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JUSTICE AND JUDGMENT

CORNELIUS F. MURPHY, JR.*

INTRODUCTION

Modern intelligence seeks to bridge the gap between the highest abstractions and the most concrete experiences. As a result, sciences like mathematics which prove capable of establishing such connections gain in prominence; those without such ability, decline. The idea of justice has fallen within the latter category. Justice Cardozo's lament that "they do things better with logarithms" is widely shared, and is one of the principle reasons why the ideal of justice has come into disrepute.

The positivists' conviction of justice as an irrational ideal is an expression of such skepticism. They saw clearly that it is impossible to deduce a concrete solution from the hypothesis of an abstract norm. Kelsen emphasized the reality of social conflict; alleged standards of justice were incapable of demonstrating which interest deserved to be realized at the expense of any other.¹ Radbruch overcame some of the tenets of positivism, but he was one with them on this crucial issue. The best solution which legal philosophy could offer for jural indeterminacy was to illuminate the options available for choice.² Perelman's insistence upon persuasive rational argumentation³ is a contemporary means of compensating for the fact that the theories of justice fail to give that concrete certitude which is so desirable to the human consciousness.

Other thinkers have sought to discover what can cognitively be determined about justice at the immediate levels of concrete conflict.

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1. H. Kelsen, *WHAT IS JUSTICE?* 4 (1967).

2. See Radbruch, *Legal Philosophy*, in 4 *TWENTIETH CENTURY LEGAL PHILOSOPHIES SERIES: THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN* 49-111 (K. Wilk transl. 1950).

3. See G. PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENTATION* (Petrie transl. 1963). See also C. PERELMAN & L. OLBRECHTS-TYTEGA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* (J. Wilkinson & P. Weaver trans. 1969).

Convinced that contemplation bakes no loaves, Edmund Cahn turned attention to the vital reactions of individuals to perceived wrongs. The "sense of injustice," reflecting operative demands for human dignity and equality, made the antagonisms between people and their governments to some degree intelligible. Predictable outrage resulting from abuses of authority such as judicial favoritism, uneven treatment of like offenses, cruel punishment, or the suppression of inquiry, evidenced underlying expectations which illuminated the vicissitudes of social existence.⁴

Tillich, noting the disparity between abstract norms and the demands of concrete action, sought to discover whether anything of content could be discerned at the level of personal encounter. He insisted that one must first acknowledge the other as a person. Beyond that, one must look to the cultural process in which he finds himself for guidance. The interplay between personal conscience and the existing laws and customs within a society usually provides a substantial foundation for the justice of a specific confrontation. Having exhausted these positive sources, one cannot revert to structures of natural law for assistance. Whatever cogency they possess as abstractions is lost at concrete levels of existence where they become indeterminate and relative. Rather, one must turn to creative justice, which is love, to determine what is just in person to person encounters; love listens so it can truly understand the intrinsic claim of the other; love gives to such relations whatever of ourselves that can aid reunion; and love forgives injuries so that those who are estranged from the human community can again be reunited.⁵

The rejection of justice because of its inability to provide explicit guidance to concrete adjustments on the one hand, and the efforts to discover meaning within instant encounters on the other, suggest that a leap from abstract norms to immediate insight appears to be the only way of satisfying the human need for operative certitude. But the options are in reality not so radical. Modern thought has discovered other means for illuminating the realm of decision; approaches which lie between the demands of abstract justice and the requirement of existential confrontation.

One such method is to view human conflict in sociological terms.

4. For a collection of his writings, see E. CAHN, *CONFRONTING INJUSTICE: THE EDMUND CAHN READER* (L. Cahn ed. 1966).

5. See P. TILICH, *LOVE, POWER, AND JUSTICE* (1969).

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Social observation reveals that in human interactions persons and groups seek to achieve, within different forums, a wide range of values from varied bases of power and by the utilization of different strategies. Given these realities, "justice" can be made intelligible only through a systematic, objective consideration of these social interactions. Scientific scrutiny of these processes makes it possible to determine the nature of these interactions with some precision. By such a technique, one can discover a broad range of participants in social conflict, ascertain the strategies being utilized to achieve their objectives, and identify the diverse values which they seek to realize.⁶

This disciplined approach to problems of human conflict helps officials prevent an arbitrary projection of their personal preferences from serving as the "justice" to be applied to controversies they must resolve or to the content of a public policy they are empowered to enunciate. The objectivity of social evidence moderates the subjectivity of choice which is an inevitable consequence of human fallibility. But the process involves more than the passive register of sociologic truth. When value assertions are discovered, they must be evaluated by the observer or decisionmaker in terms of the value structure of the relevant community. The determination of community policy has an empirical frame of reference. The patterns of official decisions, the emerging consensus of public preference, and other reliable evidence are the immediate source of norms which must govern the outcomes of social interaction. But the science itself makes us aware that there is in all practical affairs a real dependence upon transcendental norms of righteousness.

A policy question has an empiric index of meaning; it also implies a moral significance which is not exhausted by the given community value structure. Professor McDougal, a leading exponent of sociological method, brings to his analysis of politico-legal problems the postulated values of human dignity in a free society.⁷ But his theories also acknowledge that within that discretion which social truth does not en-

6. Sociological jurisprudence in America begins with the work of Roscoe Pound. Its current form is provided by the unique methods of analysis developed through the collaboration of the political scientist Harold Lasswell and the legal scholar Myres McDougal. Their seminal work is Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203 (1943). For more complete bibliographies, see Moore, *Prolegomenon to the Jurisprudence of Myers McDougal and Harold Lasswell*, 54 *VA. L. REV.* 662 (1968).

7. See Lasswell & McDougal, *supra* note 6.

close, the philosophical systems upon which the individual is nurtured will exert their unique influence upon the processes of choice.

If we combine these varying insights we can see how they testify to the persistent effort by intelligence to attribute meaning to justice within the obscure realms of human conflict. The different approaches to concrete experience have overcome the fear that personal efforts to be just are so many steps into darkness. Yet, this rehabilitation of practical life has not been a complete success. The field of action now contains multiple insights important in themselves but without the coherence of a unified structure. We lack guidance as to the relative worth of any one approach; we have no comprehensive understanding of how each fits into an overall theory of judgment. What remains is the need to make the entire process, from abstract values, through sociological analysis, to concrete encounter, intelligible as a whole.

Traditional approaches may be of some help. Scholasticism, continuing the Aristotelian division, delineated two realms of existence: the speculative and practical orders of life. The former encompassed all those mental activities in which knowledge was sought for its own sake; the latter referred to the world of activity. The practical order was subdivided into the sphere of making—artistic work—and the field of activity strictly so-called—the domain of ethics and moral philosophy—where concern was centered upon the proper use of human freedom. Here the will seeks the good rather than the beautiful.⁸

The key to these classifications appears to lie in the presence or absence of abstract thought; yet the practical order has always been

8. For the distinction between the speculative and practical orders, see J. MARITAIN, *THE DEGREES OF KNOWLEDGE* App. VII (1938). See also J. MARITAIN, *ART AND SCHOLASTICISM* (1962) (contains some reflections on this subject, especially with respect to the distinctions between the artistic and moral aims of practical life). In affirming the latter distinction, an absolute dichotomy between the good and the beautiful is not implied. Nevertheless, the distinction is a real one, for in pursuit of the good it is the perfection of the subject rather than that of the object which is emphasized (although with justice, focus is upon the other and his due). The use which an individual makes of his freedom—how he conducts himself—is the object of moral study; art, a concern with making, rather than doing, has as its end not the ethical improvement of the person but rather the work to be fashioned. Moreover, distinguishing the good from the beautiful accentuates the fact that ethics requires judgment, the ability to make up one's mind decisively and carry out what one has decided. The contemplative response to beauty (including an interest in justice because it is an attractive idea), can be accompanied by an irresoluteness, an incapacity for the arduous efforts which are necessary to realization of the ideal. On the other hand, the creative response to actual needs which is the essence of judgment reflects both goodness and beauty.

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understood as possessing a speculative dimension. In art the intellectual presence is intense, but abstract intelligence is also engaged in the work of ethics. In some aspects of moral philosophy abstract reflection plays a major role; in others, practical considerations, immediate existential components, predominate.

The practical order is increasingly concerned with action for its own sake; the search for justice must culminate in personal choice or decision. Whatever of value can be said of justice at the level of abstraction, we are naturally more concerned with its existential modalities. But if we think of the process as being at once speculative and practical we can attain a fairly stable understanding of what is involved when one makes decisions. Viewed as a mixture of reflective cognition and immediate needs we can avoid the danger of leaping blindly from value postulates to arbitrary choice. And if we see that the realm of the practical order is replete with intelligible possibilities—both moral and sociological—we may avoid taking too narrow a view of the extent to which decisionmaking can be understood. Rather than replace remote hypothesis with immediate insights, we may gain a deeper understanding of the broader waves of practical knowledge which bear upon the potentials of personal commitment.

Some structural continuity can be acquired by placing the realm of action within this larger framework, yet we are still unenlightened concerning the more crucial questions of personal choice. Our summary of sociological jurisprudence included a margin of indeterminacy which allowed the actor to join his personal value structure to his scientific appraisal of social interactions. But the precise relationship between perceived and personal values, and their combined influence upon final choice, was not explicated.

If guidance is sought from the subjective tradition of justice, personal norms originating within the autonomous self would become the decisive feature in human judgment. All that can be demanded is that the individual defend his jural options by the procedures of rational argument. Such a requirement is highly desirable, but it does not exhaust the possibilities of determining whether actual choices are proper exercises of personal freedom. Justice is not fully understandable without consideration of its quality as a virtue, and the field of practical judgment shall remain obscure unless all its ethical dimensions are taken into account. Sensitive insight and scientific method have greatly improved our understanding of decisionmaking. If we

add the moral imperatives of the autonomous decisionmaker⁹ we gain a deeper understanding of the dimensions of judgment. To make our comprehension complete, we need to become aware of how processes of choice involve the moral perfection, as well as the autonomous freedom, of the one who must choose. The transition from abstract norm to specific choice is a continuous movement towards action, a thrust of thought and will whose practical character culminates in the virtue of prudence.

PRUDENCE

Prudence is a highly misunderstood term. Its common usage includes a sense of timidity if not outright perversity. Given this overgrowth of negative meaning, it is difficult to correlate the word with sentiments of moral excellence. Nonetheless, developments in the search for an understanding of human judgment encourage a restatement of its significance. At a point where scientific discipline ends and personal freedom begins, there is a vacuum susceptible of additional knowledge. Our abhorrence of arbitrary action suggests the need to bring the realm of indeterminate choice as much as possible within the measure of moral reason.

The general relevance of prudence can be best understood in relation to "subjective" theories of justice. Thinkers such as Radbruch and Perelman have taken pains to point out that the problem of justice can only be understood in terms of the innate impulse of an individual to be just. For Radbruch, this inward thrust explained the phenomena of law as a value-related phenomena; for Perelman the moral imperatives of the autonomous self were the modern source of prophetic justice. The moral drives of the individual become the primary criteria of goodness.¹⁰ By contrast, Thomism insists that urges towards justice do not, of themselves, constitute virtue. Inner imperatives must gain the additional ethical qualities associated with prudence if jural impulses are to become good actions.¹¹

9. See notes 2-3 *supra*. See also G. DEL VECCHIO, *JUSTICE* (Guthrie transl. 1956); G. DEL VECCHIO, *MAN AND NATURE* (R. Newman ed., A. Campbell transl. 1969). For a critique of Rawls's Theory of Justice relevant to the present discussion, see Murphy, *Distributive Justice, Its Modern Significance*, 17 *AM. J. JUR.* 153, 162-65 (1972).

10. This emphasis is also evident in an important new casebook. See W. BISHOP & C. STONE, *LAW LANGUAGE AND ETHICS* (1972); cf. Murphy, *Book Review*, 25 *J. LEGAL ED.* 492 (1972).

11. T. AQUINAS, *SUMMA THEOLOGICA II-II Q.* 47-56. See J. PIEFER, *PRUDENCE*

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The conflict between idealism and Thomism on this point is not as extreme as it may first appear. Perelman acknowledges that imperatives need a moderating influence; in the concept of the just rule, the self's sense of righteousness is conditioned by the need for rational justification. And on the plane of anthropological evidence, studies of the judicial process demonstrate that personal imperatives do not, without more, constitute human justice. There is a growing conviction that judges do not have a "roving commission to do good"; their immediate inclinations must be tempered by a consideration for decided tradition, the place of the judiciary in the total scheme of government, and the capacity of a particular people to absorb the requirements of abstract right at a given time in their history.¹² The just decision, in addition to its ethicalness, is also encompassed by broader considerations of reason. These reflections find a parallel in the structure of prudence considered as a moral power or ability of the decision-maker.

Prudence commands the immediate decision; it is thus highly volitional in character. But it also has cognitive characteristics. Its function is to determine the requirements of the here and now, but it implies a knowing. It assumes a will formed by the good as well as shaped by concrete realities. If stress is laid upon the existential aspect of human conduct, the individual's immediate sense of right is in the foreground of action. But to make this self-perspective the absolute source of justice would be an incomplete interpretation of moral responsibility. Just judgments are not only the realization of norms which the autonomous ego gives to oneself; the wisdom of prudential judgments implies that the actor has nourished his volition on a wide range of extramental truths.

In any ethical decision, personal conscience must be the primary guide. Thus, positive efforts towards the realization of justice have immediate subjective causes. The leading figures in struggles with injustice point to this voice of conscience as the source of the imperatives which they have sought to realize. But if we are to form a com-

(1959) (providing a general exposition of prudence as a central moral virtue). For the incorporation of prudence into legal philosophy, see Dabin, *General Theory of Law*, in 2 *THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN* (K. Wilk transl. 1950). See also Murphy, *Some Implications of Thomistic Jurisprudence*, 36 *TUL. L. REV.* 687 (1962).

12. See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); K. LLEWELLYN, *THE COMMON LAW TRADITION* (1960).

prehensive understanding of human judgment, it is necessary to push reflection beyond the personal conviction of what ought to be. Motivation is a complex phenomenon involving cultural conditioning, subconscious drives, aversions and affinities, as well as existential aspirations towards fulfillment. A single choice reflects an immense variety of influences, many of which elude rational scrutiny. But if we are to deepen our understanding of human affairs, the effort must be made to identify those aspects of human judgment which, by general assent, can be equated with reason.

The emphasis upon rationality implied by prudence refers to the entire spectrum of truths which bear, remotely as well as immediately, upon the requirements of decision. Beyond the norms derived from self-consciousness, the acting self is circumscribed by all the given data relevant to the problem for which he must find a just solution. Modern thought has accentuated the concrete factors to which the actor must be responsive if his judgments are to be acceptable. Emphasis upon contextual considerations, the profound importance of evidentiary facts, the phenomenological features of justice, these, and related insights, dominate modern analyses of the problem. A consideration of judgment as the expression of personal virtue can expand the range of relevant considerations without contradicting these truths about the nature of decisionmaking.

The perspective of personal perfection involves the full information of moral intelligence; it means that desires for justice can be improved through an adherence to all truths which give meaning to free choice. That the demands of prudential judgment require personal assent to the ontological as well as the existential modes of natural law and justice is one consequence of such an ideal.

Prudence is primarily concerned with means rather than ends, yet it seeks to achieve that which has already been willed.¹³ A partial understanding of moral truths impairs our ability to make choices consonant with the overall purposes of human existence. Without an insistence upon personal adherence to objective truth, responsibility is enhanced only to the extent of making one conscious of the divergent values which comprise the potentials of a decision. Given his premise of moral relativism, Radbruch could improve upon natural

13. This does not mean that a specific situation is to be subsumed under a general category, or that "answers" can be deduced from abstract norms. One's general understanding has a real but indistinct influence upon concrete choice.

preferences only by increasing consciousness of value possibilities and the diversity of ideological persuasion. To some extent contemporary sociological jurisprudence seeks the same objective, since its rigorous method draws one's attention to the distributions of value implicit in choice. Much of this is, of course, to the good. Given a concrete assertion of contrary values, those responsible for resolving such disputes must have a sound grasp of the available options and consequences. But such methodology is incapable on its premises of reaching the deeper basis of personal responsibility. No matter how precisely developed, social sciences do not exhaust the personal obligation to pursue an ultimate structure of values. Such an effort is assumed by the concept of prudential judgment.

Personal moral imperatives must be supplemented by ontological articulations of ethics,¹⁴ but this does not exclude moral insights gained through other modalities of knowing from the scope of prudence. All good is embraced by the virtue; this assimilative quality makes it possible to see how differing concepts of justice all play a part in developing the ability to make right decisions. Brecht, a modern jurist, discovered by phenomenological reflection that judgments, to be just,¹⁵ must be based upon a general scheme of values rather than upon the arbitrary selection of preferred norms. From his study of Western man's efforts to be just, Stone concluded that one quasi-absolute was the ideal that actions should affect all persons involved equally, unless there were sufficient reasons for doing otherwise.¹⁶ Such insights are of great importance to the realization of justice; they acquire added significance when viewed as truths of which a prudent decisionmaker must become aware if his choices are to be a proper exercise of freedom.

The same spirit of inclusiveness applies to existential truths about personal encounters. A sense of human fraternity, the creative justice which listens, gives, and forgives, these and similar intuitions all contribute to the development of personal responsibility. They are all

14. For the relationship between moral knowledge and practical choice, see S. HAMPSHIRE, *THOUGHT AND ACTION* (1960). See also J. MARITAIN, *MORAL PHILOSOPHY* (1964). That the same knowledge of good and evil influences one's conception of legal theory is evident in Professor Hall's approach to criminal law. See J. HALL, *FOUNDATIONS OF JURISPRUDENCE* 87-100 (1973). In the present essay only the general connection between ethical knowledge and decision can be noted.

15. A. BRECHT, *POLITICAL THEORY* ch. X, XII (1959); Brecht, *The Ultimate Standard of Justice*, in *NOMOS VI JUSTICE* (1963).

16. J. STONE, *HUMAN LAW AND HUMAN EXISTENCE* 343-44 (1965).

aspects of moral truth to which the self must refer if one's inclinations are to be fully oriented towards the accomplishment of authentic good.

Prudence implies a knowledge of reality as well as a realization of the good. An openness to moral truths gains further enhancement from general truths about humanity. The more one knows of man and the more one learns from science and the humanities, the better equipped one is to persuasively advance a cause and to wisely adjust human conflict. The broader bases of prudence are more immediately evident in the dependence upon reality which is essential to its deliberative aspects. The "Brandeis brief" proved the importance of socioeconomic data to the just resolution of controversies; and modern legal science has become increasingly conscious of how varied human disciplines impinge upon the resolution of jural problems. The deeper significance of these interdependencies is revealed in the traditional requirement that the ability to make proper decisions depends upon one's willingness to be instructed by the competence of others.

The given "data" for proper judgment includes not only moral, scientific and humanistic truths but also the more immediate knowledge which can be supplied by professional economists, physicians, or practitioners of any other relevant discipline. No single perspective can adequately plumb the nature of a claim for redress or change; those called to find official solutions must be opened to all available perspectives which can illuminate the contours of responsible decision. Such dependence does not mean servility; the decisionmaker retains his autonomy and accountability for what occurs within his authority. The proper balance between free choice and intrusion of alien disciplines depends upon the intrinsic ability of the individual official to evaluate the worth of each contribution. Law cannot, for example, be ignorant of psychiatry; it is a wise lawyer, or judge,¹⁷ who can delineate its significance for the resolution of legal issues. And such a power of discernment depends in large measure upon the breadth of moral and cultural knowledge which the person brings with him to his decisional tasks.

The achievement of a balance is an important objective of prudence, the ability of a person to move creatively between extremes

17. The juror also has responsibilities. *See* *Holloway v. United States*, 148 F.2d 665 (D.C. Cir. 1945).

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is often indicative of the presence of the virtue. Admittedly, the concrete realization of justice requires prophets, and their insight often transcends measure. But if we wish to trace the general contours of reason applied to action, some sense of balanced order is essential, even though its standards may be prosaic.

Various themes of balance have grown out of reflections on prudential judgment. One important component is the emphasis upon the here and now. The self is, as Heidegger observed, a being in the world.¹⁸ Choices are not made in an abstract vacuum, they are made in the context of involvement with others, especially those affected by the decision. Demand for rational persuasion can temper the moral impulses of one authorized to decide, but such criteria are not the only limits upon the desire of an autonomous ego to accomplish what it believes to be justice. Some sense of the possible is indispensable to moral decision; and it is this restraint which is most difficult to reconcile with righteousness. That one must respect the actual capacity of the governed to assimilate an abstract norm is particularly abhorrent to those whose insights are *avant-garde*.

This dimension of prudence is especially important in contemporary society where the ideals of human liberty have become an operative part of social policy. The more perceptive advocates and decision-makers are aware of the movement of history, they are intensely conscious of the primary moral value of human freedom and dignity. Personally committed to advance these goals, they are impatient with qualifications which they are prone to treat as evasions. In some cases, a so-called "prudence" is in reality a strategy of avoidance or subterfuge; yet there is a substratum of objective truth behind the general notion of considered judgment. Unthinking realization of ideals, no matter how noble in themselves, can only, in the long run, have destructive consequences.¹⁹ The good judgment must reconcile opposites and harmonize the discordant clash of values which make up the essence of human antagonisms. Expression must be reconciled with reputation,²⁰ art with morals, the liberties of an accused with the general

18. See M. HEIDEGGER, *ON BEING AND TIME* (J. Stambaugh transl. 1972).

19. There are historical illustrations. The inflexibility of President Wilson on important questions had a detrimental effect upon his foreign policy; the dogmatism of the Allende government undoubtedly contributed to the recent Chilean chaos.

20. See *New York Times v. Sullivan*, 376 U.S. 254 (1964) (where a balance is struck between the values of free and vigorous discussion protected by the first amendment and the right to a reputation traditionally protected by the laws of defamation).

security, and all this requires some conscious effort to reconcile opposites, rather than an uncompromising insistence upon the immediate implementation of a perceived good.

But if circumspection and foresight are a part of wisdom, undue caution is an essential deficiency. Respect for established precedent and procedures is an integral part of authoritative lawmaking, but excessive reliance upon tradition may suggest moral weakness. Adamant resistance to change or adjustment reflects a myriad of psychic influences. The very structure of modern mass society encourages a kind of pervasive anxiety which results in hostility towards anyone who would modify the prevailing manner of life. Uncritical attachment to abstract ideals leads to what Marcel has called the "fanaticized consciousness," a disease which can affect persons of either liberal or conservative persuasion.²¹ Beyond these, and other possible psycho-cultural causes, the phenomena of inordinate caution are to some extent susceptible of ethical scrutiny.

Such imprudence, according to Thomistic tradition, is grounded upon covetousness, a vice referring primarily to an inordinate love of wealth, but which also encompasses the more basic anxieties which we associate with a desperate self-preservation or grasping for security. Such attitudes are fundamentally inimical to authentic prudence because unreasonable reserve obstructs the accomplishment of justice. Timidness is opposed to that fortitude which is essential if each is to be given what is his due.

The qualifications introduced by prudence may seem to make it inhospitable to the freedom of the one poised for action. But the same stress upon circumstances which may restrain jural impulses also accentuates the liberty of the decisionmaker. Focus upon the particular situation emphasizes the deliberation which must precede judgment; it also affirms that the immediate measure of action is the imperative of prudence in the person who must decide. What the choice shall be depends upon a perception of specifics which are only accessible to the one with the relevant responsibility. It rests with his living experiences;²² only he is privy to all the contingencies which envelope his problem.

21. See G. MARCEL, *MAN AGAINST MASS SOCIETY* (G. S. Fraser transl. 1962). See also E. HOFFER, *THE TRUE BELIEVER* (1951).

22. See B. CARDOZO, *THE GROWTH OF THE LAW* (1924) (which reveals an acute consciousness of these nuances).

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CONCLUSION

These ideas gain confirmation from legal science. The phenomenon of law is increasingly being understood as a decisionmaking process. Law results from the establishment of authority to create rules. This truth emerges from a modern understanding of the judicial process, which stresses the indeterminacy of precedent and the conscious decisional choice of judges. It also emerges from more structural interpretations of positive law. The existence and growth of law is dependent upon the will and creativity of those empowered to make it.²³

The fact that law is a problem-solving process also emphasizes its relation to choice. Legal rules result from the solution of jural problems: a question for executive determination, the formulation of legislative or administrative policy, or the adjudication of an adversary dispute. It is essentially a job to be done rather than a truth to be discovered. Understood as a means to an end—as actions by which jural institutions, rules and procedures are adapted to the purposes of civilized life—law is essentially a function of the practical reason. Remotely dependent upon speculative understanding, it is immediately dependent upon judgment.

These truths—which ironically arise from the complementary insights of Thomism and positivism—carry human understanding of the personal dimensions of decisionmaking beyond the probings of subjective philosophy. Radbruch demonstrated that exterior phenomena of positive law were essentially related to individual inclinations towards justice; but neither he, nor subsequent subjective thinkers, perceived the deeper significance of this personal link. Del Vecchio's emphasis upon self-consciousness ignored the mental operations of deliberation and choice; Perelman suspends the search for inner causality by imposing the objective criteria of argumentation upon the moral imperatives of the deciding official. The connections between positive law and the lawmaker can only be fully understood in the light of the quality of practical reason within the one who decides. Dabin puts it explicitly: "Law is prudence."²⁴

23. Such complimentary insights can be seen in Kelsen's idea of law creating within a dynamic system of norms and Hart's idea of secondary rules, especially of change and adjudication. See H. HART, *THE CONCEPT OF LAW* (1962); H. KELSEN, *PURE THEORY OF LAW* (1967).

24. Dabin, *General Theory of Law*, in 4 *TWENTIETH CENTURY LEGAL PHILOSOPHY*

As a moral virtue, prudence is the discernment and effective realization of means most appropriate to moral ends; similarly the jural decisionmaker must adapt legal rules to the pursuits of civilization. The characterization of law as jurisprudence reflects the close affinity between the ethical and juridic realms. And in creating rules—in being prudent—the decisionmaker possesses, in large measure, that subjective freedom of choice which has been traditionally identified as an integral part of the virtue.

The affirmation of freedom which flows from the dependence of law upon prudence is not a sanction for arbitrary action. The liberty of one authorized to choose is limited by the institutional framework within which he works. He must be responsive to the allocations of competence designated by constitution or custom; expectations that he will act with the guidance of received precedents also restrict the available options. Whatever choices have been made must be defended by techniques of authoritative persuasion.²⁵ Yet the decision *itself* must rest with the personal conscience of the authorized official.

PHIES SERIES: THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN 341, 373-82 (K. Wilk transl. 1950).

25. With respect to the decision of the Supreme Court, see Murphy, *The Supreme Court and Democratic Theory*, 17 SYRACUSE L. REV. 642 (1966).