.

³¹ "Logical Method and Law", 24.

³² *ibid.*, 24.

discovery", exposition, for Dewey, implies a definitive solution has been reached.

In these accounts, the justification of decisions seems to be related to the judging process and to the written presentation but the precise role and status of justification in the judging process is unclear. For example, Frank writes that one of the chief uses of rules and principles is to enable judges to give formal justifications-rationalizations of the conclusions at which they otherwise arrive.³³ His statement implies that formal justifications occur in oral or written presentations, but there is no indication that the primary function of oral or written decisions is justification or that justification is the most significant feature of legal reasoning. Hutcheson's self-report suggests he justifies his decision to himself and then writes it down. In Dewey's opinion, the purpose of the exposition "is to set forth grounds for the decision reached so that it will not appear as an arbitrary dictum, and so that it will indicate a rule for dealing with similar cases in the future."³⁴

Although both Frank and Dewey distinguish between the elements involved in the process of reaching a decision and the presentation of the decision, nothing in their work

³³ Law and The Modern Mind, 130.

³⁴ "Logical Method and Law", 24.

indicates that the elements of legal reasoning can be studied in isolation from each other in terms of their psychological, discursive, justificatory, or ethical status. For Frank and Dewey the elements of the judging process, which include both the method of reaching and presenting a decision, are closely linked in that the judging process consists of the operation of the following five elements: (1) brooding and puzzling, (2) achieving a hunch or intuition, (3) checking or testing the hunch or intuition, (4) reaching a judgment, decision or solution, and (5) presenting or expounding the judgment in the time-honoured fashion. Hence, the exposition of a decision, which includes arguments concerning why the decision is justified, is but one aspect of a decision, not the major constituent or the primary function of the judging process. They only mention briefly that the presentation or exposition sets forth the grounds of the apologia, ratiocination, or justification. They ascribe a limited function to justification to the extent that justification is only one of a number of aspects of decision-making and as such is a distinct issue from the actual judgment and the written presentation of that judgment.

(b) The Judging Process and Logic

Frank's and Dewey's study of logic can be understood as an attempt to understand the relation between non-logical and

logical forms and activities in the judging process in order to determine the proper role of logic in decision-making. Their distinction between the judgment as a non-logical activity and the written presentation of the judgment helps explain why decisions can be presented in a logical form. Although Frank asserts that the judging process is not deductive he thinks that legal opinions ...are written in conformity with the time-honored theory. They picture the judge applying rules and principles to the facts, that is, taking some rule or principle (usually derived from opinions in earlier cases) as his major premise, employing the facts of the case as the minor premise, and then coming to his judgment by processes of pure reasoning.³⁵

Frank's explanation is that the written decision does not describe how the judging process actually works. Dewey also distinguishes between thinking and the syllogism. In his words, "...while the syllogism sets forth the results of thinking, it has nothing to do with the operation of thinking."³⁶ Thus, for Dewey, syllogisms can play a role in presenting decisions.

In Frank's opinion, the proper logical use of rules and principles is to check tentative conclusions. The judge tries to link by formal logic his own tentative conclusion

³⁵ Law and The Modern Mind, 103.

³⁶ "Logical Method and Law", 22.

with the acceptable and more general point of view of the rule or principle. If he does not discover any link he is forced to re-consider "whether his tentative conclusion is wise both with respect to the present case and with respect to possible implications for future cases."³⁷ Dewey's opinion is almost identical. For Dewey, legal rules and principles "are working hypotheses needing to be tested by the way they work out in application to concrete situations..."³⁸

Dewey, like Frank, denigrates the role of logic in legal decision-making, but Dewey's explanation of the nature of thinking and logic is more precise than Frank's rejection of the logical form as the method of thinking used by judge to decide cases. Dewey believes that syllogisms can play a limited role in justifying legal decisions insofar as they present the results of thinking and are the means by which judges account to others for their conclusions. However, for Dewey, understanding the decision process in terms of logic misrepresents how decisions are actually reached. He thinks that "logical justification implies the prior and given existence of particulars and universals"³⁹ and that such a view implies that for every possible case, there is a fixed antecedent rule already at hand; that the

³⁷ Law and The Modern Mind, 131.

³⁸ "Logical Method and Law", 26.

³⁹ *ibid.*, 22.

case in question is either simple or unambiguous, or is resolvable by direct inspection into a collection of simple and indisputable facts.

The exposition of realism presented here does not include the argument that different logical justifications could be made to support either side of a case. The implication is that the indeterminacy of formal decision-making leaves open the question about whether substantive elements are the actual determinants in a decision.

(3) Conclusion

The legal realists raised interesting questions about the nature of decision-making and how to study it. One contribution was their approach to studying the judging process as it "actually occurs in judges". Although Frank and others did not explain or evaluate their methodology, their use of self-reports about how judges reach decisions was a novel way to study the mental activities of judges. Their method of studying the judging process provided an approach to identifying and accounting for the multitude of factors that influence legal decisions.

Their method of studying the decision process was an approach in which the mind of the judge was the centre of the analysis, not unsubstantiated assumptions or formal classifications. Their data was the judge's mind. Their method was to understand decision-making by analysing how it concretely occurred. They understood decision-making as a dynamic process that included various activities, not as a static and completed end-product such as the formalists' perspective suggested.

The realists' explanation of the judging process can be understood within different contexts. Not only was their explanation of the judging process the basis of their criticisms of mechanical decision-making and the portrayal

of legal reasoning as deductive or quasi-deductive, but they identified the significant elements that constitute the judging process. They named activities such as puzzling, hunching, intuiting, checking and testing the solution, judging or deciding, and presenting the judgment as playing a role in the judging process. Despite the fact that some of these activities are little more than names, the realists created the basis for further investigations into the nature of these activities and the relations among them.

One of their most important results was the identification of the judicial hunch or intuition. Frank identified the hunch with the discovery or invention of solutions to legal problems. The hunch was the key element in the realists' explanation of the functions of, and relationships among, the other constituents of the judging process which include puzzling, testing, deciding and expressing the decision. Although the realists did not explain hunches in detail, the acknowledgment of hunching and intuitions provided the realists with an alternative to the primacy ascribed by jurists to deductive methods of decision-making and descriptions of decision-making that were deductive. Although the realists' method of investigation did not amount to much more than the assertion that they were studying how judges actually think by examining self-reports and asserting that hunches were the creative

elements in the decision process and claiming that the decision process involved a non-logical process, they nevertheless initiated an important line of research into the role of non-logical and logical process in law in that hunches occur in response to brooding and puzzling.

The realists' results also raise questions about the relationship between how legal decisions are reached and how they are presented, including both how hunches are presented in a decision and whether hunching and intuitions play any role in the presentation of decisions.

Unfortunately the term "hunch" seems to suggest that the process of hunching is mysterious and cannot be analysed. Neither the legal realists' method of studying decision-making nor their results have been used or developed by modern jurists. Hunches and intuitions have not been studied in contemporary analyses of legal reasoning. Indeed, I shall argue, the nature of the judging process itself has been distorted and ignored by subsequent jurists and that the relationship between the judging process and formal logic remains problematic. This state of affairs may exist because the realists themselves used their awareness of the importance of the judging process in a negative way to undermine the claims of their formalist opponents. But, there are other explanations. Although the realists distinguish between puzzling, hunching and

testing hunches in the decision process, their innovations have been responded to in the form of a debate about the process of discovery and the process of justification which obscures many of the realists' arguments, novel contributions, and even their overall project to understand and to promote wise decision-making and candid legal reporting.

It is necessary to examine these later developments - in the form of contributions by Wasserstrom, Bankowski, and MacCormick - as they define the current context in which questions about "hunches" and "discovery" are posed. Wasserstrom reformulates the legal realists' description of formalism by retreating from the claim that logic or deduction describes the actual way judges reach decisions. In so doing, he creates a clear distinction between the process of reaching a legal decision and the process of justifying it. MacCormick supports the clear distinction between discovery and justification. His work represents a modified formalism that recognizes that substantive elements play a role in the process of justifying legal decisions. Bankowski clarifies what is meant by "discovery" by redefining it as including both the procedures used to reach and to test legal decisions.

3. Searching For The Clear Distinction Between Discovery and Justification

(1) Richard Wasserstrom

Wasserstrom's search for a clear distinction between the process of discovery and the process of justification can be understood as a response to the legal realists' criticisms of legal formalists who described or proposed an essentially deductive or logical decision-making procedure. Wasserstrom calls such a view the deductive theory. His account of the deductive theory, in fact, represents an important modification or qualification of the formalism, attacked by realists, that claimed the judging process is logical and that written decisions accurately describe how a decision is reached. The distinction between discovery and justification, in Wasserstrom's opinion, helps explain the disagreements between jurists who emphasize deduction in judicial decisions and jurists, like Frank, who criticized their theories for being inaccurate and for impeding clear and consistent thinking about the judicial process. Wasserstrom says that the critics of the deductive theory say that "the deductive theory is an inadequate, quite inaccurate account of the way in which courts really have decided cases."⁴⁰ However, in his

⁴⁰ R. Wasserstrom, The Judicial Decision, (London: Oxford University Press, 1961), 16.

opinion,, neither the characteristics of the deductive procedure nor the reasons for its rejection have been clarified in respect to the use of logic in the decision process.⁴¹ He admits that "alternative expositions [of the decision process] have been hinted at"⁴², but thinks that they have not been developed.

Wasserstrom considers the work of Hutcheson and Frank as two undeveloped alternatives to the deductive theory. According to Wasserstrom, Frank's position is that a hunch or intuition of what is the just solution in a case is not the determinative factor by which a judge decides a case. Instead, he argues, Frank believes that it is a judge's personality which is the key to understanding the way in which cases are decided. The decision process employed in a case can be explained only by referring to the individual traits of the judge.⁴³ Hunches, then, depend on the judge's personality. Wasserstrom argues it is wrong to base a criticism of the deductive theory on the idea that the key aspects of the decision process are "feeling, emotion, sensory experience, or unanalysed personal predilection."⁴⁴

⁴¹ *ibid.*, 14.

⁴² *ibid.*, 20.

⁴³ *ibid.*, 21.

⁴⁴ *ibid.*, 24.

Wasserstrom's account of Frank's position amounts to an over-simplification of Frank's point of view in that Wasserstrom states that personality traits stimulate hunches and are the sole elements that influence the decision that is made. By contrast, Frank's opinion is that legal rules and principles also influence the emergence of hunches. Indeed, Frank's point is that, if judges could identify or account for their personality traits, legal decisions would be wiser and more candid. Hunching is only one of the five elements (which include checking and testing hunches) involved in the decision-making process. Hunching is therefore not the only element in the decision-making process.

Wasserstrom also singles out Holmes' statement (quoted on pages four and five) that a judgment regarding the relative worth and importance of competing legislative grounds lies behind the logical exposition of a judgment as an example of the perspective which portrays legal decisions as determined by judges' personalities. Wasserstrom criticizes this point of view by contrasting it with the notion that good or persuasive reasons are the best that can be required to support propositions. He argues that many philosophers, including the realists, confuse the question of whether an argument is formally valid with the question of whether there can be good reasons or persuasive

reasons for believing a proposition to be true or false.⁴⁵ Wasserstrom wants to explicitly distinguish between the process of selecting and evaluating the contents of the propositions, which involves presenting persuasive reasons that support propositions, and the use of formal logic to test the relations between premises that have been selected. Hence he thinks that statements such as Holmes' above and Frank's criticisms of the deductive theory are mistaken if they infer the inherent arbitrariness of the judicial decision process from the limited utility of formal, deductive logic.⁴⁶

Although Wasserstrom states that it makes little sense to describe the judicial decision process as completely deductive and that a judge's opinion is not an accurate report of the decision process, he claims that it makes even less sense to insist "that for this reason courts could not (and should not) employ a procedure or set of procedures that permits of some kind of reasoned justification for the judicial decisions reached by those courts."⁴⁷ He proposes that deduction can be used to test the validity of legal arguments.

This representation of Frank's position also seems to be a

⁴⁵ *ibid.*, 24.

⁴⁶ *ibid.*, 24.

⁴⁷ *ibid.*, 24.

simplification. The realists did, in fact, advocate the use of logic to check the relation between legal rules or principles and potential judgments. Hence both Wasserstrom and Frank seem to identify the use of logic in testing decisions. There is no evidence in Frank's writings that justifying a decision does not require reasons to be given.

Wasserstrom solves the problem concerning the legal realists' response to the formalists, as he understands it, by concluding that the formalists and Frank are describing two distinct processes or "procedures that must be followed before a decision is made or accepted."⁴⁸ The realists are describing the process of discovery and the formalists are describing the process of justification. The process of discovery is concerned with "the manner or procedure in which a decision or conclusion was reached"⁴⁹ - the factors that led to or suggested the decision such as judicial hunches, emotions, and personality. On the other hand, questions concerned with the process of justification inquire about whether a given decision or conclusion is justifiable or justified and "...the manner in which the conclusion was to be justified."⁵⁰ The process of justification involves searching for and testing premises or arguments that substantiate a legal conclusion. An

⁴⁸ *ibid.*, 25.

⁴⁹ *ibid.*, 27.

⁵⁰ *ibid.*, 25.

explanation of the way in which a conclusion or decision was reached is distinct from an account of the procedure a judge employed in "testing" it and does not always "respond to the question of whether the conclusion is in fact justifiable."⁵¹ In other words, he rejects the interpretation of formalism in which the syllogism describes the actual process of decision-making. From Wasserstrom's point of view, the realists were attacking too crude a version of formalism. All that really matters, to Wasserstrom, is how the decision is justified.

Wasserstrom insists that, before judges render a decision, they must be able to justify it. Hunches and intuitions do not count as justifications for a binding judicial decision. They are aspects of the process of discovery. Hence, the decision must be tested to determine if it is justified. For Wasserstrom, there are two procedures that might be followed before a decision is made or accepted.⁵² He leaves open the question regarding at what point one can speak of a "decision", that is whether one speaks of a decision only after a conclusion has been justified.

Wasserstrom understands the judicial opinion to be a report of the justificatory procedure employed by a judge. He claims that, from this point of view, the judge's reliance

⁵¹. *ibid.*, 25, 30-31.

⁵² *ibid.*, 25.

upon rules of law and rules of logic and "the kind of reasoning process that is evidenced by the usual judicial opinion is more suggestive of a typical justificatory procedure"⁵³ than a discovery process. His evidence that such a justificatory procedure exists is the assertion that "some judges have thought they must be able to establish a formally valid relationship between the decision and certain more general premises, and to be able also to give good reasons for the premises so selected."⁵⁴

Wasserstrom states that his description of the process of justification does not conflict with Frank's description of how decisions are reached and that it corresponds, in fact, to Frank's description of how a decision is checked. According to Wasserstrom, the legal realists' arguments are probably correct if the decision process is understood or equated with the process of discovery which he describes as a report of why or how a judge "hit upon" the decision. Remembering that, according to Frank, judging of all kinds begins

...with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it. If he cannot, to his satisfaction, find proper arguments...he will, unless he is

⁵³ ibid., 28.

⁵⁴ ibid., 29.

arbitrary or mad, reject the conclusion and seek another.⁵⁵

To help explain both the dichotomy between reaching a conclusion by whatever means and the process of testing the decision or conclusion, Wasserstrom presents several examples. He illustrates and supports the distinction between discovery and justification in law by introducing a "scientist who has discovered a vaccine which purportedly provides complete immunization against cancer..."⁵⁶ This scientist "... informs the scientific community that he hit upon this particular chemical combination... by writing down 1,000 possible chemical combinations on separate pieces of paper, putting them all into a big hat, and pulling out one of the pieces at random."⁵⁷ This method of finding the vaccine is the process of discovery the scientist followed. But whether the vaccine works is not known. It is a subsequent question whether the scientist's claim is in fact justifiable. This vaccine must be empirically tested to determine if it immunizes people against cancer. "How the scientist happened to select the formula is one question"⁵⁸ and "Whether this formula is an effective vaccine, whether the conclusion can be

⁵⁵ Law and The Modern Mind, 100.

⁵⁶ *ibid.*, 25.

⁵⁷ *ibid.*, 25.

⁵⁸ *ibid.*, 26.

empirically validated, is quite a different [question]."⁵⁹ Moreover, it does not matter how the vaccine was discovered or selected for testing. The relevant question is whether the vaccine, in fact, works.

Although he seeks to establish a "rigid dichotomy" between the factors that lead to the "discovery" of the conclusion and the process by which it is justified, Wasserstrom states that, in practice, discovery and justification may be related in three ways: (1) "...there is nothing immutable about any particular process of discovery or justification."⁶⁰ Various procedures of discovery and justification are possible. The process of discovery and the process of justification may be (a) ordered and formal or (b) haphazard and unsystematic. Wasserstrom reserves the terms "logic of discovery" and "logic of justification" for those procedures of discovery or justification that form a regular pattern and are systematically used in each instance of discovery or justification. (2) The logic of justification guides discovery and provides the criteria for evaluating particular conclusions and the procedures of discovery.⁶¹ (3) The two separate procedures - discovery and justification - are usually performed by the same person in the sense that "...it is generally assumed one

⁵⁹ *ibid.*, 26.

⁶⁰ *ibid.*, 27.

⁶¹ *ibid.*, 27.

should not put forward a conclusion or act upon a decision until one has subjected it to, and substantiated it by, one's logic of justification."⁶² Wasserstrom uses the term "decision" to refer to an outcome that has not been tested and suggests that discovery and justification are not independent processes insofar as justification guides the process of discovery and tests the tentative conclusion or decision.

Wasserstrom's method of analysis is different from the legal realists' approach. It consists of attempting to reconcile the debate between formalists and legal realists by constructing two analytical categories - discovery and justification - based on relegating the non-deductive aspects of decision-making to a process of discovery. He is not engaged in an empirical study of how a decision is reached. His method is to identify the opposing positions in a debate, to comment on them, and then to settle the debate by creating two classifications or categories, arguing that the debate has arisen, at least partly, from realists mistaking formalist claims about the role of logic in justification for claims that logic describes the whole decision-making process. By using this technique he explains and justifies his interest in justification and portrays justification as the primary or more significant process in the decision process.

⁶² *ibid.*, 27.

Wasserstrom concentrates on the critical project of the legal realists and downplays their constructive aims and results. Frank names five activities to be part of the judging process, whereas Wasserstrom claims that only two processes constitute the decision process. Frank's analysis includes (1) puzzling (2) having a hunch (3) checking and testing, (4) judging or reaching a decision or solution, and (5) expounding the decision, but Wasserstrom identifies only (1) the process of discovery and (2) the process of justification. In his explanation of the decision process, Wasserstrom relegates hunches to a minor role relative to the process of justification. But, according to Frank, hunches are the source of legal decisions and play a vital role in the decision process. For Frank, the justification of a decision is simply one aspect, feature, role, or purpose of the written decision, not the primary part of the decision process. The outcome of Wasserstrom's analysis is to reduce the five elements of the decision process named by the realists to two categories and to make one category, justification, the key element in legal reasoning.

(2) Neil MacCormick

Neil MacCormick's explanation of the process of justification can be understood as an affirmation and development of Wasserstrom's response to the legal realists' methodology and results on behalf of an extended formalist positivist perspective. It is an "extended" perspective insofar as he recognises some of the limitations of formalism as pointed out by realists, and hence he accounts for the presence of substantive elements in legal decision-making. His analysis is also shaped by analogies he draws between testing in science and in law and by his own legal-political theory.

MacCormick affirms Wasserstrom's distinction between discovery and justification. He shares Wasserstrom's view that justification has the more significant role in legal reasoning relative to the process of discovery. MacCormick writes that analysing justification in the legal context will make it possible to determine whether discovery or justification is the more dominant process and whether justification guides discovery.⁶³

A number of factors that support the distinction between discovery and justification can be identified in

⁶³. N. MacCormick, Legal Reasoning and Legal Theory, (Oxford: Clarendon Press, 1978), 16.

MacCormick's work. His interpretation of legal realism is one reason for his distinction between discovery and justification. He writes that "what prompts a judge to think of one side rather than the other as a winner is quite a different matter from the question whether there are on consideration good justifying reasons in favour of that side rather than the other side."⁶⁴ He identifies the study of the process of discovery with the legal realists who, in his opinion, have studied "what prompts judges to think of one side as a winner..."⁶⁵ and associates the process of justification, in contrast, with the study of "good justifying reasons" in favour of one side rather than another. The separation of discovery and justification answers the claim of the simplified version of legal realism that justifying reasons are so vague and indecisive that they are always compatible with a decision no matter what it is. The line of solution to this problem taken by MacCormick is to analyse the process of justification in law in order to determine whether the process of argumentation as a process of justification simply consists of justifying reasons that do no more than cloak decisions made on other grounds.⁶⁶

MacCormick examines two types of legal justification,

⁶⁴ *ibid.*, 16.

⁶⁵ *ibid.*, 16.

⁶⁶ *ibid.*, 6.

namely (1) first-order justification and (2) second-order justification. In first-order justification, decisions are justified if they can be deduced from a major premise formulating a valid rule of law and a minor premise formulating the facts proven by the relevant legal procedures and rules of evidence. Thus first order justification could lead to the situation so often stressed by realists that rival rulings in a case could both be formally justified and as such be legally valid. To address that situation MacCormick analyses second-order justification. Second-order justification involves testing rival universal rulings or norms in order to decide which one to accept as legally valid. This topic will be discussed in more detail in the following pages.

MacCormick's book, Legal Reasoning and Legal Theory, is important in that he openly acknowledges the political aspects of his approach. (Such political concerns have, of course, been at work from the outset in the debates between formalism and realism but often they are left unstated.) His theory can be understood as a way of coping with challenges or problems posed by a liberal democracy concerning the function and role of law, namely how to limit judicial discretion and to maintain the separation of powers between the legislature and the judiciary. Not only are deduction and legal justification methods to constrain judicial discretion, they are also methods to control the

arbitrary and irrational factors that influence the formulation of rulings. The realists' talk of hunching represents a threat to the rule of law model in that hunches are seen as arbitrary, irrational, unpredictable, subjective, and the root of unauthorized innovation. Hence, MacCormick presents his account as a description and a prescription concerning how arbitrary and irrational factors in the discovery process are contained and should be contained and how unsystematic and unauthorized judicial decisions are constrained and should be constrained. Because the problem is the arbitrary power of judges there seems to be a fear of anything that looks arbitrary, irrational, or uncontrollable.

To the extent that his theory responds to these challenges or solves these problems, his account of legal justification is not only presented as a description of legal justification, but also as a prescription for a "sound justification procedure".⁶⁷ He "...argues for what [he sees] as good procedures of decision-making and justification."⁶⁸ Indeed, his theory amounts to a defence of current judicial practice which he apparently believes lives up to the prescription.

⁶⁷. N. MacCormick, "Universalization and Induction in Law", Reason in Law: Proceedings of the Conference Held in Bologna, 12-15 December 1984, Volume One, ed. C. Faralli & E. Pattaro, Milan, 1987, 100.

⁶⁸. Legal Reasoning and Legal Theory, 77.

Nevertheless, questions about the extent to which these political concerns affect and distract from an uncommitted and comprehensive investigation of legal decision-making can be raised. In particular, one can ask about the extent to which the clear distinction between discovery and justification is a solution to problems about how to constrain the discretion of judges and how to control the arbitrary and irrational factors that may affect legal decision-making rather than an investigation devoted solely to understanding the nature of discovery and justification. The process of discovery is portrayed as the psychological part of decision-making that must be "constrained" or kept under control by an independent process of justification.

MacCormick uses his understanding of discovery and justification in science to illustrate and support the distinction between the process of discovering legal decisions and the process of justifying legal decisions. Discovery and justification, he asserts, are separate processes in science. "Insights" or sudden flashes of illumination are part of the discovery process. The process of discovery is exemplified by Archimedes' "blinding flash of insight" which occurred when the water overflowed as he got into the baths. In law, the various arguments presented by lawyers to a judge are analogous to scientists' "flashes of insight". Flashes of insight,

however, must be justified.⁶⁹ They could be true or false. Deciding whether an insight is true or false involves testing and proof which are part of the process of justification. Similarly, a judge must test legal arguments and rulings in order to decide whether or not they are legally justified.

MacCormick draws an analogy between Popper's version of "scientific justification" and "second-order legal justification" in order to explain and support his analysis of "testing" in second-order justification. MacCormick explains the analogy between testing in science and second-order justification in the following way. He argues that "...just as scientific justification involves testing one hypothesis against another and rejecting that which fails relevant tests second-order justification in law involves testing rival possible rulings against each other and rejecting those which do not satisfy relevant tests..."⁷⁰ The relevant tests are whether or not the hypotheses/rulings (1) make sense in the world and (2) make sense in the context of the system. Whether a scientific hypothesis makes sense in the real world depends on whether the experimental evidence supports it; by analogy, whether a ruling makes sense in the world depends on whether an evaluation of the consequences of the ruling supports it.

⁶⁹ *ibid.*, 15.

⁷⁰ *ibid.*, 103.

Whether a scientific hypothesis makes sense in the system depends on whether it is compatible with other relevant theories; by analogy, whether a legal ruling makes sense in the system depends on whether it is consistent and coherent with the existing legal system.

I will examine MacCormick's analysis in greater detail in the next chapter. I have chosen his position on the distinction between discovery and justification because, of modern legal theorists, his writings on the subject are the most comprehensive and persuasive.

(3) Zenon Bankowski

As part of an essay defending the use of the jury, Bankowski analyses notions of truth and fact-gathering. He challenges the position that there is a clear distinction between discovery and justification. Two lines of argument can be identified which support his claim. His first argument is terminological. It is concerned with when something can be properly called a discovery. Stated simply, a discovery is something that has passed the relevant tests. His second argument is concerned with the relationship between discovery and justification. In his view, discovery and justification are not independent processes.

Bankowski's point about the use of the term "discovery" is that something cannot be called a "discovery" until it has been justified. Something counts as a "discovery" only if it has passed the appropriate tests. Thus mistakes are not discoveries. In other words, a discovery is a "justified truth". It is wrong either to call a new drug that has not yet been tested a "discovery" or to call the outcome of a legal case that has not yet been justified a "discovery". The new drug or the outcome of the case do not count as discoveries unless they satisfy the relevant tests. For Bankowski, just as part of the process of discovering a cure for cancer is to show that the particular drug

actually works, part of the process of a jury discovering whether an accused person is guilty involves testing and showing that the events form a coherent picture, ie. showing that the events "fit together".

Bankowski directs his criticism of the use of the term "discovery" at Wasserstrom who uses the term to cover only those factors involved in reaching hypotheses or tentative legal decisions. Thus, on Wasserstrom's view, discovery is independent from the process of justifying scientific hypotheses or legal decisions. Nonetheless, in Wasserstrom's analysis, discovery and justification are related insofar as the process of justification guides the procedures and evaluates the conclusions of the discovery process. By contrast, Bankowski argues that Wasserstrom's version of discovery "...artificially curtails the notion of discovery."⁷¹ Bankowski is emphatic that "...discovery includes justificatory activity."⁷²

Bankowski states that his version of what counts as a discovery fits in more readily with our ordinary way of speaking about scientific research than Wasserstrom's explanation of discovery in science. According to Bankowski, if a scientist presented a conclusion to the

⁷¹. Z. Bankowski, "The Jury and Reality", ed. M. Findlay & P. Duff, The Jury Under Attack, (Edinburgh: Butterworths, 1988), 13.

⁷². *ibid.*, 13.

world "...we assume that part of the process of discovery is showing that it actually works..."⁷³ "...and we would assume that this was part of the process of discovery."⁷⁴ Bankowski claims that "Wasserstrom is equating the stage of the choice of hypothesis with the whole process of scientific discovery."⁷⁵ Hence "...it is straining language to demarcate [the act of choosing an hypothesis] as discovery and the rest as justification."⁷⁶

Bankowski's point about when the term "discovery" should be used is important in distinguishing simplified versions of legal realism from the accounts of legal realism presented in this chapter. The simplified versions claim that judges decide cases the way they personally desire and then rationalize their decisions or make up justifications to support them. Such decisions, by implication, are merely "discoveries" that are not necessarily related to legal rules or principles and have not been subject to legally authorized testing or justification. Indeed, the justifications given are considered to be merely camouflage for the "real" reasons for the decision. But this version is not the position of Frank or Dewey who both claimed that judges checked and tested tentative conclusions against

⁷³. *ibid.*, 13.

⁷⁴. *ibid.*, 13.

⁷⁵. *ibid.*, 13.

⁷⁶. *ibid.*, 13.

legal rules and principles in the judging process.

The terminological point is also important in requiring linguistic precision. Unless one espouses a simplified version of legal realism, one should not speak about "discovery" as constituting the judging or decision-making process unless one also includes testing. At the same time, in the decision-making process, the activities of puzzling and hunching which lead to tentative conclusions should be distinguished from the activities involved in testing the tentative conclusions, just as the realists have argued.

Bankowski's second argument is that discovery and justification are not two clearly distinct processes. In Bankowski's words, "Discovery cannot be independent from justification: one cannot separate the two. Discovery includes justificatory activity."⁷⁷ Discovery and justification are inter-related in that what counts as a discovery is partly determined by the procedures of discovery which, in turn, depend on the procedures of justification adopted in that particular situation.⁷⁸ Like Wasserstrom, Bankowski implies that justification or truth-certifying procedures guide the process of searching for tentative hypotheses and legal decisions.

⁷⁷. *ibid.*, 9.

⁷⁸. *ibid.*, 13.

He argues against a form of the correspondence theory of truth whereby the "truth" or "facts of a matter" correspond to some independent reality which is used to measure the truth or falsity of a statement. The criterion of "truth" is not whether particular facts or events correspond to what "really happened". On the contrary, he argues that knowledge of the "truth" or "facts of a matter" is inexorably linked to the methods used to apprehend it. Thus, the procedures of discovery and justification one uses affect what one discovers.

The discovery of the "truth" or "facts of a matter" depends on both the method of searching for what subsequently counts as a discovery and by the criteria or tests used to certify that a discovery has been made. For example, scientific truth depends on the particular method used to discover a hypothesis and satisfying the particular criteria used to test it. Similarly, whether a jury finds an accused person guilty depends on the trial process and the laws of evidence and procedures that are used to construct and to test rival "coherent" stories about what occurred. In Bankowski's own words, "The way we set about finding the truth will also determine in part the truth we get..."⁷⁹

The inexorable links between the procedures used to search

⁷⁹. *ibid.*, 21.

for and to certify or justify a discovery, plus the links between the truth-certifying procedures and what ultimately counts as a discovery, lead Bankowski to the conclusion that different methods of discovering the "truth" or "facts of a matter" can exist that are not necessarily incompatible. Particular procedures of discovery and truth-certification are specific to different systems, institutions, or modes of life. For example, the conclusion of a police investigation that "X did it" is the endpoint of a particular method of discovering what happened. The verdict of a jury that "X is guilty" is the endpoint of a different procedure for discovering what happened. The two conclusions are the outcomes of different methods of discovery.

However, they are not competing "truths" or rival explanations of what "really happened". The particular method of discovery adopted is influenced by a mixture of political, moral, and pragmatic criteria.⁸⁰ For example, the discovery and truth-certifying procedures used by the police are influenced by the desire to apprehend as many law breakers as possible. In contrast, the discovery and truth-certifying procedures adopted in the context of a trial depend, in part, on the need to produce secure verdicts.

⁸⁰. *ibid.*, 22.

4. Conclusion

Two explanations of discovery and justification have been presented in this chapter: (1) the legal realists' version in which hunching and testing are part of the judging or decision-making process and (2) the legal positivists' analyses of the process of discovery and the process of justification. In this section, I highlight the differences in these two positions by summarizing how legal theorists have answered two key questions about discovery and justification. The questions are: (1) "What does the process of discovery entail?" and (2) "What does the process of justification entail?"

So, "What does the process of discovery entail?" Various answers have been given to the question. Both the legal realists and legal positivists identify a creative moment or act, called a hunch or insight, as the key element in a non-logical decision-making process. The realists define a hunch as an intuition of what is just in a case. An insight, the equivalent to a hunch, is the name positivists give to the creative moment in the discovery process. Both the legal realists and legal positivists claim that hunches and insights are tentative and hence they must be tested or justified before they are accepted.

Despite these similarities, legal realists and legal

positivists offer conflicting explanations of the nature of the inquiry that leads to hunches and insights. The legal realists' and legal positivists' characterizations of the discovery process and the factors that influence the emergence of hunches and insights cannot be reconciled with each other. The legal realists treat the process of discovering hunches as a deliberate problem-solving activity. The judge puzzles and broods about a case in order to discover a just solution to it. This search for a solution and the hunch itself are not treated as if they are essentially arbitrary or irrational activities. Although a hunch may be influenced by factors such as a judge's personality traits, the crucial factors that stimulate hunches, according to legal realists, are legal rules and principles and a judge's experience deciding cases. These factors are not portrayed as arbitrary or irrational influences.

By contrast, legal positivists stress that the emergence of judicial insights depends primarily on "subjective" factors such as personalities and emotions which they consider to be essentially arbitrary and irrational influences. Moreover, they characterize the process of discovery that leads to insights as an essentially arbitrary and irrational process in the sense that it is a psychological process that cannot be studied by using the rational and logical methods used by legal positivists. While



Wasserstrom recognises that the process of discovery can form a regular pattern, and in that sense be "logical", he categorizes the act of hunching as primarily irrational.

Legal positivists create confusion regarding what the "process of discovery" entails when they identify the process of discovery with only part of the legal realists' explanation of the judging process. The legal realists do not explicitly use the terms "discovery" or "process of discovery" to describe the judging process. But legal positivists define the "process of discovery" as the subject-matter of the legal realists' studies, namely how a judge reaches a decision. However, legal positivists define the "process of discovery" in terms of only two elements named by legal realists as part of the judging process: (1) puzzling and brooding and (2) the hunch or insight. Legal positivists ignore the other three elements - (1) testing a hunch, (2) reaching a solution or decision in a case, and (3) expounding the decision - that legal realists present as part of the judging process.

Confusion about what the process of discovery entails is also due to the different ways the term "discovery" is used by legal theorists. "Discovery" is used by legal positivists to denote a hunch or insight that is tentative or untested, ie. not yet justified. By contrast, "discovery" would be used by Bankowski to describe a hunch

or insight that has satisfied relevant tests. For him, something is properly called a "discovery" only if it has passed tests. His argument is that the successful outcome of an investigation, what is discovered, depends on both the procedures followed to reach tentative conclusions and the truth-certifying procedures that are used to test whether or not to accept a conclusion. Thus, the process of testing or justifying is part of the process of discovery.

Unfortunately, the confusion about, and conflicts between, the answers to the question "What does the process of discovery entail?" cannot be addressed by simply comparing and contrasting the differences among legal theorists and then resolving them. In my opinion, the process of discovery itself must be investigated in greater detail if the nature of discovery in law is to be correctly understood.

When answering the second question, "What does the process of testing/justification entail?", legal realists and legal positivists agree on a number of issues. They both claim that both logical deduction and procedures which are not strictly logical are used to test or justify tentative conclusions. Legal realists claim that one method of testing a hunch is by comparing it to legal rules and principles to determine if the tentative solution can be

deduced from the rule or principle plus the circumstances of the case. Similarly, in first-order justification logical deduction is used to justify outcomes in cases. If the outcome can be deduced from a valid rule of law or legal principle plus the requisite set of facts stated by the rule or principle, then the outcome is said to be legally justified.

Legal realists and legal positivists identify testing or justifying procedures that involve evaluations that are not strictly logical. Legal realists claim that what a judge thinks to be just and wise in a particular case and in similar future cases is a crucial factor in checking and testing judicial hunches. Similarly, the non-logical justification procedures identified by legal positivists include an evaluation of whether the consequences of a legal ruling make sense in the world in light of justice, common sense, public benefit, and convenience.

Despite these similarities, legal realists and legal positivists offer competing explanations of the relationship between the process of discovery and the process of justification. Legal realists present testing as an element in the decision-making process or what would be known by positivists as the process of discovery. Realists treat checking and testing as an inherent part of a decision-making or judging process that includes: (1)

puzzling and brooding over the case, (2) having a hunch, (3) checking and testing the hunch, (4) reaching a solution or decision, and (5) expounding the decision. The process of checking and testing hunches is not considered to be independent or distinct from the decision-making process.

Bankowski offers an explanation of the relationship between discovery and justification that corresponds to the legal realists' position. Both the realists and Bankowski treat the process that leads to tentative conclusions and the method of testing them as part of a more comprehensive problem-solving procedure. Like the legal realists, Bankowski treats the method of discovering tentative solutions and the procedures used to test them as part of a discovery process. He argues that the conclusion of an inquiry depends on both the procedures of discovery and the truth-certifying procedures that are used by an investigator. Bankowski's point is that discovery and justification cannot be separated. The criteria of testing the truth of a matter guides the process of searching for the truth and the truth of a matter depends on the discovery procedures. Discovery and justification are related to the extent that a person takes into account the testing criteria when devising a strategy to make a discovery. Hence truth-certifying procedures are part of the discovery process.

In contrast to the legal realists and Bankowski, legal positivists do not consider legal justification to be part of the decision-making process. The legal positivists make a clear distinction between the process of discovery whereby a judge discovers a tentative legal ruling and the process of justification whereby legal rulings and decisions are legally justified. Indeed, discovery and justification are distinct and independent processes that must be studied by different methods. The process of discovery is the proper subject-matter for psychologists who employ specialized methodology to study it, whereas the process of justification is the proper subject-matter of legal theorists who use logical and rational methods of investigation. They stress that the process of justification is not part of the decision-making process in the sense that justification is a process that is independent from any mental elements that comprise the decision-making process and is not necessarily related to questions about what a judge thinks about when reaching a decision.

Legal realists and legal positivists differ in their assessments of the relative significance of discovery and justification in the legal context. Realists do not treat puzzling, brooding, and having hunches as less important or more important than checking and testing tentative solutions or presenting them in public. However, legal

positivists claim that the process of justification is the more crucial process compared to discovery. The effort to find out how a judge reaches a decision is less important than determining whether the decision, reached by whatever means, is legally justified. Hence the legal positivists study legal justification and ignore the process that leads to insights. Moreover, they have not explicitly asked questions about how a judge actually goes about testing tentative rulings and decisions in the decision-making process.

These rival explanations of the relation between discovery and justification are related to a number of problems concerning what decision-making entails. (1) The first problem is terminological. The term "decision" is used in various ways. (2) The second problem is that explanations of the process of decision-making itself are problematic. Different versions of "decision-making" offer conflicting explanations of the relations between discovery and testing in the decision process. (3) The third problem concerns the relation between the process of decision-making and legal justification. The relation between "testing" in decision-making and legal justification has not been investigated by legal theorists, yet various relations between "testing" and legal justification are assumed. I will identify each of these problems in turn.

(1) The absence of deliberate efforts to define "decision" leads to confusion and conflicts about the subject-matter under investigation. "Decision" is used to denote a possible or tentative outcome or conclusion that has not been tested. "Decision" is also used to indicate an outcome or conclusion that has successfully passed tests. "Decision" is, additionally, the name given to an outcome or conclusion reached on grounds that are different from the reasons publicly given for the outcome. Here a "decision" would be a rationalization of the "actual" decision process. "Decision" is also used to refer to an oral presentation or written text that communicates an outcome. And "decision" is also used to indicate the moment when a judge chooses a conclusion. It is difficult to resolve debates about the relations between the nature of decision-making and justification when theorists are defining "decision" in so many different ways and are, in effect, talking about different things.

(2) Legal theorists offer conflicting versions of the decision-making process. The legal realists' and Bankowski's versions of decision-making include both the process of discovering tentative outcomes and the process of checking and testing them. Both discovery and testing are elements comprising the actual process whereby a judge or an inquirer reaches a legal decision and subsequently expounds it. By contrast, legal positivists define the

process of decision-making solely in terms of the process of discovering tentative outcomes such as insights and possible legal rulings. In other words, "decision-making" and the "process of discovery" are different names for the same process. Unfortunately, they neither ask questions about the nature of testing in the decision-making process nor about the relation between testing in decision-making and the process of legal justification. Their view is that the process of legal justification begins where the process of discovery or decision-making ends.

(3) Legal positivists argue that legal justification is distinct and independent from the decision-making process. Although they do not treat the process of justification as part of the process whereby a judge reaches a decision, they do not deny that there may be some overlap of testing in the decision-making process and the public legal justification of a decision. In their opinion, how a judge actually tests and justifies a legal decision to oneself in private is independent from the process of public legal justification that ultimately determines which rival legal ruling is accepted which, in turn, determines the outcome of a case. Hence questions about the mental processes that comprise the decision-making process such as how a judge actually tests and justifies an outcome to oneself are irrelevant to their project. Instead legal positivists direct their efforts to understanding and explaining why

and how a legal decision is legally justified irrespective of what a judge actually thought about when testing it.

Perhaps one should simply accept Wasserstrom's conclusion that discovery and justification are clearly distinct and that the realists and legal positivists are talking about different things. The realists are investigating the process of discovery, (how a judge reaches a tentative outcome), and the legal positivists are analysing legal justification, (how a decision is publicly justified). Even Bankowski's amendment that the process of discovery includes truth-certifying procedures does not undermine Wasserstrom's conclusion above. The legal positivists' version of legal justification can still be regarded as independent from the process used by a judge to privately test and justify a decision to oneself.

The problem with accepting this conclusion is that discovery and testing in the decision-making process have not been studied by legal theorists. Thus one can neither conclude that discovery or testing in legal decision-making are independent from legal justification nor claim that any similarities between testing and legal justification are merely incidental. Before drawing such conclusions, discovery and testing in the decision-making process must be thoroughly investigated.

In summary, the explanations of the nature of discovery and justification discussed in this chapter are problematic in two important ways: One, the realists' version of puzzling, brooding, and having hunches competes with the legal positivists' explanation of the emergence of insights and tentative legal rulings as the correct explanation of the process of discovery. The nature of discovery is disputed. Legal realists treat puzzling and hunching as a deliberate problem-solving activity, whereas legal positivists portray the process of discovery as an essentially arbitrary and irrational activity. Moreover, the contents of the discovery process are not settled. Discovery, for legal realists and Bankowski, would include testing, but legal positivists define the process of discovery in terms of puzzling and insights. The question is whether the process of discovery includes untested or tested hunches/insights. In my opinion, these issues can only be resolved by examining the process of discovery in detail.

Two, legal positivists draw a number of conclusions about the relationship between discovery and justification that compete with the methodology and findings of the legal realists. Legal positivists assume that justification is the crucial process compared to how a conclusion is reached or is privately tested, whereas realists do not treat any of the elements in the judging process as more important

than another. Legal positivists define decision-making in terms of discovering tentative conclusions. By contrast, for the realists, not only is discovering hunches part of decision-making, but testing is also a crucial part of decision-making. Finally, although legal positivists study justification, the nature of testing in decision-making and the relations between testing and justification are not known. Unfortunately, the nature of testing in the decision-making process has not been studied by modern legal theorists. In my opinion, these issues can only be addressed by investigating "testing" in the decision-making process.

The goal of this thesis, then, is to introduce an approach to examining the nature of discovery and testing in legal decision-making. Questions about the nature of discovery, testing, and justification are answered by examining the decision-making process in detail. How tentative outcomes actually emerge and how they are actually tested will be examined. The writings of two philosophers - Bernard Lonergan and Garret Barden - on discovery and testing will be used to help answer two questions: (1) "What does discovery in legal decision-making entail?" and (2) "What does testing in legal decision-making entail?"

Chapter Two

The Analogy Between Science and Law

1. Introduction

In this chapter, I want to explore the analogy between science and law referred to in Chapter One. A number of modern legal theorists, including R. Wasserstrom and Z. Bankowski, have drawn an analogy between science and law in order to illustrate and support their arguments concerning the relation between discovery and justification in law. Yet, I would suggest, these discussions about the relationship between discovery and justification in science and law are more general and gestural than explanatory. By contrast, Neil MacCormick offers what appears to be a more sustained and explicit use of the science-law analogy in his analysis of legal justification.

In particular, I will examine how the analogy between science and law has been used (1) to understand how legal justification is similar to testing in science and (2) to understand the distinction between discovery and justification. My focus is on how MacCormick invokes Popper's explanation of scientific testing in Legal Reasoning and Legal Theory.

Insofar as MacCormick's analysis of legal reasoning goes

beyond a general and gestural invocation of science in law, it presents an opportunity to investigate the processes involved in legal decision-making that are understood and explained by using this analogy. However, if the analogy between science and law is taken seriously, it turns out that the analogy is rather weak. Perhaps MacCormick did not intend the analogy to be taken so seriously, but it is disappointing to discover that the analogy offers a limited perspective from which to study "discovery".

Although I do not want to reject the science-law analogy entirely, this chapter raises doubts about the enterprise of comparing science and law. Using the scientific analogy as a means to study law, that is, studying law in terms of science, may obscure processes that are particular to law. In fact, even as an account of science, the Popperian model of science used by MacCormick as the basis of his analogy between science and law has been challenged by a number of philosophers of science. Hence an important question raised later in this chapter is, "To what extent do science and law operate in analogous ways?"

2. Legal Justification

As sketched out in the previous chapter, Legal Reasoning and Legal Theory explores the potential and limitations of formalism in the deductive application of rules. MacCormick calls the process of legal justification, to the extent that it is purely deductive and logical in character, first-order justification. First-order justification consists in testing whether the relationship between a valid rule of law, legal facts, and a legal decision is a valid deductive inference. A decision is legally justified if it can be logically deduced from a valid rule of law plus the existence of the relevant operative facts which are stated in the rule of law. Deductive justification, however, has a number of well-known weaknesses. The same decision can be derived from different rules of law and, on the other hand, opposite decisions can also be obtained by deductive reasoning. As the realists emphasised, the problem of formalism as a test is that rival decisions can easily survive. Hence, deductive subsumption in some cases, by itself, does not seem to be a sufficient test of legal justification. It is due to these weaknesses of first-order justification that, while first-order justification is necessary, it is not always sufficient on its own to justify a decision.

Due to these weaknesses, especially the possibility that rival rulings or rival versions of a ruling may be

applicable in a case, other factors including substantive concerns are evaluated in order to determine which ruling to apply. In MacCormick's opinion, the judges' evaluation of such factors is not some whimsical irrational activity that leads to arbitrary decisions, but rather the process is controlled through various requirements or processes known collectively as second-order legal justification. Hence judicial decision-making is constrained by fulfilling a set of general requirements or conditions. The consequences of the legal rulings are evaluated in the particular case and in other imagined cases in terms of public good, justice, common sense and convenience. The legal ruling must also be consistent with other valid and binding rules of law and be coherent with the legal principles in the legal system.

The comparison MacCormick makes between Popperian science and law is concerned with two overarching analogies: (1) testing in science as a model for legal justification and (2) the clear distinction between discovery and justification. In the following sections, I will examine and evaluate these two analogies in more detail.

3. Popper's Model of Science

Sir Karl Popper sharply distinguishes between discovery and justification in the sense that "the process of conceiving a new idea" is independent from "the methods and results of examining it logically".¹ This distinction is based on his claim that different methods must be used to study how hypotheses are reached or discovered and how hypotheses are tested. How new ideas and scientific theories occur and the reconstruction of the processes involved in the stimulation and release of an inspiration are, in his opinion, the concerns of empirical psychology, not his discipline - the logic of knowledge. Questions about the discovery of new ideas and inspirations cannot be answered by logical analysis. Popper claims "There is no such thing as a logical method of having new ideas, or a logical construction of this process"² because "every discovery contains an irrational element, or a creative intuition, in Bergson's sense."³

Despite the title of his book, The Logic of Scientific Discovery, Popper limits his study to the logic of justification. His discipline - the logic of scientific knowledge - is a quite different field of inquiry from

¹. Karl Popper, The Logic of Scientific Discovery, (New York: Basic Books, 1959), 37.

² *ibid.*, 31.

³. *ibid.*, 31.

psychology. The logic of scientific knowledge is concerned with answering questions about how new ideas and hypotheses are tested and justified. It is concerned with the logical examination of scientific statements that have been formulated and presented for logical analysis and testing. Some of the questions the logic of scientific knowledge seeks to answer are "Can a statement be justified? And if so, how? Is it testable? Is it logically dependent on certain other statements? Or does it contradict them?"⁴

Testing begins only after tentative hypotheses have been formulated and presented for testing. Popper describes his account as the "deductive method of testing". His method of logically analysing the procedure of testing in science is based on his stated assumption that the logic of knowledge "consists solely in investigating the methods employed in those systematic tests to which every new idea must be subjected if it is to be seriously entertained."⁵ His method is to rationally reconstruct, that is, to give a logical skeleton of the procedure of testing.

Testing a theory or hypothesis is performed by deducing predictions from the theory which will, in turn, be subject to empirical tests. Two stages can be detected in Popper's explanation of testing in science. The first stage of testing consists of three activities: (1) deducing

⁴. *ibid.*, 31.

⁵. *ibid.*, 31.

predictions and comparing them to each other, (2) determining whether or not the predictions can be empirically tested, and (3) judging whether, if the theory passes the requisite tests, it would be a scientific advance compared to a rival theory. These activities are involved in determining whether the theory can be empirically tested. In other words, the first stage of Popper's account of scientific testing could be considered a test of the empirical testability of the theory. If the theory is not empirically testable it would be rejected. The following paragraphs are a brief explanation of the three activities involved in the first stage of testing.

(1) Predictions are deduced from a theory or hypothesis which is given or assumed to be known and initial conditions which are known or assumed to be true by observation. These predictions are compared to each other to determine whether the logical relations among predictions are equivalent, derivable, and compatible with each other and to determine whether the theory is internally consistent.

(2) The theory or hypothesis is analyzed to determine if it is empirically testable in the sense that the predictions must be empirically falsifiable. It must be possible to design an experiment to test whether or not the predictions deduced from the theory conflict with experimental results. In other words, it must be possible to refute the theory or

hypothesis by observation. If contradictory predictions can be deduced from the same theory and no experiment can be designed to show that, if the experimental results agree with one prediction, they cannot agree with the other prediction, then the theory is empirically untestable.

Some theories are more testable than others insofar as "the testability of a theory grows with its degree of universality since the number of predictions that can be deduced and tested is proportional to the degree of universality of the theory."⁶ The greater a theory's degree of precision⁷, the greater its testability. A precise statement can be more easily refuted than a vague statement because specific predictions can be deduced from it. Measurements and quantitative statements in testing help increase the degree of empirical testability of theories.

Popper envisages testing as a competition between rival theories - the current or existing theory and the new theory. One theory is accepted in preference to another if it can stand up to more severe tests and if it is testable in a more rigorous way.⁸ As between two competing theories, predictions that are testable are further

⁶. K. Popper, Objective Knowledge, (Oxford: Clarendon Press, 1972), 356.

⁷. *ibid.*, 356.

⁸ *ibid.*, 108.

selected according to two criteria: (a) the non-derivability of the predictions from the current theory, in contrast to the new theory and (b) the extent that the predictions contradict the current theory.

(3) The theory is examined to judge if it would be a scientific advance, assuming it survives testing, by comparing it with other theories. Here, Popper envisages competing theories being tested to determine which one is better corroborated by experimental results, can predict new phenomena that the rival theory cannot predict, and is capable of explaining the success of the rival theory. The concern is whether the theory or hypothesis makes sense in the context of current scientific knowledge.

The second stage of scientific testing includes performing experiments in order to compare the predictions to an actual observable situation. One decides whether or not the predictions agree with the experimental results and, in turn, whether the theory is falsified or not. Thus, the second stage of testing involves testing a theory or hypothesis in order to find out how far the predictions deduced from it stand up to experimentation and/or practical technological applications.

Popper explicitly analyses the procedure of testing predictions. Predictions are compared with the results of experiments which represent an actual observable situation

and practical applications in order to make a positive or negative decision about whether the predictions occurred or not. If a prediction does not agree with the observed situation, then the hypothesis or theory is shown to be false and is said to be falsified. Whether a prediction turns out to be acceptable or not therefore depends on whether the experimental results contradict the prediction or not. If the prediction turns out to be acceptable or corroborated, then the theory has passed the test. For the time being there is no reason to discard the theory. There is always the possibility of future negative experimental results which could overthrow the current theory. As long as a theory withstands testing and is not superseded by another theory, Popper says it is corroborated or has proved its mettle by past experience. But a theory is falsified if the predictions derived from the theory are contradicted by the experimental results.⁹ "If the [predictions or] consequences do not agree with the actual observable situation"¹⁰ the theory or hypothesis from which they were logically deduced is false.

After this type of testing we still do not know whether the theory is false or whether the initial conditions describe a situation that does not correspond to the real situation and hence are false. But we do know that if a prediction is falsified that means that either the theory or the

⁹. *ibid.*, 96.

¹⁰. Objective Knowledge, 353.

initial conditions are false or that both the theory and the initial conditions are false. However, if the prediction is not falsified it does not mean that the theory is verified because a prediction that corresponds to observable events can be deduced from false premises.¹¹ A theory, then, is not and cannot be tested directly. Only specific predictions are tested by experiments and practical applications. The question of the falsifiability of theories is reduced to the question of the falsifiability of predictions.

Theories are also tested against their rivals. Competing theories offer different predictions. If the predictions deduced from the first theory agree with the experimental results and the predictions deduced from the second theory do not agree with the experimental results, the second theory should be rejected and the first theory should be accepted. The theory with the greater number of predictions that agree with the experimental results should be accepted as the better explanation and the other theory should be rejected.

But decisions settle the fate of a theory. The result of a test includes a decision about the point at which further testing of the observable events is unnecessary and a decision about which empirical results to accept or reject. These decisions ultimately rest on agreement among

¹¹. *ibid.*, 353.

investigators. But one general guideline is that a theory is not rejected due to the immediate or automatic acceptance or rejection of a single prediction.¹²

Although all statements about observations can be subject to further testing, every test of a theory must stop at some observable event that "we decide to accept."¹³ Scientists stop at the point they are satisfied with for the time being. The stopping point is identified during testing when investigators agree to accept or reject the correspondence between predictions and observable events as a sufficient criterion. Although Popper talks about "observable events" as stopping points, in his opinion, predictions are not justified by perceptual experiences. Popper says that, from a logical point of view, the testing of a theory depends upon accepting or rejecting predictions as the result of a decision or agreements which "are reached in accordance with a procedure governed by rules."¹⁴ A theory is applied and if the observable events are accepted by a free decision, then the theory is not falsified.

The role of deduction is a crucial aspect of Popper's analysis of testing in science. Deduction is used when a scientist has already formulated a theory and wants to test

¹². *ibid.*, 15.

¹³. The Logic of Scientific Discovery, 104.

¹⁴. *ibid.*, 106.

it empirically. During the first stage of testing, in which predictions are deduced from a theory, deduction is the method used to find the logical consequences or predictions from a theory and initial conditions. Here, its role is to deduce predictions and as such is a method of discovery. But deduction is also an important part of testing whether the theory can be tested. If predictions cannot be deduced, then the theory is not testable. Deduction, then, is both a discovery technique and a method of testing. In the second stage of testing, each prediction is tested by comparing it to an actual observed situation. If the prediction does not agree with the observed situation, either the universal theory or the description of the initial conditions, or both the theory and initial conditions are false. Here, deduction is used to test a theory by double checking whether the observed results of experimentation can be deduced from the theory and the initial conditions.

4. The Analogy Between Science and Law

(1) Scientific Testing/Legal Justification

MacCormick compares Popper's model of testing in science with justification in law. In this section, I will identify the main points of correspondence between scientific testing and legal justification. I will examine the analogies he draws between (a) scientific hypothesis and legal rulings (which are general legal rules or norms), (b) predictions deduced from scientific theories and consequences derived from legal rulings, (c) the requirement in science and law that hypotheses and rulings must make sense in the system and (d) in the real world.

It is essential not to confuse Popper's first stage of testing with first-order legal justification. One might expect the law-science analogy to be between testing predictions deduced from a theory and testing outcomes or conclusions deduced from a rule of law. Hence the plausibility of the analogy might seem to rest on understanding the legal syllogism as the method of deriving predictions, just as predictions in science are logically deduced from theories and hypotheses. But this is not the case. The difference is that, in science, empirically testing the predictions will test the theory. By contrast, in first-order justification the particular outcome or conclusion in a case is not deduced in order to test a rule

of law; the rule of law is taken to be legally valid before the conclusion is deduced. There is no question at all that one could end up concluding that a rule of law is not valid. Rather, deduction is used to test whether the particular outcome or conclusion in a case is legally valid. The legal syllogism is used to determine whether a particular outcome can be deduced from a single valid rule of law plus the requisite factual situation stipulated by the rule.

Further, in science, deduction is used to draw predictions from rival theories in order to empirically test which of the competing theories should be accepted, whereas in first-order justification deduction is not used to settle situations involving rival rulings, for each ruling has a corresponding outcome that is part of a syllogistic justification. That is why they are rivals. Hence the analogy between science and law drawn by MacCormick is between testing rival scientific hypotheses and justifying rival rulings in second-order legal justification.

(a) Hypotheses/Rulings

MacCormick compares the legal problem of rival legal rulings (i.e. "rival legal rules or rival general norms") to the situation in science described by Popper of rival scientific theories or hypotheses. A legal ruling is like a hypothesis. Both rulings and hypotheses are universals

that must be tested. Two legal rulings (two rules of law or two versions of the same rule of law) seem to be rivals in two ways: (1) competing for acceptance and also (2) yielding opposed outcomes. In science, if the relevant tests are satisfied, one is justified in accepting one hypothesis rather than another and in law, if the appropriate tests are passed, one is justified in claiming that the ruling is legally justified and therefore it ought to be given.

(b) Predictions/Consequences

Testing in science is treated as analogous to justification in law in that rival hypotheses and rulings are tested to determine which one to accept. For Popper, the key to testing hypotheses is to deduce predictions from them and then to test the predictions by comparing them to experimental results. The analogue to predictions in law is actually the consequences which are derived from legal rulings and subsequently tested. For instance, it might be that accepting a ruling that allowed recovery for pure economic loss would lead to a huge increase in litigation. This is a consequence to be "tested". It is in this context that MacCormick applies Popper's hypothetical-deductive model of testing to law.

(c) Hypotheses/Rulings Must Make Sense in the System

MacCormick draws an analogy between the requirement that, before a legal ruling is considered justified, it must make sense in the legal system and the requirement found in Popper's first stage of testing that a hypotheses must make sense in the system or body of knowledge. A hypothesis must be compatible with, or fit with, other theories and hypotheses. The requirements of consistency and coherence are the tests of whether a legal ruling "makes sense in the legal system". Legal rulings must be "consistent with the pre-established body of law in the strict sense of not directly conflicting with any already authoritative and undistinguishable rule."¹⁵ A ruling also "has to fit with the general principles of the system, whether principles already formulated or newly developed on the basis of analogical arguments."¹⁶

(d) Hypotheses/Rulings Must Make Sense in the World

MacCormick's claim that legal rulings must "make sense in the world" is equivalent to Popper's second stage of testing in which theories and hypotheses are empirically tested. Presumably, evaluating the acceptability of the

¹⁵ N. MacCormick, "Universalization and Induction in Law", Reason in Law: Proceedings of the Conference Held in Bologna, 12-15 December 1984, Volume One, ed. C. Faralli & E. Pattaro, Milan, 1987, 101.

¹⁶ *ibid.*, 101.

logical and probable consequences of legal rulings in light of their justice, common sense, public benefit and convenience is analogous to testing predictions by performing experiments and comparing them to observable experimental results.

Despite the plausibility and attractiveness of the analogies between testing in science and legal justification, there seems to be a floating quality to the analogy. If the analogy with science is examined more closely, we find that some aspects of testing in science and legal justification are very different. Furthermore, we find that some analogies between science and law have not been developed and, hence, what at first glance seems analogous is not. Although MacCormick's explanation of legal justification has a persuasive appeal it does not, on further examination, seem to be a rigorous analysis. Indeed, it is not intended to be a comprehensive analysis.

(2) The Clear Distinction between Discovery and Justification

MacCormick transfers Popper's clear distinction between discovery and justification in science to law. MacCormick's explanation of the roles of discovery and justification in law parallels Popper's account of discovery and justification in science; in both fields the process of discovery provides tentative formulations - hypotheses and legal rulings - that must be subsequently tested by an independent testing or justifying process.

The distinction between discovery and justification in science rests on Popper's claim that independent methods must be used to study each process. Similarly, the proper discipline for examining the process of discovery in science and law is psychology, whereas the process of justification in science and law is studied from the point of view of the logic of testing. A scientist and judge can come up with their ideas by any means, but the crucial issue is whether their ideas are justified. Hence studying how legal rulings are discovered is not directly relevant to investigating the process of legal justification.

5. Problems with the Analogy Between Science and Law

In section four, I explained that the analogue to scientific predictions was not the syllogistic deduction involved in first-order justification, but instead was the consequences derived from two rival legal rulings. As a critical point, it is important to emphasize that this comparison suggests a superficial plausibility to the analogy between scientific testing and legal justification. MacCormick did not intend the analogy to be taken seriously on all points. Nonetheless, in this section, I want to examine the differences between testing in science and legal justification.

(a) Hypotheses/Rulings

Although MacCormick presents rival legal rulings and competing scientific hypotheses as analogues in that they both must be subject to a testing process before accepting one rival and rejecting the other, legal rulings and scientific hypotheses are different in an important way. The nature of the rivalry between two scientific hypotheses is different from the nature of the rivalry between two legal rulings. Two scientific hypotheses are rivals in the sense that a scientist must decide which hypothesis is corroborated by the experimental results and which hypothesis is not. Experimental results are used to settle the rivalry insofar as they corroborate one hypothesis and

not the other. Moreover, one common set of experimental results is used to settle the rivalry between hypotheses.

Although two legal rulings are rivals in the sense that they are alternatives that compete for acceptance by a judge, there is a more significant type of rivalry that has not been noticed. The consequences of each ruling are also rivals. The judge must decide which consequences are preferred - those of ruling A or those of ruling B. To be more specific, the evaluation of the pros and cons of the consequences of ruling A competes with the evaluation of the pros and cons of the consequences of ruling B. Hence the significant rivalry in the legal context is between the results of two separate test results - results of the test of the consequences of ruling A and the results of the test of the consequences of ruling B. This type of rivalry is not found between scientific predictions deduced from competing theories. The rivalry between predictions in science is settled by one common set of test results, whereas rival consequences in law that have been tested are still rivals because the test results themselves compete. For example, Ruling A may "test well" or "score high" on public benefit, but Ruling B may "test well" on justice. The judge must still choose which ruling to accept. In this way, the test results themselves are rivals; public benefit competes against justice. (This issue will be addressed later in Chapter Six concerned with practical reasoning.) The rivalry between rulings is not settled

until the judge judges that one set of tested consequences is preferred to another set and chooses to accept the ruling that has those particular tested consequences. In short, the rivalry between scientific hypotheses is over which hypothesis is better supported by what, in fact, are the experimental results. But the rivalry between legal rulings remains unresolved, even after testing, until a choice is made between two sets of test results.

(b) Predictions/Consequences

Although MacCormick presumably equates predictions with consequences in that both are derived from universal statements, there are significant differences in the way they are derived and tested. For Popper, predictions are derived by deducing them from rival hypotheses. Predictions amount to particular statements deduced from universal hypotheses. The process of deduction moves from a universal to particulars. Although MacCormick speaks of the "logical and probable" consequences of a legal ruling, consequences are not derived from a legal ruling in the same way as predictions are deduced from universal hypotheses. Consequences are not derived through syllogistic deduction. Consequences are derived through a process of universalizing that involves considering the effect of the ruling in similar cases. The judge presumably wants to know the consequences that the legal ruling logically implies and would probably bring about in

hypothetical cases which might occur and would come under the terms of the ruling.¹⁷ In other words, consequences are understood as the outcome of universalizing.

This explanation is quite different from Popper's explanation of the deduction of predictions from hypotheses in two ways. One, the process of deduction in science moves from universal to particular, that is, from an universal hypothesis to a particular prediction, whereas in law the process moves from a particular to a universal, that is, from identifying the particular consequence of a legal ruling in the case at hand to universalizing or generalizing the consequences in hypothetical situations. Second, consequences are not particulars, whereas predictions are particular. Consequences consist in a universalized or generalized state of affairs, not in particular concrete effects or results. Consequences understood in terms of arguments about "floodgates" and the "justice" of deciding similar cases in a specific way are quite different from predictions such as "A load of 2 pounds will break the thread." Predictions, then, are unlike consequences in that predictions are particular and consequences are universal.

Although deducing predictions from theories and hypotheses and then testing them is vital to Popper's explanation of testing, no analogous process of deduction can be detected

¹⁷ *ibid.*, 105.

in MacCormick's account of legal justification. Despite the fact that deduction is a crucial part of first-order justification, first-order justification is not part of the science-law analogy and deduction in first-order justification has nothing to do with deriving predictions or consequences. However, in second-order justification, where predictions are presumably analogous to consequences, it turns out (1) that predictions in science are particular but consequences are universal and (2) that predictions are deduced but consequences are universalized.

(c) Hypotheses/Rulings Must Make Sense in the System.

The first stage of testing that I identified in Popper's account of scientific testing consists of a set of tests that precede a second stage of empirical testing. I have already considered and cast doubt on MacCormick's construction of a legal equivalent to Popper's first stage of testing when I contrasted predictions and consequences. But MacCormick invokes other aspects of the first stage of scientific testing, namely a determination of the logical relations among predictions and other theories. The legal analogues are the requirement of consistency and the requirement of coherence. However, after analysing the comparison, the analogy seems weak.

Popper writes about assessing the consistency among predictions deduced from a theory or hypothesis. The aim

is to determine if the predictions are logically equivalent, derivable, and compatible with each other. But, for MacCormick, the logical relations among consequences (the analogues to predictions) are not tested at all. Instead, the requirement of consistency is concerned with testing whether a legal ruling is consistent with other valid and binding rules of law, that is, it makes sense in the system. Thus the science-law analogy drawn by MacCormick is between predictions and legal rulings, between particulars and universals, and not between predictions and consequences as one might anticipate.

MacCormick's explanation of the requirement of coherence, according to which a legal ruling cannot conflict with valid legal principles of the legal system, resembles Popper's requirement in the first stage of testing that the relation between a new theory or hypothesis and the existing body of scientific knowledge must be examined. For Popper, spelling out the relation between a new theory or hypothesis and other scientific theories and hypotheses is a vital part of the testing process. The requirement of coherence, on the other hand, is not part of a procedure for testing whether a legal ruling is testable. Instead, the test of coherence is an important part of testing whether to accept the ruling at all. Coherence is not a test of the testability of a ruling.

As part of the process of testing whether a new theory or hypothesis is testable, a new theory or hypothesis must be examined to assess whether it has any meaningful implications for the body of scientific knowledge in the sense of whether the theory or hypothesis would be an advance in understanding if it is not falsified by empirical testing. By contrast, questions about whether a legal ruling would be some sort of "advance" in the legal system are not raised by MacCormick. In fact, MacCormick does not raise questions about testability in the legal context. Apart from the requirement that legal rulings must be universals, he does not discuss whether there are any pre-requisites that must be satisfied before testing the consequences of a legal ruling. In contrast, for Popper, a theory or hypothesis is testable only if it has some form that can be empirically tested. Some theories such as Marxism, psychoanalysis, and astrology are so vague that opposite predictions can be deduced from them. Such theories are empirically untestable. If a theory or hypothesis is to rank as science it is essential that only one element in a set of opposites can be deduced from the theory or hypothesis.

(d) Hypotheses/Rulings Must Make Sense in the World

Although both hypotheses and legal rulings, and hence predictions and consequences, must be tested to determine whether or not they make sense in the world, the method of

testing is fundamentally different in science and law. Predictions are tested by comparing them to actual observable situations by experimentation. Deciding whether to accept or reject a prediction depends on whether the prediction corresponds to observed events. In contrast, consequences are tested by examining how they are related to values such as justice, common sense, public benefit, and convenience. The findings of such an analysis are then compared in order to decide which set of consequences is more acceptable and, in turn, which ruling is preferred. This type of testing amounts to a thought-experiment. Testing involves thinking of a case, working out the logical and probable consequences of that case and other cases and testing the consequences by thinking about them.

Further, in science the decision whether or not to accept a prediction depends on whether the prediction agrees with the observed events, but in law the decision to accept a consequence rests, not on observations, but on an evaluation of the consequences. In science, testing predictions can be summed up by the question, "Do these predictions agree with the experimental results?" but in law the question is "Do I prefer these imagined consequences which "score high" on public benefit or those imagined consequences that "score high" on justice.

In science, the decision to accept an hypothesis and the evidence for it are open to inspection by others. The

experiment can be repeated to check if the observed events occur and the conclusion can be checked in light of the observed events to determine if the observed events are sufficient to support the conclusion. In science, the decision to accept a hypothesis must be supported by sufficient evidence. However, in law it is more difficult for others to evaluate whether the decision to accept a legal ruling is adequate. The specific "thought-experiment" of a judge cannot be precisely replicated by another person. The factors that one judge even thinks about, the factors one judge considers pertinent, and the factors that are considered sufficient for accepting a ruling can vary from judge to judge. Hence, in order to evaluate the decision to accept a legal ruling, another person cannot re-do the original tests performed by the first judge. Instead the second person must perform an evaluation of the case for oneself, which will be influenced by one's own knowledge and values. In short, the decision whether or not to accept a legal ruling depends more on the knowledge and values of an individual judge than the decision to accept a hypothesis made by a scientist.

MacCormick accepts Popper's account of falsifiability and suggests that a theory or hypothesis that is not falsified is similar to a ruling that has been accepted. In Popper's model, despite the fact that a theory may be thought to be a better explanation than a rival, it is not verified in

the sense of being true. It has only been shown that, so far, the theory is not false. In contrast, the legal ruling which is chosen over a rival is the one that "ought to be given" and the ruling which is considered to be "just" and "right". From this perspective, the acceptance of a legal ruling is more conclusive than the non-rejection of a theory or hypothesis. One might even go so far as to say that a legal ruling is a true statement of the law at that particular time and in those circumstances. On the other hand, the legal ruling could be considered as not yet falsified in the sense that disadvantages of the ruling may become evident in the future and the law may need to be modified. But these issues are not raised by MacCormick.

6. Re-considering The Analogy Between Science and Law

I have indicated many points of asymmetry and lack of fit between what initially was presented as a plausible analogy between testing in science and legal justification. Some differences between testing in science and testing in law are fundamental while other differences are less significant. However, collectively they cast doubt on the appropriateness of the attempt to use testing in science as a way of understanding and legitimating the process of legal justification. The analogy drawn between science and law cannot be defended by arguing that the analogy is only meant gesturally for two reasons. One, by identifying law with science, the prestige of science in the intellectual community helps bolster and enhance the attractiveness of MacCormick's account of legal justification. In this sense, the analogy helps quell doubts about the absence of limitations and constraints on judicial decision-making. Decision-making is not out of control, but is "scientifically managed". Second, the plausibility of the analogy seems to depend on not taking the analogy seriously. Although analogies are drawn between hypotheses and rulings, between the derivation of predictions and consequences, between the idea of empirically testing predictions and consequences, and between the body of scientific knowledge and the body of rules that constitute a legal system, the analogy breaks down at almost every point of comparison when subjected to a detailed analysis.

Up to this point in the chapter, I have accepted the idea that, in principle, an analogy can be drawn between testing in science and legal justification. But this idea can be questioned. Legal positivists draw an analogy between science and law by claiming that discovery and justification in science and in law are distinct and independent processes. However, even in its own terms, Popper's model indicates more connections between discovery and justification than are currently recognized by legal theorists. Moreover, in law there are also more connections between discovery and justification than the legal positivists' versions of legal reasoning admit. I will now identify a number of links between discovery and justification.

(1) Connections Between Discovery and Justification

The rigid separation of discovery and justification is problematic even in science. Paul Feyerabend, for example, thinks it should be abolished. He claims the traditional view that there is a context of discovery which "may be irrational and need not follow any recognized method"¹⁸ and a context of justification, which "starts only after discoveries have been made, and proceeds in an orderly way"¹⁹ does not play a role in scientific practice and mis-represents the roles of discovery and justification in scientific research. For him, the important questions are to what extent the distinction between discovery and justification reflects a real difference and whether science can advance without a strong interaction between the separated domains, not how to make distinctions in a complex process.

Feyerabend identifies a conflict between the explanations of testing "reconstructed" by philosophers of science and the actual procedures used by scientists in research. He claims that if philosophers' accounts of criticism and proof in the context of justification had been used, science as we know it would never have been permitted to arise. Moreover, in actual scientific research, the

¹⁸ P. Feyerabend, Against Method, (London: New Left Books, 1974), 165.

¹⁹ *ibid.*, 165.

procedures of proof have often been over-ruled by procedures belonging to the context of discovery.²⁰ In his opinion, "in the history of science standards of justification often forbid moves that are caused by psychology, socio-economic, political, and other "external conditions", but science survives only because these moves are allowed to prevail."²¹ When inventing and contemplating theories, scientists often make moves forbidden by methodological rules when interpreting evidence to fit fanciful ideas and refusing to take difficulties seriously. He asserts that "science...could not exist without a frequent over-ruling of the context of justification."²²

Feyerabend's version of the relations between discovery and justification is that they involve different activities and that both discovery and justification are equally important to science. Although neither one is more important than the other, sometimes there is conflict between discovery and justification. In such situations, one can choose "moves" recommended by either discovery or justification to advance scientific research. In short, scientific research does not advance by either the procedures of discovery alone or alternatively, by the procedures of justification alone. But rather discovery and justification are part of

²⁰ *ibid.*, 166.

²¹ *ibid.*, 166.

²² *ibid.*, 167.

a "single uniform domain of procedures which are equally important for the growth of science."²³

Although Popper treats discovery and justification as separate processes, he does give some sense of what could be called a process of discovery when he discusses "the search for an explanation" in his book Objective Knowledge. He discusses the role of the syllogism in inventing hypotheses. The syllogism has a key role in a discovery process which involves a search for premises - a search for a universal law plus a search for initial conditions - from which an already known conclusion can be deduced. A scientific explanation takes the form of a syllogism and consists of a universal theory and specific initial conditions from which a conclusion can be deduced. Thus, a particular phenomenon will be explained if it can be deduced from the theory and initial conditions.

In the search for an explanation, the starting point is the conclusion known by observation which is to be explained. One searches for premises that will explain the conclusion. In other words, one seeks the universal theory and the initial conditions by asking "From what universal theory and specific initial conditions could this observed conclusion be deduced?" The syllogism defines the form in which the results of the discovery process are presented.

²³ ibid., 167.

The syllogism can also be understood as part of the strategy to discover premises. Knowing the form or characteristics of the syllogism helps guide the inquiry insofar as it directs one's attention to searching for premises. Popper illustrates this account of the search for an explanation by tracing the steps that are taken to discover why a rat has died. If one stumbles upon a rat that is lying upside down, one knows the rat is dead by observation and may wonder why the rat is dead and seek an explanation. The starting point is to state the conclusion which is known by observation. Here, the conclusion is "This rat is dead." This statement is the conclusion of some syllogism in which the premises are, as yet, unknown. One then asks, "What happened to the rat?" and searches for a theory and initial conditions from which the conclusion can be deduced. Discovering an explanation of the conclusion includes trying out conjectural or hypothetical explanations such as "The rat died of a large dose of rat poison." Such a hypothesis can be used to help formulate a major premise from which the conclusion can be deduced. However, the conclusion of the syllogism cannot be deduced from this statement because the statement is not universal. An explanation requires the discovery of a universal theory or law. Thus, a universal statement regarding the effects of rat poison on rats is necessary, such as "If a rat eats at least 8 grains of rat poison it will die within 5 minutes." In this way, the syllogism places limits on what will be considered to be a possible major premise.

An explanation also requires a statement defining the initial conditions. Hence the initial conditions must be discovered and formulated. This statement is the minor premise of the syllogism. Popper suggests that "This rat ate at least 8 grains of rat poison more than 5 minutes ago" as a possible set of initial conditions. The conclusion that "This rat died" can now be deduced from the universal law and the initial conditions.

But we do not know whether the universal law or the initial conditions are supported by empirical evidence. Perhaps it takes 10 grains of poison to kill a rat within 5 minutes and perhaps the rat did not eat any poison at all. The universal law and the initial conditions must be tested independently of the conclusion if a satisfactory explanation of the observed conclusion is to be found.

So, even in Popper's writings, there is a recognition that discovery and justification are inter-related to the extent that the syllogism plays a key role in the discovery of explanations.

(2) "Justification" in The Process of Discovery

One important argument in the previous chapter and in this chapter is that MacCormick's model of testing obscures and ignores the role of discovery in legal reasoning. The fact that he approaches legal reasoning through an analogy with testing in Popperian science may help explain why his theory is restricted to discussions about legal justification. Nonetheless, some sort of discovery process can be detected in his account of legal justification. The use of deduction to discover premises in science has a potential parallel in law. Indeed, Wasserstrom made this point when he wrote about the process of justification guiding the process of discovery. Although MacCormick does not draw this particular analogy, not only can his explanation of first-order justification be understood as a process of justification, but it can also be understood as a description of a search for a universal rule of law to explain a particular decision.

Looked at more carefully, first order justification is analogous to Popper's explanation of the search for a scientific explanation. First-order justification can be understood as some sort of process of discovery insofar as the process of making a legal syllogism can be understood as a process of discovery. The syllogistic form can play a key role in the search for a rule of law. As in the search for an explanation in which inventing a syllogism is

a method of discovering a theory or hypothesis, the search for a rule of law plus facts would begin with a known decision and would then seek to discover an appropriate major premise consisting of a rule of law plus an appropriate minor premise consisting of facts. The relevant question would be "From what proposition of law and what particular proposition of facts can this legal decision be deduced?" Judges would be using the syllogism in the same way as scientists searching for an explanation.

MacCormick discusses discovery in general terms when he alludes to strategies of discovery in science. Discovery depends on one's previous knowledge. In his opinion, except for revolutionary discoveries, "the making of discoveries takes place within a body of scientific knowledge."²⁴ Knowledge is needed to identify the relevant scientific questions and to understand "the shape of the slot in the relevant branches of knowledge into which the explanation has to fit."²⁵ He says that a person's existing knowledge gives one "leads" which are worth thinking about and trying out. He claims that "you have to know a lot before you even know what sort of thing you are looking for"²⁶ and that "even the most striking and brilliantly creative discoveries necessarily involve extrapolation from what is already known along lines

²⁴ *ibid.*, 102.

²⁵ *ibid.*, 103.

²⁶ *ibid.*, 103.

determined by the body of existing theoretical knowledge."²⁷

Although MacCormick does not link the discussion above to discovery in law, an analogy can be drawn between using one's knowledge of science and using one's knowledge of law in order to make discoveries. Thus, I want to examine how the requirements of consistency and coherence can also play a role in the process of discovering legal rulings. The requirements of consistency and coherence can be understood as guidelines to follow when attempting to discover or invent legal rulings in that they help direct one's attention to a limited line of inquiry or restricted range of questions by placing restrictions on what will be considered relevant in a search for possible rulings. One begins the search for rulings knowing that one is searching for rulings that will be coherent and consistent with the rules and principles of the legal system. The discovery process can begin with one knowing, in general terms, what one is seeking. This strategy aids the task of discovering and selecting legal rulings insofar as one can identify a range of rulings that ultimately can be subject to stricter testing. Hence the requirements of coherence and consistency can be used to limit one's search to rulings that satisfy those conditions.

But the requirement of coherence can also be used as a

²⁷. *ibid.*, 103.

source of inspiration in the search for a solution to a case. Solutions to one type of situation may serve as clues to discovering or inventing a solution to a different type of case. Analogy can be used as a method of discovery. Edward Levi's discussion²⁸ of the development or transformation of the category of "imminently dangerous" things which included loaded guns, defective guns, and poison into the category of "probably or simply dangerous" things, which includes cars, is an illustration of the creative use of analogy to discover a solution to a problem. The problem in the case of MacPherson v Buick Motor Co.²⁹ was whether the manufacturer of a car would be held liable for the injury to the car owner caused by a defective wheel. The solution was reached by comparing guns, poison, and cars. Loaded guns and poison are similar to cars in that "the nature of the thing is such that it is reasonably certain to place life and limb in peril, when negligently made..."³⁰ Another example would be the use of analogy to find a solution to the problem whether parents of children who died in the Hillsborough disaster and who suffer from nervous shock after watching the disaster on television could recover for nervous shock. Both the trial judge and the Appeal Court judges in the Hillsborough case compared other cases of nervous shock in which parents were

²⁸ E. Levi, An Introduction to Legal Reasoning, (London: University of Chicago Press, 1949), 9-24.

²⁹ 217 N.Y. 382, 111 N.E. 1050 (1916).

³⁰ *ibid.*, 23.

"within sight and hearing of an accident" or witnessed the "immediate aftermath" of an accident to watching the disaster on television in order to help them find a solution to the case.

As in first-order justification where the syllogism has two jobs - justifying and discovering - consistency and coherence have two roles in second-order justification. MacCormick identifies their role in justifying legal rulings, but they also play a role in guiding the process of discovering legal rulings insofar as they are the criteria used to help select possible legal rulings for testing. This analysis helps explain Wasserstrom's and Bankowski's point that the criteria of justification guides the discovery process.

Although discovery is not discussed in detail by MacCormick in Legal Reasoning and Legal Theory, discovery is an important part of second-order justification. Some type of discovery occurs in the process of justifying legal rulings. The consequences of a legal ruling in a particular case and in hypothetical cases must be discovered or invented. The consequences are neither given nor do they have some sort of independent existence. Evaluating the consequences also involves some sort of discovery in that the criteria - sense of justice, common sense, public benefit, and convenience - are general in form. They do not exist in some specific and definite

form. In each particular case the relevance of each criterion or value must be specified. Such specifications would seem to amount to discoveries or inventions.

The accepted view that there is a clear distinction between discovery and justification in science and in law cannot be supported when the writings of those theorists that espouse that position are examined in detail. My discussion of the syllogism, consistency and coherence, and consequences indicates that not only do elements in the process of justification have justifying roles, but they also have what appears to be roles in the process of discovery. Moreover, the discussion indicates that the strategies, procedures, and techniques of discovery that a judge may use are not inherently arbitrary, irrational and uncontrollable, but instead seem to be intelligent and deliberate. In the following chapters, I examine a less positivist model of science formulated by Bernard Lonergan.

7. Conclusion

The analogy between science and law, the clear distinction between discovery and justification, and understanding legal justification as testing involves accepting the plausibility of a comparison between the "empirical" field of science and the "evaluative" field of law. Yet in many contexts, the comparison between science and law breaks down, especially the analogy between Popper's model of testing and MacCormick's account of legal justification. The asymmetry between predictions and consequences and between empirical testing and evaluations of justice, common sense, public good, and convenience challenges the plausibility of comparing empirical and evaluative domains. Recognizing that scientific testing involves discovery also challenges the model of science which forms the basis of the analogy drawn between science and law. The conventional analogy between discovery and testing in science and in law in which discovery and testing involve different types of process may be too simple a position. Justification seems to play a role in discovery. In the following chapters, I attempt to overcome the evident limitations of this analogy by using Bernard Lonergan's and Garret Barden's writings to pose questions about the role of the process of discovery and testing in science and in law. The next chapter introduces Lonergan's approach to studying discovery and testing.

Chapter Three

Bernard Lonergan on Insight in Theoretical¹ and Practical Reasoning

1. Introduction

The process of discovery has not been investigated in detail. Although the writings of the legal realists, especially Frank and Dewey, point to the significance of "discovery" in the decision process, their studies do not amount to comprehensive investigations. They do little more than name the relevant elements which constitute "discovery" in law. Identifying elements such as puzzling, brooding, hunches and intuitions does not explain how these activities are performed. Furthermore, the tendency of modern legal theorists to present "discovery" in terms of irrational and arbitrary factors that are beyond the concerns of jurists helps support the assumption that "discovery" cannot be analysed. However, the work of B. Lonergan on insight suggests otherwise. In fact, his study of insight in theoretical and practical reasoning as a problem-solving process is relevant to questions about both

¹ Throughout this thesis, I use the term "theoretical" reasoning to emphasize the common structure of direct insight in different contexts and to distinguish between theoretical and practical reasoning. I do not use the term "theoretical", in Lonergan's more precise sense, to distinguish between the domains or horizons of "theory" and "common sense".

discovery and justification.

Bernard Lonergan was a Canadian Jesuit (1904-1986) who addressed questions regarding philosophy, theology, and economics. Unfortunately, his work is relatively unfamiliar to scholars outside the field of theology and is unknown to most legal theorists. His major philosophic works are Insight: A Study of Human Understanding² and Method in Theology³. Insight is primarily concerned with analysing the role that questions and insights play in human understanding and in determining its relationship to philosophy, metaphysics, ethics, and theology. In short, his book combines and extrapolates the Aristotelian and European phenomenological traditions. In Method in Theology, Lonergan develops the general method of analysis used in Insight and discusses its implementation in theology.

Insight is an exploratory study of a neglected region of inquiry - the nature of insight in human understanding and knowing. Despite the efforts of philosophers to study human understanding they have not analysed insight; yet for Lonergan, insight plays an essential role in human knowledge. Insights are the source of knowledge and are

² B. Lonergan, Insight: A Study of Human Understanding, (London: Harper & Row, 1978).

³ B. Lonergan, Method in Theology, (London: Darton, Longman, & Todd, 1971).

also the source of novel rules and practices that can improve or even replace established routines. As such, insights are the source of new discoveries and inventions in human affairs.

The primary reason Lonergan studies insight is that, for him, the critical problem in philosophy is "the question...not whether knowledge exists, but what precisely is its nature."⁴ As part of that project he analyses acts of insight of people in different fields - mathematics, science, and practical affairs - in order to understand the general structure of insight and to ascertain its significance. Part One of Insight is an analysis of insight first as a mental activity and second as an element in the structure of human knowing. Lonergan's analysis of insight focuses on "what precisely it is to understand, what are the dynamics of the flow of consciousness that favours insight, what are the interferences that favour oversight, what, finally, do the answers to such questions imply for the guidance of human thought and action."⁵

Insight is the key part of Lonergan's general theory of human understanding and knowing. It mediates his approach to a wide range of philosophical and theological questions and serves as the basis of his position on issues in

⁴ Insight, xvii.

⁵ ibid., xvi.

philosophy and metaphysics. His philosophy, metaphysics, ethics, and theology are derived from his analysis of insight in human knowing. Insight is related to philosophy in that it is the source of answers to questions that lead to human knowledge and new routines and rules. Hence, in Lonergan's opinion, insight is the most significant activity in his explanation of human understanding and knowing. Insight is related to metaphysics insofar as the nature and ground of specialized methods in various fields are a specialized application of human knowing. Specialized methods of inquiry, such as the scientific method, are answers to questions that seek the best approach to understanding the nature of unknowns in different fields. For Lonergan, "an ethics results from knowledge of the compound structure of one's knowing and doing."⁶ Insight is related to ethics to the extent that a person's insight into, or understanding of, a particular situation can lead to the person wondering about and discovering what one can and should do about the situation. When solving practical problems, knowing what to do depends on correctly understanding the situation and correctly identifying problems.

Since his viewpoint is all-inclusive and comprehensive and his arguments complex, a summary of his philosophy would be an inadequate way to introduce his position. However,

⁶ *ibid.*, xxix.

important aspects of his work can be identified, namely the significance that insight plays in his cognitional theory and his method of studying human knowing. Because insight plays such an important role in knowing, its opposite, the flight from understanding, is also very important in his work. In order to promote and encourage knowing, Lonergan not only studies the conditions that promote insight, but also the conditions that suppress insights.

Lonergan diagnoses various manifestations of the flight from understanding - psychiatric, moral, social, cultural, and philosophic. Although the flight from understanding takes different forms in different contexts, its general nature is the suppression of questioning and the failure of insights to occur. For example, the flight from understanding in its philosophic form "appears to result simply from an incomplete development in the intelligent and reasonable use of one's own intelligence and reasonableness."⁷ The flight from understanding is manifest in confused and mistaken theories of knowledge. He argues that insight into oversights will reveal what activities are unintelligent and will explain the existence of a multiplicity of philosophies and a series of mistaken metaphysical and anti-metaphysical positions. He claims that "insight into insight, then, will reveal what activity

⁷ *ibid.*, xii.

is intelligent."⁸

Individual bias and group bias are part of the flight from understanding. Individual bias is illustrated by the person who solves one's own problems, but refuses to consider questions about whether the solutions can be or should be applied in similar situations. Relevant questions that are outside the range of one's own selfish interests are suppressed.⁹ Group bias is characterised by loyalty to one group and hostility to other groups. It is a flight from understanding in that the group suppresses questions and fails to have insights that would challenge its own assessment of its well-being and usefulness.¹⁰ In fact, the flight from understanding could be used to characterize the dismissal of the discovery process insofar as it is an oversight or error.

In the two previous chapters, I argued that (1) the legal positivists have neglected to study the process of discovery and testing in the decision-making process and that (2) the clear distinction between discovery and justification is problematic in that justification seems to involve some sort of discovery. Although Lonergan does not discuss law, his analysis of insight is relevant to these

⁸ *ibid.*, xiv.

⁹ *ibid.*, 222.

¹⁰ *ibid.*, 223.

issues. He explicitly studies discovery or invention and testing in various fields, particularly science, in terms of puzzling, asking questions, experiencing insights and testing hypotheses. Questions arise when one is puzzled. Insights occur in response to questions. Insights lead to the formulation of new ideas and then one tests them. But as I will explain in this chapter, insights also occur in testing. Because his concern is with insights as discoveries of ideas and also with their role in testing, the distinction between discovery and justification is not as significant for Lonergan as it is for legal positivists. Indeed, a clear distinction between discovery and justification in his work cannot be found. Lonergan's analysis of human understanding and knowing is neither based on the assumption that there is a clear distinction between the process of discovery and the process of justification nor is he concerned primarily with the process of justification. Lonergan's study is not an examination of the process of discovery and justification as they are understood by legal positivists. He neither studies the psychology of decision-making nor attempts to determine the unconscious processes and factors that influence decisions. Lonergan's account of human knowing is philosophical. In the following chapters, I will be using his explanation of insight to help understand the

process of discovery and testing¹¹ in science and in law.

¹¹ I use the term "testing" to refer to the actual process followed by a judge when testing a tentative solution in the decision-making process. On the other hand, while "justification" includes aspects of testing, it also involves the public exposition of the solution or decision.

2. Insight as an Act of Discovery or Invention in Solving Problems and Answering Questions

Insight is the mental activity that discovers answers to questions and solutions to theoretical and practical problems. By the act of insight we discover possible answers to questions when we want to understand an unknown and we invent possible answers to our questions when we want to know what to do. According to Lonergan, the act of having insights is a common everyday occurrence in people of all walks of life and circumstances. Insight is involved in both mundane activities such as telling the time and in great scientific achievements such as discovering the molecular structure of DNA.

Lonergan explicitly analyses the essential role of insight as an act of discovery in two modes or dimensions - (1) theoretical reasoning and (2) practical reasoning. In theoretical reasoning, insights can occur when a person is understanding sense-experience and when a person reflects on and discovers the truth or falsity of what one understands. When solving practical problems, insights can occur when a person discovers possible courses of action and when an individual is deliberating about and discovers which possible course of action is sufficiently appropriate to perform in the circumstances.

Loneragan illustrates the distinct nature of insight as an act of discovery by contrasting insight with vision, wonder, or questions that arise when reading a detective story. He writes that:

In the ideal detective story the reader is given all the clues yet fails to spot the criminal. He may advert to each clue as it arises. He needs no further clues to solve the mystery. Yet he can remain in the dark for the simple reason that reaching the solution is not merely the apprehension of any clue, not the mere memory of all, but a quite distinct activity of organising intelligence that places the full set of clues in a unique explanatory perspective.¹²

One can stare at all the clues in a detective story indefinitely and still not be able to solve the mystery because the act of discovery, the insight, has not occurred. The individual cannot discover the significance of the clues by simply looking at them. Moreover, the significance of the clues will not be discovered unless the reader is wondering who the criminal is and asks pertinent questions such as "Who is the criminal?" and "Is so-and-so the criminal?" Insight is achieved after wondering, puzzling, and questioning. Nonetheless, a person may be puzzled and ask questions and still fail to spot the criminal. As yet, insight has not occurred. A supervening

¹² *ibid.*, x.

mental synthesis of the clues is required if the criminal is to be discovered. Insight is the act of catching on to the identity of the criminal. Insight makes "the difference between the tantalizing problem and the evident solution."¹³

Loneragan portrays insights as acts of discovery that occur in response to wondering and asking questions when attempting to solve problems. As an act of discovery, insight is a distinct activity that can be distinguished from sense-experience, wonder, and questions. Although insight depends on sense, wonder, and questions, it cannot be equated with any of them. Insight is distinct from sense-experience. Sense-experience can be illustrated by imagining a person sitting on a beach staring at the clouds drift by. The individual is doing little more than looking at the clouds. The "looking" is simply sense-experience. One is neither puzzled about clouds nor trying to understand clouds. So far, insight has not been achieved; the act of discovery has not occurred. Sense-experience supplies no more than the raw materials for puzzling and questioning.

Questions are essential to insight. Through questions, an inquiry moves from sense-experience through insight to judgment. The act of insight itself is neither the

¹³ *ibid.*, xi.

formulation of an idea or definition nor is it a direct apprehension, perception, or intuition of the truth. Insights must be tested in order to judge whether they are true or false, probable or possible, impossible or unreasonable, sufficiently suitable or unsuitable.

Lonergan analyses the role of insight as a distinct mental operation in terms of its relation to other mental activities in human knowing. Lonergan believes that, in order to understand insight, one must also discover, identify, and become familiar with the other mental elements that compose the recurrent and related pattern of mental activities that constitute knowing. He conceives human knowing to be a structure that is a conjunction of distinct cognitive operations. Lonergan's explanation of human knowing is in terms of cognitive operations that can be grouped according to three dimensions - (1) sensible presentations or imaginative representations, (2) understanding, and (3) reflection. Although his terminology is shared by faculty models of knowing, his conception of knowing is structural; it is not a faculty model. Thus he criticizes and rejects theories that consider knowledge to be the intuition of sensible objects.

Individuals are active knowers. Knowing consists of mental acts that constitute experiencing, understanding, and judging. Knowing is illustrated by mathematicians solving

equations and testing their answers, scientists understanding their data and verifying their hypotheses, and people of practical affairs finding alternatives and evaluating them. Asking and answering questions is the method by which people are and become attentive, intelligent, reasonable, and responsible human beings. They attend to sense-experience and circumstances, correctly identify problematic issues, actively seek answers to questions, have insights that are intelligent solutions to problems, and critically test the truth and falsity of their insights.

Lonergan's position includes a normative attitude toward knowledge itself, in that individuals should actively seek knowledge and should not be, for example, passive cloud-watchers. He thinks people should be curious, should wonder, should ask questions, should actively investigate and seek answers to their questions and solutions to their problems until they have insights. They should test their insights to see if they are correct, and should not rest until they have complete answers. In fact, Lonergan thinks knowing is ever-questioning and characterized by an unrestricted desire to understand.

3. Insight in Theoretical and Practical Reasoning

There are two basic types of insight, (1) direct and (2) reflective, and they both occur in two dimensions - (1) theoretical reasoning and (2) practical reasoning. Both theoretical and practical reasoning seek knowledge. Theoretical reasoning seeks knowledge for the sake of knowledge, but practical reasoning seeks knowledge for the sake of knowing what to do. This section develops the basic idea that insight is the activity that discovers answers to questions and invents solutions to problems. I will briefly explain the structure of insight and its role in human knowing not only when a person discovers possible answers to theoretical and practical questions, but also when a person tests and evaluates his or her own answers to theoretical and practical questions. Critical reflection and evaluation occur in both theoretical and practical reasoning. In discovering possible answers, either in theoretical or practical reasoning, there are two distinct orientations. Direct insight in theoretical reasoning is analogous to practical insight in practical reasoning. Both direct insight and practical insight are oriented toward understanding or discovering possible relations among data. As such, the contents of direct insights are possible answers which could either be true or false and the contents of practical insights are proposed courses of action which may or may not be sufficiently appropriate to

perform in a particular situation. In other words, direct insight itself is not concerned with truth, and practical insight itself is not concerned with actuality. In theoretical reasoning, direct insight is tested by reflective insight and, in practical reasoning, practical insight is evaluated by practical reflective insight. Insight, in each context, does not occur in isolation. Insight is related to, and depends on, other mental activities such as puzzling, questioning, previous insights and formulations, judgments of fact, judgments of value and decisions. Reflective insight leads to a judgment concerning truth and falsity and practical reflective insight leads to a judgment of value concerning whether a proposed course of action is sufficiently suitable.

In Lonergan's theory, the crucial activity in theoretical reasoning is direct insight. It occurs after wondering and puzzling about sensible presentations, imaginations, or memories. Puzzling in this context can be represented by an individual asking What-questions that demand definitions, explanations, or interpretations such as "What is it?" "Why is it so?" For example, a person might ask "What is a circle?" or "What is a cat?" What-questions lead to direct insight. One has a direct insight when one catches on, when the mind clicks, when one gets the idea. Direct insights are not simply perceptions. They are the consequence of interrogating one's sense perceptions. They

go beyond mere perceiving to discovering the relations among what is sensed, imagined, or remembered. Moreover, direct insights are not definitions or interpretations. Rather, direct insights are the mental activities that definitions and interpretations are based upon; thus such insights are pre-conceptual. Direct insights demand formulation and are made explicit as definitions, explanations, or interpretations. Direct insight is the act of discovery that, for example, leads to formulating the definition of a circle as the loci of a set of points equidistant from a centre in the same plane.

In the theoretical context, just as understanding can be represented as answers to questions such as What-is-it? and leads to direct insight, critical reflection can be represented by questions such as "Is-it-so?" that lead to reflective insights involved in testing. According to Lonergan, direct insights occur frequently and are "a dime a dozen". But direct insights do not necessarily discover truth. Some insights may be correct and others may be wrong. Critical reflection in theoretical reasoning is initiated by puzzling and by questions that ask "Is it true?" "Is it so?" These questions lead to reflective insights and judgments of fact. The attitude of the inquiry is characterized by the question - "Is-it-so?" Questioning leads to reflective insights which discover the link between prospective judgments and the sufficiency of

the evidence for making judgments of fact regarding the truth or falsity of direct insights and formulations.

Like direct insight in theoretical reasoning, practical insight is the key activity in practical reasoning. As in theoretical reasoning, a person who is involved in practical reasoning wonders and puzzles, asks questions, has insights, and formulates them. However, in practical reasoning one wonders not only about sensible presentations, imaginations, and memories, but also about particular situations and circumstances. The mental attitude in this context is not represented by questions that ask "What-is-it?", but rather by questions that ask "What-is-to-be-done?" This questioning attitude leads to insights that discover the unity of proposed courses of action rather than the unity in data. Just as direct insights are formulated as explanations or interpretations, practical insights are formulated as possible courses of action. For example, a person may arrive at the scene of a gruesome car accident and ask "What can I do?" Several alternatives such as pulling the people out of the car, calling an ambulance, or stopping other cars for help may be discovered by practical insights. Or a person who notices that his rowboat is sinking may ask "What am I to do?" and may consider various options discovered by practical insight such as bailing out the water, sending a distress signal, rowing to shore, or going down with the

ship.

In practical reasoning, testing and evaluating practical insights and proposed courses of action lead to practical reflective insights. Like direct insights that are possible correlations, relations, links or unities that may be correct or incorrect, practical insights discover only possible courses of action. Some of those courses of action may be impossible or unreasonable to perform. One alternative may be preferred. The mental attitude of the individual in this context can be represented by questions that ask "Is-it-to-be-done?" and "Should the course of action be performed?" When a person evaluates the alternatives, practical reflective insight discovers the relation between the significant factors of a particular situation, the proposed course of action, and the consequences and implications of the action. The person at the scene of an accident who asks, for example, "Should I first stop the bleeding or give artificial respiration?" then discovers the victim may suffocate before he bleeds to death. The rower who asks "Should I just row quickly to shore or start bailing out the water?" discovers that if he does not begin bailing immediately his boat will sink and he will never reach land. Practical reflection or deliberation leads to a judgment of value that one course of action is sufficiently suitable. The bystander judges that one should perform artificial respiration first and

the rower judges one should row rather than bail. A decision to perform the course of action ends practical evaluation. For example, "Yes, I will perform artificial respiration first" or "No, I will simply row quickly to shore."

Theoretical reasoning (which includes direct insight and reflective insight) and practical reasoning (which includes practical insight and practical reflective insight) are related in a number of ways. Practical insights and practical reflective insights depend on direct insights and judgments of fact about concrete situations. In other words, knowing what is the appropriate thing to do in a situation depends on knowing what the situation is. For example, a doctor's diagnosis precedes his judgment of value concerning which treatment should be prescribed. In the legal context, knowing that a situation is a case of nervous shock precedes a judge's judgment of value regarding what the solution to the case should be. Here, theoretical reasoning precedes practical reasoning insofar as understanding a particular situation leads to questions concerned with what to do in the concrete situation. On the other hand, practical reasoning precedes theoretical reasoning when practical questions occur before the situation is understood. A doctor may ask the practical question "What should I do to help this patient?" and then realize that a diagnosis must be made before prescribing a

course of treatment. A judge may ask the practical question "Should I allow this person to recover damages for nervous shock?" and realize that the particular situation and the relevant law must be understood before answering the practical question. In these cases, the person tries to understand the situation through the occurrence of direct insights before judging what is the sufficiently suitable thing to do in the circumstances.

The basic idea which I want to develop in the following chapters is that theoretical reasoning is concerned with interpreting situations and practical reasoning is concerned with discovering or inventing what to do in a situation. By theoretical reasoning one is able to understand the facts of a situation in relation to the relevant law and other cases. But at some point the judge asks "What should I do to solve the problem?" Such a question is a practical question. The judge via theoretical reasoning may judge that the current case and a previous case are similar in relevant ways and then reach the same solution to the current case as the previous case. Here, the judge is using theoretical reasoning to help solve a practical question. On the other hand, the current and previous cases may not be significantly similar and the solution to previous cases may be inappropriate in the current case. Here, the judge must engage in practical reasoning to discover or invent a suitable solution to the

current case. Practical reasoning can also lead to theoretical reasoning when practical insights, practical reflective insights, and judgments of value lead to the creation of new situations which are understood by direct insights, which in turn can lead to new questions about what to do, new practical insights, and new judgments of value.

Lonergan's analysis of insight in theoretical and practical reasoning offers a novel approach to examining discovery and testing. The activity at the centre of theoretical and practical reasoning is insight, an activity that discovers or invents possibilities and also tests them. Although it is not surprising that insight, as an act of discovery, is the crucial activity in the creation of ideas and courses of action, one does not expect that insight also plays a key role in testing and evaluating direct insights and practical insights. But for Lonergan, insights are the key activities in discovering new ideas and also in testing them. Lonergan's position is distinct from the realists and legal positivists in that he recognizes that the role of reflective insights and practical reflective insights in testing and evaluating is creative or synthetic insofar as the contents of previous mental activities are considered in a new way. To put it crudely, he examines the role of discovery in justification. In other words, although reflective insights and practical reflective insights test

and evaluate direct and practical insights they are also like direct and practical insights in that they transform the raw materials they work on. Reflective insights synthesize direct insights and what is sensed. Practical reflective insights synthesize practical insights, evaluations, and sense-experience. It is in this sense that discovery is a significant part of testing in theoretical and practical reasoning.

Lonergan's treatment of the nature of, and the relationship between, insight in discovering possibilities and in testing and justifying them further complicates the debate concerning the distinction between discovery and justification that became evident when the realists' and positivists' writings were analysed in Chapter One. For example, in contrast to the legal realists who simply claim that puzzling and brooding lead to hunches, Lonergan explicitly presents what would otherwise be known as "decision-making" as a problem-solving process and argues that particular types of questions demand particular types of insights. Rather than speaking inarticulately of hunches and intuitions, Lonergan analyses the role of insight in human understanding and explains that direct and practical insights discover possible relations and unities in data. Rather than speaking vaguely about the process of discovery and separating discovery and justification, Lonergan explicitly distinguishes between two orientations

or phases in reasoning - understanding and testing - and argues that insight is the central activity in each context. In marked contrast to legal positivists' explanations of testing and justification, the creative and synthetic aspects of insight constitute a significant part of testing and evaluation.

Lonergan investigates what would otherwise be known by Bankowski as the process of discovery inasmuch as theoretical reasoning includes both procedures of discovery and testing. He also investigates what would otherwise be known by legal positivists as the process of discovery in that he analyses the emergence of direct insights. However, like the legal theorists discussed in Chapter One, Lonergan's use of the term "discovery" is ambiguous. He calls both unverified and verified hypotheses "discoveries". Bankowski, by contrast, would reserve the term "discovery" only for insights that have been tested and found to satisfy the relevant truth-certifying procedures.

It might seem appropriate to call the understanding phase in Lonergan's version of theoretical and practical reasoning "discovery" and to call the testing phase "justification". And to do so would not be wrong. However, in my opinion, this approach should be resisted. Traditionally, "discovery" has been treated as an intuitive

activity that is necessarily distinct from justification. Yet the creative act of insight occurs in both the understanding and testing phases of theoretical and practical reasoning. "Discovery" could be reserved for the activities involved in having an idea and "justification" could be reserved for the activities involved in "testing" it. Yet having an idea and testing it are both part of a single comprehensive process, not independent processes. To call the understanding phase "discovery" and the testing phase "justification" would continue to mask the creative role of insight in testing. To analyse reflective insight and practical reflective insight and not to stress that they are acts of "discovery" would mis-represent the creative nature of testing.

4. Lonergan's Method of Examining Theoretical and Practical Reasoning

Lonergan studies the process of discovery from the point of view of those people who are actively engaged in solving problems by asking and answering questions. He explicitly examines the method scientists devise and follow to solve their problems. The person engaged in seeking knowledge for its own sake by asking and answering What-questions and Is-questions is the knowing subject. A scientist searching for the cause of ulcers is a knowing subject. On the other hand, a person seeking knowledge in order to know what to do in a situation is the ethical subject. A judge or jury determining what punishment to give an offender would be ethical subjects.

Lonergan's analysis concentrates on the knowing and ethical subject actively engaged in seeking knowledge rather than on what is known. He is concerned with the nature of knowing rather than the existence of knowledge. In fact, the first 315 pages of Insight are devoted to the question "What is happening when we are knowing?" which he answers by constructing an account of human knowing. He is not "concerned with the objects understood in mathematics but with mathematicians' acts of understanding, not with objects understood in the various sciences but with scientists' acts of understanding, not with the concrete

situations mastered by common sense but with the acts of understanding of men of common sense."¹⁴ His approach is consistent with his conception of knowing as a structure of cognitive operations performed by a subject rather than as some sort of object that can be observed. His notion of the subject as a questioner is apparent in the data he chooses to study; he studies acts of insight, not what is understood. For him, the subject as a questioner is not conceived of as an object. Instead, the knowing and ethical subject is conceived as being constituted by the actual performance of cognitive operations.

The procedure Lonergan uses to study the nature of human knowing is modelled on his understanding of himself as a knower, as a person who experiences, asks questions, understands, reflects, and judges. For Lonergan, it is by attending to his own experiences of knowing that he has come to understand how he understands and judges, and to present his account of human knowing. Similarly, for anyone else to understand the nature of human knowing, one must be attentive to one's own experiences of sense-experience, insights, and judgments. It is in this way that Lonergan understands the structure of knowing to be a conjunction of experiencing, understanding, and judging. Although he refers to the familiar philosophical categories - experiencing, understanding, and judging - they are

¹⁴ *ibid.*, xi.

understood as a unity or a structure constituted by a recurrent pattern of cognitional activities. His procedure of analysis is not to construct catalogues of abstract properties of knowing conceived of as an object. He does not regard knowing as the execution of "this or that operation, but as a whole whose parts are operations."¹⁵ Human knowing is not like taking a look; it is not simply understanding without judging; and it is not judging without experiencing and understanding.

Although one may spontaneously perform the mental activities that constitute knowing, one may not know what they are. Furthermore, a person may be conscious of having insights, but may not have any idea what an insight entails. According to Lonergan, the effort to understand the structure of knowing, which he calls self-appropriation, leads to self-knowledge. Parallels between the activities of knowing and self-knowing can be identified. Just as human knowing "is not some single operation or activity but, on the contrary is a whole whose parts are cognitional activities",¹⁶ self-knowing is also a whole whose parts constitute a dynamic pattern of recurrent operations that are cognitional activities. Just as knowing is not looking or like looking, imagining or

¹⁵ B. Lonergan, "Cognitional Structure", ed. P. McShane, Introducing the thought of Bernard Lonergan, (London: Darton, Longman & Todd, 1968), 17.

¹⁶ *ibid.*, 18.

intuiting, self-knowing is not inward introspecting, imagining, or a mystical experience. Instead, self-appropriation is a matter of inquiry, of enlarging one's interest, of discerning, comparing, identifying, and naming the operations that compose the structure of human knowing.

Lonergan's procedure to understand human "knowing" is derived from his conception of human knowing. Since he conceives the structure of knowing as a conjunction of experiencing, understanding, and judging, he infers that the procedure used to know human knowing must be a re-duplication of that structure. Thus self-knowledge or knowing knowing is:

"(1) experiencing one's experiencing, understanding, and judging, (2) understanding the unity and relations of one's experienced experiencing, understanding, and judging..."¹⁷ and (3) "judging one's experienced and understood experiencing, understanding, and judging it to be correct..."¹⁸ Lonergan calls this procedure self-appropriation. His strategy in Insight is to invite and lead the reader through a series of strategically chosen instances so that one may personally make explicit one's own "dynamic and recurrently operative structure of cognitional activity."¹⁹

¹⁷ Method in Theology, 15.

¹⁸ ibid., 15.

¹⁹ Insight, xxiii.

Lonergan notes that we experience our experiencing, understanding, and judging every time we experience, or understand, or judge. The elements of knowing are conscious when one is experiencing (that is, when one is seeing, hearing, tasting, touching, smelling), understanding, and judging, but as such they are neither understood nor known. Our attention is apt to be focused on the object rather than on the activities of our cognitive operations. In contrast, self-appropriation is finding in oneself the conscious occurrence of the cognitional activities whenever an object is seen, understood, and judged. It is by becoming familiar with one's own performance of these mental activities that one becomes able to understand the mental activities that comprise theoretical and practical reasoning. In this way, the individual's mental activities such as insight become known to oneself.

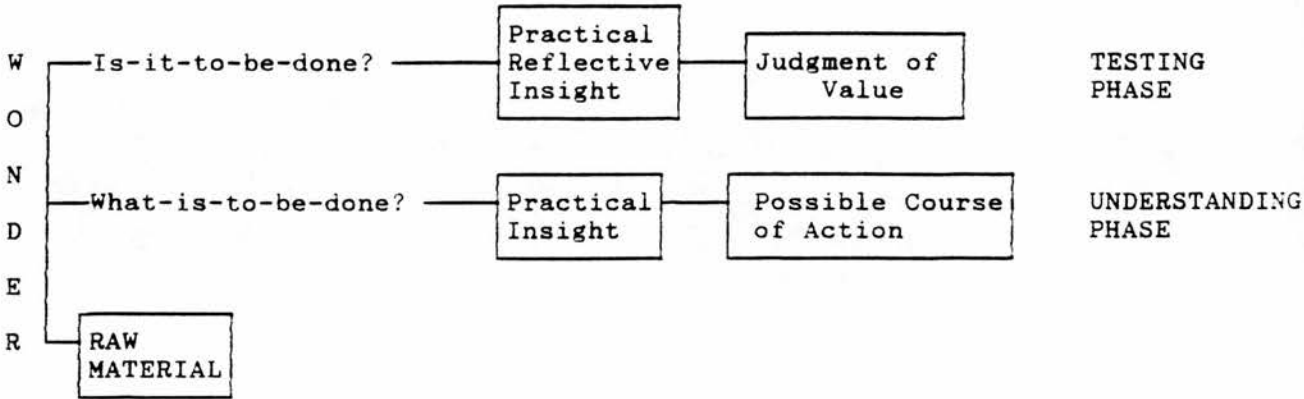
5. The Elements of Theoretical and Practical Reasoning

Lonergan's efforts of self-appropriation presented in Insight and Method in Theology reveal thirteen elements or basic operations that are employed in knowing and doing. In the context of human knowing, experiencing involves (1) sensitive or imaginative representations. Theoretical understanding includes (2) What-questions, (3) direct insights, and (4) formulations of definitions, explanations, or interpretations. Testing includes (5) Is-questions, (6) reflective insights, and (7) judgments of fact.

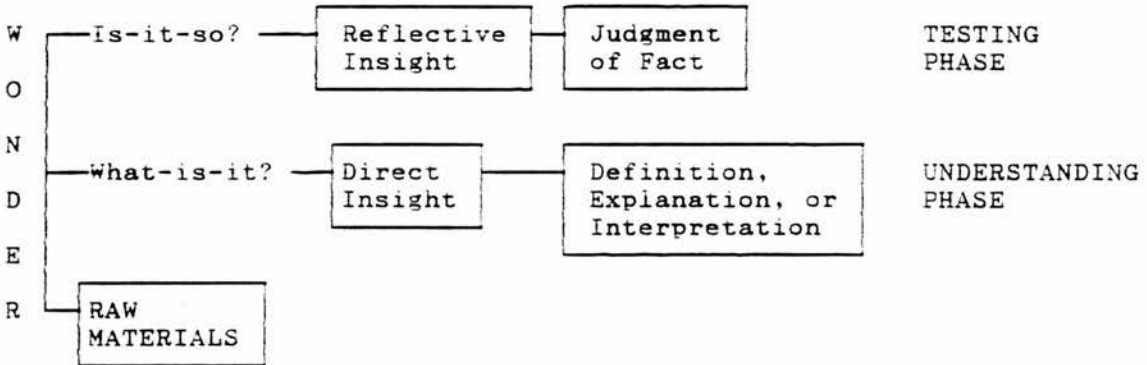
Practical understanding includes (8) What-is-to-be-done-questions, (9) practical insights, and (10) formulations of proposed courses of action. Testing includes (11) Is-it-to-be-done-questions, (12) practical reflective insights, and (13) judgments of value. Decision, a separate mental operation, ends practical reasoning. In other words, insight occurs at two levels - understanding and testing - but not at the level of sense-experience.

The relations among the cognitional activities in theoretical and practical reasoning can be illustrated with the following diagram²⁰:

²⁰ This diagram is adapted from the diagram in P. McShane, Wealth of Self and Wealth of Nations, (New York: Exposition Press, 1975), 15.



THEORETICAL REASONING



According to Lonergan, these thirteen elements constitute the human cognitive structure. It is materially dynamic since the distinct, irreducible mental activities constitute a pattern that is a particular sequence. One operation follows another and so on. The operations are experienced not only singly but in their relations to each other. Thus, there is a functional unity and relatedness to the extent that, without sense, nothing can be understood and, without sense and understanding, judgment would be rash. The structure of mental activities "...is formally dynamic inasmuch as it calls forth and assembles the appropriate operations at each stage of the process..."²¹ The completion of one operation leads to the initiation of another. The dynamism that promotes or drives this recurrent pattern of related cognitive operations is human wonder. In the inquiring mind, sense-experience provokes wonder. Puzzling shifts the inquiry from sense-experience to understanding, and direct insight goes beyond sense to grasp a synthesis in the data only to call forth, and be called forth, by the exigencies of reflection; this process is completed by reflective insight and judgment of fact. The orientation of one's questioning can shift to practical reasoning, that is, puzzling about what to do. Practical insights discover possible courses of action and deliberation enables the

²¹ Method in Theology, 13.

sufficiently suitable solution to be discovered by a practical reflective insight and then formulated as a judgment of value. Finally, the pattern is completed when a person decides or chooses to make the suitable option actual.

Theoretical and practical reasoning are closely linked with respect to the execution of their functions in the cognitive structure. Practical reasoning completes the pattern of cognitive operations insofar as it includes and goes beyond knowing, resulting in action. Theoretical reasoning grounds practical reasoning inasmuch as you must know in order to do. Theoretical reasoning provides the factual data which practical reasoning must take into account. With the question "What-is-to-be-done?", the context of the inquiry moves from theoretical to practical reasoning and the formulation of practical insights is demanded. Once satisfied, the inquiring mind, ever alert, moves to the next context - "Is-it-to-be-done here and now?" Practical reflective insight answers the question only to the point where a decision is made. In Insight, the procedure of self-appropriation is also used to analyse the structure of doing. The result of such self-appropriation adds a fourth level to the cognitive structure. Self-appropriation of practical reasoning involves "deciding to operate in accord with the norms immanent in the spontaneous relatedness of one's

experienced, understood, affirmed experiencing, understanding, judging, and deciding."²²

Lonergan wants to promote the operation of knowing in human affairs by explaining its operation and having people know how they understand, judge and decide. His position is normative insofar as he thinks knowing can lead to intelligent and reasonable explanations and responsible actions. For Lonergan, the performance of knowing is good because it can be attentive to circumstances, can discover intelligent answers to questions, can make reasonable judgments, and can discover and execute responsible actions in appropriate circumstances. Moreover, knowing can identify inattention, obtuseness, unreasonableness, and irresponsibility. The operation of knowing is the method that can help arrest the flight from understanding. Through knowing, the occurrence of insights can be promoted and the factors that lead to mistaken insights or suppressed insights can be identified and eradicated. Problems in any field, for Lonergan, can only be solved if their solutions are actively sought.

Lonergan admits that his perspective on cognitional theory is difficult to understand because it requires the reader to familiarize oneself with Lonergan's terminology, to evoke the relevant operations in one's own consciousness

²² *ibid.*, 15.

and to discover in one's own experience the dynamic relationships leading from one operation to the next.²³ He asserts that, if one is to understand knowing and doing as he conceives them, one must practise self-appropriation oneself; without doing that, one can no more know knowing and doing than a blind man can know colours.

²³ *ibid.*, 7.

6. Conclusion

The notion of insight presented so far has been rather static. However, it is necessary to appreciate the nature of insight as an active mental element in theoretical and practical reasoning in judicial decision-making. The following two chapters analyse in detail insight so that the structure and role of insight in relation to the functions of the other mental activities that constitute theoretical and practical reasoning can be examined. Direct insight, reflective insight, practical insight, and practical reflective insight will be studied in order to understand what it means for each type of insight to say that it "discovers" or "invents" such-and-such a relation. Chapter Four is an analysis of understanding and testing in the process of solving theoretical problems in the legal context. Chapter Five is an analysis of understanding and testing in the process of solving practical problems in the legal context. Lonergan's work raises fundamental questions about the nature of discovery and testing that are not raised by and cannot be adequately answered by examining the writings of modern legal theorists.

Chapter Four

"Discovery" in Theoretical Problem-Solving

1. Introduction

In Chapter One, I noted that the nature of the process of discovery is not settled and pointed out that how a judge actually tests hunches/insights has not been examined in detail. I also questioned the clear distinction between discovery and justification in light of conflicting versions of legal reasoning. In Chapter Two, I cast doubt on the clear distinction between discovery and justification by suggesting that justification is involved in the process of discovery. I concluded both chapters by claiming that, in order to address these issues, the actual decision-making or judging process should be investigated in detail. The aim of this chapter, and the following two chapters, is to examine "discovery" in theoretical and practical problem-solving in legal decision-making. The nature of "discovery" is analysed in both the understanding and testing phases of theoretical and practical problem-solving.

Conventional accounts of legal reasoning portray legal reasoning in terms of theoretical (empirical) reasoning or, alternatively, as practical reasoning. Theoretical and practical reasoning are presented as each having their own

mutually exclusive spheres of operation in the sense that legal reasoning is understood as a specialization of either theoretical or practical reasoning. In these accounts, theoretical reasoning would be concerned with establishing the facts in a particular case, describing valid law, and predicting the behaviour of judges.¹ Theoretical reasoning also seems to include "decisions on the facts".² In such cases, the validity of the rule of law comprising the major premise of the legal syllogism is not in question. Rather the problem is to prove the particular facts of the case or to classify the facts according to a legal category that comprises the minor premise of the legal syllogism.

On the other hand, practical reasoning involves solving practical questions regarding "what should or may be done or not done."³ It is concerned with establishing the legal validity of universal propositions, ie. "legal rulings or norms". The problem practical reasoning must solve is to decide which rival universal proposition will comprise the major premise of the legal syllogism.⁴ Practical reasoning both tests and justifies legal rulings in order to

¹ R. Alexy, A Theory of Legal Argumentation, (Oxford: Clarendon Press, 1989), 213; Also see Legal Reasoning and Legal Theory, 103-104.

² Legal Reasoning and Legal Theory, 86-97.

³ A Theory of Legal Argumentation, 213.

⁴ Indeed, it is this problem regarding how to test and justify rival rulings that frames the debate concerning the nature of discovery and justification.

determine which universal legal ruling will be followed in a case and in similar cases that may occur in the future.

Thus, it can be seen that, despite differences in orientation, conventional accounts of the structure of both theoretical and practical reasoning are dominated by analyses of the legal syllogism and universal rules or norms in the context of the process of justification.

In contrast to conventional accounts of theoretical and practical reasoning, in this chapter and the following chapter, I use Lonergan's work to offer an explanation of theoretical and practical problem-solving in legal decision-making that is neither dominated by the legal syllogism nor by universal rules or norms. Rather, questions and answers are the key elements in the analysis. "Discovery", not justification, is the focus of the inquiry. The actual decision-making process, understood from this perspective, involves both theoretical and practical problem-solving.

But before analysing "discovery" in legal decision-making, the relation between theoretical and practical problem-solving, as understood from Lonergan's perspective, must be briefly examined. As stated in Chapter Three, theoretical and practical reasoning are concerned with answering different types of questions. In general terms, in the legal context, theoretical problem-solving is oriented to

discovering and testing what the particular situation and relevant law, in fact, are. Questions about the interpretation of a situation and relevant law is therefore part of theoretical problem-solving. For example, theoretical reasoning would be concerned with interpreting situations as cases of "manslaughter", "nervous shock", or "pure economic loss" by judging that one case was relevantly similar to other cases of that type or category. On the other hand, practical problem-solving is oriented to discovering and evaluating what should be done in a particular situation. Practical questions are asked in order to find a solution to a case when one cannot be discovered by comparing the case to other cases.

In an effort to minimize confusion between Lonergan's versions of theoretical and practical problem-solving, in Chapter Three, I presented theoretical and practical problem-solving as if theoretical problem-solving always precedes and leads to practical problem-solving in an orderly progression. And in the paragraph immediately above, I portrayed them as distinct methods of problem-solving. However, the interplay between them is much more complex and messy than I have indicated. Not only is practical reasoning involved in cases where rulings compete with each other, but all legal decision-making involves both theoretical and practical reasoning to some extent. Both types of problem-solving complement each other in the decision-making process.

However, understanding precisely the relation between theoretical and practical problem-solving in legal decision-making is problematic. At least three possible general lines of problem-solving can be identified in the legal context. One is theoretical problem-solving. As mentioned above, it can precede practical problem-solving. Practical reasoning begins when theoretical reasoning stops. A judge may use theoretical reasoning to interpret a situation as a case of manslaughter and then through practical reasoning discover the appropriate punishment. This approach is consistent with the view that, in order to know what to do in a case, one must first understand the situation and the relevant law. Two, practical questions may guide theoretical problem-solving. A judge may ask the over-arching practical question "What should I decide in this case?" and then use theoretical reasoning to compare the case to other similar cases in order to discover the answer to the over-arching practical question. Three, practical problem-solving can be an alternative to theoretical problem-solving. In cases in which a solution cannot be discovered by comparing cases, it may be necessary to discover or invent a solution by practical reasoning.

However, the other possibility is that when a judge is actually solving a problem, theoretical and practical problem-solving are inter-related throughout the decision-making process. A judge's attention may shift from

theoretical to practical problem-solving and from practical to theoretical problem-solving more or less continuously. Attention would alternate between theoretical questions such as "What is it?" and "Is it so?" to practical questions such as "What is to be done?" and "Should it be done?" This process would lead to a complex inter-related set of insights, judgments of fact, judgments of value, and finally a decision.

But the primary aim of this chapter and the following chapter is to investigate "discovery" in legal decision-making, not to determine the relation between theoretical and practical problem-solving. Despite the apparent complexity of theoretical and practical problem-solving in legal decision-making, they can be examined separately insofar as they each involve different types of questions and answers. Thus, in this chapter, I analyse "discovery" in theoretical problem-solving and, in the following chapter, I analyse "discovery" in practical problem-solving. These two chapters are a more detailed study of problem-solving than that of Chapter Three. I will return to the issue regarding the relation between theoretical and practical problem-solving in legal decision-making in Chapter Six, when I identify two general strategies of problem-solving in Barden's writings.

2. Theoretical Problem-Solving

Lonergan's work can be understood as an investigation of the nature of "discovery" in that he carefully articulates the nature of insight through his explanation of theoretical reasoning. As outlined in Chapter Three, two types of "discovery" occur in the process of solving theoretical problems: (1) direct insight and (2) reflective insight. Direct insights are the creative and synthetic acts that discover tentative answers to questions; reflective insights are the creative and synthetic acts involved in testing these answers.

In this chapter, I examine Lonergan's explanation of theoretical reasoning as a dynamic problem-solving process. I explicitly distinguish between two phases in theoretical problem-solving: (1) the understanding phase and (2) the testing phase. In the understanding phase, one has hunches and insights and discovers hypotheses and explanations. The aim of analysing this phase is to explain the nature of hunches and insights. The understanding phase would otherwise be known by legal positivists as the process of discovery. Although calling it the "discovery" phase, rather than the "understanding" phase, would be in line with conventional terminology, as I stated in the previous chapter, using the term "discovery" to refer to untested hunches and insights would mask the fact that "discovery" also occurs in testing. I use the term "discovery" to

emphasize the creative nature of both direct insight and reflective insight. The understanding phase involves: (a) sense-experience, (b) wondering and puzzling, and asking What-questions, (c) having direct insights, and (d) formulating or expressing direct insights as hypotheses, definitions, explanations, diagnoses, or interpretations.

In the testing phase, one is concerned with testing and verifying hypotheses, definitions, explanations, diagnoses, and interpretations. This phase involves (a) asking Is-questions, (b) having reflective insights, and (c) formulating judgments of fact. Contrary to expectation, "discovery" is a crucial part of the testing phase. The aim of the analysis of testing is to examine the extent that the testing phase involves "discovery".

Unfortunately, Lonergan does not examine problem-solving in the legal context. He investigates discovery and testing in science and other fields. To the extent that various contexts involve direct insight and reflective insight, they can help us understand the general characteristics of insight in the legal context. Moreover, I will suggest that the distinctions that can be identified between insights in different fields are of some significance. Hence, throughout this chapter, I draw analogies between medicine and law in order to illustrate the general procedure whereby theoretical problems are solved. I note the similarities in the problem-solving procedures followed

by physicians and judges, especially the similarities among What-questions and Is-questions and the direct insights and reflective insights those questions demand. I would like to stress that I am not analysing Lonergan's explanation of theoretical reasoning to construct a new analogy between science and law. Rather, the aim is to investigate the nature of "discovery" in judicial decision-making.

3. The Understanding Phase in Theoretical Problem-Solving

(1) Introduction

Doctors and judges follow the same general method when solving problems or searching for answers to questions. In the understanding phase, they both ask What-questions that call for direct insights and formulations. The understanding phase begins when a doctor or judge wonders or puzzles about sense-experience. A physician may wonder about why the patient complains about stomach cramps and a judge may puzzle about the course of events that led to a person's death or whether a situation amounts to a case of murder. The doctor and judge ask questions in order to understand the situation. The type of questions they pose are What-questions. A physician consulted by a patient asks the over-arching question "What is the situation?" or "What is the problem?" and then searches for an explanation. Similarly, a judge listening to lawyers' arguments and witnesses' testimony, asks "What is the situation?" or "What is the problem?" and seeks an answer. Such questions lead to direct insights into particular situations. The physician's direct insight is into a particular problem experienced by a particular individual. The answer is a direct insight that discovers the connections among the doctor's understanding of relevant symptoms, diseases, and previous diagnoses, and the patient's complaints and symptoms. Similarly, a judge has

a direct insight into a particular situation or course of events that occurred at a particular time and place. The judge experiences a direct insight that discovers the relation among the judge's understanding of the situation as potentially defined by legal categories and previous cases, lawyers' arguments, and witnesses' testimony. Direct insight is an act of discovery or invention in that it discovers relations among data that were previously not understood to be related. Direct insight transforms sense-experience and What-questions by considering sense-experience in a new way. It discovers a unity among data that can include sense-experience, imaginations, memories or any raw materials such as direct insights and judgments of fact. Direct insights into concrete situations are formulated by physicians as explanations or diagnoses and by judges as interpretations. The doctor formulates this direct insight as a diagnosis of the situation or problem such as "This person has an ulcer." The judge formulates direct insights as a tentative interpretation of the situation or case such as "This is a case of murder" or "This is a case of nervous shock".

The aims of this section are (1) to analyse the relations among the elements in the understanding phase of theoretical problem-solving, (2) to explain the extent to which direct insight is an act of discovery, and (3) to illustrate the conscious and deliberate nature of the understanding phase.

(2) Elements in The Understanding Phase

(a) Sense-experience

Imaginings, memories, sensible presentations such as colours, shapes, sounds, odours, and tastes are the raw materials of direct insights. According to Lonergan, direct insight depends on sensible presentations and memories for its object. Sensible presentations represent a link between outer circumstances and mental activity. Unlike other mental activities which are not directly dependent on outer circumstances, sensible presentations depend on outer circumstances to the extent that "the occurrence and the content of sensation stand in some immediate correlation with outer circumstance."⁵ For example, "unless you are deaf, you cannot avoid hearing, and unless you are blind, you have only to open your eyes to see."⁶ As already mentioned in Chapter Three, sensation is distinct from direct insight. A person lying on a beach gazing at the clouds is not puzzled about clouds. Similarly, there is no effort to understand when we are remembering past experiences, imagining other places and times, or telling stories. These examples are simply presentations. No synthetic activity is occurring. The attitude of the curious, puzzled, inquiring mind is not

⁵. B. Lonergan, Insight: A Study in Human Understanding, (London: Darton, Longman & Todd, 1978), 5.

⁶ *ibid.*, 5.

present. Perception by itself, in Lonergan's view, never leads to direct insight. By itself, presentations yield nothing more than uninterrogated sense-experience.

(b) Wondering, Puzzling and Asking What-questions

But, one can see, hear, taste, touch, smell and also be wondering about what one sees, hears, tastes, touches, smells, remembers, or imagines. One may be puzzled; one may wonder about something; one's curiosity may be sparked. A physician may be puzzled about how a patient's complaints are linked and a judge may be puzzled about how the testimony of witnesses is related. The attitude of the inquiring mind has replaced the passive observer and one may express one's puzzlement as "What is it?" "Why is it so?"

According to Lonergan, wonder is the root of all questions, not a question in words or concepts, but just the effort to understand without any formulation.⁷ For him, inquiry is the element of intellectual alertness. It is a questioning attitude which is oriented toward understanding. One is trying to get hold of something but as yet one is not understanding anything; one is puzzled. The desire or effort to understand what one sees or remembers is driven

⁷ B. Lonergan, Understanding and Being: An Introduction and Companion to Insight, ed. E. Morelli & M. Morelli, (New York: The Edwin Mellen Press, 1980), 41.

forward by the dynamism of the inquiring mind and is represented by questions that seek understanding such as "What is it?" For example, "What is a circle?" "What is cross-eyedness?" "What is a house?" "What is the patient's problem?" "What type of legal situation is this?"

What-questions are posed in two contexts - the context of everyday speech and the theoretical context. Hence two types of answers can be given to the same question. One can ask "What is a circle?" and be satisfied with the answer, "Something round". One can ask "What is the patient's problem?" and be satisfied with naming the patient's problem "a duodenal ulcer" and yet have no understanding of the ulcers at all. One can ask "What type of case is this?" and be satisfied with naming the situation "murder" and yet have no knowledge of the elements of the crime of murder or how they are relevant in the concrete situation. Such answers simply involve pointing or naming and are insights into the use of language.

But a person may not be satisfied with answers that simply point or name. What-questions can also demand definitions, explanations, and interpretations. When you ask "What is a circle?" you seek the definition of a circle. When you ask "What is strabismus?" you seek an explanatory account of cross-eyedness. These are what Lonergan would

understand as typical "scientific" questions. But even when you ask "What is a house?" you seek an explanation of how the parts constitute a unity or whole. And when you ask "What is the patient's problem?" you seek an explanation of how the symptoms are related. When you ask "What type of legal situation is this?" you seek an interpretation of the situation that relates the facts of the case to previous cases, legal categories, and relevant law. These types of questions, called "What-questions", ask for a cause, a reason, a correlation, a unity, an explanation, or an interpretation.

Sometimes, according to Lonergan, the two questions "What?" and "Why?" turn out to be the same. For example, the questions "What is rain?" and "Why does it rain?" turn out to be one and the same. The answers to both questions involve an explanation of evaporation and condensation. Lonergan writes that Aristotle's example, "What is an eclipse of the moon?" and "Why is the moon thus darkened?" are not two questions, but one and the same because if you "Say that the earth intervenes between the sun and the moon, blocking off the light received by the latter from the former...at once you know why the moon is thus darkened, and what an eclipse is."⁸ They are the same question because both questions represent the orientation of the inquirer toward understanding the nature of eclipses

⁸ B. Lonergan, Verbum: Word and Idea in Aquinas, (Notre Dame: University Press of Notre Dame Press, 1967), 35.

and because the same answer satisfies each question. In the legal context, the question "What caused this person's death?" and "Why did this person die?" turn out to be the same question. They both demand an explanation of the course of events that led to someone's death.

Unlike sensible presentations which depend on outer circumstances, the emergence of What-questions depends on presentations insofar as a person is attentive to what one sees, hears, etc., but What-questions are also free from outer circumstances in a way that the raw materials of inquiry, sensible presentations, are not. Although sensible presentations have some immediate relationship to outer circumstances, What-questions can occur or not occur. What-questions are concerned with what is sensed, yet they move beyond sensible presentations to ask about what is sensed, imagined, or remembered. The inquirer asking questions arranges particular aspects of the materials presented by sense and imagination in a new way. The creative element in this activity is the emergence or creation of the question itself from the raw materials of sensible and imaginative presentations. Questions focus attention on particular aspects of the data.

Answers will not occur unless questions are asked. For example, if King Hiero had not asked Archimedes to determine whether the crown was pure gold, Archimedes probably would not have thought about the problem and

probably would never have reached his insight.

Answers to What-questions depend on the accurate presentation of questions and problems. Questions and answers form a context and until the question or problem is accurately and precisely formulated, an answer, which is a related insight or a related set of insights, will not be immediately forthcoming. Problems will not be solved until the appropriate questions are asked. Insights depend on the particular questions that are asked. For example, the motion of falling bodies was not understood until the impetus theories of the Aristotelians were replaced by Galileo's inquiry into the relationship between the distance and time of falling objects. Galileo's insights depended on him specifically asking "What is the relationship between distance and time when objects fall?" For Galileo, the particular problem was not to describe the trajectory of the object but to correlate the distance and time of falling objects.

But solutions to problems that represent great advances in science are not the only insights that depend on precisely formulated questions. Solutions to familiar problems and questions also depend on questions being accurately formulated. For example, wanting to know the time at this moment depends on posing the question "What is the time?", not on asking "What day is it?" Similarly, wanting to know someone's birthdate is not met by asking "What is your sign

of the zodiac?", but by asking "What is the date of your birth?" A physician wanting to understand why a patient cannot read an eye chart will ask specific questions such as "Does the person have cataracts?" and "Does the person have glaucoma?" Asking questions about the patient's teeth will not help the doctor understand the patient's eye problems. Similarly, a judge may ask specific questions about the order in which events occurred in a case in order to understand a particular case.

The fact that direct insight depends on an accurate formulation of the question not only illustrates the fact that the question focuses attention on particular aspects of data that will be considered relevant to answering the question. Framing the question accurately narrows the link between the question and answer to be discovered by direct insight. The question can place limits on the direct insight inasmuch as it focuses attention on particular aspects of the data and creates the context in which answers will be relevant. Questions, then, guide the inquiry toward answers and solutions to problems.

However, the relevance of questions to a problem can depend on the previous occurrence of direct insights. Previous questions and direct insights may be required in order to answer a question or solve a problem. For example, the emergence of questions about molecular formulae depend on understanding the periodic table. The questions asked by

a physician about a patient's symptoms depend on a doctor's understanding of disease, similar symptoms encountered in previous patients, and previous diagnoses. Previous knowledge helps a doctor pose the pertinent questions in that an experienced doctor can probably detect what is relevant and what is irrelevant to the inquiry. Similarly, questions asked by a judge about a particular case depend on the judge's knowledge of law and similar cases and their relation to legal categories. An experienced judge is more likely to ask the relevant questions in order to understand the relevant aspects of a specific case.

Insight is not restricted to the raw materials of sense perception. Not only do insights occur in the context of presentations, What-questions, and formulations, but insights are also related to other insights. According to Lonergan, insights do not occur in isolation. In the scientific context, "A single insight yields an object of thought; a conception yields a definition; and from a cluster of insights, one builds up a system of definitions, axioms, postulates, and deductions..."⁹ According to Lonergan, Euclid's geometry and subsequent developments and the periodic table in chemistry are examples of related insights. He writes that we learn inasmuch as we can add insight to insight, inasmuch as the new does not exclude the old but complements and combines with it.

⁹ Understanding and Being, 61.

Understanding concrete situations, such as those experienced by doctors diagnosing ailments and judges interpreting situations, also depends on the relation of sets of related insights. A doctor builds on his or her understanding of a patient's complaints by asking questions in order to rule out potential diagnoses and to narrow down the possible diagnoses as much as possible. In this way the doctor adds insight to insight until the doctor has a supervening insight (formulated as a diagnosis) that encompasses the previous insights. Similarly, a judge interpreting a case asks question after question about the law, previous cases, and the events that took place, thereby building on his previous knowledge of the law and the case until a supervening insight that encompasses and synthesizes the previous insights is reached and formulated as an interpretation of the situation.

(c) Direct Insight: The Act of Discovery in The Understanding Phase

What-questions lead to direct insights. In Lonergan's words, "The insight is the click, the grasp, the discovery, what is added to one's knowledge when one sees the "must" in the data."¹⁰ A doctor's insight into a problem is a discovery of the unity in the symptoms, that is, how the symptoms "must be" linked together. Similarly, a judge's

¹⁰ *ibid.*, 41.

insight into events discovers the unity in the events, that is, how the event "must be" linked together. But the "must" that is discovered is not a "must" that is concerned with truth. Instead, it is a definition, explanation, unity, or interpretation that, as yet, is not known to be correct or incorrect, true or false. The doctor's diagnosis and the judge's interpretation, at this point, are possibly correct.

But to what extent is direct insight an act of discovery? The nature of the discovery that occurs in direct insight can be introduced by considering simple examples such as jokes and crossword puzzles. Direct insight occurs when you "get" the punch line of a joke. The act of discovering the relationship between the question and the punch line is the insight. "Do you know why mice have such small balls?????????????????????" "Because not many of them dance." In this example, "getting the joke" depends on an insight that discovers the link between the ambiguous meaning of the word "balls" and dancing. Put crudely, this section is concerned with what it is to "get" a punch line of a joke. In other words, the goal of this discussion is to explain the structure of the "get" or the "discovery" in human understanding. Similarly, people doing crossword puzzles also have insights. They are provided with clues in the form of obscure phrases, letters they have already filled in, and boxes indicating the length of words. Insights discover possible solutions to a puzzle.

So what does it mean to talk about direct insight as discovering relations immanent in data such as sensible presentations or imaginative representations? The best way to answer this question is to begin by discussing what Lonergan thinks direct insight is not. Just as Lonergan distinguishes insight from sensible presentations, he distinguishes insight from formulations of insight. The activity of insight, according to Lonergan, is pre-conceptual; that is, it occurs before expression. Insight is not expression, ie. stating the contents of the insight. Insight is the basis of concepts; it is not the formulation of what it discovers. The insight is the act of discovery which is prior to stating the content of the discovery as a concept, correlation, definition, hypothesis, explanation, interpretation, or unity.¹¹

The difficulty of explaining what it means to discover relations in data or to grasp the "must" in the data is due to the fact that explanations of what insight discovers depend on and occur after insight has occurred, but the resulting explanation of the nature of insight as an act of discovery must be used to explain the discovery that occurred as insight prior to its formulation. So, to explain insight in terms of an act of discovery is to go beyond the insight, the mental activity, to a formulation or explanation of the insight. Hence, defining the

¹¹ *ibid.*, 47.

structure of discovery or the grasp of the "must" is difficult, but not impossible.

Because the contents of the discovery can only be understood in light of a formulation of an insight, the study of the grasp of the "must" must use particular cases. The notion of "discovering relations" or "seeing the must in the data" cannot be understood apart from particular data since it is meaningless to talk about "discovering relations" in the absence of data. Insights are into data and do not occur unless there are raw materials that can be interrogated. Hence, the search for a universal definition of "what it is to grasp relations" will be in vain. Although some general characteristics of "grasping" can be formulated, the study of the act of discovery is restricted to particular examples and it must be acknowledged that the data for studying what is a pre-conceptual activity are based on and depend on the activity being studied. In other words, to study the activity, the expression of the activity must be examined. The methodological problem lies in the fact that the expression of the insight is not the activity of the insight and yet we want to study the activity of insight itself. Consequently, we must rely on inferences regarding the structure of "grasping" or discovering.

The nature of discovery as "grasping the must"¹² cannot be over-emphasized. Direct insight is into particular data and leads to the expression of particular links and particular relations among data. A doctor's insight into symptoms is a discovery of what the relation among the symptoms "must be". This discovery does not alter the symptoms in any way. The patient still feels ill. A judge's direct insight into legal arguments and testimony is also a discovery of what "must be" the relation among data. A judge's interpretation of arguments and testimony does not alter what a judge has heard. Although insight depends on data for its contents and will not occur without particular data, insight does not change sensible presentations. It does not add anything to the presentations. Rather, insight grasps relations immanent in the data.

Insight can be understood as the nexus between particular What-questions and answers. One can ask "What is strabismus?" which is answered by discovering and formulating a definition or an explanation. From this point of view, the activity of insight - "discovering" - can only be understood and specified if the questions and answers have particular contents. Insight discovers particular relations in data. Consequently, it is necessary to analyse the structure of insight in particular

¹². Remembering, of course, that the "grasp of the must" can be mistaken.

situations to understand the act of discovery that occurs in the act of insight. I have chosen to discuss Lonergan's analyses of geometrical insights, scientific insights, and insights that grasp the concrete unity in data. While both the contexts in which these insights occur and the nature of the discoveries made by these direct insights differ, all three types of direct insight have the same structure in that they all "grasp" or "discover" the relations or links among raw materials that would otherwise be unknown. Direct insight in geometry discovers the relations among the data that are necessary and also the relations among the data that are impossible. The scientific direct insight discovers possible relations between independent and dependent variables. Direct insights that discover a concrete unity discover how data are related to each other to form of a unity or whole. For example, direct insight in medicine discovers how a patients's symptoms are related to disease and previous diagnoses. Similarly, direct insight in law discovers how particular events and law are related as, for instance, a case of murder.

Lonergan illustrates the geometrical insight by explaining how one comes to understand the definition of a circle. In Insight, Lonergan considers how one discovers the definition of a circle in detail. He summarizes the process of discovery in Understanding and Being in the following manner: "The What-question he answers is "What is a circle?" In his own words,

We start with the cartwheel and draw the radii. We see that if any of the radii are unequal, there are bound to be either bumps or dents in the perimeter. If one radius is a little too long, we have to bring the perimeter out, and if one is a little too short, we have to bring the perimeter in. However, if one considers that the radii are infinite in number and that they are exactly the same length, then the circle is bound to be perfectly round. That is the insight. What the insight grasps is necessity and impossibility - the necessity of the circle being perfectly round and the impossibility of the circle being perfectly round if any radii are unequal.¹³

Lonergan says that the insight in this case grasps a necessary relation in the sensible presentation. The sensible presentation consists of imagining the perfect roundness of this curve, and supposing an infinity of radii belonging to this curve. The insight adds to the sensible presentation, that in order for the curve to be perfectly round, all the radii must be equal. This is a necessary relation. The impossible relation is that, if any of the radii are unequal, it is impossible for the curve to be perfectly round. The geometrical insight grasps necessity and impossibility immanent in the data. This type of insight grasps that, if a particular relationship among

¹³ *ibid.*, 46.

data exists, it is impossible for certain other relationships among the same data to exist.

The scientific insight will be analyzed by considering an ophthalmologist's desire to understand strabismus (cross-eyedness). This type of insight discovers an explanation, a cause, a reason, or a correlation. For example, an ophthalmologist may want to know about crossed eyes and may ask "What is strabismus?" The researcher seeks an explanation of strabismus. He begins his investigation by distinguishing between different types of strabismus and the various degrees of each type, the relative lengths and strengths of opposed sets of eye muscles. The researcher relates his findings to critical periods in eye development and correlates these critical periods to the presence or absence of particular growth factors, chemicals, hormones, environmental factors, and investigates the relationship between strabismus and recessive autosomal genes. For example, he may compare the incidence of strabismus with the occurrence of a particular recessive autosomal gene and find a positive correlation. His insights grasp the possible relations among the two sets of data. Insofar as new developments in technology or research strategies could revise or even supercede his insights, his insights grasp possibilities inherent in the data such as the possibility that there is a positive correlation between the incidence of strabismus and the existence of a particular gene. The relations he grasps are not "necessary" since they could

later be revised.

Direct insight can discover a concrete unity in sensible presentations. Insight grasps the concrete unity or wholeness in the data. Lonergan notes that an insight into what is a house is not a combination of separate analyses of walls, roof, foundation, windows, and doors. Instead, this type of insight grasps that the relations among these parts constitute a concrete unity or whole - a house. P. McShane illustrates this type of insight with the tale of Jonah who

...woke up lying on his back feeling sick. The place is pitch dark, smelly, damp. He feels with his hands the damp, mossy surface around him. He gets to his feet and the whole place sways about. He shines his pocket torch around: He is in some sort of cave, reddish coloured, with odd projections and pieces of bone around. Then it dawns on him... "I'm in a whale." Now, note that the "dawning" added nothing to the data beyond the unity-identity-wholeness of one thing [that was discovered]. (We speak loosely - obviously it pulls in his understanding of whales.)¹⁴

¹⁴ P. McShane, Wealth of Self and Wealth of Nations, (New York: Exposition Press, 1975), 28.

Jonah is not the only one to have a direct insight that discovers the unity in sensible data. Doctors and judges also discover the concrete unity in sensible presentations. A physician discovers that the particular symptoms of a patient are related as a disease. Similarly, a judge discovers that particular elements in a case are related to each other as a whole or unity in that they constitute a crime. The discovery that a situation amounts to murder involves discovering the relation among the significant events of the case, the relevant law, and previous cases that amount to murder.

A few observations can be made about these examples. The first is that the relations discovered by the three types of insight are different. Geometrical insights discover necessity and impossibility in the data and are expressed as abstract definitions. Scientific insights discover possible relations among the data that are formulated as abstract explanations and definitions. Insights in concrete circumstances discover that the data constitutes a concrete whole. As I have indicated at various points, legal decision-making primarily involves direct insights that discover the concrete unity in data. But this is not to say that direct insight in law does not resemble scientific insights. Many legal academics are engaged in searching for and formulating legal principles and legal definitions.

However, it is equally important to note that direct insight has the same basic structure in all contexts. The particular relation discovered by direct insight depends on the specific question asked and the type of data that is being interrogated. These differences result in the differences among the three types of insight. Despite the fact that the nature of the grasp of insight is only meaningful in relation to particular questions and data, it seems that the activity of insight can discover relations in data that are very diverse. Insight is an adaptable activity capable of coping with unfamiliar and changing data.

There are no rules that will automatically lead to a discovery if they are followed. Lonergan claims that insight is not reached solely by learning rules, following precepts, nor by studying any methodology. A doctor may have rules of thumb that are followed in order to make a diagnosis, but a problem is not understood because the doctor follows a set of rules. A diagnosis is made if relevant questions are asked. Similarly, while a judge follows rules regarding the order in which testimony can be presented and rules concerning, for example, hearsay evidence, such rules do not guarantee that a judge will discover how the testimony of the witnesses fits together or how the events and the law are related. The judge must ask pertinent questions in order to interpret the situation; these questions are not pre-determined and do

not necessarily arise in an orderly fashion. Solving legal problems is primarily a matter of trial and error. In Lonergan's opinion, "Were there rules for discovery, then discoveries would be mere conclusions."¹⁵

Although the process of reaching direct insights is not determined by following rules or by logical deduction, this does not mean that the process is essentially arbitrary and irrational. On the contrary, the process is conscious and deliberate. Questions are deliberately and consciously asked in order to have direct insights. Moreover, if one wants to understand the nature of something, one identifies the end that is desired and then devises a strategy to reach that end. For example, if a doctor wants to understand the nature of a patient's complaints such as a stomach ache and vomiting, the doctor's strategy might be to feel the person's abdomen and perform an ultra-sound examination. The doctor knows that these methods have successfully led to a diagnosis on previous occasions. If a judge wants to discover if a person is guilty of some crime, the strategy that has been devised is a trial where the evidence and arguments by opposing counsel is subject to strict rules and procedures that help the judge or jury reach an unbiased verdict. This trial method is used because it has helped solve legal problems on previous occasions. Although these strategies involve trial and

¹⁵. Insight, 4.

error they are not essentially irrational nor arbitrary, but are conscious, deliberate, and intelligent.

Insight is the source of all learning and knowledge. "Discovery is a new beginning. It is the origin of new rules that supplement or even supplant the old. Genius is creative. It is genius because it originates the novelties that will be the routines of the future."¹⁶ Although Lonergan writes here as if insight leads only to major discoveries that might be considered as representing paradigm shifts in science, he also thinks that insight occurs as a normal activity in science and indeed in all areas of inquiry.

(d) Formulation or Expression

As noted above, insight is different from expression, but it leads to it. Direct insight leads to the distinct mental activity of formulating and expressing the insight. The act of direct insight discovers the particular relation that can be expressed or considered and transformed into a general expression. For Lonergan, an insight is distinct from a formulation of a definition or explanation. A direct insight is into a particular case, set of data, or circumstances. In medicine, the doctor's insight is into a particular patient's problem and can be expressed as a

¹⁶ ibid., 4.

diagnosis of one patient's problem. A judge's insight is into a particular case and can be expressed as an interpretation of one particular situation. For example, "This particular situation is a case of murder."

Lonergan writes that "...one has to do some further thinking if one wants a conception, an expression, a general formulation of that insight."¹⁷ In science, "One has to take time out to think out a general formula that adequately expresses the insight."¹⁸ Archimedes' insight about weighing the crown in water is expressed in terms of scientific generality as the relation between specific gravity, mass, and volume. Such a definition holds for different fluids. If a doctor wants to formulate a general definition of ulcers, this is done by expressing the relevant similarities among ulcers. If a judge wants to formulate a general definition of murder, the judge must express the relevant similarities among cases of murder. Formulating the insight completes the pattern of mental activities involved in the process of discovery in the understanding phase of theoretical reasoning.

Lonergan uses Archimedes' solution to Hiero's problem to illustrate how insight is a pivot between the concrete and the abstract. Lonergan says Archimedes had a concrete

¹⁷. Understanding and Being, 41.

¹⁸ ibid., 41.

problem - "to settle whether a particular crown was made of pure gold."¹⁹ Lonergan says Archimedes' concrete solution was to weigh the crown in water. The abstract part of the procedure includes the abstract formulations of the principles of displacement and of specific gravity that are derived from the concrete problem and solution. The scientific importance lies in the abstract formulations that can be applied to solve other problems. The direct insight was into one particular problem and the solution concerned one particular crown. Archimedes' direct insight was into his particular situation. However, because the formulation of his direct insight as an abstract law can be applied to other situations, Lonergan understands the scientific direct insight, as he does all types of insight, as a pivot between the concrete situation and the abstract formulation.

Lonergan notes that defining what is necessary and sufficient to the insight may be tricky because attention to the general case may not be automatic. The act of formulating the direct insight involves picking out everything that is sufficient and necessary to the insight and leaving out what is not necessary for having the same insight again. In Lonergan's words, "...one selects what is essential and omits what is incidental; one selects

¹⁹. Insight, 5.

what is significant and omits what is negligible."²⁰ He says that "We formulate generally what is necessary in the presentations to have the insight."²¹ In a general definition, only the necessary conditions for the definition of a circle are formulated. The incidental elements are excluded from the general definition. Whether the particular circle that is analyzed is blue or red, big or small, bright or dull is irrelevant to the definition of a circle. These factors do not play an essential role in the genesis of the definition of a circle. The same process occurs when formulating insights into particular concrete situations. The physician discovers the relations among the patient's symptoms and grasps the link between the symptoms and ulcers in order to make a diagnosis. The patient's height, address, or hair colour are irrelevant to the formulation of the insight and are omitted from the explanation. The person may have blue eyes but eye colour is not relevant to the explanation. In the legal context, the judge presents an interpretation of the events which includes events that are, for example, relevant to understanding causation in a murder case, but excludes events that are not relevant to the interpretation. For example, the fact that the victim died from stab wounds made by a knife would be relevant to establishing the cause of death, but the colour of the knife's handle probably

²⁰. Understanding and Being, 48.

²¹ ibid., 133.

would not be relevant to the question of causation. In Jonah's case, it is irrelevant to his insight whether the whale is a humpback or a blue whale, male or female. What is necessary for the insight into the concrete situation is the relationship between the damp, cold, dark, place where Jonah is situated and his understanding of whales. Likewise, the colour of a house, the height of the walls and the type of roof are irrelevant to the insight that grasps these elements - walls, a floor, and a roof - as part of a concrete unity, a house.

Attempts to formulate the insight in general and abstract terms reveal that direct insight "pivots between the concrete and the abstract."²² The concrete nature of direct insights is due to the fact that direct insights in theoretical reasoning discover the relations among sensible presentations and imaginative representations. Scientists have insights into sensory presentations. Because what insight adds to sensible presentations can also be formulated in abstract terms, Lonergan says that direct insight, by its nature, is the mediator, the hinge, the pivot between concrete sensible presentations, specific questions and abstract formulations that not only cover the particular data studied but also other similar data. If the data are similar, a different insight is not required to understand them. This function of insight places it at

²². Insight, 5.

the centre of the process of human discovery and illustrates its significance and its relevance in understanding similar situations.

4. The Testing Phase in Theoretical Problem-Solving

(1) Introduction

Questions about truth are not part of the understanding phase of problem-solving. First we understand and then we judge. Thus a testing phase follows direct insight and formulation. The testing phase is concerned with notions of truth and falsity, certitude and probability. The function of the testing phase is to test whether or not direct insights and formulations are correct. A physician tests whether the diagnosis of the symptoms is correct and a judge tests whether the interpretation of the situation as a case of murder is correct. In each scenario, sufficient evidence for a judgment of fact is sought.

The testing phase begins when a doctor or judge wonders or puzzles about whether their diagnosis or interpretation of the situation is correct. Such wonder and puzzling become focused when the physician and judge ask questions. The type of questions they ask are Is-questions such as "Is the diagnosis correct?" and "Is this a case of murder?" This type of question leads to reflective insights. Reflective insight is the act of discovery in the testing phase. Reflective insight discovers the relations among a proposed judgment of fact, the conditions that are sufficient for making the judgment, and whether or not the conditions are satisfied. A doctor discovers, by reflective insight,

whether or not the symptoms of the patient are sufficient for making the judgment that the diagnosis is correct. A judge discovers, by reflective insight, whether or not the evidence is sufficient for judging that the interpretation of the case is correct. Reflective insights are formulated as judgments of fact. A doctor may state, "Yes, this is a case of an ulcer", and a judge may write, "No, this situation is not a case of murder."

The aims of this section are: (1) to analyse the role of questions in testing definitions, hypotheses, explanations, diagnoses, and interpretations and (2) to explain the extent to which reflective insight an act of discovery in the testing phase.

(2) Elements in The Testing Phase

(a) Is-questions

As What-questions characterize a shift in the context of inquiry from mere sensible and imaginative presentations to a desire to understand, so Is-questions signify a shift in the focus of the inquiry from understanding presentations to a concern with reflecting upon and testing whether one's understanding is true or false. In this new context, the orientation of the questioner is toward judging whether one's direct insight, concept, definition, explanation, diagnosis, or interpretation is correct or incorrect, true or false. According to Lonergan, the expression or formulation of a direct insight can be a nominal definition or an explanation, a hypothesis, or a whole theory. But is it true? Is it correct? Are our definitions, explanations, theories, or interpretations simply bright ideas? Our concern has shifted from the questions, "What-is-it?" and "Why-is-it-so?", which ask for some sort of tentative or definitive explanation to questions such as "Is-it-so?" "Is-it-correct?" "Is-it-true?" We ask questions such as "Is the definition of a circle the loci of a set of points equidistant from the centre?" "Is it raining?" "Is Jonah correct when he declares he is inside a whale?" "Does the person suffer from an ulcer?" "Is this situation a case of murder?" These questions, called Is-questions, portray the mental attitude of an inquirer

seeking truth. They are fundamentally different from What-questions. They are not concerned with questions that ask "What?" or "Why?" and seek a tentative discovery. Is-questions stand in need of sufficient evidence in order to make reasonable judgments.

(b) Reflective Insight: The Act of Discovery in The Testing Phase

Reflective insight is the mental activity that mediates between Is-questions and judgments of fact. It transforms Is-questions into judgments of fact. As such, reflective insight is an answer to a question, a solution to a problem about whether or not a formulation is correct. Both direct and reflective insights are insights into data. Whereas direct insight is into sensible presentations and imaginative representations, reflective insights are insights into a conjunction of presentations and conceptions, explanations, definitions, diagnoses, and interpretations. Direct insights and presentations are the raw materials for reflective insight. For the doctor, reflective insight grasps the relation among symptoms and the diagnosis. The reflective insight reached by a judge grasps the link among oral testimony, legal arguments, and the judge's interpretation of the situation. The mental attitude of the inquirer in this context can be represented by the questions "Is-it-true?" "Is-it-so?" Is-questions initiate reflection by demanding reflective insight.

Both direct insight and reflective insight involve discovery. As direct insight discovers causes, correlations, definitions, explanations or unities, reflective insight discovers "the sufficiency of the evidence for a prospective judgment."²³ The reflective insight itself discovers whether or not the evidence is sufficient as a basis for making a judgment of fact, that is, whether the patient's symptoms or the oral testimony of witnesses are a sufficient basis for making the diagnosis or the interpretation. The questions I want to answer in this section are: "What does it mean to discover the sufficiency of the evidence for a judgment?" "What is the nature of the discovery that occurs?"

An individual begins the process of reflection by formulating a prospective judgment that "Such-and-such is correct" or "Such-and-such is incorrect". This judgment is prospective in the sense that it is a potential or possible judgment. A judgment will be made after a reflective insight has occurred. Hence, at this stage, a judgment has not yet been reached. A judgment that "Such-and-such is correct" has conditions which must be fulfilled if the judgment is to be correct. The judgment must be supported by sufficient evidence.

Both the conditions for making the judgment and whether or

²³ *ibid.*, 279.

not they are supported by evidence must be discovered. Hence, reflective insight involves two types of discovery. First, the individual discovers the link or relations between the prospective judgment and the conditions that are sufficient for making that judgment. In other words, in reflective insight one discovers the conditions or criteria that are sufficient, if fulfilled, for making the prospective judgment. Second, one discovers whether or not the conditions for making the prospective judgment are actually fulfilled or satisfied.²⁴

In a single act, the reflective insight itself discovers (1) the link between the prospective judgment and the conditions for that judgment and (2) whether or not these conditions are fulfilled. Lonergan summarizes the general form of critical reflection as the occurrence of

- ...a reflective insight in which at once one grasps:
- (1) a conditioned, the prospective judgment that a given direct or introspective insight is correct,
 - (2) a link between the conditioned and its conditions, and this on introspective analysis proves to be that an insight is correct if it is invulnerable and it is invulnerable if there are no further, pertinent questions, and
 - (3) the fulfilment of the conditions, namely that the

²⁴ P. McShane calls these latter two discoveries pre-judgmental insights in Wealth of Self and Wealth of Nations, 36.

given insight does put an end to further, pertinent questioning and that this occurs in a mind that is alert, familiar with the concrete situation, and intellectually master of it.²⁵

Let's examine a simple example. Suppose I am about to leave my flat and as I gaze out of my third floor window I ask myself "Is it raining today?" The prospective judgment I might formulate is "Yes, it is raining." But I have not yet made this judgment; it is only a prospective or potential judgment.

I must discover the conditions or criteria that, in my opinion, are sufficient for making this judgment. The conditions that, in my opinion, are sufficient for the prospective judgment are: (a) that people on the pavement have their umbrellas open and (b) that cars on the road have their windshield wipers operating. I have discovered the first element of reflective insight, the link between the prospective judgment and the conditions that are sufficient for the judgment.

Next I look out the window and see that umbrellas are open and windshield wipers are operating. I discover that the conditions for the judgment are satisfied. The fulfilling conditions are on the level of sense-experience. I have

²⁵. Insight, 287.

relied on acts of seeing but these sense-presentations are not judgments.²⁶

Reflective insight, in a single moment or instant, discovers that the prospective judgment that "It is raining" is correct, that seeing umbrellas open and wipers operating is sufficient for making the judgment that "It is raining", and that the two conditions are satisfied - umbrellas are open and wipers are operating.

A doctor discovers the conditions that are sufficient, if fulfilled, for making the judgment that the diagnosis of a stomach ulcer is correct. The conditions that must be fulfilled, that is, the symptoms that are sufficient, consist in sense-experience and previous judgments. In the "discovery" phase, the doctor listens to the patient complain about stomach aches and vomiting and feels the patient's enlarged stomach. What the doctor hears and feels is sense-experience. A direct insight is reached and formulated as the diagnosis that this patient has a stomach ulcer. But is this diagnosis correct? The doctor tests whether the three symptoms - the stomach ache, vomiting, and enlarged stomach are sufficient conditions for making the diagnosis. Whether the three symptoms are a sufficient basis for the diagnosis is discovered by asking relevant questions such as "Could the symptoms support a different

²⁶ *ibid.*, 282.

diagnosis?" If the symptoms can also support the diagnosis of a duodenal ulcer, then the three symptoms are not sufficient for diagnosing a stomach ulcer. Further conditions must be satisfied, but what are they? Perhaps an ultra-sound test will resolve the doubt about the diagnosis. The point is that, when there are no more pertinent questions about the conditions for making the diagnosis, then the sufficient conditions (if fulfilled) for making the judgment have been discovered.

But so far the physician has discovered that only three conditions have been fulfilled. The patient has stomach aches, vomits, and has an enlarged stomach. The fourth condition that must be satisfied is that some aberration of the stomach must be detected by ultra-sound. Hence the physician must perform an ultra-sound test and then identify the aberration in order to judge whether the diagnosis is correct or mistaken.

Similarly, a judge's verdict of guilt in a murder case depends on a judge discovering which conditions must be satisfied and also whether the conditions are fulfilled. The task is aided by the fact that the conditions that must be satisfied are stated as law. The accused must "intend to cause death or grievous bodily harm". However, the judge must discover what the particular conditions are, in this particular case, that are sufficient for judging guilt. The judge must also discover whether or not the

conditions that are sufficient for a guilty verdict are actually fulfilled.

In terms of Lonergan's version of theoretical reasoning, the analogy between testing a hypothesis, diagnosis, or interpretation is whether the evidence is, in fact, sufficient to support the hypothesis, diagnosis, or interpretation. The scientist reflects on whether the experimental results are sufficient to support the hypothesis. The doctor reflects on whether the symptoms and test results are sufficient to support his diagnosis of a duodenal ulcer. The judge reflects on whether the circumstantial evidence linking the accused to the scene of the crime is sufficient for a judgment of guilt.

However, there is a difference in the aims of theoretical problem-solving in science and in law. The goal of scientists is a complete explanation of their data, to know everything. In contrast, the goal of theoretical inquiry in law is not a full understanding of the circumstances. Instead, the aim in the legal context is to attain a sufficient understanding to enable one to tackle or solve a particular problem. One way this is accomplished is by judging the similarity among cases. Cases are not judged to be similar in all respects. The similarity among cases depends on what features of the cases are considered to be relevant to a particular question or problem posed by a judge. The judge is not concerned with finding out all the

ways the cases could be similar. If the cases are similar in the way the judge considers relevant, then that is "good enough". The cases are judged to be sufficiently similar with respect to the question the judge considers relevant.

But it is when one considers rival rulings that the limitations of the purely theoretical analysis becomes evident. Theoretical problem-solving is not concerned with judging which rival ruling to accept. Judging which rival ruling to accept not only depends on sense data, but also on an evaluation of aims, purposes, and values. From this point of view, an evaluation of competing rulings would be an aspect of practical reasoning insofar as practical reasoning is concerned with judging what should be done, rather than with judging whether an interpretation of a particular situation is supported by sufficient evidence.

The point I want to make here is that the conditions that one considers sufficient for a prospective judgment of fact are discovered by asking relevant questions. The key question is "Are the conditions, if fulfilled, sufficient for the prospective judgment?" The criterion for the sufficiency of the conditions is that there are no further pertinent questions. Testing whether the conditions for a judgment are sufficient is a process of discovery insofar as it involves posing questions and discovering answers to them. It is in this sense that justifying the link between the prospective judgment and its conditions involves

discovery.

Whether an explanation or interpretation is correct does not depend on rules. Rather, the criteria for a judgment of fact is the absence of further relevant questions that occur to the person engaged in problem-solving. Hence all judgments of fact are neither absolutes nor certainties. Judgments of fact are grounded on evidence that is considered sufficient or good enough for the specific judgment. The evidence may be sufficient for a judgment of manslaughter, but not for murder.

Loneragan's explanation of the correctness of direct and reflective insights - as discovered in testing - is based on an operational distinction between vulnerable and invulnerable insights. He states that "Prior to our conceptual distinction between correct and mistaken insights, there is an operational distinction between invulnerable and vulnerable insights."²⁷ An insight is vulnerable when further questions arise. "Those further questions are such that the insight one has at present will be complemented and qualified and perhaps corrected to some extent by future insights."²⁸ He concludes that "an insight is correct if there are no further, pertinent

²⁷ *ibid.*, 284.

²⁸ Understanding and Being, 150.

questions"²⁹ and that "the conditions for the prospective judgment are fulfilled when there are no further, pertinent questions."³⁰ This idea, which he considers to be an immanent law of cognitional process, can be illustrated by analysing how an individual comes to judge whether the following definition of a circle is correct or mistaken.

The definition of a circle was formulated as the loci of a set of points equidistant from a centre. But, this definition also describes the coastline of Africa. The coastline is the loci of a set of points equidistant from the centre of the earth. The expression of the insight is vulnerable since further relevant questions arise such as "Why do the coastline of Africa and a circle both fit this definition of a circle? Surely the coast of Africa and a circle are different? Answering these questions involves the additional insight that the loci of a set of points of a circle and its centre must lie in the same plane. Therefore, when the definition of a circle is amended there are no further relevant questions.

According to Lonergan, "There is a stage where insights move on to be invulnerable, in the sense that de facto there are no further relevant questions that might complement or change the given insight. The invulnerable

²⁹ Insight, 284.

³⁰ ibid., 284.

insight hits things right on; and there is no doubt about it, no possibility of any further questions that will change things."³¹ "Insights head towards a limit. When that limit is reached, one has the invulnerable insight, that is, one has reached a point where further relevant questions de facto do not arise."³² There can be additional questions, but they are not relevant. When there are no more relevant questions about a diagnosis or a verdict and the relevant questions have been satisfactorily answered, the diagnosis or verdict has successfully passed tests.

Lonergan states that the condition of the invulnerable insight is stated objectively, not subjectively.

The point is not that no further relevant questions occur to me, but that there are no further relevant questions. It may happen that no further relevant questions occur to me because I am not giving them a chance to arise or because I am a scatterbrain, because I did not think long enough about it. Again, it may be that further questions arise that seem relevant to me, but I do not have good enough judgment to judge whether they are relevant or not...³³

Insights are correct as a matter of fact, and the fact

³¹. Understanding and Being, 150.

³². *ibid.*, 151.

³³ *ibid.*, 152.

exists when there are no further relevant questions. "It is not a question of possibility, 'Could there be some further relevant question?' The question of possibility does not bear upon the judgment that de facto these insights have reached the point of invulnerability."³⁴

Although his notion of objectivity is linked to the fact that no further questions arise, he is not stating that invulnerable insights are absolutely correct. He is only saying that the insights may be as invulnerable as you can get or need to get in the circumstances. Good judgment then is relative. In Lonergan's view it depends on:

(1) "[giving] the further questions a chance to arise."³⁵

(2) "the previous acquisition of a large number of other, connected, and correct insights."³⁶

(3) the fact that insights occur within a self-correcting process of learning in which the shortcomings of insights provoke further questions until one becomes familiar with a situation and masters it.³⁷

(4) making a special effort to cope with temperament, ie. rashness and indecisiveness.³⁸

Thus, reflective insight depends on inner conditions

³⁴ *ibid.*, 153.

³⁵ Insight, 285.

³⁶ *ibid.*, 285.

³⁷ *ibid.*, 286.

³⁸ *ibid.*, 287.

insofar as one takes one's time before judging, is alert and asks questions, talks things over, and tests hypotheses, explanations, and interpretations.

(c) Judgments of Fact

Reflective insight leads to the act of judgment. Judgment itself depends on reflective insight. Judgment can be expressed in two basic ways - "It is so" or "It is not so." Lonergan states that "judgments proceed rationally from a grasp of the sufficiency of the evidence."³⁹ "One makes a judgment because one grasps the sufficiency of the evidence."⁴⁰ In other words, "the act of judgment is caused by the act that grasps the sufficiency of the evidence where "cause" means "because" as rational consciousness, a consciousness that is obligated by its own rationality to judge, by the rational necessity of judging."⁴¹ The act of judgment is not of synthesis, but an act in which one posits synthesis. A theory, an hypothesis, an explanation, or an interpretation is already a synthesis. Judgment does not add further synthesis. Judging is an expression of a reflective insight.

A judgment of fact answers the Is-question by expressing

³⁹. Understanding and Being, 138.

⁴⁰. Insight, 140.

⁴¹. Understanding and Being, 137.

what is grasped by reflective insight as one of two alternatives: "Yes" or "No" or in one of a variety of modalities - "I don't know", "Possibly", "Probably", "We'll see", "Certainly". The act of judgment is the act that adds assent to a proposition, that changes a proposition from the expression of an act of conceiving, defining, thinking, supposing, or considering to a proposition that states that the content of the expression is true or that an object exists. A doctor states, "Yes, this patient's problem is a stomach ulcer", and a judge states, "This situation is a case of murder". Thus a judgment of fact is more than an expression or formulation of a reflective insight.

For Lonergan, judgment is a personal commitment. Judgment involves personal responsibility.⁴² Unlike memory or insight judgment is under our control, and is a personal act. "One does not have to say "Yes" or "No"; one can say "I don't know." One does not have to say "It certainly is so"; one can say "It probably is so" or "It possibly is so." All the alternatives relevant to human weakness, ignorance, and tardiness are provided for, and one is committed to picking out the right one..."⁴³ He states that "a judgment is the responsibility of the one that

⁴². Understanding and Being, 138.

⁴³. *ibid.*, 138.

judges."⁴⁴ "Because it is so personal, so much an expression of one's own reasonableness apart from any constraint, because all alternatives are provided for, it is entirely one's own responsibility, one does not complain about one's bad judgments; one is responsible for them."⁴⁵ Yes, No, I don't know, with certitude or only probability; the question as presented can be dismissed, distinctions introduced, and new questions substituted. "The variety of possible answers makes full allowance for the misfortunes and shortcomings of the person answering, and by the same stroke it closes the door on possible excuses for mistakes."⁴⁶ A physician is held responsible for a diagnosis, just as a judge is held responsible for a verdict. Both the doctor and the judge are the individuals who discover the criteria that are sufficient for their judgments and also discover whether the evidence is a sufficient basis for their own judgments of fact. If the evidence is considered by the doctor or judge to be sufficient for the judgment, then, according to that doctor or judge, the judgment is correct or justified. Hence doctors and judges are held responsible for their mistaken judgments. Doctors are sometimes sued for mis-diagnosing ailments and judges are sometimes criticized for their interpretations of cases.

⁴⁴. Insight, 322.

⁴⁵. Understanding and Being, 139.

⁴⁶. Insight, 272.

Like formulations which depend on the concrete data that are studied and the particular direct insights that occur, the meaning of a judgment depends on its context. It is related to a particular Is-question and a particular reflective insight. According to Lonergan, a judgment is meaningless apart from the question it answers and its content which is supplied by a reflective insight. For this reason Is-questions, reflective insight, and judgment form an integrated whole. It is an integral element of the structure of knowing.

Because the judgment depends on the sufficiency of the evidence it follows that if one does not grasp the sufficiency of the evidence and nevertheless says "It is" or "It is not", one is just guessing. For example, judging that a person has an ulcer without undertaking some sort of investigation is rash, and judging that a person is guilty of murder would be unfounded without relying on relevant forensic evidence. On the other hand, according to Lonergan, if one grasps the sufficiency of the evidence and hesitates, one is being silly because one's rationality demands that one judge. For example, the doctor would be defaulting on his rationality if he grasped that the evidence for the diagnosis of a duodenal ulcer is sufficient, but did not judge. In Lonergan's opinion, defaulting on your rationality is introducing a contradiction within your cognitive structure because what reflective insight discovers or fails to discover does not

become explicit in the act of judgment. Another characteristic of rational consciousness "includes the principle of excluded middle, provided the question is fairly put - either it is or it is not, either one or the other. It includes the principle of non-contradiction - it cannot be both."⁴⁷ Rationality, for Lonergan, does not lie in logic.

Understanding and testing in theoretical problem-solving are not independent phases. According to Lonergan, because the two previous levels of presentations and understanding provide the content for Is-questions and reflective insights, it is possible to distinguish between the proper content and the borrowed content of a judgment. The proper content is the positing, the "Yes", the "No", "It is", "It is not"; the borrowed content of a judgment of fact is the expression of the insight which is formulated as an explanation, definition, diagnosis, or interpretation. Judgment transforms the synthesis reached in the understanding phase by What-questions, insights, and formulations into an object that exists or states that a proposition is correct or incorrect. The explicit content of the synthesis discovered or invented by the reflective insight [and its presentation] includes both the contents borrowed from the direct insight and its own proper content which consists of the answer "Yes" or "No". But there is

⁴⁷. Understanding and Being, 144.

also the implicit content of judgment. For Lonergan, when one says, "'It is', one also means 'It is true that it is.' Truth is the implicit content of every judgment."⁴⁸

Reflective insight depends on direct insight in another way. In the ideal situation, Is-questions arise only after What-questions have been fully answered by direct insights, but there can be situations in which Is-questions lead to What-questions. Such circumstances may arise when a jury is asked to pronounce a verdict in a criminal trial. An Is-question may be asked: "Is the person guilty?" but after reflecting on the evidence, the jury may need to ask further What-questions in order to understand the events, motives, or witnesses' testimony before they make a judgment. When Is-questions cannot be answered without further understanding, the attention of the inquirer can return to questions that seek further direct insights before reaching a reflective insight and a judgment of fact.

Lonergan believes that the form of reflective insight is the basic activity involved in judging rather than deductive inference. For him, "the link between the prospective judgment and the fulfilling conditions is a structure immanent and operative within cognitional

⁴⁸. Understanding and Being, 140.

process."⁴⁹ It is not a judgment or a definition; "it is simply a way of doing things..."⁵⁰ McShane states that "the fulfilment of conditions is appreciated in a prejudgmental fashion".⁵¹ According to him, there is a prejudgmental grasp or discovery of the fulfilled conditions which is on the level of sense-experience and it is not a judgment.

⁴⁹. Insight, 282.

⁵⁰. ibid., 282.

⁵¹ Wealth of Self and Wealth of Nations, 36.

5. Conclusion

Lonergan offers a plausible explanation of problem-solving in theoretical reasoning. It is comprised of a dynamic pattern of seven mental activities that involves (1) sense-experience, (2) What-questions, (3) direct insights, (4) formulations, (5) Is-questions, (6) reflective insights, and (7) judgments of fact.

The study of the understanding phase indicates that the elements that comprise what would otherwise be known by the legal positivists as the "process of discovery" can be studied. Moreover, it turns out that the process of discovery is a deliberate and conscious process that is not essentially arbitrary, haphazard, and irrational. The detailed analysis of direct insight as an act that discovers the relations among data partially addresses debates about what "discovery" entails insofar as it explains the nature of the acts of discovery in theoretical reasoning and precisely addresses the issue concerning what the term "discovery" refers to.

The analysis of the testing phase addresses an area of the decision-making or judging process that has been neglected by legal theorists. Not only is testing performed by asking and answering pertinent questions, but perhaps the most significant finding is that testing involves an act of discovery, namely reflective insight. The explanation of

reflective insight as a mental activity that discovers the sufficiency of the evidence for a judgment of fact is a key contribution to the explanation of the nature of "discovery" in theoretical problem-solving.

Finally, the understanding and testing phases in problem-solving are inter-related. The understanding phase provides the formulations that will be subsequently tested in the testing phase. The testing phase relies on sense-experience when discovering whether the conditions for a judgment are fulfilled. Although the usual progression is from What-questions to Is-questions, Is-questions can also lead to What-questions. In short, the understanding and testing phases are part of a pattern of mental activities oriented to answering questions and solving problems.

Chapter Five

"Discovery" in Practical Problem-Solving

1. Introduction

Not only does decision-making in medicine and law involve theoretical problem-solving, it also involves practical problem-solving. Physicians and judges both ask practical questions such as "What is to be done?" "What can I do about the patient's stomach ulcer?" and "What can I do with the guilty person?" However, these are only the most obvious examples. Practical questions occur throughout the decision-making process. Practical questions demand the emergence of practical insights which are formulated as proposed courses of action. The doctor's options could include prescribing drugs, performing surgery, or advising a special diet. The judge's options could include probation, a suspended sentence, or a term in jail. A judge faced with the problem of judging whether parents, who suffer from post-traumatic stress syndrome after watching their children physically injured on television, can recover from nervous shock has two options - either to award the parents damages for nervous shock or not to award them damages.

Nor does the practical problem-solving process end with the discovery of alternatives. Having formulated their

options, the doctor and judge go on to ask which alternative they should perform. Doctors and judges both ask "Is this proposed course of action sufficiently suitable in the particular circumstances?" "Should I prescribe drugs or perform surgery?" A judge could ask "Should the sentence be probation or 10 years in jail?" "Should I judge that the parents can recover damages due to nervous shock after watching the Hillsborough disaster on television?" or "Should I judge that they cannot recover damages for nervous shock in this case?"

Evaluations of options by a doctor or a judge lead to a practical reflective insight and a judgment of value that one course of action is sufficiently suitable or more appropriate than others in the circumstances. Finally, the physician or judge chooses or decides whether or not to perform the course of action that has been judged to be sufficiently suitable in the circumstances.

2. Practical Reasoning

As in theoretical reasoning, Lonergan does not distinguish between a process of "discovery" and an independent stage of "justification" in practical reasoning. The image that a discrete and essentially irrational "discovery" stage ends with the formulation of courses of action which are subjected to an independent and essentially logical process of justification cannot be found in Lonergan's writings. Rather, the mental operations that are involved in discovering (or inventing) and testing options are part of a recurrent pattern of mental activities that comprise a problem-solving process.

Unfortunately, Lonergan does not examine practical problem-solving in the legal context. Even his general explanation of practical reasoning is not illustrated by examples. However, one scholar who does illustrate practical reasoning in a way that is consistent with Lonergan's writings is Garret Barden. What Barden calls the "ethical or moral field" is equivalent to "practical reasoning" in Lonergan's writings. In fact, Barden does not draw a distinction between ethical, moral, or practical action. For him, the ethical/moral/practical field encompasses activities that involve "realizing a possibility over which one has control and for which one is responsible."¹ The

¹ G. Barden, After Principles, (London: University of Notre Dame Press, 1990), 7.

boundaries of the ethical field are defined in terms of the type of questions asked by an individual, not according to whether the issue is trivial or important. Hence the questions "Should I cross the road?" and "Should I kill Jim?" are both ethical/practical questions. In other words, ethical or practical actions are actions that are subject to deliberation and choice.² By contrast, theoretical reasoning would include matters not subject to deliberation and choice.³

Like Lonergan, Barden examines practical reasoning from the point of view of a person engaged in an inquiry asking and answering practical questions in order to discover what to do. The two key ethical or practical questions posed in this context are: (1) "What am I to do in this situation?"⁴ and (2) Is the "proposed course of action good, better, more important, more urgent than another?"⁵ The aim of ethical inquiry is to discover what to do in a particular situation. The search is for what, reasonably, the situation could be. In short, ethical or practical reasoning involves deliberation and choice.

But the ethical subject is not limited to simply asking

² *ibid.*, 9.

³ *ibid.*, 12.

⁴ *ibid.*, 30, 48, 54, 71.

⁵ *ibid.*, 79.

questions. Like Lonergan, Barden defines the ethical subject as a pattern of basic mental operations. Not only does the ethical subject ask questions, but one also considers a particular situation, works out possible courses of action, determines which are practicable, truly valuable, really better, and more worthwhile in light of a particular situation as it is understood, seeks reasons for and against each possibility, allows time for questions to arise so that the disadvantages and difficulties of each alternative can be discovered and finally chooses a course of action to perform.⁶

In this chapter, I analyse Lonergan's account of practical problem-solving and, where appropriate, I present Barden's specification of practical reasoning in order to investigate the extent to which practical insight and practical reflective insight are acts of "discovery" in judicial decision-making. My method of examining "discovery" in practical problem-solving is similar to that used to study theoretical problem-solving in the previous chapter. I analyse practical problem-solving in terms of two phases: (1) the understanding phase and (2) the testing phase. In the understanding phase, one discovers possible courses of action. This phase involves: (a) wondering and puzzling about "What-is-to-be-done?" in a particular situation, (b) having practical insights, and

⁶. *ibid.*, 72, 79.

(c) formulating proposed courses of action.

In the testing phase, one is concerned with evaluating whether or not the proposed courses of action are sufficiently suitable and whether one option is more suitable than others. This phase includes: (a) asking "Is this course of action to be performed?" (b) having practical reflective insights, and (c) formulating judgments of value. Finally, deciding or choosing whether or not to perform the action judged to be sufficiently suitable ends the testing phase.

3. The Understanding Phase in Practical Problem-Solving

(1) Elements in The Understanding Phase

(a) Wondering and Puzzling about What to do?

The understanding phase is composed of a pattern of mental activities that includes and is initiated and motivated by wondering and puzzling about sensible presentations, memories, imaginations, direct insights and formulations, judgments of fact, and previous practical insights that comprise one's explanation or interpretation of a situation or problem. A doctor wonders and puzzles about what to do about the patient who is diagnosed as suffering from a stomach ulcer. Similarly, a judge puzzles about what to do in the situation interpreted as a case of murder. A judge can also puzzle about what to do in the case in which parents suffer post-traumatic stress syndrome after watching their children die on television due to the negligence of the police. In these examples, the raw materials for practical problem-solving are the diagnosis and the interpretation of a situation. The attitude of someone engaged in this phase of the inquiry can be represented by the question "What-is-to-be-done?" or "What am I to do in this situation as I understand it?" These questions call for practical insights.

(b) Practical Insight: The Act of Discovery in The Understanding Phase

Practical insight is the act of discovery in the understanding phase of practical reasoning. Practical insights discover the link between the relevant aspects that constitute a particular situation and relevant aspects of the options which could transform the situation. Practical insights are subsequently formulated as possible courses of action in the sense that they are options which could become actualities.

The occurrence of practical insight depends on the accurate representation of problems. A sufficiently accurate interpretation of the problematic situation is required so that a solution which sufficiently addresses the relevant aspects of the situation can be discovered. In this context, practical problem-solving depends on theoretical problem-solving. Knowing the nature of a patient's problem helps the doctor to discover what to do in order to treat the problem. An ambiguous or mistaken diagnosis can lead to solutions that may not adequately treat the problem. For example, the diagnosis of a stomach ulcer leads to one set of options that would be relevant to treating stomach ulcers, whereas the diagnosis of stomach cancer leads to a different set of possible alternatives that probably would not be relevant to treating stomach ulcers. Similarly, interpreting a situation as a case of murder leads to one

prescribed option - life imprisonment - whereas interpreting the situation as a case of manslaughter leads to a range of sentencing options. Interpreting the effects of watching the Hillsborough disaster on television as having an "instant effect on emotions and a lasting effect on memory" makes the situation similar to previous cases in which parents have seen or heard of the disastrous event or its immediate aftermath and have recovered for damages due to nervous shock. This interpretation of the situation leads to one solution - the parents can recover. But an interpretation of the situation as a case of communication by a third party, not a case of parents being within sight and hearing of the event, and not a case equivalent to the immediate aftermath of an accident, leads to the alternative solution that the parents cannot recover for nervous shock. In all these examples, the courses of action that are judged to be suitable depend on how the situation is understood.

The occurrence of practical insights depends on one's concerns insofar as one is alert to, and concerned with, practical matters and asks questions such as "What-is-to-be-done?" The more familiar a person is with solving practical problems in particular fields, the more likely it will be that practical insights will occur in new situations. Practical insight occurs almost at will in similar circumstances once one has had the initial practical insight. What was once a difficult and vexing

problem is no longer so. The solution is simple and obvious after the practical insight has occurred. For example, a doctor who treats ulcers will probably know immediately what the treatment options are when faced with an ulcer in a patient. The options do not have to be re-invented each time a doctor diagnoses an ulcer. Similarly, a judge who awards damages in the case in which nervous shock is the outcome of watching a disaster on television will probably not have to re-discover the range of damages that would be appropriate compensation in a similar case. The point is that the entire practical problem-solving process that was required to find a solution in a novel situation does not need to be performed again to solve a similar case. The range of options has already been discovered.

Moreover, familiarity with situations helps a person identify what is different, new, or changed and relevant in subsequent circumstances. In general, experts in particular fields who are interested in, and experienced in, solving practical problems will probably notice deviations from expectations more readily. The doctor who is an expert in ulcers will probably be able to discover what to do when faced with unfamiliar types of ulcers. Similarly, a judge who is an expert on nervous shock cases will probably be more likely to discover or invent a suitable solution in a novel case than a judge who is not familiar with cases involving nervous shock.

(c) Proposed Courses of Action

In contrast to direct insight, practical insight does not possess the same degree of generality and relevance to other situations. A doctor can formulate a general definition of an ulcer and a judge can formulate a general definition of murder. But practical insights lead to the formulation of possible courses of action that might or might not be appropriate in the particular circumstances. In practical affairs, new courses of action may be required if the situation changes. The old options may not work or may not be applicable. Practical insight lacks the generality of direct insight in theoretical reasoning because in each concrete situation practical insights occur. Practical insight depends on particular situations. Drugs may be an appropriate way to treat one person's ulcer, but surgery may be required to adequately treat another person's ulcer. Similarly, a two-year sentence may be appropriate in one case of manslaughter, but ten years may be suitable in another manslaughter case. Awarding damages for nervous shock may be appropriate in one type of case such as when parents see their injured children immediately after an accident, but it may not be judged to be suitable when parents have seen the accident on television. Practical insight is universal only to the extent that one situation is judged to be significantly similar to other situations. And what is significant in a particular situation is what the person who is familiar

with both situations judges to be significant in the circumstances.

Practical insights do not discover the most suitable option in a situation. In Lonergan's words, practical insight is not concerned with "Whether the unity is going to be made to exist or whether the correlation is going to be made to govern events."⁷ For example, a cyclist with a flat tyre could come up with a variety of courses of action to consider. He could phone home and ask for a lift; he could stick out his thumb and hitch hike; he could fix the tyre on the spot; he could walk the bicycle home; or he could throw the useless machine into the lake and revel in his ability to solve problems. After a doctor diagnoses an ulcer, he may ask "What treatment should I prescribe for this patient?" and become cognizant of various possibilities such as drugs, surgery, or special diet. After a judge interprets a situation to be a case of manslaughter, a judge discovers the possible sentences such as one year, two years, or ten years. After a judge interprets the situation of watching a disaster on television to be equivalent to the perception of the actual event or its immediate aftermath, the judge may discover that the possible solutions to the problem are limited to awarding damages, but that the amount of suitable compensation must be discovered. The question concerning

⁷ B. Lonergan, Insight: A Study in Human Understanding, (London: Harper & Row, 1978), 609.

which option is sufficiently suitable in the particular circumstances has not yet been posed.

4. The Testing Phase in Solving Practical Problems

(1) Introduction

Wondering about possible courses of action leads to asking questions about whether a proposed course of action should be performed. The attitude of the inquirer in the testing phase can be represented by questions that ask "Is-it-to-be-done?" or "Should I perform this course of action?" These questions, according to Lonergan, demand practical reflective insight.⁸ The practical reflective insight is an act of discovery. It discovers the relevant issues and their implications. According to Lonergan, questions can be raised regarding the proposed course of action such as the steps required to realize it, its consequences, the feasibility of making the course of action an actuality; the motives for performing the course of action -its agreeableness, its utility, the desirability of the goals, its short-term and long term implications.⁹ Practical reflective insight leads to a judgment of value that a particular course of action is sufficiently suitable or more suitable than others. Practical reflection or evaluation ends in a decision or choice to perform the action or not to perform it.

⁸. See P. McShane, Wealth of Self and Wealth of Nations, (New York: Exposition Press, 1975), 49; Insight, 614.

⁹ Insight, 610.

The testing phase involves discovering answers to questions such as "Which option should be realized?" and "Is this course of action sufficiently suitable in this particular situation?" In this section, I want to examine the actual process of testing and to analyse the extent to which "discovery", in the form of practical reflective insight, is a crucial part of the testing phase in practical problem-solving.

(2) Elements in The Testing Phase

(a) Is-questions

The raw materials of reflective insight in theoretical problem-solving are the contents of previous mental operations such as sense-experience and direct insight, but the raw materials for practical reflective insight are presentations, direct insights, judgments of fact, practical insights, and proposed courses of action.

Questions for practical reflection can address two issues. One set of questions asks whether a proposed course of action can be reasonably realized. "Is this proposed course of action feasible in the circumstances?" "Is it possible?" "Is it sufficiently suitable?" Another set of questions involves a comparison of proposed courses of action in order to discover which alternative is sufficiently appropriate in the circumstances. "Is this proposed course of action more suitable or more appropriate than others?"

For example, from my analysis of practical insight we know that the cyclist has a number of options. Although individuals who are familiar with flat tyres may discover the most reasonable course of action without hesitation, the activity of practical reflection can be illustrated by an analysis from the cyclist's point of view of how he

chooses or rejects possible courses of action. The bike rider could phone home for a car ride; hitch hike home; repair the flat on the spot; pump up the tyre and ride on it; or throw the bike away and walk home. Each alternative raises further questions if one is to judge which one is sufficiently suitable. The reasonableness of phoning home and asking for a ride depends on whether it is possible, that is whether a car is available and whether someone will pick him up. These factors may depend on whether he is near or far from home, whether he is prepared to inconvenience someone, or whether he has enough money for the phone call assuming that a phone is nearby. These queries and possibly others must be answered if this particular proposed course of action is to be judged by the cyclist to be both possible and reasonable. The course of action may be possible - someone may be able and willing to pick him up. But he may judge that this particular course of action is not reasonable because he does not want to inconvenience anyone. The option to repair his tyre on the spot may be judged to be impossible if he is on a deserted road and does not have a bike pump, or if he has the equipment but lacks the ability to fix flat tyres. Inflating the tyre to ride on it is possible only if he has a bike pump and the air does not escape as soon as he inflates the tube. Or he may judge that the option is unreasonable because he will bend his rim if he rides on it without the tyre fully inflated. After judging which alternatives are possible and impossible, reasonable and

unreasonable, other factors may be relevant to deciding which alternative to choose.

He must judge which option is more suitable than another. If he has the repair equipment he may judge that fixing it on the spot is more suitable than riding on a flat tyre. If he is a short distance from home, he may judge that simply inflating the tyre, riding home, and fixing it later is more suitable. Judging which proposed course of action is more appropriate or suitable depends on the particular situation and the particular person who assesses one's options in the situation. Each solution in a case has the potential to be a precedent insofar as other cases are judged to be similar to it and the solution is judged to be sufficiently suitable.

A doctor asks whether each option - drugs, special diet, or surgery - is feasible in the circumstances. For example, the doctor asks "Is the patient capable of following a special diet?" "Can I (the doctor) perform the surgery?" "Is the patient allergic to the drugs?" The doctor could ask which course of action is more suitable than others. For example, "What are the side effects of the drugs?" "Will a change of diet cure the ulcer?" "How much does surgery cost?" Similarly, a judge could ask whether the proposed course of action - probation or a prison sentence - are feasible in the circumstances. A judge could ask whether it is possible to perform each particular course of

action. For example, "Is the person likely to leave the country?" "Is there room in a prison for the person?" A judge could also ask whether each course of action is reasonable. For example, "Is probation a sufficient punishment?" "Will a prison sentence deter the person from doing the criminal act in the future?" In the case of parents watching a disaster on television, a judge could ask questions such as "Can the police authority pay the damages?" "Can the plaintiffs be accurately identified?" "Is the class of plaintiffs too wide for some reason?" "Is it reasonable to compensate people who suffer nervous shock after watching the disaster on television?" "Was it reasonably foreseeable to the defendant that the defendant's negligence would lead people watching the event on television to suffer injury?"

(b) Practical Reflective Insight: The Act of Discovery in The Testing Phase

Practical reflective insight discovers the relevant issues and their implications. The aim of practical reflective insight is a full discovery of the relevant issues and their implications. The answers to questions of practical reflection resemble answers to questions for reflection in that answers can be "yes", "no", "maybe", "possibly", "certainly", "probably". You may wonder if you can fix the flat tyre and answer that "probably you can since you have the equipment" or that "no, you cannot since you lack the

ability". Practical reflection not only demands reasons, but you may also ask yourself "...just what the proposed course of action is, what are its successive steps, what alternatives it admits, what it excludes, what consequences it will have, whether the whole proposal is really possible, just how probable or certain are its various features."¹⁰ In this fashion, comprehensive sets of practical reflective insights are constructed that discover the links among particular aspects of the situation or problem and particular courses of action.

Practical reflective insights are concerned with assessing the suitability of proposed courses of action. Practical reflective insight discovers the links between the relevant features of a particular situation, the proposed courses of action, and the reasons for and against the proposed course of action in order to discover whether the course of action is possible or impossible, sufficiently suitable or unsuitable.

The discovery of the appropriate course of action by practical reflective insight depends on one's familiarity with the situation at hand, the seriousness of the consequences of the proposed course of action, the uncertainties and risks it involves, the extent of one's willingness to assume responsibility for the consequences

¹⁰. Insight, 610.

and to run the risks further questions may raise.¹¹ These factors influence the emergence of questions that would be considered relevant.

As in other types of insight - direct, practical, and reflective - once practical reflective insight occurs, its emergence in identical or similar circumstances is easier and occurs almost at will. A doctor may routinely dispense medicine for common ulcers but in unfamiliar and complicated cases may spend time talking to colleagues about what the most suitable treatment would be. A judge may spontaneously discover what to do in familiar cases but may agonize for days, weeks, or months over what to decide in cases that are unfamiliar.

(c) Judgments of Value

Practical reflective insight leads to judgments of value that pronounce whether a particular course of action is possible or not possible, sufficiently suitable or unsuitable, or more appropriate than others in the circumstances. In other words, the judgment of value pronounces whether or not the action can be or should be performed.

Barden explains the method of testing proposed actions

¹¹ Insight, 610.

along lines similar to Lonergan. A proposed action is tested by subjecting the reasons for it to questioning. As in theoretical testing, in practical testing the absence of further relevant questions is the criterion for the invulnerability of judgments of value. He emphasizes that the ultimate criterion for a judgment of value is the individual who chooses the reason and the criteria for the action.

As in Lonergan's discussion of practical reasoning, the criteria of action is whether the ethical subject is convinced that a particular course of action is the most appropriate one to perform in the particular circumstances.¹² In other words, the reasons supporting one's judgment of value that a particular course of action is sufficiently suitable in the circumstances must be sufficient for the person making the judgment. The course of action one judges to be sufficiently suitable is correct because the person interpreting the situation and making the judgment of value has asked what are, for that person, all the relevant questions and is satisfied with the answers. Thus, the criteria of action depend on the questions that are asked and answered and the extent that each ethical subject is open to questions.

Barden stresses that judgments of value are not certain or

¹². After Principles, 48.

infallible.¹³ One can over-look relevant features of a situation. One can give more or less significance to evaluations than one would give on another occasion. One can also mis-interpret the situation and thereby reach a mistaken judgment of value. And one can judge from within a restricted horizon or context thereby suppressing questions that would otherwise be relevant in a broader context.

The particular questions posed and answered depend on one's horizon or context. Barden argues that the variability among people in what amounts to sufficient evidence for a judgment of value is due to the fact that, not only do individuals differ in their evaluations, but they also live within different traditions and experience "different emotional, intellectual, social, cultural, aesthetic, moral, and spiritual" development.¹⁴

Barden argues that the ultimate criterion for a judgment of value is not a rule or proposition that is accepted because it is fixed, given, innate or due to some authority. This perspective would seem to conflict with the goals of more traditional versions of practical reasoning in which decisions are legally justified by virtue of their relation to legally valid universal rules or norms. But from

¹³ *ibid.*, 83-85.

¹⁴. *ibid.*, 51.

Barden's point of view, the outcome of a case would not depend on a logical deduction from a universal rule of law plus requisite facts nor on the legal justification of one member of a pair of rival rulings. On the contrary, a particular legal judgment would be judged to be suitable or more suitable than other judgments insofar as that judge asked, and satisfactorily answered, what were considered by the judge to be all the relevant questions. For Barden, a universal legal ruling would express an appropriate solution to a practical problem; it would not in itself be the criterion for a legal judgment.

5. Decision/Choice

In Chapter One, I noted the terminological confusion among legal theorists about how to use the word "decision". Lonergan gives a precise definition of "decision". Decision is concerned with actuality; decision confers actuality upon a course of action that otherwise would not occur. Testing or evaluation in practical problem-solving ends with a judgment of value, but decision ends practical problem-solving itself. A decision is an act of will which may or may not follow the judgment of value.¹⁵ It is one thing to know why you should or should not do something, but it is quite another matter to do it. Practical reflection can go on indefinitely. In Lonergan's view, it possesses no capacity to bring itself to an end. "As long as one is reflecting, one has not decided yet. Until a person has decided, the reflection can be prolonged by further questions. But when a decision is made the reflection is over and done with."¹⁶ Decision, then, brings to an end the questions and answers in a single view grounding the choosing of a particular course of action which ends practical problem-solving. For example, practical reflection is ended by the cyclist when he decides to inflate the punctured tyre and ride on it as long as possible and then to inflate the tyre again and

¹⁵ Insight, 613, 709f.

¹⁶. ibid., 612.

again until reaching home. A doctor ends practical reflection when he decides, in accord with a judgment of value, to prescribe drugs for the patient's ulcer. A judge ends the practical problem-solving process when the choice is made to sentence the person to ten years or when the decision is made to allow the parents to recover for nervous shock after watching the Hillsborough disaster on television.

According to Lonergan, decision selects one member of a pair of contradictories. Decision either consents or refuses to perform a specific course of action. Decision is not concerned with rival options or rival rulings. After a doctor formulates a judgment of value that drugs should be prescribed, a doctor either decides to prescribe drugs or refuses to prescribe them. After a judge formulates a judgement of value that the person should be sentenced to ten years, the decision involves sentencing the person to ten years or refusing to sentence the person to ten years. After a judge reaches a judgment of value that the parents who watched their children suffer injuries on television during the Hillsborough disaster should recover for nervous shock, the decision involves awarding them damages or refusing to award them damages.

6. Conclusion

Lonergan offers a plausible explanation of practical problem-solving. It is comprised of a dynamic pattern of six mental activities that involve: (1) wondering, puzzling, and asking What-is-to-be-done-questions, (2) having practical insights, (3) formulating proposed courses of action, (4) asking Is-it-to-be-done-questions, (5) having practical reflective insights, and pronouncing judgments of value. Finally, decision ends practical reflection.

A number of significant findings can be summarized. One, the understanding phase in practical problem-solving, which would otherwise be known by legal positivists as the process of discovery, is a deliberate and conscious activity that involves asking and answering relevant questions. Two, the extent to which legal decision-making involves "discovery" is further developed by my examination of practical insight and practical reflective insight. Not only is "discovery" a key part of understanding, but "discovery" is also a crucial part of testing. Practical reflective insight is a full discovery of the relevant issues and implications of courses of action.

Chapter Six

General Methods of "Discovery" or Problem-Solving

1. Introduction

My analyses of problem-solving in theoretical and practical reasoning, in the two previous chapters, suggest that the understanding phases involve a single insight and that the testing phases also involve a single insight. However, the actual process is much more complex than I have indicated. Many insights are involved in each phase. The procedure a judge follows to interpret a situation can be understood as the emergence of a complex set of related insights and judgments of fact. Sufficiently understanding a situation involves theoretical reasoning. In the process of understanding a particular situation or problem, the judge must discover the relevant data. In a murder trial, if someone has been killed, the judge will listen to witnesses tell their interpretations of the situation. For the judge, the witnesses' interpretations are data that must be understood and tested for their reliability. If witnesses' stories are judged to be reliable, each story only constitutes the data or raw materials of the judge's interpretation. The judge must discover how the different stories fit together. In other words, the judge must interpret the various stories. The selection of the relevant data will depend on the questions and answers of

the judge which, in turn, depend on what questions the judge considers relevant to his ultimate goal of judging guilt or innocence. Through sets of direct insights, the judge discovers possible relations among events. The judge must also test that his interpretation is supported by sufficient evidence. Through sets of reflective insights and judgments of fact, the judge discovers in a supervening reflective insight whether the interpretation of the situation is, in fact, supported by sufficient evidence.

Following an interpretation of the situation, the judge must discover what should be done. This procedure also involves complex sets of insights and judgments. There may be no option; according to law a judgment of "not guilty" leads to releasing the accused person. But the judge may have a range of options, albeit limited and prescribed, when the verdict is guilty and must judge which course of action would be sufficiently suitable in the circumstances. If this is the case, practical reflection or evaluation occurs. Questions are asked in order to evaluate the various options. The questions lead to sets of practical reflective insights and a supervening practical reflective insight. A judgments of value, expressing that one option are more suitable than another or aspects of one options are more suitable than another, is formulated. On the other hand, the judge may not know what to do may compare the case to other cases in order to discover whether the solutions in those cases would be suitable in the current

case. This procedure also involves sets of insights and judgments.

The same general complex procedure would be involved when a judge is judging whether the parents of children injured in the Hillsborough disaster should be entitled to recover for post-traumatic stress syndrome suffered as a result of watching the disaster on television. In general terms, the judge discovers the relevant data; the particular situation must be sufficiently understood; possible solutions are discovered by comparing the case to other cases; the solutions are evaluated; the more suitable solution is discovered by practical reflective insight and is subsequently formulated as a judgment of value; finally, a decision is made. Problem-solving in these circumstances also involves a complex array of questions and insights, not single questions and single insights.

In fact, it is difficult to identify all the mental activities that comprise theoretical and practical problem-solving in legal decision-making due to the complexity of situations and the complexity of the process of theoretical and practical problem-solving. Some insights are spontaneous and relations among sense-experience can be discovered instantly and not be noticed. Insights may be combined with other insights so that new insights may include and mask previous insights. The fulfilling conditions of reflective insights may depend on a lifetime of learning law, identifying issues, knowing when to pursue

clues, and exceptional powers of attention to what is seen, read, or heard that may be impossible to make explicit or to analyse. Spontaneous shifts in the types of questions asked and the answers reached may be untraceable because they are not noticed. In Lonergan's opinion, it may be impossible to identify the mental activities accurately in all but the simplest situations.¹

¹ B. Lonergan, "The Form of Inference", Collection, (London: Darton, Longman & Todd, 1967).

2. General Methods of Judicial Decision-Making

Despite the problems involved in identifying all the specific mental activities that constitute legal decision-making, the broad or grand lines of theoretical and practical problem-solving can be identified. Indeed, Barden's writings² suggest there are two basic types of "discovery" or problem-solving strategies in judicial decision-making: (1) the process of applying posited law and (2) the process of discovering equitable judgments. These two strategies can be distinguished along the lines of the extent to which they are concerned with either theoretical or practical problem-solving. Applying posited law would primarily involve theoretical problem-solving and reaching equitable judgments would primarily involve practical problem-solving. Nevertheless, the aim of each problem-solving strategy is to find just solutions. In this section, I simply want to portray these strategies as methods of "discovery" in judicial decision-making.

(a) Applying Posited Law

Barden portrays the expression of posited law as part of a problem-solving strategy driven by the practical question

² G. Barden, "Aristotle's Notion of Epieikeia", ed. M. Lamb, Creativity and Method, (Milwaukee: Marquette University Press, 1980), 359.

"What is just in this kind of situation?"³ Posited laws are practical solutions to recurrent situations or problems. A posited law is a discovery in the sense that, as an answer to the question immediately above, it is the expression of what is thought to be just in the kind of case specified by the posited law.⁴ A posited law would be a formulation of the just solution in cases that are judged to be similar in relevant respects. The posited law would express the relevant similarities among a set of cases and also what should be done in such cases. This portrait of posited law as a practical solution to a problem contrasts with that of more formalist models which emphasize the role of rules of law to logically justify a decision. As an expression of a just solution in a type of case, the rule of law, for Barden, would be a summary of a set of similar situations. The primary role of such rules would be to help a judge discover suitable solutions in cases, not to ensure that decisions were legally justified.

The application of posited law in particular cases is presented as a problem-solving strategy by Barden. A posited law can be used to help discover the just solution in a particular case. Because a posited law expresses an understanding of what is thought to be just in the kind of case specified by that posited law, a posited law only

³ *ibid.*, 359.

⁴ *ibid.*, 358, 359, 363.

applies to the kind of cases specified by it. The expression of what is thought to be just in a type or kind of situation specified by the law is universal, according to Barden, only in the sense that any particular situation similar to the type specified by the law can be understood in the same way as the type of case formulated by the posited law. Although the operator of the search for the just solution in a case is the question, "What is the just solution in this case?", Barden states that the application of a posited law in a particular case involves answering the question "Is the particular case an example of the type specified by the law?" This is a theoretical question.

The first step in discovering whether the case is a member of the class covered by the law is to compare the particular case to the posited law. According to Barden, one must "discover how similar this case is to the case envisaged in the law and to the other cases where judgments have been given."⁵ If the posited law and the particular case are similar, then the just solution to the kind of case specified by the posited law will be the just solution in the particular case. The discovery is that the case expressed in the law is relevantly similar to the particular case. "If relevant similarity is established, then by the principle that similars are similarly

⁵ *ibid.*, 358.

understood,... the law can be applied without further ado"⁶ i.e. without further inquiry about the just solution. The just solution to this kind of case has already been discovered, tested, and formulated as the law. Hence, the discovery made by the judge is whether or not the particular case is envisaged by the universal law.

In Barden's opinion, "A law fits a case inasmuch as the justice intended by the law is realized when the law is applied to the case."⁷ If the judge discovers that the law covers the case, he applies the law because "the law adequately states what is just in the situation."⁸ The law is accepted as yielding the just solution to the case. Testing whether the law expresses the just solution in the particular case is not required because it has already been tested.

Testing in this method of problem-solving is primarily concerned with factual/theoretical similarity, not with evaluating the justice of the legal solution since, if the situation described by the law and a particular case are similar, then the just solution will also be similar. Nevertheless, practical questions that call for judgments of value may also be posed. A judgment of value expressing

⁶ *ibid.*, 358.

⁷ *ibid.*, footnote 15, at 364.

⁸ *ibid.*, 365.

whether the comparison made between the law and the case is "good enough" or "sufficient" to solve the legal problem may be given.

Barden stresses the fact that, when the particular case is not understood as an example of the type of case envisaged by and formulated by the law, a judge cannot assume what is just in the case is the same as in the type of case specified in the law. Thus it is necessary to have a way of finding out what type of case is envisaged by a particular law. The just solution is discovered by comparing cases and asking questions about previous cases and the particular case itself, not by the automatic or mechanical application of a universal posited law to a particular case.

(b) Discovering Equitable Judgments

Barden, following Aristotle, calls just solutions in cases not covered by posited law "equitable judgments". As answers to the practical question, "What is the just solution in this particular case?"⁹, equitable judgments are discoveries or inventions of what is thought to be just in particular situations. An equitable judgment is discovered in light of the communal sense of justice "contained in [or expressed by] the law but not totally

⁹ *ibid.*, 360.

specified by it."¹⁰ The strategy of a judge is to investigate the situation in light of what one has learned by living in the community and studying its tradition (including its past legislation, past jurisprudence, general discussions and writing about justice in society) and precedents which express the community's sense of justice. For Barden, laws express general types of acceptable practical solutions to typical practical problems in a society. They do not specify precisely what is involved for a particular person at a particular time in a particular situation. Thus, the tradition does not act as a sharply delineated criterion which can be applied more or less automatically to a novel and unforeseen situation. The tradition is much more like a field of action in which the detailed action must be discovered or invented¹¹ inasmuch as laws suggest the grand lines of a solution in a case.

The specification of what to do in particular circumstances must be performed by the individual asking and answering practical questions such as "What am I to do in this situation?" and "Is this or that solution more worthwhile?" Thus, the procedure used to reach equitable judgments would predominately involve practical problem-solving. The judge discovers what is just in a particular case by studying and

¹⁰ *ibid.*, 360.

¹¹ G. Barden, After Principles, (Notre Dame: University of Notre Dame Press, 1991), 29.

correctly understanding both the particular novel situation and also what is considered just in the tradition. In this context, the judge would pose and answer theoretical questions. But the judge builds on that theoretical knowledge by discovering or inventing a practical solution to the case and then evaluating it.

3. Conclusion

Barden's analysis of the problem-solving processes in law is not an effort to explain in detail the relation between theoretical and practical reasoning in judicial decision-making. His portrait of decision-making is in terms of general problem-solving strategies, not in terms of the nature of theoretical and practical problem-solving. Rather, Barden's study presents two contexts in which the process of legal decision-making could be further investigated. (1) The application of a posited law in a case could be studied from the point of view of how one discovers and tests the similarities between the situations comprised by a posited law and a particular case. Further, Barden's portrait of problem-solving strategies, which involves comparing situations, provides the framework for studying the nature of the understanding and testing phases when making analogies and generalizations. (2) The process of discovering or inventing equitable judgments in novel situations could be investigated in terms of the mental activities involved in discovering and testing equitable judgments. Such work might help us understand the relationship between theoretical and practical problem-solving in judicial decision-making in more detail.

Chapter Seven

The Form of "Discovery" in R v Morgentaler¹1. Introduction

The analysis of problem-solving in the previous chapters can be used to help understand the extent to which Madame Justice Bertha Wilson's discussion of the right to liberty in R v Morgentaler is a solution to a problem. This chapter examines how her opinion can be understood as an explanation of a problem-solving process that is performed in order to solve a legal problem. In conventional terms, her opinion can be considered an illustration of a "discovery" process which includes both discovery and truth-certification procedures.

Wilson's opinion is interesting because elements that are involved in theoretical problem-solving, as described by Lonergan, can be detected in her text. In fact, she presents her opinion as a report or explanation of her search for, and discovery of, a solution to a legal problem. She explicitly formulates What-questions that call for definitions and Is-questions that lead to judgments of fact. Although these elements can be identified in Wilson's text, I am not attempting to re-

¹ R v Morgentaler, [1988] 1 S.C.R. 30. (Supreme Court of Canada)

construct the actual process Wilson followed to solve the problem. The questions and answers she formulates in her text could be a partial re-construction of her own problem-solving process, but at most her text describes the broad outline of the actual process she followed. It would be impossible for her, or me, to identify all her questions and answers in such a complex problem-solving process. Rather, I investigate the questions and answers Wilson formulates in the Morgentaler case in order to identify the parallels between theoretical problem-solving and the explanation of problem-solving presented by Wilson.

Not only can elements in theoretical reasoning be detected in her text, but Wilson uses them for her own purposes. She exploits the structure of theoretical problem-solving in an effort to persuade the reader to accept her legal opinion. In general terms, she leads the reader through her text by asking and answering questions in the same way a teacher leads a student to the "desired" answer to a question. More specifically, Wilson uses What-questions and definitions or interpretations, Is-questions, and judgments of fact to provoke, shape, and control the reader's own questions and answers about the case in order to lead the reader to understand and to solve the legal problem in the same way as she presents the case. In the latter part of this chapter I examine this topic.

The Morgentaler case arose after three physicians - Drs.

Morgentaler, Smoling and Scott - set up a clinic to perform abortions on women even though they did not have a certificate from a committee of an approved or accredited hospital which is required by s. 251(4) of the Canadian Criminal Code. They were indicted on the charge of conspiring with each other with the intent to procure abortions contrary to s. 423(1)(d) and s. 251(1) of the Criminal Code. Before the three doctors entered pleas they moved to quash the indictment or to stay the proceedings on the grounds that s. 251 of the Criminal Code was ultra vires the Parliament of Canada because it infringed ss. 2(a), 7, and 12 of the Charter of Rights and s. 1(b) of the Canadian Bill of Rights.² The appellants and the Crown agreed that the main issue concerned s. 7 of the Charter. Consequently, the arguments of counsel and the judges' opinions in the case dealt with the constitutional question whether s. 251 of the Criminal Code infringed the right to life, liberty and security of the person in s. 7 of the Charter. I will restrict my analysis to Madame Justice Bertha Wilson's discussion of the right to liberty in this case.

The problem that Wilson must solve in this case was agreed upon and formulated by counsel for the Crown and the defence. The problem she is given to solve is "Does s. 251

² The Charter of Rights is part of the Canadian Constitution and the Canadian Bill of Rights is federal legislation.

of the Criminal Code violate s. 7 of the Charter?"³ "Does s. 251 of the Criminal Code which limits the pregnant woman's access to abortion violate her right to life, liberty, and security of the person within the meaning of s. 7?""⁴ This problem is formulated as an Is-question that calls for a judgment of fact such as "Yes, s. 251 violates s. 7" or "No, s. 251 does not violate s. 7." Wilson's opinion is ultimately a solution to this problem; it is an answer to this constitutional question. But she does not immediately provide an answer to this particular question and support it with evidence or reasoned arguments. Rather, she describes an elaborate problem-solving process that ultimately leads to the solution to this problem.

Wilson's method of solving this abstract constitutional problem is comprised of three stages. First, she specifies her version or interpretation of the problem. For her, the problem is whether a woman can be compelled by law to carry a foetus to term. Two, she devises and follows a strategy or method to discover a solution to this problem. She must discover the meaning of the right to liberty in the context of the abortion issue. The meaning can be discovered by considering the purpose of the Charter in general and the purpose of the right to liberty in particular. She follows the method in order to answer that question and discovers

³ This question and the other quotations underlined in this chapter are not underlined in Wilson's text.

⁴ R v Morgentaler, 162.

that: (a) the purpose of Charter rights is to achieve human dignity, (b) the right to liberty "...guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives"⁵, and (c) in the context of the abortion issue, the right to liberty "...gives a woman the right to decide for herself whether or not to terminate her pregnancy."⁶ Three, she answers the abstract constitutional question by judging that s. 251 violates the right to liberty in s. 7.

It is useful to summarize the aspects of the other opinions in the case that are relevant to Wilson's opinion. Chief Justice Brian Dickson states in his opinion that, in order to answer the constitutional question, "it is sufficient to investigate whether or not s. 251 meets the procedural standards of fundamental justice."⁷ He emphasizes that the job of the Court is not to solve the abortion issue, but simply to measure the content of s. 251 against the Charter. Although s. 7 of the Charter states that "Everyone has the right to life, liberty, and security of the person", Dickson answers the abstract constitutional question solely in terms of the right to security of the person. He defines a breach of security of the person as state interference with bodily integrity or as serious

⁵ ibid., 171.

⁶ ibid., 172

⁷ ibid., 53.

stress imposed by the state.

Dickson answers two questions, (1) "Does s. 251 infringe the s. 7 right to security of the person?" and (2) "Is the infringement of security of the person in accord with the fundamental principles of justice in the procedural sense?"

His answer to the first question is that the right to security of the person is breached for two reasons: One, forcing a woman to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations by a threat of criminal sanction is a profound interference with a woman's bodily integrity. Two, the result of the delay in obtaining abortions caused by the mandatory procedures of s. 251 is a higher probability of complications and a greater risk to the woman's physical and psychological health. These two reasons are concerned with procedural issues.

Dickson's answer to the second question "Does the breach of security of the person comport with the principles of fundamental justice in the procedural sense?" is that the objective of the legislation is valid, but that the means to balance the competing interests of the woman and the foetus are not "reasonable and demonstrably justified" because the procedures and administrative structure of s. 251 are unfair and arbitrary. Consequently, they defeat the legitimate objective of protecting the life of the woman. He argued that, according to the Canadian criminal

justice system, a defence should not be illusory or so difficult to attain as to be practically illusory. He points out that abortions are not available in some hospitals because the legislation requires that each hospital must have four doctors who can perform abortions; some hospitals are not accredited and so are automatically disqualified from performing abortions; the requirement that a province must authorize a hospital to perform abortions restricts the number of hospitals that can perform abortions; and that s. 251(4) fails to provide an adequate standard for abortion committees to decide whether a woman qualifies for an abortion. Thus, in his opinion, s. 251 infringes the right to security of the person and the principles of fundamental justice in the procedural sense guaranteed by s. 7 of the Charter.

In a similar opinion, Justice Beetz agrees with Dickson's analysis of the procedural requirements of security of the person and with the decision that s. 251 infringes the right to security of the person. Like Dickson, Beetz says that the means, ie. the rules and procedures in s. 251, are not reasonable and demonstrably justified because they are not rationally connected to the legitimate objective of the legislation which is to protect the foetus, and to the ancillary objective, which is to protect the life and health of the pregnant woman.

2. Theoretical Problem-Solving as a Form of Expression

(1) Interpreting the Problem

Wilson defines the abstract constitutional problem or question she is given more specifically by asking "...whether a pregnant woman can, as a constitutional matter, be compelled by law to carry a foetus to term."⁸

In order to support the view that her version of the problem is sufficiently suitable, she evaluates the merits of interpreting the problem solely in terms of procedural matters which is the approach used by the other judges. This procedural route had been followed by her fellow judges who judged that s. 251 infringes a woman's right to security of the person and that the infringement did not comport with the principles of fundamental justice in the procedural sense. They judge that the procedures and administrative structure stipulated by s. 251 are unfair and arbitrary and hence defeat the objective of protecting the life and health of the woman and the foetus. In contrast to this approach, Wilson argues that, regardless of whether or not the procedural requirements of s. 251 regulating whether a woman or her physician can terminate the pregnancy can be imposed, the question whether a woman can or cannot, according to the Constitution, be compelled by law to carry a foetus to term should be answered first.

⁸ ibid., 161.

In her opinion, a review of the procedural requirements would be "purely academic", "pointless", and "an exercise in futility" if the law that compels a woman to carry a foetus to term is unconstitutional in the first place. The problem is not, and should not be, about the procedures used or the justice of such procedures, but about the deeper reasons why a woman can or cannot be compelled in the first place. This is the deeper problem, the real question, a substantive issue, which is prior to, and more basic and fundamental than an analysis of procedural matters.

(2) Devising a Strategy or Method of Problem-Solving

(a) Narrowing the Search

Wilson's general strategy in answering the question "Does s. 251 of the Criminal Code which limits the pregnant woman's access to abortion violate her right to life, liberty, and security of the person within the meaning of s. 7?" is to search for interpretations or definitions of the right to life, liberty, and security of the person in s. 7. She relies on statements made by Chief Justice Dickson in the same case to help narrow down her search for these interpretations or definitions. According to Dickson, it is not necessary to define life, liberty and security of the person for all possible situations. Not only is it impossible to envisage all the context in which the right to liberty might be asserted, but the current case only concerns s. 251.⁹ Hence Wilson limits her search for the definitions of the rights in s. 7 of the Charter to the more limited context of s. 251. In particular, she wants to know whether liberty or security of the person gives a woman the right to decide whether to have an abortion. This Is-question provides her search for the meanings of liberty and security of the person with a further degree of precision.

⁹ ibid., 162.

Wilson further narrows down her search from "life, liberty, and security of the person" to "liberty" by arguing that current definitions of security of the person do not and cannot answer a particular question.¹⁰ She begins by examining Dickson's and Beetz' definition of security of the person in the Morgentaler case. She agrees with them that security of the person covers threats to the physical and psychological security of a pregnant woman. But, in her opinion, both this definition of security of the person and this interpretation of s. 7 are limited. This interpretation of s. 7 does not answer the question "Whether a legislative scheme that does not pose a threat to the physical and psychological security of the person of the pregnant woman would be valid under s. 7?" S. 7, which includes liberty and security of the person, may encompass more than physical and psychological security. This unanswered question is used to demonstrate the relevance of liberty to the problem and the inadequacy of the current definition of security of the person. In other words, Dickson's and Beetz' interpretation of security of the person is inadequate to answer the question above because relevant questions about it can still be posed.

The structure of her criticism of Dickson's and Beetz' interpretation of s. 7 corresponds to the explanation of testing in theoretical problem-solving in which

¹⁰ Wilson does not define or interpret "life" in s. 7 of the Charter in her legal opinion.

formulations are sufficient only when they have satisfied all the relevant questions. Dickson and Beetz stopped asking questions when they were convinced they had asked and satisfactorily answered all the relevant questions in order to give their own interpretation of the constitutional question. But from Wilson's perspective, Dickson and Beetz stop asking questions when they have reached only a partial answer or solution because their interpretation of s. 7 is insufficient to answer the question posed by Wilson.

(b) Discovering the Method or Strategy to Discover the Definition or Interpretation of the Right to Liberty

The right to liberty must be defined before Wilson is able to answer the question whether s. 7 gives a woman the right to decide whether to have an abortion. Wilson explicitly formulates the question as a What-question that calls for a definition: "...what is meant by the right to liberty in the context of the abortion issue?"¹¹ After having answered that question she will be able to answer the explicit Is-question, "Does it...give the pregnant woman control over decisions affecting her own body?"¹²

Wilson discovers the method that she can use to help her

¹¹ ibid., 163.

¹² ibid., 163.

discover a definition of the right to liberty by reading a previous case. She follows the method of discovery outlined by Dickson in the case of R v Big M Drug Mart.¹³ In that case, he advocates a purposive approach to defining Charter rights. The purpose can be discovered by referring to the "character and larger objects of the Charter", to the "language" expressing the right, the "historical origin" of concepts enshrined in the Charter, and the "meaning and purpose of other rights and freedoms" associated with the rights in question.¹⁴ Furthermore, the interpretation is to be "generous, not a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefits of the Charter's protection."¹⁵ Hence Wilson's method of searching for the definition of the right to liberty is "...to consider the purpose of the Charter in general and [the purpose of] the right to liberty in particular."¹⁶

(c) Searching for the Purpose of the Charter

The purpose of the Charter is revealed after Wilson presents a series of passages written by MacCormick, a legal philosopher, and Dickson, the Chief Justice of the

¹³ R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295.

¹⁴ R v Morgentaler, 164.

¹⁵ ibid., 164.

¹⁶ ibid., 164.

Supreme Court of Canada, that, taken as a whole, focus on the links between human dignity, free choice, the state, and the Charter. After presenting these passages, she makes further claims about Charter rights and human dignity and then discovers the purpose of Charter rights. Her approach is to present issues in general terms and to specify them as her inquiry unfolds.

She begins her search with the general claim that the purpose of the Charter is to "erect an invisible fence around each individual that the state will not be allowed to trespass."¹⁷ In other words, Charter rights are a means to keep governmental activities and decisions from interfering with individuals. This perspective is consistent with the classical notion of liberty.

The second general point, presented by quoting a passage written by MacCormick, turns on a link between liberty and human dignity. Liberty, in the sense of being able to decide for oneself, is a means or a method to achieve self respect and contentment, ie. human dignity. This is a quite different version of liberty from the one immediately above which stresses the protection of individuals from government interference.

Wilson presents a quote taken from Dickson's opinion in Big

¹⁷ ibid., 164.

M Drug Mart to develop the theme concerning the relationship between individual choice and state. For Dickson, the ability of citizens to make free and informed decisions is the absolute pre-requisite for democratic government. Moreover, the Charter rights associated with freedom of individual conscience are "fundamental" because they are central both to democracy and to basic beliefs about human dignity.

In the quotation from MacCormick, liberty and individual choice are conditions of human dignity. In contrast, Wilson has used the quotation from Dickson to develop or specify this tie in terms of the idea that the Charter rights associated with freedom of individual conscience are central to beliefs about human dignity. In so doing, she presents an account of the role of the Charter that is different from the original idea that the Charter constructs a fence around each individual. Not only has she shifted her attention back to the Charter, but she has also changed the terms of the discussion. Instead of considering "liberty" and "individual choice" in general terms of making one's own decisions without state interference, the relationship between the individual and the state has been developed into the idea that these Charter rights are "fundamental" because they are central to a free and democratic political system and to human dignity. The "state" is now described more specifically in terms of a "free and democratic political system" and

Charter rights are linked to human dignity in some, as yet, unexplained way.

The next step is a further specification of Dickson's point above regarding how democracy is tied to human dignity. Wilson quotes a passage written by Dickson in R v Oakes.¹⁸ In that case, respect for human dignity is one of the values and principles essential to a free and democratic society.

Wilson makes her own contribution when she claims that values such as human dignity are the "genesis" of the rights guaranteed by the Charter and are also the ultimate standard against which to test whether a limit of a right is reasonable and demonstrably justified. In her opinion, "the idea of human dignity is expressed in almost every right and freedom in the Charter."¹⁹ Thus, Wilson discovers the purpose of Charter rights. The purpose of Charter rights is to achieve human dignity.

(d) Discovering the Purpose of the Right to Liberty

As in her search for the purpose of the Charter, the search for the purpose of the right to liberty begins with general statements that are formulated more specifically as the

¹⁸ R v Oakes, [1986] 1 S.C.R. 103.

¹⁹ R v Morgentaler, 166.

search progresses. She begins by considering general statements about liberty, but ends with the discovery of the specific purpose of the right to liberty.

Wilson returns to and develops the general theme concerning the boundary between the individual and the state by defining the basic theory underlying the Charter to be that "the state will respect choices made by individuals and to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life."²⁰ She refines this point by writing that "an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state."²¹

She broadly defines her first interpretation or definition of liberty by stating that "the right to make fundamental personal decisions without interference from the state"²² "...is a critical component of the right to liberty."²³ Prior to this interpretation or definition, Wilson's explanation of the relationship between the individual and the state in the context of the Charter has been that the state will respect choices made by individuals. But now

²⁰ ibid., 166.

²¹ ibid., 166.

²² ibid., 166.

²³ ibid., 166.

she specifies what she did not earlier, namely that particular types of choices - "personal decisions" - demand respect. Her position has been that so long as the choices are made by individuals they will be respected. However, at this point in her analysis, her position shifts from one akin to classic liberalism to the idea that the decisions with which a state will not interfere are a special type or class, namely "fundamental personal decisions". Wilson also introduces a second explanation of how liberty and human dignity are related. In contrast to classical liberalism's stress on protecting the individual from the state as fundamental, MacCormick's text implied that liberty was a condition of, or means to reach, human dignity, something even more fundamental than protection from the state. Here Wilson develops that notion by suggesting that liberty and human dignity are "equivalent" or "overlap" in some way. She does not clearly define the relationship between them, however, preferring instead to let the relationship float.

Her next steps involve interpreting or defining the right to liberty more precisely. She states that the right to liberty "...grants the individual a degree of autonomy in making decisions of fundamental personal importance."²⁴ This second definition or interpretation of the right to liberty compared to her previous definition, namely the

²⁴ *ibid.*, 166.

right to make fundamental personal decisions without interference from the state, is also different from the classical notion of liberty. She now incorporates a "degree of autonomy" into the right to liberty. Instead of the term "fundamental personal decisions" which suggests a special definable class of decisions that are basically or essentially personal according to some criterion or group, she now speaks of "decisions of fundamental personal importance" which suggests a wider range of decisions than would be considered very important by a particular individual.

Wilson specifies the more general relation between individual choice and the state by asserting that the proper ambit of the right to liberty is that liberty does not require the state to approve personal decisions, but it does require the state to respect them.

After considering how American cases, including cases about abortion, have interpreted the right to privacy and the Fourteenth Amendment to elaborate the scope of the right of individuals to make fundamental decisions affecting their private lives, Wilson re-defines or re-interprets the right to liberty. In the third interpretation or definition, the right to liberty "...guarantees to every individual a degree of personal autonomy over important decisions

intimately affecting their private lives."²⁵

Compared to her previous definition of the right to liberty, she increases the power of the right by changing the word "grants" to "guarantees". The "individual" still remains the beneficiary of the right to liberty. But "decisions of fundamental personal importance" are now expressed as "important decisions intimately affecting their private lives". This interpretation is similar to the interpretation of liberty above²⁶ which stressed "fundamental personal decisions". But the notion of "private life" is a development in Wilson's text that seems to be borrowed from Judge Blackmun of the U.S. Supreme Court.²⁷ Prior to this definition of the right to liberty, the notion of "private", in Wilson's opinion, has been associated with the idea of protecting individual choices from state interference, ie. the classic liberal notion. From this perspective, an individual choice is "private" if it is not regulated by law. In other words, any decision not regulated by law would be "private" decision. But the introduction of the term "private lives" here has a different meaning. In this context it is not associated with choices that are not regulated by law. Although her notion of "private lives" is not spelled out, it seems to

²⁵ ibid., 171.

²⁶ See page 13.

²⁷ ibid., 170-171; Thornburgh v American College of Obstetricians and Gynecologists, 106 S.Ct. 2169 (1986).

be associated with "personal" and "intimate" decisions and she suggests it constitutes a criterion of a specialized class of decision rather than a wide range of decisions of a more general character. To be protected by her definition of the right to liberty, decisions must be "important" decisions and must "intimately affect" persons' "private lives".

(e) Searching for the Purpose of the Right to Liberty in the Context of the Abortion Issue

So far the meaning of the right to liberty in the context of the abortion issue has not been discovered. Wilson's method of discovering it involves answering the question "Does the decision of a woman to terminate her pregnancy fall within this class of protected decisions [ie. the class of decisions defined by the right to liberty]?" This question is an Is-question that calls for a judgment of fact concerning whether or not the right to liberty covers a woman's decision to terminate her pregnancy. Wilson's judgment is that she has "no doubt that it does"²⁸ cover a woman's decision to terminate her pregnancy.

She also presents evidence in support of her judgment. The evidence which supports her judgment is concerned with the special nature of the decision whether or not to have an

²⁸ ibid., 171.

abortion.²⁹ Wilson writes that the decision will have "profound psychological, economic and social consequences..."³⁰, that the circumstances that give rise to the decision "can be complex and varied"³¹, and that the considerations involved in the decision may be, and usually are, both powerful and militating in opposite directions.³² She says that "the decision reflects the way a woman thinks about herself and her relationship to others and society at large"³³ and that it is a profound social and ethical decision, not just a medical decision.³⁴ Finally, the woman's "response to the decision will be the response of the whole person."³⁵

A man cannot adequately understand this situation. In Wilson's opinion, "It is probably impossible for a man to respond, even imaginatively..."³⁶ to such a dilemma "because it is outside the realm of his personal

²⁹ The language used by Wilson to describe the decision whether or not to have an abortion is similar to that used by C. Gilligan, In A Different Voice, (London: Harvard University Press, 1982).

³⁰ *ibid.*, 171.

³¹ *ibid.*, 171.

³² *ibid.*, 171.

³³ *ibid.*, 171.

³⁴ *ibid.*, 171.

³⁵ *ibid.*, 171.

³⁶ *ibid.*, 171.

experience"³⁷ and "because he can only relate to it by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma."³⁸ Wilson seems to be giving another sense of "private", that is, unintelligible to men.

Wilson discusses women's rights and human dignity from the point of view of women. She uses Noreen Burrows' writings to explain the special nature of women's rights. According to Burrows, the struggle for human rights since the Eighteenth Century has consisted in men struggling to assert their dignity and common humanity against the state, but the more recent struggle for women's rights has been "a struggle to place women in the same position as men."³⁹ The consequence has been that the right to reproduce has been ignored because it is not part of the existing set of male rights. In her opinion, the right to reproduce or not is to be properly perceived "as an integral part of a modern woman's struggle to assert her dignity and worth as a human being."⁴⁰ Thus, it seems that the right to reproduce or not is both part of the right to liberty and a condition or means to achieve liberty.

³⁷ *ibid.*, 171.

³⁸ *ibid.*, 171.

³⁹ *ibid.*, 172.

⁴⁰ *ibid.*, 172.

Next, Wilson answers her early question "What is the meaning of the right to liberty in the context of the abortion issue?" For her, the right to liberty "...gives a woman the right to decide for herself whether or not to terminate her pregnancy."⁴¹ This is Wilson's fourth and most specific interpretation or definition of the right to liberty.

⁴¹ *ibid.*, 172.

(3) Discovering the Solution to the Abstract Constitutional Problem

Now that she has defined the right to liberty in the context of the abortion issue, Wilson returns to solve the abstract constitutional question "Does s.251 of the Criminal Code violate s.7 of the Charter?" She repeats her question "...does s.251 of the Criminal Code violate this right [to liberty]?"⁴² Wilson's judgment is "Clearly it does."⁴³

The evidence she presents in support of this judgment is that (1) the purpose of s. 251 is "...to take the decision away from women and give it to a committee"⁴⁴; (2) "...the committee bases its decision on criteria entirely unrelated to [a pregnant woman's] own priorities and aspirations"⁴⁵; and (3) letting a committee decide whether a woman should be allowed to terminate her pregnancy is just as great a violation of a woman's right to personal autonomy in decisions of an intimate and private nature as letting a committee decide whether a woman should be allowed to continue her pregnancy because "both arrangements violate the woman's right to liberty by deciding for her something

⁴² *ibid.*, 172.

⁴³ *ibid.*, 172.

⁴⁴ *ibid.*, 172.

⁴⁵ *ibid.*, 172.

that she has the right to decide for herself."⁴⁶

⁴⁶ *ibid.*, 172.

3. Theoretical Problem-Solving as a Method of Persuasion

(1) Introduction

With regard to Wilson's opinion, the problem-solving process has a number of roles. Not only does she use the problem-solving process as the form in which to report or explain her solution to the constitutional problem, but she also uses the structure of the problem-solving process in an effort to persuade the reader to agree with her opinion. To be more specific, she uses the structure of the problem-solving process as a method of persuading the reader to agree with, assent to, or accept her way of solving the abstract constitutional problem. Her approach is not simply to convince the reader to agree with her ultimate solution because one accepts a set of reasons that support her solution. Instead, her general approach is to lead or guide the reader through a problem-solving process giving the reader the opportunity to assent to each step in her search for the solution. Her method of persuasion includes convincing the reader that her version or interpretation of the problem that must be solved is sufficiently suitable, that her method of solving it is the only plausible approach, and that the solution to the abstract constitutional question is correct. Stated simply, Wilson wants the reader to understand and to solve the problem in the same way as she presents the case. This approach seems to be typical of judicial opinions and Wilson's opinion

should not be understood as an exceptional case.

This section is also concerned with examining how Wilson exploits the nature of problem-solving in order to persuade the reader to agree with her opinion. I investigate how she uses the process as a whole and also how she uses questions and answers as persuasive techniques. The activity of persuasion cannot be adequately understood if one is concerned solely with identifying the persuasive techniques expressed in a text such as Wilson's opinion. The effects of these persuasive techniques on a person reading the opinion must also be examined. Regarding Wilson's opinion, the reader is engaged in problem-solving in that the reader asks and answers questions in order to correctly understand her opinion. The reader asks questions in order to understand ideas expressed in her text and may also ask questions to understand ideas which are gestured at rather than spelled out. In both contexts, the written text provokes the reader to ask one's own questions and to discover and test the answers for oneself. For example, the reader might ask "What is the problem Wilson must solve?" and "Is my understanding of Wilson's interpretation of the case correct?" In short, the reader's acceptance of, or assent to, her solution depends on the reader's questions and answers concerning the case.

More specifically, Wilson's questions and answers play a crucial role in persuading the reader to agree with each

step in the problem-solving process. Wilson wants to convince the reader that the questions she formulates are relevant and that her answers are correct. For example, when she defines her version of the abstract constitutional problem, she raises crucial substantive questions that are not and cannot be answered by the competing "proceduralist" position and she does this in order to undermine the competing position. When she searches for the meaning of the right to liberty, she presents her line of questioning as the sole plausible method of discovery and her definition of the right to liberty as the correct definition. And her ultimate solution to the problem is presented as an answer that has been proven to be correct.

The significant feature of Wilson's use of questions and answers is how she uses them for her own purposes. She exploits (1) the relationship between her own questions and answers and those of the reader and (2) the relationship between question and answer. She uses her own questions and answers to provoke and shape the questions posed and the answers given by the reader regarding the case. I examine how Wilson uses her own questions and answers to provoke, shape, control, and suppress the questions posed and the answers given by the reader. She manipulates the relationship between What-questions and definitions and between Is-questions and judgments of fact to shape and suppress the reader's questions and answers.

Wilson shapes the reader's problem-solving process by leading or guiding the reader through her own particular method of solving the problem. She leads the reader to agree with her solution to the problem in the way a teacher guides a student to the desired solution to a problem by asking questions and providing clues that direct the student to consider particular aspects of the problem. Similarly, Wilson provokes and creates a series of opportunities for the reader to ask questions, experience insights, and make judgments by formulating questions and answers in her text. She uses her questions and answers to lead the reader to understand her decision from her point of view by inviting the reader to answer her questions as if they are one's own, to follow her strategy of answering them, and subsequently to reach answers similar to her own.

Wilson influences the reader's problem-solving process by formulating questions that appeal to the reader's curiosity and ability to solve problems.⁴⁷ The reader could, in principle, ask any question and seek its answer, including the questions explicitly posed by Wilson. Hence Wilson shapes the questions the reader asks by explicitly formulating the relevant questions for the reader. With this technique she controls the reader's understanding of the case insofar as answers are correlative to, and depend

⁴⁷ For a general discussion of this aspect of persuasion see G. Barden, After Principles, (Notre Dame: University of Notre Dame Press, 1990), 128-131.

on, the particular questions asked. Supplying or presenting the reader with questions to answer is an effective way to shape the reader's understanding of her decision. By explicitly formulating significant questions in an orderly sequence Wilson leads the reader from one question to its answer and then to the next question and its answer until the reader comes to understand the case from her point of view.

Wilson also gives the reader the answers to her questions. This practice enables the reader to check one's own answers by comparing them to her answers to ensure that the reader's answers are correct from Wilson's point of view. Providing "correct" answers, and in some instances, evidence in support of her judgments amounts to exerting a further degree of control over the reader's definitions and judgments in that alternative answers are not considered. In this way, answers are shaped and options are suppressed.

By posing particular questions and answering them, Wilson directs the reader's attention to selected aspects of the case or the issues that she considers relevant. This technique shapes the reader's questions and answers to the extent that, by asking and answering questions along the line proposed by Wilson, the reader's attention is directed away from aspects of the case that may provoke questions about other issues that could be relevant. For example, questions could be raised about the circumstances in which

deciding to have an abortion could be appropriate or inappropriate. By selecting what is important to her decision, Wilson helps the reader ignore other aspects of the case. She directs the reader's attention to considering the capacity or ability of a woman to decide to have an abortion and ignores questions about what factors or guidelines would be relevant to making educated, reflective individual decisions concerning abortions. This technique restricts the range of questions the reader asks about the case. In other words, she uses her questions and answers to direct the reader's attention to what she considers relevant and thereby to displace and suppress other questions that may lead to understanding the case from another point of view.

Wilson uses What-questions and Is-questions in an effort to shape and suppress the reader's questions and answers. Limiting the questions posed to the type of questions featured in theoretical problem-solving enables the problem-solving process to be portrayed as a search for correct definitions or interpretations of an issue and true judgments of fact. This method is also presented as the correct way to solve the problem. Practical questions about possible alternatives and an evaluation of the merits of alternatives are not posed. The reader may limit one's own questions to What-questions and Is-questions insofar as the text fails to provoke questions about other possible definitions or interpretations and why one definition or

interpretation is preferred over others. In this way, practical questions that call for evaluations are suppressed.

(2) Shaping the Reader's Problem-Solving Process

In this section, I examine how Wilson uses questions and answers to persuade the reader to accept her way of solving the problem. In particular, I analyse how she uses questions and answers to lead the reader through (a) the interpretation of the abstract constitutional problem and (b) the definition of the right to liberty.

(a) The Use of Questions and Answers to Lead the Reader to Accept Wilson's Interpretation of the Problem

The way that Wilson defines the problem that must be answered by focusing on the "real" or "deeper" question illustrates a number of techniques she uses to persuade the reader to agree with her version of the problem. Most important is the way she presents her approach and that of Dickson and Beetz as alternatives. The competing positions take different questions as the specification of the problem. The reader is presented with the choice between two different interpretations of the relevant problem to be solved. Wilson confronts the reader with the choice of either accepting the approach of Dickson and Beetz by presuming that a woman can be compelled by law to carry a foetus to term or to accept her own position which is to explicitly ask and answer the question "Can a woman be compelled by law to carry a foetus to term?" Dickson and Beetz presume the answer to this question in the sense that

they evaluate the procedural requirements that must be met in order to have an abortion. One can infer that they first presume that the law can compel a woman to carry a foetus to term before they analyse the procedural requirements of the legislation. The reader's choice is between presuming that a woman can be compelled or to explicitly ask and answer the question "Can a woman be compelled by law to carry a foetus to term?" If the reader presumes the answer to the question is yes, then the problem that must be solved is the question "Do the procedural requirements of s.251 comport with fundamental principles in the procedural sense?" But if, on the other hand, the reader explicitly asks the question whether a woman can be compelled by law to carry a foetus to term, this question becomes the problem that must be solved. These alternatives appear exhaustive, limiting the reader's choice to these two alternatives. She rhetorically diminishes Dickson's and Beetz' approach in a series of three repetitive propositions in which she characterizes the alternative approach as "purely academic", "pointless", and "an exercise in futility".

But how is the reader led to choose one alternative rather another? Wilson first considers the alternative position. She agrees with Dickson and Beetz that s. 251 violates the right to security of the person. But then she contrasts their position more sharply with her own. She presents their position as limited to considering only security of

the person and coping only with the contingent and immediate legislative scheme of s.251. In contrast to her own position, their analysis does not answer the question whether an ideal legislative scheme that does not create a threat to a woman's physical and psychological health would be valid under s.7. She suggests they do not answer this question because they do not consider the right to liberty and fail to ask if the definition of security of the person is wider. In other words, from her perspective their approach omits to ask and answer relevant questions.

She continues to denigrate their position by asserting that their definition of security of the person "begs" the central issue in the case. They are concerned with purely procedural matters. Then she presents her own position as a way to solve the limitations or deficiencies of Dickson and Beetz. From Wilson's perspective the question they do not answer is crucial. According to her, if the right to liberty or security of the person or a combination of the two confers the right to decide whether or not to have an abortion, then we must look at both substantive and procedural issues. Hence the problem that must be solved is whether the right to liberty or security of the person or a combination gives a woman the right to decide whether to have an abortion. Wilson presents the method of solving the problem by explicitly formulating three questions that "we must answer".

To summarize, Wilson introduces the problem as a choice between two alternative methods of answering the abstract constitutional question. She shakes the foundation of Dickson's and Beetz' opinions by posing questions that their shared perspective does not, and cannot, answer and presents their focus on procedural justice as evasive. Moreover, which interpretation of the problem to choose can only be decided by asking further questions and then answering them in turn. By identifying the relevant questions that must be answered, Wilson moves beyond Dickson's and Beetz' approach. What began as the reader's choice between two possible alternatives has been developed by Wilson into a choice between trying to discover an answer to a crucial question or ignoring the question.

(b) The Use of Questions and Definitions to Persuade the Reader to Accept Wilson's Definition or Interpretation of the Right to Liberty

An aspect of Wilson's method of leading the reader to understand and to agree with her definition of the right to liberty is to present her approach to discovering the definition as the only plausible strategy. Wilson confronts the reader with the problem of how to discover an answer to the question "What is meant by the right to liberty in the context of the abortion issue?" by explicitly posing this question. There is more than one route that could be taken to answer this question and the

right to liberty could be defined in a number of ways. But Wilson leads the reader to the answer by telling the reader the method to use. The method is to consider the purpose of the Charter and the purpose of the right to liberty. She presents the execution of this strategy as if it is the sole way to answer the question. Alternatives are not considered. For example, she does not compare or explain why her interpretation or definition of liberty is more suitable than others. Remembering that in this case three doctors have been indicted, perhaps one way to answer the constitutional question would be to define the right to liberty from their point of view as a right to perform safe medical procedures when a woman's physical or psychological health is threatened and she has consented to the procedure. She does not evaluate why the reasons that support the judgment that the law should not be used to compel a woman to carry a foetus to term are more persuasive than the reasons why the law should be allowed to compel a woman to carry a foetus to term. She neither explains why or how a woman's right to decide whether or not to terminate her pregnancy leads to greater human dignity nor what she means by human dignity.

The strategy Wilson follows to discover the purpose of the Charter is to lead the reader through a series of interpretations of the relationship between the Charter, liberty, and human dignity drawn from MacCormick's writings and legally authorized sources. She specifies a

potentially broad and general analysis of the topic by initiating a discussion of the relationship between the individual and the state from the point of view of classical liberalism. Then she further develops this discussion by presenting various versions of the "inextricable tie" between the Charter, liberty, and human dignity before presenting the reader with her version of the purpose of the Charter. The purpose of the Charter is to achieve human dignity.

Her next step is to lead the reader to accept her definition of the right to liberty as the correct definition. She leads the reader to her definition through a series of definitions of liberty. Each definition is formulated more specifically than its predecessor. She begins by claiming that all the Charter rights express the idea of human dignity and that the Charter is founded on one aspect of human dignity, namely "the right to make fundamental decisions without interference from the state".⁴⁸ She claims this right is an aspect of the right to liberty. This general definition of the right to liberty is consistent with classical liberal theory.

Wilson re-defines this general definition of liberty in more specific terms by simply presenting increasingly specific interpretations or definitions of the right to

⁴⁸ *ibid.*, 166.

liberty. She states that the right to liberty "...grants to the individual a degree of autonomy in making decisions of fundamental personal importance."⁴⁹ In that definition, she stresses the characteristics of the decision insofar as the right to liberty is concerned with protecting "decisions of fundamental personal importance". Wilson then takes the reader back to the general statement that the proper scope of the right to liberty requires the state to respect personal decisions made by citizens, but does not require them to approve them, and says that this view is consistent with American jurisprudence. She leads the reader through American cases in which, according to the right to equality and the right to privacy in the American Constitution, the state could not interfere with certain fundamental personal decisions concerned with education, child rearing, procreation, marriage, or contraception to a more specific definition of the right to liberty. Now the right to liberty is interpreted or defined by stating that the right to liberty "...guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives."⁵⁰ After taking the reader through an analysis of the nature of a woman's decision whether or not to terminate her pregnancy, she presents her final interpretation or definition of the right to liberty. The right to liberty

⁴⁹ *ibid.*, 166.

⁵⁰ *ibid.*, 171.

"...gives a woman the right to decide for herself whether or not to terminate her pregnancy."⁵¹ The reader is invited to agree with her interpretation or definition because it is presented as the only plausible definition and is somehow derived or discovered by following her method of discovery.

⁵¹ *ibid.*, 172.

(3) Exploiting the Relationship Between Questions and Answers

(a) What-questions and Definitions/Interpretations

Wilson uses the relationship between question and answer in her text to shape the reader's questions and answers. She shapes the type of questions asked and the type of answers reached by the reader about the right to liberty by limiting the questions she formulates to What-questions and Is-questions. The reader's answers are shaped insofar as the answers to questions are correlative to the type of questions asked. What-questions demand explanations and definitions such as "What is the purpose of the Charter in general?" and "What is the content of the right to liberty in the context of the abortion issue?" Such questions direct the reader's attention to searching for definitions or interpretations that can be tested to determine whether they are true or false. The reader is asked to discover the correct or true purpose of the Charter and the correct or true definition of the right to liberty. Wilson's formulation of the question as a What-question creates an expectation that the right answer to the question can be discovered.

Wilson's presentation of the answer as the correct definition or interpretation of the right to liberty does not encourage the reader to consider alternative ways to

understand liberty or to ask whether and why one alternative should be preferred to another. By presenting her explanation of liberty in terms of an answer to a What-question, the reader's attention is directed away from questions about alternative ways to understand liberty and away from practical questions concerned with whether and why her particular definition or interpretation is "good", "bad", "valuable", or "suitable". In this way, questions about the possibility of alternatives that could challenge her explanation of the right to liberty are suppressed by asking a What-question that calls for a definition or interpretation and by presenting the answers as the correct definition. Moreover, practical questions that call for evaluations of why the purpose of the Charter and why the right to liberty should be defined in the way she has defined it are not formulated by Wilson and hence the reader is not provoked by her text to ask such questions.

(b) Is-questions and Judgments of Fact

Wilson's method of persuading the reader to agree with her solution to the abstract constitutional problem is to state her answer as a judgment of fact and then to prove it is correct by presenting the reasons that support it. Her judgment that s. 251 violates the right to liberty in s. 7 of the Charter is supported by three reasons. Her "reasons" consist in an explanation of the purpose and effects of s.251. The first "reason" is that the purpose

of the legislation is to take the decision away from a woman and to give it to a committee. The second "reason" is that the committee bases its decision on criteria unrelated to the pregnant woman's own priorities and aspirations. The third "reason" is that the committee decides for her something she has a right to decide for herself.

Wilson uses Is-questions to shape the reader's questions and answers. The use of Is-questions avoids practical questions that call for an evaluation of whether the answers reached are sufficiently suitable in the circumstances. She uses Is-questions to direct the reader's questions to factual matters and away from the invention of options and the evaluation of which option should be implemented or which interpretation should be accepted. She treats questions such as "Can a woman be compelled by law to carry a foetus to term?" "Does the right to liberty give a woman control over decisions affecting her own body?" "Does the decision of a woman to terminate her pregnancy fall within the class of decisions protected by the right to liberty?" and "Does s. 251 violate s. 7 of the Charter?" are Is-questions that demand judgments of fact.

Wilson presents her answers to these questions as judgments of fact that have been proven to be factually correct. She formulates the judgment and then gives the evidence that supports it. For example, she presents her judgment that

the decision to have an abortion is protected by her interpretation or definition of the right to liberty. The evidence in support of that judgment consists in an analysis of the special characteristics of the decision to have an abortion and a woman's assertion of human dignity. The first characteristic consists of sweeping and general characteristics and implications of such a decision stated in language borrowed from C. Gilligan.⁵² The second characteristic is Wilson's claim that it is probably impossible for a man to respond, even imaginatively, to such a dilemma. The third characteristic concerns the way in which Wilson describes the special relationship between the right to reproduce or not and dignity. The right to reproduce or not is stated to be an integral part of a woman's struggle to assert her human dignity and worth. She does not explicitly analyse either the reason why the decision to have an abortion is protected by the right to liberty or the reasons why the decision should not be protected.

The reader is persuaded to agree with her judgment because the statements made in support of it are so sweeping and general that it is difficult to refute them. However, the question that Wilson does not raise is whether and why she considers that her description of the special nature of the decision and her arguments about autonomy and dignity are

⁵² See C. Gilligan, In a Different Voice.

sufficient to support her judgment. She suppresses questions that call for evaluations by posing the question as an Is-question that demands a judgment of fact. Wilson's text does not provoke the reader to ask questions that evaluate the merits of this judgment. Indeed, the effect of this type of presentation on the reader is to suppress practical questions that call for judgments of value. The judgment is presented as "true", in the theoretical sense, and the evidence for it as beyond reproach. Further questions are unnecessary.

Wilson's questions and answers form a complete and closed point of view or context. Only questions directly relevant to her solution to the constitutional problem are raised and answered by her. The question "What is the right to liberty?" is relevant because it helps answer the abstract constitutional question. Questions that are not relevant to her particular and immediate concerns are outside her context and are not raised. Questions about religious perspectives on abortion, whether the foetus is a person, whether the foetus has a right to life, and the responsibilities of doctors regarding abortions do not, in her opinion, help to answer the question and are not posed. Portraying her questions as the only questions that need to be answered in order to solve the problem helps to restrict the range of questions that are considered relevant by the reader and also suppresses the reader's questions that may lead to a more suitable understanding of the problem and a

more suitable solution.

Chapter Eight

Conclusion

My investigation of "discovery" in judicial decision-making began by analysing the legal realists' accounts of decision-making. The realists study the judicial decision-making process itself. They believe that understanding this process, and the factors that influence it, would promote wise decisions and candid reporting. Their method of inquiry is to analyse the self-reports of judges which described how they actually reached decisions. Although they amount to little more than names, the realists identify five key elements in the decision-making process: (1) puzzling and brooding, (2) having a hunch or intuition, (3) checking and testing the hunch, (4) reaching a decision, judgment, or solution, and (5) expressing or expounding the solution.

Unfortunately, modern legal theorists have neglected to build on the realists' methodology and results. A number of factors seem to support this state of affairs. Perhaps the most significant factor is Wasserstrom's attempt to create a clear distinction between the process of discovery and the process of justification. In an effort to resolve the debate between the realists and formalists over the nature of decision-making, he argued there is a "rigid dichotomy" between the process of discovery and the process

of justification. He claimed that the realists studied only the process of discovery, the process whereby tentative legal decisions are discovered. The process of justification, by contrast, was a separate and independent process with the function of publicly justifying these tentative legal decisions. He considered this process to be the proper subject-matter of legal theorists.

A number of related factors support the view of modern legal theorists that justification, not discovery, is the more crucial process in the legal context. Modern theorists claim that investigating the process of discovery is beyond the scope of their methodology and outside their range of concerns. They accept, and argue, that the process of justification is, and should be, the method of constraining judicial decisions in a liberal democracy.

I ended this introductory discussion by contrasting the positions of the legal realists and legal positivists on the nature of "discovery" itself. Although they both name hunches/insights as creative elements in decision-making, their views on the nature of "discovery" differ. The realists portray decision-making as a deliberate and conscious problem-solving activity, whereas the positivists represent "discovery" as an essentially arbitrary, irrational, and unconscious activity that is primarily influenced by the bias and prejudices of judges. I noted Bankowski's concern with the question whether "discovery"

includes testing. I concluded that such confusion about the nature of "discovery" in judicial decision-making can only be settled by investigating "discovery" in detail.

In an effort to investigate the nature of "discovery" in greater detail, I identified a number of connections between MacCormick's explanation of first-order and second-order legal justification and "discovery". I argued that aspects of the process of justification play a role in the process of discovery. The legal syllogism can guide the search for appropriate rules of law and relevant facts. The requirements of coherence and consistency can act as guidelines in the search for appropriate legal rulings. Further, the requirement of coherence can be used to discover clues or can function as a source of inspiration in the search for a solution to a novel case. Hence, not only do elements in the process of justification have justifying roles, but they also play roles in the process of discovery.

Next, I turned to Lonergan's study of insight in other fields of inquiry. I described his general method of studying human knowing and identified the pattern of thirteen mental acts involved in human knowing. These thirteen mental elements were distinguished in terms of two orientations - theoretical problem-solving and practical problem-solving. Theoretical problem-solving involves asking What-questions that call for definitions and

interpretations and asking Is-questions that demand judgments of fact. By contrast, practical problem-solving involves asking What-is-to-be-done-questions that call for courses of action and Is-it-to-be-done-questions that demand judgments of value.

I highlighted Lonergan's account of insight as the source of new discoveries and inventions. In so doing, I identified two types of insight: (1) insights concerned with understanding such as direct insights which discover ideas and practical insights which discover or invent courses of action and (2) insights involved in testing ideas and courses of action, such as reflective insights which discover the sufficiency of the evidence for a judgment of fact and practical reflective insights which discover the issues relevant to, and the implications of, a course of action that are sufficient for a judgment of value.

I then used this general analysis of insight in problem-solving to help understand "discovery" in judicial decision-making. Judicial decision-making was represented as comprising both theoretical and practical problem-solving. Theoretical problem-solving is concerned with interpreting situations and testing whether the interpretations are correct. On the other hand, practical problem-solving is concerned with discovering and evaluating solutions to practical problems.

In turn, theoretical and practical problem-solving each consist of an understanding phase and a testing phase. I examined the extent to which insight is an act of discovery in the understanding and testing phases of theoretical and practical problem-solving. These investigations led to a number of very interesting findings. Not only can the non-logical activities, such as insights, involved in "discovery" or "invention" in judicial decision-making be studied, but they are not essentially arbitrary, irrational, nor unconscious. On the contrary, asking questions and having insights is a conscious and deliberate process. However, the more surprising finding is that "discovery", in the form of reflective insights and practical reflective insights, is a crucial part of the testing phase in judicial decision-making. "Discovery", therefore, occurs in two contexts - understanding and testing. Moreover, the analysis of questions and answers, and the pattern of mental activities in which they occur, can be understood as an account of a form of "discovery" in judicial decision-making.

General strategies or methods of "discovery" in judicial decision-making can also be identified. Despite the difficulty of identifying every single question, insight, and judgment that occurs, it is possible to trace the grand lines of judicial decision-making. I represented Barden's analysis of applying posited law and reaching equitable judgments as such specialized methods of "discovery".

The Morgentaler case was used to illustrate another form that "discovery" takes in judicial decision-making. "Discovery" takes two forms in this case. It is a method or form of expression and a method of persuasion. Wilson expresses her legal opinion as a theoretical problem-solving process, ie. as a search for, and discovery of, a solution to her legal problem. She formulates her interpretation of the legal problem; she devises and follows a strategy to solve the problem; and she presents her solution to the legal problem. She also uses this form of "discovery" to lead and guide the reader to agree with each step in her solution to the problem. More specifically, she controls a reader's problem-solving process by exploiting the relationship between questions and answers in order to provoke, shape, and suppress a reader's questions and answers. She provides the reader with questions to answer and leads the reader to the "correct" answers. She exerts a further degree of influence over the reader by suppressing questions that call for judgments of value. Only theoretical questions - What-questions and Is-questions - are formulated. The reader's attention is directed to discovering the definition or interpretation that is "factually correct", not to discovering options or to evaluating what the solution should be.

Finally, this study of "discovery" in judicial decision-making raises doubts about the extent to which "discovery"

and justification are separate and independent processes. Not only are elements conventionally identified as aspects of legal justification part of the process of discovery, but "discovery", in the form of insights, is a crucial part of testing, and "discovery", as a form of expression or method of persuasion, can also be part of justification. Such findings blur the distinction between discovery and justification. Further, the extent to which justification is the dominant process relative to discovery needs to be re-examined in light of my re-interpretation of "discovery". This study indicates that "discovery" could even be the predominant activity in legal reasoning. Such questions, however, are beyond the scope of this project. I have been content to restrict my efforts to the more fundamental problem of understanding the nature of "discovery" in judicial decision-making.

Answer:

With respect to s. 605, the answer is No. As to s. 610(3), I adopt the reasons of the Court of Appeal and say that no costs should be awarded. ^a

7. Question:

If sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(d), 11(f), 11(h) and 24(1) of the *Canadian Charter of Rights and Freedoms*, are ss. 605 and 610(3) justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*? ^b

Answer:

No answer is required.

The following are the reasons delivered by

WILSON J.—At the heart of this appeal is the question whether a pregnant woman can, as a constitutional matter, be compelled by law to carry the foetus to term. The legislature has proceeded on the basis that she can be so compelled and, indeed, has made it a criminal offence punishable by imprisonment under s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34, for her or her physician to terminate the pregnancy unless the procedural requirements of the section are complied with. ^c

My colleagues, the Chief Justice and Justice Beetz, have attacked those requirements in reasons which I have had the privilege of reading. They have found that the requirements do not comport with the principles of fundamental justice in the procedural sense and have concluded that, since they cannot be severed from the provisions creating the substantive offence, the whole of s. 251 must fall. ^d

With all due respect, I think that the Court must tackle the primary issue first. A consideration as to whether or not the procedural requirements for obtaining or performing an abortion comport with fundamental justice is purely academic if such requirements cannot as a constitutional matter be imposed at all. If a pregnant ^e

Réponse:

La réponse est négative quant à l'art. 605. Pour ce qui est du par. 610(3), je suis d'avis d'adopter les motifs de la Cour d'appel et de ne pas accorder de dépens.

7. Question:

Si l'article 605 et le par. 610(3) du *Code criminel* du Canada portent atteinte aux droits et aux libertés garantis par l'art. 7, les al. 11d), 11f), 11h) et le par. 24(1) de la *Charte canadienne des droits et libertés*, sont-ils justifiés par l'article premier de la *Charte canadienne des droits et libertés* et donc compatibles avec la *Loi constitutionnelle de 1982*? ^f

Réponse:

Il n'est pas nécessaire de répondre à cette question. ^g

Version française des motifs rendus par

LE JUGE WILSON—La question au cœur de ce pourvoi est de savoir si une femme enceinte peut, sur le plan constitutionnel, être forcée par la loi à mener le fœtus à terme. Le législateur a tenu pour acquis qu'on pouvait l'y forcer et a d'ailleurs prévu, à l'art. 251 du *Code criminel*, S.R.C. 1970, chap. C-34, que l'interruption de grossesse par une femme ou son médecin, à moins que les exigences procédurales de cet article ne soient respectées, constitue une infraction criminelle punissable d'emprisonnement. ^h

Mes collègues, le Juge en chef et le juge Beetz, ont attaqué ces exigences dans des motifs que j'ai eu l'avantage de lire. Ils ont jugé qu'elles ne respectent pas les principes de justice fondamentale sur le plan de la procédure et ont conclu que, puisqu'elles ne peuvent être séparées des dispositions de fond qui créent l'infraction, l'ensemble de l'art. 251 doit être invalidé. ⁱ

Avec égards, je pense que la Cour doit s'attaquer d'abord à la question fondamentale. Se demander si les exigences procédurales pour obtenir un avortement ou pour le pratiquer respectent ou non la justice fondamentale devient une question purement théorique si, sur le plan constitutionnel, ces exigences ne peuvent absolument pas ^j

woman cannot, as a constitutional matter, be compelled by law to carry the foetus to term against her will, a review of the procedural requirements by which she may be compelled to do so seems pointless. Moreover, it would, in my opinion, be an exercise in futility for the legislature to expend its time and energy in attempting to remedy the defects in the procedural requirements unless it has some assurance that this process will, at the end of the day, result in the creation of a valid criminal offence. I turn, therefore, to what I believe is the central issue that must be addressed.

1. The Right of Access to Abortion

Section 7 of the *Charter* provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

I agree with the Chief Justice that we are not called upon in this case to delineate the full content of the right to life, liberty and security of the person. This would be an impossible task because we cannot envisage all the contexts in which such a right might be asserted. What we are asked to do, I believe, is define the content of the right in the context of the legislation under attack. Does section 251 of the *Criminal Code* which limits the pregnant woman's access to abortion violate her right to life, liberty and security of the person within the meaning of s. 7?

Leaving aside for the moment the implications of the section for the foetus and addressing only the s. 7 right of the pregnant woman, it seems to me that we can say with a fair degree of confidence that a legislative scheme for the obtaining of an abortion which exposes the pregnant woman to a threat to her security of the person would violate her right under s. 7. Indeed, we have already stated in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, that security of the person even on the purely physical level must encompass freedom from the threat of physical punishment or suffering as well as freedom from the actual punishment or suffering itself. In other words, the fact of exposure is enough to violate security of the person. I agree with the Chief Justice and Beetz J. who, for differing reasons,

être imposées. Si une femme enceinte ne peut, sur le plan constitutionnel, être forcée par la loi à mener le fœtus à terme contre sa volonté, l'examen des exigences procédurales par lesquelles elle peut y être forcée perd sa raison d'être. En outre, il serait, à mon avis, futile pour le législateur de gaspiller temps et énergie à tenter de remédier aux défauts des exigences procédurales s'il n'a quelque assurance que ce faisant, une infraction criminelle valide sera en fin de compte créée. J'en viens donc à ce que je crois être le point central qu'il faut examiner.

1. Le droit à l'avortement

L'article 7 de la *Charte* porte:

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Je conviens avec le Juge en chef qu'il ne nous est pas demandé dans cette affaire de délimiter dans tous ses aspects le droit à la vie, à la liberté et à la sécurité de la personne. Ce serait là une tâche impossible car nous ne pouvons concevoir tous les contextes dans lesquels ce droit pourrait être revendiqué. Ce qu'on nous demande de faire, je crois, c'est de définir ce droit dans le contexte de la loi contestée. L'article 251 du *Code criminel* qui limite le recours d'une femme enceinte à l'avortement viole-t-il son droit à la vie, à la liberté et à la sécurité de sa personne au sens de l'art. 7?

Si nous mettons de côté pour le moment les incidences que peut avoir l'article pour le fœtus et que nous nous intéressons uniquement au droit que l'art. 7 confère à la femme enceinte, il me semble que nous pouvons dire avec suffisamment de certitude qu'une structure législative régissant l'avortement qui menace la sécurité de la personne de la femme enceinte viole le droit que lui garantit l'art. 7. D'ailleurs, nous avons déjà dit dans l'arrêt *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177, que la sécurité de la personne, même au niveau purement physique, doit comprendre la liberté d'être exempt de toute menace de châtement corporel ou de souffrance, tout autant que la liberté d'être exempt du châtement ou de la souffrance eux-mêmes. En d'autres termes, l'éventualité elle-même suffit pour qu'il y

find that pregnant women are exposed to a threat to their physical and psychological security under the legislative scheme set up in s. 251 and, since these are aspects of their security of the person, their s. 7 right is accordingly violated. But this, of course, does not answer the question whether even the ideal legislative scheme, assuming that it is one which poses no threat to the physical and psychological security of the person of the pregnant woman, would be valid under s. 7. I say this for two reasons: (1) because s. 7 encompasses more than the right to security of the person; it speaks also of the right to liberty, and (2) because security of the person may encompass more than physical and psychological security; this we have yet to decide.

It seems to me, therefore, that to commence the analysis with the premise that the s. 7 right encompasses only a right to physical and psychological security and to fail to deal with the right to liberty in the context of "life, liberty and security of the person" begs the central issue in the case. If either the right to liberty or the right to security of the person or a combination of both confers on the pregnant woman the right to decide for herself (with the guidance of her physician) whether or not to have an abortion, then we have to examine the legislative scheme not only from the point of view of fundamental justice in the procedural sense but in the substantive sense as well. I think, therefore, that we must answer the question: what is meant by the right to liberty in the context of the abortion issue? Does it, as Mr. Manning suggests, give the pregnant woman control over decisions affecting her own body? If not, does her right to security of the person give her such control? I turn first to the right to liberty.

(a) *The Right to Liberty*

In order to ascertain the content of the right to liberty we must, as Dickson C.J. stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, commence with an analysis of the purpose of the right. Quoting from the Chief Justice at p. 344:

ait atteinte à la sécurité de la personne. Je partage l'avis du Juge en chef et du juge Beetz qui, pour des raisons différentes, ont conclu que les femmes enceintes voient leur sécurité physique et psychologique menacée par la structure législative élaborée à l'art. 251 et, comme il s'agit là d'aspects de la sécurité de la personne, leur droit en vertu de l'art. 7 est par conséquent violé. Mais bien entendu, cela ne répond pas à la question de savoir si même une structure législative idéale, en présumant qu'elle ne constitue pas une menace à la sécurité physique et psychologique de la personne de la femme enceinte, serait valide en vertu de l'art. 7. Il y a deux raisons à cela: (1) parce que l'art. 7 englobe plus que le droit à la sécurité de la personne, il mentionne aussi le droit à la liberté, et (2) parce qu'il se peut que la sécurité de la personne englobe plus que la sécurité physique et psychologique; c'est ce que nous avons à décider.

Il me semble donc que prendre comme point de départ de l'analyse la prémisse que le droit de l'art. 7 ne comprend qu'un droit à la sécurité physique et psychologique, sans traiter du droit à la liberté, dans ce contexte de «la vie, la liberté et la sécurité de sa personne», c'est présumer résolue dès le départ la question centrale en litige. Si le droit à la liberté, le droit à la sécurité de la personne ou une combinaison des deux confèrent à la femme enceinte le droit de décider elle-même (sur les conseils de son médecin) d'avoir ou non un avortement, il nous faut alors examiner la structure législative non seulement du point de vue de la justice fondamentale quant à la procédure mais aussi quant au fond. Je pense donc que nous devons répondre à la question: qu'entend-on par le droit à la liberté dans le contexte de la question de l'avortement? Donne-t-il, comme M^e Manning le prétend, à la femme enceinte le pouvoir de prendre des décisions relativement à son corps? Sinon, son droit à la sécurité de sa personne lui donne-t-il ce pouvoir? Je traiterai d'abord du droit à la liberté.

i) *Le droit à la liberté*

Pour déterminer ce que comprend le droit à la liberté, nous devons, comme le juge en chef Dickson le dit dans l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, procéder d'abord à l'analyse de l'objet de ce droit. Pour citer le Juge en chef, à la p. 344:

... the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection.

We are invited, therefore, to consider the purpose of the *Charter* in general and of the right to liberty in particular.

The *Charter* is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The *Charter* reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control. Thus, the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.

The *Charter* and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity. Professor Neil MacCormick, Regius Professor of Public Law and the Law of Nature and Nations, University of Edinburgh, in his work entitled *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (1982), speaks of liberty as "a condition of human self-respect and of that contentment which resides in the ability to pursue one's own conception of a full and rewarding life" (p. 39). He says at p. 41:

To be able to decide what to do and how to do it, to carry out one's own decisions and accept their consequences, seems to me essential to one's self-respect as a

... l'objet du droit ou de la liberté en question doit être déterminé en fonction de la nature et des objectifs plus larges de la *Charte* elle-même, des termes choisis pour énoncer ce droit ou cette liberté, des origines historiques des concepts enchâssés et, s'il y a lieu, en fonction du sens et de l'objet des autres libertés et droits particuliers qui s'y rattachent selon le texte de la *Charte*. Comme on le souligne dans l'arrêt *Southam*, l'interprétation doit être libérale plutôt que formaliste et viser à réaliser l'objet de la garantie et à assurer que les citoyens bénéficient pleinement de la protection accordée par la *Charte*.

On nous invite donc à examiner l'objet de la *Charte* en général et du droit à la liberté en particulier.

La *Charte* est fondée sur une conception particulière de la place de l'individu dans la société. Un individu ne constitue pas une entité totalement coupée de la société dans laquelle il vit. Cependant l'individu n'est pas non plus un simple rouage impersonnel d'une machine subordonnant ses valeurs, ses buts et ses aspirations à celles de la collectivité. L'individu est un peu les deux. La *Charte* exprime cette réalité en laissant un vaste champ d'activités et de décisions au contrôle légitime du gouvernement, tout en fixant des bornes à l'étendue appropriée de ce contrôle. Ainsi, les droits garantis par la *Charte* érigent autour de chaque individu, pour parler métaphoriquement, une barrière invisible que l'État ne sera pas autorisé à franchir. Le rôle des tribunaux consiste à délimiter, petit à petit, les dimensions de cette barrière.

La *Charte* et le droit à la liberté individuelle qu'elle garantit sont inextricablement liés à la notion de dignité humaine. Neil MacCormick, professeur de droit public et de droit naturel et international à l'Université d'Édimbourg, dans son ouvrage intitulé *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (1982), parle de la liberté comme [TRADUCTION] "une condition du respect de soi et de la satisfaction que procure la capacité de réaliser sa propre conception d'une vie bien remplie, qui vaille la peine d'être vécue" (à la p. 39). Il dit à la p. 41:

[TRADUCTION] Pouvoir décider ce qu'on veut faire et comment le faire, pour concrétiser ses propres décisions, en en acceptant les conséquences, me semble essentiel au

human being, and essential to the possibility of that contentment. Such self-respect and contentment are in my judgment fundamental goods for human beings, the worth of life itself being on condition of having or striving for them. If a person were deliberately denied the opportunity of self-respect and that contentment, he would suffer deprivation of his essential humanity.

Dickson C.J. in *R. v. Big M Drug Mart Ltd.* makes the same point at p. 346:

It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.

It was further amplified in Dickson C.J.'s discussion of *Charter* interpretation in *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136:

A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the

respect de soi en tant qu'être humain et essentiel pour parvenir à cette satisfaction. Ce respect de soi et cette satisfaction sont, à mon avis, des biens fondamentaux pour l'être humain, la vie elle-même ne valant la peine d'être vécue qu'à la condition de les éprouver ou de les rechercher. L'individu auquel on refuserait délibérément la possibilité de parvenir au respect de lui-même et à cette satisfaction se verrait privé de l'essence de son humanité.

Le juge en chef Dickson, dans l'arrêt *R. c. Big M Drug Mart Ltd.*, soutient le même point de vue, à la p. 346:

Toutefois, il faut aussi remarquer que l'insistance sur la conscience et le jugement individuels est également au cœur de notre tradition politique démocratique. La possibilité qu'a chaque citoyen de prendre des décisions libres et éclairées constitue la condition *sine qua non* de la légitimité, de l'acceptabilité et de l'efficacité de notre système d'auto-détermination. C'est précisément parce que les droits qui se rattachent à la liberté de conscience individuelle se situent au cœur non seulement des convictions fondamentales quant à la valeur et à la dignité de l'être humain, mais aussi de tout système politique libre et démocratique, que la jurisprudence américaine a insisté sur la primauté ou la prééminence du Premier amendement. À mon avis, c'est pour cette même raison que la *Charte canadienne des droits et libertés* parle de libertés «fondamentales». Celles-ci constituent le fondement même de la tradition politique dans laquelle s'insère la *Charte*.

Le juge en chef Dickson a approfondi ce point de vue dans son analyse de l'interprétation de la *Charte* dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, à la p. 136:

Un second élément contextuel d'interprétation de l'article premier est fourni par l'expression «société libre et démocratique». L'inclusion de ces mots à titre de norme finale de justification de la restriction des droits et libertés rappelle aux tribunaux l'objet même de l'enchéatement de la *Charte* dans la Constitution: la société canadienne doit être libre et démocratique. Les tribunaux doivent être guidés par des valeurs et des principes essentiels à une société libre et démocratique, lesquels comprennent, selon moi, le respect de la dignité inhérente de l'être humain, la promotion de la justice et de l'égalité sociales, l'acceptation d'une grande diversité de croyances, le respect de chaque culture et de chaque groupe et la foi dans les institutions sociales et politiques qui favorisent la participation des particuliers et des groupes dans la société. Les valeurs et les principes sous-jacents d'une société libre et démocratique sont à

ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.

Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

This view is consistent with the position I took in the case of *R. v. Jones*, [1986] 2 S.C.R. 284. One issue raised in that case was whether the right to liberty in s. 7 of the *Charter* included a parent's right to bring up his children in accordance with his conscientious beliefs. In concluding that it did I stated at pp. 318-19:

I believe that the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric — to be, in to-day's parlance, "his own person" and accountable as such. John Stuart Mill described it as "pursuing our own good in our own way". This, he believed, we should be free to

l'origine des droits et libertés garantis par la *Charte* et constituent la norme fondamentale en fonction de laquelle on doit établir qu'une restriction d'un droit ou d'une liberté constitue, malgré son effet, une limite raisonnable dont la justification peut se démontrer.

La notion de dignité humaine trouve son expression dans presque tous les droits et libertés garantis par la *Charte*. Les individus se voient offrir le droit de choisir leur propre religion et leur propre philosophie de vie, de choisir qui ils fréquenteront et comment ils s'exprimeront, où ils vivront et à quelle occupation ils se livreront. Ce sont tous là des exemples de la théorie fondamentale qui soutend la *Charte*, savoir que l'État respectera les choix de chacun et, dans toute la mesure du possible, évitera de subordonner ces choix à toute conception particulière d'une vie de bien.

Ainsi, un aspect du respect de la dignité humaine sur lequel la *Charte* est fondée est le droit de prendre des décisions personnelles fondamentales sans intervention de l'État. Ce droit constitue une composante cruciale du droit à la liberté. La liberté, comme nous l'avons dit dans l'arrêt *Singh*, est un terme susceptible d'une acception fort large. À mon avis, ce droit, bien interprété, confère à l'individu une marge d'autonomie dans la prise de décisions d'importance fondamentale pour sa personne.

Ce point de vue est conforme à la position que j'ai prise dans l'arrêt *R. c. Jones*, [1986] 2 R.C.S. 284. Dans cette affaire, il s'agissait de déterminer notamment si le droit à la liberté énoncé à l'art. 7 de la *Charte* incluait le droit pour un père d'élever ses enfants conformément à ses croyances intimes. En concluant que c'était le cas, j'ai dit, aux pp. 318 et 319:

Je crois que les rédacteurs de la Constitution en garantissant la «liberté» en tant que valeur fondamentale d'une société libre et démocratique, avaient à l'esprit la liberté pour l'individu de se développer et de réaliser son potentiel au maximum, d'établir son propre plan de vie, en accord avec sa personnalité; de faire ses propres choix, pour le meilleur ou pour le pire, d'être non conformiste, original et même excentrique, d'être, en langage courant, «lui-même» et d'être responsable en tant que tel. John Stuart Mill décrit cela ainsi: [TRA-

do "so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it". He added:

Each is the proper guardian of his own health, whether bodily *or* mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest.

Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them.

This conception of the proper ambit of the right to liberty under our *Charter* is consistent with the American jurisprudence on the subject. While care must undoubtedly be taken to avoid a mechanical application of concepts developed in different cultural and constitutional contexts, I would respectfully agree with the observation of my colleague, Estey J., in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, at pp. 366-67:

With the *Constitution Act, 1982* comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court.

The courts in the United States have had almost two hundred years experience at this task and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States courts.

As early as the 1920's the American Supreme Court employed the Fifth and Fourteenth Amendments to the American Constitution to give parents a degree of choice in the education of their children. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court struck down a law prohibiting the teaching of any subject in a language other than English. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), an Oregon statute requiring all "normal children" to attend public school and thus prohibiting private school attendance was held to be unconstitutional. The Court in *Pierce* at pp. 534-35 characterized the interest being infringed

DUCTION] «rechercher notre propre bien, à notre façon». Nous devrions, pensait-il, être libre de le faire «dans la mesure où nous ne tentons pas de priver les autres du leur, ni d'entraver leurs efforts pour y parvenir». Il ajoutait:

[TRADUCTION] Chacun est le véritable gardien de sa propre santé, tant physique que mentale et spirituelle. L'humanité a plus à gagner à laisser chacun vivre comme cela lui semble bon, qu'à forcer chacun à vivre comme cela semble bon aux autres.

La liberté dans une société libre et démocratique n'oblige pas l'État à approuver les décisions personnelles de ses citoyens; elle l'oblige cependant à les respecter.

Cette conception de la portée qu'il convient de donner au droit à la liberté sous le régime de notre *Charte* est conforme à la jurisprudence américaine sur le sujet. Quoiqu'il faille sans doute prendre garde d'appliquer mécaniquement des concepts élaborés dans des contextes culturels et constitutionnels différents, je souscris à l'observation que fait le juge Estey dans l'arrêt *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357, aux pp. 366 et 367:

La *Loi constitutionnelle de 1982* apporte une nouvelle dimension, un nouveau critère d'équilibre entre les individus et la société et leurs droits respectifs, une dimension qui, comme l'équilibre de la Constitution, devra être interprétée et appliquée par la Cour.

Les tribunaux américains ont presque deux cents ans d'expérience dans l'accomplissement de cette tâche, et l'analyse de leur expérience offre plus qu'un intérêt passager pour ceux qui s'intéressent à cette nouvelle évolution au Canada.

Dès les années 20, la Cour suprême des États-Unis a eu recours au Cinquième et au Quatorzième amendements de la Constitution américaine pour accorder aux parents une certaine latitude dans l'éducation de leurs enfants. Dans l'arrêt *Meyer v. Nebraska*, 262 U.S. 390 (1923), la Cour a annulé une loi interdisant l'enseignement, quelle que soit la matière, dans une langue autre que l'anglais. Dans l'arrêt *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), une loi de l'Oregon obligeant tous les «enfants normaux» à fréquenter l'école publique, et leur interdisant par le fait même la fréquentation d'une école privée, a été jugée

as "the liberty of parents and guardians to direct the upbringing and education of children under their control".

The sanctity of the family was underlined by the decision in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), where the Supreme Court invalidated a state law authorizing the sterilization of individuals convicted of two or more crimes involving moral turpitude. While the law was struck down on the basis that it violated the equal protection clause of the Fourteenth Amendment, the Court had this to say of the interest at stake: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race" (at p. 541).

Later the Supreme Court was asked to determine the constitutionality of a Connecticut statute forbidding the use of contraceptives by married couples. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the majority held this statute to be invalid. The judges writing for the majority used various constitutional routes to arrive at this conclusion but the common denominator seems to have been a profound concern over the invasion of the marital home required for the enforcement of the law. *Griswold* was interpreted by the Supreme Court in the later case of *Eisenstadt v. Baird*, 405 U.S. 438 (1972), where the majority stated at p. 453:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make up. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

In *Eisenstadt* the Court struck down a Massachusetts law that prohibited the distribution of any

inconstitutionnelle. Dans l'arrêt *Pierce*, aux pp. 534 et 535, la Cour a qualifié l'intérêt auquel on portait atteinte comme étant [TRADUCTION] «la liberté des parents et tuteurs de diriger l'éducation des enfants dont ils ont la garde et l'enseignement qui leur est donné».

Le caractère sacré de la famille a été souligné par l'arrêt *Skinner v. Oklahoma*, 316 U.S. 535 (1942), où la Cour suprême a invalidé la loi d'un État qui autorisait la stérilisation des individus reconnus coupables de deux ou plusieurs crimes impliquant la turpitude morale. Quoique la loi ait été annulée parce qu'elle violait la clause de l'égalité de protection de la loi établie par le Quatorzième amendement, voici ce que la Cour a dit de l'intérêt en cause: [TRADUCTION] "Nous avons affaire ici à une loi qui touche aux droits civils fondamentaux de l'homme. Le mariage et la procréation sont fondamentaux pour l'existence et la survie mêmes de la race" (à la p. 541).

Ultérieurement, la Cour suprême a été appelée à statuer sur la constitutionnalité d'une loi du Connecticut interdisant aux gens mariés d'utiliser des contraceptifs. Dans l'arrêt *Griswold v. Connecticut*, 381 U.S. 479 (1965), la majorité a jugé cette loi invalide. Les juges qui ont écrit au nom de la majorité ont emprunté diverses voies constitutionnelles pour arriver à cette conclusion, mais le dénominateur commun semble avoir été une profonde appréhension que l'application de la loi exige une incursion dans le foyer conjugal. La Cour suprême a interprété l'arrêt *Griswold* dans une affaire ultérieure, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), où elle a dit, à la majorité, à la p. 453:

[TRADUCTION] Il est vrai que dans l'arrêt *Griswold* le droit à la vie privée en cause a été considéré comme inhérent à la relation conjugale. Néanmoins le couple marié n'est pas une entité indépendante dotée d'un esprit et d'un cœur distincts, mais une association de deux individus, chacun pourvu de caractéristiques intellectuelles et émotionnelles distinctes. Si le droit à la vie privée signifie quelque chose, c'est bien le droit de l'individu, marié ou célibataire, d'être libre de toute intrusion gouvernementale injustifiée dans des domaines touchant si fondamentalement à la personne, comme la décision de porter ou de mettre au monde un enfant.

Dans l'arrêt *Eisenstadt*, la Cour a annulé une loi du Massachusetts qui interdisait la distribution de

drug for the purposes of contraception to unmarried persons on the ground that it violated the equal protection clause.

The equal protection clause was also used by the Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967), to strike down legislation that purported to forbid inter-racial marriage. The Court tied its decision to the previous line of cases that protected basic choices relating to family life. It stated at p. 12: "The freedom to marry has long been recognized as one of the 'vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival [The] freedom to marry . . . resides with the individual" Thus, by a process of accretion the scope of the right of individuals to make fundamental decisions affecting their private lives was elaborated in the United States on a case by case basis. The parameters of the fence were being progressively defined.

For our purposes the most interesting development in this area of American law are the decisions of the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and its sister case *Doe v. Bolton*, 410 U.S. 179 (1973). In *Roe v. Wade* the Court held that a pregnant woman has the right to decide whether or not to terminate her pregnancy. This conclusion, the majority stated, was mandated by the body of existing law ensuring that the state would not be allowed to interfere with certain fundamental personal decisions such as education, child-rearing, procreation, marriage and contraception. The Court concluded that the right to privacy found in the Fourteenth Amendment guarantee of liberty ". . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" (p. 153).

This right was not, however, to be taken as absolute. At some point the legitimate state interests in the protection of health, proper medical standards, and pre-natal life would justify its qualification. Lawrence H. Tribe, Professor of Law at Harvard University, in his work entitled

toute drogue à des fins de contraception aux gens non mariés pour le motif qu'elle violait la clause de l'égalité de protection de la loi.

La Cour suprême a aussi eu recours à la clause de l'égalité de protection de la loi dans l'arrêt *Loving v. Virginia*, 388 U.S. 1 (1967), pour invalider une loi qui avait pour objet d'interdire les mariages raciaux mixtes. La Cour a lié sa décision à la jurisprudence antérieure qui protégeait les choix fondamentaux en matière de vie familiale. Elle dit, à la p. 12: [TRADUCTION] «La liberté de se marier est reconnue depuis longtemps comme l'un des droits vitaux personnels essentiels à la recherche méthodique du bonheur par les hommes libres. Le mariage est l'un des «droits civils fondamentaux de l'homme», le fondement de notre existence et de notre survie mêmes . . . [La] liberté de se marier . . . réside chez l'individu». Ainsi, en quelque sorte par accretion, l'étendue du droit des individus de prendre des décisions fondamentales concernant leur vie privée a été élaborée cas par cas aux États-Unis. Les dimensions de la barrière ont ainsi été progressivement définies.

Pour nos fins, les décisions concomitantes de la Cour suprême *Roe v. Wade*, 410 U.S. 113 (1973), et *Doe v. Bolton*, 410 U.S. 179 (1973), constituent le développement le plus intéressant dans ce domaine du droit américain. Dans l'arrêt *Roe v. Wade*, la Cour a jugé qu'une femme enceinte a le droit de décider d'interrompre ou non sa grossesse. Cette conclusion, a dit la majorité, était imposée par le corps de droit existant qui interdit à l'État d'intervenir dans certaines décisions personnelles fondamentales telles l'enseignement donné aux enfants et leur éducation, la procréation, le mariage et la contraception. La Cour a conclu que le droit à la vie privée que l'on trouve dans la garantie de la liberté du Quatorzième amendement [TRADUCTION] «. . . est suffisamment large pour inclure la décision d'une femme d'interrompre ou non sa grossesse» (à la p. 153).

Ce droit ne doit pas, toutefois, être considéré comme absolu. Parvenu à un certain point, les intérêts légitimes de l'État vis-à-vis de la protection de la santé, des normes médicales appropriées et de la vie fœtale justifient de le restreindre. Dans son ouvrage intitulé *American Constitutional Law*,

American Constitutional Law (1978), conveniently summarizes the limits the Court found to be inherent in the woman's right. I quote from pp. 924-25:

Specifically, the Court held that, because the woman's right to decide whether or not to end a pregnancy is fundamental, only a compelling interest can justify state regulation impinging in any way upon that right. During the first trimester of pregnancy, when abortion is less hazardous in terms of the woman's life than carrying the child to term would be, the state may require only that the abortion be performed by a licensed physician; no further regulations peculiar to abortion as such are compellingly justified in that period.

After the first trimester, the compelling state interest in the mother's health permits it to adopt reasonable regulations in order to promote safe abortions — but requiring abortions to be performed in hospitals, or only after approval of another doctor or committee in addition to the woman's physician, is impermissible, as is requiring that the abortion procedure employ a technique that, however preferable from a medical perspective, is not widely available.

Once the fetus is viable, in the sense that it is capable of survival outside the uterus with artificial aid, the state interest in preserving the fetus becomes compelling, and the state may thus proscribe its premature removal (i.e., its abortion) except to preserve the mother's life or health.

The decision in *Roe v. Wade* was re-affirmed by the Supreme Court in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and again, though by a bare majority, in *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169 (1986). In *Thornburgh*, Blackmun J., speaking for the majority, identifies the core value which the American courts have found to inhere in the concept of liberty. He states at pp. 2184-85:

Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government . . . [citations omitted] That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a

1978, Lawrence H. Tribe, professeur de droit à l'Université Harvard, donne un résumé commode des limites que la Cour a jugé inhérentes au droit de la femme. Je cite les pp. 924 et 925:

^a [TRADUCTION] Plus précisément, la Cour a jugé que, puisque le droit de la femme de décider d'interrompre ou non une grossesse est fondamental, seul un intérêt supérieur peut justifier une réglementation de l'État qui entraverait ce droit de quelque façon. Au cours du premier trimestre de la grossesse, alors que l'avortement est moins dangereux pour la vie de la femme que mener la grossesse à terme le serait, tout ce que l'État peut exiger, c'est que l'avortement soit pratiqué par un médecin qualifié; aucune autre réglementation de l'avortement comme tel n'est impérieusement justifiée au cours de cette période.

Après le premier trimestre, l'intérêt supérieur de l'État dans la santé de la mère l'autorise à adopter une réglementation raisonnable afin de favoriser des avortements sans danger; mais exiger que les avortements ne soient pratiqués que dans des hôpitaux, ou uniquement après qu'un autre médecin ou comité aura donné son aval, outre le médecin de la femme, ne saurait être autorisé, car ce serait exiger que la procédure d'avortement suive une technique qui, si préférable soit-elle dans une optique médicale, n'est pas largement répandue.

Lorsque le fœtus devient viable, en ce sens qu'il peut survivre à l'extérieur de l'utérus pourvu qu'on l'aide artificiellement, l'intérêt de l'État dans la préservation du fœtus devient supérieur et l'État peut alors interdire qu'on l'enlève prématurément (c.-à-d. le faire avorter) sauf pour préserver la vie ou la santé de la mère.

L'arrêt *Roe v. Wade* a été réaffirmé par la Cour suprême dans l'arrêt *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), et aussi, quoique par une très mince majorité, dans l'arrêt *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169 (1986). Dans l'arrêt *Thornburgh*, le juge Blackmun, s'exprimant au nom de la majorité, cerne la valeur centrale que les tribunaux américains ont jugé inhérente à la notion de liberté. Il dit, aux pp. 2184 et 2185:

[TRADUCTION] Notre jurisprudence reconnaît depuis longtemps que la Constitution comporte la promesse qu'une certaine sphère privée de la liberté individuelle demeurera largement hors de portée du gouvernement . . . [références omises]. Cette promesse vaut pour les femmes autant que pour les hommes. Peu de décisions sont aussi personnelles et intimes, aussi littéralement

woman's decision — with the guidance of her physician and within the limits specified in *Roe* — whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

In my opinion, the respect for individual decision-making in matters of fundamental personal importance reflected in the American jurisprudence also informs the Canadian *Charter*. Indeed, as the Chief Justice pointed out in *R. v. Big M Drug Mart Ltd.*, beliefs about human worth and dignity "are the *sine qua non* of the political tradition underlying the *Charter*". I would conclude, therefore, that the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives.

The question then becomes whether the decision of a woman to terminate her pregnancy falls within this class of protected decisions. I have no doubt that it does. This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma. As Noreen Burrows, lecturer in European Law at the University of Glasgow, has point-

privées ou aussi fondamentales pour la dignité et l'autonomie individuelles que la décision prise par une femme — sur les conseils de son médecin et dans les limites indiquées dans l'arrêt *Roe* — d'interrompre ou non une grossesse. Le droit de la femme de faire ce choix librement est fondamental. Toute autre conclusion, à notre avis, protégerait inadéquatement un aspect central de cette sphère de liberté que notre droit garantit également à tous.

À mon avis, le respect du pouvoir décisionnel de l'individu dans des domaines d'importance personnelle aussi fondamentaux que traduit la jurisprudence américaine nous renseigne aussi sur la *Charte* canadienne. D'ailleurs, comme le Juge en chef le rappelle dans l'arrêt *R. c. Big M Drug Mart Ltd.*, la foi en la valeur et en la dignité humaines «constitue [...] le fondement même de la tradition politique dans laquelle s'insère la *Charte*». Je conclus donc que le droit à la liberté énoncé à l'art. 7 garantit à chaque individu une marge d'autonomie personnelle sur ses décisions importantes touchant intimement à sa vie privée.

La question devient alors de savoir si la décision que prend une femme d'interrompre sa grossesse relève de cette catégorie de décisions protégées. Je n'ai pas de doute que ce soit le cas. Cette décision aura des conséquences psychologiques, économiques et sociales profondes pour la femme enceinte. Les circonstances qui y mènent peuvent être compliquées et multiples et il peut y avoir, comme c'est généralement le cas, des considérations puissantes en faveur de décisions opposées. C'est une décision qui reflète profondément l'opinion qu'une femme a d'elle-même, ses rapports avec les autres et avec la société en général. Ce n'est pas seulement une décision d'ordre médical; elle est aussi profondément d'ordre social et éthique. La réponse qu'elle y donne sera la réponse de tout son être.

Il est probablement impossible pour un homme d'imaginer une réponse à un tel dilemme, non seulement parce qu'il se situe en dehors du domaine de son expérience personnelle (ce qui, bien entendu, est le cas), mais aussi parce qu'il ne peut y réagir qu'en l'objectivant et en éliminant par le fait même les éléments subjectifs de la psyché féminine qui sont au cœur du dilemme. Comme Noreen Burrows, maître de conférence en

ed out in her essay on "International Law and Human Rights: the Case of Women's Rights", in *Human Rights: From Rhetoric to Reality* (1986), the history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men (pp. 81-82). It has not been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being.

Given then that the right to liberty guaranteed by s. 7 of the *Charter* gives a woman the right to decide for herself whether or not to terminate her pregnancy, does s. 251 of the *Criminal Code* violate this right? Clearly it does. The purpose of the section is to take the decision away from the woman and give it to a committee. Furthermore, as the Chief Justice correctly points out, at p. 56, the committee bases its decision on "criteria entirely unrelated to [the pregnant woman's] own priorities and aspirations". The fact that the decision whether a woman will be allowed to terminate her pregnancy is in the hands of a committee is just as great a violation of the woman's right to personal autonomy in decisions of an intimate and private nature as it would be if a committee were established to decide whether a woman should be allowed to continue her pregnancy. Both these arrangements violate the woman's right to liberty by deciding for her something that she has the right to decide for herself.

droit européen à l'Université de Glasgow, le fait observer dans son essai "International Law and Human Rights: the Case of Women's Rights", dans *Human Rights: From Rhetoric to Reality* (1986), l'histoire du combat pour les droits de la personne, du dix-huitième siècle à aujourd'hui, est l'histoire des hommes qui ont lutté pour affirmer leur dignité et leur commune humanité contre un appareil d'État autoritaire. Plus récemment, la lutte pour la reconnaissance des droits des femmes a été un combat contre la discrimination, pour que les femmes trouvent une place dans un monde d'hommes, pour élaborer un ensemble de réformes législatives afin de placer les femmes sur le même pied que les hommes (aux pp. 81 et 82). Il ne s'agit pas d'une lutte pour définir les droits des femmes par rapport à leur position particulière dans la structure sociale et par rapport à la différence biologique entre les deux sexes. Ainsi les besoins et les aspirations des femmes se traduisent seulement aujourd'hui en des droits garantis. Le droit de se reproduire ou de ne pas se reproduire, qui est en cause en l'espèce, est l'un de ces droits et c'est à raison qu'on le considère comme faisant partie intégrante de la lutte contemporaine de la femme pour affirmer sa dignité et sa valeur en tant qu'être humain.

Étant donné alors que le droit à la liberté garanti par l'art. 7 de la *Charte* confère à une femme le droit de décider elle-même d'interrompre ou non sa grossesse, l'art. 251 du *Code criminel* viole-t-il ce droit? Manifestement il le viole. L'article a pour objet d'enlever cette décision à la femme pour confier à un comité le soin de la prendre. En outre, comme le Juge en chef l'observe à juste titre, à la p. 56, le comité fonde sa décision sur "des critères totalement sans rapport avec ses [celles de la femme enceinte] propres priorités et aspirations". Le fait que la décision d'autoriser ou non une femme à interrompre sa grossesse soit dans les mains d'un comité est une violation tout aussi grave du droit de la femme à l'autonomie personnelle en matière de décision de nature intime et privée que serait celle d'établir un comité pour décider s'il faut autoriser une femme à mener sa grossesse à terme. Dans les deux cas, il y a violation du droit de la femme à la liberté, car on décide pour elle ce qu'elle a le droit de décider elle-même.

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