# Dialectical Reasoning and Personal Judgment

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## INTRODUCTION

## I. BODENHEIMER ON PRACTICAL REASON AND HUMAN CONFLICT

It is difficult to enumerate, much less comprehend, the various ways in which Edgar Bodenheimer enriched the field of legal philosophy. Unfortunately, it is not difficult to understand why those valuable contributions did not have a broader influence during his lifetime. For while Bodenheimer was a jurist of the first rank, the general direction of his thought ran counter to the influential currents of academic opinion. Following the Second World War, legal positivism experienced a revival and it became fashionable to value a strict separation between law and morals. Bodenheimer had personal reasons for rejecting this false dichotomy. He saw his own legal career, in his native Germany, destroyed by the rise of the Nazis. Bodenheimer's deep understanding of the whole tradition of legal philosophy from the Greeks onward gave him the ground for distinguishing the legitimate, from the illegitimate, demands of a legal regime. From his perspective, the emphasis which the modern legal positivism placed upon the exclusive analysis of legal concepts was plainly inadequate. He stated:

> Legal concepts and generalizations . . . assist us in the formulation of external standards in the absence of which reasonable men would be reluctant to submit their controversies to the courts. It lies in the nature of a concept, however, that it is fixed and definite only in its kernel or core, and that it becomes blurred and indistinct as we move from the center toward the periphery. This affords a handle to the judge by which he can either widen or reduce the "corona" around the solid part in response to social necessity or the requirements of justice. It is in this outer, penumbral area that the law inevitably intersects

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> with ethics, economics, social policy and other factors considered "extraneous" by the radical positivist.[1]

Thus, in its modern form, legal positivism was not sufficiently humanistic in either its methods or objectives to command the devotion of one who really understood the higher purposes of law and legal philosophy.

Legal positivism was soon challenged by the revival of Liberalism. However, this newer, immensely popular development in academic jurisprudence was not congenial to the mind and outlook of Edgar Bodenheimer. The 1971 publication of *A Theory of Justice*, by John Rawls, was an effort by an academic moral philosopher to articulate a conception of justice which would make the human person the center of political and social existence. Rawls' objective was to subject the constitutional structure of a democratic society to principles of justice imaginatively derived from a hypothetical social agreement. Representative individuals, unaware of their specific endowments or deficiencies, would deliberate over the terms of social cooperation. Principles of justice which resulted from this ideal deliberation would then be applied throughout the political and legal order. Once in place, these principles would constitute the standards which one would apply to resolve social, political, and legal conflicts.[2] Bodenheimer had reached a different, more sophisticated understanding of the nature of human conflict. His was an understanding which was directed toward the complex realities of social existence rather than the articulation of universal principles which would regulate those contingencies.

Rawlsian justice was designed to give liberal values an elevated

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[1] Edgar Bodenheimer, *Modern Analytical Jurisprudence and the Limits of Its Usefulness*, 104 U. PA. L. REV. 1080, 1083 (1956) (footnote omitted). *But cf.* H.L.A. Hart, *Analytical Jurisprudence In Mid-twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953 (1957) (stressing distinction between legal concepts and legal theories).

[2] JOHN RAWLS, A THEORY OF JUSTICE (1971). The imagined reflections are thought of as yielding two principles of justice. Under the first, each person is to have an equal right to the most extensive system of basic liberties compatible with an equal right for all. Under the second, social and economic inequalities must be arranged so that the greatest benefit goes to the least advantaged. Under this principle, each person has equal access and opportunity to all offices and positions. *See id.* at 60-65; *see also* CORNELIUS F. MURPHY, JR., DESCENT INTO SUBJECTIVITY: STUDIES OF RAWLS, DWORKIN AND UNGER IN THE CONTEXT OF MODERN THOUGHT 1-60 (1990) (discussing and evaluating Rawls' conceptions).

position in a democratic polity. To reach this height, one must pass through what is given in political experience and ascend to a higher level of moral comprehension. Respect for rights becomes a matter of unconditional obligation. Liberalism aims to ensure that in matters of social conflict, personal rights outweigh other values. To advance that end, controversies must be resolved by reference to foundational principles which protect individual entitlements against the power of both state and society.

Rawls' conception is a form of neo-Kantian prescriptivism. It treats justice as an ideal which promotes the right rather than the good. The advancement of that good can only be achieved through reliance upon a restricted notion of rationality. The rational consists of the calculation of self-interest under the control of foundational principles. In effect, practical reasonableness is absorbed into a theoretical disposition. This attitude is an extension of the post-Cartesian ambition to extend to all aspects of human culture the reasoning *more geometrico* which had proved so successful in the modern revival of mathematics and the development of the natural sciences.[3] When applied to ethics and law, this approach ignores the extent to which the practical use of reason often requires the making of choices among opposing alternatives rather than the straightforward application of abstract, axiomatic norms. Bodenheimer was acutely aware of this different understanding of practical reason and of its relevance to both law and politics.

In his seminal article, *A Neglected Theory of Legal Reasoning,*[4] Edgar Bodenheimer insisted upon the need to recognize the distinction between dialectic and demonstrative forms of reasoning and argumentation. Legal theory too often assumed that deductive, inductive, and analogous reasoning exhausted the ways in which reason was operative in the legal process. This limited understanding was inconsistent with experience. Advocates and judges realized that the balancing of conflicting interests, in individual situations, was a pervasive aspect of the practice of law. This experience revealed ways in which law engaged modes of reasoning that were not adequately described by the prevailing models of legal rationality. The fact that dialectical reasoning

[3] *See generally* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY (1989) (providing good description of *more geometrico*).

[4] Edgar Bodenheimer, *A Neglected Theory of Legal Reasoning*, 21 J. LEGAL EDUC. 373 (1969).

requires the weighing of opposing claims means that the administration of justice cannot be governed by standards of absolute truth or transcendental value. As we shall see, this attention to complexity had implications for the development of character as well as the broadening of understanding. The awareness of polarity and contingency that made dialectical reasoning distinctive expands the range of reflection which must proceed mature choice. It also calls the human person to its highest forms of deliberation, dialogue, and judgment.

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In articulating the relation of dialectical reasoning to a mature understanding of human conflict, Bodenheimer drew upon contemporary, as well as traditional, sources. In the ancient world, the foundations were laid by the Greek philosophers, especially in the works of Aristotle.[5] In modern literature, the sources were diverse. Justice Cardozo recognized the pervasive opposition of values within the judicial process.[6] The Belgian legal philosopher, Chaim Perelman, fully explored the philosophical, as well as the jurisprudential, aspects of dialectical reasoning.[7] Alert to these developments, Bodenheimer also made use of the important distinctions between convergent and divergent reasoning to reinforce his conviction that a dialectic of contingency was at the core of all important human problems.[8]

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[5] This is especially true in *The Topics* where Aristotle proposes dialectic deduction as a superior method of reason. *See* ARISTOTLE, *The Topics, in* THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 161-277 (Jonathan Barnes ed., 1984).

[6] *See, e.g.,* BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE (photo. reprint 1968) (1928) (emphasizing necessity of compromise between competing values); *see also* BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 56-80 (1924) (stressing importance of choice of reasoning method); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98-141 (1921) [hereafter CARDOZO, JUDICIAL PROCESS] (describing inadequacy of logic as sole rationale in judicial decision-making); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 20-57 (1990). The influence of Cardozo can be seen in Edgar Bodenheimer, *Cardozo's Views on Law and Adjudication Revisited*, 22 U.C. DAVIS L. REV. 1095 (1989).

[7] *See* CHAIM PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT (John Petrie trans., 1963).

[8] *See* Edgar Bodenheimer, *Compromise on the Realization of Values, in* COMPROMISE ON ETHICS, LAW, AND POLITICS 142-59 (Nomos XXI: Yearbook of the American Society for Political and Legal Philosophy 1979). Bodenheimer's essay on compromise is a mature expression of his views upon the dichotomous nature of social reality. The distinction between

These insights enhance our understanding of difficult legal controversies and the demands that such litigation makes upon those authorized to make decisions. As awareness of value divergence increases, the ones responsible for resolving "hard" cases become more conscious of their complexity. Where existing legal sources do not, of themselves, provide a solution to a dispute, the resulting indeterminacy suggests a need to give greater attention to the dialectical elements of the controversy. One must, however, be careful not to overstate the degree of doubt.

In the field of constitutional adjudication, Justice Scalia of the United States Supreme Court has made important contributions to the revival of a formalism which would rely more upon clear rules and determinate sources of decision than upon a discretion aroused by an awareness of the inconclusive nature of legal disputes.[9] He has also contributed to a similar debate within the field of statutory interpretation.[10] Despite the limitations of this formalist approach, one must recognize that certainty has always been considered an integral part of the nature of justice.[11] It should also be observed, however, that those who oppose the formalist revival justify their opposition by reference to dialectical considerations which they see as more in keeping with nature of practical reasoning.[12] Of course, it is impossible to determine in advance when certainty ends and doubt begins. Much of the

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divergent and convergent reasoning was developed in ERNST F. SCHUMACHER, A GUIDE FOR THE PERPLEXED (1977).

9 *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); *see also* Burnham v. Superior Court, 495 U.S. 604 (1990). The decision, upholding "tag" jurisdiction over a non-resident temporarily in the forum, may negate the inquiry into the reasonableness of the exercise of in personam jurisdiction laid down in Shaffer v. Heitner, 433 U.S. 186 (1977). *See* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990) (analyzing Scalia's reasoning in *Burnham*); Symposium, 22 RUTGERS L.J. 559 (1991).

10 *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 452-55 (1987) (Scalia, J., concurring).

11 *See* ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988) (comparing different rationality traditions); CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY (1987) (asserting that policies must be neutral to be justifiable); *see also* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991) (analyzing formalist viewpoint).

12 *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 345-83 (1990); Daniel A. Farber,

determination depends upon how open-minded the decision-maker is with respect to the diverse jural realities. Such an ungrudging acceptance of dichotomous phenomena cannot be taken for granted in a time when ideological presuppositions skew the resolution of legal, as well as political, controversies.

Bodenheimer was conscious of these difficulties. He insisted that the multidimensional nature of important legal problems could only be grasped when doctrinaire prejudices do not obstruct the consideration of all relevant factors.[13] This is an insight which has a much greater bearing upon the authoritativeness of important judicial decisions than is commonly recognized. There are also other philosophical insights into the phenomenon of deliberation which can help moderate ideological distortions and help promote the impartial administration of justice.

## II. Dialectical Reasoning and the Administration of Justice

At the beginning of the modern period it was widely assumed that ethical progress would depend upon the degree to which important decisions were fully determined by clear, universal rules and principles. That earlier confidence has substantially diminished. Not only has our understanding of the scope of human choice increased, but also, we are now more aware of the complexity of ethical problems than we were even in the last century. It has become increasingly difficult to know the degree to which general rules can have a claim upon our consciences in the varied contexts of our practical life.

In some situations, objective moral principles have an immediate and decisive relevance to our conduct. To state an extreme example: one may be so harassed by another, that one is tempted to kill her. Here the complexity is subjective: it consists primarily of an inward struggle to control destructive impulses. In most situations, however, one is often faced with problematic situations which give rise to conflicting duties. These circumstances require

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*The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 Vand. L. Rev. 533, 547-59 (1992).

[13] Bodenheimer, *supra* note 4, at 382. "[I]t is the aim of this method to see to it that legal problems are grasped in their full complexity, i.e., that no consideration relevant to their solution is cut off by doctrinaire prejudices since only in that event the solution can be right . . ." *Id.* (quoting Martin Kriele, Theorie der Rechtsgewinnung 124 (1967)).

actions which must reflect some consideration of incompatible principles or rules. It is then that one must really *do* something. At that point, one must choose among several possible alternatives.[14]

These broader, more subtle experiences, have become an important part of the contemporary understanding of the nature of ethical choice. There is a movement away from monistic theories which assume that a single principle can always tell us what to do. That premise is being replaced by the ancient insight which understands personal judgment as an activity which is not governed by general rules, but instead is a form of conduct in which one responds to the specifics of a situation calling for choice without having advanced knowledge of the appropriate decision.

There are comparable advances in our understanding of the nature of justice. Some questions of justice can be disposed of by the immediate application of a determinate rule.[15] But many problems of what is due are of such a complex nature that their resolution cannot be rule-governed. The contingencies are so numerous that they cannot be subsumed under a single definite precept. Which claims have merit and what remedy each claimant deserves, is too uncertain to allow for simple resolution. These situations are not governed by rules because the doing of justice, in subtle context, requires a knowledge and appraisal of all the particulars of a given situation. And there are no rules for determining how one should understand such particulars.[16]

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[14] *See* JACQUES MARITAIN, EXISTENCE AND THE EXISTENT 56-61 (Lewis Galantiere & Gerald B. Phelan trans., 1966) (discussing existentialist perspective on conflicts between rules and desires); LARMORE, *supra* note 11, at 6-9 (examining role of moral judgment in applying moral rules); NICHOLAS RESCHER, ETHICAL IDEALISM: AN INQUIRY INTO THE NATURE AND FUNCTION OF IDEALS 26-54 (1987) (pointing out difficulties that conflicting rules create); EDMUND L. PINCOFFS, QUANDARIES AND VIRTUES: AGAINST REDUCTIVISM IN ETHICS 13-52 (1986) (criticizing ethical theories relying on foundational principals for failing to address variety of moral problems); RONALD BEINER, POLITICAL JUDGMENT 102-52 (1983) (arguing that political decisions should not incorporate any current comprehensive theories of political judgment).

[15] "Where does the judge find the law which he embodies in his judgment? There are times when the source is obvious. The rule that fits the case may be supplied by the [C]onstitution or by statute. If that is so, the judge looks no farther . . ." CARDOZO, JUDICIAL PROCESS, *supra* note 6, at 14.

[16] *See generally* MACINTYRE, *supra* note 11, at 124-45 (analyzing Aristotelian approach to determining relevance).

When a legal or ethical problem is "easy," doing what is right requires nothing more than the application of a determinate rule to a particular instance. Where the situation is truly inconclusive and involves a consideration of incommensurate values, however, the burdens on the one responsible for the decision correspondingly increases. Expressed in terms of the modes of reasoning, such a person, having exhausted the powers of deductive, inductive, and analogical thought finds herself in a situation where dialectical reasoning becomes significant. It is then necessary for the decision-maker to recognize that reasoning powers are interconnected, and that they depend upon certain psychological dispositions. As the decision-maker's awareness of complexity increases, certain defensive mechanisms can come into play and the decision-maker may seek to avoid the increasing uncertainties. The legitimacy of such evasion is itself a matter of some difficulty.

Avoidance of complexity may be motivated by a need for certainty. In situations of widening discord, a conscientious judge may feel compelled to invoke principles of stare decisis even if doing so forecloses further exploration into the substantive demands of justice.[17] The judge may also seek to avoid what others may consider arbitrary decisions. Extreme particularity is incompatible with the rule of law. To be sure, law must reduce some contingencies to rules which, by their normative force, restrict a more extensive inquiry into the specifics of an alleged injustice.[18] There are other strategies of evasion though which have more to do with ideological or personal preferences than they have to do with the ideals of the fair administration of justice.

In "hard" cases of constitutional litigation, the relevant texts, principles, statutes, and precedents cannot, of themselves, provide a certain answer to the controversies.[19] Such conflicts are

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[17] *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 135-43 (1990); *see also* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2803-16 (1992) (stating that stare decisis required reaffirmation of woman's limited right to abortion).

[18] *See generally* Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) (arguing for reliance on formal rules in decision-making); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991) (asserting rule-based and particularized decision-making processes are compatible in law).

[19] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975). I evaluate this aspect of Dworkin's work in Cornelius F. Murphy, Jr., *Liberalism and Judicial Authority*, 21 DUQ. L. REV. 1 (1982). *See* MURPHY, *supra* note 2, at 61-130.

inconclusive because there is an essential opposition of values at their core. Liberty is opposed by claims of equality, freedom by claims of authority, and the private interest by claims of important social values.[20] When a judge has a strong preference for one value, she may seek to disparage whatever may call her preference into question.

In *Stone v. Powell*,[21] the Supreme Court refused to provide federal habeas corpus relief to persons convicted of serious crimes by state courts. In his dissent, Justice Brennan ridiculed the values which the majority felt to be important:

> The Court . . . argues that habeas relief for non-"guilt-related" constitutional claims is not mandated because such claims do not affect the "basic justice" of a defendant's detention . . . . [T]his is presumably because the "ultimate goal" of the criminal justice system is "truth and justice". . . . This denigration of constitutional guarantees and constitutionally mandated procedures, relegated by the Court to the status of mere utilitarian tools, must appall citizens taught to expect judicial respect and support for their constitutional rights.[22]

This disposition to elude important social values which one holds in contempt can be found among jurists of conservative, as well as liberal, persuasion. The proponents of a constitutional jurisprudence of "original intent" manifest the same inclination to avoid any value divergence which may call into question interpretations which they find congenial to their own deepest convictions.[23] No matter what may be the nature or source of the preference, such bias indicates the degree to which our search for constitutional comprehension has been marred by the ascendancy of preferential opinion over mature deliberation. The doctrinaire jurist rejects values of fundamental importance which may threaten a preferred vision of either liberty or community. Such a person is also avoiding the elementary tensions which lie at the heart of an evolving democratic society.

In his early *Treatise on Justice*, Edgar Bodenheimer criticized the Supreme Court's subjective tendencies in rendering constitutional justice. He pointedly observed the consequences of a free-

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20 *See* Bodenheimer, *supra* note 8, at 142-47.

21 428 U.S. 465 (1976).

22 *Id.* at 523 (Brennan, J., dissenting) (footnotes omitted) (emphasis omitted).

23 *See generally* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) (presenting "original intent" theory).

wheeling discretion. As an expression of sovereign power, judicial review is nothing more than the projection of the personal predilections of a inconstant judicial majority. Their interpretations of the broad concepts of fundamental law will lack sufficient reasons for public acceptance of constitutional decisions.[24] We now understand more fully the deeper implications of a subjectivist approach to Supreme Court discretion.

It has become commonplace to assume that a certain perspectivism defines the human condition. Personal bias is inevitable because each interprets the texts of the world according to their own contingencies. Because every inquiry presupposes a particular point of view, we seem obliged to accept endless variants of constitutional interpretation. But there are other consequences of perspectival knowing which are generally ignored. A particular perspective validates oneself and it also makes an epistemic statement. In effect, one who insists upon a relativist position is claiming complete possession of the truth. Such an approach may encourage creative discretion, but it also breaks the cognitive relation between reflection and experience. The potentials of meaning which lie within the complex interaction of divergent values are replaced with closed order conceived within the mind of one who is making a purely personal interpretation.

Under these conditions, constitutional interpretations become *decisively* subjective. Knowledge of fundamental law does not arise out of an encounter with the externalities of public existence. By contrast, those who fully enter the world of divergence and polarity reach beyond themselves and enter into an engagement with the broader dynamics of constitutional existence. When the powers of dialectical reasoning are fully operative, the conscientious judge does not separate her inner experience from the broader realities which bear upon the exercise of the office. She addresses these pervasive dichotomies rather than distancing herself from them. In adjudicating the fullness of constitutional controversies, such a judge does not rely upon either a priori rules or a priori preferences.[25]

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[24] *See* EDGAR BODENHEIMER, TREATISE ON JUSTICE 136-41 (1967).

[25] Here I draw upon the thought of Eric Voegelin. *See generally* EUGENE WEBB, ERIC VOEGELIN: PHILOSOPHER OF HISTORY (1981) (summarizing Voegelin's philosophy).

## III. Value Divergence and Constitutional Controversies

Where important personal and social values are at odds in constitutional cases, a preferred value may be given pre-eminence. Instead of trying to reconcile the diversity inherent in such conflicts, the one holding the preference may decide that under the circumstances, rational choice consists of the maximization of that value and the weighing of all alternatives with reference to its supremacy. This attitude can be expressed as a matter of theory, as well as of practice. It can be seen in conceptions of the purposes of law which consider virtuous action to consist of conscientious adherence to universally unqualified principles. Ronald Dworkin's conception of integrity, considered as the monological extension of the principle of equal concern and respect, comes immediately to mind.[26] But there are other, opposing conceptions which remain influential. For example, John Austin's view that liberty is important only to the degree that it promotes general utility could be easily translated into contemporary conservative ideology.[27] All such theories rest upon a belief that responsible choice can be reduced to a uniform measure of value.

Where judicious deliberation is dialogical there is, as I have pointed out, a movement towards external conflict and an effort to understand the significance of the opposing interests. The wise decision-maker resists the temptation to reduce the diverse goods implicit in the controversy to a single value. Like dialogical reasoning, the deliberation engendered by the openness to diversity has Aristotelian roots:

> To value each separate constituent of the good life for what it is in itself entails . . . recognizing its distinctness and separateness from each of the other constituents, each being an irreplaceable part of a composite whole . . . Can it be rational to deliberate in a way that effaces this distinctness? . . . The really rational way to choose, says Aristotle with great plausibility, is to reflect on and acknowledge the special contribution of each item, and to

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26 *See* Ronald Dworkin, Law's Empire 176-224 (1986); *see also* Murphy, *supra* note 2, at 61-130 (analyzing Dworkin's philosophy).

27 Political or civil liberty has been erected into an idol, . . . with extravagant praises by doting and fanatical worshippers. But political or civil liberty is not more worthy of eulogy than political or legal restraint. Political or civil liberty, like political or legal restraint, may be generally useful, or generally pernicious; and it is not as being liberty, but as conducing to the general good, that political or civil liberty is an object deserving applause.

1 John Austin, Lectures on Jurisprudence 274 (5th ed. 1885).

> make the understanding of that heterogeneity a central part of the subject matter of deliberation. Evasiveness is not progress.[28]

From this perspective, the deliberations which precede judgment are focused upon the conflicting values which are integral to the controversy. The desire for an autonomous decision, however, may cut short this objective reflection. For one may come to understand the dialectical dimensions of difficult cases while preferring to fill in the resulting uncertainties with one's own personal convictions.

When the process of adjudication is conceived as a monistic enterprise there is no free exercise of judgment. A divergence of values may be acknowledged, but it is thought that the conflict can be overcome by recourse to some higher principle. From a deontological perspective, appeal may be made to a universalized norm of individual respect; a utilitarian may evoke the greatest happiness principle. In lived experience, neither option is likely to be pursued with fanatical commitment. But even if one abjures all dependence upon higher principles, she must still find a way to *resolve* the conflict.

Following the model of Justice Holmes, one may think that the circumstances of uncertainty now call for the exercise of "the sovereign prerogative of choice."[29] Such a stark statement of ultimate power may be consistent with the logic of legal positivism, but it is unsatisfactory as a standard of judgment because it gives too much deference to judicial will. Following Cardozo, the judge facing the dilemmas of choice may seek to weigh the conflicting interests, taking into account personal values and community morality as well as institutional concerns which inher in the judicial process. But this path is also covered with doubt:

> My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. . . .

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[28] MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE 60 (1990). It should be realized that as a matter of the doctrine of judicial review, certain values protected by the Bill of Rights are given special protection. *See* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

[29] Oliver W. Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 461 (1899).

> If you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge . . . from experience and study and reflection; in brief, from life itself.[30]

Justice Cardozo realized that such a weighing of opposing values can create agonizing tension between personal conviction and social realities. His writings suggest a subtle awareness of the "constant and subtle interaction between what is without and what is within."[31] If the one responsible for decision is determined to remain autonomous she will be inclined to prefer the inward source of authority as the ultimate basis of judgment.

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To make judgments which are both dignified and rational, one must preserve a measure of personal independence. At some point in the process of deliberation each person must depend upon her own moral resources rather than rely upon conventions which lie outside the self. The judging individual cannot be deprived of personal autonomy either because of the demands of some universal principle or because of the pressures of contemporary social reality.[32] If the judgment is to be authoritative for the community, however, it must manifest an acknowledgment of the full human, heterogeneous complexity of the controversy which the judge is empowered to adjudicate. This is not to suggest that the conscientious judge must endorse any particular values, either individualistic or communitarian. However, there must be an openness to the weight and intrinsic appeal of the divergent values; a *reckoning with* which goes beyond the bare acknowledgement of their existence.

When all of the relevant factors are taken into account, the process of dialectical reasoning gains a new subtlety. The decision-maker must be sympathetic to the particular values expressed by the various interests, but there must also be a sufficient detachment from the conflict to assure the personal quality of the ultimate decision. To further complicate matters, one must also recognize that the adjustment finally decided upon must reflect

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[30] CARDOZO, JUDICIAL PROCESS, *supra* note 6, at 113; *see also* POSNER, *supra* note 6, at 20-32.

[31] CARDOZO, JUDICIAL PROCESS, *supra* note 6, at 110-11.

[32] *Cf.* BEINER, *supra* note 14, at 129-52 (asserting imagination is necessary for prudent decision-making).

some substantial convergence between the judge's purposes and those of the community at large.

Dialogical reasoning draws the jurist and the judge beyond the confines of self-limiting awareness towards the rich possibilities inherent in the various and contrasting aspects of great public issues. The changing perceptions within the Supreme Court on the abortion question illustrate how a deeper understanding of value divergence can influence the course of constitutional development. One of the major criticisms of *Roe v. Wade*[33] was that the decision failed to acknowledge the genuine conflict of values inherent in the controversy.[34] Priority was given to the privacy interest while the public interest in the protection of the unborn was virtually ignored. The joint opinion in the recent *Casey* decision[35] explicitly acknowledges the deficiency in *Roe* and makes corresponding adjustments in its assessment of the weight to be given to the irreconcilable interests. It remains to be seen whether a maturing court will take into account the dialogical dimensions of other important constitutional conflicts.

As awareness of value divergence intensifies, the center of gravity in constitutional adjudication shifts away from the self, with its "temperamentally preferred activities,"[36] to the more substantive conditions of human interaction. Yet, at some critical juncture, there must be a return to what the person cannot help believing is the decisive truth. This return to decisional autonomy should be premised upon some notion of personal integrity. Such final discretion may not be subject to legal rules but it must be justified by something more meaningful than an unrestricted will to perspectival power. We must have freedom of decision without abandoning the demands of reason. We need an ideal of discretion which is more substantial than that pragmatic temperament which, burdened by contingency, is content with a vague, constantly changing, reweaving of purely private convictions.[37]

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[33] 410 U.S. 113 (1973).

[34] *See* Andrew L. Kaufman, *Judges or Scholars: To Whom Shall We Look For Our Constitutional Law?*, 37 J. LEGAL EDUC. 184, 201 (1987).

[35] Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

[36] Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1447, 1450 (1990) (reviewing RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990)).

[37] *Compare* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 23-43 (1989) *with* the conception of judging defended in POSNER, *supra* note 17.

## IV. DIALOGUE AND JUDGMENT

In a dialectical dialogue one does not start reasoning from uncontestable foundations. The mind is drawn to the imperfect premises of historical experience; an experience in which values are pursued but never fully realized. These realistic promises are part of the art of judging. The conditions for collegial dialogue among appellate judges is similar to that which classical tradition has assigned to a philosophical exchange:

> Philosophical dialogue is, *par excellence*, dialectical; indeed it determines the very characteristics of a dialectical method. . . . The agreement between the interlocutors rests upon what in their milieu is considered as well-grounded, and as requiring to be accepted until there is proof to the contrary. The point of departure for a dialectical argumentation does not consist in necessary propositions, valid everywhere and for all time, but in propositions effectively admitted in a given milieu; in a different setting, in a different historical and social context, these propositions may no longer meet with general approval. . . . [T]hese basic propositions will serve, most of the time, not as axioms of a deductive system but as arguments supporting other theses that one endeavors to put forward. Neither their value as arguments, nor their use as examples or as elements of analogy, gives rise to a compelling conclusion, since the explicit adherence of the interlocutors is indispensable at every step, in order to allow the reasoning to proceed.[38]

Deliberative reasoning is not a Hegelian quest for an absolute reason; it is a searching for the good which is, perhaps, best described as a "groping for the truth."[39] As a search among alternatives, such a way of deliberating has a rhetorical quality. This deliberation is much more than an exercise in the arts of persuasion. It is also a means of constituting a community. The paradox is that as one moves from what is good for oneself to

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[38] PERELMAN, *supra* note 7, at 166-67. *Cf.* MACINTYRE, *supra* note 11. The observations of Learned Hand, one of our best judges, are also relevant:

> You must be able successfully to realize how other people in the society with which you are concerned are likely to respond to the adjustments that you propose . . . Of course, you must have impartiality. What do I mean by impartiality? I mean you mustn't introduce yourself, your own preconceived notions about what is right. You must try, so far as you can . . . not to interject your own personal interests, even your own preconceived assumptions and beliefs.

LEARNED HAND, *A Personal Confession*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 309-10 (Irving Dilliard ed., 3d ed. 1963).

[39] Bodenheimer, *supra* note 4, at 380 & n.17.

what is good for the community, one gains an enhancement of personal identity.

The practice of judging, as an aspect of the practice of law, encourages the development of certain traits of character which run much deeper than the idiosyncrasies of purely individual biography. These practices activate standards which test what kind of person a particular judge is. The measures in question may be considered "political" in the sense that they cannot be completely divorced from shifting social currents. They are not, however, the same as conventional politics. There are special responsibilities both for the administration of justice and well-being of the community at large. There is also the virtue of good judgment:

> [W]e are most dependent upon our judgment, most in need of good judgment, in just those situations that pose genuine dilemmas by forcing us to choose between, or otherwise accommodate, conflicting interests and obligations whose conflict is not itself amenable to resolution by the application of some higher-order rule. It is here that the quality of a person's judgment comes most clearly into view . . .[40]

Judgment, in this sense, is a first-person form of deliberation. How one resolves the intractable problems, how one reconciles sympathy with detachment, how well one can both entertain a wide range of alternatives and still choose among them; all of these aspects of dialectical deliberation imply an inner order of character. It suggests the maturing development of a unique personal responsibility which, at the same time, is also the fulfillment of a public trust.

Such an account of basic dispositions must respect both the requirements of an authorized power and the personal roots of action. It must make room for both the indeterminate nature of collective life and the relevance of principle to that life. It must be ethical "all the way down;" reaching the ultimate grounds of deliberation and choice. And it must connect private decision with the demands of community. To explore these dimensions of character we must move from models of reasoning to the virtues of judgment.

In the classical Christian tradition, the quality of character which best expresses the demands of practical life is the virtue of

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[40] Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 848 (1987).

prudence. Prudence is what causes other moral qualities, such as courage and justice, to be virtuous. As a perfected ability to habitually make good choices, prudence covers the whole range of important human acts. The expression *jurisprudence* captures its relevance both to law and to the human actions which make a legal system a fully human enterprise.[41] In modern thought, unfortunately, prudence has a bad name. Characterized as expediency, it compares unfavorably with unswerving devotion to moral principle. As a "passive virtue," it has been assimilated to conservative, neo-traditionalist ideologies.[42] Yet, if properly understood, it has positive qualities which transcend both the impulse to self-preservation and the compulsion to uphold the past.

A prudential discretion comes into play most fully under circumstances of complex deliberation over important public questions. The possibilities for the exercise of the virtue arise whenever dialectical reasoning reveals a deep tension between stability and change, or when such deliberation forces one to choose between incommensurable values. In such situations, prudential discretion is guided by principle, but it is not subject to the decisive control of any one principle. A prudential judge never knows in advance whether the past or the future will have preference. Nor does she know whether the balance should be tipped in favor of an individual or a community interest. At the highest levels of appellate judgment, the freedom of decision is virtually absolute.

A prudent judge does not omit anything of significance from deliberation. Inner reflection and outer realities are intimately connected. At the same time, the specifics of the final decision are alone, hers to make. In complex cases, with all their nuances, variables, and contingencies, there cannot be any single right answer because the content of the final decision cannot be known in advance. But, the decision of an individual judge, if prudent, cannot be inwardly wrong. In addition, such judgments are not

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[41] *See* JOSEF PIEPER, *Prudence*, *in* THE FOUR CARDINAL VIRTUES 3, 3-42 (Richard Winston & Clara Winston trans., 1965) (discussing nature of prudence); Jean Dabin, *General Theory of Law*, *in* 4 20TH CENTURY LEGAL PHILOSOPHY SERIES: LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN 227 (Edwin W. Patterson & Kurt Wilk trans., 1950) (discussing concept of law).

[42] *See* POSNER, *supra* note 17.

wilful or arbitrary because, from the personal point of view, they are fully reasonable.[43]

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[43] *Cf.* MURPHY, *supra* note 2, at 61-130.