COMMENTARIES

Between Clarence Thomas and Saint Thomas: Beginnings of a Moral Argument for Judicial Jusnaturalism

*Juha-Pekka Rentto**

INTRODUCTION

A Propos Clarence Thomas

An interesting feature of the recent American debate on Judge Clarence Thomas' nomination to the United States Supreme Court was the issue of judicial jusnaturalism. Thomas' nomination raised the question of whether it is a good or a bad thing for a Justice of the Supreme Court to be a jusnaturalist—i.e., a supporter of the notion of a Natural Law behind and above the positive law. Many doubted the desirability of having a professed jusnaturalist on the Supreme Court. As Virginia Black pointed out, these doubts were more or less rooted in an apprehension that "natural law is adjudicatively mischievous or would intercept in a pernicious way legal judgments that . . . must, for good reason, respect written law and precedental interpretation."[1] My

* Associate Professor of Law, The University of Turku, Finland.

[1] Virginia Black, *Natural Law, Constitutional Adjudication and Clarence Thomas*, 2 FIDES DIREITO E HUMANIDADES 43, 44 (1991) [hereafter Black, FIDES]. At the request of the U.C. DAVIS LAW REVIEW, Virginia Black has revised the original version of her FIDES article and added a substantial postscript. Virginia Black, *Natural Law, Constitutional Adjudication and Clarence Thomas*, 26 U.C. DAVIS L. REV. 769 (1993).

task in the present Essay is to explicate precisely what various types of positivism critics accuse jusnaturalists of and to outline an argument for holding that it is in fact a certain kind of positivism which is "adjudicatively mischievous" and "pernicious" for legal judgments, rather than jusnaturalism. The argument will be based on an interpretation of St. Thomas Aquinas' views on law, justice, and morality. But before I proceed to unfold my argument, I must address two apologies for jusnaturalism that the Clarence Thomas debate prompted.

Professors Virginia Black and Jude P. Dougherty have each published an article *à propos* Clarence Thomas, each with a view to showing why there is nothing dramatic about the Natural Law.[2] Both argue for a demystification of the concept, seeking to demonstrate that there is nothing extraordinary or esoteric about the ways of a jusnaturalist mind. Dougherty points out that the Natural Law really concerns some of the most evident and unquestioned moral considerations in Western society,[3] and Black goes so far as to claim that the Natural Law simply is the ordinary Western morality of the common man.[4] In her view, Clarence Thomas can help being a jusnaturalist as little as any reflective Western man or woman. Therefore, his jusnaturalistic predilection should not be a significant issue at all. Dougherty endorses a different view, according to which Western morality has been more or less spoiled by the after-effects of the Enlightenment.[5] For him, jusnaturalism is something to be argued and fought for, as long as one is clear on what it is in fact all about.

Dougherty stresses inherited wisdom and tradition, which should not be wasted, and an intelligible order of nature which can be found out by human intellectual effort. For him, Natural Law is not so much a set of normative propositions, but a metaethic which advises one to "[p]roceed with confidence that intelligence can determine in a general way what is good for man."[6] What is good for man is rooted in human nature, which is part and parcel of the intelligible order of all things. But the good for man is "in a general way," and what is good for a precise person at a precise time in a precise place needs to be determined

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[2] Black, FIDES, *supra* note 1, at 44; Jude P. Dougherty, *On Natural Law: What Clarence Thomas Did Not Say*, THE WORLD & I, May 1992, at 583.

[3] Dougherty, *supra* note 2, at 584.

[4] Black, FIDES, *supra* note 1, at 54.

[5] Dougherty, *supra* note 2, at 584.

[6] *Id.* at 585.

by individual human reason: the constant and the variable are at a constant interplay in the Natural Law, and it is the task of reason to strike a balance between them. For Dougherty, jusnaturalism is like a method of reasoning that seeks human well-being and the common good with reference to unified natural structures which lend sense to the effort. This is why it is to be preferred to alternative approaches like "morals by agreement" and John Dewey's moral pragmatism.[7]

I believe that Dougherty's argument is by and large valid. But I also think that it overlooks a major point when it stresses the natural order of things. The point, which is unexplicit but obvious in Black's argument, is that human beings are not prisoners of their specific nature. For reasons to be explained below, the focal demand of the Natural Law on men is not so much that they should act according to a nature given to them, but that they should, by using their own reason, define for themselves that very nature by which they are to act. Human beings are autonomous—i.e., they are responsible not only for obeying the rules but also for making them up for themselves. To my mind, it is only this insight which carries home the decisive moral argument for preferring jusnaturalism to legal positivism in the judiciary.

Black, like Dougherty, refers to "orders of nature" which can be understood by reason.[8] She also points to "substantive values which are without qualification good,"[9] as well as to "principles of natural justice which no one repudiates."[10] Like Dougherty, she underlines that the human nature is purposive, wherefore the Natural Law drives individual men to "do better."[11] The difference between Black and Dougherty is that Black stresses the *individual* in the purpose of "doing better," a stress emphasized by her recognition of the notion of *virtue* at the heart of the Natural Law.[12] "Doing better" entails, where morality is concerned, becoming virtuous—i.e., making up a good life, becoming a person with moral integrity, and growing to have a good character. The Natural Law is not merely about natural structures; it is, more importantly, about each individual person's responsibility to give form to his own character. Obviously, Black thinks that it

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7 *Id.* at 590-95.
8 Black, FIDES, *supra* note 1, at 48.
9 *Id.* at 50.
10 *Id.* at 51.
11 *Id.* at 52.
12 *Id.* at 49.

is part and parcel of ordinary Western morality that individual character is important and that there should be no issue between jusnaturalism and legal positivism on that question: character is a common concern for all. I am not so sure this is true any more, because of much the same reasons which Dougherty holds responsible for the latter-day distaste for tradition and natural structures.[13] Modern morality tends to be more interested in outward deeds than in inward character, in justice rather than in virtue, and in consequences to the material good of the patient rather than to the moral good of the agent. I will argue that, contrary to what Black perhaps believes, there is an important issue between legal positivism and jusnaturalism on the question of virtue: judicial positivism tends to discourage virtue in the judiciary, while a sound judicial jusnaturalism tends to encourage it. To my mind, this is a reason to favor jusnaturalistic candidates like Clarence Thomas for judicial positions—as long as they, as well as we, know what jusnaturalism really is all about.

I. Defining The State of the Question

The problem I shall tackle in this Essay concerns the practical point of adopting a jusnaturalist stand in making legal judgments: Does it make any practical difference if a judge is a jusnaturalist or a legal positivist? Are the judgments of a jusnaturalist likely to be different from the judgments of a positivist in any circumstances? Or is there some other difference between a jusnaturalist and a positivist which would give us reason to prefer the former to the latter in the legal profession? The scene for the discussion was set by the well-known trans-Atlantic dialogue between Harvard's Lon Fuller and Oxford's H.L.A. Hart. Since then, the problem has become a constant part of the larger dispute between proponents of and opponents to the Natural Law doctrine.

The question is important for two reasons. On the one hand, there is a strong belief among those favorably attuned to jusnaturalism that adopting a Natural Law stand makes a profound difference and that at least in some hard cases a jusnaturalist is able to make morally sound judgments which are not available to a positivist. On the other hand, there is an equally strong belief among positivists that it makes little or no difference whether a judge cleaves to jusnaturalism or to positivism, and that even if it

[13] *See* Juha-Pekka Rentto, *The Postmodern Aquinas: A Fresh Start, in* The Future of Thomism 149 (Deal W. Hudson & Dennis W. Moran eds., 1992).

should sometimes make a difference, it would be disfavorable to the jusnaturalist. The arguments for and against adopting a Natural Law stand divide into three groups. The first group revolves around the practical consequences of a judge's jusnaturalism for the way his particular judgments come out: will or can the actual outcome of his deliberation be significantly different from the outcome of a positivist judge's deliberation in a similar case? The question is particularly pertinent to situations where an unjust law or an unequitable application of a just law is at stake. Jusnaturalists tend to claim that adopting a Natural Law stand makes it possible to do justice more often and more thoroughly than adopting a positivist stand. A positivist, again, might contend that there is no reason why he should be worse equipped for doing justice than a jusnaturalist; rather, to the contrary. I shall argue that it will usually make little practical difference whether a judge professes to a belief in jusnaturalism or positivism. Nevertheless, there is one significant exception to this general judgment.

The second group of arguments concerns the political consequences of adopting a Natural Law stand in legal decision-making. Positivists sometimes claim that it is dysfunctional for the political system to make jusnaturalistic judgments in the cases in which jusnaturalism can make a practical difference. There are two different grounds for an argument like this. One is the content which positivists assume that jusnaturalists believe the Natural Law has.[14] Because that argument merely concerns straw-jusnaturalisms defined by critics in order to increase the credibility of their criticism, this Essay does not address it. The other argument has to do with the credibility of the positive legal system as a whole: jusnaturalism may deteriorate the observance of the Rule of Law, which in turn can weaken the whole system. I shall argue that positivists do pursue a valid point when they are concerned about the credibility of the positive legal system, but that this point is equally central for a sound jusnaturalism, even if in a different way.

The third group of arguments deals with the moral impact of jusnaturalism or positivism on judges. Positivists sometimes claim that jusnaturalism makes bad judges because it encourages

[14] A common argument against jusnaturalism is that it is radically conservative, promotes "old" values, and is therefore incompatible with any social development.

them to rely all too much on their subjective notions.[15] No doubt, jusnaturalism can make bad judges. But it depends on the judge, not on jusnaturalism, whether he becomes a good or a bad judge. Moreover, where legal positivism is concerned, it sometimes takes a form which tends to encourage and even require judges to learn to make fraudulent judgments. A component which can foster moral deterioration in the judiciary may also be built into the very notion of legal positivism. Of course, it also then depends on the judge what he becomes. But I shall argue that there is a significant moral difference between jusnaturalism and positivism: the former calls for moral integrity and personal responsibility, whereas the latter gives an easy and attractive opportunity for loosening one's moral grip and shunning one's personal responsibility for one's judgments. That is why a Natural Law stand is, morally, to be preferred over a positivist one in making legal judgments. But this conclusion has very little to do with whether the judgments of a jusnaturalist are different from the judgments of a positivist. Instead, it depends on the more fundamental point that jusnaturalism—at least in the form to be defined below—concerns the whole personalities of everyone involved in a judgment, including the judge himself, whereas positivism regards the judge as a non-person, an impersonal outsider who has nothing to win or to lose in the game he is to play according to the rules laid down by the positive law.[16]

Let us now define our problem more closely. Basically, the question we have posed is whether it is good or bad for a judge to adopt a jusnaturalistic stand when he makes legal judgments. It should be obvious that not just any viewpoint which is or can be

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[15] The modern opinion is that judicial discretion is by and large undesirable because it is beyond "objective" control. But it has not always been so: the Aristotelian classical tradition, formerly predominant in Europe, held that discretion was the best and most distinctive skill of a good judge and that the best control over practical matters—over which "objective" scientific control is impossible—is the personal control of a prudent man! Whereas the ancients believed in individual human reason and encouraged its use, the moderns have a deep distrust of the idiosyncratic and seek to suppress it.

[16] In this respect, we might well say that positivism as defined here is closely tied up with modern individualism at large. *See, e.g.*, ALASDAIR MACINTYRE: WHOSE JUSTICE, WHICH RATIONALITY? 3-4 (1988) (arguing that individuals who look to philosophy, religion, and political associations to discover tenets of justice are unable to arrive at rationally justifiable conclusions).

called by the name of "jusnaturalism" will do: the concept is as ubiquitous as it is misused.[17] The interesting question is whether a judge should adopt a *sound* jusnaturalistic standpoint. Therefore, we must first make up our minds as to what we mean by a sound Natural Law stand.

Russell Hittinger has pointed out that jusnaturalistic positions can roughly be divided into minimalist and maximalist positions.[18] Basically, I agree with him that authentic jusnaturalistic standpoints will be among the maximalist ones: the minimalist theories tend to be theories of law and *morality* but not of law and *nature*.[19] However, instead of talking about minimalism and maximalism, I prefer to divide the positions more simply as follows: a genuine jusnaturalism looks at law against the background of the concept of nature, whereas false jusnaturalism looks at law without direct reference to nature. False jusnaturalism will, in most cases, build on a more or less ingenious notion of objective morality or objective values to which the positive law should conform. Thus, the usual claim of false, as well as genuine, jusnaturalism is that the law is under an objective constraint—that the law is in some sense *unverfügbar*.[20] Such jusnaturalism is not jus*naturalism*, though, but moral objectivism applied to the law and expressed in a language of jusnaturalism. The idea of objective constraint is common to both genuine and false jusnaturalism, but only a genuine Natural Law stand will ground the constraint in *nature*. Modern objectivisms cannot do this, because they operate with a descriptive, non-normative concept of nature, out of which they can derive no practical conclusions without running the risk of having them condemned by their colleagues as fallacious derivations of value from fact or of Ought from Is. As a consequence, this Essay does not have the modern false jusnaturalism in mind.

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17 For a discussion of some of the alternatives, see JUHA-PEKKA RENTTO, PRUDENTIA IURIS: THE ART OF THE GOOD AND THE JUST 102-25 (1988).

18 *See* Russell Hittinger, *Varieties of Minimalist Natural Law Theory*, 34 AM. J. JURIS. 133 (1989) (defining minimalist natural law theory and exploring impact of this theory).

19 *See id.* at 143 (identifying "minimalist natural law" as natural law that concerns itself with law and morals rather than nature).

20 José Llompart strongly advocates this notion of unarbitrariness (Unverfügbarkeit, Unbeliebigkeit). *See, e.g.*, José Llompart, *Naturrecht als geschichtliches Recht*, 1 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE (ARSP), SUPPLEMENTA 4: Zeitgenössische Rechtskonzeptionen 31 (Paul Trappe ed., 1987).

Where genuine jusnaturalism is concerned, it is beyond any doubt that the Aristotelian theory of nature has fathered by far the most comprehensive, the most consistent, and the most widespread theory of Natural Law. Together with Alasdair MacIntyre,[21] I believe that the Thomasian version of it promises law and justice more than any other theory of practical reason because it is part and parcel of the most elegant and ambitious synthesis of worldly knowledge ever attempted. Nevertheless, I will not say that a genuine Natural Law stand can only build on St. Thomas. All I will claim is that a genuine jusnaturalism needs to be based on an ontology like his—an ontology which builds on a purposive and normative concept of nature and existence. Only in this manner can nature be relevant for law. For this reason, we can well take the Thomasian outlook on nature and on law as a model and example for genuine jusnaturalism.

I cannot lay out the Thomasian theory of Natural Law in all its details in this Essay; instead, let me sketch out its most important features as I understand them.[22] To begin with, it is not a deontological system of objective rules, but a system of natural human ends.[23] It is like a chart of what is good for a human being to seek as a member of his species. Its primary function is not to lay constraints on human actions. Instead, it gives them a natural direction within a system of universal human ends, but leaves actual choice between particular ends and between particular means to the autonomous intellect of the acting person.[24] As its concept of

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[21] *See* MACINTYRE, *supra* note 16, at 389 (outlining his "emerging Thomistic conclusion"); *see also* MICHAEL B. CROWE, THE CHANGING PROFILE OF THE NATURAL LAW (1977) (tracing history of natural law theory from ancient Greek to contemporary philosophers).

[22] For a more thorough discussion, see JUHA-PEKKA RENTTO, MATCH OR MISMARRIAGE? A STUDY ON ONTOLOGICAL REALISM AND LAW (1992).

[23] A breakthrough for this conception of the Natural Law was due to Germain G. Grisez, *The First Principle of Practical Reason: A Commentary on the* Summa theologiae, *1-2, Question 94, Article 2*, 10 NAT. L.F. 168 (1965). Note that the Grisez-Finnis school maintains today that there are moral negatives which are absolute, but that these absolute prohibitions are nevertheless expressive of the fulfillment of human possibilities. *See, e.g.*, JOHN M. FINNIS, MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH (1991) (arguing that human beings achieve fulfillment by truly adhering to moral absolutes).

[24] FINNIS, *supra* note 23, at 1-6. Finnis makes a strong case for holding that, even if the individual choice between goods is free, there are some absolute evils which never ought to be chosen and which ought not even to be considered as possible choices. As I understand it, Finnis thinks that the principal argument for holding that, for example, killing the innocent or

nature is geared to growth, its fundamental normative content is that it enjoins men to grow to full manhood. The basic task of individual men is to become better men and to actualize their human potential in an ever greater degree of perfection. But individual human beings can only become better by their own choice: no one can make another person a good person. Hence, what one is results from what one has done, and what one can become depends on one's personal choices. In other words, a human being is responsible for his own personality. Thus morality is about the growth of one's personality, and consequently about virtue and vice. It follows that the moral task of the law, too, is to help the citizens enhance their personalities by their own effort. If the law can make its subjects more autonomous—i.e., increase their moral freedom and responsibility—it will have accomplished its task and actualized the common good in a political community of mutually virtuous and morally autarkic citizens. In short, the very moral point of law is to enhance civic virtue. But as no one can make another person virtuous, not even law can impose virtue on anyone—it can only help the citizens help themselves. If a legal system fails in this, it is a complete failure as law.

The Thomasian view defines a sound Natural Law stand as follows: acting according to the Natural Law does not primarily consist of following any precise prescriptions of the Natural Law; rather, it consists of acting according to one's nature. But the human nature, even if specifically determined, is personally undetermined because of the moral freedom of rational choice which is at its very core. Therefore, every individual human being participates in making up his personal so-called second nature or habit. It is precisely one's personal responsibility for giving form to one's nature which is the essence of the Natural Law: "Act like a human being and make yourself!" is what it demands from us.

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manufacturing babies is absolutely prohibited is the principle of cooperation with God: man is not God, and he should realize that it is beyond his providential capacity to assess the goods and evils connected with certain basic aspects of human life; therefore, he ought to rely on God's judgment concerning what is good for him where these basics are concerned. *See id.* at 12 (stating that human beings must not violate absolute laws even if doing so might appear to achieve human good). However, even with this proviso, the point of the Natural Law is to define human possibilities and ends rather than to place barriers on human action. *See id.* at 17 (observing that person must do everything morally possible to achieve good that violating absolute would achieve).

If the positive law is to live up to this requirement, it must be *subsidiary* to the individual citizens: it must recognize that each citizen must make self-forming choices for himself, and neither the state nor anyone else should make them except in cases where a citizen needs help in order to be or become capable of adopting full responsibility for himself. The key concept is, then, *responsibility*. When we ask ourselves whether it is desirable that a judge hold a Natural Law stand, we are in the last analysis asking whether it is desirable that he consider helping the persons involved to inform themselves to be the major criterion of right judgment.

II. "JUSNATURALIST" AND "POSITIVIST" OPTIONS

It is a widely held belief that a judge who professes to jusnaturalism has more options open to him than a positivistic judge has. Some assume that a jusnaturalist can make a legal judgment which departs from an established prescription of the positive law when the Natural Law seems to require it, whereas for a positivist such a judgment is by the very notion of positivism quite out of the question: a positivist can, by definition, only judge according to the positive law. In order to see whether this is really the case, we shall first take a look at how St. Thomas, a reputed jusnaturalist, envisages the position of a judge.

The Thomasian Natural Law is thin. Because of its high level of abstraction, it cannot direct human actions in their innumerable particular details on its own. Therefore, it is necessary for the common good of every political community to frame positive laws to complement the Natural Law.[25] St. Thomas is a clear jusnaturalist when he says that all positive laws are derived from the Natural Law.[26] Yet, at the same time, he is an outspoken positivist when he claims that in actual fact most positive human laws do not derive their binding force from the Natural Law but merely from the fact that they have been properly issued by a legitimate authority for the genuine common good of the community in question.[27] But the Thomasian scheme of Law also builds on continuity between the different levels of law: the Natural Law

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[25] *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA Pt. Ia-IIae, Q. 91, art. 3 (Christian Classics 1981) (Fathers of the English Dominican Province trans., 1911) [hereafter AQUINAS, SUMMA THEOLOGICA].

[26] *Id.* at Pt. Ia-IIae, Q. 95, art. 2.

[27] *Id.*

and the positive law are aspects of the same Law, with different degrees of universal validity.[28] The Natural Law consists of considerations which can be acknowledged as more or less evidently valid for all men, whereas the positive law mainly consists of precepts which, because of their close ties to time and place, are not evidently valid but must be explicitly framed and promulgated for those concerned. Nevertheless, once issued, even positive laws bind all the citizens in conscience as long as they are just laws, and all administrators of the law ought as a rule to judge according to their explicit prescriptions.[29]

An unjust law will not bind any man's conscience just because it is a law. As Aquinas puts it, unjust laws are not really laws but violence dressed up as law.[30] A law can be unjust by being contrary either to the Natural Law or to the Divine positive law. A human positive law which tends to idolatry or is otherwise against the Divine positive law must never be observed under any circumstances.[31] But where laws against the Natural Law are concerned, St. Thomas denies their binding force on the conscience by inserting an important proviso: a law which fails to be directed to the true common good of all, or which imposes unjust burdens on some citizens, or which has been framed without legitimate legislative competence, will not bind a man, "except perhaps in order to avoid scandal or disturbance."[32] In other words, the Thomasian position is quite compatible with moderate legal positivism: a moderate positivist can well hold that a judge is not bound in conscience by an unjust law. Besides, Aquinas explicitly points out that there may be moral or political reasons for abiding by even an unjust law if disobedience would be dilapidating for the society. Maintaining a general belief and trust in the legal system as a whole will often be sufficient reason even for a jusnaturalist to withhold from acting against an unjust law. But being bound in conscience is different from outward obedience. One may well think that while it is possible for a positivist not to be bound in

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28 I have argued for and developed the idea of the different laws—the eternal, the natural, the positive, and the law of nations—as a continuum of different degrees of universal validity. Juha-Pekka Rentto, Ius Gentium: *A Lesson from Aquinas*, 3 FINNISH Y.B. INT'L L. 103 (1992).

29 AQUINAS, SUMMA THEOLOGICA, *supra* note 25, at Pt. Ia-IIae, Q. 94, art. 4 & 6; *id.* at Pt. IIa-IIae, Q. 60, art. 5.

30 *Id.* at Pt. Ia-IIae, Q. 94, art. 4.

31 *Id.*

32 *Id.*

conscience, he must nevertheless outwardly obey, whereas a jusnaturalist might decide not to obey.

Aquinas' answer divides into two parts according to whether the law in question is in itself just but its literal application in the case at hand would involve an injustice, or the law is in itself unjust. The first situation presents a classical case for equity instead of literal accordance with a general rule of justice.[33] Circumstances may come up in which it is impossible to apply a positive law according to the conditions it has itself explicitly laid for its own application without causing detriment to the common good, or injustice. A moderate positivist can well accept that one must sometimes modify the rules for the needs of a particular case because they obviously fail to meet the problem at hand in a satisfactory manner. No one in his right mind can cling so fanatically to rules that he can not see that a rule, by the very notion of rule, cannot be valid without exception.[34] Referring to the reasonable intention of the lawgiver can overcome positivistic uneasiness about equity: one supposes that the judge, when he judges by the letter of the law, actually judges according to what the letter of the law would reasonably have been for the kind of case at hand if the lawgiver had foreseen the problem. Indeed, he does not then pass judgment on the law. Instead, he passes judgment on a particular case "in which he sees that the letter of the law is not to be observed."[35]

The second type of situation is perhaps more problematic for a positivist. Aquinas holds, namely, that if a law contains anything against the natural right—i.e., if it is unjust as the general rule it is—it is not to be called a law, but rather a corruption of law, "and consequently judgment should not be delivered according to (it)."[36] Clearly, Aquinas here advocates plain disobedience to the

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[33] *Id.* at Pt. Ia-IIae, Q. 96, art. 6; *id.* at Pt. IIa-IIae, Q. 60, art. 5, reply obj. 2.

[34] *Id.* at Pt. Ia-IIae, Q. 96, art. 6, reply obj. 3; *see also* M.J. DETMOLD, THE UNITY OF LAW AND MORALITY: A REFUTATION OF LEGAL POSITIVISM (1984). Detmold argues for a view according to which rules are either otiose (when they add nothing to the appropriate reasons for actions that are at hand) or an obstacle to reasonable judgments (when they are at odds with the appropriate reasons for action—i.e., when they do not match the problem at hand). For Detmold, no third alternative exists. *See id.* at 9, 16, 44, 74, 232 (giving examples illustrating this view).

[35] AQUINAS, SUMMA THEOLOGICA, *supra* note 25, at Pt. Ia-IIae, Q. 96, art. 6, reply obj. 1.

[36] *Id.*

positive law if it should fail to meet the essential requirement of being intended for the true common good of all citizens.[37] If we take his proviso about "scandal and disturbance" seriously, a case can be made for holding that, prima facie, the positive law should normally be obeyed by all citizens (in particular, by judges and other public personages) unless shown otherwise. But that case will build on the political effects of the choice between obedience and disobedience, to which I shall return in the following section. There I shall argue that the case is not exclusively positivistic but also—and perhaps with even more reason—jusnaturalistic. But aside from that, a Thomasian jusnaturalist seems to have one option which is not open to a positivist: he can judge beside and against the explicit requirements laid down by an unjust positive law. For a jusnaturalist, it is only "natural" that his loyalty to the law is to the Law as a whole and not merely to the positive part of it. But a legal positivist would hardly seem to be a consistent positivist if he should feel compelled to judge against the positive law and remain in his office to do so, too.

A positivist ought perhaps to resign in order to avoid abiding by an unjust law, whereas a jusnaturalist could remain in office and treat the unjust law with no regard as if it were not law at all. Nothing prevents a legal positivist from being a moral objectivist and feeling disinclined to obey the positive law because he considers it unjust. But if no positive norm will justify a judgment against the letter of the unjust law, he cannot turn his standpoint into a disobedient judgment if he is to remain true to his calling at the service of the positive law. Nevertheless, if we take a closer look at what a judge in fact does when he passes judgment on a case under the constraint of the positive law, we shall see that the difference between the positivist and the jusnaturalist reaction is narrower than it looks.

That there can be a significant difference like the one I outline above between a positivist's and a jusnaturalist's judgment at the face of unjust law depends on the assumption that it is in fact possible to judge according to the law. This assumption is quite problematic because of the way in which a legal judgment must, in the last analysis, be made. I have explained in detail elsewhere why I do not think it is possible to act "according to the law" in

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[37] *See id.* at Pt. Ia-IIae, Q. 104. Aquinas argues that obedience is a virtue. However, it is part and parcel of virtue to distinguish when it is right to obey and when it is not.

the sense of merely following the requirements laid down by the law.[38] Therefore, before we can say that a legal positivist ought always to abide by the law whereas a jusnaturalist may be justified in breaking with the law, we must make clear in which way, if any, we can talk about meaningful "accordance with the law."

The positive law purports to organize social interaction by excluding other considerations: pretending to be the ultimate standard of action, it seeks to define the conditions of its own application to particular cases.[39] In very simple words, the message of the lawgiver is: do as I tell you because I tell you to do as I tell you. And this is precisely the message the positive law should carry if it is to accomplish its political task and actually impose a permanent working order upon society. For the sake of maintained mutual expectancies between citizens, the positive law should be trustworthy: everyone should be able to rely on everyone relying on the fact that most citizens on most occasions will abide by the positive prescriptions of law.[40] In this respect, it is of special importance that the courts of law as well as the other public officials, who *are* the law *in corpore*, act according to the law they personify. If not, mutual expectancies would deteriorate and the legal system would fail to uphold a permanent beneficial order for the common good of all.

Thus we have every reason to hold that it is one of the elementary requirements of a functioning legal system that its positive prescriptions be followed. The question is, nevertheless: can they be followed? In a trivial sense, the law may be said to apply on its own terms when it is sufficiently clear and the judge has no quarrel with the lawgiver about its application. But even then, the judge will not, *in ultima analysi*, apply the law because the law tells him to apply it. Rather, he will apply the law because his interpretation of what the law reasonably prescribes matches the unquestionable intention of the lawgiver.[41] Our point is more acute in a

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[38] *See* RENTTO, *supra* note 17, at 392; RENTTO, *supra* note 22, at 213-25 (arguing that judges use positive law merely as guide in resolving particular legal problems).

[39] In a manner of speaking, the law purports to create "exclusionary reasons for action," as Joseph Raz expresses it. *See* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 3-33 (1979).

[40] *See, e.g.*, EERIK LAGERSPETZ, 44 ACTA PHILOSOPHICA FENNICA: A CONVENTIONALIST THEORY OF INSTITUTIONS (1989) (using game theory to analyze effectiveness of legal systems).

[41] In other words, the applier of the law is not an automaton conditioned

so-called hard case: before one can apply a law to a particular case, one must give it an interpretation that fits the case at hand. The law is not applied, then, as it is in itself. Rather, it is applied as it is interpreted by the person who is to apply it. But if this is so, then we are allowed to say that the law will be applied on its own terms of application only if its interpretation derives from the language in which the positive law is expressed, and from nothing besides that language. This condition can hardly be met.

The modern discipline of general linguistics, together with philosophical hermeneutics, has made it very clear that language is not an isolated and self-sufficient logical system of univocal lexical items, but an innovative, open, and context-dependent structure of adaptable meanings.[42] There is no one-to-one correspondence between a word and a clear, univocal, and unchanging meaning it is supposed to carry. Instead, a word may have a fairly clearly circumscribable array of potential meanings, but its actual meaning in a given utterance can only be gathered from its relationship to the context in which it is being used as a whole. Without understanding the whole sentence, one cannot understand the words that make it up. Without understanding the whole book, one cannot understand the individual sentences that make it up. Without understanding the historical, social, cultural, and personal context in which the book was written, one cannot understand the book. And so forth. If we apply this insight to legal judgment, our conclusion is that the language in which the positive law is expressed can only be understood against the background of the relevant context. Part of this context is the general social environment in which the law was issued and in which it is to be applied. But a law has not been issued just for the purpose of matching a general social environment—it has been intended to be applied to particular cases with individual and unique characteristics. The practical task of a law is to yield solutions to particular problems. Therefore, an even more important part of the relevant context is the particular situation which is being considered by the judge: the law under scrutiny must make good sense

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by the lawgiver. Instead, he always makes his own choice as to whether he applies the law in this way or in that way or if he applies it at all. A judge will not make a decision to apply the law according to the wishes of the lawgiver merely because the lawgiver tells the judge to do so, but because the judge thinks he has good reason to take the lawgiver's word for it and follow his prescriptions.

42 *See* RENTTO, *supra* note 17, at 63.

for the precise persons involved in the precise situation which they are in, and it must solve the precise problem at hand in a meaningful way.[43] It follows that in his attempt to give a reasonable interpretation to the law, the judge is in fact interpreting the law so that it would match his interpretation of the case at hand. In the last analysis, the judge must in fact have solved the case before he can assign a reasonable meaning to the law that is supposed to govern the case. But if so, in what way is he following the law?

Of course it works the other way, too: the judge's preconceived idea of what the law stipulates affects the way in which he analyses the case at hand. We shall not pursue the question of whether the judge's preconceived understanding of the law governs his interpretation of the particular case more than his understanding of the case affects his actual interpretation of the law, or vice versa. Instead, I wish to draw attention to a two-fold consideration which is of fundamental importance. For one thing, it is impossible for a judge to keep the process of interpreting the law and the process of interpreting the case at hand apart in the process of making a particular judgment: the two processes intertwine in an inextricable manner. It follows that the outcoming interpretation of the law is equally a result of the judge's intended solution to the particular problem as that solution is a result of his conception of the law. Furthermore, there is in principle no way of knowing which precise part of the judgment is the result of precisely which activity. Secondly, for the judge, neither the law nor the case at hand is something given from the outside which he can simply observe and understand. He is himself part and parcel of the context in which he is to make judgment. He must interpret both the law and the context personally, so that they make sense to him. Therefore, it is always up to him to choose between possible interpretations. In and by that choice, he makes up his mind as to what he thinks makes good sense there and then. It is the judge, then, who in fact assigns the law the meaning it is to have

[43] As I see it, this tension between the universal and the particular is at the core of the most persistent ethical problems connected with the law; concerning, for example, equity, obligation, and obedience. The tension is in the nature of law as a set of universal rules which are to deal with particular situations. As such, it is as necessary as it is problematic because the very raison d'être of law is that it creates universal standards for the evaluation of unique facts.

in the actual case. His judgment does not follow from the law; rather, the law seems to follow from his judgment.[44]

Because a law can only make sense in a particular case if it is applied on the terms defined by the case itself, it is thus impossible in a fundamental way for a judge to apply the law on its own terms. Consequently, even if it is not out of the question for a positive law to have objectively correct and incorrect applications, it is not possible in cases of doubt to determine which alternative applications are objectively legal and which are objectively illegal for the purposes of solving a case before one has actually solved the case to which the law is to be applied. Hence, one cannot claim that a jusnaturalist can make an illegal judgment where a legal positivist cannot. There is no clear division between legal and illegal applications of the law in either case: it is the vested responsibility of the judge to make up his mind as to the interpretation he will give to the law there and then. The question of whether he should in fact deliver judgment according to that interpretation or not can only arise after he has arrived at his final interpretation. But that question is no longer about legal and illegal but about what-the-judge-thinks-is-legal and what-the-judge-thinks-is-illegal. The only significant division between legal and illegal is, then, subjective: quite regardless of objective legality or illegality, a judge may subjectively envisage his position to require a choice between what he believes to be in accordance with the law or what he believes to be at discord with it.

At this point, our conclusion is that there is a difference between how a jusnaturalist and a legal positivist can judge by the law: a legal positivist cannot, if he is to be consistent with his positivist conviction, judge against the interpretation of the law which he is personally convinced is the appropriate one to use for solving the present case. A jusnaturalist, on the other hand, need have no qualms about arriving at an interpretation of the law which he considers to be definitive, while at the same time deciding that the interpretation is not to be applied to the case at hand. But whether a positivist can decide that the definitive interpretation of a law applicable to a case is that it ought not to be applied to the case after all, depends on how one defines legal positiv-

[44] *Cf.* INGWER EBSEN, GESETZESBINDUNG UND "RICHTIGKEIT" DER ENTSCHEIDUNG: EINE UNTERSUCHUNG ZUR JURISTISCHEN METHODENLEHRE (1974).

ism.[45] We can envisage three kinds of positivism in this respect. One kind denies any possibility for a judge to disregard or amend a law, except perhaps when a law which has not been applied to a case in a long range of years can be considered outdated and therefore in disuse. Such positivism was current in Finland before a piece of legislation some years ago gave equity the support of positive law. A second kind is similar to the Swiss civil law, which stipulates that a law must be applied according to justice and equity.[46] A third kind is like the law in the United States or Germany, where the constitution incorporates explicit moral standards which both justify and obligate the judges to overturn an unjust—i.e., unconstitutional—law if it varies from those standards.

III. A Political Argument

A standard argument for jusnaturalism is that only a pre-positive ground in objective natural standards can provide a secure foundation for the legitimacy of a legal system.[47] A recurrent argument for positivism is that a true democratic rule can exist and give legitimacy to the positive statutes only in a strictly positivistic legal system.[48] Where the objective legitimacy of a legal system is concerned, the matter concerns theory more than practice. But the subjective belief of the citizens in the legitimacy of a legal system is of immediate practical concern. For only a legal system which can in fact accomplish its task of creating and main-

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[45] *See, e.g.*, Peter Koller, *Zur Verträglichkeit von Rechtspositivismus und Naturrecht*, *in* Das Naturrechtsdenken heute und morgen: Gedächtnisschrift für René Marcic 337 (Dorothea Mayer-Maly & Peter Simons eds., 1983).

[46] Schweizerisches Zivilgesetzbuch [ZGB] art. 4 (Switz.). In the absence of a pertinent norm, articles 1 and 2 authorize the judiciary to create one when necessary to solve a case and to judge *praeter legem* when the application of the letter of a law would consist in a misuse of justice. *See* René A. Rhinow, Rechtsezstung und Methodik: Rechtstheoretische Untersuchungen zum gegenseitigen Verhältnis von Rechtsezstung und Rechtsanwendung 13, 33, 68 (1979).

[47] *See, e.g.*, Otfried Höffe, *Das Naturrecht angesichts der Herausforderung durch den Rechtspositivismus*, *in* Das Naturrechtsdenken heute und morgen, *supra* note 45, at 303.

[48] For a representative argument to this effect, see Christoph Gusy, Legitimität im demokratischen Pluralismus (1987); *see also* Carol C. Gould, Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy, and Society 215-46 (1988) (reconciling inherent conflict between democracy and political authority).

taining a permanent social order for the common good of all can be legitimate, and the major condition for its success is that it in fact evoke the citizens' trust. It can only accomplish this if it can uphold the society's general subjective belief that it is largely successful in its task.[49]

The argument under present scrutiny claims that a legal system cannot function successfully and maintain permanent and stable order if its judges and other administrators of law profess to jusnaturalism and consider it their legitimate prerogative to judge against the letter of the law when they think it is unjust. The very point of establishing a system of positive law is to create and maintain social stability, certainty, and predictability: when the law reduces the innumerable variations of human conduct to a few practicable categories, it enables the citizens to base their plans of action on fairly certain expectations of how their fellow citizens are going to act and react in response to their awareness of the fact that they are expected so to act and react. What is more, in order to plan safely for the future, the citizens need to know with fair certainty how the courts of law and any other public bureaus and officials will act and react. In sum, the task of the positive law is to establish a web of mutual expectancies in the political community. If most people can expect with fair certainty that most other people at most times expect themselves to be expected to act and react in a certain manner, and that they also act and react accordingly, the legal system has fulfilled its purpose of creating a stable coordination which reduces interactive uncertainty to a bearable minimum and thus facilitates the citizens' pursuit of their individual and shared goals. A society can only maintain such coordination if most citizens in fact regard the positive law as the universally valid standard for action and reaction within the society—i.e., if the citizens can put their trust in the legal system. Again, this presupposes that most citizens must be able to know with fair certainty what the law is for any of their particular purposes. Finally, this requires that the law be clear and convincing.

Today, positivists and jusnaturalists alike must acknowledge that the law is not clear as issued, and can never be so without exception. In principle, the judge must always interpret the law

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49 *See* RENTTO, *supra* note 22, at 220 (suggesting that laws are supposed to provide decision-maker means of achieving reasonable and consistent judgment).

when he applies it to particular cases. Now, the very fact that room remains for different interpretations is apt to foster uncertainty with regard to future judgments. In order to minimize the risk of highly divergent and unpredictable variations in their activity, judges ought to develop and abide by unified standards and policies of interpretation. This calls for great caution against letting any "extralegal" considerations, such as moral standpoints, affect judgments. If a judge lets himself be guided by his idiosyncratic moral or other intuitions uncritically, the coordinating force of the legal system runs the risk of being weakened by unreasonably unpredictable judgments which are hard to understand and accept unless one shares the same intuitions. Such judgments are beyond public control if they are based on idiosyncratic and publicly unjustifiable intuitions.

If a judge lets himself be persuaded to judge against the letter of the positive law when he finds it in discord with fundamental precepts of the Natural Law, the predictability of the legal system diminishes if there are no clear and universally applied criteria for deciding both precisely when and how the Natural Law ought to prevail over the positive law, not to mention clear and universally applied criteria for what the Natural Law actually prescribes. But doctrines of jusnaturalism are notoriously vague on these points: the judge will make the decision at his discretion. Again, this creates an unnecessary moment of uncertainty in the legal system. To avoid the uncertainty, judges ought to restrain their jusnaturalistic intuitions and stick to the positive law and the positive morality one can verify that it incorporates. Otherwise, judges would undermine the very floor on which they stand.[50]

If the positive legal system is to fulfil its task, then, one cannot accord it the status of juridically valid law which ought to prevail over the positive law when the latter is in gross discord with the former. In that case, legal clarity could grow opaque, certainty could turn into uncertainty, and predictability would be frustrated. As a result, the whole system of legal coordination could deteriorate, and individual whim would govern instead of the rule of law.

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[50] An argument like this is exemplified by AULIS AARNIO, *Eternal and Changing Law: Problems in Modern Natural Law Theory, in* 36 ACTA PHILOSOPHICA FENNICA: PHILOSOPHICAL PERSPECTIVES IN JURISPRUDENCE 105-17 (1983) (arguing that judges should not decide cases using natural law principles).

My reply to that argument has two parts. First, I shall affirm that it is indeed important even from the jusnaturalistic point of view that the rule of (positive) law govern the political community. Nevertheless, I shall continue to point out why the political importance of the rule of law as such will not preclude justified deviation from the positive law even by a judge, if necessary.

IV. The Political Argument Redoubled

An important tenet of Thomasian jusnaturalism is that the Natural Law on its own is not capable of thoroughly organizing a political community. Rather, it needs to be complemented by an order of positive law which determines in sufficient detail what is practically necessary to be undertaken in keeping with the Natural Law if the community in question is to actualize the common good. In other words, it is a straightforward requirement of the Natural Law that each political community be governed with positive law.[51] Given this, if the law is to organize the community, it must be universally followed; if it is to be universally followed, a multilaterally mutual civic trust in the legal system must prevail; if mutual trust is to prevail, the law must be enforced in a constantly predictable manner; therefore, if the law is to work for the common good, the rule of law should prevail in all judicial and administrative activities.[52] In short, the Natural Law requires that the positive law ought to be obeyed precisely because it is the positive law in effect, and precisely so that a general civic belief can be maintained that it is normally followed on the very terms on which it explicitly requires itself to be followed. The Natural Law thus endorses a solid legal positivism. The small but important difference between Thomasian positivism and positivistic positivism is that the former offers a justification for positivism from human nature defined by natural law. For that reason, its case for positivism can, with more fundamental and comprehensive sup-

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[51] An interesting parallel to this is the Habermasian substitute for jusnaturalism: the discursive theory of law. That theory builds on the idea that (discursive) morality is in itself insufficient and susceptible of inefficacy. Therefore, one of its requirements is that it be complemented with a set of positive rules backed by political authority.

[52] For a good example of an argument to this effect, see John M. Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory*, 1 Notre Dame J.L. Ethics & Pub. Pol'y 115, 136 (1984) [hereafter Finnis, *Authority of Law*]; John M. Finnis, *Law as Co-ordination*, 2 Ratio Juris 97, 102 (1989) (arguing that non-discriminatory application of law ensures fairness).

port from the human ontology, be even stronger than the positivistic case for positivism, which shrinks from extrapositive justifications.

But the fact that Thomasian jusnaturalism endorses strong commitment to the positive law does not mean that it would elevate the positive legal system to an absolute standard that allows no deviation. Positivism is, on its view, justified only because it works for the common good of all citizens in the political community. Therefore, if abiding by the positive law in a particular case would be detrimental to the common good, at least the possibility for deviating from the letter of the law must be left open, even by a judge. Nevertheless, St. Thomas is well aware that a decision to deviate from established rules is precarious: extreme caution is necessary, and only qualified persons in a position of sufficient authority should make such decisions, except in cases where the damage to justice and the common good would be so immediate that no delay can be tolerated and so evident that anyone can see it.[53] Caution is necessary because it is difficult—if not impossible—for an individual person to assess all the aspects of a situation from the viewpoint of the total common good of all citizens over all time. But when a judge is, all things considered, honestly convinced that he should judge against the letter of the law, he ought to follow his conscience. Doing the contrary would be wrong under all circumstances and against the highest precept of the eternal law which enjoins each man to do what his conscience in the name of God tells him to do.[54]

The problem is now whether judges with a tendency to follow the voice of their conscience over and above the letter of the positive law are subversive of the political organization of the society. Let me begin by comparing the options open to a committed positivist and to a conscientious jusnaturalist. Even the most sturdy legal positivist must admit that it is not possible to run a political community by always following every prescription of every law to the letter. Even a positivistic legal culture must allow for a modicum of flexibility in its judiciary and administration. A positivist judge who wants to make a judgment beside the letter of the law must do it covertly, giving at least an outward impression that he is following the prefabricated standards of positive law even if in

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[53] *See* AQUINAS, SUMMA THEOLOGICA, *supra* note 25, at Pt. Ia-IIae, Q. 96, art. 6, reply obj. 2.

[54] *See id.* at Pt. Ia-IIae, Q. 19, art. 5-6.

fact he has made up the law for the case at hand. A jusnaturalist judge who wants to judge beside or against the letter of the law, on the other hand, can do it openly, letting everyone know the grounds on which he has arrived at his judgment. Which strategy is more disruptive of the legal system?

Whether it is better for the common good in the short or long term to maintain a false appearance of a solid and unfailing supremacy of the rule of law or to let the citizens honestly know that it is sometimes for the best of all not to stick to even a clear prescription of the law depends on various factors. However, those who think that open use of discretion in making legal judgments can be disruptive of the civic trust in the legal system assume that the citizenry is at a relatively low level of moral and social competence. Even if we were not ready to accept the universal validity of Lawrence Kohlberg's detailed schema of individual moral development from pre-conventional via conventional to post-conventional stages of moral competence,[55] I believe that it makes an important point which does enjoy evident validity: there is an important difference between conventional and post-conventional attitudes. The latter are more differentiated and more mature than the former, and most people have the capacity to go from conventional thinking to a post-conventional moral and political stance. Because they have that capacity, they should not be underestimated. The legal culture should give them a chance to develop a postconventional attitude to law as well: they should be allowed to learn that it is not always the appropriate thing to do as previously agreed—i.e., it is not always the appropriate course of action to abide by the strict letter of the law as issued. I believe that this is also a valid strong point in Jürgen Habermas' well-known theory of communicative reasoning and discursive ethics. If it is to meet the moral standard of post-conventional citizens, law ought to be an honest, mutual communication between equal partners. In such a relationship of open communication, even individual legal judgments that are against the letter of the law—if reasoned justification for them is offered to the citizens—will not disrupt but rather reinforce the mutual trust on which the common good builds. If the citizenry is post-conventional, the legal establishment's assumption that the citizens will

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[55] *See, e.g.*, 2 LAWRENCE KOHLBERG, ESSAYS ON MORAL DEVELOPMENT 170-205 (1984) (arguing that humans go through various stages of moral development from childhood to adulthood).

not be able to understand why the official organs of the state should sometimes do the right thing instead of the lawful thing when the two cannot be reconciled constitutes a blatant show of underestimation and disrespect. Also, if the citizens have not yet grown out of conventional attitudes, a legal establishment which refuses to revise its estimate on their potential moral capacity deprives them of the chance to learn more about how things ought to be done in the political community. It is only appropriate to hide reasonable deviations from the law under a legalistic camouflage in a society where it is clear that, at present, the general populace has no capacity whatever to gain a post-conventional standpoint to the law.

Our positivist's concern for the political integration of society is quite valid, but his prescription is not universally—perhaps not even most often—acceptable. The problem crystallizes in the question of whether it is regenerative or degenerative of the political integration of the citizens for judges to openly admit that it is sometimes reasonable—and not only reasonable but also lawful—to make the judgment which is right instead of making the judgment which is according to the letter of the law. In a world of morally adult citizens, the jusnaturalist concern for the right judgment gains weight over and above the concern for maintaining the rule of law as an apparently seamless web[56] into which everyone can always fall as into an unfailing security net. The security of the citizens does not require mere scrupulous legality: one must judge not only according to the established rules but also judge correctly.[57] One essential aspect of the difference between a jusnaturalist and a positivist judge is that the former conceives of himself as primarily obliged promote justice, whereas the latter sees himself in the service of justice only insofar as his first allegiance to the positive legal system will allow. It is in these self-images that I find the moral grounds for maintaining that, morally, a good judge is by definition a jusnaturalist. This will be the matter for my final section.

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[56] "Seamless web" is an idiom well-liked by John M. Finnis. *See* Finnis, *Authority of Law*, *supra* note 52, at 120.

[57] Aulis Aarnio strongly stresses this point. *See* AULIS AARNIO, THE RATIONAL AS REASONABLE: A TREATISE ON LEGAL JUSTIFICATION 6 (1987) (emphasizing that judicial decisions must not only have legal authority but also reasonable basis).

V. The Moral Argument and Its Mirror Image

So far I have concluded that preoccupation with constant stability and predictability in the application of the positive law is a legitimate concern shared by the jusnaturalist as well as by the legal positivist. Nevertheless, the appropriate method of upholding that stability is not necessarily strict legalism; on the contrary, the integrating function of the legal system may require that legal judgments not always stick to the letter of the law no matter how clear the law's applicability to the case at hand. What is the best strategy for the common good of a particular political community is a matter for the exercise of the political prudence of the relevant public authorities. The circumstances are different for each civic community and the moral and political maturity of the citizens is a major factor. Where a conventional society demands a conventional approach with unfailing obedience to official convention—i.e., the letter of the law—a post-conventional community is sufficiently mature to be even beside or against the explicit requirements of the valid positive law. In an advanced civil community, natural right gets the upper hand over positive right, if by natural right we mean the concern for that which is the right thing to do vis à vis the merits of the case (that is, according to the nature of things rather than for that which is the right kind of thing to do in the kind of cases authoritatively defined by the general rules in which the positive law consists). But the case is not closed yet. The positivist has another important argument up his sleeve: an argument with both political and moral undercurrents.

The argument has a double origin. According to a version which traces its roots back to the political theories of the Enlightenment, the different powers of the state should be kept apart. This prohibits the judicial power from engaging in the exercise of legislative power. For this reason, the judicial power should accept the positive law as objectively given. The judicial power should only apply the law as the law requires it to apply the law: the courts of law ought to be nothing but automata which translate the universal will of the legislator into a particular language that refers to particular persons in their particular circumstances. However, the division itself of the powers is not our concern here. We are interested in the concomitant view that if a judge engages in free exercise of practical reason beside or against the letter of the law, he usurps a power that does not belong to him. A traditional ground for holding such an usurpation morally deplorable

is that it impairs the *objectivity* of legal judgments and thereby risks rendering them unjust. A more modern version holds that independent judicial discretion violates the *democratic constitution* of modern law and society: a judgment beside or against the valid positive law is not only in contempt of the law but in contempt of the democratic principle according to which it is the explicit will of the majority which is always to be done, whatever it may be. In each case, the judge unduly places his private opinion over and above the universally valid law. In this manner, his judgment runs a risk of being arbitrary and therefore unjust.

Let me first address the argument regarding objectivity. The idea behind it is that the measure the law imposes on human affairs is a good measure precisely because it is an impersonal, objective, and universal standard which applies to all alike.[58] Justice, in this view, consists first and foremost of formal justice, according to which like ought to be treated alike. Strict adherence to the rule of law ensures like treatment of like cases. Therefore, judgments according to the valid law are by definition just judgments. A judgment which requires deviation from the valid law may be just in a different sense, but a judge is not in a position to discern just from unjust deviations. The very point of legislation is to remove judgments from the scope of personal discretion and deliver them to the sphere of an impersonal application of law. A free exercise of discretion by the judge carries the risk of unjustly imposing different standards on different persons involved in different cases judged by different judges. It is not only different judges' judgments that run the risk of becoming arbitrary; the same judge may arbitrarily deliver different judgments in different cases merely because of his idiosyncratic convictions, moral attitudes, personal sympathies, and antipathies. To avoid such injustices, the judge ought to follow the objective, impersonal and universal (as well as equally applicable) law to the letter.

The argument follows indirectly from the modern pessimistic view about the moral character of human beings: men are considered to be "slaves of the passions" whose reason is subject to the arbitrary whims of their flimsy will, which follows the direction the senses point out from reacting to external stimuli for one's

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[58] *Cf.* JOHN M. FINNIS, NATURAL LAW AND NATURAL RIGHTS 270-71 (1980) (stating that legal system exemplifies rule of law if its rules are, *inter alia*, clear and consistently administered).

selfish gratification. In short, the modern image of man is that of a selfish animal whose reason is just a tool for the satisfaction of personal desires.[59] Judges are no exception. They are to be morally trusted as little as anyone else. Therefore, as judgments will have to be made by individual men, let them be delivered in a manner which lets those individuals affect their outcomes as little as possible—i.e., by strictly following rules fixed antecedently by the impersonal authority of the lawgiver. According to such a view, discretion is undesirable, a dangerous exercise of self-aggrandizement, and a usurpation of *power*.[60] The task of the legal system is to minimize discretion and thereby to maintain formal justice.

I shall not adopt those criticisms of modernity which argue that the post-modern society is getting so complicated and differentiated that positive legislation, no matter how sophisticated, can no longer constitute a certain and unfailing crutch for all human affairs and a valid solution to all human problems. I will only point out that it is not necessary to hold a pessimistic view of humanity. The Aristotelian-Thomasian philosophy sees man as a good being—good not only because everything that is, is good because it is a being,[61] but also in the teleological sense according to which man, by nature, is fundamentally directed towards good. Not only does man's reason tend towards good: so do his will and his bodily senses.[62] So even if particular human beings may have lost sight of good ends either by mistake or as a result of acquiring the bad habit of letting oneself make such mistakes, they are good deep down insofar as their capacity for seeking good ends

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[59] *See* Rentto, *supra* note 13, at 155-56 (characterizing Alasdair MacIntyre's conception of human beings as individuals driven by egotistic pursuits).

[60] A characteristic of the modern view is to conceive of discretion as an opportunity to use power. In the classical view, on the other hand, discretion consists of use of reason. *See infra* note 67 and accompanying text (discussing how judge's moral conscience affects his judgments).

[61] *See* AQUINAS, SUMMA THEOLOGICA, *supra* note 25, at Pt. Ia, Q. 5, art. 3.

[62] According to the Thomasian view, human reason is fundamentally capable of knowing what is good, and human will is as incapable of willing something that is not good as it is ready to accept the direction of the reason. Similarly, the sensible appetite is naturally geared to avoid evil and to seek good. Mistakes and corruption are possible—perhaps even likely—and they can lead individual men astray. However, the natural capacity for and direction towards good remains to govern the whole human constitution.

and redirecting their life towards good by acquiring virtuous habits remains incorruptible.[63] According to this view, the highest standard of right judgment is not the impersonal standard imposed by some external authority, but rather the very personal standard imposed by the act of conscience of a prudent man. Discretion is not an undesirable usurpation of *power*, it is a necessary and commendable exercise of prudent *reason*. A good judgment is a prudent judgment, in accord with the conscience of the person who makes it. And an integral part of prudence is the capacity to see when general rules ought not to be applied to a case, however authoritative and valid they may otherwise be.[64] A good judge, as opposed to the modern view which demands that the judge exclude his personality from judgment, is a judge who puts his person at stake.

The difference between the modern positivist and the classical jusnaturalist does not merely concern the empirical question of whether the servants of the law are in fact good persons or bad persons. Basically, the question is ideological: the answer to it depends on which philosophical idea of man and human nature we choose. It is perhaps impossible to give conclusive grounds for preferring one view to another. Nevertheless, my reason for choosing the classical view is that if we are to believe in meaningful human dignity, human rights, personal autonomy, or freedom of the will, we must adopt a view of man as morally on his own. Only the classical philosophy, outstandingly exemplified by Aristotle and Aquinas, offers such a view of man as his own making: the nature of man is not exhausted by the specific nature common to all men; in addition, it is up to each human being to make up his individual "second" nature or moral personality.[65] For this, each man has the capacity to be basically directed to good but to have freedom of choice between different goods.[66] However, although he has the capacity, he is also the only one who has it: no

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[63] That is, the Divine spark, or the natural virtue of *synderesis*, the nursery of all acquired virtues, will never vanish from the human heart. *See* AQUINAS, SUMMA THEOLOGICA, *supra* note 25, at Pt. Ia, Q. 79, art. 12; *id.* at Pt. Ia-IIae, Q. 94, art. 6.

[64] An important distinction is made between actions covered by the common rules, and things which are to be judged beside the common rules. *See id.* at Pt. IIa-IIae, Q. 51, art. 3-4.

[65] *See* RENTTO, *supra* note 17, at 115, 198 (discussing Aquinas' view of human virtue and role of positive law in fostering common good).

[66] *See* AQUINAS, SUMMA THEOLOGICA, *supra* note 25, at Pt. Ia, Q. 82, art. 1-2.

one can make another person virtuous or vicious. Therefore he, and he alone, also has personal responsibility for what he becomes. This insight leads us to the moral argument for judicial jusnaturalism which I hold decisive.

The argument has to do with the difference between the modern and classical definitions of morality. Where modernity tends to define morality as that aspect of practical reason which deals with how one treats others, classical morality is primarily concerned with how one treats oneself. Where modern morality enjoins one to do good things and not to do bad things, classical morality tells one to become a good person. Where modern morality concentrates on the external effects of one's acts, classical morality looks on how one's actions affect one's personal moral growth. Where modern morality seeks justice, classical morality requires virtue. Where modern morality counts the good things one has and can get, classical morality focuses on the moral quality of one's life. Where modern morality restrains selfish acquisitiveness, classical morality demands that one's foremost concern should be one's moral self. As no one, in the classical conception, can be morally responsible for a person except the person himself, it is not only the right but also the responsibility of everyone to take care of one's moral integrity first and of the material well-being of others only under the aspect of one's growth into a good person.[67] Moral good is what furthers moral integrity in oneself; moral evil is what impedes it. In short, morality is that aspect of reason which is concerned about one's self-formation and about one's responsibility to give one's "second nature" a definite shape.

If we accept such a view of morality, an important corollary for judicial reasoning will follow. If the primary moral demand placed on judges and other public officials is personal moral growth, it is their moral obligation to accept their responsibility for themselves and to exercise virtue in order to develop the quality of their moral life. Such an exercise consists of putting oneself morally at stake in making genuinely personal decisions and judgments and in adopting full responsibility for one's morally relevant choices. Decisions and judgments can only yield moral

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[67] *See id.* at Pt. IIa-IIae, Q. 58, art. 7, reply obj. 2; *id.* at Pt. IIa-IIae, Q. 58, art. 9, reply obj. 3 (defining relationship between common good and individual good); *id.* at Pt. IIa-IIae, Q. 25-26 (explaining why charity requires that each human being take care of his own soul first and of all other things only after that).

growth if they are one's own. However, a central aspect of the positive law is that one must follow it to the letter even against one's own personal conviction of conscience. A potential conflict ensues: ought a judge to abandon the act of his conscience, or should he disregard the law? I am not claiming that there is necessarily a conflict between conscience and law: one's conscience and the valid law may well require the same judgment. Even if they do not, there is no reason why one's conscience could not come around to the conclusion that one's obligation to the law outweighs one's personal opinion. The law does not necessarily require one to discard the use of one's own reason and to adopt authoritatively prefabricated solutions that another thought out and imposed.[68] But I will argue that there is something in the way in which the positive law requires its own application that discourages judges from taking personal responsibility for their judgments and thus compels them to disregard their moral integrity and growth. That "something" will become clear if we turn our attention to the democratic version of positivism.

The democratic argument for positivism ties in with the argument for objectivity as follows: there are no pre-positive objective precepts or values from which one can cognitively derive any definite conclusions concerning the content that positive laws should or should not have. In modern pluralistic society, different viewpoints compete on equal standing. Political decisions are made by following a procedure in which many competing viewpoints are represented. The outcome is a majority rule where in principle, even if not in real practice, the majority of the people issue the valid laws. In this way, the laws reflect the predominant morality and values of the citizens. This also lends legitimacy to the positive law theory. Each citizen should obey the law because it reflects the objective will of the people—including his own—either directly (because he has voted for the policy or for the people who have voted for it) or indirectly (because he, by voting, or at least by not revolting against the democratic system of government, has expressed his will to subscribe to the system as a whole even when his opinion represents a minority view). Refusal to abide by the valid prescriptions of positive law amounts to nothing less than contempt for the whole People who made the law.

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[68] Govert den Hartogh forwarded an illuminating argument to support this view in a paper delivered at the I.V.R. World Congress at Göttingen in 1991, entitled *Authority and the Balance of Reasons*.

Objective moral truth is thus replaced by the objectivized and impersonalized will of the sovereign people.

Democratic or not, the will of the sovereign legislator remains a fiction. And it may be even more difficult to crystallize that will if lawmakers are a legion, rather than only one, or a few. The applier of the law faces his task without definitive guidance from the legislator: in order to apply the law in a reasonable way, he has to interpret the law. But the judiciary is not a democratic institution: the judicial body of the state is clearly a meritocracy. Moreover, it is clear that the application of the law is not an activity which should be subjected to a democratic vote between different interests. One of the main tasks of the judiciary is to mediate between interests, and this can only be done if the judges are aloof from those interests.[69] On the other hand, however, the legitimacy of the law suffers if the people are not in a position to follow the law-applying activities of the judiciary and to subject them to criticism. In judicial and administrative procedure, one exercises democracy by giving the citizens a chance to get to know and understand the delivered judgments in a way which enables them to form their own informed and reasoned opinions as to whether they accept the rightness and legitimacy of the judgments. In legislation, democracy (in principle) gives the citizens a chance to participate in making the laws for the political community. In the application of the law, democracy gives them a chance to decide for themselves whether they accept the particular consequences of that legislation for individual cases.

Thus, the demand on the judiciary is as follows: to make all judgments public in a way which clearly and explicitly presents the grounds on which they are based and the method by which they are arrived at, so that interested citizens, including the parties involved, can form a moral opinion on them each time if they wish.[70] Underlying this argument is an assumption that a general

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[69] This is nothing but a practical application of the Thomasian ideal of mixed government: the best government combines the best characteristics of democracy, aristocracy, and monarchy, and uses each principle of government in that sphere of public life where it promises the best success for organizing the community to the common good of all. *See* AQUINAS, SUMMA THEOLOGICA, *supra* note 25, at Pt. Ia-IIae, Q. 95, art. 4.

[70] The discursive school of ethical and legal reasoning likes to see this as a central method for enhancing the overall legitimacy of the legal system: if the citizens are given a chance to participate in the judicial practices as parties in the critical discussion on their justice and legitimacy, their

consensus between the citizens and the officials is desirable because without consensus, the people's contempt of the will of the administrators of the law will be apt to cause friction and discontent with the system as a whole. If the laws reflect the will of the majority as passed, they should also reflect the will of the majority as applied. But our moral problem begins right here: an appeal to the "moral majority" in making legal judgments is hardly consistent with the Thomasian view of morality.

Of course, the democratic positivist is careful not to make an explicit appeal to the moral majority. Instead, his strategy can go like this: as there are no pre-positive and naturally valid standards for what is right and wrong, legal judgments cannot be justified by reference to such ready-made and obviously valid standards, either. The standards acceptable to each society are different. They also differ over time, as well as from one person to another. Therefore, to strike a reasonable balance, a proper justification appeals to the different views held by different kinds of persons. The goal of the justification is to convince the representatives of a relevant "audience" of potentially interested citizens that the judgment is meet and just. One reaches this goal by giving the judgment grounds and reasons that the "audience" will accept.[71] It follows that, as a matter of course, the judgment will be justified with reference to reasons and standpoints which enjoy a sufficient degree of *universal validity* among the citizens of the community in question. In fact, not every citizen need be convinced about the rightness of each judgment, nor is it practicable to demand that a successful justification is one that would be capable of actually convincing every citizen. Instead, the "reasonable citizen" is the target: it is the audience of reasonable citizens whose informed

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"democratic" control over the judiciary increases. Hopefully, this contributes to the legitimation of the positive law and its institutions.

[71] The audience was a central concept in Chaïm Perelman's theory of New Rhetoric as a method of practical as well as legal reasoning. Since then, it has been more or less explicitly adopted by the various branches of the discursive school of ethics, exemplified by Jürgen Habermas, Robert Alexy, and Aulis Aarnio. Of course, it is not only the discursive school of practical reasoning which stresses the universal validity of practical statements: most modern theories of ethics share the tendency to idealize the notion of universal validity as a major criterion for rightness. This, I take it, depends on a historical development which has led the post-Enlightenment ethical theories to take scientific objectivity as their ideal. *See* Rentto, *supra* note 13, at 150 (discussing how to answer questions left unresolved by modern political philosophy).

consent is sought. If reasonable citizens could be convinced in principle with the offered argument, the judgment is, for present purposes, justified.

The problem with such a dialogical (or discursive, as it is often called) strategy of justification is that it is at essence a matter of rhetoric. Even if one seeks the *informed* consent of the *reasonable* citizens, the situation is unavoidably one where the ability of the justification to convince is more important than the rightness of the judgment itself. It is not only that such a justification is bound to stand or fall on account of the lowest common denominator between the different viewpoints endorsed by different parts of the society. What is even more problematic from our point of view is that such a strategy necessarily consists of an appeal to *others*. The judge is asked to show others why his judgment is the reasonable one to make.[72] He can only do this by referring to arguments which can be shared by the audience. Only arguments with a universal interpersonal validity can convince the members of the audience. But the rightness of a judgment is a particular matter: a judgment is right precisely there and then for the precise persons concerned in the precise circumstances at hand and as made by the precise person in question. Rightness, as opposed to lawfulness, cannot be universalized. Hence, the judge finds himself in a position where, on the one hand, he ought to make judgment on the particular grounds at hand; but where he, on the other hand, is required to verbally present his judgment to a potentially interested audience in a manner which renders it acceptable to its members.

As long as a legal judgment must be both legal and right, the conflict that lies here is in itself unavoidable. The judge can make a particularly valid judgment—i.e., a right judgment—and justify it with universally valid reasons on which he did not make the judgment. He can also make a right judgment and fail to justify

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[72] In other words, he is asked to concentrate on the justification of his judgment as opposed to the *discovery* of the right judgment. He must show the audience why his *opinion* is *justified*, rather than why the judgment is *right*. For a more thorough exposition, see Juha-Pekka Rentto, *Aquinas and Alexy: A Perennial View to Discursive Ethics*, 36 AM. J. JURIS. 157 (1991) (discussing similarities and differences between Aquinas' and Alexy's theories of ethics); Juha-Pekka Rentto, *Is the "Practical" Discourse Practical? A Modern Problem from an Ancient Viewpoint*, *in* ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE, BEIHEFT 51: RECHTSSYSTEM UND PRAKTISCHE VERNUNFT (Robert Alexy & Ralf Dreier eds., forthcoming 1993).

it, because his reasons are not conveniently universalizable. Or else he can make a particularly invalid—i.e., false—judgment which is, nevertheless, perfectly justifiable on some universalizable grounds. In this way, if he is even to try to justify his judgments as required, he is enticed either to intellectual dishonesty, or to doing injustice to the case he is to pass justice upon. If he is to succeed in convincing his audience, he must render his judgment to the public opinion, as it were. Instead of delivering judgment the way he would if he were not answerable to the moral majority, he is asked to formulate his judgments to please the "reasonable citizen." In other words, the judge is asked not to take ultimate personal responsibility for his judgments and to rely on his conscience in order to do justice to the unique and non-universalizable merits of the case at hand. Quite on the contrary, he is explicitly encouraged to pass his responsibility on to others—to a faceless fiction of the average reasonable citizen who shares the predominant social values. If a judge assumes such an attitude in his activity, he stifles the personal moral aspect of his legal judgments and lets them become impersonal, disengaged, uninterested, unaffected approximations of what he thinks are someone else's reasonable opinions.

It is clear that impersonal judgment is the quintessential requirement for legal reasoning: justice is seriously impaired if judges discriminate between citizens without good reason or if they let their own material interests unduly affect their judgments. But it is a long haul from here to a sacrifice of personal judgment to the public opinion. One can perfectly well be personally engaged for charity as well as for external justice, and still make judgments which are not unduly affected by irrelevant considerations. And it is entirely possible for a judge to be deeply interested in his own personal growth and to let that consideration affect his judgment, and to still be just to his clients. In the long term, it is only a judge who cares about his moral integrity who can remain and grow in justice. For justice, as Aquinas points out, is no isolated thing, but grows only in proportion to all the other virtues.[73] There is no way to have the virtue of external justice and not to have the other virtues of prudence, fortitude, and temperance. If a judge is not allowed to train his prudence, his fortitude, and his temperance, he will lose his capacity to

[73] *See* AQUINAS, SUMMA THEOLOGICA, *supra* note 25, at Pt. Ia-IIae, Q. 58, art. 3-4; *id.* at Pt. Ia-IIae, Q. 61, art. 4; *id.* at Pt. Ia-IIae, Q. 65 & 66.

habituate to justice as well. The grave danger that the democratic and discursive version of modern positivism brings about lies precisely here: based on a moral universalism, it necessarily seeks to restrict the scope of a judge's legitimate reliance on his own moral capacity. Thereby, it implicitly bans moral training and consequently moral growth. Instead, if an individual judge takes it seriously, it will stultify him and make him disinterested not only from the parties of the cases brought before him but also from his own moral growth. In the long run, the result may be an army of self-ignorant, self-satisfied, and self-indulging judges who enjoy the easy life brought about by the moral escapism in which they engage when they pass responsibility for their judgments to the impersonal lawmaker or to the equally impersonal "reasonable citizen." Such a vision of the future is hardly compatible with any meaningful conception of political and legal justice: in a world of such judges it is, paradoxically, their interest in personal comfort which dominates the legal process. An excessive positivistic aversion to the exercise of discretion in legal judgments corrupts judicial prudence. This corruption engenders perverted and arbitrary judicial discretion in order to avoid personal engagement on behalf of justice and moral integrity. In the long run, such judicial hypocrisy will hardly strengthen the citizens' belief in the law.

VI. AFTERWORD

We have all reason to expect that a jusnaturalist judge is by conviction more ready to do particular justice than a positivist judge can be in a case where that which is the right thing to do is at conflict with that which is the strictly lawful thing to do. But this is not the basis of our case for judicial jusnaturalism. A professed positivist—even a judge—can also exhibit a similar concern for what is right (as well as lawful) as opposed to what is merely lawful. That is, being a positivist will not make a judge worse than he is, nor will being a jusnaturalist make a judge better than he is. A judge is what he is, and he becomes what he makes of himself. As Virginia Black points out in her article on the debate about Clarence Thomas, it all turns on character, or personal virtue.[74]

In a sense, Professor Black may be right when she claims that

[74] *See supra* note 12 and accompanying text (discussing Black's view of virtue's role in natural law).

positivists and jusnaturalists alike consider the moral character of a judge to be one of the most important qualifications of a good judge. But I have argued that there is a significant difference between how a positivist and a jusnaturalist judge cherishes the integrity of his moral character. A positivist sets an artificial restraint on himself when he makes it his duty to abide by the positive law even when his judgment would therefore be unjust. Where a jusnaturalist can deliver an "unlawful" judgment and take personal responsibility for it, a positivist can only abide by the law or resign and let someone else take the responsibility for the justice of the judgment-to-be-made. Each of these decisions is a moral choice, shaping the personality of the judge in question. As such, neither of them is morally better or worse than the other in abstraction from the actual circumstances of the decision. Therefore, no judge is to be morally blamed merely because he deviates from the positive law, or because he abides by it, or because he resigns in order to avoid abiding by it. However, he is to be blamed if his choice has a less than virtuous object. Of course, it is entirely possible that a judge who claims to be a jusnaturalist will use a false measure in his judicial activity. But this is not a moral problem unless the person in question consciously uses the false measure through malice or as a result of some bad habit which he has developed and by which he fails to see, or to care, what would be the right measure.

A positivist, on the contrary, uses a false measure if he thinks he can solve particular problems with universal rules. Of course, the very point of rules is that they are "false" measures—i.e., universal abstractions from the facts. However, this only becomes a moral problem if a judge begins to act as if it were the main objective of his judicial activity to follow the rules instead of delivering right judgments. A positivistic doctrine is morally pernicious if it directly enjoins or indirectly encourages a judge to adopt an attitude according to which it is not the judge who has personal responsibility for a particular judgment, but the impersonal lawgiver, or the law in abstract. Although most positivisms do not explicitly entice the judiciary to moral escapism, I have argued that it is implicit in the very notion of positivism that it tends to place the burden of responsibility on the legal system as a whole rather than on the individual persons who compose it. If a judge learns to take such an ideology seriously and begins to apply it to his own life, he runs a risk of developing a legalistic attitude towards his professional activity. In the long run, he will get used

to relying on "the law" instead of his own reason and unlearn whatever skill he may have had at judicial discretion. In the end, it may become a matter of personal comfort: the judge may become reluctant to make the personal effort of putting his person at stake because it is more comfortable to let things go without personal involvement in justice. A lack of training in discretion leads to inability to exercise discretion, and an ingrained habit of avoiding discretion leads to a growing unreadiness and even unwillingness to exert one's mind in order to discriminate between those things which are to be judged by the general rule and those which are to be judged beside it. The moral fortitude of the judge diminishes, and he loses his prudential skill to discriminate between the reasonable and the unreasonable. When he abstains from making a personal contribution to the workings of the law, he also loses his ability to do justice on his own. Thereby, he becomes morally indifferent and cares not whether he delivers right or wrong judgments as long as he can justify them with reference to the valid positive law.

Perhaps judges are not quite as easily enticed to the positivistic web today as they were in pre-war Germany. Besides, few positivists would now be so naive as to believe that they actually could apply the law as proclaimed, without giving it a personal interpretation. Nevertheless, one modern form of positivism is particularly dangerous for the moral development of the members of the judiciary. This form of positivism is combined with the democratic ideology and with a discursive theory of practical reason: from a democratic viewpoint, it is regrettable that democratically issued laws cannot be applied in a democratic procedure but must be entrusted to the hands of an aristocratic judiciary. Therefore, to render even the application of the law democratic, the judiciary ought to be required to take the will of the moral majority into account and deliver judgments which would be acceptable to most "reasonable citizens." Such an appeal to concepts like "democracy" and "the reasonable will (or interest) of the majority" is eminently capable of inseminating the judiciary with a growing distrust of its own critical virtue and its ability to remain aloof from the fluctuations of the predominant positive morality entertained by shifting majorities of the citizenry. Again, if judges actually begin to make their judgments acceptable to the predominant moral majority, they run the grave risk of unlearning to take personal responsibility for them. Instead of relying on their own reasonable discretion, they place the respon-

sibility for their judgments on the impersonal shoulders of "the reasonable citizen." This makes the judiciary immune from criticism and unable to take personal initiative for justice. Could we safely trust our affairs to the hands of such a judiciary?

I have argued that jusnaturalism, at least in its Aristotelian-Thomasian version, is a good antidote for such an outcome. Its recognition that each human being is himself entirely responsible for what he becomes encourages the judge to pay attention to what he makes of himself when he fulfills the duties of his office. It encourages him to develop his facility for virtue, to exercise his personal capacity for reasonable discretion, and to be personally engaged for the rightness of his judgments. In short, when Thomasian jusnaturalism stresses the judge's responsibility to inform his own "second nature," it asks him to take full responsibility for his judgments. His judgments make him what he is as a judge. If his judgments are genuinely his own, he learns more about discretion and becomes a better judge. If he shrinks from personal responsibility, he unlearns whatever he may have known about discretion and becomes a worse judge. A keen consciousness of this option is the most important gift from jusnaturalism to a judge. Jusnaturalism gives a judge an opportunity to take his destiny in his own hands in a way which is not open to legal positivism. It lets him nurse and train his *character* more openly than positivism. If Professor Black is indeed right that legal positivists as well as jusnaturalists value the character of judges highly, they should all accept that they are jusnaturalists in that crucial respect. But positivists may have a different view of good character: perhaps some of them really think that a good judge shows nothing but impersonal, "objective" indifference and stifles his personality in order to make room for an uncritical reception and application of the will of the lawgiver or of the moral majority. If that is the case, we should consider more seriously than ever whether we want to have a positivistic or a jusnaturalistic judiciary.

Finally, this leads us to an apostrophic question regarding the personal make-up of the judiciary: how should we pick and choose our judges? On different levels of the judicial system, judges are sure to be appointed in different ways: the procedure can hardly be the same for the appointment of a Justice of the Supreme Court and a local Justice of the Peace. But even if it is

not necessarily the most important appointment,[75] the way a Justice of the Supreme Court is appointed symbolizes the whole system because it is the most visible. From a Finnish point of view, there is an obvious contrast between the American and Finnish procedure. The American procedure, with public televised hearings, a prominent role for the legislative body, and a strong nationwide interest shared by ordinary citizens with the most varied backgrounds, is about as different as can be from the Finnish procedure. In Finland, no public discussion precedes the appointment, the legislature has no say whatever in the matter, the nomination is made by the Supreme Court itself, and the choice between the candidates is entirely at the discretion of the President of the Republic. An appointment of a Justice of the Supreme Court is hardly noticed by the press, still less by the audiovisual media. A lot of the difference is explained by the fact that the Finnish tradition allows for no open judicial review of parliamentary statutes, wherefore the political interest in the composition of the Court is less acute. Nevertheless, the Finnish Supreme Court has in recent years adopted a role which has—in practice—increased its prejudicial importance. So a comparison between the American and the Finnish Court is not entirely out of place.

In Finland, history has formed a tradition which has shown itself to be very hard to break. Law school graduates divide very early in their career into two groups: career judges and career lawyers. Once a lawyer in business, always a lawyer in business; once a judge, always a judge. Local courts get their new judges from among their young trainees. High courts get their new judges from among the judges of the local courts within their jurisdiction. And the Supreme Court gets its new judges from among the judges of the high courts. It is practically impossible to break from the outer world into the esoteric circle. Because of the traditional court procedure which usually allows for an oral hearing of the parties only in the local court and hardly ever in the appellate courts, the result is that when years go by and the judges get further on in their career, they meet fewer and fewer people and more and more paper. By the time they get to the

[75] Although the Supreme Court deals with difficult and politically significant cases and makes prejudicial rulings with wide social effects, the local courts are more important for most clients of the judicial system. A local judge deals with real people. Justices of a high court deal with abstract principles.

Supreme Court, they have forgotten what real people are. That is the current opinion among the general public, at least. Part of this criticism may stem from the fact that the general public has no part in their appointment: they are given no opportunity to see for themselves whether the Justices of the Supreme Court have the character necessary for being good servants of justice and equity or whether they merely have the character necessary for thriving in the closed atmosphere of the judicial system.

The American system is weak for the opposite reason. When the appointment of a Justice of the Supreme Court is made a public show with a distinct flair of theatrical entertainment, the character of the players is put on display. The players are undressed in front of the public. The directors and stage managers play on the public's sentiments with ruthless skill. The Clarence Thomas hearings show very clearly how little attention the procedure pays to the *character* of the nominee and how much it makes of his *presentability*. Consider the debate on Thomas' jusnaturalism. Between the lines, the arguments presented against him as a jusnaturalist read, "Jusnaturalists are not presentable, they are not clean, they are not invited to parties, let us not have anything to do with them." The arguments that revolved around Thomas' alleged sexism were an even more blatant example of an attack on presentability. Thomas' character was not really the focus. Instead, the focus was his appearance in the eyes of the decent middle class society.

The present problem is fundamentally equivalent to another one I addressed in this Essay:[76] when the qualifications of a judge *in spe* are assessed in a public procedure, his appointment is subject to public opinion in a way which makes those who are interested in securing his appointment more interested in *justifying* their choice to the public than in *making* the right choice. Similarly, those who are interested in preventing his appointment are encouraged to focus the debate on questions which will hopefully *carry it home to the public* why he should not be appointed, rather than to the more material question of why he perhaps does not deserve appointment. The outcome is not very different from the outcome of the Finnish procedure: the public is given no real opportunity to assess the true character of the nominee. The difference is that the American procedure at least gives the public an

[76] *See supra* note 69 and accompanying text (discussing why judges should not be elected officials).

illusion that it has this opportunity. Whether it is better to be served an illusion than to be served nothing at all is up to the reader to decide. But a balanced blend of the two procedures would surely submit the moral character of the nominees to a more accurate test.