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OBJECTIVE DECISION MAKING IN LONERGAN AND DWORKIN

Abstract: Critical Legal Scholars argue that judges are unable to make truly objective decisions. This view gained strength in 2000 in *Bush v. Gore*, when the U.S. Supreme Court decided the presidential election largely along partisan lines. This Note, however, argues that Critical Legal Scholars fail to provide positive, constructive answers to the problems of objective decision making. Alternatively, the Note examines these problems through the philosophies of Bernard Lonergan and Ronald Dworkin. The Note explains both philosophers' approaches to objective decision making, then examines those approaches in the context of *Bush v. Gore*. The Note concludes that Lonergan's philosophy, though not designed specifically for legal thinking, provides the stronger means for understanding and achieving objective judicial decision making.

INTRODUCTION

It seems like every time a judge decides an important well-publicized case, those with access to the media who disagree immediately criticize the decision. A common approach for these critics is to show how the judge's decision-making process was not objective; that is, that the decision was influenced by the judge's personal characteristics, such as political persuasion, race, ideology, gender, or economic background.[1] This critique is often accomplished by demonstrating that the current decision is at odds with one of the judge's previous decisions or publicly stated principles, other times by simply stating that the decision produces some sort of favorable effect for whatever class of persons the judge is assumed to be favoring.[2] Despite the potential asymmetry in this type of critique of judge's decisions,[3] their

[1] *See* Vincent Bugliosi, *None Dare Call It Treason*, NATION, Feb. 5, 2001, at 12; Ronald Dworkin, *A Badly Flawed Election*, N.Y. REV. BOOKS, Jan. 11, 2001, at 53; Mary McGrory, *Supreme Travesty of Justice*, WASH. POST, Dec. 14, 2000, at A3.

[2] *See* Bugliosi, *supra* note 1; Dworkin, *supra* note 1; McGrory, *supra* note 1.

[3] If the decision by the judge is inconsistent with a previous decision, and improperly influenced by the judge's biases, what about the previous decision with which it is being contrasted? Was that decision motivated by the opposite bias? And what effect should the simple fact that a favored group receives or is denied a benefit have upon the judge? Should she make the opposite decision on the basis of what group is affected, or would that merely be an example of the same bias in reverse?

effect is to strike at the heart of the United States' system of government: the independent, and formally neutral, judiciary.[4]

This issue was thrown into stark relief in the United States' most recent presidential election. The election was extremely close, and the entire country watched with fascination as the two main candidates, George W. Bush and Albert Gore, Jr. contested every aspect of the race, before and after Election Tuesday, in the media, the Florida vote counting offices and the courts.[5] When the United States Supreme Court finally decided between the two candidates,[6] half the country was delighted and half disgusted.[7] But Americans were also nervous: What exactly did it mean that the Supreme Court, one of the most respected institutions in the country, had apparently voted down party lines?[8] At the time, pundits proclaimed loudly that such a blatant abuse of the Court's power had dealt a deathblow to the Court's prestige.[9]

This election presents an almost perfect scenario in which to consider whether objective decision making is possible, and if so, how an individual should go about making such decisions. The judges who, in essence, voted for George W. Bush, were criticized for allowing their political persuasion to sway their decision.[10] In this case, one specific aspect of the judges' personalities, their political persuasion, was blamed for the decision, and this characteristic happens to be one of the easiest for critics to highlight because of the United States' two party system.[11]

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[4] *See* U.S. CONST. art. III.

[5] *See* ALAN M. DERSHOWITZ, SUPREME INJUSTICE 19–52 (2001) (discussing in detail the elements of the political and judicial struggle that occurred between Democrats and Republicans while contesting the Florida vote).

[6] *See* Bush v. Gore, 531 U.S. 98, 98 (2000). For further discussion of this case, see *infra* notes 285–357, and accompanying text.

[7] Drawing from the fact that the national popular vote was very nearly a tie. *See* Charles Fried, *'A Badly Flawed Election': An Exchange*, N.Y. REV. BOOKS, Feb. 22, 2001, at 8.

[8] The five Justices of the majority were appointed by Republican presidents. *See* DERSHOWITZ, *supra* note 5, at 198–99.

[9] *Id.* at 3–4 (listing various contemporary commentators). Subsequent events seem to have reduced the relative importance of the *Bush* decision. The terrorist attacks of September 11, 2001 reminded citizens that being an American is more important than being a Democrat or Republican. And empirically, a recount headed up by the Miami Herald seemed to show that George W. Bush would have won the election even apart from the Court's decision. Dennis Cauchon & Jim Drinkard, *Florida Voter Errors Cost Gore the Election*, USA TODAY, May 11, 2001 at 1A.

[10] Bugliosi, *supra* note 1, at 12; McGrory, *supra* note 1, at A3.

[11] Bugliosi, *supra* note 1, at 12; McGrory, *supra* note 1, at A3; *see also* DERSHOWITZ, *supra* note 5, at 50–52 (blaming the decision on political partisanship). Elections in the U.S. typically present a binary choice, between a Democrat and a Republican. This greatly

Can judges make objective decisions, free from personal bias? Can anyone, ever, make any decision free from all bias? After all, a judge is simply a person, and when they judge, they simply make a decision, similar in form, if not in content, to any well thought out decision made by an intelligent person.[12] One major trend in contemporary philosophy answers this question with a vociferous "No!"[13] This negative view of the possibility of objective decisions is carried into the legal arena by the Critical Legal Scholars,[14] who also answer no, and then apply that answer to the practice of law, attempting to show that in fact judges do not make unbiased decisions.[15]

The Critical Legal Scholars' approach, however, is unsatisfying. A careful reading of their work turns up many more critiques and rants, than constructive suggestions.[16] At the end of the day, one may be left with only the sickening feeling that all of society and law is a construct of white male patriarchy, designed to maintain the status quo, and that there is nothing one can do to change that. Although ultimately unsatisfying, the Critical Legal Scholars are effective when demonstrating the weaknesses of many of the traditional answers to the question of whether a person or a judge can make an unbiased, objective decision.[17] But still, the reader of the Critical Legal Scholars' writings is not likely to come away with any sense of what a real judge should do tomorrow morning when they go to work and are required to decide their next case.[18]

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clarifies the possible biases for a judge's choice in situations where the judge's choice will favor one party over the other.

[12] *See* Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 65 (1984) (debunking the myth that judges have an advantage over ordinary people while making decisions).

[13] *See e.g.*, Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811 (1990); Singer, *supra* note 12, at 4.

[14] Critical Legal Studies is a very diverse movement, if it can even be termed a movement. Some common tenets include a rejection of traditional hierarchy, concern for marginalized groups, especially racial minorities and women, and often radical proposals for addressing these situations. *See* Singer, *supra* note 12, at 5, 67–70. For an interesting, although now somewhat dated, collection of representative pieces, see Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461, 461–62 (1984).

[15] *See* Singer, *supra* note 12, at 25–26.

[16] *See* Kennedy & Klare, *supra* note 14.

[17] Ronald Dworkin represents one traditional approach to these questions, sometimes identified as a variation of natural law theory. Critical Legal Scholars have, for example, criticized Dworkin's reliance on rational consensus to justify his theory of society and law. *See* Singer, *supra* note 12, at 35 n.112.

[18] *See id.* at 52, 58. Singer, for example, argues for a substantive program to nihilism, which under other circumstances might be laughable, based simply on the definition of the word nihilism. *See id.*

A person seeking positive and constructive answers to the problems of objectivity must, accordingly, turn to another philosophy. This alternate must address the weaknesses of traditional philosophy which have been highlighted by the Critical Legal Scholars.[19] It must account for the fact that many people, and many judges, do not make unbiased decisions. And it must provide hope for a successful approach to objective, unbiased decision making. If it cannot do these things, then the seeker is no better off than if he or she had converted to nihilism, as some Critical Legal Scholars have proposed.[20] The philosophy of Bernard Lonergan, however, provides just such a constructive approach.

Bernard Lonergan lived from 1904–1984. His major works included *Method in Theology* and the monumental *Insight*.[21] Despite his prominence in general philosophical circles, Lonergan's work has been underused in the more specific area of legal philosophy.[22] This may be because Lonergan himself never wrote specifically about the legal arena, and in fact used the law as an example only rarely.[23] Lonergan's answer to the question of how people should make objective decisions is, however, a rich, well-rounded approach, well suited to decision making in the legal arena.[24] This Note will introduce Lonergan into the legal context by comparing his approach to objectivity with that of Ronald Dworkin.

Ronald Dworkin is a thinker and writer, well known in the area of legal philosophy, who has constructed a positive answer to the question of objectivity.[25] He provides his most complete explanation of his

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[19] These weaknesses include problems in making sense of human interactions, in explaining (or even affirming the possibility of) meaningful dialogue, and, more importantly for this Note, a total denial of classical objectivity. *See* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 335 (1979); Singer, *supra* note 12, at 25–26.

[20] Singer, *supra* note 12, at 7–8.

[21] BERNARD LONERGAN, INSIGHT: A STUDY OF HUMAN UNDERSTANDING (Frederick E. Crowe & Robert M. Doran eds., Univ. Toronto Press 1992) (1957) [hereinafter LONERGAN, INSIGHT]; BERNARD LONERGAN, METHOD IN THEOLOGY (1971) [hereinafter LONERGAN, METHOD].

[22] *But see* Patrick Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. REV. 227 (2002); Anthony J. Fejfar, *Insight into Lawyering: Bernard Lonergan's Critical Realism Applied to Jurisprudence*, 27 B.C. L. REV. 681 (1986).

[23] *See* Brennan, *supra* note 22, at 263.

[24] Lonergan's work may be classified as neo-Scholasticism, he drew on the legacy of Aquinas and Aristotle, but with different emphases and a broad understanding of modern science, mathematics, philosophy, and religion. *See id.*

[25] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986) [hereinafter DWORKIN, LAW'S EMPIRE]; Ronald Dworkin, *Pragmatism, Right Answers and True Banality*, *in* PRAGMATISM IN LAW AND SOCIETY (Michael Brint & William Weaver eds., 1991).

thinking on this question in *Law's Empire*.[26] Dworkin approaches the question of objective decision making specifically within the legal context, but ultimately tackles many of the same questions as both the Critical Legal Scholars and Lonergan.[27] For this reason, his work helps to highlight questions in the legal arena which must be answered by Lonergan's philosophy if that philosophy is to succeed, and to provide a response to the current dominant critique of objectivity in the law, the Critical Legal Scholars. This Note argues that Lonergan's explanation of objective decision making provides a better model than does Dworkin's explanation, both as an answer to the Critical Legal Scholars and in the real world of contentious cases.

In working toward the comparison of the two thinkers, Part I examines Lonergan's model of objectivity to gain familiarity with his thinking.[28] This necessarily includes an extensive discussion of Lonergan's theories of cognitional structure and error, and how these relate to society.[29] Part II provides a similar examination of Dworkin's theory of objectivity.[30] This entails a discussion of Dworkin's theory of legal interpretation, the principle he terms integrity, and the place of each in the adjudication of legal disputes.[31] Part III compares Lonergan's and Dworkin's works in the context of *Bush v. Gore*, in order to apply Lonergan's answers to the problem of objective decision making to a practical legal context.[32]

I. LONERGAN

Part I will trace Lonergan's arguments, leading up to his explanation of objective decision making, drawing primarily on his seminal work, *Insight*.[33] In order to determine if it is ever possible to make an objective decision, Lonergan first asked, what am I doing when I make a decision?[34] The answer to this question is a theory of knowing, which forms the basis of Lonergan's entire philosophy, and underlies

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[26] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at vii-ix (explaining that *Law's Empire* draws together all of Dworkin's prior work in jurisprudence, including, relevant to this Note, his notorious 'right answers' thesis, into a broad far-reaching description of law and its place in society).

[27] Both authors answer questions about objectivity and the form of proper decision-making processes. *See infra* notes 108–144, 269–284 and accompanying text.

[28] *See infra* notes 33–144 and accompanying text.

[29] *See infra* notes 33–144 and accompanying text.

[30] *See infra* notes 145–284 and accompanying text.

[31] *See infra* notes 145–284 and accompanying text.

[32] *See* Bush v. Gore, 531 U.S. 98 (2000); *infra* notes 298–357 and accompanying text.

[33] *See* LONERGAN, INSIGHT, *supra* note 21.

[34] *See id.* at 23.

his answer to the problem of objective decision making.[35] Even after knowing the alternatives, an individual must still decide between them, so Lonergan further explored what choosing adds to knowing.[36] Building on this structure, he explained what error is, how it can and does distort the process of decision making in practice, and how error can be corrected and avoided.[37] Finally, he answered the question directly, and delineated a method for making objective judgments.[38]

A. *Cognitional Structure*

Lonergan understood human knowing as an activity, intimately involving the knower, which occurs through a dynamic structure with three interacting levels.[39] It is not simply "taking a look" at things that exist outside the person, and then reporting those things, as many of the major strands of Western philosophy had supposed.[40] This cognitional structure is natural and inherent in everyone, but rarely recognized formally.[41]

The first level of this structure is experience.[42] Experience arises in a number of forms.[43] The most commonly recognized forms are the five senses, but beyond these Lonergan identified many others including feeling, remembering, and imagining.[44] All provide raw material, data, to the knower to be understood.[45] Without some experi-

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[35] *See infra* notes 39–79 and accompanying text.

[36] *See infra* notes 70–76 and accompanying text.

[37] *See infra* notes 80–106 and accompanying text.

[38] *See infra* notes 108–144 and accompanying text.

[39] *See* LONERGAN, INSIGHT, *supra* note 21, at 298–99.

[40] *See* BERNARD LONERGAN, THE SUBJECT 14–18 (1968). Lonergan criticized Kant, among others, for taking this too simplistic position. The result of such a position is an epistemology with too sharp a differentiation between subject and object. *See id.*

[41] Although all human knowing, according to Lonergan, proceeds via this cogitional structure, it is only by turning the process back upon itself that an individual is able to formally experience, understand and judge the existence of the structure. It is inapt, Lonergan explained, to conceive of the process of becoming aware of oneself as looking inwardly, in the same way that it is inapt to conceive of knowing as looking outwardly. Rather, knowledge of how one knows must be acquired by the same mechanism as knowledge of the outside world. Lonergan referred to this process, which he considered to be of central importance for any person, and especially for anyone attempting to utilize his work, as "the self-affirmation of the knower." *See* LONERGAN, INSIGHT, *supra* note 21, at 343–60.

[42] *See id.* at 299, 307.

[43] *See id.* at 204–14.

[44] *See id.*

[45] *See id.* at 96–97.

ence to draw upon, there is nothing to be understood.[46] Thus experience is prior to insight.[47]

Experience provides the data that allows for the possibility of an insight, the second level in Lonergan's theory of knowing.[48] An insight, as the term is used by Lonergan, is the act of catching on, the moment of understanding information which was previously available but unintelligible.[49] One key element of insights is that they cannot be forced, nor can one person have the insight on behalf of another.[50] They can, however, be encouraged in another person with apt questions and diagrams.[51] Lonergan reminded his audience that asking a question is the key to experiencing an insight; if individuals refuse to ask questions they will be unable to comprehend answers.[52] He aptly described how people experience a sense of wonder or an innate curiosity, a pre-verbal and even pre-conceptual desire to know, which leads them to ask questions.[53] It is these questions which drive investigation, and investigation in turn provides experiences and culminates in the act of insight.[54] In fact, this same sense of wonder provides the foundation for objective judgments.[55]

Judgment is the third level, or activity, of knowing; judgment follows and acts upon insights.[56] The innate curiosity described above is not content with just any insight; it drives the thinker to find the correct insight.[57] So judgment consists of reflecting on a prior insight and asking oneself, is it correct?[58] One aspect of this judgment is deciding whether one has enough information upon which to base the judgment.[59] If not, the judgment must be delayed until further pertinent questions have been identified, understood, and judged.[60] The

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[46] *See* LONERGAN, INSIGHT, *supra* note 21, at 298–99, 307.

[47] *See id.* at 298–99. Lonergan was well acquainted with the work of Jean Piaget, the renowned psychologist, and his work clearly shows Piaget's influence. *See generally*, LONERGAN, *supra* note 21, at 193–207; Walter E. Conn, *Objectivity—A Developmental and Structural Analysis: The Epistemologies of Jean Piaget and Bernard Lonergan*, 30 DIALECTICA 197 (1976).

[48] *See* LONERGAN, INSIGHT, *supra* note 21, at 298–99.

[49] *See id.* at 29.

[50] *See id.* Thus, for Lonergan, knowing (and by extension objectivity) is in the first instance an individual activity. *See id.*

[51] *See id.*

[52] *See id.* at 34.

[53] *See* LONERGAN, INSIGHT, *supra* note 21, at 34.

[54] *See id.*

[55] *See infra* notes 110–114 and accompanying text.

[56] *See* LONERGAN, INSIGHT, *supra* note 21, at 297–99.

[57] *See id.* at 404.

[58] *See id.* at 298–99.

[59] *See id.* at 404–05.

[60] *See id.* at 297.

final answer must be yes, no, or I don't know, meaning further questions are necessary, and yes and no may be qualified as more or less probable.[61] Judgments are communal and public in the sense that any number of people can affirm the judgment for themselves.[62] Where several individuals do make the same judgment, the independent thinkers obviously did not share the exact experience that gave rise to the understanding that is affirmed in the judgment, rather they too affirm the truth of the insight behind the judgment.[63]

These three parts of the cognitional structure—experiencing, understanding, and judging—all presuppose and complement each other.[64] Experiences without understanding are unintelligible, but understanding requires experience to act upon.[65] Equally, understanding without judgment is meaningless, but judging involves an intimate interaction with an insight, and through the insight, with experience.[66]

Insights tend not to occur singly, rather they often occur in complex webs, where an initial insight can trigger the necessary questions and provide explanatory material that make the next insight much more likely.[67] Where a system of insights leads to a radically new understanding of the subject, there arises what Lonergan termed a higher viewpoint.[68] The insights that allow the higher viewpoint provide the basis for a rich, broad line of inquiry which transcends the prior understanding of the subject.[69]

Given this tripartite cognitional structure of experience, insight, and judgment, and the development of knowledge, Lonergan was able to describe the relationship between knowing and deciding.[70] Deciding is an activity that subsumes the structure of knowing in

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[61] *See* LONERGAN, INSIGHT, *supra* note 21, at 297.

[62] *See id.* at 197–99, 729.

[63] *See id.* at 315. *But see* Rorty, *supra* note 19, at 335 (arguing that the word "objective" only means that the parties agree).

[64] *See* LONERGAN, INSIGHT, *supra* note 21, at 298.

[65] *See id.* at 298.

[66] *See id.* at 298.

[67] *See id.* at 37–38.

[68] This is the basis of Lonergan's theory of development. *See id.* at 37–42.

[69] *See* LONERGAN, INSIGHT, *supra* note 21, at 37–38. Lonergan explains that there are ways to engineer the creation of a higher viewpoint. In general, a heuristic structure is a guide to getting answers, such as the generation of a higher viewpoint or the question that guides an insight. A method is a fully developed heuristic structure that guides the question, anticipates the kind of insight to be expected, and provides a method of verification. Thus a method provides the form, but not the content, for inquiry which can ultimately lead to the solution of any problem, including that of general bias. *See id.* at 67–68.

[70] *See id.* at 636–37.

much the same way that, within the structure of knowing, judging subsumes simple understanding, and understanding mere experience.[71] So in the process of deciding, the decision maker first experiences, understands, and judges the truth or existence of alternative courses of action.[72] In order to choose between extant alternatives, however, one must further judge the value of the alternatives.[73] Thus the decision maker must further experience, understand, and judge the value of the alternatives before choosing the greatest value.[74] Value, then, is a basic element of deciding.[75] Deciding adds to the evaluation of a commitment in order to "bring some course of action into being which, if you do not do it, will not exist."[76]

By basing all his work on his understanding of cognitional structure, Lonergan described the process of knowing, from its beginnings in experience.[77] He traced the transformation of experience into understanding through insight, and the judgment that asks if the insight is true or not.[78] Finally, he incorporated this structure of knowing into a broader structure of deciding, which includes determining the value of alternate courses of action, and committing to bring the most valuable alternative into being.[79]

B. *Error*

Although the cognitional structure is the same in each person, it clearly is not a static equation that necessarily leads to correct conclusions.[80] The world is full of people who, although sharing a single cognitional structure, make radically different decisions in exactly the same situations.[81] This, however, is not necessarily a bad thing.[82] Di-

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[71] Deciding is best understood as the fourth level in the cognitional structure, except that the first three complete the act of knowing, and deciding begins the process of acting on that knowledge. *See* JOSEPH FLANAGAN, QUEST FOR SELF-KNOWLEDGE: AN ESSAY IN LONERGAN'S PHILOSOPHY 196–97 (1997); LONERGAN, INSIGHT, *supra* note 21, at 636–37.

[72] *See* FLANAGAN, *supra* note 71, at 197–98.

[73] *See id.* at 200–01; LONERGAN, INSIGHT, *supra* note 21, at 636–37.

[74] *See* LONERGAN, INSIGHT, *supra* note 21, at 624.

[75] *See id.* at 624–25.

[76] FLANAGAN, *supra* note 71, at 201. Not only is the new, valuable course of action brought into being, but the actor is changed as well, she takes more responsibility for her own being through creating more value in herself and the world around her. *See id.*

[77] *See* LONERGAN, INSIGHT, *supra* note 21, at 96–97.

[78] *See id.* at 298–99.

[79] *See id.* at 636–37.

[80] *See* FLANAGAN, *supra* note 71, at 107.

[81] *See* LONERGAN, INSIGHT, *supra* note 21, at 234.

[82] Lonergan called for a diversity of ideas, for example, in his description of cosmopolis. *See id.* at 264.

verse backgrounds and applications of the structure allow for multiple outcomes, which is one reason why Lonergan understood that a community is necessary to combat overall decline in society.[83] Besides legitimate differences, however, it is also true that decisions are sometimes made poorly and incorrectly.[84] As one Lonerganian scholar has pointed out, "[b]esides the desire to understand, there is also the fear of understanding."[85] An individual's fear may operate in many ways to block insight.[86] For example, fear may intrude at the fountainhead of cognitional activity, by blocking the sense of wonder upon which the whole activity depends.[87] The individual may not want to understand, and thus flee from insight.[88]

At other times, an individual may prefer him or herself to the group in such a way as to choose to block out the insights that would force each to see his or her own selfishness.[89] An entire economic or racial group within a community may resist changes, either actively or passively, and so avoid understanding how these changes would actually improve the community.[90]

Lonergan also described the general bias of common sense toward theoretical patterns of knowing.[91] Although the same cognitional structure described above is found in everyone,[92] individual people according to their needs and practices apply it in various situations and towards various ends.[93] Lonergan noted that there is one very basic distinction in patterns of knowing that causes a great deal of trouble.[94] At certain times, people direct their attention toward scientific, disinterested knowing, and then they anticipate understand-

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[83] *See id.* at 263–67. Because absolutely correct knowing, and thus decision making, is so difficult and time consuming, and modern industrialized societies are enormous and intricate, it would be impossible for one person to gain expertise in enough areas simultaneously to effect an entire society. Thus a community, although not in the traditional sense of the word, of experts is necessary to effect widespread change. *See infra* note 378.

[84] *See* LONERGAN, INSIGHT, *supra* note 21, at 244–45.

[85] *See* FLANAGAN, *supra* note 71, at 80.

[86] *See id.*

[87] *See id.*

[88] *See id.*

[89] *See* LONERGAN, INSIGHT, *supra* note 21, at 244–47.

[90] *See id.* at 247–50.

[91] *See id.* at 250–51.

[92] *See id.* at 359–60. The structure is described by Lonergan as invariant. *See id.*

[93] *See id.* at 203.

[94] *See* LONERGAN, INSIGHT, *supra* note 21, at 200–01. Lonergan detailed a number of "patterns of knowing" but these two are the important ones for the limited point made here.

ing generalizations and technical answers.[95] At other times, people are interested in common sense knowing, in understanding each immediate situation in a very practical way, and seeking particular and practical answers.[96] As even this summary statement of the different purposes of the two patterns of knowing indicates, the two are complementary; common sense thinking solves practical immediate problems, while theoretical knowing generates long-term planning and describes common-sense situations in helpful ways.[97] But in fact the tension generated between the two patterns often breaks down into what Lonergan termed general bias.[98] Common sense knowers, because they are by definition incapable of explanatory introspection, cannot accept that common sense is a limited field and may often disparage theoreticians as useless dreamers.[99]

Unfortunately, when people of common sense disparage theoretical knowing the result is often an overall cycle of decline.[100] Common sense, with its focus on immediate, contextual decisions, is incapable of successfully guiding a society in the long term.[101] The various individual and group biases described above[102] contribute to shorter cycles of decline which cause chaos and decay in specific parts of society, by restricting and distorting the decision-making processes.[103] And when left unchecked because of the general bias against theory, this gradual decay can incrementally drag an entire culture into lower viewpoints and more restrictive horizons.[104] The only answer to this problem is the creation of a higher viewpoint that will "attack the problem at its source."[105] This higher viewpoint must provide a

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[95] *See id.* at 198–200. Another way of describing scientific knowing is that it is interested with the relations between things. *See id.*

[96] *See id.* at 200–01. Common sense knowing is a popular and important subject which has been explored in the legal literature by a number of scholars including Catharine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727 (1990).

[97] *See* FLANAGAN, *supra* note 71, at 85.

[98] *See* LONERGAN, INSIGHT, *supra* note 21, at 251–53.

[99] *See* FLANAGAN, *supra* note 71, at 85, 93.

[100] *See* LONERGAN, INSIGHT, *supra* note 21, at 251–53.

[101] *See id.* at 251–52. For example, the common sense response to one type of city planning problem in the 1960s was a complete failure when applied on a broad scale. It required the creation of a whole new, broader, more integrated theory of urban planning by Jane Jacobs to create a workable theory and reverse this error. *See generally* JANE JACOBS, DEATH AND LIFE OF GREAT AMERICAN CITIES (1994).

[102] *See generally*, LONERGAN, INSIGHT, *supra* note 21, chs. 6 and 7.

[103] *See* LONERGAN, INSIGHT, *supra* note 21, at 254.

[104] *See id.*

[105] *See* FLANAGAN, *supra* note 71, at 88. For example, Einstein's theory of relativity represented a higher viewpoint than Newton's theory of gravity. Einstein's work built on and

method for interpreting history and identifying the sources of the problems, in individuals, groups, and the society as a whole, and determining what steps can be taken to remedy the problems and reverse the cycle of decline.[106]

C. *Objectivity*

Finally, we can approach Lonergan's definition of objectivity by synthesizing the previously introduced concepts. This definition of objectivity will utilize and combine the cognitional structure and the explanation of error set out above.[107] Objectivity is first, merely putting aside passions, prejudices, and biases.[108] And second, objectivity is simply making true judgments and decisions.[109]

In the first sense, it is the unrestricted desire to know which drives and guides objectivity.[110] This desire is unlimited, it drives people, ultimately, to search for correct answers to every possible question.[111] Because this desire strains toward the answers to all questions, it drives the process of intellectual development.[112] Because it is oriented toward only correct judgments, it guides the process of self-improvement.[113] Lonergan captured this sense of objectivity when he wrote, "[T]o be objective . . . is to give free rein to the pure desire, to its questions for intelligence, and to its questions for reflection."[114]

The desire to know may, however, be distorted by biases of egotism or fear.[115] A bias may be either personal, or may result from membership in a group or society.[116] As to personal biases, the solution is to work to eliminate them through a constant process of improvement.[117] These biases must be pruned through introspection and comparison with the best self the knower can imagine for him-

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incorporated many of Newton's insights, but ultimately transcended them. *See* ALBERT EINSTEIN, RELATIVITY 135–57 (Robert W. Lawson, trans. 1961).

[106] *See* LONERGAN, INSIGHT, *supra* note 21, at 258–59.

[107] *See supra* notes 39–106, and accompanying text.

[108] *See* LONERGAN, INSIGHT, *supra* note 21, at 404. This corresponds roughly with what Lonergan termed normative objectivity. *See id.*

[109] *See id.* at 402. This corresponds roughly with what Lonergan termed absolute objectivity. *See id.*

[110] *See id.* at 404.

[111] *See id.*

[112] *See id.*

[113] *See* LONERGAN, INSIGHT, *supra* note 21, at 404–05.

[114] *See id.* at 404.

[115] *See id.* at 247–50.

[116] *See id.* at 244–50.

[117] *See id.* at 618–56.

self.[118] Each bias must be identified, eliminated, replaced with a proper or true insight or web of insights, and all the branchings and effects of the bias must be searched out and reversed.[119] As each is successfully dealt with, the knower's ability to conceive of himself as potentially perfect may improve, leading to further discoveries of bias and further self-improvement.[120] The only alternative to this strict regimen of attention and work is to allow oneself to sink downward into a personal cycle of meaningless chaos.[121]

As to group and cultural biases, a similar framework of attention and effort is required.[122] Just as the individual is juxtaposed against his or her own potential perfection, the culture as a whole and in its various parts must be evaluated against the ideal society, what a society would look like if all correct decisions were made.[123] The society must be analyzed in terms of various areas of progress or decline.[124] Areas of decline must be identified, their effects studied, and corrections made, both on the individual level and on the public level.[125] Because the scope of a modern society is so enormous, a meaningful critique of this sort requires many people, perhaps including experts in history, psychology, politics, economics, spirituality, law, and philosophy, to collaborate.[126]

People making objective judgments must also account for the bias common sense decision makers have against theory and anything that has no practical effect, which Lonergan termed the general bias.[127] Lonergan saw this general bias against theoretical knowing as a terribly invidious and widespread problem.[128] It is both positive and negative; it rationalizes as well as blinds.[129] Despite the outline provided for the correction of error, the struggle against the blandishments and lies propagated by errors is long-term and lacks a clear

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[118] *See* LONERGAN, INSIGHT, *supra* note 21, at 500–02.

[119] *See* LONERGAN, METHOD, *supra* note 21, at 44.

[120] *See id.* This is the self-transcendent principle which serves as the bedrock for all of Lonergan's work.

[121] *See id.* at 231. Of course, most people fall in between the extremes, they do improve themselves more or less constantly, and yet probably no one is perfectly able to avoid all bias.

[122] *See id.* at 44.

[123] *See* LONERGAN, INSIGHT, *supra* note 21, at 265–66.

[124] *See id.*

[125] *See* LONERGAN, METHOD, *supra* note 21, at 44.

[126] *See* LONERGAN, INSIGHT, *supra* note 21, at 266.

[127] *See id.* at 250–51.

[128] *See id.* at 258, 266–67.

[129] *See id.* at 253.

standard for victory.[130] There are, besides, further difficulties as Lonergan comments in *Insight,* "[b]eneath [this problem] lies the almost insoluble problem of settling clearly and exactly what the general bias is. It is not a culture but only a compromise that results from taking the highest common factor of an aggregate of cultures."[131] As a result, Lonergan called for the sort of collaboration mentioned above; a broad-based effort, composed of many experts working in community, and with only a long-term hope for success.[132]

In the second sense, objectivity is simply making true judgments and decisions.[133] A judgment is absolutely objective if all the questions that could possibly be asked about the insight that is being judged have been satisfactorily answered.[134] In non-ideal situations, absolutely objective judgments do not often occur.[135] Rather, judges must, in the interest of proceeding with life, content themselves with answering a restricted range of further pertinent questions.[136] This results in a provisional judgment.[137] Of course, deciding which questions are pertinent requires a correct judgment as well, and so on.[138] Because the desire to know is never satisfied, even these provisional judgments will be reexamined from time to time, checked against new judgments, and eventually incorporated into a higher viewpoint.[139] The judgments will be incorporated in a way that affirms the validity of the previous judgment, but offers a new explanation, a new spin, or a broader context in which to place the earlier judgment.[140] Or the provisional judgments may be reevaluated and found wanting, to be replaced by a better judgment, one which incorporates a broader web of related insights or satisfies a greater number of criteria.[141]

Lonergan delineated his basic approach to objectivity simply in four transcendental precepts, "Be attentive, Be intelligent, Be reasonable, Be responsible."[142] According to Lonergan, to ignore these pre-

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[130] *See id.* at 266.

[131] *See* LONERGAN, INSIGHT, *supra* note 21, at 266–67.

[132] *See id.* at 266. Lonergan termed this community of the mind cosmopolis. *See id.* at 263–67.

[133] *See id.* at 175.

[134] *See id.* at 402. This particular sort of objectivity is only realized in transcendent subjects according to Lonergan. *See id.*

[135] *See id.* at 402–03.

[136] *See* LONERGAN, INSIGHT, *supra* note 21, at 404–05.

[137] *See id.*

[138] *See id.* at 370.

[139] *See id.* at 493–94.

[140] *See id.* at 493–96.

[141] *See* LONERGAN, INSIGHT, *supra* note 21, at 493–96.

[142] *See* LONERGAN, METHOD, *supra* note 21, at 53. The quote continues:

cepts is to condemn oneself and ultimately one's entire society to decline.[143] To practice them is to become a wise knower and an objective decision maker—a true progressive.[144]

II. DWORKIN

Ronald Dworkin is one of the preeminent contemporary Anglo-American legal philosophers.[145] As such, he provides a respected, articulate, and complex contra position against which to apply Lonergan's work to the philosophy of law. Thus, Part II builds up to an explanation of Dworkin's approach to objective decision making.

Ronald Dworkin, in his book *Law's Empire,* promulgated a theory of law—what it is and how society does and should utilize it.[146] In doing so, he considered many of the relevant issues that Lonergan dealt with.[147] Still, because of the specific nature of Dworkin's work it is necessary in many cases to draw these broader, underlying concepts out of Dworkin's notes, and to delve into the theoretical implications and assumptions which stand behind his arguments.[148]

This exploration of *Law's Empire* begins by examining the disagreements in the philosophy of law which exist just beneath the surface of the everyday practical workings of the law.[149] Some of the most common topics of this debate are the questions, "Do judges make law? And should they?"[150] In order to answer these questions, Dworkin suggests we must first explore, in broad terms, what exactly judges are doing when they judge.[151] Dworkin answers this question by proposing his theory of interpretation, which applies his implicit theory of cog-

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> Being attentive includes attention to human affairs. Being intelligent includes a grasp of hitherto unnoticed or unrealized possibilities. Being reasonable includes the rejection of what probably would not work but also the acknowledgment of what probably would. Being responsible includes basing one's decisions and choices on an unbiased evaluation of short-term and long-term costs and benefits to oneself, to one's group, to other groups.

See id.

[143] *See id.* at 53–55.

[144] *See id.* at 53.

[145] *See* PAUL GAFFNEY, RONALD DWORKIN ON LAW AS INTEGRITY: RIGHTS AS PRINCIPLES OF ADJUDICATION 1 (1996).

[146] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at vii-ix.

[147] For example, he addressed questions of interpretation, objectivity (in the form of "right answers"), and other issues of general philosophy. *See id.*

[148] *See e.g., id.* at 425–28 n.23–27.

[149] *See id.* at 6.

[150] *See id.* at 6–11.

[151] *See infra* notes 157–192 and accompanying text.

nition to legal decisionmaking.[152] Second, Dworkin delves into the question of what principles should and do guide judges when making decisions.[153] Dworkin proposes his principle of integrity to mediate between justice, fairness and due process, and allow decision makers greater flexibity.[154] Third, Dworkin attempts a theoretical, but descriptive, justification of the concrete decisions the legal system makes everyday.[155] Finally, this justification is extended into a theory of objectivity, which explains why people should accept judges' pronouncements.[156]

A. *Creative Interpretation*

Disagreement and debate about the law can be carried on despite widely differing conceptual frameworks because, Dworkin claims, the debates are all aimed at interpreting the same concrete set of social practices, namely the behavior of actual judges, and the existence and observable effects of statutes and judicial opinions.[157] Understanding the sort of interpretation that commonly occurs in these debates is therefore a key element for Dworkin in developing a theory of law.[158] Toward this end, Dworkin noted that people use several differing interpretive schemes, depending on the context.[159] The most common is conversational interpretation, interpreting the sounds or marks other people make to convey meaning.[160] Others include scientific interpretation, artistic interpretation, and social interpretation.[161] He characterized the interpretation that lawyers participate in as the interpretation of social practices, or social interpretation.[162] Dworkin described social interpretation, along with artistic interpretation, as creative because both aim to interpret something created by people (arguably unlike scientific interpretation) and yet distinct from the individual (unlike conversation).[163]

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[152] *See infra* notes 157–192 and accompanying text.

[153] *See infra* notes 193–241 and accompanying text.

[154] *See infra* notes 193–265 and accompanying text.

[155] *See infra* notes 242–265 and accompanying text.

[156] *See infra* notes 269–284 and accompanying text.

[157] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 46.

[158] *See id.* at 50.

[159] *See id.*

[160] *See id.*

[161] *See id.* These distinctions are similar to the distinctions Lonergan drew between theoretical and common sense knowing. *See supra* notes 91–106 and accompanying text.

[162] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 50.

[163] *See id.* In general philosophical terms, this might be restated as: interpreting conversation involves understanding a subject as object, while interpreting art or social practice involves understanding only an object.

Creative interpretation is central to Dworkin's argument.[164] First, artistic interpretation is necessarily constructive, as opposed to being simply another instance of the conversational method.[165] Conversational method tries to discover the intention of the author or speaker, but creative interpretation tries to interpret the work (or social practice) as the best possible example of its genre.[166]

Dworkin described several basic steps in this creative interpretation.[167] The first step is pre-interpretive, where the interpreter decides on the broad outline or definition of what is to be interpreted; for example, deciding which social custom to interpret, and what that social custom is.[168] Even this first step may entail a certain amount of interpretation, as customs do not sort themselves nicely into manageable categories.[169] The second step is to value the work or custom being interpreted; why that custom, in general, is worth pursuing.[170] Finally, there is a post-interpretive, or reforming, stage during which the interpreter will adjust, or suggest adjustments to, certain specifics of the practice or work in order to make the custom work better, or become more valuable.[171]

To capture the foregoing definition in a practical example, Dworkin proposes that the interpretation of law, or any other social practice, is analogous to a chain novel wherein a subsequent author constructs each chapter.[172] Each author takes responsibility for constructing the next chapter in such a way that it represents the best interpretation and continuation of the novel as a whole.[173] Each author, although not formally constrained, is practically limited by two considerations.[174] First, the author is limited by basic fit; for example, a romance novel cannot suddenly be transformed into a physics textbook.[175] Second, where more than one interpretation makes sense, the author must choose the one which best suits the work as a whole.[176] A variety of factors, including both textual (or procedural in

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[164] *See id.*
[165] *See id.* at 52.
[166] *See id.*
[167] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 65.
[168] *See id.* at 65–66.
[169] *See id.* at 66.
[170] *See id.*
[171] *See id.*
[172] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 228–29.
[173] *See id.*
[174] *See id.* at 230–31.
[175] *See id.* at 230.
[176] *See id.* at 231–32.

the legal context) and aesthetic (substantive) will have to be considered.[177]

One common objection to this view of interpretation is that interpretation, especially artistic interpretation, is really about recovering the author's intent in producing the work, not constructing it.[178] Construction is always subjective, the objection goes, and what is needed is an objective understanding of the author's intent.[179] Dworkin replies that the recovery of original intent is an extremely complex, and ultimately problematic, concept.[180] The author may be dead or may have changed his views, or the author may have intended the work for a particular audience who would have understood it in a way not accessible to the current audience.[181] The complexities are so great, in fact, that they necessarily result in ambiguities for the conscientious interpreter, choices wherein she has no guidance except that she hopes to interpret the work in the most valuable light possible.[182]

Further complexities arise in the context of interpreting social customs, such as law.[183] When there is no clear author, for whose intention is the interpreter searching?[184] The answer cannot be the interpreter's own intention, because the underlying point of the overall objection to Dworkin's understanding of creative interpretation is that his theory is subjective, so the answer must be outside the interpreter.[185] The intention of any single member of the social group will be equally subjective, however, and attempts to find an intention common to all the members of the group are likely to fail, particularly if the custom in question is very important or powerful.[186] Dworkin briefly discusses finding the intention of the group as a unity or a superentity, but concludes that even if such a thing were possible, the

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[177] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 234.

[178] *See id.* at 55.

[179] *See id.*

[180] *See id.* at 55–56.

[181] *See id.* at 55–59. Dworkin uses the example of Shakespeare's Shylock, noting that a contemporary director would probably have to rearrange the character if she were to evoke in a contemporary audience the reaction Shakespeare's audience would have had. *See id.* at 55–56.

[182] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 58–59.

[183] *See id.* at 62.

[184] *See id.* at 62–63.

[185] *See id.*

[186] *See id.* at 63–64.

result would simply be one more subjective opinion to be evaluated and debated.[187]

Another option is for the interpreter to generalize.[188] By raising the explanation of the social custom to the proper level of generality, the interpreter can include most if not all of the widely varying members of the group whose social practice is being studied.[189] This, however, is still not the same as creating a linguistic foundation for the social practice.[190] The interpreter's general interpretation stands open to challenge, and it applies only to a specific time and community.[191] Because there is no real alternative to this conversational model of interpretation, Dworkin asserts that his interpretive theory is the only available system for explaining and interpreting social practices.[192]

B. *The Principle of Integrity*

Dworkin next applies this interpretive theory to the field of law.[193] He begins by describing judges as interpreters of a social practice, as discussed above.[194] As with the producer of a play or the author of a chain novel, judges normally take part in the process rather than simply criticizing it.[195] Each judge's interpretive method depends on what he or she sees as the value of the entire system.[196] Rather than leading to an unintelligible dispersion of interpretations, however, the combined pressures of various core concepts that every interpretation must account for, the pressures of living within an actual society, and the custom of relying on precedent (which includes other judges' interpretive theories) help to unify judges.[197]

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[187] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 64–65, 422 n.15. The concept of the superentity, however, looks rather similar to Dworkin's core concept of personification. *See infra* notes 214–218 and accompanying text.

[188] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 70–71.

[189] *See id.*

[190] *See id.*

[191] *See id.*

[192] *See id.* at 86.

[193] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 87.

[194] *See id.*

[195] *See id.*

[196] *See id.* at 88.

[197] *See id.* Because governments use collective force to further their aims, Dworkin suggests that the primary aim of legal practice is to restrict government. "Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified." Judges are active participants in this process. *See id.* at 93.

On the other side, a number of factors tend to force divergence among judges. These include the variety of ideological commitments that judges bring to the bench, the dynamics of the interpretive process, and differing conceptions of core ideas such as justice and fairness.[198] Although too wide a divergence in one generation would promote chaos and disintegration, too much similarity would stagnate the system, according to Dworkin.[199]

One of the most important unifying factors is the judges' commitment to certain principles, with which each decision must be in accord.[200] Dworkin introduces integrity as one of the four major principles of our political system, setting it alongside the commonly recognized principles of justice, fairness, and procedural due process.[201] These four principles form the core of our political system and provide the major unifying force behind legislatures and courts, and among the various legislators and judges.[202] They provide stability and guidelines for judges as they interpret the social practice we call law.[203]

Dworkin divides integrity into two important aspects. One aspect is political integrity, which requires that those creating the law work to keep it coherent in principle.[204] The second aspect is adjudicative integrity, which requires that those applying the law make decisions which are coherent with the past, and coherent with the whole scope of the law, not piece by piece.[205]

It is important to note immediately that integrity is not simply consistency.[206] Integrity may require a departure from a previous practice, which consistency would require upheld, if the practice is found to contradict a principle.[207] Because integrity calls for consistency in principle, not in policy, it is possible that the best interpretation of a principle may call for differing policies in differing situations.[208]

Dworkin provides two criteria for judging integrity which are, in fact, the same criteria used in any creative interpretation: does it fit

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[198] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 88.

[199] *See id.* at 89.

[200] *See id.* at 225.

[201] *See id.* at 164–65.

[202] *See id.* at 87–88.

[203] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 87–88. This might be restated in more general terms as: these are principles that provide guidelines for determining the value of the alternatives.

[204] *See id.* at 167. This duty effects judges, legislators and bureaucrats at various times as they carry out their duties. *See id.*

[205] *See id.*

[206] *See id.* at 219–20.

[207] *See id.*

[208] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 219–20.

our politics and does it reveal our politics in the best light?[209] Integrity does fit our politics, because only the assumption that political decision makers value integrity explains why, for example, we do not allow checkerboard statutes (e.g., a criminal law that applies only to arrests made every other Friday), or apply equal protection in a specific instance only to people born in even years.[210] Integrity is also attractive, because it often prevents inefficiencies and provides a theory which gives protection against arbitrary and deceitful practices.[211] Integrity also heightens the responsibility that individual citizens feel toward their political system insofar as their own interactions fall within the scope of this same integrity.[212] It is attractive, however, only if we accept Dworkin's argument for personification of a moral agent.[213]

The law as integrity argument is dependent upon Dworkin's assumption that a community can be treated as a single unit, or personified, and can thus be committed, in a sense similar to an individual, to a principle like integrity as a unity.[214] The idea of personification allows Dworkin to assert that the community actually is committed to the principle of integrity despite individual denials of the principle or refusals to act with integrity.[215] Dworkin defends personification through a common-sense example. If an automobile company's cars were found to be defective, and a thorough inquiry determined that in fact no individual employee or officer was guilty of any negligence in designing or building the cars, who should bear the burden of replacing the defective cars?[216] If we treat the company as a whole as a moral agent, we can blame the company, apart from, and prior to, any individual.[217] Dworkin describes actual examples of personification at work in the guilt contemporary white Americans feel toward the descendants of slaves, and Germans for Holocaust survivors, for example.[218]

One important feature of integrity is that it is a real-world principle.[219] In a perfect world, integrity would not be needed because

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[209] *See id.* at 176.
[210] *See id.* at 184–85.
[211] *See id.* at 188–89.
[212] *See id.*
[213] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 187.
[214] *See id.* at 167–68.
[215] *See id.* at 167, 172.
[216] *See id.* at 169–71.
[217] *See id.* at 170.
[218] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 172–73.
[219] *See id.* at 176.

every political decision would be perfectly just and fair.[220] But where conflicts develop, where choices must be made between fairness and justice, integrity exists as another consideration that may provide a legitimate reason to tip the balance one way or the other.[221] In fact, Dworkin defends integrity because its adoption allows his argument for the legitimacy of our community to succeed.[222]

The principle of integrity underpins Dworkin's theory of the moral justification of the law.[223] What justification is there for the coercive effects of the law, and of political force in general, upon individuals? A political system that includes the principle of integrity has a better claim to this legitimacy than a political system without integrity according to Dworkin's description of society.[224]

Dworkin describes society as a community comprised of associative obligations.[225] Several conditions are necessary to give rise to these obligations in any meaningful sense. The members of the community must accept, at least in a pre-interpretive sense, the structure of what obligations it is that they will jointly undertake.[226] The members of the group must understand that these obligations are special, owed only to the other members of the group and not owed in the same sense to outsiders.[227] The associative obligations are also personal, they run from individual to individual, not merely to the group as a whole.[228] Finally, the obligations also require personal concern for other members of the group, and that concern must be equal toward all members.[229]

Dworkin terms this the principled model of community.[230] In the principled community, people view their associations as driven, at root, by a shared set of principles, like the four noted above, which result in various more or less satisfactory practices.[231] Which principles should be included is considered a serious question for debate in this model.[232] The members accept their obligations as arising from

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[220] *See id.*

[221] *See id.* at 177.

[222] *See id.* at 188–89. Dworkin relies heavily on the community's acceptance of integrity in building his theory of the legitimacy of coercion. *See id.* at 190–92.

[223] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 190.

[224] *See id.* at 192.

[225] *See id.* at 195–97.

[226] *See id.* at 198.

[227] *See id.* at 199.

[228] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 199.

[229] *See id.* at 199–201.

[230] *See id.* at 211.

[231] *See id.* at 210–11.

[232] *See id.*

their shared history, even while working to more fully implement their chosen principles.[233]

The principled model, Dworkin asserts, is the best possible model for a "morally pluralistic society."[234] The principled understanding of our community justifies the exercise of "bare power" by the state, despite the incredible diversity among our citizens.[235] It is worth noting that merely because the community is principled does not guarantee that it is just.[236] There may come a time in the life of the community when the demands of justice override even the community's obligation to the principle of integrity.[237] But at least the principled model allows for the possibility of a legitimate and just community.[238]

The principled model, although it has been described as a good fit with our society's actual practices, does not claim to cover every example of actual practice.[239] There are cases where actual practice opposes principles that society has agreed upon, and this model condemns such as breaches of integrity.[240] Because no generation starts with a clean slate, but rather breaks in upon an historical stage already cluttered, justice and fairness will at times conflict with integrity, and individual decision makers must in those cases decide which principle is best suited to the situation.[241]

C. *Integrity in Adjudication*

Dworkin demonstrates how judges should make these difficult decisions in his explanation of the adjudicative side of integrity.[242] Law as integrity rejects the dualist proposal that judges either find or make law when they decide cases.[243] Applying the principle of integrity, judges attempt to interpret the law as though it were expressing the principles of a single personified viewpoint.[244] The flip side of this position is that these decisions should be regarded as valuable only if

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[233] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 210–11.
[234] *See id.* at 213–14.
[235] *See id.* at 214–15.
[236] *See id.* at 202.
[237] *See id.*
[238] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 215.
[239] *See id.* at 217.
[240] *See id.*
[241] *See id.*
[242] *See id.* at 225–26.
[243] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 225.
[244] *See id.*

they represent the best interpretation of the principles of justice, fairness, procedural due process, and integrity.[245]

Integrity does not require that a judge's decision be consistent with all historical forms of principles.[246] Where a society has abandoned a certain historical interpretation of justice, the judge is not required to maintain integrity with the historical interpretation.[247] Integrity is only required contemporaneously, across the various areas of law.[248] The effect of history in law as integrity is limited by its contemporary focus and integrity does not try to capture the intent of historical figures, for example.[249] History does retain a place in Dworkin's theory of law, however, because an understanding of history is necessary to evaluate the legitimacy the scheme of principles that gave rise to current laws.[250]

To illustrate his theory, Dworkin creates a mythical judge, named Hercules, and describes the steps he would take in deciding a complex and difficult case to provide a narrative example of how his principled theory of integrity would be utilized in practice.[251] Dworkin describes Hercules as a judge of inhuman patience and superhuman intelligence, who has an entire career to devote to a single case.[252] Dworkin is also careful to point out, while describing Hercules, that law as integrity is intended to describe an approach, a method of asking questions, personified by Hercules, and the answers are variable depending on the specific problem.[253]

Hercules begins by attempting to form a coherent theory which explains the past decisions of the issue at hand.[254] He first generates a list of possible interpretations which would account for the prior decisions.[255] Next, he tests these theories by asking whether a hypothetical individual official, acting as the personification of the community, and

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[245] *See id.*

[246] *See id.* at 227.

[247] *See id.*

[248] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 227.

[249] *See id.* at 227.

[250] *See id.* at 227–28.

[251] *See id.* at 238–58.

[252] *See id.* at 239. Dworkin acknowledges the unrealistic characteristics of Hercules. *See id.*

[253] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 239. Lonergan's work deals extensively with the concept of method, a structure that guides questioning, but doesn't dictate the content of a decision. *Cf.* LONERGAN, METHOD, *supra* note 21, at 4–25. Also, note the similarities between Hercules' decisionmaking process and Lonergan's process, *supra* notes 70–79 and accompanying text.

[254] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 240.

[255] *See id.*

coming to coherent decisions, could have used any of these theories.[256] Theories that clearly fail this test are rejected.[257]

Hercules proceeds by expanding his inquiry into more general fields of law.[258] He tests each remaining theory to see if it could be understood as expressing a principle which justifies the entire legal system.[259] Of course a finite judge would be unable to pursue this sort of inquiry to its ultimate conclusion, but would be able to approximate it both through a wise understanding of the law and more limited research confined to a certain department of the law.[260] If only one theory remains, well and good, Hercules' job is done.[261]

If the results are divided, though, either more than one theory still fits, or no theory adequately explains the entirety, Hercules must move to the second aspect of interpretation.[262] He must attempt to determine which theory shows all the prior work, or decisions, of the personified community in its best light.[263] In order to do this, he will have to consider both his own and his community's perceptions of justice and fairness, and balance those against integrity.[264] In the end, Hercules makes his decision, and announces it as law.[265]

D. *Objectivity*

Dworkin's view of objectivity underlies his description of judging and what he believes is necessary to justify judicial decision making.[266] Unlike Lonergan, however, Dworkin's theory of objectivity does not seem to be constructed from other elements of his theories.[267] Rather, Dworkin's judicial objectivity is, at least ostensibly, simply the application of a common sense, descriptive view of objectivity.[268]

Because Dworkin's overall philosophical views are commonly seen as a variation of natural law theory, he is often accused of relying

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[256] *See id.*

[257] *See id.*

[258] *See id.* at 245.

[259] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 245.

[260] *See id.* at 245–46.

[261] *See id.* at 246.

[262] *See id.* at 246–47.

[263] *See id.* at 248–49.

[264] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 249.

[265] *See id.*

[266] For example, in Law's Empire, Dworkin's brief explicit discussion of objectivity is placed within the section on interpretation. *See id.* at 79–83.

[267] Compare Lonergan's theory of objectivity, *supra* notes 108–144 and accompanying text, with Dworkin's theory, *infra* notes 274–277 and accompanying text.

[268] *See infra* notes 274–277 and accompanying text. Dworkin's theory may seem somewhat uncritical as a result of his reliance on common sense.

on an outdated philosophical concept of reality, one in which there is a "really real" world[269] of meaning and ultimate truth somewhere out there beyond the everyday world waiting to be discovered, like Newton's ether.[270] Dworkin, however, denies this charge and sets out his theory of objectivity in contrast to this classic natural law explanation.[271] As a preliminary matter, he notes that it is absurd to claim that there are no right views, for then the person holding the view that there are no right views cannot herself be holding a right view.[272]

Dworkin's view of objectivity avoids both this absurdity and the classic natural law explanation of objectivity.[273] He explains that when he says something is objectively right, he is not referring to some elusive reality which is the source of truth.[274] Rather he is saying that it is his belief that X is true, and that such a statement must always be backed up with sound arguments from policy, experience, or logic.[275] So for Dworkin the difference between "I like vanilla ice cream" and "I think that objectively speaking vanilla ice cream possesses greater value than any other flavor" is merely that the first refers to one's own taste, and so stands alone as a true statement, and the second purports to be true for everyone, and therefore requires that convincing evidence be presented.[276] Thus, objective language for Dworkin is no more than a shortcut for claiming that good reasons exist why he be-

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[269] The term "really real" is sometimes used in philosophy to denote the difference between the world as it is commonly perceived by human beings, the real world, and the world which can be proven to exist apart from human beings and exists in theory, the really real world. *See* LONERGAN, INSIGHT, *supra* note 21, at 323.

[270] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 262–63. Newton, at a loss to explain the concept of empty space, posited an ether (a field of mechanical corpuscles), so far undetected, which gave space its boundaries and prevented space from being empty. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 72–74 (1962).

[271] In the classic natural law view, objectivity is correctly reporting what is "out there." Dworkin's very similar view has been extensively criticized by some 'postmodern' thinkers (including Rorty and Singer). Some of this criticism argues that it is impossible to discover what is really out there, since human beings are so heavily influenced by a mass of factors, like race, gender, and family background, which constantly skew all attempts at classic objectivity. Because there is no one who can stand outside these influences and judge between opposing ideas, it is impossible to prove that one idea is "objectively" better than another. Rather, opposing ideas can only be judged to be different. *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 78–80, 262–63 (restating and replying to some critiques of this sort).

[272] *See id.* at 373.

[273] *See id.* at 80–81.

[274] *See id.*

[275] *See id.* at 81. This response relies on the likelihood of rational consensus amongst subjects, which Singer, for example, denies. *See* Singer, *supra* note 12, at 35–38.

[276] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 81.

lieves a particular statement should be true for everybody, or is the best choice in a given situation.[277]

Nevertheless, Dworkin's theory of creative interpretation provides the rough outline of a method of questioning that results in more correct decisions by judges, and is thus similar in its effects to what Lonergan termed objectivity.[278] Under his theory, Dworkin expects judges to make decisions based on their determination of which choice will result in greater value for the community.[279] Value in the legal context is judged in light of the four principles—justice, fairness, procedural due process and integrity—that provide the unifying force behind the community's practice of law.[280] Thus, the outcome that can be interpreted as best achieving these four principles is the most valuable, and should be chosen.[281] The process of evaluation is accomplished by first generating a list of possible interpretations, then checking for rough fit in light of the four principles, and finally comparing whatever options remain and choosing the one that provides the most attractive understanding of the previous cases.[282] According to Dworkin, this process will yield the "right answer"[283] (as he has explained it) in a given case.[284]

III. Analysis

The United States Supreme Court's decision in *Bush v. Gore* provides an excellent real world scenario against which to distinguish Dworkin and Lonergan's approaches to objectivity.[285] In *Bush v. Gore* the Supreme Court settled the 2000 presidential election on December 12, 2000.[286] A total of six opinions, including one concurring and four dissenting, were issued as the Court reversed and remanded the Florida Supreme Court's decision.[287] The Court's decision prevented

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[277] *See id.*

[278] *Cf. supra* notes 133–144 and accompanying text (explaining Lonergan's theory of objectivity).

[279] *See* Dworkin, Law's Empire, *supra* note 25, at 59–60, 65–66.

[280] *See id.* at 164–66.

[281] *See id.* at 225–26.

[282] *See id.* at 238–58.

[283] In light of the foregoing explanation, it seems that what Dworkin has termed the "right answers" thesis, one of his most famous contributions to jurisprudence, really boils down to "better answers," the arguments which he finds most convincing, and will work to convince others to accept. *See* Gaffney, *supra* note 145, at 186–87.

[284] *See* Dworkin, Law's Empire, *supra* note 25, at 255–58.

[285] *See generally* Bush v. Gore, 531 U.S. 98 (2000).

[286] *See id.* at 98.

[287] *See id.* The Florida Supreme Court case that was the subject of the *Bush* decision, can be found at *Gore v. Harris*, 772 So.2d 1243 (Fla. 2000).

the recount and inclusion of certain votes in Florida's final certified total.[288] The effect was to preserve George W. Bush's lead in Florida, and thereby ensure his overall victory.[289]

The media immediately dissected the opinions, and the majority members were widely maligned for their decision.[290] The decision was considered weak in theory and principle, and explainable only on extra-legal grounds.[291] Specifically, the five majority Justices were criticized for allowing their personal political preferences to improperly influence their decision.[292] Critics asserted that the majority Justices were motivated by an overall preference for the Republican Party and the Republican candidate.[293] These critics further asserted that some of the majority Justices were swayed by their hope to retire under a Republican President who could appoint a Republican replacement.[294] Finally, they accused the Justices of acting in an attempt to cancel out the perceived Democratic preferences of certain members of the Florida Supreme Court.[295]

As a result of these assertions, one vocal critic, Professor Dershowitz, described the decision as corrupt, and noted that he could think of no other Supreme Court decision that had been so blatantly motivated by the Justices' personal political preferences.[296] Dershowitz set the stage for a discussion of objectivity when he wrote, "Some judges, of course, do actually apply the law in a neutral manner, without regard to their personal preferences. Others deceive themselves into believing that the arguments they are offering are neutral—that is, not explicitly calculated to produce a desired outcome."[297] This quote restates the question of objectivity, how can a judge neutrally

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[288] *See Bush*, 531 U.S. at 100–03.

[289] *See* DERSHOWITZ, *supra* note 5, at 51–52.

[290] *See id.* at 3–5.

[291] Linda Greenhouse, *Collision with Politics Risks Court's Legal Credibility*, N.Y. TIMES, Dec. 11, 2000, at A1.

[292] *See id.* For a summary of contemporaneous critics, see DERSHOWITZ, *supra* note 5, at 174–76. The majority Justices, including, by deduction, Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas, wrote a *per curiam*, or unsigned, opinion. *See Bush*, 531 U.S. at 98.

[293] *See* DERSHOWITZ, *supra* note 5, at 174–76. Justice O'Connor, for example, is the "'former Republican floor leader of the Arizona Senate.'" *Id.* at 160, *quoting* Robert Novak, *Court That Really Swings*, CHICAGO SUN-TIMES, Dec. 21, 2000, at 39. Justice Kennedy also was previously involved in Republican politics, he "had ties to Ronald Reagan during Reagan's governorship and to Reagan's executive secretary, Edwin Meese, and had worked as a lobbyist . . . ." DERSHOWITZ, *supra* note 5, at 162.

[294] *See* DERSHOWITZ, *supra* note 5, at 162.

[295] *See id.*

[296] *See id.* at 174.

[297] *See id.* at 188.

apply the law, without allowing personal preferences to distort the outcome?

Several important issues must be resolved in order to answer this question. First, is there actually any possibility of an objective decision in a case like *Bush v. Gore*? Second, if such a decision is possible, what guidelines should a judge utilize in making the decision? And third, what would a judge in *Bush* have to do to ensure that her decision is free from impermissible personal preferences?

Part I explored Bernard Lonergan's understanding of objectivity primarily through his work in epistemology and ethics.[298] Part II explored Ronald Dworkin's understanding of objectivity primarily through his work in jurisprudence and political philosophy.[299] Despite the different contexts of these two approaches to objectivity, both answered substantially similar questions.[300] Part III will first summarize the two theories of objectivity, then apply both theories to a real world scenario and compare the effects of their respective explanations.

A. *Is Objectivity Possible?*

Is objectivity possible in a decision like *Bush v. Gore*? Dworkin, in light of his explicit statements about objectivity would answer no.[301] Objectivity for Dworkin is only a matter of good arguments, so it would be useless to accuse the Justices who decided *Bush v. Gore* of corruption.[302] A decision for Bush was as right as a decision for Gore, because both decisions are equally open to the charge that they were determined by personal preferences.[303] The only possibility is to disagree with the Justices' reasoning.[304] Of course, Dworkin might suggest that the arguments the majority Justices actually relied upon were in fact private arguments, rather than the equal protection arguments explicitly included in their written opinion.[305] Dworkin could argue that the majority Justices' personal preference for the Republican

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[298] *See supra* notes 108–144, and accompanying text.

[299] *See supra* notes 269–284, and accompanying text.

[300] *Compare supra* notes 108–144 (Lonergan's theory of objectivity), and notes 269–284 (Dworkin's theory of objectivity).

[301] Dworkin did, however, contrary to this thesis, publish at least two articles attacking *Bush v. Gore* on a number of fronts. *See* Dworkin, *supra* note 1, at 53; Ronald Dworkin, *'A Badly Flawed Election': An Exchange*, N.Y. REV. BOOKS, Feb. 22, 2001, at 9.

[302] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 81.

[303] Personal preference, in this case, takes the form of accepting whatever arguments the judge finds personally persuasive. *See id.*

[304] This did not stop Dworkin from condemning the *Bush* opinion however. *See* Dworkin, *supra* note 1.

[305] *See Bush*, 531 U.S. at 109–10, Dworkin, *supra* note 1, at 53.

party should have been accorded much less weight than the legal principles the Justices customarily may consider.[306] Still, this further argument does not resolve the problem. Even if a particular Justice were able to ignore the identities of the contestants and put aside her personal preferences, it would be impossible, under Dworkin's formula, to determine whether a certain argument in the final decision was decisive because of its "objective" legal rationale, or if it simply provided a basis for the Justice to decide the case in the same way that she voted in the election.[307] So, according to Dworkin's theory, because Justice O'Connor favors the Republican party, the fact of her decision for Bush, the Republican candidate, appears to be proof of her bias, regardless of the strength of her underlying analysis.[308] Thus, Dworkin's explicit theory of objectivity ultimately provides no method by which to differentiate between two options in a hard case, except personal preference.[309]

Lonergan, on the other hand, would assert that an objective decision is possible, although not logically necessary.[310] An objective decision would be possible because the Justices who decided between Bush and Gore are knowers.[311] As knowers, they have the capacity to gather data, understand the data, judge the data, evaluate the resulting alternatives and choose the best alternative.[312] Within this process, each Justice has the capacity to critique themself; to experience themselves as knowers, to understand themselves as such, and to judge whether the decisions they have made in regard to the case are contaminated.[313] If the decisions are in fact contaminated by bias, each Justice has the capacity to mentally reopen the decision, to ask further questions, gain further experience, etc.[314] If this cycle is repeated until

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[306] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 240.

[307] *See id.*

[308] For a harsh discussion of Justice O'Connor's political affiliations, see DERSHOWITZ, *supra* note 5, at 156–62.

[309] *See id.* at 81. Since Dworkin's explicit theory of objectivity is so unhelpful, from here on this Note will utilize Dworkin's interpretive theory, which possesses many of the characteristics of a theory of objectivity, although Dworkin never phrases it that way.

[310] Objectivity is not a logically necessary outcome resulting from a formulaic series of actions, but Lonergan asserts that it is possible, an assertion with which the reader is free to disagree. But if it is possible, he continues, there are conditions which give rise to it. And if there are such conditions, those conditions may be fulfilled, etc. *See* LONERGAN, INSIGHT, *supra* note 21, at 141–45, 343. The argument, while hopeful, is somewhat tautological.

[311] *See id.* at 352–53. In regard to the following paragraph, see generally, chs. 11 and 13 in LONERGAN, INSIGHT, *supra* note 21.

[312] *See id.* at 346–48.

[313] *See id.* at 633–34.

[314] *See id.*

all relevant biases have been eliminated and all the further pertinent questions have been answered, within the applicable time limits, the decision approaches objectivity.[315]

B. *Objective Method*

If an objective decision is in fact possible, what practical steps could a Justice deciding *Bush v. Gore* take in order to ensure that their own decision is actually objective? If we rely on his alternative interpretation argument instead of his explicit theory of objectivity, Dworkin first provides a guiding motivation for the Justices.[316] The judge's overall goal, according to Dworkin, should be to make a decision that interprets all the relevant background material, including the judge's complete understanding of the particular area of law and society, in its best (most aesthetic) light.[317]

Dworkin provides a two step elimination process for realizing this aesthetic result.[318] In the first round of elimination, the judge should allow only those options that provide a rough fit with the broad purposes of the relevant laws and precedents.[319] Following this model, a Justice deciding *Bush v. Gore* could quickly narrow the available options down to a decision either for Bush or for Gore, and exclude a decision for Nader, for example.[320] The Justice could also narrow her rationales to her concept of equal protection, and the deference due a state supreme court, and discard any consideration of tort liability.[321]

In the second round of elimination, the judge should choose from among the remaining options based on their aesthetic appeal—their "fit" with the existing laws and precedents.[322] Dworkin claims that while there is a real difference in the strength of various arguments, there is no general way to evaluate that strength except in terms of personal preference.[323] If this is true, it seems unlikely that a community would ever come to a shared understanding of a deeply

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[315] *See id.* at 404–05.

[316] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 52.

[317] *See id.* This motivation is informed by appeal to the four principles set out above. *See supra* notes 193–203 and accompanying text.

[318] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 65.

[319] *See id.* at 231.

[320] *See Bush*, 531 U.S. at 100–01.

[321] *See id.* at 103.

[322] *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 231.

[323] *See* GAFFNEY, *supra* note 145, at 187 (using the term "personal resonance" to describe the concept described as personal preference in the text). Personal preference refers to Dworkin's theory of objectivity; he claims that arguments are better because they seem better to the decision maker. *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 82–83.

divisive issue.[324] In particular, it should come as no surprise to Dworkin that the Supreme Court was divided about the validity of the Supreme Court's decision for Bush.[325] When the nine Justices evaluated the equal protection arguments that were presented by the parties, five thought that stopping the recount was the option that best fit prior precedent and law.[326] Four Justices thought otherwise.[327] But the difference between the majority and the minority fits more or less easily within the unsettled areas of equal protection doctrine where reasonable people can disagree.[328]

Similarly, Lonergan also initially described a guiding motivation, but one that is both broader and more basic to objective decision making.[329] Lonergan based the process of objectivity on human curiosity, the desire to know, potentially unrestricted by error and bias.[330] This curiosity drives the decision maker not only to gain insights, but correct insights; and thus to continually improve the quality of her judgments.[331] The decision maker is genuine insofar as she pursues decisions, for example in regards to eliminating error and bias, that improve her capacity to make correct judgments.[332] Thus, for Lonergan, the decision maker's first loyalty is to herself as a genuine seeker.[333] It is through this genuineness that she becomes a good judge.[334]

Grounded in this concrete orientation toward correct judgments, the judge proceeds through the activities of experiencing, understanding, judging and decision making.[335] In the first place, the judge is required to obtain information upon which to base the decision.[336] In a situation like that in *Bush v. Gore*, this information comes through several obvious channels, appellants' and amicus briefs, the records of

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[324] *See* GAFFNEY, *supra* note 145, at 162; Singer, *supra* note 12, at 35 n.112 (referring to Dworkin's dependence on the likelihood of rational consensus within a society, which Singer, to the contrary, finds unlikely, verging on impossible).

[325] *See supra* notes 285–289 and accompanying text.

[326] This can be deduced from the fact that four Justices dissented. *Bush*, 531 U.S. at 98.

[327] *See id.*

[328] For example, see the discussion between Dworkin and Fried, where two very intelligent law professors disagreed about exactly this issue. *See* Dworkin, *supra* note 301; Fried, *supra* note 7.

[329] *See* LONERGAN, INSIGHT, *supra* note 21, at 404.

[330] *See id.*

[331] *See id.* at 405.

[332] *See id.* at 500.

[333] *See id.* at 502–03.

[334] *See* LONERGAN, INSIGHT, *supra* note 21, at 499–502.

[335] *See id.* at 401.

[336] *See id.*

the lower court decisions, precedent and applicable statutes.[337] It is also derived, however, from a complex web of prior experiences, long-held jurisprudential theories, evaluations of the actions and motives of the lower courts, and so on.[338] It would plainly be counter-productive to expect a judge to forget everything that makes him a good judge, the experience derived from years spent making difficult decisions when making a difficult decision.[339]

In addition to acquiring and then understanding all this information, which includes both the general background experience gained over a period of years and specific information about *this* case, the judge also evaluates, or judges, that understanding.[340] Judging the understanding includes, first, asking of each piece of information, is it so?[341] Each true bit of understanding can be legitimately synthesized into an argument that tends to support one party or the other.[342]

The final step before deciding is to consider the value of each of the several arguments.[343] After judging the information, understandings, and judgments with the greatest certainty possible within the time limits allowed,[344] a judge chooses, considering the value of all the principles that will be given effect by her choice.[345] In light of this definition of evaluation, although the decision may initially seem a simple choice between George W. Bush and Albert Gore, Jr., formulating the problem as binary is injudicious, and tends to obscure the non-binary complexities that the Justices actually faced.[346] In contrast to Dworkin's personal preference argument, Lonergan's work ac-

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[337] *See Bush*, 531 U.S. at 98–100 (noting the various sources the Justices considered while deciding the case).

[338] These are all the various elements of a good, experienced judge, or more broadly, of any expert in their own field. *See* LONERGAN, INSIGHT, *supra* note 21, at 209–10 (describing the process of acquiring expertise in a particular field).

[339] *See id.* at 405.

[340] *See id.* at 297.

[341] *See id.* at 298–99.

[342] *See id.*

[343] *See* LONERGAN, INSIGHT, *supra* note 21, at 636–37. Evaluation takes a place in Lonergan's structure similar in some regards, to the second interpretive step in Dworkin's theory. It is significantly different however because where Dworkin's sense of aesthetics ultimately relies on personal preference, Lonergan's method relies on human curiosity. *See supra* notes 110–121 and accompanying text.

[344] The United States Supreme Court handed down its decision in *Bush*, for example, only four days after the Florida Supreme Court's decision. *See* 531 U.S. at 98, 100.

[345] *See* LONERGAN, INSIGHT, *supra* note 21, at 624, 636.

[346] The question presents a false choice between holding a personal preference for Gore or for Bush, when in fact the judge's understanding of equal protection and federalism might have more impact on the decision. *See Bush*, 531 U.S. at 112, 120–21 (Rehnquist, C.J., concurring) (basing decision on federalism, and balance of powers).

knowledges that the real world consequences of the decision did not boil down to a binary choice.[347] Nonetheless, much of the criticism of the final *Bush* decision failed to appreciate the actual complexity of the arguments presented by both sides.[348]

Lonergan restated his method of decision making in four succinct principles which encapsulate a judge's responsibility and serve as guidelines during the decision making process.[349] The first principle is, be attentive.[350] The attentive judge directs attention to the relevant experiences, memory and data, that present themselves to her consciousness.[351] The second, be intelligent.[352] The intelligent judge seeks to understand everything she hasn't already understood, to become aware of "hitherto unnoticed or unrealized possibilities."[353] The third, be reasonable.[354] The reasonable judge distinguishes between viable and unviable alternatives.[355] Finally, the fourth, be responsible.[356] The responsible judge values alternatives correctly, with an eye to what is best for society, for the groups involved in the dispute, and for her own development as an objective decision maker.[357]

C. *Avoiding Errors*

When a judge has engaged in the activities of knowing and decision making, how can he be sure that he has made a decision free from bias? Bias in Dworkin's work consists of mistaking weaker arguments for stronger ones, for whatever reason.[358] Because Dworkin understands objective language only as a shortcut for asserting an argument of universal application, all judgment is essentially based on ar-

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[347] Note however that the opposite outcome, a decision in Gore's favor, may well have subjected the Court to the same type and extent of criticism, only substituting Republican critics for Democratic critics.

[348] For example, Professor Fried notes the fact that the Florida Supreme Court seemed to respond poorly to the United States Supreme Court's initial decision and remand should not be overlooked. *See* Fried, *supra* note 328, at 8. Another complex issue involved the Equal Protection argument, which asked who was harmed, and who, if anyone, had the right to sue. *See id.*

[349] *See* LONERGAN, METHOD, *supra* note 21, at 53.

[350] *See id.*

[351] *See id.*

[352] *See id.*

[353] *See id.*

[354] *See* LONERGAN, METHOD, *supra* note 21, at 53.

[355] *See id.*

[356] *See id.*

[357] *See id.*

[358] *See* GAFFNEY, *supra* note 145, at 162.

gument.[359] Thus, viewed from within Dworkin's framework, his attempt to blame Justice O'Connor's personal preferences, namely her political ties to the Republican party, for the outcome of the case, can be viewed as an attempt by Dworkin to avoid the fact that she holds a different view of equal protection than Dworkin, and there is very little Dworkin can do about that fact.[360] No matter how strongly Dworkin might disagree with her decision, under Dworkin's definition of objectivity, he can never logically claim the right to enforce his own decision over that of a judge.[361]

By contrast, Lonergan's treatment of error is thorough and methodologically conclusive. He discusses a number of ways in which bias creeps into decision-making activities.[362] At the most basic level, fear of understanding can undermine the force driving the entire activity of decision making, the pure desire to know.[363] Simple egotism can also interfere with the process.[364] A judge who expected to realize personal gain from a particular decision could be open to this sort of influence.[365] Or a subtler group egotism, for example Republican versus Democrat, could distort the decision.[366]

These biases can only be corrected through a difficult, long-term process of introspection, development, and, ultimately, transcendence.[367] A judge who frequently makes overtly objective decisions is likely to have become conscious of, and to have worked to eliminate, these biases in herself over the course of her career.[368] And yet, without both a general theory of error and correction, and further, without some foundation upon which to proceed, bias may go undetected

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[359] *See id.*

[360] *See id.* It is quite possible that most people would disagree with a judge's use of a particular argument, but it would still be a simple disagreement.

[361] Unless, for example, Dworkin assumes that his power to supercede the judge's understanding is based on the fact that a majority of the population has granted him the power to do so. Such a resort to the brute force of democratic majorities would, however, undermine Dworkin's position in opposition to the Critical Legal Scholars. *See* DWORKIN, LAW'S EMPIRE, *supra* note 25, at 440 n.19; *c.f.* Singer, *supra* note 12, at 48–49 (describing much of traditional legal theory, including Dworkin's work, as inherently illegitimate attempts to force people to agree by reason instead of force).

[362] *See* LONERGAN, INSIGHT, *supra* note 21, at 244.

[363] *See id.* at 214.

[364] *See id.* at 245.

[365] *See* DERSHOWITZ, *supra* note 5, at 162.

[366] *See* LONERGAN, INSIGHT, *supra* note 21, at 247–50.

[367] *See id.* at 500–02.

[368] *See id.* at 318 (explaining that as one attempts to become a "reliable judge" one will engage in the self-corrective process of learning, which prunes bias).

even by a conscientious judge.[369] In the context of a particular case, a careful judge should consciously review all the potential sources of bias arising in the case, especially those which have been previously identified as particularly germane to the individual judge.[370] Specifically in the context of the *Bush v. Gore* decision, critics have identified a number of perceived biases that may have affected the final outcome of the case.[371] Ultimately, Lonergan's method does not claim to definitely determine if *Bush v. Gore* was decided objectively or not, because his method is primarily focused inwardly.[372] Lonergan's method does, however, provide both a method by which to evaluate one's own response to the Supreme Court's decision, and, at a minimum, a shared framework around which to conduct a dialogue and critique of the decision.[373]

Lonergan's description of the varieties of bias suggests a further avenue for consideration.[374] In the context of American society as a whole, a judge faced with a political decision should consider if bias has crept into the process of choosing judges.[375] Are judges chosen for their objectivity, or exactly for their perceived ideological bias? If the latter seems to be the case, the ruthless pursuit of objectivity becomes even more important for the individual judge.[376] Knowing that she has been selected as a judge based on partisan concerns, she must determine whether her true duty lies to objectivity or to her patrons. If to objectivity, then she must search out these partisan biases and eliminate them.[377] If judges in the United States are chosen for their partisan commitment, that answer also seems to call for a meaningful critique of society, a critique that can provide the impetus for communal introspection, correction, and further development.[378]

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[369] Lonergan referred to biases as blind spots (scotoma). Of course the problem with blind spots is that one is often unaware of them until too late. *See id.* at 215–27.

[370] For example, if a judge knows that she was raised as a Republican and has acted with political motives in making previous decisions, she must scrutinize how her political affiliation affects the current decision, perhaps more than she examines other, less relevant, aspects of the decision, such as gender.

[371] *See* DERSHOWITZ, *supra* note 5, at 151–72.

[372] The basis of Lonergan's work is cognitional structure, and cognitional structure is based on an inner sense of curiosity. *See supra* notes 39–79 and accompanying text.

[373] *See, e.g.*, Brennan, *supra* note 22, at 292–302.

[374] *See supra* notes 122–126 and accompanying text.

[375] Dershowitz noted this problem in the context of the *Bush v. Gore* decision. *See* DERSHOWITZ, *supra* note 5, at 187–90, 197–200.

[376] *See* LONERGAN, INSIGHT, *supra* note 21, at 310–11.

[377] *See* LONERGAN, METHOD, *supra* note 21, at 44.

[378] This critique is the sort of activity Lonergan called for in cosmopolis, although cosmopolis is not a formal academy or any sort of organization as such. Rather cosmopolis is a type of person or a state of mind. *See* LONERGAN, INSIGHT, *supra* note 21, at 263–67.

Conclusion

Bernard Lonergan's philosophy provides a rich, detailed foundation upon which to base a normative method for objective decision making by judges and lawyers. This foundation is constructed from a brilliant, comprehensive, yet at the same time practical, understanding of how people think and know. While building the complex structure that leads up to the possibility of an objective judgment, Lonergan returned at each step to the driving force of the human intellect—a sense of wonder and innate curiosity. It is this curiosity that drives the basic cognitional structure of experiencing, understanding and judging. It is this same curiosity that makes it possible for a willing thinker to search for and eliminate errors. And finally it is curiosity that allows the thinker to reflect on her own process of knowing, to evaluate the extent to which she has discovered and corrected errors within herself, and finally to determine the probability that her decision is objective.

Lonergan's method for objective decision making is well suited to the specialized field of law. And Lonergan's work on objectivity compares favorably with that of Dworkin, a leading legal philosopher. Lonergan's work even successfully addresses a few areas where Dworkin's work seems to disappoint. Based on this analysis, Lonergan's contributions to general philosophy should not be lost to the law merely because of a shortage of work specifically applying his thinking to the law. Hopefully, legal philosophers will have cause to consider Lonergan's work more frequently in the future.

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