JURISPRUDENCE AND PRUDENTIAL JUSTICE

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"The wise in heart shall be called prudent."[1]

I. EXPLANATIONS

Our state courts have become the object of expanding and sharpening public commentary. Certain significant, highly visible, and very controversial decisions have served as a lightning rod to draw that critical attention. *Mt. Laurel II*,[2] expounding governmental obligations to provide affordable housing, is such a case. *Kelly v. Gwinnell*,[3] the social-host-liability case, and *In re Conroy*,[4] the right-to-die case, are others. The earlier *Robinson v. Cahill* cases,[5] addressing the constitutional adequacy of public education, serve the point that critical dialogue relating to the

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I have had the benefit of helpful review from several persons. I want specially to acknowledge Janine Bauer, Esq., my law secretary during the 1984-1985 court term, for her perceptive insights, and Harold L. Rubenstein, Esq., an attorney with the New Jersey Supreme Court's administrative office and an adjunct professor of philosophy at Rutgers University, for his scholarly criticism and deft guidance through the abundant authority on the subject.

1 *Proverbs* 16:21.

2 Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983).

3 96 N.J. 538, 476 A.2d 1219 (1984).

4 98 N.J. 321, 486 A.2d 1209 (1985).

5 Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *modified*, 63 N.J. 196, 306 A.2d 65, *cert. denied*, 414 U.S. 976 (1973). In *Robinson*, the New Jersey Supreme Court declared the state's public school financing scheme violative of the New Jersey Constitution's provision requiring "a thorough and efficient system" of public education. *Id.* at 515, 303 A.2d at 295. Two years later, the court implemented a provisional financing scheme, which was designed to allow the legislature additional time to approve a constitutionally permissible system of school financing. *See* Robinson v. Cahill, 69 N.J. 133, 155, 351 A.2d 713, 724, *cert. denied*, 423 U.S. 913 (1975). The New Jersey Legislature responded by passing the Public School Education Act of 1975, ch. 212, 1975 N.J. Laws 871, and in 1976, the state supreme court upheld this Act. *See* Robinson v. Cahill, 69 N.J. 449, 467, 355 A.2d 129, 139 (1976). Subsequently, the court enjoined any expenditures for public education until the legislature provided full funding for the scheme established by the 1975 Act. Robinson v. Cahill, 70 N.J. 155, 160-61, 358 A.2d 457, 459, *injunction dissolved*, 70 N.J. 465, 360 A.2d 400 (1976).

courts in the wake of such decisions is neither new, unexpected, nor necessarily undesirable.

How should a court contend with adverse public commentary? What, if anything, should a court do when confronted and challenged by such criticism? There are some who hold the view that judicial independence and integrity foreclose any rejoinder to critical attacks upon courts. A higher responsibility of the courts, it is believed, mandates a calculated stoicism in the face of critics.

There is something to be said for the avoidance of spirited rejoinder to public rebuke. One might agree that courts should not engage in any open defense of their decisions. To do so could entail abandoning or compromising that which is unique and essential to the judiciary—its ability to be truly independent, objective, and impartial, and to remain above public, partisan, or political fray.

Even so, I do not think that judicial independence demands studied passivity or stubborn indifference to the public reaction to court decisions. Indeed, as a constituent and vital part of representative democratic government, the judiciary must be highly attuned to the needs and feelings of its citizens; it should be acutely aware of the public's perception of its general performance, as well as its particular decisions. In short, the judiciary cannot be oblivious to the reactions that its own actions have engendered or the effects that its adjudications have created within the society it serves.

Judicial responsiveness to the public is proper because the judiciary, notwithstanding its need to be objective and impartial, must still perform a cooperative and constructive function as a pivotal, governmental role player in representative democracy. Yet, while to some degree courts must understand and accommodate public expectations, they do not have the same structured outlets to develop and gain public support as the other two popularly elected branches of government. Courts cannot secure a popular mandate. It is therefore especially necessary for the judiciary to be concerned with its own legitimacy and to assure and project that legitimacy within a proper framework.

This discussion, then, concerns the special kind of legitimacy that a court may seek and achieve. It deals with "judicial legitimacy," and with judicial responsibility and accountability, which are the twin pillars of that legitimacy. In dealing with these themes, an appropriate point of departure is the judicial deci-

sional process. It is primarily through this process that courts discharge their constitutional responsibility, perform their allotted governmental role, and have their greatest effect upon society. The discussion will focus upon the nature of the decisional process and explore, with the benefit of scholarly insight, whether that process can be elucidated in a manner so that courts can better understand their own work and so that, in turn, the work of the courts can be better understood. This may bring us to a clearer perception of judicial responsibility and accountability.

It seems to me that a reasoned, sound, and coherent conception of the nature of law is at the heart of any analysis purporting to address these concerns. An overview of jurisprudence, particularly contemporary conceptualizations as to the essential nature of law, can be instructive. To this end, I propose to survey some aspects of jurisprudence, albeit with pardonable oversimplification consistent with my own limitations and the constraints of time.

I believe some common elements can be culled from an exposition of current legal philosophy. These elements can serve as both a guide for and a measure of the adequacy of judicial adjudication. The decisional process should, therefore, reflect the application of these implied principles. It should be possible to see how, and with what success, the application of these principles is effectuated in the decisions of particular cases.

This discussion of jurisprudential conceptualizations, implications, and applications should suggest some interesting ramifications that relate to the decisional process as such and to our threshold—and ultimate—concerns of judicial responsibility, accountability, and legitimacy. In a sense, we will have come full circle. In the course of this journey, I hope we will have seen whether it is possible to recognize and heed public criticism of judicial performance, to assess the reasonableness of such criticism in terms of the adequacy of judicial decision making, and to defend credibly—through explanation—the role of the judiciary without compromising judicial independence or integrity.

II. CONCEPTUALIZATIONS

First, let me sketch some of the major schools of contemporary jurisprudence. I accept the notion that the legal system is a human institution designed to accomplish human purposes. As such, we can believe that law is a human inspiration and creation,

and that law in a broad sense reflects both the kind of society in which we wish to live and the goals we wish to achieve. Nevertheless, throughout civilized history, law has often been perceived as reflecting not only social authority, but also an ultimate truth or morality. From this perspective, law has been considered to be divine or as emanating from immutable and universal principles of nature.

Conceived as divine or natural, law embraced not simply society's power, but also its moral values. This view of law was perhaps most forcefully expounded by the English jurist Lord Blackstone, who taught that the English common law was both the natural law and the law of God, incidentally giving judges a rather cardinal role in the scheme of things.

Over time, others articulated the view that some of our most important moral values either do not lend themselves to achievement directly through laws or judicial decisions or, for other reasons, should be considered outside the prerogative of law. Such a philosophy, denominated legal positivism, reflects the influence of the English legal theorist Jeremy Bentham. Bentham, who had attended Blackstone's lectures at Oxford, was dismayed by the notion that the common law was the "natural" law or God's law. From Bentham's intellectual rebellion arose the legal positivist philosophy that survives with vigor in English and American law schools today.

The legal positivist theory is characterized by the separation of legal and moral principles. It is derived from the premises that law is positive and must arise from the will of the majority; that law has no inherent moral or ethical content; that moral questions are irreducibly subjective; and that the judge's function is to discern what the law *is*, not what it *ought* to be.[6] This philosophy

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[6] It is important to note that the positivist theory, which separates legal and moral obligations, is not devoid of moral content. It merely employs a different kind of principle or obligation to reach the results it sees as correct. Bentham was a moral philosopher himself, and subsequent legal positivists were heavily influenced by the utilitarian philosophy of John Stuart Mill, an intellectual disciple of Bentham.

According to the legal positivists, the critical moral assessment of our legal institutions should be done according to utilitarian, not natural law, principles. Thus, under one aspect of utilitarianism—act utilitarianism—a person's action is morally right if it brings about good consequences. Another form of utilitarianism—rule utilitarianism—would regard an action as morally right if it is the kind that would have good consequences if everyone did it. Thus, moral rules are implicated in legal positivism because they are conceived as being based on a precept that does not itself specify an end or purpose, the furtherance of which makes acts right.

has been expressed in many forms throughout history.[7]

There are those who have reacted to legal positivism with extraordinary singularity. Their jurisprudence effectively reduces law to essentially one dimension. For example, Karl Llewellyn contended at one time that it was illusory to believe that rules decided cases.[8] Jerome Frank believed that law is simply *the* decision in a particular case.[9] This view, which perceives judges as policy makers, came to be described as legal realism, an indigenously American philosophy.[10]

The foremost proponent of contemporary legal positivism is H.L.A. Hart. His basic thesis is that law reflects social authority.[11] Law is encapsulated in clear legal rules, which are understood, identified, and validated by a "master rule"—the "rule of recognition"—reflecting a common understanding or general consensus. Decisions not based upon rules, according to Hart, are not truly law, but instead constitute the exercise of judicial discretion and are essentially legislative in character. Hart characterizes the areas in which judicial discretion has to be invoked as "zones or areas of creativity" involving unprecedented cases that are governed not by available rules, but by extralegal factors such as social purposes, public policies, and occasionally, moral considerations.

Hart's understanding of the role of moral rules also reflects the Benthamite roots of contemporary legal positivism. Moral rules, according to Hart, are content neutral. While moral rules differ from rules of law, they are properly called "rules" only be-

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[7] *See, e.g.*, D. RICHARDS, THE MORAL CRITICISM OF LAW 7-36 (1977) (summarizing natural law and origins of legal positivism). The subject of legal positivism receives extensive attention in this article. This discussion is derived for the most part from the cited sources and the several books and articles that are referred to and cited hereafter.

[8] *See* K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 3-41 (1962).

[9] *See* J. FRANK, LAW AND THE MODERN MIND 50-51 (Anchor Books ed. 1963).

[10] *See generally* Bodenheimer, *Hart, Dworkin, and the Problem of Judicial Lawmaking Discretion*, 11 GA. L. REV. 1143, 1149-51 (1977) (contrasting legal realism with rule-oriented decision making); Richards, *Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GA. L. REV. 1069, 1076-78 (1977) (outlining the common law reasoning process).

[11] One of the primary works expounding the essential elements of Hart's philosophy is H.L.A. HART, THE CONCEPT OF LAW (1961). Other instructive sources are Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977), and Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). His legal theories have also been described and analyzed by most of the authors whose works are referred to in the text and footnotes of this article.

cause of the following reasons: (1) they have great importance; (2) they are immune from deliberate change; (3) they call for voluntary compliance and excuse noncompliance; and (4) they preserve compliance through conscience, not punishment.

There are others who do not hold with the dichotomous view of the legal positivists or the one-dimensional view of the realists. The leading contemporary exponent of a differing view is Professor Ronald Dworkin, who succeeded to Hart's chair at Oxford.[12] Law, for Dworkin, is that which is determined not only by clear and uncontradicted rules, but also by precepts that are firmly recognized though not totally clear, fixed, or uncontradicted. These he calls principles. Thus, law, according to Dworkin, is and may be predicated on principles as well as upon rules. The primary difference between a principle and a rule is that a principle can be controversial. In effect, principles are inchoate or embryonic rules. What is necessary to convert a principle into a rule is for a judge to crystallize the principle into a clear basis for decision. This process arises in the context of the "hard case"—a case that is not governed by an existing rule or precedent.[13]

Judicial discretion, in Dworkin's view, is implicated in deciding a case according to principles. This decisional task is difficult and discretionary because it entails choosing among competing principles, and assigning weight and importance to principles in the process of finding the correct grounds for decision. A principle thus used as a ground for decision can create a legal obligation, just as a rule does. Because legal obligations arise from the application of principles, courts must apply principles with consistency, that is, with reference to existing rules and established precepts. On the basis of such consistency, a case decided according to principle will have had its roots in the extant body of law. From this perspective, such a decision does not radically alter reasonable expectations; the decision comes as no real surprise and is therefore entitled to be applied retroactively.[14] Thus, all decisional law must have this nexus with existing legal

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[12] Professor Dworkin is one of the most heavily discussed contemporary legal philosophers. The following works of Dworkin are particularly relevant to this discussion: R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977) and R. DWORKIN, A MATTER OF PRINCIPLE (1985) [hereinafter cited as R. DWORKIN, A MATTER OF PRINCIPLE]. *See also* Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975) [hereinafter cited as Dworkin, *Hard Cases*].

[13] *See* Dworkin, *Hard Cases*, *supra* note 12, at 1060.

[14] *See id.* at 1061-62.

sources, demonstrating what Dworkin calls "articulate consistency."[15]

Dworkin also takes great care in drawing and explaining the distinction between policy and principle.[16] According to Dworkin, a decision based on principle rather than policy addresses the legal rights and relationships of the parties; it secures an individual or group right. In contrast, a policy decision is one that seeks to advance or protect a collective goal of the community as a whole.[17] Consequently, policy determinations entail the selection among available means to serve collective ends. "Policy" is concerned with achieving societal or collective ends, not individual rights. In addition, law that is based on policy, unlike law based on rules and principles, need not have any articulate, internal consistency, nor even any reasoned basis for assigning more weight or importance to one policy consideration than to another. For these reasons, policy decisions are most appropriately left to the legislature; courts, in Dworkin's view, should eschew being a "deputy-legislature" and avoid determining questions of policy.

In this setting, Dworkin also holds to a dichotomous view of the law. Some commentators have referred to Dworkin as a "closet positivist" because he believes that law is based only on rules and principles and because he acknowledges that certain principles can be legally valid. These scholars maintain that any test that establishes the validity of principles is really a disguise for Hart's "rule of recognition."[18] Dworkin's conceptualization of law may be contrasted with that which might be referred to as the "holistic" view of law, a philosophy that law does not end abruptly at a boundary embracing only rules, or only rules together with principles, but instead goes beyond, covering policy and moral considerations as well. Decisions that are based upon any or all of these grounds truly constitute law.

Professor Lon Fuller was one of the most prominent contemporary philosophers to express the view that law embraces moral values.[19] According to Fuller, law is not content neutral,

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[15] *Id.* at 1064.

[16] *See id.* at 1058-70.

[17] *Id.* at 1059, 1067.

[18] *See, e.g.*, Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972) (analyzing and criticizing Dworkin's theories); *see also* J. RAZ, THE CONCEPT OF A LEGAL SYSTEM 197-200 (1970) (commenting on Hart's "rule of recognition").

[19] Professor Fuller's views have been the subject of extensive commentary. References to Fuller have been drawn primarily from L. FULLER, THE MORALITY OF LAW

but is "purposive." A legal system must contain certain moral properties—such as generality, publication, prospectivity, intelligibility, consistency, adjustment to human capacity, stability, and congruity. With such properties, the legal system can provide public rules that serve as a basis for legitimate expectations upon which people can orient their behavior. Law is an enterprise, a dynamic process that attempts to subject human conduct to the governance of rules and, as such, is inherently value laden. Fuller theorized that law must of necessity consider what ought to be. He concluded that law derives its ultimate support from the sense of being "right." It is characterized by an "internal consistency," involving moral rules that reflect what is intrinsically "right." As a dynamic process, however, law is not always successful. That is because law is not simply a manifested fact of social authority, something to be studied only for what it is and does; rather, it should also be analyzed for what it is trying to do and become. Thus, to Fuller, law is a complex of what is *and* what ought to be.

There are many other contemporary theorists who have expressed in differing ways, sometimes through their own exegesis and sometimes through the constructive criticism of others, this more expansive, holistic conceptualization of the law. Their views with respect to the decisional process are highly instructive.[20] For example, Kent Greenawalt of the Columbia School of Law accepts Dworkin's thesis that judges must rely on principles in deciding certain cases and accepts the distinction between principles and policy. He does not, however, subscribe to Dworkin's notion of judicial discretion, which always leads to the presumed, correct result. Discretion, Greenawalt observes, could be

(rev. ed. 1969). *See also* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

20 In addition to the scholars mentioned in the text, holistic or moralistic conceptualizations of law have been expressed in a variety of forms by other commentators. For example, William T. Blackstone expressed the concept of a "morality of natural necessity," which is the basis for primary rules of obligation in law. There are, in his view, "moral facts" inherent in human existence and survival, which have a proper place in the rendition of law. *See* Blackstone, *The Relationship of Law and Morality*, 11 GA. L. REV. 1359, 1371 (1977). David A.J. Richards espoused "methodological natural law theory," emphasizing the absence of any clear demarcation between principles and policy—the "rich middle ground" that comprises much of law. D. RICHARDS, *supra* note 7, at 31-34. This theory arises from the "essentially empirical observation that legal and moral concepts significantly interconnect in concrete legal institutions of many kinds." *Id.* at 33. It is a view that Dworkin seemingly tolerates. *See, e.g.*, Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1250-58 (1977).

said to exist "so long as no practical procedure exists for determining if a result is correct, [so long as] informed lawyers disagree about the proper result, and [so long as] a judge's decision either way will not widely be considered a failure to perform his judicial responsibilities."[21] Thus, when legal sources leave an issue genuinely in doubt, judges properly rely on firm convictions of moral rightness and social welfare that command wide support. Greenawalt feels that it is necessary for courts to "lend a hand," particularly in the area of statutory interpretation.[22]

Edgar Bodenheimer disagrees with Dworkin that rules are all-or-nothing. He agrees, however, that principles are a part of the law, but he would go further. He acknowledges that informal sources of law, such as common conviction, principles of public policy, and moral considerations, are also part of the legal order.[23] Successful judicial effort involves the linkage of innovation to a set of accepted opinions, traditions, or preferred societal values. A new right is determined, according to Bodenheimer, when arguments in its favor are of "decisive superiority," even though the right is controversial. There can be a judicial transmutation of a moral canon into a legal duty when a mode of behavior is conceived "to be a well-nigh indispensable, rather than a merely desirable"[24] aspect of human conduct. Thus, according to Bodenheimer, there may be moral and social principles that lend themselves to incorporation into the legal order.

Similar to these views is one that embraces the open-ended concept of law. Stephen Munzer, who teaches at UCLA, recognizes Dworkin's philosophy and its important precept of articulate consistency, but points out that it does not preclude numerous cases in which the right answer will be lacking.[25] He draws a provocative analogy to literature—the standard of "narrative consistency"—and uses Maggie Verver in James's *The Golden Bowl* and Joyce's *Finnegan's Wake* among his examples—I would add a contemporary work such as Fowles's *The French Lieu-*

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[21] Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 386 (1975).

[22] *See generally* Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991 (1977); Greenawalt, *supra* note 21.

[23] *See* Bodenheimer, *supra* note 10.

[24] *Id.* at 1169.

[25] Munzer, *Right Answers, Preexisting Rights, and Fairness*, 11 GA. L. REV. 1055, 1057-59 (1977). The elusiveness of consistency in adjudication is discussed in Book Note, *Dancing in the Dark: The Philosophical Moves of Ronald Dworkin*, 23 HARV. J. ON LEGIS. 307 (1986).

tenant's Woman[26]—to point out that an author may construct a work so that an issue is left purposely in an ambiguous state.[27] Thus, according to Munzer, in an advanced legal system, principles of decision may not "yield uniquely correct results."[28] Even Dworkin has come to recognize a class of hard cases—perhaps to be called the "hardest cases"—that will not have uniquely correct results. Munzer states that just as authors may write novels that intentionally leave some questions insusceptible of definite resolution, so may judges—and of course legislators—leave the exact bearing of a legal determination open with respect to certain issues. The purpose of such "conscious indeterminacy" is often to defer the resolution of the most difficult issues until those issues can be more precisely formulated and the consequences better ascertained.[29]

Another exponent of this open-ended view of law is Joseph Singer of the Boston University Law School, who expresses the notion that law necessarily and properly should be applied on an ad hoc basis. He particularly stresses the inevitability of contradictions, which arise whenever a judge must determine the applicable legal rule.[30] He acknowledges that there is no real objectivity to the resolution of contradictions in particular cases; rather, what is done, echoing the thought of Oliver Wendell Holmes, is to preserve "the illusion of certainty."[31] In effect, according to Singer, courts can make rational choices, but not by a very refined logic. Singer accepts as a consequence of his thesis that the legitimacy of judicial power is seemingly undermined by the realization that decisions are, in this sense, "politically" motivated. Because even legal decisions must grapple with fundamental contradictions, courts have no alternative but to decide cases in light of competing goals and interests on a case-by-case basis. The antidote to this is the conscientious weighing of com-

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[26] In rewriting this article subsequent to the delivery of the lecture, I consulted R. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 12. I discovered that in developing the analogy between law and literature, Dworkin was similarly struck by the purposeful ambiguity of Fowles's novel, which he treats extensively in chapter six, *How Law is Like Literature*. *See id.* at 154-58.

[27] *See* Munzer, *supra* note 25, at 1057.

[28] *Id.*

[29] *Id.* at 1059.

[30] *See* Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1058-59 [hereinafter cited as Singer, *Legal Rights*]; *see also* Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

[31] Singer, *Legal Rights*, *supra* note 30, at 1058 (quoting Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 7 (1894)).

peting considerations and persuasive explanations of the reasoning process and the result reached.[32]

III. IMPLICATIONS

Regardless of the philosophy preferred or chosen, this overview implies that standards of general applicability to the decisional process can be identified and extrapolated from jurisprudence. These standards can serve not only as guidelines for, but also as a rudimentary measure of, the adequacy of judicial performance.

An important implication to be derived from jurisprudence is that law has an inner core. While the scholars seemingly differ on the issue of the outer boundaries of law, they appear to agree that law has a tangible center. Law always encompasses, at a minimum, clear and accepted rules. While, according to some, this central core *is* the law, it is in reality the primary basis upon which law—indeed most of our decisional law—is based.

There are special cases whose resolution can move or extend the law from its core foundations. These cases stretch current or accepted law beyond its traditional, recognized bounds, regardless of how fixed those boundaries are drawn. Bodenheimer regarded these as unprovided-for cases, whose determination occurs in an extralegal corona, a transitional or penumbral zone of law, in which the decisional determinants move farther and farther away from the gravitational pull of the core-center of the law itself.[33] Thus, there is general acknowledgment that the decisional process can involve in a given case not only the determination of law as it exists without dispute, but also the extension of law, which may or may not be properly considered a genuine part of the law, depending on the underlying conceptualization of the nature of law.

A primary implication distilled from this perception of lawmaking is the existence of the "hard case." Hart, who so strongly stressed that fixed rules comprise real law, also dealt extensively with the difficult case that cannot be readily resolved by such rules, arguably implying that law has an elastic quality. Dworkin, who is most identified with the concept of the "hard case," considered such cases as those in which a judge would be called upon to select principles as a ground of decision in the absence

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[32] *See id.* at 1059.

[33] *See* Bodenheimer, *supra* note 10, at 1150, 1171-72.

of a determinative rule. Once decided, however, such a decision itself would then take its place in the family of law. Furthermore, Dworkin also recognized the potential for the judicial determination of a "hard case" to be premised upon policy rather than a reasoned extension of principle. There could be an exception for cases of "special urgency." Munzer observed that numerous cases did not yield uniquely correct or "right answers." Singer stressed the intractable, inevitable, and recurrent contradictions inherent in the legal system, which demand resolution on an ad hoc basis, implying that most cases are really "hard cases." Justice Cardozo, in *The Nature of the Judicial Process*, while not resorting to the vocabulary we are presently employing, himself aptly described a judge's confrontation with the "hard case":

> What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?[34]

The "hard case" is the crucible in which law is created; it propels the law toward new horizons. For these reasons, the "hard case" can serve as a launching pad, in effect, for an analysis of the decisional process. An instructive example is *Henningsen v. Bloomfield Motors, Inc.*,[35] a case extensively discussed by Dworkin.

In *Henningsen*, the New Jersey Supreme Court concluded that an automobile manufacturer should be held to a higher standard than other manufacturers and should not be insulated from liability by the narrow warranty limitation in the contract of sale when the automobile proved defective.[36] In reaching this unprecedented result, the court identified competing principles and then assigned comparative weight and importance to each in order to determine whether the "weight of the individual right" asserted by the plaintiffs overcame the countervailing principles, or rights, offered by the defendant.[37] Thus, the court observed that "we must keep in mind the

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[34] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921).
[35] 32 N.J. 358, 161 A.2d 69 (1960).
[36] *See id.* at 404-05, 161 A.2d at 95.
[37] *See id.* at 403-04, 161 A.2d at 94-95.

general principle that, in the absence of fraud, one who does not choose to read a contract before signing it, cannot later relieve himself of its burdens."[38] It also factored into its analysis the related principle of "freedom of competent parties to contract," as well as the absence of real bargaining power on the plaintiff's part.[39]

The court then acknowledged the need to weigh competing principles, observing that "[f]reedom of contract is not such an immutable doctrine as to admit of no qualification in the area in which we are concerned."[40] The competing principles and policy considerations that the court marshaled were these:

> In a society such as ours, where the automobile is a common and necessary adjunct of daily life, and where its use is so fraught with danger to the driver, passengers and the public, the manufacturer is under a special obligation in connection with the construction, promotion and sale of his cars, [an obligation to treat] consumer and public interests . . . fairly.[41]

The court then asked rhetorically, " '[I]s there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice?' "[42] It concluded, in selecting a determinative principle, that the courts will " 'refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other.' "[43]

What *Henningsen* illustrates so well is the existence of a firm bedrock to which law is anchored. The "hard case" is the one that exposes what underlies the surface and frees the law from its foundational moorings. In addition to the themes of the core-center of law and the outreaches of law that are exemplified by such a hard case, however, jurisprudence invariably points up the distinctive role of morality in influencing law.

There are unique conceptual difficulties in the law's accommodation of morality. This is so whether morality is considered an intrinsic part of the law or an extralegal influence. The implications of the role and impact of morality in the effectuation of law and the

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38 *Id.* at 386, 161 A.2d at 84.

39 *Id.*

40 *Id.* at 388, 161 A.2d at 86.

41 *Id.* at 387, 161 A.2d at 85.

42 *Id.* at 389, 161 A.2d at 86 (quoting United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting)).

43 *Id.* (quoting United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting)).

decisional process are not of passing academic interest only. The assumptions concerning the proper place of morality in the development of law can measurably determine not only the decisional route taken by a court in a given case, but also the degree to which others, including society, can accept the court's decision as properly founded.

A favorite example of the interaction between morality and law involves the question of whether one has a legal or moral duty to rescue another in distress, a question frequently posed over time. In general, there is an almost complete absence of a legal duty to rescue a person in fatal danger. In 1908, James B. Ames wrote that one who can attempt a rescue with little or no inconvenience to himself should have a legal duty to do so; he recognized the practical difficulty in line drawing, but observed that the problem it presents is continual rather than insurmountable.[44]

Dworkin hypothesizes a situation in which one person is drowning and another may rescue the person at peril while incurring only a negligible risk.[45] The ultimate issue is whether the rescuer owes a duty to save the drowning man. Dworkin sees this question as turning upon whether the "collective utility" of both men is improved by the rescue, thereby extending to the drowning man a right to the rescue and to the potential rescuer a duty to act.[46] His ultimate view rests solely on a consideration of "the welfare of those whose abstract rights are at stake."[47] In this context, Dworkin specifically cautions against reliance upon policy. He argues that if the principle requiring rescue at minimal risk is modified to consider the marginal utility to the entire community rather than only the collective or respective utilities of the victim and the rescuer, the results will be both inconsistent and unpersuasive. In such a case, the rescuer would be required to consider the risk to himself, the risk to the victim, and the relative social importance of each individual. What might logically follow is that an "insignificant" man might be required to save a "rich" man, but not vice versa. This result, according to Dworkin, compels the rejection of policy as a foundation for deciding the "hard case."[48]

In 1959, this legal and moral conundrum was presented to the Pennsylvania Supreme Court in the case of *Yania v. Bigan*.[49] In that

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44 Ames, *Law and Morals*, 22 HARV. L. REV. 97, 112-13 (1908).
45 *See* Dworkin, *Hard Cases*, *supra* note 12, at 1076.
46 *Id.*
47 *Id.*
48 *Id.* at 1077.
49 397 Pa. 316, 155 A.2d 343 (1959).

case, the defendant taunted the victim to jump into a water-filled ditch located on the defendant's property. The victim then drowned while the defendant stood by.[50] The court held the defendant not liable, stating that "[t]he mere fact that Bigan saw Yania in a position of peril in the water imposed upon him no legal, although [there was] a moral, obligation or duty to go to his rescue unless Bigan was legally responsible . . . for placing Yania in the perilous position."[51] Thus, the court refused to include its own idea of morality as a part of the decisional law of the state.

Jurisprudence can also determine or color perceptions of the appropriate intergovernmental roles and functions in the legal process. A particular conceptualization of law impliedly assigns and allocates responsibility for making law. According to one view of the nature of law, the determination of a given issue or controversy may be one that can appropriately be made only by judges, or alternatively, only by legislators, or indeed, may best be left to society and the collective conscience of the community. Nevertheless, a particular controversy may present issues that tangle a variety of decisional strands—rules of law, general principles, precepts of policy, and moral values—so that an ultimate and enduring resolution may actually require the participation of not only the judiciary, but also the legislature. Indeed, such a resolution may call for public involvement and social understanding of the issue as well. Jurisprudential assumptions may have a lot to do with the acceptability of the way law is effectuated in a given matter.

Thus, considerations of jurisprudence can yield a number of important implications that are relevant to the judicial decisional process. The first is that accepted, clear legal rules undergird most of our decisional law. Another, the obverse, is suggested by the existence of the controversy that cannot be resolved by established law or precedent. Such cases escalate the decisional role to a level that is complex, dynamic, and innovative, rather than straightforward, static, or mechanical. A further consequence is that the identification or characterization of a case as one invoking this heightened judicial performance itself becomes a significant judicial function.

An additional implication is the importance of comprehending the available bases that may be relevant and applicable in deciding such hard cases. In dealing with the hard case, the court must engage in a wide-angle survey of the decisional topography; a court must orient itself to a sense of whether it is on the solid bedrock of

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[50] *Id.* at 318, 155 A.2d at 344-45.

[51] *Id.* at 321-22, 155 A.2d at 346.

precedent, the loose footings of principle, or the uneven terrain of policy or morality. The court must then rationally choose the particular bottom in which to plant its decision. In this exercise, the court must proceed rationally in quantifying, comparing, and weighing the various decisional grounds that are available, and its ultimate selection of a decisional foundation must follow soundly from a rational methodology. Because a court's decision in a hard case is bound to be disputable, the court should also recognize the need to reveal and explain fully all of the facets of the decisional process: the initial analysis of the controversy, the threshold categorization of the case as hard or unprecedented, the identification and examination of all grounds that bear upon the decision, the selection among competing grounds, and the reasons by which particular grounds are quantified, assigned priority, and ultimately given determinative weight.

Finally, it is important to recognize when the court has based its determination upon policy considerations or moral values. Decisions resting on these grounds usually transcend the interests of the parties themselves. They uniquely implicate the interests of society in general, as much as they determine the rights of the individuals or groups who are litigants in the particular case. In cases affecting collective or community interests, the court must be prepared to acknowledge its own finite decisional authority and powers. It must, in such cases, take into account the paramount subject-matter concerns and the superior issue-resolving resources and ability of other branches or agencies of government, and of those institutions and segments of society whose assigned or accepted role is to address and decide just such questions. In those cases, the court must be attuned to recognize, even as it renders a decision, when appropriate and responsible actions concerning the judicially decided issues are or may be taken by others. When courts confront novel and significant public questions, eventual judicial response and reaction can be as important as threshold judicial initiative and imagination.

IV. APPLICATIONS

Within the analytical framework we have structured, it should be possible to see whether a court has properly and soundly engaged in the decisional process. This thesis can be illustrated by representative decisions relating to major areas of public concern, such as those involving individuality, those dealing with interpersonal relationships, and those addressing

group relationships, including governmental or institutional relationships.

With recurring frequency, courts have been called upon to decide cases that directly touch the integrity of the individual. Three such cases are *In re Quinlan*[52] in 1976, *In re Grady*[53] in 1981, and *In re Conroy*[54] in 1985. In each, the court was faced with profound and vexatious issues concerning incompetent persons unable to make choices for themselves on matters affecting their very survival, basic well-being, and personal privacy: *Quinlan* involved a twenty-two-year-old, permanently comatose woman, whose father sought to have her removed from a life-prolonging respirator;[55] *Grady* involved a nineteen-year-old, mentally retarded woman whose parents wished to have her sterilized;[56] and *Conroy* concerned the request of a guardian to have a feeding device removed from an eighty-four-year-old, seriously and permanently impaired woman whose death was imminent.[57]

The controversy giving rise to *Conroy* unquestionably presented a "hard case," one not governed by available decisional precedent or any statutory ground of decision or regulatory rule of law. The court proceeded to examine a number of relevant principles as possible grounds for reaching its determination. The court referred to Ms. Conroy's right of privacy. It found this principle to be inapposite as a determinative ground of decision, however, and ultimately turned to tort principles for guidance. Specifically, the court based its analysis on the doctrine or principle of "informed consent"—"a primary means developed in the law to protect this personal interest in the integrity of one's body."[58] From the tort doctrine of informed consent, the court reasoned that "[t]he patient's ability to control his bodily integrity through informed consent is significant only when one recognizes that this right also encompasses a right to informed refusal."[59] Together, the right of consent and the right of refusal comprised the common law right to self-determination. The court then determined that countervailing principles relating to state interests in preserving life, preventing suicide, safe-

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52 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).
53 85 N.J. 235, 426 A.2d 467 (1981).
54 98 N.J. 321, 486 A.2d 1209 (1985).
55 *Quinlan*, 70 N.J. at 18, 355 A.2d at 651.
56 *Grady*, 85 N.J. at 240-42, 426 A.2d at 469-70.
57 *Conroy*, 98 N.J. at 337-39, 486 A.2d at 1216-17.
58 *Id.* at 346, 486 A.2d at 1222.
59 *Id.* at 347, 486 A.2d at 1222.

guarding the integrity of the medical profession, and protecting innocent third parties failed to outweigh the right to self-determination.[60]

The more troublesome issue in *Conroy* arose from the need to protect and vindicate this right in view of the individual's inability to exercise it. In resolving this dilemma, the court built on its foundational right to self-determination. Analogizing to testamentary dispositions of property, the court reasoned that a person's inability to express herself does not result in the loss of that person's entitlement to those rights.[61] Accordingly, in line with its self-determination premise, it ruled that "life-sustaining treatment may be withheld or withdrawn from an incompetent patient when it is clear that the particular patient would have refused the treatment under the circumstances involved."[62] With respect to the majority of the people, however, who have not previously revealed their views on life-sustaining treatment, the court recognized the shortcomings of the self-determination premise, observing that "in the absence of adequate proof of the patient's wishes, it is naive to pretend that the right to self-determination serves as the basis for substituted decision-making."[63] The court therefore turned to a traditional legal principle, the parens patriae power, which supports the State's authority to permit decisions to be made for an incompetent that serve the incompetent's best interests. It then fashioned objective or demonstrable tests to effectuate the best interests of the patient in determining whether life-sustaining treatment should be ended.[64]

Although the court properly attempted to ground its decision firmly on the basis of principles that were carefully compared, quantified, and balanced, it is noteworthy that it could not avoid treading upon the infirm footings of moral values, a consequence, I submit, that is inherent in the best-interest standard. A decision based on an individual's best interests reflects "a collection of values that society will impute to incompetent persons who cannot express their own preferences."[65] The case in this respect exemplifies the ways in which even the most scrupulously considered and conservatively drawn decisions—those based as

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60 *See id.* at 348-53, 486 A.2d at 1223-25.

61 *Id.* at 359, 486 A.2d at 1229.

62 *Id.* at 360, 486 A.2d at 1229.

63 *Id.* at 364, 486 A.2d at 1231.

64 *See id.* at 364-67, 486 A.2d at 1231-33.

65 *Id.* at 392, 486 A.2d at 1246 (Handler, J., concurring in part and dissenting in part).

much as possible on recognized "legal" precedent and carefully weighed principles—will frequently draw upon public policy and morality.

The application of these precepts to another major area of public concern—interpersonal relationships—is exemplified by the case of *Kelly v. Gwinnell*.[66] The *Kelly* court was challenged to consider the relationship between a social host, his guest, and unknown third persons, and whether that relationship entailed a responsibility and an enforceable legal duty on the part of the host to avoid the risk that his drunken guest would cause an automobile accident. The challenge was posed by a young woman who was seriously injured when her automobile was struck head-on by a car driven by the guest after he had become extremely intoxicated at the home of the host.[67] This case was regarded as a "hard case" in that no case law or statute had considered imposing a legal duty on the host under these particular circumstances. While precedent existed imposing liability upon one engaged in the tavern business for the conduct of an inebriated adult patron who subsequently caused injury and upon social hosts serving liquor to an intoxicated minor, our courts had recognized neither the extension nor the limitation of liability to a social host for serving liquor to a visibly intoxicated adult.[68] The issue was genuinely unresolved and not governed by any firm precedent.

Initially, the court recognized that this case involved the traditional precepts of negligence. Thus, it simply considered whether under traditional tort principles a duty exists or should be imposed upon the social host to prevent the unreasonable risk of harm presented by a drunken driver. In ascertaining whether a duty should rightfully be imposed upon a social host under the facts, the court specifically noted that perceptions of fairness should dictate the result, which called for the "weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution."[69] In addition, the court considered matters of public policy. It emphasized the drunken driving problem in society, citing numerous sanctions as evidence of the community's policy and moral judgments. It found these to

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[66] 96 N.J. 538, 476 A.2d 1219 (1984).

[67] *Id.* at 541, 476 A.2d at 1220.

[68] *See generally* Note, *Social Host Held Liable for Serving Liquor to Intoxicated Guest Who Causes Auto Accident Injuring Third Party*, 15 SETON HALL L. REV. 616, 619-24 (1985) (outlining prior New Jersey law).

[69] *Kelly*, 96 N.J. at 544, 476 A.2d at 1222.

outweigh community mores associated with social drinking in the home and concluded that the curtailment of these mores was significantly outweighed by a rule of conduct that would reduce the harm that can result from such drinking.[70]

The opinion is also instructive because the court expressly made its holding prospective only. This determination impliedly recognized that controversial policy considerations, in contrast to clear legal rules or common principles, constituted the major ground of decision. In this sense, the opinion departs from the notion of "articulate consistency." Because such a decision moves into the realm of the unexpected, fairness and acceptability require that it not be applied retroactively.[71] The opinion is controversial—aside from one's view of its correctness—because it implicates considerations of public policy and also draws upon the perceived moral judgment of the community, which roundly condemns the evils of drunken driving. It thus falls within the legislative domain, albeit not exclusively.

In addition, the case is noteworthy in terms of what it did *not* decide. The decision left unresolved issues such as the legal status of persons in different social settings from that involved in the *Kelly* case itself. The opinion thus illustrates Singer's ad hoc approach and Munzer's notion of "conscious indeterminacy" in the development of the decisional law.

Finally, there is the case of *Department of Environmental Protection v. Ventron Corp.*,[72] which focused on group and governmental relationships. In *Ventron*, the court addressed the responsibility of various corporate entities for the cost of cleanup and removal of mercury that had been dumped onto a forty-acre tract of land and allowed to seep into Berry's Creek, an estuary of the Hackensack River.[73] The case primarily involved the interpretation of statutory provisions governing pollution liability. The statute purported to impose liability upon any person who was responsi-

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[70] *See id.* at 548, 476 A.2d at 1224.

[71] This further illustrates why a "hard case" may be on the cutting edge of judicial adjudication:

> Because the principles invoked in judicial decision of hard cases are implicit in extant precedents, there is no actionable unfairness in a court's insistence that such principles in fact existed prior to the particular decision actually applying them. In contrast, legislative decisions, typically resting on policies, are correctly given only prospective effect.

Richards, *supra* note 10, at 1081 (footnote omitted).

[72] 94 N.J. 473, 468 A.2d 150 (1983).

[73] *Id.* at 481, 468 A.2d at 154.

ble for causing a toxic-waste injury to the land.[74]

In its decision, the court drew upon existing precedent and major relevant principles. Because of the imprecision of the statutory phraseology and the uncertain status of legislative intent, the court felt impelled to review cases dealing with landowner responsibility and common law nuisance principles. Accordingly, it clarified an existing body of decisional law. It elected to adopt the principle of an early common law case, *Rylands v. Fletcher*,[75] which had previously been rejected in New Jersey, and ruled that as a matter of common law, a landowner would be strictly liable for harm caused by ultrahazardous activity on his property.[76] In effect, the court considered and quantified competing principles of law, and having assigned greater importance to this common law principle, the court applied it as a precedent in interpreting the statute. The court also considered the established rules of law concerning the separateness of corporate identity and whether the corporate veil could be pierced under these circumstances.[77] It held that under the statute, liability would be imposed on prior landowners as well as their corporate agents for their actions in generating toxic materials on their own property and for the effects of toxic wastes that in the past caused severe injury to the property of others.[78]

The court's decision is constructively grounded upon principles nourished by legitimate concerns of public policy. As Dworkin himself observed, a rule of law may be properly "generated by principle and qualified by policy."[79] The court's statement that "[t]hose who poison the land must pay for its cure"[80] articulates a new rule of law fused from precedent, principle, and public policy.

Each of these cases illustrates the decisional process in light of contemporary jurisprudence. They are examples of "hard cases," presenting issues not determinable by available precedent or clear rules of law. While they recognize the bedrock of law at the base of the controversy, they accept the need to move from that foundation in search of a satisfactory basis for resolving the dispute. They reflect decisional principles, such as articulate

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74 *Id.* at 494, 468 A.2d at 160-61.
75 3 L.R.-H.L. 330 (1868), *aff'g* 1 L.R.-Ex. 265 (1866).
76 *See Ventron*, 94 N.J. at 488-93, 468 A.2d at 157-60.
77 *See id.* at 500-01, 468 A.2d at 164.
78 *See id.* at 503, 468 A.2d at 166.
79 Dworkin, *Hard Cases*, *supra* note 12, at 1059.
80 *Ventron*, 94 N.J. at 493, 468 A.2d at 160.

consistency and conscious indeterminacy. In varying degrees and with different emphasis, each decision involves a threshold analysis of the kinds of issues that are presented for determination, with an initial consideration of clear legal rules and available precedent. Each presents an assessment of relevant, albeit competing, principles, a confrontation with controversial considerations of public policy as these shade into the deeper concerns of social and individual morality, and ultimately, a determination of the grounds that justify the resolution of the underlying issues.

V. RAMIFICATIONS

Having examined the process of decisional lawmaking against the landscape of contemporary jurisprudence, we can consider anew our earlier queries. These, to reiterate, arose from a concern for courts confronted with public commentary and criticism in the wake of controversial decisions. This is a concern that touches upon judicial legitimacy.

Given the premise that most decisional law is firmly based on clear and established legal doctrine, can courts adequately identify those cases that are "hard"—those that genuinely find existing law inadequate and require creative and novel reasoning in order to reach a sound disposition? Our examples—*Conroy*, *Kelly*, and *Ventron*—indicate that courts can make such judgments. Thus, regardless of the asserted correctness of the results in these cases, they are properly viewed as hard cases not controlled by available precedent, cases reasonably demanding the formulation of innovative grounds for decision. The acuteness of the particular controversies, the urgency of a needed resolution of the specific conflicts, and the patent inadequacy of conventional doctrine all suggest that these cases truly required a conscientious exploration of new bases for their dispositions.

A ramification that flows from the thesis of the "hard case" is whether in the decisional process courts can satisfactorily identify, define, and quantify the reasons that govern the decisional results. Directly related to this concern is whether a court can clearly and fully explain its reasoning. If the court so explains its reasoning, the decision itself should serve as a self-testing measure of its intrinsic soundness. Such a decision should also be a map showing how far and by what route the court has moved along a course that will have started from a point marked by clear and fixed rules of law and ended in the thickets of public policy and social morality. Again, I submit, the examples confirm the

courts' ability to explore the decisional challenge, fashion a decisional structure, and plot the decisional journey so as to enable the reader to follow a decision's every turn from a clear beginning to a firm conclusion.

By unfolding the decisional process, a court may in a particular case be perceived as having ventured beyond its appropriate jurisdictional turf, arguably trenching upon areas that are properly occupied by the legislature or perhaps even by society as a whole. Gauging the distance the court may have gone entails the ability to recognize when a particular subject falls clearly within the exclusive domain of others, and when it falls within overlapping areas of mutual or shared responsibility. Such cases can involve questions or issues of policy, in which individual interests are overshadowed by community interests and collective ends, and in which the decision on the issues presented effectively or necessarily determines such community or collective concerns. Such determinations will often settle not only the particular individual rights and interests of the litigants whose personal claims triggered the case, but community or societal interests as well.

Thus, it may be, and often is, that a case and its resultant decision involve a mix of individual rights and collective interests. Such a case can pose the most difficult decisional challenges to a court. The challenge can be acute when courts are required to fashion judicial remedies in order to effectuate or preserve the individual rights it has determined. The scope of the remedy itself may be tantamount to a policy determination. The effect of such judicial remedies may constitute, in Dworkin's terminology, the selection of available means to accomplish what may be perceived as a collective interest as much as it involves the remedial protection of an individual right. Thus, *Mt. Laurel II* has as much to do with remedies as it does with constitutional rights and interests. *Robinson v. Cahill* is a similar case. When in these cases the court has enunciated a defensible legal right—in *Mt. Laurel II*, the entitlement to affordable housing, in *Robinson v. Cahill*, the entitlement to an adequate public education—that right is enjoyed not only by the litigants before the court, but also by classes of persons comprising a broad stratum of society. The interest at stake can fairly be considered to encompass a collective end or a societal goal, as well as an individual or group right. Consequently, the judicial remedy that is devised to protect these interests constitutes both the vindication of the litigants' rights and the selection of particular means to achieve a societal goal.

From this perspective, it is important to understand that such a decision implicates matters of policy that are legislative and social in character.

The considerations generated by such cases touch upon questions of governmental and institutional authority and intergovernmental responsibility, initiative, and cooperation. All branches of government have both competing and interlocking roles in the effectuation of law. Judicial decisions that are strongly influenced by or grounded on matters of policy, or which synthesize policy and moral principles, constitute "law." While such decisions effectuate law, however, they can also be catalysts for both legal and social change. They are developmental as well as determinative. Such decisions are intrinsically mutable—susceptible, indeed genetically programmed, to change.

The changes wrought by these decisions can vary in form and effect. Such change can take the form of an evolving common law. *Henningsen*, for example, truly gave birth to the modern, judicially crafted legal doctrine of strict liability for manufactured products. The decision has been credited with producing a revolutionary transformation in the law of torts. The right-to-die cases of *Quinlan* and *Conroy* and the social-host case of *Kelly v. Gwinnell* are examples of cases in which the grounds of decision incorporate evident policy precepts and moral values, as well as legal rules and principles. Each effectuates law, providing a legal benchmark against which individuals can understand and measure their rights and duties and arrange their conduct accordingly. These decisions also have a developmental prepotency; they have galvanized public attention upon important issues that implicate public policy and which are particularly amenable to legislative resolution.[81]

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[81] The process of legal growth exemplified by these cases is a repetition of the evolution of the law that was stimulated by the *Robinson v. Cahill* decision in the field of public education. *Robinson v. Cahill* was followed by the Public School Education Act of 1975, ch. 212, 1975 N.J. Laws 871 (codified as amended at N.J. STAT. ANN. §§ 18A:7A-1 to -33 (West Cum. Supp. 1985-1986)). *See generally supra* note 5. In Abbott v. Burke, 100 N.J. 269, 301, 495 A.2d 376, 393 (1985), the court, in dealing with a constitutional attack upon that statute, held that there should be an exhaustion of administrative remedies to allow full effectuation of the Act, reflecting the perceived importance of a resolution of issues entailing community or collective goals by other branches of the government. This process is also similar to the legal developments that followed the judicial rejection of the doctrine of sovereign immunity in Willis v. Department of Conservation & Economic Dev., 55 N.J. 534, 264 A.2d 34 (1970), which was followed by legislation controlling tort claims against the government. *See* Tort Claims Act, ch. 45, 1972 N.J. Laws 140 (codified as amended at N.J. STAT. ANN. §§ 59:1-1 to :12-3 (West 1982)). This, in turn, paral-

One consequence flowing from this thesis is that courts that have exercised initiative in areas that overlap the legitimate concerns of another branch of government, or society as a whole, must be prepared to tolerate and consider the differing views of the other bodies when appropriately and properly expressed. Depending upon the nature and mix of public and individual issues that are implicated in a given case, a court should be prepared to defend, share, or yield the ground upon which its decision rests.

Our exposure to jurisprudence also highlights the need to recognize in the decision of cases issues that may lie at the outermost reaches of public policy, even as these fuse into areas of morality. *Kelly v. Gwinnell* could be viewed as a decision in which policy grounds were strongly influenced by moral values. This, I suggest, is not necessarily wrong or even inappropriate. Professor Fuller had an insightful way of describing the moral principles judges employ in determining tort liability, a theory that rested on the notion of duty. In *The Morality of Law*, he wrote at length on which societal concerns should and should not be the subject of legal compulsion. Fuller distinguished between the morality of aspiration, or the striving for excellence, and the morality of duty. He said:

> Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark. It is the morality of the Old Testament and the Ten Commandments. It speaks in terms of "thou shalt not," and, less frequently, of "thou shalt." It does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead, it condemns them for failing to respect the basic requirements of social living.[82]
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leled the judicial abrogation of the doctrine of charitable immunity in Colloppy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958), which was similarly followed by legislation. *See* N.J. STAT. ANN. §§ 2A:53A-7 to -11 (West Cum. Supp. 1985-1986). Most recently, in the controversial area concerning affordable housing, *Mount Laurel II* was followed by the enactment of the Fair Housing Act, ch. 222, 1985 N.J. Sess. Law Serv. No. 7, at 46 (West). This legislation was recently upheld by the New Jersey Supreme Court in Hills Dev. Co. v. Township of Bernards, 103 N.J. 1, 510 A.2d 621 (1986). This result exemplifies the court's deference to the responsibilities of the other branches of government in areas affecting public policy and community interests and goals.

[82] L. FULLER, THE MORALITY OF LAW, *supra* note 19, at 5-6.

> As we consider the whole range of moral issues, we may conveniently imagine a kind of scale or yardstick which begins at the bottom with the most obvious demands of social living and extends upward to the highest reaches of human aspiration. Somewhere along this scale there is an invisible pointer that marks the dividing line where the pressure of duty leaves off and the challenge of excellence begins. The whole field of moral argument is dominated by a great undeclared war over the location of this pointer.[83]

It is fair to conclude that there is a framework within which a court must act if it is to act responsibly. This framework, structured from the elements of jurisprudence, must account for the appropriate recognition of the character of the case a court is called upon to decide and for a sound methodology for a court to follow in reaching its determination. In addition to acting responsibly within this framework, courts must also be perceived as acting responsibly; in this sense, courts must be accountable. This entails intellectual candor, clarity, and completeness. The public should be able to understand readily and fully what the courts are doing and why they are doing it.

The integrity of judicial decisions has to do with determining cases in this way. A valid judicial decision is one that holds no secrets or hidden meanings, that inspires confidence that it is right as well as correct, sound as well as accurate, complete as well as focused, comprehensive as well as pointed, fair as well as wise, and tolerant as well as decisive. It should reflect a sense of justice that is, in a word, prudential. Will not judicial legitimacy come unbeckoned to a court that has grasped its responsibilities in this way?

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[83] *Id.* at 9-10.