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TOWARDS A PERSONALIST JURISPRUDENCE: BASIC INSIGHTS AND CONCEPTS

Samuel J. M. Donnelly*

I. INTRODUCTION**

In my youth, Roscoe Pound offered me what I then thought was a profound insight about law; I still perceive it as a very wise comment. During a conversation in his office he said: "Some think that law is economics, and there is a great deal to be said for this; others think that law is ethics; and some think that law is social engineering. They are all wrong. Law is all of these."¹ During Pound's youth, Oliver Wendell Holmes, Jr., had argued that the life of the law is not logic but experience.² Since then, as David Granfield contended recently in *The Inner Experience of Law, a Jurisprudence of Subjectivity*, American jurisprudence has been about the piecemeal recovery of a role for the person in law.³ It also has been about the forms of legal reasoning. A principal theme of this Article is that law is primarily about persons and their relationships.

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** Each reader is invited while reading this Article to enter the conversation and to experiment mentally by examining his or her own intellectual and legal method. Readers engaged in this exercise may imagine themselves as judges. While this Article often refers to the judge as he, that pronoun generically refers to both men and women. A woman judge engaged in introspective reflection on her judicial method would refer to herself as she. The male author of this Article engaged in a similar exercise would refer to himself as he. Readers engaged in reflecting on their own intellectual method should substitute the appropriate pronoun. The crossing of horizons recommended by this Article would require one to recognize the different use of pronouns by different readers and perhaps to imagine oneself using the different pronoun.

1. Samuel J. M. Donnelly, Book Review, 3 HOFSTRA L. REV. 899, 915 (1975) (reviewing WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973) and DAVID WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW (1973)) [hereinafter Donnelly, HOFSTRA Book Review].

2. OLIVER W. HOLMES, THE COMMON LAW 5 (Mark D. Howe ed., 1963) [hereinafter HOLMES, THE COMMON LAW].

3. Samuel J. M. Donnelly, Book Review, 36 AM. J. JURIS. 239, 241 (1991) (reviewing DAVID GRANFIELD, THE INNER EXPERIENCE OF LAW, A JURISPRUDENCE OF SUBJECTIVITY (1988)) [hereinafter Donnelly, AM. J. JURIS. Book Review].

This Article is an attempt to contribute a series of related insights, which could be described as a theory of personalism, to the current discussions about law. In recent years Alan Gewirth offered a theory of personalism full of valuable insights but developed differently than the discussion in this Article.⁴ Margaret Radin, working within the context of feminism and pragmatism, has also presented valuable personalist thoughts to the ongoing conversation about law.⁵ Yet a rich vein of European personalist thought has been mined only sparsely for valuable contributions to American legal thought. The insights in this Article are to some extent influenced by Bernard Häring⁶ and in particular ways, especially in the theory of the common good offered below, by the work of Karol Wojtyla in *The Acting Person*.⁷ The principal nonlegal background for this Article, however, is

4. See ALAN GEWIRTH, *REASON AND MORALITY* (1978).

5. Margaret J. Radin, *The Pragmatist and the Feminist*, in *PRAGMATISM IN LAW AND SOCIETY* 127 (Michael Brint & William Weaver eds., 1991).

6. See BERNARD HÄRING, *FREE AND FAITHFUL IN CHRIST* 77, 82-83 (1978). Häring states:

One of the essential words and concepts of today's German theology and culture is *Mitmenschlichkeit*, which could be translated as "co-humanity". We realize our full humanity in all its dimensions and potentialities insofar as we honor and promote the same humanity in our fellowmen.

....
Our leitmotif, "free and faithful in Christ", calls not so much for a metaphysical approach in view of the abstract "being" as for a personalistic and communal approach. One of the main perspectives, therefore, is *healthy relationships* with God, with fellowmen, with one's self and with all of creation. The whole of doctrine is to be seen explicitly in view of salvation, wholeness of persons and of fostering families, communities and societies of responsible persons.

See generally BERNARD HÄRING, *Being-a-Person in Word and Love*, in *THE CHRISTIAN EXISTENTIALIST* 10-11 (1968) [hereinafter HÄRING, *THE CHRISTIAN EXISTENTIALIST*] (Deems Lectures delivered at New York University in 1966), where Häring summarizes:

The self of man in the lonely crowd often experiences the deepest self-estrangement, frustration, and lack of self-communication from which abstract thought and a materially oriented knowledge is totally incapable to free him. Modern psychology recognizes ipsation . . . as a severe illness, a sign of man's immaturity. Ipsation represents man's incapacity for genuine human communication and, in short, his inability to emerge from himself in a genuinely human manner. . . .

....
Modern personalism, as represented by such philosophers and theologians as Ferdinand Ebner, Martin Buber, Max Scheler, Emil Mounier, Gabriel Marcel, Theodor Steinbüchel, Romano Guardini, Emil Brunner, Karl Barth, Dietrich Bonhoeffer, Richard Niebuhr, is a personalism of encounter and community in word and love.

7. KAROL WOJTYLA, *THE ACTING PERSON* (Anna-Teresa Tymieniecka ed. & Andrzej Potocki trans., 1979).

a melding of the thought of Bernard Lonergan⁸ and John Macmurray.⁹

Bernard Lonergan—in *Insight: A Study of Human Understanding*, a philosophical work, and *Method in Theology*—offers an understanding of general intellectual method as well as an analysis of a series of existing methodologies, including the scientific, the mathematical, and the historical. He describes a number of these, including the historical, as specialized commonsense methods. He describes commonsense method as the self-correcting process of learning through living.¹⁰ Lonergan's development of a general intellectual method from multiple particular methods, and his commonsense method offer a number of important insights into law. He probably would classify law among the specialized commonsense methods. In *Insight*, Lonergan encourages the reader to participate in his exploration through an introspective analysis of our own intellectual method.¹¹ As will be argued later, introspective analysis of a judge's intellectual method implies that the judge is a person, a subject, whose subjectivity is worth examining. A judge who understands himself as a subject more readily recognizes that those with whom he deals are also persons or subjects.¹² Lonergan offers a way to reflect on the minds of judges, and hence, on judges as persons and to relate legal decision-making method and law to that reflection.¹³

John Macmurray—in *The Self As Agent*,¹⁴ that is as one who acts, and *Persons in Relation*¹⁵—has developed a theory of persons in relation to each other through action. Although Lonergan's thought has many personalist aspects, including his important discussion of con-

8. BERNARD J.F. LONERGAN, *INSIGHT: A STUDY OF HUMAN UNDERSTANDING* (3d ed. 1970) [hereinafter LONERGAN, *INSIGHT*]; BERNARD J.F. LONERGAN, *METHOD IN THEOLOGY* (2d ed. 1973) [hereinafter LONERGAN, *METHOD IN THEOLOGY*].

9. JOHN MACMURRAY, *THE SELF AS AGENT* (1957) [hereinafter MACMURRAY, *THE SELF AS AGENT*] (volume 1 of Professor Macmurray's Gifford Lectures given under the title *THE FORM OF THE PERSONAL*); JOHN MACMURRAY, *PERSONS IN RELATION* (1961) [hereinafter MACMURRAY, *PERSONS IN RELATION*] (volume 2 of Professor Macmurray's Gifford Lectures given under the title *THE FORM OF THE PERSONAL*).

10. See LONERGAN, *INSIGHT*, *supra* note 8, at 44, 396-98, 425; DAVID TRACY, *THE ACHIEVEMENT OF BERNARD LONERGAN* 104-32 (1970).

11. See LONERGAN, *INSIGHT*, *supra* note 8, at xix.

12. See Donnelly, AM. J. JURIS. Book Review, *supra* note 3, at 242.

13. See TRACY, *supra* note 10, at 133-44; Samuel J. M. Donnelly, *Principles, Persons, and Horizons: A Friendly Analysis of What Dworkin Has Overlooked*, 26 ST. LOUIS U. L.J. 217, 254-65 (1982) [hereinafter Donnelly, *Principles, Persons, and Horizons*].

14. See MACMURRAY, *THE SELF AS AGENT*, *supra* note 9.

15. See MACMURRAY, *PERSONS IN RELATION*, *supra* note 9.

version in *Method in Theology*,¹⁶ Macmurray offers a more fully personalist understanding of the individual in relation to others and to society.¹⁷ Lonergan's analysis of intellectual method, when used to develop an understanding of the judge's decision-making process, allows us to apply Macmurray's personalist theory and insights to law. The judge may be understood as one who acts through judicial decisions in relation to others.¹⁸ An examination of a judge's decision-making method is an examination of his action as a person in relation to other persons and to society, which could be considered one mode of persons acting together.

In *The Inner Experience of Law, A Jurisprudence of Subjectivity*,¹⁹ David Granfield applies Lonergan's insights and method to law and takes the first steps towards melding his thought with the grand conversation of American jurisprudence.²⁰ Following the path broken by Granfield and continuing the development of Lonergan's thought as applied to law is an easier task because of a series of developments in American jurisprudence over the last century. Among these are the piecemeal recovery of a role for the person in law, noted by Granfield,²¹ and the focus of American jurisprudential thought on the judge's decision-making process.²² The American legal realists in particular have begun the introspective analysis of the judge's decision-making method²³—an exploration continued to some extent by the critical legal studies movement and other postmodern approaches to law.²⁴

A major dilemma for personalist thought posed by the current stage of the grand conversation of American jurisprudence is the apparent incompatibility between decisions grounded in strong principles reflecting important ideals and decisions grounded in contextual

16. See LONERGAN, *METHOD IN THEOLOGY*, *supra* note 8, at 237-47, 267-69.

17. See MACMURRAY, *PERSONS IN RELATION*, *supra* note 9.

18. See Donnelly, *AM. J. JURIS. BOOK REVIEW*, *supra* note 3, at 243-45.

19. *Id.*

20. See *id.* at 240, 251; see also SAMUEL J. M. DONNELLY, *THE LANGUAGE AND USES OF RIGHTS* (1994) (explaining theory of grand conversation of legal philosophy in twentieth century) [hereinafter DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*].

21. See Donnelly, *AM. J. JURIS. BOOK REVIEW*, *supra* note 3, at 241.

22. *Id.* at 243-45.

23. See Donnelly, *HOFSTRA BOOK REVIEW*, *supra* note 1, at 911-12; see also Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 226-37 (discussing situation sense as method of judicial decision making).

24. See Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); cf. Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985) (demonstrating how reader's preconceptions of gender affect understanding of law casebook).

decision making. Ronald Dworkin's insistence on principled decisions ultimately justified by equal respect and concern for all persons has great appeal for personalist thought.²⁵ Nevertheless it is difficult to relate adequately and do justice to real persons without contextual decision making; decision making that concerns the relationships between persons in particular situations.²⁶

This Article, then, is an attempt to contribute insights to the grand conversation of American jurisprudence by further melding personalist thought with the piecemeal recovery of the person in law and with the continuing discussions of the judicial decision-making process.

The next segment of the Article, Part II,²⁷ continues this brief introduction to personalist thought by presenting a central concept, the person—or the judge—as one who acts, and discussing the clarification which that concept offers to jurisprudence. Part III²⁸ traces briefly the recovery of a role for the person in American reflections on law. One important moment in that recovery was the legal realist discovery of “insight” which Karl Llewellyn called “hunching” or “situation sense”²⁹ and Jerome Frank described as the “gestalt.”³⁰ That vital moment in introspective reflection on judicial and intellectual method is discussed in Part IV,³¹ which lays a foundation for further discussion and a personalist critique of method in Part V.³² Reflection on intellectual and legal method, both in Lonergan's work and in much postmodern thought, encounters our own limited knowledge and understanding and the contextual situatedness of our thought, a phenomenon which Lonergan describes as horizons.³³ Part VI³⁴ discusses horizons in intellectual and legal method and examines the experiences which Lonergan describes as crossing and transcending horizons.³⁵ Principles, ideologies, and fundamental theories must be perceived, as argued in Part VII, within the context of horizons but

25. RONALD DWORKIN, *LAW'S EMPIRE* 198, 206-07 (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*]; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 178-81 (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*].

26. See Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 258-63.

27. See *infra* text accompanying notes 44-65.

28. See *infra* text accompanying notes 66-77.

29. See Donnelly, *HOFSTRA Book Review*, *supra* note 1, at 906-11.

30. *Id.* at 909.

31. See *infra* text accompanying notes 78-105.

32. See *infra* text accompanying notes 106-43.

33. See TRACY, *supra* note 10, at 12-21, 104-32.

34. See *infra* text accompanying notes 144-86.

35. See Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 254-65.

also as related to commitment to persons. In personalist thought, commitment to persons is central but it requires us not merely to announce, and perhaps logically develop, that commitment but also to listen to and attempt to understand persons in the context of their concrete circumstances and situations.³⁶ Commitment to principles, then, must be accompanied by a commitment to cross horizons in an effort to listen to and understand persons.³⁷

With that background understanding of the role of principles and theories, it is possible, in Part VIII,³⁸ to offer a personalist theory of the common good which must be developed, as argued in Part IX,³⁹ in a pluralist society; a society composed of multiple horizons, through conversation with others across horizons.⁴⁰ Parts II through IX could be described as an introduction to the basic concepts and insights of personalism as applied to law. They also present important aspects of the ideal judge's intellectual search and effort to relate to persons through law. That search is further described and summarized in Part X.⁴¹

One who is engaged in personalist jurisprudence pursues a similar search—a search which requires conversation with others, including the many thinkers who have contributed to recovery of a role for the person in American law. Personalism is not only committed to deep respect and concern for each and all persons but is fascinated with all aspects of human life, particularly with the multiple contexts in which persons relate to each other.⁴²

This Article offers a theory of personalism in law and an introduction to its basic concepts which must be understood in the context of that search. It is an effort to contribute insights to the ongoing conversation about American law and judicial decision-making method. As is normal in conversation, the reader may find some appealing insights as well as others that do not fit the reader's understanding of law. Lonergan encourages the removal of insights from one setting and then incorporating them into different theories, under-

36. See Donnelly, *HOFSTRA Book Review*, *supra* note 1, at 906-07.

37. See Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 254-65.

38. See *infra* text accompanying notes 214-79.

39. See *infra* text accompanying notes 280-321.

40. See DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 81-91.

41. See *infra* text accompanying notes 322-95.

42. See HÄRING, *THE CHRISTIAN EXISTENTIALIST*, *supra* note 6; see also MACMURRAY, *PERSONS IN RELATION*, *supra* note 9 (discussing structure of personal world and how personal relations constitute personal existence).

standings, and horizons.⁴³ That approach is a useful and normal result of intellectual conversation. With this concept in mind, the conversation in this Article begins with a discussion of the person as one who acts.

II. ACTION

H.L.A. Hart once exclaimed that Americans are all "mad," particularly when they write about jurisprudence⁴⁴—they have been driven mad by the power of the United States Supreme Court.⁴⁵ For this reason much of American jurisprudential writing in the twentieth century—unlike Hart's own descriptive analysis—is concerned with discussing, arguing about, and prescribing methods for judicial decision making.

The philosophical and religious thinkers, whom in this Article I will describe as "personalists," would find that American emphasis appropriate. Some leading personalists—for example John Macmurray,⁴⁶ Alan Gewirth,⁴⁷ and Karol Wojtyła⁴⁸—would describe a person primarily as one who acts. In contrast, a Cartesian understanding would place the emphasis on thinking.⁴⁹ Reflection, thinking, analysis, and abstract thought in general are important to action; but, as Gabriel Marcel noted, they are secondary.⁵⁰

43. See generally TRACY, *supra* note 10, at 151-55 (explaining Lonergan's notion of advancing positions and reversing counterpositions).

44. See H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 969-70 (1977).

45. *Id.*

46. See MACMURRAY, *PERSONS IN RELATION*, *supra* note 9; MACMURRAY, *THE SELF AS AGENT*, *supra* note 9.

47. See GEWIRTH, *supra* note 4.

48. See WOJTYLA, *supra* note 7.

49. See MACMURRAY, *THE SELF AS AGENT*, *supra* note 9, at 84-103; see also WOJTYLA, *supra* note 7, at 18-22 ("On the ground of the integrated experience of man, unlike through the behavioristic approach, the person is revealed through action, because in this experience man is given us from the inside and not only outwardly."). See generally GEWIRTH, *supra* note 4 (claiming that action is necessary to principle of morality).

50. 1 GABRIEL MARCEL, *THE MYSTERY OF BEING: REFLECTION & MYSTERY* 83 (G.P.S. Fraser trans., 1950-1951); see also KENNETH T. GALLAGHER, *THE PHILOSOPHY OF GABRIEL MARCEL* 41-45 (1962) (discussing distinction between primary and secondary reflection). It is important to note, however, that we may do violence to our language by defining all persons as agents that act. As Harry G. Frankfurt pointed out, a callous definition of the term "person" diminishes our vocabulary and may lead to the neglect of an important area of inquiry. Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5, 5-6 (1971). Arguably, the definition of "person" should capture something unique to the human species, and yet, not be so exclusive that it discounts some humans (i.e., those in a coma, those with severe brain defects, et cetera). The definition of

Hart, in a view that is now perhaps out of date, would have defended the old-fashioned distinction between the "is" and the "ought," between law and morality, for example.⁵¹ That distinction disappears, as is apparent from many American writings, when one examines law from the perspective of a judge about to decide a case. The judge's decision is action or conduct subject to moral evaluation. The judge must determine what *ought* to be done. One describing the law or the judge's decisions has a different perspective. Arguably, at least from the descriptive perspective, the task of describing the is can be separate from the task of evaluating. However, that separation is not possible from the perspective of one who acts and decides.

Defining the person as one who acts provides a foundation for exploring the decision-making method of the judge as one who acts and decides.⁵² That perspective, in turn, invites introspective analysis of the judge's decision-making method. This turn to the subject implies that the judge is a person, a subject. In personalist thought, action is an important foundation for intersubjectivity, for interpersonal relations—persons are related through action.⁵³ The judge as a person who acts and decides is related to other persons through his actions. An important task in American legal theory is to relate abstract principles grounded, as Dworkin recommends, in friendship or deep respect and concern for the other, to a more concrete understanding of human persons acting together in real life situations.⁵⁴ The personalist understanding of the judge as a person in relation to other persons through his actions and who should appropriate his own decision-making method through introspective analysis, provides an opportunity for exploring the relationship between abstract principles and concrete interpersonal relations.

Through action, one perceives oneself as a person and the other as a person. In action, one cannot be isolated; one's action is in relation to something or someone. One who acts intentionally encounters

a person as an agent who acts, then, is not meant as an all encompassing definition; rather, it is offered as a clarifying concept in the realm of jurisprudence.

51. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 596 (1958) [hereinafter Hart, *Positivism*].

52. See Donnelly, AM. J. JURIS. Book Review, *supra* note 3, at 243-45.

53. See MACMURRAY, PERSONS IN RELATION, *supra* note 9, at 11-13; *cf. id.* at 12 ("For our present purpose . . . the result which concerns us especially is that it ends the solitariness of the 'thinking self', sets man firmly in the world which he knows, and so restores him to his proper existence as a community of persons in relation.").

54. Compare Donnelly, AM. J. JURIS. Book Review, *supra* note 3, at 245 (emphasizing concern for human element in law) with DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 25, at 180 (emphasizing judicial integrity over individual equality).

resistance and, hence, perceives an object which resists. In the action he perceives himself both as a subject, the one who intends the action, and an object of his action.⁵⁵ Through experiment he discovers that some resistance is intentional and, hence, the resistance of a subject. As an actor, then, he perceives himself both as subject and other because he intends his own action and perceives himself as the object of another subject.⁵⁶ As a subject we can refer to the actor as "I"; and as an object he is "You."⁵⁷ In action, persons are perceived and given together. There is always an I and a You—two subjects who perceive each other as acting intentionally although they are objects of each other's activity. John Macmurray, explaining his emphasis on the Self as agent or actor rather than as thinker, argues:

In reflection we isolate ourselves from dynamic relations with the Other; we withdraw into ourselves, adopting the attitude of spectators, not of participants. We are then out of touch with the world, and for touch we must substitute vision; for a real contact with the Other an imagined contact; and for real activity an activity of imagination.

. . . .

We know existence by participating in existence. This participation is action. When we expend energy to realize an intention we meet a resistance which both supports and limits us, and know that we exist and that the Other exists, and that our existence depends upon the existence of the Other.⁵⁸

This is similar to Jean Paul Sartre's description of how one defines oneself under the Look of the Other.⁵⁹ Sartre expands this concept to explain the manner in which a group may define itself.⁶⁰ Labor, for example, defines itself under the Look of management. World War II partisans perceive themselves under the Look of the Nazis. In Macmurray's view, one perceives oneself as a subject in relation to another subject because of the intentional resistance one encounters to one's intentional action.⁶¹

55. See MACMURRAY, PERSONS IN RELATION, *supra* note 9, at 64-85.

56. See *id.* at 15-43; MACMURRAY, THE SELF AS AGENT, *supra* note 9, at 104-26.

57. See MACMURRAY, PERSONS IN RELATION, *supra* note 9, at 27-28.

58. See *id.* at 16-17.

59. JEAN PAUL SARTRE, BEING AND NOTHINGNESS 340-400 (Hazel E. Barnes trans., 1969).

60. *Id.* at 534-56.

61. See MACMURRAY, PERSONS IN RELATION, *supra* note 9, at 16-17, 79-82.

The personalist emphasis on action, then, both parallels the American concern for understanding law from the perspective of the deciding judge and offers a fruitful foundation for jurisprudential thought.⁶² It offers a resolution for the now old-fashioned quarrel over whether law as it is can be distinguished from law as it ought to be. In addition, when the judge is perceived as one who acts, he is seen in personalist thought as a person in relation to others through his actions.⁶³ As a person capable of introspective reflection, the judge and those criticizing him properly are concerned with his intellectual method, particularly as explained by his judicial decision-making process. Because that process results in action affecting others, the judge's intellectual method and the criticism of that method is an important aspect of what Jerome Frank called three-dimensional law—an understanding of law which perceives a decision maker relating to a situation and the people in that situation through the language and rule element.⁶⁴ The recognition of the judge as a person who acts avoids the misunderstanding which Frank would have described as flat law—namely a vision of law which concentrates on the language and rule element and ignores people and their relationships.⁶⁵

III. THE RECOVERY OF THE PERSON IN AMERICAN LEGAL THOUGHT

David Granfield contends that over the course of the twentieth century there has been a piecemeal recovery of the person in American legal thought.⁶⁶ Sociological jurisprudence, open to multiple human demands and concerned with impact and interest analysis, could be regarded as humanistically seeking to understand the effects—either beneficial or oppressive—of law on human beings. Legal realism, a related school of thought, sought in its early mode to predict what judges with their multiple quirks and subject to many influences—political, social, and cultural—would in fact do. To attempt such a prediction is to stumble across judges as human beings. Lon Fuller emphasized his concern for reciprocal relations between persons.⁶⁷ Ronald Dworkin, who criticized Fuller's failure to relate

62. See Donnelly, *AM. J. JURIS. Book Review*, *supra* note 3, at 251.

63. See *id.* at 243-45.

64. JEROME FRANK, *COURTS ON TRIAL* 74, 182-83, 197-98 (1949).

65. *Id.*

66. See Donnelly, *AM. J. JURIS. Book Review*, *supra* note 3, at 239.

67. See LON FULLER, *ANATOMY OF THE LAW* 73-76 (1968) [hereinafter FULLER, *ANATOMY OF THE LAW*].

his thought to fundamental commitment,⁶⁸ has offered, in *Taking Rights Seriously* and *Law's Empire*, an interpretation of law and a method for judicial decision making which is grounded in such fundamental principles as affording all persons equal respect and concern.⁶⁹ John Rawls's *A Theory of Justice*, could be understood as grounded in a similar commitment.⁷⁰ The critical legal studies movement, with its many facets and its cast of thousands, claims legal realism as its intellectual ancestor and its object as support for the cause of humanity.⁷¹ A major concern is to perceive and attack oppression. James Boyd White understands law as rhetoric, an ongoing argument about what society should be which relates persons and constitutes society.⁷² Feminist jurisprudence,⁷³ perhaps in the critical legal studies tradition, wants to break through the establishment structures and bring before society hidden oppression, or perhaps, to participate in the ongoing debate, described by White, as to what society should be. Some feminist thought would emphasize the transformation of society to make it more caring.⁷⁴ Outsider jurisprudence likewise is concerned with oppression and the transformation of society.⁷⁵

The recovery of the person in twentieth century American jurisprudence nevertheless has been partial. David Granfield sometimes describes American thought as perceiving a truncated person, as fo-

68. See Ronald Dworkin, *Philosophy, Morality, and Law—Observations Prompted by Professor Fuller's Novel Claim*, 113 U. PA. L. REV. 668, 673 (1965).

69. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 150-83; DWORKIN, *LAW'S EMPIRE*, *supra* note 25, at 180, 195-215.

70. JOHN RAWLS, *A THEORY OF JUSTICE* (1971). For Dworkin's critique and interpretation of Rawls, see DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 150-83.

71. The critical legal studies movement emerged in the late 1970s. Some leaders in this movement include: Duncan Kennedy, Karl Klare, Morton Horwitz, Mark Tushnet, and Roberto Unger. See Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983); see also *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984) (discussing critical legal studies movement and its relevance to society); Morton J. Horwitz, *The Bork Nomination and American Constitutional History* (Kharas Lecture Series), 39 SYRACUSE L. REV. 1027 (1988) (examining constitutional theories involved in Bork nomination to Supreme Court).

72. See JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985) [hereinafter WHITE, *HERACLES' BOW*].

73. See Radin, *supra* note 5; Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN IN CULTURE & SOC'Y 515-44 (1982).

74. See Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1 (1990).

75. Mari J. Matsuda uses the term "outsider" rather than "minority." She does this so that readers are not gripped by the numerical significance that belies the term "minority." See, e.g., Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323-24 (1989).

cusing on aspects of the person rather than attempting to understand the whole.⁷⁶ One is reminded of the children's story from India about four blind men who attempted to describe an elephant. One who felt the elephant's leg announced that it was a log. Another, feeling the elephant's ear, disagreed and proclaimed it was a fan. A third, who held the tail, said it was a rope. The fourth, who was exploring the elephant's body, said it went on and on forever. American jurisprudence, in the twentieth century, could be perceived as a series of announcements, all genuine but partial discoveries, as to what the elephant is. Each pronouncement contains one important insight or another into the relation between persons and law.

Because the insights are partial, those who grasp and proclaim them often are in deep conflict with others who have discovered another aspect of human relations and law. Thus modern jurisprudential discourse presents a series of conflicts, puzzles, and dilemmas. Because of the remarkable parallels between personalist thought and twentieth century American jurisprudence, a melding of insights from each tradition may enrich the discourse and contribute to the resolution of some conflicts, puzzles, or dilemmas. In the mainstream of American jurisprudential thought, perhaps that melding of insights will offer a foundation for—or at least a beginning sketch of—a more complete understanding of the person I will later describe as the authentic judge and his task of deciding disputes and searching for and offering justification for decisions.

The personalist emphasis on the judge as one who acts and decides offers a foundation for melding personalist insights with the mainstream of American jurisprudential thought, with its great proliferation of ideas flowing from the rejection of flat, formalist law and the recognition of multiple aspects of the person in our understanding of law. Perhaps personalist thought as applied to law, with its fuller grasp of the person in action and in intellectual activity, may contribute to the further development of American jurisprudential insights and to the reconciliation of competing views.⁷⁷

76. See Donnelly, AM. J. JURIS. Book Review, *supra* note 3, at 242; DAVID GRANFIELD, *THE INNER EXPERIENCE OF LAW* 14-36 (1988).

77. See *infra* text accompanying notes 101-27.

IV. INSIGHT: AN INTROSPECTIVE MOMENT IN PERSONALISM AND AMERICAN JURISPRUDENCE

Oliver Wendell Holmes, Jr., renown for many aphorisms and for his intellectual creativity, often remarked that he just wanted the insights, itself a fascinating comment on the creative process.⁷⁸ Bernard Lonergan, reflecting on the moment of intellectual creation, found inspiration in a story about Archimedes, the Greek scientist. One day Archimedes emerged from his bath in Syracuse, the ancient Greek city-state in Sicily, shouting "Eureka" as he ran naked through the streets in the excitement of a scientific discovery.⁷⁹ While in the bath, Archimedes, according to legend, suddenly perceived that he could determine whether the Tyrant of Syracuse's crown was gold without destroying it by measuring whether the water it displaced was equal in amount to that displaced by a package of gold. Lonergan commented not only on the joy of discovery but also upon the suddenness—or flash of—what he called insight.⁸⁰ David Granfield summarizes Lonergan's understanding of "insight" as follows:

What is an insight? It is a bright idea, a snap judgment, a shrewd guess, a tentative understanding. Insights ground every kind of knowledge. But an insight should not be considered to be like seeing something; it is not literally an intuition. The naive realist thinks that he looks at his experiences, the data of sense and consciousness, and then judges. But he leaves out an essential step, the insight, which occurs when the intelligence comprehends in the data some kind of coherence, when the data begins to make sense, to evidence a possibility, to suggest a meaning. An insight as such is unverified and unproven; it may be wrong but it is plausible. It is like love at first sight, perhaps an infatuation but perhaps the beginning of a lifelong commitment.⁸¹

As Lonergan understands it, insight is a sudden perception of a pattern in the matter or data being examined.⁸² Typically one grasps an insight after a period of hard study. Then perhaps while one is shaving in the morning the lightening flash of insight occurs. Insight

78. LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 216-17, 273-74 (1991).

79. See LONERGAN, *INSIGHT*, *supra* note 8, at 3-6.

80. *Id.*

81. See GRANFIELD, *supra* note 76, at 54-55.

82. See LONERGAN, *INSIGHT*, *supra* note 8, at 3-6; see also TRACY, *supra* note 10, at 105-12 (describing steps of inquiry that lead to insight).

came to Archimedes in the bath. Jerome Frank, the distinguished but radical legal realist who served as a judge of the Second Circuit, reports a similar phenomenon in his book, *Courts on Trial*.⁸³ Frank, commenting on Judge Hutcheson's report that judges decide by hunching, compares that with gestalt psychology:

Is Judge Hutcheson's description wholly mistaken? . . . I believe not. Pertinent here is gestalt psychology, the main thesis of which is, roughly, this: All thinking is done in forms, pattern, configurations. A human response to a situation is "whole." It is not made up of little bricks of sight, sound, taste, and touch. It is an organized entity which is greater than, and different from, the sum of what, on analysis, appear to be its parts. The gestaltist's favorite illustration is a melody: A melody does not result from the summation of its parts; thus to analyze a melody is to destroy it. It is a basic, primary, unit. The melody, a pattern, determines the functions of the notes, its parts; the notes, the parts, do not determine the melody. Just so, say the gestaltists, no analysis of a pattern of thought, of a human response to a situation, can account for the pattern

I do not suggest that anyone swallow whole this notion of the "whole." But it does illuminate, does tell us something of importance about, men's reactions to experience. In particular, it sheds light on a trial judge's "hunching." The trial judge, we may say, experiences a gestalt.⁸⁴

Karl Llewellyn also seized upon Judge Hutcheson's notion of hunching and associated it with "situation sense," a favorite Llewellyn term.⁸⁵ Llewellyn used situation sense in a variety of contexts. One can find a good discussion in William Twining's biography, *Karl Llewellyn and The Realist Movement*.⁸⁶ Often Llewellyn would equate situation sense with horse sense which is definable as the uncommon common sense of one experienced in horse trading.⁸⁷ Llewellyn, as the chief drafter of the Uniform Commercial Code, was an admirer of the situation sense of the experienced commercial judge. That situation sense represented an understanding of business patterns and

83. FRANK, *supra* note 64.

84. *Id.* at 170-71.

85. KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 121 n.154 (1960) [hereinafter LLEWELLYN, *THE COMMON LAW*].

86. WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 216-27 (1973).

87. *Id.* at 220 n.71.

commercial relationships in commerce developed over years of experience representing clients in various industries and hearing commercial disputes as a judge.⁸⁸ Since Llewellyn also equated situation sense with Judge Hutcheson's hunching, it resembled Frank's lightening gestalt⁸⁹—the sudden perception of a pattern in the commercial situation before the judge but now based on long experience with commercial cases.

In a uniquely balanced article, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, Duncan Kennedy reports and comments upon a similar phenomenon while offering an imaginary phenomenology of a decision he would make if he were a judge in a hypothetical case.⁹⁰ Kennedy imagines he is a federal district court judge faced with a request for an injunction in a labor dispute. The workers, city bus drivers now on strike, are lying down in front of the buses to prevent scabs from driving them. The company requests an injunction. On initial impression, Kennedy presumes the law is on the company's side and would allow the injunction. The critical phenomenology follows his review of the law through several stages including "playing around with the rule" and "rack[ing his] brain."⁹¹ While in despair from his inability to find a solution acceptable to his own political position that the workers should control the means of production, he suddenly has a "breakthrough."⁹² He perceives the possibility of recharacterizing the case not as a labor injunction situation but rather as a First Amendment freedom of speech case in which prior restraints such as injunctions are impermissible. That sudden perception of a possibility for a recharacterization resembles Loneragan's insight, Frank's gestalt, and Llewellyn's hunching or situation sense. It is a sudden perception of a pattern in the data. Here it is the perception of the possibility of reconfiguring the pattern, that is, a creative moment.

Kennedy, in his report of his imaginary decision-making process, does not leap immediately from the breakthrough or creative insight to judgment. Rather, he goes through a stage of checking out his insight against the First Amendment cases for legitimacy but also for

88. See Donnelly, HOFSTRA Book Review, *supra* note 1, at 906-11.

89. See FRANK, *supra* note 64, at 157-86; *see also* LLEWELLYN, THE COMMON LAW, *supra* note 85, at 121 (explaining how judges draw on "uncommon knowledge" in making decisions).

90. Kennedy, *supra* note 24.

91. *Id.* at 523.

92. *Id.* at 525.

wisdom.⁹³ Lonergan, discussing general intellectual method, also notes that in most modern intellectual disciplines there is a checking-out stage which follows the insight and, indeed, follows the formulation of the theory.⁹⁴ In traditional scientific method, verification of the theory is a vital stage.⁹⁵ Lonergan would not insist upon scientific verification in other fields but would generalize from scientific and other intellectual methods and insist upon a checking-out stage in general intellectual method. He would call those who mistake the insight, the sudden perception of a pattern, for reality—naïve realists.⁹⁶ Whether Llewellyn and Frank are naïve realists in Lonergan's sense is an interesting inquiry. It certainly is possible that, entranced by the notion of the hunch or the gestalt, they would contemplate moving directly to judgment from the insight.⁹⁷ In judicial practice it may be—and is worth considering—that the moment of insight is the moment of judgment. Perhaps it happens during oral argument or while the judge is reading the briefs. On the other hand, both Llewellyn and Frank often recommend restraining the gestalt or the hunch until further consideration is possible.⁹⁸ One function of the common law adversary method is to suspend the gestalt until arguments on both sides have been considered. Llewellyn, and Twining, when describing the proper functioning of situation sense recommend a consideration of the pattern of facts, relationships, and values in the commercial situation before an application of the legal categories.⁹⁹ That process will restrain a gestalt based solely on the legal configurations before the commercial situation and problem is adequately understood.

The recognition of the hunch or the gestalt, and its creative use in framing a method for using the commercial judge's situation sense, is a high point in the recovery of the person in American jurisprudence. The introspective analysis of the judge's intellectual method necessary to recognize the function of the hunch or the gestalt in the judicial decision-making process carries the implication that the judge is a subject, a person whose thought process is worth examining. Classically, if one recognizes oneself as a person then one is more likely to per-

93. *Id.* at 525-33.

94. See LONERGAN, *INSIGHT*, *supra* note 8, at 284-86.

95. See TRACY, *supra* note 10, at 88.

96. See GRANFIELD, *supra* note 76, at 59.

97. See generally *id.* at 58-61 (explaining realists' use of insight in judicial practice).

98. See TWINING, *supra* note 86, at 226-29; see Donnelly, *HOFSTRA* Book Review, *supra* note 1, at 907-11.

99. See TWINING, *supra* note 86, at 226-29; see also Donnelly, *HOFSTRA* Book Review, *supra* note 1, at 907-11 (drawing out overlooked aspects of situation sense).

ceive others as persons.¹⁰⁰ So, too, within the law. If one understands law as an activity engaged in by persons such as the deciding judge rather than as a system of rules, then it is more likely that those appearing before the court will be perceived as persons rather than as cases to which the law needs to be applied.

In fact, Llewellyn and Frank were aware, not only of the judge as person, but also of persons relating to each other in the situation before the court. Llewellyn's situation sense requires the judge to examine and understand the pattern of human relations in the situation.¹⁰¹ Jerome Frank describes three-dimensional law, where we perceive a decision maker who is a person, the rule or language element, and the situation with its pattern of human relations.¹⁰² In contrast, Frank rejects the misunderstanding, which he calls flat law, where one focuses on the rule or language element.¹⁰³

The turn to the subject in Frank, Llewellyn, and Lonergan not only leads to explicit reflection on intellectual method or the judge's decision-making process but also uncovers the judge as a person in relationship to other persons. That revelation is surprising because of the emphasis on action in personalist thought and American legal realism, an emphasis that could be contrasted with the pale, sickly cast of thought that one might associate with introspective analysis of the subject. However, when we discuss the judge's decision-making process and his intellectual method, we are discussing action.¹⁰⁴

The judge's action relates to others through the moment of judgment, which is preceded by the moment of insight or gestalt, and the checking-out process. Our effort to understand that decision-making process is for the sake of action and for the sake of improving the relationship between persons in the legal system. Nevertheless, our

100. See MACMURRAY, PERSONS IN RELATION, *supra* note 9, at 19-30.

101. See TWINING, *supra* note 86, at 226-27.

102. See FRANK, *supra* note 64, at 316-25.

103. *Id.*

104. It is important to note the distinction in the characterization of a judge as a person in action and as one engaged in intellectual activity. As a judge broadens his scope of intellectual activity, his conception of the field of study also broadens. Increasing one's intellectual activity, then, provides a judge with additional avenues for action. For a useful analogy see MACMURRAY, PERSONS IN RELATION, *supra* note 9, at 53-54. Macmurray points out that a child's developmental process consists of distinct but related stages. *Id.* A child "must first learn . . . of sensory discrimination or of movement." *Id.* at 54. Once this process is learned it becomes a component of wider skills that the child acquires. *Id.* Macmurray points out that, "[i]n this way a hierarchical system of skills is developed, the lower levels of which support the higher skills . . ." *Id.* Similarly, the judge's intellectual activity, while a distinct skill, supports a wider skill: how the judge acts.

reflection on that process, as Marcel would point out, is secondary; the action is primary.¹⁰⁵ It is through the action that the judge finds himself in relation to other persons. By reflection on that action, on the moment of decision making, the judge perceives himself as a person and those appearing before him as persons engaged with him in a common action. The insights of Lonergan and Macmurray merge in our understanding of the judge's decision-making process.

From this high but introspective moment in the recovery of the person in American jurisprudence, our reflection on the judge's decision-making process should move to a discussion of method. That discussion should be a more general reflection on the judge's intellectual and decision-making method and the insights that Lonergan's thought provides for elaborating and clarifying American jurisprudential analysis of that method.

V. METHOD AND PERSONALIST CRITIQUE OF METHOD

A major aspect of Lonergan's work is his reflection on intellectual method.¹⁰⁶ In *Insight*, he analyzes a series of particular methods—scientific, mathematical, and the commonsense methods, which would include the historical, the theological, and, we could add, the legal. Lonergan's reflection on intellectual method begins with insight, a phenomenon he finds in all intellectual method.¹⁰⁷ David Tracy describes the movement in Lonergan's analysis from insight to method as follows:

Thirdly, insights do not remain merely in isolation. They coalesce into sets of insights and sets of definitions, axioms, postulates. The very dynamism of inquiry, moreover, provokes ever further questions, some of which cannot be handled on the basis of the existing set of insights and theorems. In short, as one moves ever further into the inquiry, an exigence for an ever higher viewpoint begins to emerge.¹⁰⁸

A theory, in Lonergan's thought, consists of a series of related insights.¹⁰⁹ Scientific method requires that a theory be verifiable and scientific inquiry pursues continual efforts at verification. In *Insight*, Lonergan is concerned with general intellectual method developed

105. See MARCEL, *supra* note 50.

106. See LONERGAN, *INSIGHT*, *supra* note 8, at 33-103; LONERGAN, *METHOD IN THEOLOGY*, *supra* note 8, at 3-25; TRACY, *supra* note 10, at 104-32.

107. See LONERGAN, *INSIGHT*, *supra* note 8, at 3-32.

108. TRACY, *supra* note 10, at 106.

109. *Id.* at 67-68, 235.

from reflection on a series of particular methods, including the scientific.¹¹⁰ As noted above, Lonergan, in all intellectual methods, would require a checking-out stage. A "method may be defined as a normative pattern of related and recurrent operations yielding cumulative and progressive results."¹¹¹

Method itself, however, requires verification or a checking out. One cannot verify the scientific method by the scientific method. That would be to argue in a circle. In modern times the scientific method is admired and pursued because of its large record of success. That, of course, is one test of method—whether it works, whether it produces satisfactory progress in the pursuit of inquiry. One also must reflect on the purpose for which one uses a method. The scientific method, for example, would have only tangential relevance in the pursuit of business activities. A method must be adapted to and be successful to some degree for the purpose one has in an inquiry or an activity. A major contribution of Lonergan's work is to focus our attention on the check-out of or justification for particular methods and of general intellectual method.¹¹²

Scientific method is the most successful of the modern methods and may serve as an important foundation for reflecting on general intellectual method. Nevertheless, there are other methods which serve purposes for which the scientific method is not suited. Of particular importance for law are what Lonergan calls the commonsense methods.¹¹³ Common sense may be defined as the self-correcting process of learning from living.¹¹⁴ It, of course, is important in conducting everyday life and establishing relations with others. One learns how to go to the store and to find other locations by the self-correcting process of learning through living. Aspects of general intellectual method may be found in common sense as well as the scientific method. For example, there is a checking-out stage which is very useful—failure to find the store often will result in beneficial adjustments in method. Commonsense method itself, then, is subject to continual adjustment and change in view of its success or failure in the pursuit of various human purposes—some very practical, such as finding the store.

110. See LONERGAN, *INSIGHT*, *supra* note 8, at xvii-xxx; LONERGAN, *METHOD IN THEOLOGY*, *supra* note 8, at 4-6.

111. TRACY, *supra* note 10, at 235.

112. See LONERGAN, *METHOD IN THEOLOGY*, *supra* note 8, at 20-25.

113. See LONERGAN, *INSIGHT*, *supra* note 8, at 173-244; TRACY, *supra* note 10, at 113-23.

114. See LONERGAN, *INSIGHT*, *supra* note 8, at 298.

Loneragan describes a series of more specialized commonsense methods, including historical and theological methods.¹¹⁵ When thinking of specialized commonsense methods one is reminded of Llewellyn's analogy between horse sense and situation sense. Horse sense is the uncommon common sense of one experienced in horse trading.¹¹⁶ The parallel to Lonergan's definition of common sense is remarkable. A horse trader has learned his business from the self-correcting process of living and working in his profession. Similarly, an experienced commercial judge acquires situation sense.¹¹⁷ The activity of lawyers in general and their work with law could be described as a commonsense discipline or method.

Method and the reflection on method have been important aspects of American legal thought in the twentieth century. We have already noted Karl Llewellyn's analysis and praise of the grand style of the common law which he found in both the formative era of American law and during the mid-twentieth century.¹¹⁸ He contrasted the grand style, with its openness to reason, purpose, and situation sense, and its emphasis upon leeways in the precedent and case-by-case development of the law, to the strict style which prevailed at the turn of the twentieth century, with its tendency to treat law as a closed logical system.¹¹⁹ Jerome Frank, in *Courts on Trial*, offers multiple insights into judicial method with an emphasis on three-dimensional law in which the judge perceives himself as a person, recognizes what could be described as an open-textured rule or language element, and attempts to perceive the human relations in the situation or case before him.¹²⁰ He would contrast three-dimensional law with flat law, which emphasizes the rule or language element.¹²¹ Similarly, Roscoe Pound contrasted mechanical jurisprudence with sociological jurisprudence or social engineering, which would be concerned with the careful analysis of social advantage and the development of law to adjust

115. Compare LONERGAN, *INSIGHT*, *supra* note 8, at 173-244 (discussing specialized concepts of common sense) with LONERGAN, *METHOD IN THEOLOGY*, *supra* note 8, at 214-20, 233-34 (discussing common sense in terms of thought, speech, and history) and TRACY, *supra* note 10, at 189-91, 232-39 (discussing Lonergan's classifications of commonsense methods).

116. See TWINING, *supra* note 86, at 503; see also Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 230 n.105 (recounting Llewellyn's definition of horse sense).

117. See Donnelly, *HOFSTRA Book Review*, *supra* note 1, at 908-11.

118. See *supra* text accompanying notes 85-89, 97-103.

119. See LLEWELLYN, *THE COMMON LAW*, *supra* note 85, at 217-23.

120. See FRANK, *supra* note 64, at 316-25; see also *supra* text accompanying notes 64-65 (contrasting judge as individual with judge as intellectual).

121. See FRANK, *supra* note 64, at 316-25.

and recognize human interests.¹²² These early and mid-twentieth century developments of method would be in deliberate conflict with formalism and the analytical methods of Christopher Columbus Langdell and his tendency to treat law as a closed logical system.

Leaping forward to the late twentieth century, we have noted the imaginary but critical phenomenology of a judicial decision produced by Duncan Kennedy with its reflections on judicial decision-making method.¹²³ Very recently, Robin West has contrasted the use of narrative with the emphasis on rights discourse in the Supreme Court's capital punishment decisions.¹²⁴ The adaptation of deconstruction to law is an important recent contribution to, and discussion of, legal, and perhaps, judicial method. However, the major analyst of judicial decision-making method in the late twentieth century is Ronald Dworkin. In *Law's Empire* and *Taking Rights Seriously*, he offers a judicial decision-making method grounded in political friendship or in respect and concern for each individual. He emphasizes both interpretation of the law to make the most that can be made of it and rigorous consistency with a principled understanding of the precedent.¹²⁵ Whether these various aspects of his thought and method are compatible with each other is an open question.

During the twentieth century then, along with the piecemeal recovery of the role for the person in law, there has been a proliferation of different creative approaches to legal method and to judicial decision-making method. The opportunity offered by Lonergan for critical reflection on intellectual method, then, would seem to be a potentially useful contribution to twentieth century legal theory and method.¹²⁶

Developing Lonergan's thought, one could critique various contributions to judicial decision-making method based on their workability and whether they more or less satisfactorily fulfill the purposes and function of law and the settlement of disputes by judges. Such a critique, of course, would require discussion, debate, and exchange of views concerning the purpose and function of law. However, one is concerned with judicial decision-making method for the sake of action. A judge is concerned with his own conduct, with what he ought

122. See Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 247-53.

123. See Kennedy, *supra* note 24.

124. See Robin West, *The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990).

125. See DWORKIN, *LAW'S EMPIRE*, *supra* note 25, at 87-113, 176-224; DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 180.

126. See *supra* text accompanying notes 78-116.

to do, and with what orders he ought to issue. A critic of judicial method wants to improve the actions of judges generally, which would include improvement of the dispute settlement function and its by-product—the creation of law. In this context it makes sense to merge the thought of Lonergan and Macmurray—Lonergan's critique of method and Macmurray's emphasis on persons in relation through action. That merger makes sense here because the critique of judicial method is for the sake of improving action and the relations between persons and society. To the extent that a particular understanding of judicial method overlooks the judge as a person or fails to insist upon persons and their relations in the situation before the court, that understanding of method is less satisfactory. To the extent that the role of persons is emphasized, the proposed view of judicial method is more satisfactory. Arguably, a critique of method whose cutting edge is an inquiry into the role for persons provides a powerful personalist tool for evaluating, and perhaps unifying, the vast array of proposed methods and contributions to judicial decision-making method in twentieth century American thought.

H.L.A. Hart described formalism as the vice in juristic thought that seeks to disguise or deny the presence of choice.¹²⁷ One could imagine the proliferation of different juristic methods, particularly those which have recovered one or more aspects of the person, as a series of attacks upon or attempts to escape the clutch of Langdell's logical method and the flat law of formalism. Formalism, however, could be defined more broadly than contemplated by Hart. It could, for example, include all forms of legal reasoning and judicial method because using an accepted method is to confine and deny choice. Short of that whirlpool, however, the ongoing debate over formalism and method could be perceived as a battle over or against narrow forms of legal reasoning. In the opening skirmishes, Holmes rejected Langdellian analysis with his contention that "[t]he life of the law has not been logic: it has been experience."¹²⁸ Currently, in contrast to Holmes, Dworkin offers an understanding of judicial method in which logic plays a predominant role. The realists discussed, analyzed, used, and criticized what could be described as the traditional and ordinary methods of common law reasoning. For example, in *The Common Law Tradition*, Llewellyn attempts to develop and make more sophis-

127. See Hart, *Positivism*, *supra* note 51, at 626.

128. HOLMES, *THE COMMON LAW*, *supra* note 2, at 5.

ticated what he describes as the grand style of the common law.¹²⁹ The effort was to develop new forms of reasoning related to the traditional use of precedent, such as situation sense, and to adapt the traditional reasoning by analogy and distinction to the needs of policy analysis or to the endeavor to relate law to persons. The crits, members of the critical legal studies movement, use traditional forms of legal reasoning as well as deconstruction to reach multiple results.¹³⁰ Judge Posner recently qualified his emphasis on law and economics and his goal of wealth maximization by promoting a broader pragmatism in which the ordinary methods of legal reasoning play a larger role.¹³¹ Nevertheless, he insists that law is not self-contained and that the traditional methods of legal reasoning provide inspiration rather than justification for a judge's decision.¹³² In *Law's Empire*, Dworkin argues that pragmatism, as he defines it, is morally bankrupt both because it lacks an overarching moral theory and because it rejects rigorous consistency.¹³³ Under a critical view of Dworkin, he could be said to reject pragmatism in law because it avoids narrowly logical reasoning and insists upon using multiple forms of traditional common law reasoning. The battle, then, could be portrayed as a fight over the forms of legal reasoning, narrow and limited, or broad, creative, and relating to multiple human concerns.

Alternatively, with the insights of another vision, or using another set of eyeglasses, one could perceive many of these participants in the discussion of judicial decision-making method as capturing or emphasizing one or another of the aspects of the person in law. Like the blind men examining the elephant, they perceive the tail which seems to be a rope, the legs which resemble tree trunks, and so one or another of the aspects of the person in law is emphasized in various understandings of judicial method. For example, Dworkin has

129. See LLEWELLYN, *THE COMMON LAW*, *supra* note 85, at 36. See generally TWINING, *supra* note 86 (documenting legal theories and legal realism).

130. The crits, for reasons of tactics, strategy, or criticism, often use traditional forms of legal reasoning. Traditional methodology gives the crits legitimacy as they attack established ideology. For example, see Duncan Kennedy's use of First Amendment freedom of speech rights in his article, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, *supra* note 24. The crits, however, have also used deconstruction as a form of legal reasoning. See DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 70, 72.

131. See generally RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990) (arguing basic assumption of economics—that people are wealth maximizers—is seriously incomplete) [hereinafter POSNER, *THE PROBLEMS OF JURISPRUDENCE*].

132. *Id.* at 71-124.

133. See DWORIN, *LAW'S EMPIRE*, *supra* note 25, at 95-96, 151-64.

recognized the importance in judicial reasoning of a commitment to afford each person equal respect and concern; hence, he has framed a decision-making process in which the judge's moral theory, grounded in political friendship, has an important role.¹³⁴ To the extent that Dworkin expresses a theoretical concern for each person, he has recognized the importance of persons in the cases before Hercules, his ideal judge. To the extent that he provides an important role for the judge's moral theory, he recognizes the judge as a person. Like the blind men, however, he fails to grasp the fullness of the phenomenon he is examining. He overlooks the relations between persons in the situations before Hercules,¹³⁵ the impact of his decisions on a variety of conflicting interests of real persons,¹³⁶ and lacks the flexibility necessary to regularly readjust the law in view of its adverse impact on people and their needs. This blindness leaves Dworkin open to the charge that he has created a huge juggernaut capable of crushing people while Hercules, in the tower on top of the machine, proclaims: "I afford all persons equal respect and concern." In contrast, indeed almost like a jigsaw puzzle piece which interlocks with Dworkin's views, the American pragmatists emphasize precisely those aspects of the person in the law which Dworkin overlooks while themselves passing over the importance of moral theory in law, particularly a moral theory which emphasizes political friendship and the importance of each person.

The postmoderns, including the crits, recover multiple aspects of the person in law¹³⁷—including the person's political, social, and cultural horizons.¹³⁸ The crits and other postmoderns are particularly concerned with detecting oppression and moving to correct it, perhaps by radical measures.¹³⁹ Nevertheless, their narrow equation of law

134. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 180-83, 272-78; see also DWORKIN, *LAW'S EMPIRE*, *supra* note 25, at 176-90 (examining assumption that integrity is distinct ideal of politics).

135. Compare Llewellyn's situation sense. See *supra* text accompanying notes 85-89, 97-101. See also Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 231-37 (contrasting Llewellyn's "grand style" with Dworkin's approach to precedent).

136. Compare sociological jurisprudence. See *supra* text accompanying notes 119-24; see also Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 247-53 (comparing and contrasting impact and interest jurisprudence). See generally Donnelly, *HOFSTRA Book Review*, *supra* note 1 (discussing how Pound contrasted mechanical and sociological jurisprudence).

137. See DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 5-6, 41-43.

138. See discussion *infra* part VI.

139. A common theme with the crits and other postmoderns is the goal of reshaping society so that the use of rights to protect current establishment interests is no longer possi-

with politics and their equally narrow pursuit of the political ends which seem important to them produces a rigorous inflexibility akin to that of Dworkin. While Dworkin achieves rigorous consistency through abstract principle, the crits and other postmoderns, despite deconstruction and the creative reconstruction of law, produce an inflexible consistency of result by evaluating and reaching their conclusions in the context of a rigorous political ideology. Like Dworkin, they overlook the impact of their ideologically oriented conclusions on real human relations and fail to use the tools developed by the American pragmatists to adapt law to multiple human situations and concerns.

To the extent that a proposed legal or judicial decision-making method overlooks aspects of the judge as a person or fails to appreciate the impact of law on persons and their relationships, both generally and in the particular cases before the judge, that method is less satisfactory. To the extent that proposed methods recover a role for, and an understanding of, the judge as a person, that method is more satisfactory. Likewise, a method is more satisfactory to the extent that it calls attention to the beneficial or adverse impact of law on persons and their relationships and offers new ways of perceiving and understanding how law affects human beings in general and in the cases before the court. There should be an ongoing effort not only to critique proposed methods in these terms but also to collect and correlate new understandings and methods for understanding the relation between law and persons. By this means we will gradually be able to discern the outline of the elephant as we explore various portions of its body.

Lonergan, then, has made the critique of method possible.¹⁴⁰ By merging his insights with those of Macmurray,¹⁴¹ one can critique proposed legal and judicial decision-making methods based on whether they have overlooked aspects of the person in law or have offered new understandings of the person in law. This proposed critique would be

ble. The crits are concerned with how a regime of rights oppresses and restrains society. See DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 5-6; see also Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984) [hereinafter Tushnet, *An Essay on Rights*] (developing four related critiques of rights); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 781 (1983) [hereinafter Tushnet, *Following the Rules Laid Down*] (comparing "two leading theories of modern constitutional law that attempt to ensure the rule of law by limiting the discretion of judges"); Unger, *supra* note 71 (discussing critical legal studies movement).

140. See *supra* text accompanying notes 106-40.

141. See *supra* part II.

concerned with whether a method works and serves the purposes and functions of law and judicial decision making and also with whether a method is grounded in an understanding of the decision maker as a person and those in the situation as persons. Lonergan's turn to the subject allows the introspective discovery and examination of method.¹⁴² That introspective reflection allows the judge to recognize himself as a person. Joined with Macmurray's insights, that introspective reflection on method is for the sake of action, which relates the judge to the persons in the situations before him.¹⁴³ One could summarize this merger of the thought of Lonergan and Macmurray by noting that we can move through an understanding of method to action which relates us to persons.

VI. HORIZONS

Imagine a primitive society where a young man from a mountain hunting village journeys to the oceanside and settles in a fishing village.¹⁴⁴ At first everything seems strange to him. But gradually, by what Lonergan would call a commonsense learning process, he becomes acquainted with the ways of the fishing village.

We all have shared a similar experience. Although only some of us have traveled and changed location, all of us have attended law school and retain a vivid recollection of the strangeness of the new intellectual environment and of our gradual mastery of its ways. Some of us have multiple experiences similar to this. We have studied economics or philosophy. Perhaps we have mastered the folk ways, business environment, and the law relevant to an industry and remember its strangeness and our surprise and interest in the new patterns of human interaction found there.

Bernard Lonergan would describe these experiences as the crossing of horizons.¹⁴⁵ The term, horizon, is used by philosophers such as Lonergan, Heidegger, and Gadamer to elucidate the normal human condition of having limited knowledge and understanding.¹⁴⁶ When

142. See *supra* notes 106-17, 126-27 and accompanying text.

143. See *supra* notes 52-58, 126-27 and accompanying text.

144. See, e.g., Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 257 (discussing horizon crossing and transcending).

145. *Id.* at 254-63; see also LONERGAN, *METHOD IN THEOLOGY*, *supra* note 8, at 235-37 (describing how horizons may differ); TRACY, *supra* note 10, at 1-21, 104-32 (discussing Lonergan's horizon analysis and its development in *INSIGHT*).

146. See MARTIN M. HEIDEGGER, *IDENTITY AND DIFFERENCE* 34-35 (Joan Stambaugh trans., 1969); TRACY, *supra* note 10. This Article uses the term "horizon" to show that judges have a responsibility to see and understand beyond the familiar and to take differ-

describing intellectual horizons one employs the rather useful physical analogue which Bernard Lonergan refers to as follows:

In a literal sense the word, horizon, denotes the bounding circle, the line at which the earth and sky appear to meet. This line is the limit of one's field of vision. As one moves about, it recedes in front and closes in behind so that, for different standpoints, there are different horizons. Moreover, for each different standpoint and horizon, there are different divisions of the totality of visible objects. Beyond the horizon lie the objects that, at least for the moment, cannot be seen. Within the horizon lie the objects that can now be seen.¹⁴⁷

The young man from the mountain village changed physical as well as intellectual horizons when he journeyed to the oceanside and, as a result, could see new things which were not visible in the mountains. One virtue of the physical analogue is that it offers the possibility of changing or crossing horizons.¹⁴⁸ One can journey from the mountains to the seaside. Intellectually, one can choose to study economics or to go to law school. As a result, one's intellectual vision will change; one will see and appreciate aspects of life which one was not aware of or did not understand before the change of horizons.

Most importantly, perhaps, the questions one asks change.¹⁴⁹ "Horizons in general may be established by the questions one asks or the purposes for which the questions are asked."¹⁵⁰ A classic example

ent viewpoints. See Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 254 n.250.

147. LONERGAN, *METHOD IN THEOLOGY*, *supra* note 8, at 235-36. For an introduction to Lonergan's analysis, see TRACY, *supra* note 10, at 1-21.

148. See Bernard Lonergan, *Metaphysics as Horizon*, in *COLLECTION* 202-20 (F.E. Crowe ed., 1967); see also Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 254-63 (discussing horizons in context of legal decision making).

149. Horizons depend on a three-fold division in the knowledge process. The first division is the range of questions that a person can raise and answer. The second division is the set of questions that are significant to a person, but which she is yet unable to answer. This is the area known as *docta ignorantia*. The third division consists of the questions that are incomprehensible to one. These are the questions that one cannot even ask because they have no significance for the person. Traditionally stated, this is the area of *indocta ignorantia*. Horizons can be said to be the boundary between one's *docta* and *indocta*. A second view states that what lies beyond one's horizons is the set of questions that are meaningless to one but nonetheless significant. TRACY, *supra* note 10, at 9-10; DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at n.293 (quoting Tracy's description of three-fold division).

150. Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 255; cf. LONERGAN, *METHOD IN THEOLOGY*, *supra* note 8, at 235-37 (describing additional ways in which horizons can develop).

describes a botanist and an animal biologist walking through a country field.¹⁵¹ The botanist is aware of the vegetation and recognizes different species in some detail while the animal biologist has a similar appreciation of the persistent insect life, which may be simply annoying to the botanist. Lonergan describes intellectual horizons that result from past education and which govern the course of our intellectual inquiry as follows:

Horizons, finally, are the structured resultant of past achievement and, as well, both the condition and the limitation of further development. They are structured. All learning is, not a mere addition to previous learning, but rather an organic growth out of it. So all our intentions, statements, deeds stand within contexts. To such contexts we appeal when we outline the reasons for our goals, when we clarify, amplify, qualify our statements, or when we explain our deeds. Within such contexts must be fitted each new item of knowledge and each new factor in our attitudes. What does not fit, will not be noticed or, if forced on our attention, it will seem irrelevant or unimportant. Horizons then are the sweep of our interests [sic] and of our knowledge; they are the fertile source of further knowledge and care; but they also are the boundaries that limit our capacities for assimilating more than we already have attained.¹⁵²

Horizons, both physical and intellectual, not only allow or create vision, they also confine. The young man in the mountain village cannot see the ocean. By the seaside he cannot see the mountains although he knows he will find them if he undertakes the return journey. When we became immersed in legal study, we gradually lost interest in matters that fascinated us while in college. Horizons, then, both create and confine vision.¹⁵³

Reflecting on legal method, a judge who is concerned with persons must, as Socrates and Frank comment, know himself.¹⁵⁴ He must be aware of his limited knowledge and understanding, of his horizons. An additional criterion for critiquing judicial decision-making method would be the inquiry into whether the method provides for regularly

151. See DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 49.

152. LONERGAN, *METHOD IN THEOLOGY*, *supra* note 8, at 254 n.250.

153. *Id.* at 236; see also TRACY, *supra* note 10, at 9-10 (placing horizons in framework of three-fold division of knowledge).

154. See Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 256-57.

recognizing and crossing horizons.¹⁵⁵ In a previous article, I commented:

A judge who wants to take rights seriously will provide means in his decision making methodology for both transcending and crossing horizons. Horizons are established by various processes for learning, by the devices and techniques which accompany these processes, and by the information and ways of acting which are the results of their use. Horizons can be transcended or crossed by using similar learning processes to establish new, different, or more encompassing horizons and may be accompanied by techniques for restraining the vision-blocking characteristics of one's present horizons.¹⁵⁶

In that article I both praised and criticized the decision-making method that Dworkin prescribed for his model, Judge Hercules, in *Taking Rights Seriously*.¹⁵⁷ Dworkin has changed slightly and developed further the methodology for Judge Hercules in *Law's Empire*. Dworkin now prescribes a virtue of integrity not only for the individual judge but for law.¹⁵⁸ Integrity requires a consistency with a principled understanding of past precedent that allows little leeway and is rigorous. When Hercules comes to the bench he should perform the herculean task of reexamining existing precedent and, indeed, the entirety of law with a view toward offering a new interpretation which will make the best that can be made of the law.¹⁵⁹ Some past precedent may be discarded as mistakes under Hercules's new interpretation, but the judge must then decide all new cases in a manner that is rigorously consistent with his interpretation of law.¹⁶⁰ Hercules could, at some future point, undergo a conversion and as a result he would offer a yet newer interpretation, discarding some old precedent, including his own, as mistakes.¹⁶¹ However, there is little room for in-

155. *Id.* at 258.

156. *Id.* at 259-60.

157. *Id.* at 259.

158. See DWORKIN, *LAW'S EMPIRE*, *supra* note 25, at 176-275.

159. When a judge declares that a particular principle is instinct in law, he reports not a simple-minded claim about motives of past statesmen . . . but an interpretive proposal: that the principle both fits and justifies some complex part of legal practice, that it provides an attractive way to see, in the structure of that practice, the consistency of principle integrity requires.

Id. at 228.

160. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 118-23. Dworkin's theory of mistakes allows a judge to discount some past decisions if they are no longer in accord with his theory. However, this flexibility is usable in only a few situations.

161. *Id.*

cremental change in Hercules's thought. Incremental change would violate the virtue of integrity. Integrity, then, prevents Hercules from reaching out on a day-to-day, case-by-case basis for new understandings of the persons who appear before him.¹⁶² The judicial method which Dworkin has prescribed for Judge Hercules creates large vision-blocking barriers to the regular crossing of horizons.¹⁶³ Those barriers lead a critic of Dworkin to ask whether Hercules is capable of taking concrete, real persons and their rights seriously.

In contrast, the American pragmatists whom Dworkin criticizes as morally bankrupt¹⁶⁴ have created multiple devices for crossing horizons and reaching out to persons in situations.¹⁶⁵ Several of these already have been noted in this Article, including Pound's impact and interest analysis,¹⁶⁶ which offers a lawmaker a regular opportunity for assessing the effect of law on real persons with real interests, and Llewellyn's situation sense,¹⁶⁷ which requires the judge to restrain a gestalt based solely on the law and past precedent until he appreciates the pattern of relations and values in the situation before him.

The realists, particularly Llewellyn and Frank, first called our attention in law to the phenomenon which Lonergan calls horizons. They emphasized the impact of a judge's political, social, and cultural background on his decisions and then began to create devices for overcoming the obstacles to vision created by existing horizons.¹⁶⁸ Lonergan describes those vision-blocking characteristics as follows:

As our field of vision, so too the scope of our knowledge, and the range of our interests are bounded. As fields of vision vary with one's standpoint, so too the scope of one's knowledge and the range of one's interests vary with the period in which one lives, one's social background and milieu, one's education and personal development. So there has arisen a metaphorical or perhaps analogous meaning of the word, horizon. In this sense what lies beyond one's horizon is simply outside the range of one's knowledge and interests: one neither knows nor cares. But what lies within one's hori-

162. See Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 250-51.

163. *Id.* at 263-75.

164. See DWORKIN, *LAW'S EMPIRE*, *supra* note 25, at 151-75.

165. See *supra* part V.

166. See *supra* text accompanying notes 118-22.

167. See *supra* text accompanying notes 85-89.

168. The realists were aware of the judge as a person. Their introspective analysis of the judge's decision-making process involved taking account of his political, cultural, and social background. See *supra* text accompanying notes 103-06.

zon is in some measure, great or small, an object of interest and of knowledge.¹⁶⁹

Loneragan offers a number of means for overcoming the vision-blocking characteristic of horizons.¹⁷⁰ Some means may be classified as crossing horizons,¹⁷¹ reaching out to new horizons. One crosses horizons in the same way one creates horizons. Like the young man from the mountain village who journeyed to the fishing village, one simply can go there. A judge may study economics. He then will ask new questions and understand new problems. He may undertake the study of a new industry or the problems of a minority group in society. A Brandeis brief from counsel may assist the judge in that process. The judge may develop a decision-making methodology which has a place for horizon crossing—for the Brandeis brief, for impact and interest analysis, for situation sense. All these would fit within what Lonergan calls methods for crossing horizons.¹⁷² Other means could be classified as ways of transcending horizons.¹⁷³ A higher theory, including a higher moral theory, may provide one with a broader view which would include both acceptance of one's own previous theoretical or moral views and those of others.¹⁷⁴ When a judge with a particular political, moral, or cultural background puts on the judicial robe and mounts the bench, he may perceive a duty of fairness to those with other backgrounds which he would not have accepted as readily before his appointment to the judiciary. The new judge with a commitment to fairness has transcended his previous horizons. It also would be helpful if he would cross horizons by enlarging his understanding of the great variety of human situations.

Dworkin's Judge Hercules may be said to transcend, rather than cross, horizons.¹⁷⁵ Hercules's rigorous consistency with his principled

169. LONERGAN, *METHOD IN THEOLOGY*, *supra* note 8, at 236.

170. See LONERGAN, *INSIGHT*, *supra* note 8, at 173-244; Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 256-63; see also TRACY, *supra* note 10, at 1-21 (introducing Lonergan's horizon analysis).

171. See Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 256; see also DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 48-55 (discussing concept of horizons and its influence on our understanding and interest).

172. See LONERGAN, *INSIGHT*, *supra* note 8, at 319-39; LONERGAN, *METHOD IN THEOLOGY*, *supra* note 8, at 81-99; TRACY, *supra* note 10, at 15-21, 133-39; Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 259-63.

173. See Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 259 n.268; see also DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 51-55 (discussing difference between transcending and crossing horizons).

174. See Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 260-63.

175. *Id.* at 259.

interpretation of law allows him to transcend previous political, social, and cultural horizons.¹⁷⁶ His new interpretation of law, however, creates a new horizon with its own vision-blocking aspects.¹⁷⁷ The lack of horizon-crossing devices in Dworkin's method prevents Hercules from overcoming the barriers to vision created by rigorous adherence to his interpretation of law.¹⁷⁸

The crits, drawing upon postmodern European thought and building upon the insights of the legal realists, have made the phenomenon which Lonergan labels horizons a central aspect of their thought.¹⁷⁹ We are all controlled, according to the crits, by the dead hand or the horizons of the past, particularly by the liberal capitalism inherited from the Enlightenment.¹⁸⁰ The accepted horizons in society, influenced heavily by the social and economic advantages of the established classes, control our vision and prevent us from perceiving and addressing oppression.¹⁸¹ Deconstruction, as used by the crits, is a useful device for breaking down old horizons and overcoming their barriers to vision. Thus, it should be added to the list of horizon-crossing techniques.

Nevertheless, the crits resemble Dworkin in some respects.¹⁸² In place of a rigorous adherence to a principled interpretation of law, many crits would insist upon rigorous consistency with political ideology.¹⁸³ However, one must recognize that the crits would, at times, be willing to deconstruct their own positions. Roberto Unger, in his idealized vision of society, would provide a place for destabilization rights so that the ideologically reconstructed new world could itself be

176. *Id.*

177. *Id.*

178. *Id.*

179. The crits recognize that ideological commitments create horizons. They use that understanding as a basis to attack current legal traditions rather than to create horizon-crossing methods in their own decision-making process. However, it must be noted that some crits may have begun to enter a creative mode. For example, Duncan Kennedy's article, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, offers limited horizon-crossing techniques. Kennedy allows for dialogue between judges, which allows for horizon crossing. See Kennedy, *supra* note 24, at 522-27. The effectiveness of this technique is limited, however, because the conversations remain at a doctrinal level. See DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 38-43, 51-55.

180. See Horwitz, *supra* note 71, at 1036-39; see generally Tushnet, *An Essay on Rights*, *supra* note 139 (arguing that since competing rights can always be posited, jurisprudential balancing of those rights serves status quo).

181. See Horwitz, *supra* note 71, at 1036-39.

182. See DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 41-43, 54-55, 70-71, 85-88.

183. *Id.*

overturned by those oppressed by the new vision.¹⁸⁴ The critics are ever aware of the prospects of oppression by establishment ideologies, even those newly established. Yet, one detects an absence of concern for the concrete, real person and a tendency to overlook that person and the pattern of relations in his situation in favor of an ideologically supportable result. See, for example, the decision-making process of the imaginary judge in Duncan Kennedy's article, *Freedom and Constraint in Adjudication: A Critical Phenomenology*.¹⁸⁵ Kennedy keeps searching for a politically correct solution rather than critically examining the pattern of human relations in the situation. He assumes from his ideology the best way to promote the cause of humanity in the situation. There is an absence in critical legal studies thought of the multiple devices found in early pragmatist and legal realist methods for reaching out to and understanding persons in the situation.¹⁸⁶

A personalist critique of legal method or judicial decision-making method, then, would note the presence or absence of horizon-crossing devices. A judge, aware of his limited knowledge and understanding, of his horizons, is a judge who knows himself as a person. If, in addition, he critically reexamines his decision-making methodology with a view to providing means for regularly crossing horizons, he is a judge who is concerned for persons in a variety of human situations different from his own. Such a judge is a person who acts in relation to others with a critical awareness of method, horizons, and the manner in which they affect his actions, and hence, his relations with others.

VII. PRINCIPLES, IDEOLOGY, AND COMMITMENT TO PERSONS

Oliver Wendell Holmes, Jr. is renowned for his statement in *Lochner v. New York* that "[g]eneral propositions do not decide concrete cases."¹⁸⁷ This aphorism is not unrelated to his earlier comment, in *The Common Law*, that "[t]he life of the law has not been logic: it has been experience."¹⁸⁸ Holmes may have had in mind principles as used in traditional legal method, which could be defined as a policy theme running through a series of cases. When one perceives law as a closed logical system, such principles could be abstracted from the

184. See Unger, *supra* note 71, at 599-600.

185. See generally Kennedy, *supra* note 24 (examining thought process of judicial decision making and explaining how legal doctrine constrains judges).

186. See DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 38-40, 51-55.

187. *Lochner v. New York*, 198 U.S. 45, 76 (1905).

188. HOLMES, *THE COMMON LAW*, *supra* note 2, at 5.

cases over the Bunsen burner of the Socratic method, as Langdell would say, and then used as the foundation or general premise for deductive reasoning in future decisions.¹⁸⁹ Using principles in this manner would insulate the judge from the experience offered by each new case. It would also overlook persons and their relationships in the concrete cases before the court.

Participating in the quarrels over traditional legal method, Llewellyn would recommend that principles be employed as guidelines, if at all, and then be developed in accordance with the grand style of the common law on a case-by-case basis.¹⁹⁰ Llewellyn would not advocate deciding cases by deducing the holding from a general principle.¹⁹¹ Rather, the principle should be applied only after a careful use of analogy and distinction under the guidance of the judge's situation sense.¹⁹² The use of traditional principles in Llewellyn's method would not lead the judge to overlook persons and their relationships in the concrete cases before the court.

Dworkin, in "Hard Cases," chapter 4 of *Taking Rights Seriously*, describes principles in an entirely different manner than that used by Holmes, Langdell, and Llewellyn.¹⁹³ Principles are political reasons for holdings in concrete cases based on assertions of individual rights.¹⁹⁴ In contrast, Dworkin defines policies as political reasons for decisions based on group advantage.¹⁹⁵ According to Dworkin, courts should decide on the basis of principles rather than policies.¹⁹⁶ Strong principles should prevail over competing strong policies in the court's reasoning process. Dworkin offers a hierarchy of reasons for decisions upholding concrete rights.¹⁹⁷ For example, a right not to be segregated in education rests upon the abstract institutional right to equal

189. For the realist attack on formalism, see KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 3-41 (1962) [hereinafter LLEWELLYN, JURISPRUDENCE]; Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931) [hereinafter Llewellyn, *Some Realism About Realism*].

190. See LLEWELLYN, THE COMMON LAW, *supra* note 85, at 35-41.

191. See Llewellyn, *Some Realism About Realism*, *supra* note 189, at 1251-56.

192. See TWINING, *supra* note 86, at 211-27.

193. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 81-131; cf. LLEWELLYN, THE COMMON LAW, *supra* note 85, at 256-60, 447-61 (discussing different ways in which principle and reason are used in appellate decision making).

194. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 90-100.

195. *Id.*

196. *Id.* at 96-100.

197. *Id.* at 93-94; see also Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 220-22 (discussing Dworkin's analysis of rights).

protection of the laws found in the Fourteenth Amendment.¹⁹⁸ Judge Hercules, when interpreting that clause of the Fourteenth Amendment, should offer a conceptualization or theory of equal protection, probably based on a background right to equality, which in turn is based on Hercules's commitment to afford all persons equal respect and concern.¹⁹⁹

Dworkin's grounding of decisions in reasons based on individual rights and ultimately in political friendship, or in a commitment to afford all persons equal respect and concern, is a major advance in the recovery of the person in twentieth century American jurisprudence. A second major advance is the method he offers in "Hard Cases" and "Constitutional Cases," chapters 4 and 5 of *Taking Rights Seriously*, and in *Law's Empire* for interpretation of constitutional provisions. In "Hard Cases" he requires Judge Hercules to develop a theory, understanding, or conceptualization of contested concepts which would include, as explained in "Constitutional Cases," the great contested moral concepts in the United States Constitution.²⁰⁰ In *Law's Empire* he elaborates on the requirement, stated in *Taking Rights Seriously*, that Hercules develop a theory for interpretation of the constitution, our government, and our law that would make the most that can be made of our institutions.²⁰¹ A worthy theory would be one that has good institutional fit, that is, it would offer an explanation of our laws and institutions and their development.²⁰² Among theories with adequate institutional fit, one could choose the theory which offers the higher moral interpretation.²⁰³ In *Law's Empire*, Hercules would ground his interpretation ultimately in political friendship.²⁰⁴ Dworkin's manner of using moral thought, friendship, or respect and concern for persons as the foundation for judicial decisions bears some resemblance to Bernard Lonergan's discussion of basic horizons and

198. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 101-05.

199. *Id.* at 86-116.

200. *Id.* at 81-131.

201. DWORKIN, *LAW'S EMPIRE*, *supra* note 25.

202. *Id.* at 225-75.

203. *Id.* at 254-58.

204. *Id.* It is important to note that Dworkin uses a feature called compartmentalization in choosing the best interpretation. He states:

If Hercules finds that neither of two principles is flatly contradicted by the accidental damage cases of his jurisdiction, he expands his study into, say, contract cases to see which of these principles, if either, fits contract decisions better. But in Hercules's view, if one principle does *not* fit accident law at all—if it is contradicted by almost every decision in the area that might have confirmed it—this counts dramatically against it as an eligible interpretation of that body of law . . .

Id. at 250-51.

offers an important, and vital, way of relating personalist thought to law.

Unfortunately, another aspect of Dworkin's understanding and use of interpretation requires Hercules to adhere rigorously to his comprehensive theory or interpretation of law. This erects strong barriers to crossing horizons and to understanding the persons and problems before the court. Dworkin labels this rigidity in law and decision making "Integrity."²⁰⁵ But this virtue prevents Hercules from adhering to his fundamental ideal of affording all persons equal respect and concern. To afford persons respect and concern requires that one be interested in them and listen to them. It also requires that one maintain sufficient flexibility to adapt one's actions and decisions to the needs and problems of the persons one encounters.

Nevertheless, Dworkin has added another important criteria for assessing proposed theories of law and judicial decision-making methods, namely whether they are ultimately grounded in political friendship, or respect and concern for persons. One could criticize the crits because their understandings of law are grounded in narrow political ideologies rather than in a broad respect and concern for all persons—individually and collectively.²⁰⁶ A political ideology may offer a concrete interpretation in a particular society of the advancement of the common good or the cause of humanity. The ultimate test of such an interpretation is its impact upon people and their lives. There is little indication that the crits are prepared to subject their ideologies to that test. The particular "goods" which they urge may be only partial goods.²⁰⁷ Further, there is a danger that locked within the narrow horizons of their ideologies they will promote those partial goods despite the adverse impact upon the lives and rights of individual persons. Dworkin's concern for individual rights grounded in political friend-

205. *Id.* at 176-276.

206. The crits and the specialized movements that have developed from them are often interested in what structure society should have. These movements would use rights to restructure society and promote different ideological goals. One could criticize the crits, then, not for the substance of the ideologies that they want to promote; but rather, because their interest is in the promotion of specific ideologies instead of a broad respect and concern for all persons. See DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 87-89, 93-95.

207. See STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS* (1974); see also Kennedy, *supra* note 24. Duncan Kennedy describes the imaginary case before him in a manner designed to promote his ideological position. While this may be an appropriate use of rights for those hammering on foreign horizons, it is inappropriate from the point of view of a judge. See DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 87-88.

ship, offers an important corrective and ground for assessing proposed theories of law, government, or judicial decision-making including those of the crits.

The American pragmatist movement in its various manifestations offers a negative photographic image of Dworkin's understanding of law.²⁰⁸ In most pragmatist thought there is a deliberate avoidance of fundamental commitments.²⁰⁹ The distaste for principles of the traditional sort carries over to principles as commitments to fundamental values and ideals. While striving to be continually open to the persons encountered in law or in the course of judicial decision making, the pragmatists overlook the importance of a fundamental commitment to persons individually and collectively. A question raised by the pragmatist tradition is whether such a fundamental commitment to persons *itself* erects barriers to further intellectual exploration and to the openness necessary to respond to concrete individuals.²¹⁰ For Dworkin such barriers appear to be the result of his fundamental commitments. Nevertheless, the problem as stated appears to involve a contradiction, namely that a commitment to persons prevents one from being open to the needs and concerns of the persons one encounters. Dworkin's rigidity may result from a neo-Kantian²¹¹ desire for consistency rather than from his fundamental commitment to respect and concern for persons.²¹²

The pragmatist rejection of, or reluctance to use, principles as traditionally understood was an important step in the twentieth century recovery of the person. Yet Dworkin's rediscovery of principles as grounded in respect and concern for the person is indispensable to relating legal reasoning to persons.²¹³ Dworkin's method of interpretation, particularly when applied to understanding the great contested moral concepts in the United States Constitution, enables us to understand the relationship between persons, legal reasoning, and principles

208. See DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 87-89.

209. See LLEWELLYN, *THE COMMON LAW*, *supra* note 85, at 35-45; see also TWING, *supra* note 86 (examining Llewellyn's use of concepts "situation sense" and "reason"). *Lochner v. New York* also illustrates a deliberate avoidance of general principles of law. 198 U.S. 45; POSNER, *THE PROBLEMS OF JURISPRUDENCE*, *supra* note 131, at 454-69 (emphasizing difficulties of legal system based on formal principle).

210. See POSNER, *THE PROBLEMS OF JURISPRUDENCE*, *supra* note 131, at 454-69.

211. Dworkin is described as a neo-Kantian because he, like Kant, is an absolutist and a rationalist. Dworkin believes that we can use reason to work out a consistent set of principles that cannot be overridden within this age of the law. However, Dworkin differs from Kant in that Dworkin's theory is not purely duty based.

212. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 116.

213. See *supra* text accompanying notes 193-205.

as values, ideals, and commitments related to persons. However, by uncovering both steps as important to the recovery of the person in law a dilemma arises: Can we understand and use our fundamental principles, which seem vital to respect and concern for persons, in a way which avoids overlooking the persons we encounter in concrete circumstances and denying them deep respect and concern?

VIII. THE COMMON GOOD

A. Macmurray

Ronald Dworkin, as just described, requires Judge Hercules to develop a fundamental theory or interpretation grounded in political friendship or a commitment to afford all persons equal respect and concern.²¹⁴ John Macmurray offers the beginnings of such a theory.²¹⁵ According to Macmurray, the relationship between persons is found in action where one encounters resistance, some of which one can perceive as intentional.²¹⁶ The actor, then, may distinguish between subjects who respond intentionally and objects whose resistance is unintentional.²¹⁷ From his understanding of persons in relation through action, Macmurray develops a theory of indirect relations which offers a clue to an interpretation of society grounded in political friendship.²¹⁸

In every relation between persons, each person is both subject and object.²¹⁹ One can choose to regard the other solely as object and, hence, as impersonal.²²⁰ By refusing the personal relationship one can emphasize the objective aspects of the other, denying his freedom and intentionality as another actor.²²¹ Normally, the objective aspects of a relation are for the sake of the person in which each treats the other as a person, as one who acts freely and intentionally.²²² However, one can reverse the dominance of the subjective over the objective.²²³ In slavery, for example, the master regards the slave not as a free, intentional actor, but as an object who possesses certain per-

214. See *supra* text accompanying notes 193-205.

215. See MACMURRAY, PERSONS IN RELATION, *supra* note 9.

216. *Id.* at 16-18, 79-82.

217. *Id.* at 79-82.

218. See MACMURRAY, PERSONS IN RELATION, *supra* note 9; MACMURRAY, THE SELF AS AGENT, *supra* note 9.

219. See MACMURRAY, PERSONS IN RELATION, *supra* note 9, at 25-29, 160-61.

220. *Id.* at 29-31.

221. *Id.*

222. *Id.* at 30-43.

223. *Id.*

sonal characteristics which render him useful.²²⁴ While the master perceives the slave as both subject and object, the objective aspects dominate the subjective.²²⁵ Macmurray argues that "the impersonal attitude is justifiable when it is itself subordinated to the personal attitude, when it is adopted for the sake of the personal, and is itself included as a negative which is necessary to the positive."²²⁶

Thus, the ideal of the personal "is a universal community of persons in which each cares for all the others" since the "self-realization of any individual person is only fully achieved if he is positively motivated towards every other person with whom he is in relation."²²⁷ In principle, one's relation with the Other must be inclusive rather than narrow and confined to those whom one prefers.²²⁸ This ideal is at least theoretically achievable when one has direct relations with others. In order to emphasize the personal rather than the objective aspects of a relation, one must limit one's activities in order to preserve the interests of others, particularly their freedom as independent actors.²²⁹ Unless one intends to preserve the other's freedom, one is subordinating the personal aspects of the relation and negating the Other as one who intentionally acts.²³⁰ When in communication or direct relation with others, sensible limitation to preserve their freedom and interests is possible.²³¹ When the relationship is indirect, as it necessarily must be with the majority of persons in society, it is difficult to understand which limitations make sense and will actually preserve the freedom and interests of others.

Through a discussion of indirect relations,²³² Macmurray is able to propose the beginnings of a personalist theory of political obligation and justice. The political obligation "is a derivative and indirect moral obligation."²³³ Justice is a restraint which one person accepts on his own power and action for the sake of preserving the freedom and interests of others.²³⁴ Justice is ultimately for the sake of friendship, for preserving the ideal of a universal community, and the ideal for each individual of positive motivation towards each person he is

224. *Id.* at 34-35.

225. *Id.*

226. *Id.* at 35.

227. *Id.* at 159.

228. *Id.*

229. *Id.* at 30-43.

230. *Id.*

231. *Id.*

232. *Id.* at 186-205.

233. *Id.* at 196.

234. *Id.* at 190-91, 201.

related to directly or indirectly.²³⁵ Law, in turn, arises when there is a claim of injustice.²³⁶ Courts of law make the adjustments, including changes of custom necessary to reestablish justice.²³⁷ Justice is "the minimum of morality which can be demanded as necessary to the co-operation of free agents."²³⁸ Without it we cannot cooperate in society and maintenance of the ideal becomes impossible.²³⁹

Macmurray, then, offers a clue to grounding a theory of law, justice, or government in an understanding of persons in relation. A theory of justice, however, requires a more elaborate foundation, perhaps related to Macmurray's insights. Dworkin on occasion has offered Rawls's *Theory of Justice* as a sophisticated interpretation of modern society grounded—as Dworkin would perceive—in a commitment to afford all persons equal respect and concern.²⁴⁰ Karol Wojtyla who, like Macmurray, perceives a person primarily as one who acts, offers in his book, *The Acting Person*,²⁴¹ an understanding of the common good which in some respects remarkably resembles Rawls's theory.

B. *Persons Acting Together—Wojtyla, Rawls*

In *The Acting Person*, Karol Wojtyla offers an understanding of the common good as persons acting together.²⁴² Actions contrary to the common good could be defined as those that tend to destroy or seriously interfere with the common action and as those that prevent the participation of any particular person in that action.²⁴³ Participation in action with others is a rich concept in Wojtyla's thought. One can participate in society's common action in a variety of ways: intellectually, economically, through the experience of work, and politically. In *The Acting Person*, Wojtyla offers an understanding of political opposition as a form of participation in the common action and hence as contributing to the common good.²⁴⁴ In Wojtyla's thought, one develops as a person through action, as for example, one grows through work.²⁴⁵ Acting or working with others helps one to

235. *Id.* at 204-05.

236. *Id.* at 202.

237. *Id.* at 202-03.

238. *Id.* at 204.

239. *Id.*

240. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 179-83.

241. See WOJTYLA, *supra* note 7.

242. *Id.* at 281-82.

243. *Id.* at 280-91.

244. *Id.* at 284-87.

245. *Id.* at 265.

develop more fully as a person.²⁴⁶ Understanding oneself and the Other through common action differs from the Sartrean definition of oneself under the Look and by nihilating the Look of the Other.²⁴⁷ The experience of growth through common action contrasts with Macmurray's recognition of the Other through perception of an intentional resistance to one's action.²⁴⁸ According to Wojtyla, one perceives oneself and the Other as person through the experience of cooperative intentional action.²⁴⁹

The common good, defined as persons acting together, offers the beginning of a model from which one could generate a theory or interpretation of society of the sort Dworkin requires of Judge Hercules.²⁵⁰ Dworkin suggests that Rawls's *Theory of Justice* offers such an interpretation of society and could serve as a foundation for Hercules's more particular conceptualizations of the great contested moral concepts in the United States Constitution such as due process, equal protection, freedom of speech, and cruel and unusual punishment.²⁵¹

Rawls's *Theory of Justice*²⁵² is in some respects similar to Wojtyla's model of the common good and provides some patterns which could be employed in developing that model. Rawls imagines an original position with multiple contracting parties negotiating an agreement regarding the principles of justice for their society.²⁵³ The agreement is arrived at under the veil of ignorance which conceals from the parties their own projects in life and their own advantages and disadvantages.²⁵⁴ The principles agreed to will protect all persons in the pursuit of their rational projects in life.²⁵⁵ A measure of the principles is whether they tend to maximize everyone's shares of the primary social goods and to minimize the worst disasters, defined as large or total losses of the primary social goods.²⁵⁶ Rawls would define the primary social goods as those necessary to the pursuit of any

246. *Id.* at 271.

247. *See supra* text accompanying notes 59-61.

248. *See supra* text accompanying notes 219-41.

249. *See* WOJTYLA, *supra* note 7, at 11.

250. *See* DWORKIN, *LAW'S EMPIRE*, *supra* note 25, at 45-113.

251. *See* DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 87.

252. For a summary of Rawls's theory, see Samuel J. M. Donnelly, *A Theory of Justice, Judicial Methodology, and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109, 1117-26 (1978) [hereinafter Donnelly, *A Theory of Justice*].

253. *See* RAWLS, *supra* note 70, at 60-65, 118, 150-61.

254. *Id.* at 12, 136-42.

255. *Id.* at 90-95, 142-50; *see also id.* at 64-65 (discussing "expectations").

256. *Id.* at 396-99, 433-39, 447 (explaining Rawls's "Thin Theory of Good").

rational life plan and would include among them life, liberty, self-respect, and a modicum of wealth.²⁵⁷

One developing an understanding of the common good as persons acting together might define fundamental social goods as those necessary to allow minimal economic and political participation in the common action of society. The primary principles of justice, then, would be those that would protect and promote participation in the common action and guard against elimination of any particular person's or group's participation in that common action. Important policies, in Dworkin's sense of political reasons related to group advantage,²⁵⁸ also would emerge from reflection on society as persons acting together. Such policies would promote and advance the common action and resist interference with or destruction of that action. This developing model for interpreting society would be grounded in deep respect and concern for persons and their relationships with one another. One who has respect and concern for persons should hold that regard for both the totality of persons acting together in society and for each particular person participating in the common action. Both the policies and principles which emerge from this model of the common good would be grounded in regard for the person. The principles and policies adopted through use of the model would promote Macmurray's ideal of "a universal community of persons in which each cares for all the others."²⁵⁹

The more dynamic model of the common good, as persons acting together, offers advantages when compared with Rawls's static model. It allows the development of a Dworkian interpretation of a particular society for the sake of protecting the personal despite the objective aspects of what Macmurray describes as indirect relations²⁶⁰ in a large community of persons. In addition, this model can serve as a guideline for day-to-day common sense actions, in Lonergan's understanding,²⁶¹ in the conduct of political affairs. One's actions as a judge should be guided by a concern for preserving the common action and for protecting the participation of each individual in that action. Indeed, because of the dynamic nature of the model of the common good, a judge accepting its guidance should continue to grow, to develop morally and intellectually in order to cross horizons, and to

257. *Id.* at 62, 92.

258. See *supra* text accompanying note 195.

259. MACMURRAY, PERSONS IN RELATIONS, *supra* note 9, at 159.

260. See *supra* text accompanying notes 231-39.

261. See *supra* text accompanying notes 94-96, 106-18.

reach out to others to allow, preserve, and protect their ability to participate in the common action.

In resemblance to Rawls, and indeed, drawing on his inspiration,²⁶² one could use the model of the common good as persons acting together to generate a theory of rights. A fundamental right would be to participate in the common action. Primary rights would protect against deprivation of the personal, economic, and political goods necessary to basic participation in any society's, and in this particular society's, common action.

If one were interpreting the United States Constitution, one then would examine the history, tradition, and structure of our government and develop an interpretation of the constitution generally that would meet Dworkin's two tests: good institutional fit and a higher moral interpretation.²⁶³ The argument for the interpretation that makes the moral best of the constitution would rest upon the interpretation's reflection of an understanding of the common good as persons acting together and of actions contrary to the common good as those which tend to destroy the common action or to prevent or inhibit the participation of any person in that action.

In turn, the general theory or interpretation of the constitution would become the foundation for theories of each constitutional provision. And, as in Dworkin's understanding of rights as reasons,²⁶⁴ these theories of particular provisions would become the reasons for holdings in concrete cases. One should ask how this interpretation differs from that of Dworkin. It, of course, uses much of Dworkin's method while offering a slightly different foundation. However, unlike Dworkin,²⁶⁵ this interpretation grounds both principles, as reasons for decisions based on individual right, *and* policies, as reasons for decisions based on group advantage, in the fundamental theory that is the common good. Principles must be weighed against policies. Only strong principles—those which protect the primary social goods and the opportunity of each individual to participate basically in the common action of society—would automatically trump strong policies. Further, since the understanding of the common good as persons acting together is a dynamic conception, the judge using it to interpret the constitution never would rest contentedly with his present under-

262. See Donnelly, *A Theory of Justice*, *supra* note 252.

263. See DWORKIN, *LAW'S EMPIRE*, *supra* note 25, at 225-75; DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 81-131.

264. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 81-131.

265. See *id.*

standing. In the tradition of Lonergan, the inquiry would proceed and the judge would have a strong commitment to crossing horizons.

A further difference arises from the traditional liberal distaste for a full theory of the good.²⁶⁶ That distaste may be perceived in Dworkin's focus on rights rather than policies, supporting the individual rather than group advantage. One also may recognize that distaste for a full theory of the good in Rawls, who offers instead a sufficient thin theory of the good to support a theory of the right.²⁶⁷ While the theory of the common good offered above follows Rawls in recognizing primary social goods necessary to participation in any society or in this society, it has a place for a fuller theory of the good which is continually developing as the inquiry proceeds. Actions which would tend to destroy or seriously interfere with the common action would be contrary to the common good and would be accounted for in constitutional interpretation. Policies as reasons supporting a judge's decision would be grounded in a concern for the common action and would support proposals that promote that common action. In sum, the theory of the common good is grounded ultimately in respect and concern for persons in particular and their relations with others, and with persons generally as collectively, albeit indirectly, related to each other in society.

C. Finnis

Any discussion of a full theory of the good must account for John Finnis's analysis, in *Natural Law and Natural Rights*, of the basic goods necessary for human flourishing.²⁶⁸ The goods, he contends, which are self-evidently good and not reducible to other goods, are life, knowledge, play, aesthetic experience, friendship, practical reasonableness, and religion.²⁶⁹ Other instrumental goods would promote these basic aspects of human flourishing.²⁷⁰ While Finnis is offering a premoral theory of human flourishing, one could develop a theory of rights from Finnis's list of basic goods by adding a human or moral commitment to the flourishing of each individual. To totally or substantially deny any of these basic goods to an individual person would be to deny his fundamental human rights. This understanding of fundamental human rights then could serve as a basis for offering

266. See RAWLS, *supra* note 70, at 396-99, 433-39, 447.

267. *Id.*

268. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 59-99 (1980).

269. *Id.* at 85-90.

270. *Id.* at 90-91.

an interpretation of the protection of rights and of particular rights in the United States Constitution. A possible check upon Finnis's perception regarding basic goods would be to ask whether we would consider it fundamentally wrong to deny an individual person all access to the goods listed by him. Other goods also may be discovered by use of that test. Perhaps some of the goods so discovered would be of basic importance for human flourishing in our society but not another.

Promotion of the basic goods listed by Finnis also would enhance society. For example, while it may be fundamentally wrong to deny a particular person or group all access to knowledge, it correspondingly would be good to promote knowledge and access to it in society. While resource allocation is important, neglect of certain fundamental goods, perhaps those in Finnis's list, would lead to serious deterioration of human flourishing in general. Finnis's list then contributes to an understanding of sound public policy as well as a foundation for generating a theory of rights.

Nevertheless, it is enlightening to compare Finnis's analysis with the formulas offered by Rawls and Wojtyla for locating the primary social goods. Rawls would ask what goods are necessary to pursue any rational plan in life,²⁷¹ while one using Wojtyla's definition of the common good could inquire what goods are necessary to participate in the common human action.²⁷² Wojtyla's definition, focusing not only on human action in general but the particular common action in this society, could be used to generate lists of goods important to participation at the moment in this society. Rawls's list, while overlapping with that generated by Wojtyla's definition, would differ from that of Finnis's.

Comparing Rawls, Finnis and Wojtyla highlights the need for conversation and crossing horizons in order to understand the basic needs of people in particular societies. One committed to respect and concern for persons should not maintain a closed list of primary social goods.

D. Summary

Wojtyla's understanding of the common good as persons acting together provides the central insight for a personalist theory that will relate a judge's fundamental commitment to persons in relation to each other to an understanding of rights in the United States Constitu-

271. See *supra* text accompanying notes 252-56.

272. See *supra* text accompanying notes 242-49.

tion. Actions in violation of the common good are those that tend to destroy the common action or to eliminate or substantially inhibit the participation of any particular person in society's action.²⁷³ A theory of fundamental rights, which a judge may use in interpreting the constitutional protections for rights, may be construed on the basis of that understanding of actions contrary to the common good. Construction of the theory requires discussion of primary goods necessary to participation in society. Both Rawls and Finnis offer lists of goods that could be considered primary.²⁷⁴ The disregard of those goods would tend not only to disintegrate the common action but also to harm individual participation in society. To deprive an individual of a reasonable share of any of these goods would be to treat the individual primarily as an object rather than a person. To protect each individual's share of the primary goods by a theory of rights and to promote participation in society is to follow Macmurray's desire to preserve the dominance of the personal over the objective despite the indirect relations of persons in society.²⁷⁵ A judge could adapt Dworkin's method²⁷⁶ when employing this theory to interpret the great contested moral concepts in the United States Constitution. The judge should recognize, however, that Wojtyla's theory of the common good expresses concern for the common action as well as the participation of each person.²⁷⁷ Rights as reasons, then, must be weighed against policies as reasons, although strong rights directly related to the primary social goods would trump strong policies.²⁷⁸ The judge also should recognize the dynamic nature of the definition. The common action in which the judge is participating continues despite the theory of rights constructed by the judge. Theory is secondary to, and for the sake of, action. The theory of rights provides a guide to protecting particular persons and their ability to participate in the common action. The judge, by crossing horizons among other means, must be continually alert to the impact of his holdings, including those interpreting constitutional protections for rights, on persons and their relations.²⁷⁹ That ongoing concrete concern for persons may lead to the discovery of new primary goods necessary to participation in the concrete circumstances of this society.

273. See *supra* text accompanying notes 242-44.

274. See *supra* text accompanying notes 255-57, 268-72.

275. See *supra* text accompanying notes 226-39.

276. See *supra* text accompanying notes 199-206, 260-68.

277. See *supra* text accompanying notes 242-46.

278. See *supra* text accompanying notes 264-66.

279. See *supra* text accompanying notes 118-22, 164-68.

IX. PLURALISM, HORIZONS, AND RHETORIC

A pluralist society, which may be defined as one with multiple horizons, poses a substantial challenge to a judge with a commitment to respect and concern for persons. Without consciousness of horizons, with their vision-creating and vision-blocking aspects, and a method that allows the crossing of horizons, the task of respect and concern for persons may be nearly impossible for a judge in a pluralist society. When abstracted from the many horizon-crossing activities that people actually engage in, the task of relating persons in a pluralist society may appear formidable and perhaps impossible. Since people are related through language and action, one must find ways of relating both language and action to the means for crossing horizons.

James Boyd White's understanding of law as rhetoric offers a basis for discussing the relations of persons through law in a pluralist society.²⁸⁰ While White emphasizes the language aspects of law, enough has been said in this Article to show that the language of law is for the sake of action.²⁸¹ White sees society as constituted by the ongoing argument, partially through law, regarding what society ought to be.²⁸² That vision could be developed so that law, which is both language and action, is an important means for relating persons in differing horizons to each other. A passage from *Heracles' Bow* makes the point:

[T]he law as I describe it becomes a repository of shared experiences, a set of experiments and trials and failures, which are by the law made intelligible and sharable. This is a culture of experience and experiment; it is a way of giving experience to ourselves, individually and collectively, the experience of making and remaking language under pressure. For in the law, our language of facts and law is constantly being tested against the real world, against common sentiment, against cases and argument, and being remade in light of what is discovered. This means that the law is a way in which the community defines itself, not once and for all, but over and over, and in the process it educates itself about its own character and the nature of the world.²⁸³

280. See WHITE, *HERACLES' BOW*, *supra* note 72.

281. See *supra* text accompanying notes 52-65.

282. See WHITE, *HERACLES' BOW*, *supra* note 72, at 28, 32-35, 37.

283. *Id.* at 225.

The various views, positions, cultures, and groups in society that engage regularly, through law, in argument about the remaking of society are related in one society that is constituted by high discussion about what society should be.²⁸⁴ The ongoing argument is language; but it is language about action, and indeed about the common action, which is society.

To allow the activity, which is law, to function best in relating persons in multiple horizons to the common action of society, law should function for those engaged in the activity of law, such as judges, as a means of transcending and crossing horizons. I have noted the advantages of a comprehensive theory like Dworkin requires of Judge Hercules, for transcending horizons and protecting rights.²⁸⁵ The law itself is a means of transcending the multiple cultural horizons in society. I also have noted the dangers of a rigid ideology for recognition and respect for persons and their rights.²⁸⁶ Those rights and persons who are not accounted for by the ideology will be ignored.²⁸⁷ However, every worked-out theory, even one such as Dworkin's constructed on the foundation of respect and concern for persons, will establish a new horizon with both vision-enhancing and vision-blocking characteristics and may be said to constitute an ideology.²⁸⁸ Legal methods then require horizon-crossing techniques to allow law to work well in relating persons in differing horizons to the common action of society.²⁸⁹

Law understood as rhetoric,²⁹⁰ as the ongoing argument between those in differing horizons which constitutes society, contains, or perhaps suggests, an important means for crossing horizons, that is, by argument or conversation. Argument is a means of establishing conversation, of seeking recognition for one's views and for oneself as a person, and for those within one's horizon as persons.²⁹¹ It is a way of

284. See *id.* at xii; see also DONNELLY, LANGUAGE AND USES OF RIGHTS, *supra* note 20, at 43-46 (discussing various approaches to law as rhetoric).

285. See *supra* text accompanying notes 134, 175-77; see also Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 257-59 (arguing that comprehensive theory, rigorously applied, can be means for transcending horizons and keeping political, cultural, and social predilections in check).

286. See *supra* text accompanying notes 159-64.

287. See *supra* text accompanying notes 175-84.

288. See Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 266-70.

289. See DONNELLY, THE LANGUAGE AND USES OF RIGHTS, *supra* note 20, at 50-55.

290. See WHITE, HERACLES' BOW, *supra* note 72, at xii-xiii.

291. See DONNELLY, THE LANGUAGE AND USES OF RIGHTS, *supra* note 20, at 82-95.

knocking, or perhaps hammering, on the door of foreign horizons seeking recognition and participation.²⁹²

Dworkin's method for interpreting the great contested moral concepts in the United States Constitution offers both a method and an understanding of how conversation takes place through constitutional litigation and decision making between those in differing horizons in our society.²⁹³ In "Hard Cases," chapter 4 of *Taking Rights Seriously*, Dworkin requires Judge Hercules to offer a theory or conceptualization of each contested concept in the constitution which is grounded ultimately in Hercules's vision or interpretation of our society, law, and government.²⁹⁴ Each conceptualization must justify not only the particular decisions which Hercules wants to make but also the clear core instances, or cases, on which everyone is agreed and the concept itself.²⁹⁵ Employing Dworkin's method, judges with differing visions, or with different horizons, should offer a conceptualization which interprets the concept and supports the clear core instances of the concept as well as justifies their particular decision. Thus, they are necessarily in conversation.²⁹⁶ The decisions of judges using Dworkin's method, however much their visions or horizons differ, will nevertheless overlap since each is offering an interpretation or justification of the same concept and the clear core instances on which all agree.²⁹⁷ Dworkin's model of the intellectual conversation that ought to take place in the United States Supreme Court may not be far distant from the reality. Judges with differing visions and understandings of law are interpreting the same constitutional provisions and exchanging thoughts and arguments. To the extent the justices represent different horizons in our pluralist society, those horizons are engaged in conversation and argument through constitutional decision making. That conversation between differing segments of our society would be enhanced if the Court were a balanced Court with representation from differing views and horizons. Nevertheless, constitutional litigation and the tradition of legal argument puts those from differing horizons in high intellectual argument and discussion with each other in the ongoing argument or conversation about what our society ought

292. *Id.* at 47-55.

293. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 81-131.

294. *Id.*; see *supra* text accompanying note 200.

295. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25 at 106-07, 135-37; see also Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 221-22 (defining conceptualization and explaining its process).

296. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 313-17.

297. *Id.*

to be. The views of Dworkin and White may be melded and each would benefit from the other's insights; White from Dworkin's depth of principle and theory of interpretation, and Dworkin from White's understanding of law as rhetoric, as the ongoing argument about what society should be, which constitutes society and relates persons in multiple horizons to the common action.²⁹⁸

Lonergan offers a method for relating what he calls positions and counterpositions that could be employed in the ongoing conversation or argument which constitutes society.²⁹⁹ For Lonergan, insight is an important moment in all intellectual activity.³⁰⁰ Those who do not share my particular horizons or my theories and fundamental positions, which themselves constitute horizons, nevertheless may have insights which I may perceive as valuable. I may understand those insights and their value better if I cross horizons sufficiently to perceive how those with differing views relate their insights to the circumstances of their horizons and their fundamental positions. I then may share and participate in the creative insights of those in other horizons by extracting those insights from their setting and relating them to my horizon and my fundamental positions.

Hart employs a technique, in the course of the many philosophical conversations he has engaged in, that resembles the process just described in Lonergan's thought. Hart will learn from those he engages in conversation, will take an important clarifying concept or insight from their thought, rename it, and find a place for it in his thought.³⁰¹ For example, perhaps the best way to understand the central chapters of the *Concept of Law* is to perceive them as conversations with Holmes and the legal realists.³⁰² Llewellyn often emphasized the leeways in law, as well as his view, that the law is constantly in flux.³⁰³ Hart transforms Llewellyn's notion of leeways

298. See DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 45.

299. See LONERGAN, *INSIGHT*, *supra* note 8, at 387-90, 488-514; see also TRACY, *supra* note 10, at 151-55 (discussing Lonergan's position and counterposition methodology).

300. See LONERGAN, *INSIGHT*, *supra* note 8.

301. See, e.g., H.L.A. Hart, *Definition and Theory in Jurisprudence*, An Inaugural Lecture Delivered Before the University of Oxford (May 30, 1953), in 70 *LAW. Q. REV.* 37 (1954).

302. See Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 217-18. Hart has had celebrated exchanges with Lon Fuller and with the Scandinavian legal realists. One could also argue that some of his basic concepts are an attempt to relate analytical thought to American legal realism. See also DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 12-17 (explaining Hart's method of emphasizing choice rather than rigid rules).

303. See LLEWELLYN, *THE COMMON LAW*, *supra* note 85, at 62-120; cf. Karl N. Llewellyn, *On the Current Recapture of the Grand Tradition*, Address Delivered to the Annual

into the open texture of law and legal concepts, concepts with a clear core meaning but surrounded by a shadowy or penumbral area where the concept may or may not apply.³⁰⁴ Since law, as Hart perceives it, inevitably is and ought to be open-textured, with judges as deputy legislators designated by rules of recognition, change, and adjudication to specify the rules within the penumbral area, Hart has captured in analytical form Llewellyn's understanding of law in flux with an emphasis on judicial creation of law.³⁰⁵ Hart's transformation of Hans Kelsen's *grundnorm*³⁰⁶ into his own rule of recognition is another well-known instance of his acceptance of an insight which he includes in his own system of thought.³⁰⁷

The technique of acquiring insights from foreign horizons explained by Lonergan, and perhaps exemplified by Hart, offers the possibility of conversation and occasional convergence between those in differing horizons. Conversation through law and constitutional litigation and decision making, particularly if judges use a combination of Dworkin's method and horizon-crossing techniques, offers further possibilities of convergence between the views of those from different horizons. For example, judges who offer different conceptualizations of contested constitutional concepts may find that their differing interpretations will support the same results in particular cases.³⁰⁸ They also may borrow freely from each other's insights.

The liberal distaste for a full theory of the good may rest not only on bad historical experience but also on a recognition of our limited knowledge and understanding.³⁰⁹ The liberal emphasis on human rights, then, represents not only respect and concern for each individual, an important rediscovery of the Enlightenment, but also a distrust for theories of the good which may trample the individual.³¹⁰ Arguably, the theory of the common good proposed in the last segment ac-

Meeting of the Conference of Chief Justices (1959), in LLEWELLYN, *JURISPRUDENCE*, *supra* note 189, at 215-29 (using flexibility in United States Supreme Court decisions as demonstration of law in flux).

304. See H.L.A. HART, *THE CONCEPT OF LAW* 121-32 (1961) [hereinafter HART, *THE CONCEPT OF LAW*].

305. *Id.* at 123-32; see also DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 12-17 (explaining Hart's method of emphasizing choice rather than rigid rules).

306. See HANS KELSEN, *PURE THEORY OF LAW* 8-10, 193-95 (Max Knight trans., 2d ed. 1967).

307. See HART, *THE CONCEPT OF LAW*, *supra* note 304, at 92-107.

308. See *supra* text accompanying notes 293-98.

309. See RAWLS, *supra* note 70, at 395-99.

310. See Tushnet, *An Essay on Rights*, *supra* note 139.

counts for these concerns.³¹¹ It has a place for a strong theory of rights based on the concern for participation of each person in the common action of this society.³¹² As a dynamic theory, it recognizes the ongoing action, the moral growth and development of each person in relation to others, and the development and change in society.³¹³ When related to Lonergan's understanding of horizons and of the person as engaged in ongoing inquiry with deep drives to know and to love, the theory of the common good has a grasp of the decision maker's limited knowledge and understanding and a strong commitment to and methodology for crossing horizons. A developing and changing full theory of the good can then be offered despite the liberal distaste for such theories. The full theory of the good is for the sake of the common action and is grounded in the goods that will promote human flourishing.³¹⁴ The theory, briefly sketched in the last segment, is offered as a contribution to the ongoing conversation and argument in our pluralist society that constitutes our society.³¹⁵ When fully worked out it will be an ideology with corresponding vision-creating and vision-blocking characteristics. Nevertheless, it is grounded in a desire to fully understand, respect, and appreciate persons and is committed to development, conversation, and horizon crossing. The ideological aspects of the theory must yield continually to the fundamental commitment to respect and concern for persons and to the exigencies of understanding newly developed from the ongoing inquiry, the developing common action, and the continuing conversation and horizon crossing.³¹⁶ Ideologies and understandings of law which cannot meet these tests are exposed to liberal criticism based on distaste for a full theory of the good. Such ideologies are subject to further criticism from a personalist as well as a liberal perspective, if they are prepared to override human rights for the sake of their narrow vision of the good.

Nevertheless, as experience testifies, human conduct is prone to evil;³¹⁷ evil inclinations often will overcome good intentions and theories. There is, then, a deep, and perhaps desperate need for the ongoing argument in a pluralist society about what society should be.

311. See *supra* text accompanying notes 214-79.

312. See *supra* text accompanying notes 273-79.

313. See *supra* text accompanying notes 260-62, 273-79.

314. See *supra* text accompanying notes 260-63, 273-79.

315. See *supra* text accompanying notes 214-79.

316. See *supra* text accompanying notes 277-79.

317. Regrettably, examples are not difficult to find: the Holocaust, slavery, Watergate, et cetera.

There also is a need for one important aspect of that argument, which could be described as the use of rights as rhetoric, rights discourse, and litigation, as part of the conversation which constitutes society.³¹⁸ One significant use of rights rhetoric and litigation is to hammer on the doors of foreign horizons, and of society, to demand recognition for oneself or one's clients as persons entitled to participate in the common action.³¹⁹ In the course of that conversation and litigation, old horizons may need to be deconstructed in order to allow new vision. The crits have made an important contribution to the ongoing conversation and argument which constitutes society by their emphasis on deconstruction of establishment horizons.³²⁰ Narrative, as Robin West points out, can serve a similar function to rights rhetoric in knocking on the doors of foreign horizons and encouraging or demanding that horizons be crossed.³²¹

When a society, as perhaps ours has done, provides normal vehicles or institutions for rights discourse and litigation it has provided an important means for the ongoing conversation which constitutes society. It has also provided for recognition of, and participation in, society by persons who might otherwise be overlooked within current horizons and who might be trampled upon by currently popular theories of the good. Society then has established a methodology which meets the personalist test of respect and concern for persons and Lonergan's desire for continuing the inquiry and posing ever further questions.

X. THE AUTHENTIC JUDGE, HIS SEARCH AND JUSTIFICATION

A. *The Search*

In American jurisprudence the central figure is the judge and the central aspect of law is the public dispute settlement process which takes place in our courts. Understanding the judge as a person, then, is vital to a personalist theory of law.³²² That theory should offer an

318. See generally DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 43-45 (describing rights as "significant means by which persons establish, change, talk about, fight about, reconcile, and struggle with human relations"); WHITE, *HERACLES' Bow*, *supra* note 72 (examining law as social, cultural, rhetorical, and literary activity).

319. See *supra* text accompanying notes 291-92.

320. See *supra* text accompanying notes 71-75; see also Tushnet, *Following the Rules Laid Down*, *supra* note 139 (analyzing theories of interpretivism and neutral principles and their close association with liberal political philosophy).

321. See Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. Rev. 145 (1985) [hereinafter West, *Jurisprudence as Narrative*].

322. See *supra* text accompanying notes 52-65.

understanding of the judge as a person engaged through the dispute settlement process in relationship with other persons—those who appear before him, fellow judges, and indirectly, with all persons.³²³

Martin Heidegger speaks of a person being thrown into a world.³²⁴ That metaphor aptly describes the experience of our youth when we first began to think about and sort out our universe. But it also describes well our experience in the typical American law school, particularly, but not exclusively, in the first year of law school. We plunge into the pool of law, pretend that we can swim, and then find that we can manage. Although we gradually make the law our own, we know that we did not construct this world, nor is it altogether to our liking. It is a world that has been 800 or more years in the making, both in England and in the United States. Reflecting on law as an inherited culture, James Boyd White comments:

For me it follows that the law is best regarded not as a kind of social science but as one of the humanities. Its practice requires a constant sense of the resources and limits of one's language and culture; a conscious attention to the silence against which all language action takes place, to what *cannot* be said; an awareness of one's own need for an education, particularly for an education from the past that has created our linguistic and intellectual inheritance; a recognition that it is our responsibility to preserve and improve this inheritance, leaving it fit for use by others; an acknowledgment that the authority of this inheritance is at once real and tentative; and an awareness that others, who are also users of language, composers of texts, and members of communities, are entitled to basic respect as autonomous and equal persons. All these things mark it as an essentially practical and literary, rather than scientific or theoretical activity.³²⁵

When first appointed or elected, judges must experience a similar phenomenon of being thrown into a world. While their human experiences, including their lives as attorneys are very relevant, the world in which they find themselves is in some respects altogether new. New judges regularly experience intellectual excitement, with joy and with concern for their new insight of responsibility they begin to sort through their world. Lonergan describes an ongoing process of in-

323. See *supra* text accompanying notes 52-65.

324. See MARTIN HEIDEGGER, *BEING AND TIME* 191-93 (John Macquarrie & Edward Robinson trans., 1962).

325. See WHITE, *HERACLES' BOW*, *supra* note 72, at xii.

quiry of which the new judge's experience is an instance, a process of raising and answering relevant questions and then raising yet further questions perhaps on a higher plane.³²⁶ In the course of the inquiry the judge will frame tentative theories not merely of substantive areas of law, but of the role as judge and of law as a human phenomenon. Some of our best judges have been important jurisprudential thinkers.³²⁷

Law, however, is not a purely intellectual inquiry. Law is action; law is relationship with persons.³²⁸ Judges notoriously are practical persons concerned with action and with the impact of their decisions on society and on the persons who appear before them. As a new judge sorts his way through his world he may create new commitments or strengthen and expand old ones. Lonergan would describe the process of inquiry and perhaps conversion as the product of the drive to know and to love.³²⁹

David Granfield, speaking of the lives and searches of lawyers in general, contrasts the authentic and inauthentic person as follows:

Judges, lawyers, professors, and even law students develop a characteristic mentality. Law transforms them for better or worse. If it remains merely a job, a prestigious way of making a living, a sophisticated, dialectical skill, or a springboard to a position of power and influence, it splits their life into uncoordinated personal and professional compartments. The result is that one may become worldly wise without being truly wise; true wisdom keeps asking relevant questions while trying to verify and unify insights and to integrate all of life's experiences.³³⁰

One finds a remarkably similar passage in Oliver Wendell Holmes, Jr.'s *The Path of the Law*:

And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food beside success. The remoter and more general aspects of the

326. See LONERGAN, *INSIGHT*, *supra* note 8, at 272-75; LONERGAN, *METHOD IN THEOLOGY*, *supra* note 8, at 162-65; TRACY, *supra* note 10, at 9-10, 125-26.

327. For example, Oliver Wendell Holmes, Jr., Jerome Frank, Benjamin Cardozo, and William Brennan.

328. See *supra* text accompanying notes 45-65.

329. See LONERGAN, *INSIGHT*, *supra* note 8, at 596, 658-59; LONERGAN, *METHOD IN THEOLOGY*, *supra* note 8, at 237-44; TRACY, *supra* note 10, at 191, 237.

330. See GRANFIELD, *supra* note 76, at 274.

law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.³³¹

A personalist understanding of law must rest on an account similar to the one just sketched of the authentic judge and his search. The search will be an ongoing inquiry and effort to relate persons through the law and the judicial decision-making process. Given the multiple horizons of a pluralist society and the autonomy of the human person, the judge's search will be continuous and its outcomes multiple and unpredictable. Nevertheless, a personalist account of law and the judicial decision-making process must accept that search as an essential backdrop for whatever methods, theories, or principles it offers.

Recognizing that backdrop, a very recent controversy in law, namely that occasioned by the antifoundationalism of neo-pragmatism, should be briefly addressed.³³² The personalism described in this article is nonfoundational in certain traditional senses. To the extent that a personalist judge would choose to follow classic Thomist natural law, the judge would arrive at conclusions by human reason.³³³ As Dworkin once remarked, there may be a secret book in the sky but we do not have access to it.³³⁴ Nor would a personalist thinker, in the manner of René Descartes, seek a single position such as *cogito ergo sum* from which everything else could be derived.³³⁵ While Lonergan is influenced by Immanuel Kant, his general intellectual method does not proceed by way of deduction from a priori positions.³³⁶ Inasmuch as it rejects the three foundational positions just described, personalist thought could be described as antifoundational. Lonergan's description of general intellectual method draws upon several established

331. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 478 (1897).

332. A good discussion of the controversy surrounding antifoundationalism can be found in Martha Minow & Elizabeth V. Spelman, *In Context, in PRAGMATISM IN LAW AND SOCIETY* 247-74 (Michael Brint & William Weaver eds., 1991).

333. See generally GEORGES VAN RIET, *THOMISTIC EPISTEMOLOGY* (Donald G. McCarthy & George E. Hertrich trans., 1982) (discussing objectivity of ideas as basis for judgment).

334. See Ronald A. Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165 (1982).

335. See, e.g., RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY* (George Hefferman ed. & trans., 1990).

336. But see LONERGAN, *INSIGHT*, *supra* note 8, at 319-47 (discussing self-affirmation of knower), 564-68 (discussing heuristic notion of universal viewpoint); LONERGAN, *METHOD IN THEOLOGY*, *supra* note 8, at 38-39 (discussing authentic person and judgments of value); TRACY, *supra* note 10, at 132-82 (discussing basic horizons).

methods, particularly the scientific method, as models.³³⁷ In this sense his general intellectual method, when employed in personalist thought, has a strongly empirical flavor. Nevertheless, Lonergan's understanding of method avoids the mistake of slavishly applying the scientific or any other imperialist method in all areas of inquiry.³³⁸ Rather, Lonergan offers a fundamental critique of method and of any particular method by which the usefulness of that method for the ongoing inquiry may be assessed.³³⁹ Recognizing the phenomenon of horizons, personalist thought would be wary of an overly rigid development and application of a general theory of law or of any particular legal principle. Nevertheless, personalism would have a role for legal principles as helpful generalizations, or as representing important commitments and ideals. Unlike Judge Posner's approach to generalized method, personalism would not reject all overarching theory.³⁴⁰ See, for example, the discussion above of the common good and the application of that theory in a pluralist society.³⁴¹ Personalism, nevertheless, emphasizes the importance of understanding the human person in context and the influence of horizons on the judge's perception.³⁴²

Important to personalism, however, is the value of and commitment to each and every person. Dworkin's desire to afford each person equal respect and concern and to relate that fundamental principle to the structuring and understanding of law has deep appeal to personalist thought. Macmurray's contention that the "self-realization of any individual person is only fully achieved if he is positively motivated towards every other person with whom he is in relation"³⁴³ is at the heart of personalist thought. In the indirect relations of a complex political community one accepts restraints on one's power and action for the sake of preserving the freedom and interests of others.³⁴⁴ Important strong principles of law in the Dworkian sense emerge from that fundamental commitment, important rights that will trump competing policies. These negative restraints on public action

337. See *supra* text accompanying notes 106-17.

338. See LONERGAN, *METHOD IN THEOLOGY*, *supra* note 8, at 253-66.

339. *Id.*; cf. LONERGAN, *INSIGHT*, *supra* note 8, at 279-316 (discussing reflective understanding and meaning of "the sufficiency of the evidence for a prospective judgment").

340. See POSNER, *THE PROBLEMS OF JURISPRUDENCE*, *supra* note 131, at 423-69.

341. See *supra* text accompanying notes 214-79.

342. See *supra* text accompanying notes 85-89, 144-86.

343. MACMURRAY, *PERSONS IN RELATION*, *supra* note 9, at 159.

344. See *supra* text accompanying notes 226-40.

reflect our understanding of the basics of human relations³⁴⁵ and those things that a government should not do because they are destructive of human relations and liberty in any society,³⁴⁶ or in our society because of its history, customs, and structure. We develop that understanding empirically or experientially through our growing knowledge of the world, through the commonsense process of rubbing elbows with our fellows—what Lonergan calls the self-correcting process of learning through living³⁴⁷—and through vital personal and societal experiences such as the Holocaust or witnessing human suffering or oppression. The development of such basic principles or commitments is part of the human search and thus part of the search of the authentic judge. Lonergan would contend that ultimately one develops and appropriates basic horizons³⁴⁸ in which one grasps, with an understanding that is not readily revisable, certain fundamental structures of the human mind in its search for knowledge and certain fundamental values. These values emerge from our relations with our fellows and our commitment to deep respect and concern for them.³⁴⁹

Thus the authentic judge, sorting out his world in a continuing effort to understand and to relate to persons, will frame theories about law and about the role of the judge and will recognize important human commitments and ideals, some of which will emerge as significant legal principles. Hopefully, the searching judge will stumble across and begin to understand the phenomenon of horizons. Hopefully the judge will also develop a commitment to cross horizons and to understand the human relations in foreign contexts. Recognizing that his decisions always are made within horizons and that he has the ability to cross horizons, he may avoid overly rigid development and application of legal theories and principles.

The personalist judge is one who engages in the search just described and in the course of that search recognizes himself as person and those who appear before him as persons. He understands law and the legal decision-making process as a means for relating persons.³⁵⁰ He develops a commitment to deep respect and concern for each per-

345. See POPE JOHN PAUL II, *VERITATIS SPLENDOR* 119 (1993).

346. *Id.*

347. See LONERGAN, *INSIGHT*, *supra* note 8, at 173-244, 298; TRACY, *supra* note 10, at 113-23.

348. See TRACY, *supra* note 10, at 19-21.

349. See LONERGAN, *INSIGHT*, *supra* note 8, at 596, 658-59; LONERGAN, *METHODS IN THEOLOGY*, *supra* note 8, at 237-44; TRACY, *supra* note 10, at 191, 237.

350. See *supra* text accompanying notes 66-77.

son.³⁵¹ Beyond that, he may develop or accept the theories and understandings of law presented in this Article. His commitment to persons and his understanding of law will require him to justify his decisions to himself and to others and provide some of the means and context for justification.

B. Justification: In General

In the common law dispute settlement process it is customary for a judge to write an opinion justifying his decision. A classic form of common law justification is to show that this decision is consistent with previous decisions. After recognizing that continuing common law tradition, one also must acknowledge a variety of views regarding the use of previous authority ranging from the Langdellian closed logical system³⁵² and the Dworkian insistence on rigorous, principled consistency³⁵³ to the legal realist emphasis on leeways³⁵⁴ and the crits' demonstration of the radical open texture of law.³⁵⁵ Even Duncan Kennedy, however, would prefer to justify his decisions by good legal argument.³⁵⁶ The American pragmatist tradition, and perhaps the common law, historically would recognize the importance of assessing the consequences of a decision and its impact on people, the economy, and the felt necessities of the time.³⁵⁷ Llewellyn or Fuller would justify a decision in terms of its pertinence to the reciprocal relations between persons in a situation.³⁵⁸ Dworkin would rest the justifica-

351. See *supra* text accompanying notes 258-64.

352. See TWINING, *supra* note 86, at 10-26; see also WILLIAM M. WIECEK, *CONSTITUTIONAL DEVELOPMENT IN A MODERNIZING SOCIETY: THE UNITED STATES, 1803 TO 1917* 59 (1985). Wiecek states:

Formalism was not so much a coherent jurisprudential philosophy as a set of assumptions about the way human society functioned. Formalist judges sought to achieve justice by abstracting the essential legal relationship from all the human circumstances of a case and impersonally applying existing law . . . undistorted by human bias or prejudice.

353. See DWORKIN, *LAW'S EMPIRE*, *supra* note 25, at 225-76.

354. See LLEWELLYN, *THE COMMON LAW*, *supra* note 85, at 62-120; cf. LLEWELLYN, *JURISPRUDENCE*, *supra* note 189, at 215-29 (arguing that judge should first decide case with layman's view of situation and then go back and "tidy-up" precedents).

355. See Horwitz, *supra* note 71, at 1036-39; see also Tushnet, *An Essay on Rights*, *supra* note 139 (arguing liberal rights theory indeterminate and culturally based).

356. See Kennedy, *supra* note 24, at 518-27.

357. See Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 247-53; see also DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 11-17, 24-27, 32-46 (discussing rights as goals, claims, resources, and rhetoric).

358. See Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 233, 237, 244-53; see also LON FULLER, *ANATOMY OF THE LAW*, *supra* note 67 at 59-61, 86-96 (noting that adjudicatory law, in contrast to statutory law, is made in context of complex human affairs, with emphasis on case-specific facts); LLEWELLYN, *JURISPRUDENCE*, *supra* note 189, at

tions offered by Judge Hercules, at least in part, on ideals or fundamental moral commitments.³⁵⁹

In this Article an argument has been made that some of these forms of justification can and should be reconciled. A personalist judge with a commitment to deep respect and concern for all persons and with the understanding of the common good described above must be concerned with the reciprocal relations between persons in situations, the impact of his decisions on particular persons and on society in general, and the felt necessities of the time.³⁶⁰ He is concerned with these issues precisely because of his fundamental commitment to each person, his ideals, and his understanding of the common good. He would reject along with Holmes, Llewellyn, and perhaps the critics, overly rigid understandings of common law precedent.³⁶¹ Nevertheless, deep principle and an interpretation of law and society would lie behind and support his decisions and their construction of precedent. His respect for persons extends to his fellow judges and the attorneys who appear before him. Like Kennedy, he would want to support his decisions by good legal argument out of respect for his fellow lawyers.³⁶² His opinion is a tool of legal persuasion, a participation in that ongoing argument about what society should be that constitutes society.

A key personalist understanding is that we have limited knowledge and understanding; our decisions are made within horizons. That view is widely shared by current commentators of law.³⁶³ Because of our limited knowledge and understanding, an attack may be made on justification in general or on particular forms of justification. For example, neo-pragmatists in general, and particularly Judge Posner, would attack various traditional forms of legal justification.³⁶⁴ To rely solely or primarily on legal argument or ordinary legal reasoning to justify a decision is to believe mistakenly, or pretend, that law is self-contained and to fail to recognize that it is a set of artificial con-

215-22 (arguing that judges make decisions by analysing particular case facts and fitting case facts into "type-situation," or set of interpersonal relationships involved in case).

359. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 86-116.

360. See *supra* text accompanying notes 242-79.

361. See *supra* text accompanying notes 208-12.

362. See Kennedy, *supra* note 24, at 518-29.

363. See generally *id.* (discussing problem faced by judge when law conflicts with result favored by judge); POSNER, *THE PROBLEMS OF JURISPRUDENCE*, *supra* note 131, at 148-57 (finding consequences never irrelevant in law and judicial choices are often based on personal values).

364. See POSNER, *THE PROBLEMS OF JURISPRUDENCE*, *supra* note 131.

structs.³⁶⁵ Judges, given the time constraints on their decision making and the limitations of their knowledge, are not equipped accurately or even quasi-accurately to assess the consequences of their decisions in economic or social terms. In any event, many neo-pragmatists would reject generalizations and therefore principle, and most would reject overarching theory as sufficient grounds for justifying a decision.³⁶⁶

A personalist comment on that attack could begin by recognizing that judges are part of a public dispute settlement institution that exists for a variety of purposes, including keeping the peace. Some, but not rigid, consistency is important for coordination within the system and preserving sufficient clarity in the law to allow people to adhere to it and to bring their disputes to court for settlement.³⁶⁷ The common law use of precedent serves this function, as well as several others. Among other traditional functions it promotes intellectual argument in society about what society should be.³⁶⁸ Traditional respect for precedent as described, for example, by Holmes in the *Common Law* or by Llewellyn in the *Common Law Tradition* would be sufficient to facilitate those functions. Following Lonergan, one could describe law as a commonsense intellectual method which more or less adequately serves certain purposes.³⁶⁹ Most of us think that the law is, to some extent, inadequate both as a method and in a number of its particular positions. Nevertheless, it has generally fulfilled its traditional purposes, including keeping the peace, and no rival is in view. One improvement in judicial decision-making method would be better use of the social sciences and other tools for assessing the consequences of decisions. This improvement should not be overlooked by a personalist judge concerned with the persons who suffer the impact of his decisions.³⁷⁰ Recognizing his time constraints as well as his limited knowledge and understanding, the personalist judge should acknowledge the inadequacy of his assessment of consequences.³⁷¹ An important improvement would be greater coordination between appellate judges and scholars, including economists, sociologists, and law

365. *Id.* at 220-44.

366. See, e.g., *id.*; RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988).

367. See LLEWELLYN, *THE COMMON LAW*, *supra* note 85, at 75-117.

368. *Id.*; see also DONNELLY, *THE LANGUAGE AND USES OF RIGHTS*, *supra* note 20, at 43-46 (arguing that rights-talk is rhetorical tool used by communities when debating what society should be); WHITE, *HERACLES' BOW*, *supra* note 72, at 225 (stating language of law defines community's self-perception).

369. See TRACY, *supra* note 10, at 113-20.

370. See *supra* text accompanying notes 121-22.

371. See *supra* text accompanying notes 153-54.

professors concerned with those fields. Judges could make predictions about the impact of their decisions, which could be reviewed over time in the scholarly literature. The law could then be revised judicially or legislatively in view of the consequences. This process would not produce anything resembling mathematically correct answers and in many respects would remain unsatisfactory. Nevertheless, a personalist judge, because of his commitment to persons, should make that effort to improve his method and justification of his decisions. Often intellectual method produces not certainty but emergent probability of higher or lower degrees. Concern for consequences, even if our ability to assess them produces low emergent probability, is important for justifying decisions to people by one concerned with persons. Likewise, subject to important overriding principles, particularly those protecting significant human rights, a personalist judge must be concerned with the context of the dispute before him and with the reciprocal relations between persons in that situation.³⁷² His ability to understand the situation will be confined by his horizons but enhanced by his use of techniques for crossing horizons.³⁷³ He should recognize his limited horizons but should be committed to crossing horizons.³⁷⁴ His efforts to do so are part of the justification for a decision by one concerned with persons to the people affected by his decision. Those who would reject all considerations not arising from the immediate context of decisions would find this analysis inadequate, as would those who insist on rigid, principled justification. Those who recognize our limited but genuine ability to acquire knowledge and understanding with emergent probability would, perhaps, find this form of justification either adequate or necessary as a means of explaining one's decision to persons affected by it and to whom one has a commitment of respect and concern.

In White's terms, such decisions would be part of the ongoing argument about society which constitutes society.³⁷⁵ The telling of stories is also an important part of society's discussion and an important means for crossing horizons. Narration, whether before juries, as the statement of facts in appellate argument, or in judicial decisions, always has been an important aspect of law and is becoming increasingly important.³⁷⁶ When law is considered as a means for relating

372. See *supra* text accompanying notes 242-49, 258-62.

373. See *supra* text accompanying notes 154-68.

374. See *supra* text accompanying notes 154-56.

375. See WHITE, HERACLES' Bow, *supra* note 72, at ix-xvi.

376. James Boyd White goes so far as to claim that, "[w]hoever controls our languages has the greatest power of all." James Boyd White, *Law and Literature: "No Manifesto"*, 39

persons, the role of narration in law and in justification of judicial decisions becomes an important means of relating to persons through the sharing of human experience. The totality of a judge's opinion—both the statement of facts and the legal argument—could be considered a narration of the judge's experience in arriving at the decision.³⁷⁷ Between persons, that sharing of human experience may be the most fundamental form of justification. Thus, making the opinion part of, and a partial narration of, the authentic judge's search is the basic form of personalist justification. In a legal system concerned with dispute settlement for the sake of keeping the peace, the honest sharing of human experience would seem to enhance the relation between persons and contribute to the willingness to use the judicial system for the settlement of disputes. What one expects of a judge is a willingness to listen, to understand the situations before him, to cross horizons while retaining a commitment to persons, and to high ideals related to persons. One expects him to struggle with the relationship between persons and with his fundamental commitments and to explain that struggle in justifying his decisions.

C. *Justification: In Terms of Legitimacy*

Duncan Kennedy, in *Freedom and Constraint in Adjudication: A Critical Phenomenology*, offers a shrewd political assessment of the importance of legitimacy.³⁷⁸ In justifying decisions he would make as an imaginary judge, Kennedy would attempt to offer good legal arguments for the sake of gaining and retaining legitimacy power.³⁷⁹ To the extent that a judge can justify decisions by good legal argument, he will be able to make his decisions survive appellate review and gain acceptance with future judges.³⁸⁰ When he is unable to justify his decisions by good legal argument, he expects to lose legitimacy power. Consequently, his decisions may not stick on appeal and may not be accepted by future judges.³⁸¹ In addition, his power to make future decisions that will stick and promote his political ideology will be di-

MERCER L. REV. 739, 747 (1988); see also JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984) (discussing law as literary art which creates community through language).

377. See West, *Jurisprudence as Narrative*, *supra* note 321, at 145-47; see generally JAMES B. WHITE, *THE LEGAL IMAGINATION* 757-63 (1973) (explaining that lawyers must have "a social and narrative imagination, a capacity to envision different versions of the future").

378. See Kennedy, *supra* note 24, at 528-30.

379. *Id.* at 544-45.

380. *Id.*

381. *Id.*

minated.³⁸² In contrast, when he is able to support a pacemaking decision by good legal argument and make it stick, he gains legitimacy power and, hence, the ability to command respect for future dramatic decisions.³⁸³ Kennedy also offers nonpolitical reasons for basing opinions on good legal arguments. These reasons include the wisdom he acquires from previous decisions and the promise he believes he has made upon becoming a judge—to offer good legal argument for decisions.³⁸⁴

A personalist judge, while recognizing Kennedy's political wisdom, would emphasize and develop the nonpolitical reasons Kennedy offers for maintaining the legitimacy of his decisions. The respect which the personalist judge owes to persons in general, and to each individual person in particular, requires him to offer reasons for his decisions that would be recognized as legitimate or which would be grounded in legitimacy. Thus, legitimacy may be defined not merely as being in accord with law but as capable of appearing reasonable to those governed by the decision. Offering legitimate reasons for one's decision recognizes the reciprocal relations between the judge as a representative of government and the members of society. Decisions may appear reasonable to society for a variety of reasons. The judge may argue that his decision is in accord with the previous decisions or, perhaps more importantly, with the recognized ways of construing and interpreting decisions and other authority. The personalist judge, however, would consider certain forms of appeal to legitimacy as being especially important.

Particular emphasis would be given as reasons for decisions to principles and policies grounded significantly in respect and concern for all persons and for each individual person.³⁸⁵ This would be in accord with the theory of the common good.³⁸⁶ Certain principles in accord with that theory would prevail over competing policies.³⁸⁷ These principles would be closely related to each individual's primary social goods.³⁸⁸ Strong rights would be those closely related to protection of those primary social goods. The personalist judge would accept the interpretation of democratic government offered by Dworkin

382. *Id.* at 527-28.

383. *Id.*

384. *Id.*

385. *See supra* text accompanying notes 257-59.

386. *See supra* text accompanying notes 214-79.

387. *See supra* text accompanying notes 257-59.

388. *See supra* text accompanying notes 252-63.

in chapter 5, "Constitutional Cases," of *Taking Rights Seriously*.³⁸⁹ Under that interpretation our democratic government consists not merely of majority rule but also of protection for minority rights.³⁹⁰ Allowing strong rights to trump both majority will and strong policies preserves respect and concern for each person.³⁹¹ An appeal to this interpretation of our democratic government is an appeal to legitimacy because the interpretation rests on reasons capable of appearing reasonable to the American people.

Subject to being overridden by strong principles and policies, reasons based on the reciprocal relations between persons in the situation before the court would be especially important to the personalist judge.³⁹² Arguments based on such reciprocal relations would be legitimate because they are capable of appearing reasonable to the parties to the case. Indeed, such reasons may appear particularly reasonable because use of them demonstrates that the judge has listened to the parties and attempted to understand their circumstances. A judge who listens and attempts to understand should appear particularly legitimate. One of the primary societal expectations of a judge is an ability and willingness to listen and understand.

A theme which runs through the forms of appeals to legitimacy which would seem especially important to a personalist judge is respect and concern for persons collectively, individually, and as existing in concrete circumstances. An argument can be made that grounding one's decisions in respect and concern for persons is the ultimate appeal to legitimacy; reasons so grounded are especially capable of appearing reasonable to those affected by them. One must grant that certain cutting edge decisions grounded in respect and concern for each person may be out of accord with the current sentiments of society and present therefore a particular challenge to the legitimacy power of the judge who makes them. An example would be the 1772 decision of Lord Mansfield that freed the African slave, James Somerset, and as a consequence freed 14,000 or 15,000 other African slaves in England.³⁹³ Mansfield's ultimate justification, after distinguishing seemingly analogous cases, was that slavery was so contrary to the basic dignity of human beings that it could not be established by cus-

389. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 131-50.

390. *Id.* at 132-33.

391. *Id.* at 90-100.

392. See *supra* text accompanying notes 257-62.

393. *Somerset v. Stewart*, 98 Eng. Rep. 499, 504 (K.B. 1772).

tom or case law but only by legislation.³⁹⁴ That position, which probably appeared obnoxious to substantial segments of English society³⁹⁵ at the time, was an appeal to history and to what I would describe as ultimate legitimacy. Arguably a decision grounded in respect and concern for each person and for each person's primary social goods or basic rights is a decision that will be acceptable to subsequent generations, however obnoxious it appears to present society. A decision grounded in respect and concern for each person is a decision capable of appearing reasonable to every person. Such a decision is not only grounded in basic personalist principles, but is an appeal to ultimate legitimacy, to principles capable of appearing reasonable to everyone for generations.

XI. CONCLUSION

A. *Summary*

This Article has offered a series of related insights which could be described as a theory of personalism in law or a personalist jurisprudence. It presents an outline of certain basic personalist insights and concepts in an attempt to contribute to the ongoing conversation of American jurisprudence.³⁹⁶ However, these basic insights and concepts could be perceived as aspects of, or discoveries made in, the continuing inquiry which is the authentic judge's search.

The personalist judge is one who, in the course of his search, recognizes himself and those who appear before him as persons.³⁹⁷ He understands law and the legal decision-making process as means for relating persons.³⁹⁸ Personalism as a legal philosophy is not only committed to deep respect and concern for all persons but is fascinated with all aspects of human life, particularly with the multiple contexts in which persons relate to each other.³⁹⁹ In its piecemeal recovery of a role for the person in law, American jurisprudence faces a dilemma that the personalist judge must struggle to resolve. This dilemma is the apparent conflict between principles as ideals grounded in the commitment to afford all persons deep respect and concern and, flowing from that commitment, the need to listen to persons, understand their situations and relationships in context and frame a decision that

394. *Id.* at 510.

395. See C.H.S. FIFOOT, LORD MANSFIELD 41-42 (1936).

396. See *supra* text accompanying notes 25-27, 42-43.

397. See *supra* text accompanying notes 52-63.

398. See *supra* text accompanying notes 54-65, 186-87.

399. See *supra* text accompanying notes 187-213.

reflects that understanding. In the effort to frame and justify his decisions, the judge will develop a method for judicial decision making. Hopefully, in doing so, the judge will choose from various aspects of extant methods which reflect commitment to and concern for persons.

Personalist thought, drawing upon Macmurray's personalism⁴⁰⁰ and Lonergan's critique of method,⁴⁰¹ offers a means for assessing judicial decision-making method. To the extent that a particular understanding of judicial method overlooks the judge as person or fails to focus upon persons and their relations in the situation before the court, that understanding of method is less satisfactory. In contrast, a method is more satisfactory to the extent that it emphasizes the role of persons.⁴⁰² Dworkin's concern for political friendship and his fundamental principle—afford all persons equal respect and concern⁴⁰³—from the perspective of a personalist critique of method are important contributions to the recovery of a role for the person in law. Correspondingly, however, his insistence on rigorous logical development of principles without a concern for context or for impact on persons is a major oversight, a significant flaw in his method.⁴⁰⁴ The legal realist discovery of insight, which Llewellyn called situation sense and Frank called the gestalt, is a high point in the recovery of a role for the person in law and in the development of method.⁴⁰⁵ The introspective analysis necessary to recognition of insight implies that the judge is a person.⁴⁰⁶ The perception of patterns and the interrelations between persons in the situation before the court, which is the essence of situation sense, links the judge's understanding of himself as a person with his understanding of others as persons.⁴⁰⁷ To the extent that a judge understands himself as a person he is more likely to recognize that others are persons.⁴⁰⁸ A method in which insight into the relationships between persons in the situation before the judge is central is

400. See *supra* text accompanying notes 52-58, 219-41.

401. See *supra* text accompanying notes 106-10.

402. See *supra* text accompanying notes 126-27.

403. See *supra* text accompanying notes 193-206; see also DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 25, at ii, 180-83 (discussing Rawls's theory that people have right to equal respect and concern in design of political institutions).

404. See *supra* text accompanying notes 204-06; see also DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 25, at 274-77 (discussing how fundamental liberties could be protected by either strong protection or principle of equality); Donnelly, *Principles, Persons, and Horizons*, *supra* note 13, at 163-65, 247-53 (criticizing Dworkin's analysis of judicial methodology and relating Dworkin's views to those of other legal scholars).

405. See *supra* text accompanying notes 78-105.

406. See *supra* text accompanying notes 99-100.

407. See *supra* text accompanying notes 103-06.

408. See *supra* text accompanying notes 103-06.

developed for the sake of action, the judge's decision through which he is related to others and promotes the relationship between persons.⁴⁰⁹

Recognition that those relationships in a complex society are often necessarily indirect leads a judge in his ongoing search and inquiry to a consideration of theories and principles of justice.⁴¹⁰ A personalist theory of the common good has been offered in this Article. Society should be perceived as comprised of persons acting together.⁴¹¹ Actions which tend to destroy the common action or to eliminate or seriously inhibit the participation of any individual in the common action are contrary to the common good.⁴¹² From this basic set of insights, a theory of rights may be developed after a consideration of basic goods—those goods necessary to participation in the common action. Strong rights are those directly related to the basic goods, while weak rights are other reasons for decisions related to the individual claims.⁴¹³ Among the weak rights are the normal legal rights based on precedent and other authority which Dworkin so strongly insists upon.⁴¹⁴ Weak rights must be considered by a judge but do not automatically trump important policies. In contrast, strong rights related to the basic goods normally would trump even major policies.⁴¹⁵ This theory allows both staunch protection of fundamental rights and policy decision making by judges to promote the common action. In addition, it allows the flexibility in law necessary to listen and respond to persons in context while adhering to fundamental rights.

A judge who reflects on his human situation will recognize his limited knowledge and understanding and the phenomenon which Lonergan describes as horizons.⁴¹⁶ His commitment to persons and his need to listen to and understand them should lead to development of horizon-crossing and transcending techniques as an important aspect of his decision-making method.⁴¹⁷ He also should recognize that the theories which he develops, including his theory of the basic

409. See *supra* text accompanying notes 126-27, 140-43.

410. See *supra* text accompanying notes 232-41.

411. See *supra* text accompanying notes 52-65.

412. See *supra* text accompanying notes 266-68, 273-79.

413. See *supra* text accompanying notes 264-68.

414. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 89-114.

415. See *supra* text accompanying notes 264-67.

416. See *supra* text accompanying notes 144-56.

417. See LONERGAN, *METHOD IN THEOLOGY*, *supra* note 85, at 251.

goods, while important and helpful, are framed within horizons.⁴¹⁸ For this reason, and because of his commitment to persons, he should be continually open to further development of his theory, especially through conversation across horizons in a pluralist society, a society composed of multiple horizons.⁴¹⁹ Law, as the ongoing argument about what society should be that helps constitute society and is an important aspect of our common action, is a major vehicle for that conversation. The authentic judge contributes to that conversation and justifies his decisions by an honest sharing of his experience, including his struggle and search in arriving at his conclusions.

This Article, then, has offered a series of related insights as a contribution to the grand conversation of American jurisprudence. The basic concepts and insights could be described as a theory of personalism. The reader, however, need not accept the entire theory. In the tradition of Lonergan, one could extract those insights which appeal and develop them as part of one's own theory. The basic concepts and insights of a personalist jurisprudence could be perceived as discoveries during the search of an authentic judge. Before closing the Article, however, other contexts for the personalist insights should be considered, particularly that of one engaged in doing jurisprudence. There should be a brief concluding segment on how to do personalist jurisprudence.

B. How To Do Personalist Jurisprudence

Personalist jurisprudence should be an expression of a scholar's own exploration and search as well as an effort to participate in the ongoing conversation of American jurisprudence. While one could usefully develop further the theory of personalism in law offered in this Article one also could develop other understandings of the relationships of persons to law. One could adapt further the monumental work of Lonergan to a further understanding of law and legal method.⁴²⁰ David Granfield began that process and his work could be mined for further insights.⁴²¹ Or one could draw on multiple non-legal authors of the rich personalist literature available.⁴²²

418. See *supra* text accompanying notes 273-79.

419. See *supra* text accompanying notes 278-79.

420. See LONERGAN, *INSIGHT*, *supra* note 8; LONERGAN, *METHOD IN THEOLOGY*, *supra* note 8.

421. See GRANFIELD, *supra* note 76.

422. See GEWIRTH, *supra* note 4; HÄRING, *THE CHRISTIAN EXISTENTIALIST*, *supra* note 6; HÄRING, *FREE AND FAITHFUL IN CHRIST*, *supra* note 6; LONERGAN, *INSIGHT*, *supra* note 8; LONERGAN, *METHOD IN THEOLOGY*, *supra* note 8; MACMURRAY, *PERSONS IN RELA-*

American jurisprudence over the twentieth century, as Granfield points out, has engaged in a piecemeal recovery of a role for the person in law.⁴²³ One can participate in that grand conversation by locating and bringing forward various aspects of the person in law, perhaps as emphasized by one important thinker or another. Lonergan's method of recognizing and promoting insights in other theories, which he calls advancing positions and reversing counter-positions, would be helpful here.⁴²⁴ One, then, can engage in a personalist conversation with Rawls, Dworkin, Posner, Kennedy, Unger, the critical legal studies movement in general, with feminism and with critical race theory. Indeed, one could engage heavily in law and economics, feminism, critical legal studies, law and literature, or critical race theory while emphasizing the personalist aspects of the thought one is exploring. In doing so, indeed, in engaging in any jurisprudential conversation, it would of course, be important to be aware of the impact of one's thought on persons and their relationships, to be conscious of the phenomenon of horizons and of the perception of theories of the good within horizons.⁴²⁵ Recognizing the importance of crossing horizons and understanding and protecting rights as perceived within foreign horizons is more critical when one is developing an ideologically supported full theory of the good. Carrying forward the conversation with other thinkers and schools of thought is perhaps the most significant way of doing personalist jurisprudence while contributing to the development of American thought.

A particularly attractive aspect of some recent theories is the recognition of oppression and the desire to restructure areas of substantive law to relieve oppression.⁴²⁶ A lawyer or judge inspired by personalism may find such restructuring not only an appropriate but a necessary activity. The jurisprudence of any particular field of law, such as criminal justice, could be described as a reflection on the fundamental aspects of that field in relation to one's ongoing reflection on law and human experience. Personalist reflection on the funda-

tion, *supra* note 9; MACMURRAY, *THE SELF AS AGENT*, *supra* note 9; WOJTYLA, *supra* note 7.

423. See GRANFIELD, *supra* note 76, at 29-36.

424. See LONERGAN, *METHOD IN THEOLOGY*, *supra* note 8, at 251.

425. See *supra* text accompanying notes 85-89, 97-101, 273-79.

426. See, e.g., MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (1990); Matsuda, *supra* note 75, at 2320; Robin L. West, *The Differences in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *WIS. WOMEN'S L.J.* 81 (1987); cf. Donnelly, *A Theory of Justice*, *supra* note 252 (discussing individual rights approach to capital punishment cases as alternative to majoritarian approach).

mental structure and restructuring of particular fields of law, such as criminal justice, may be an important means for understanding and correcting the oppression resulting from that field's current structure.

The discussion, then, in this Article of the basic concepts and insights of a personalist jurisprudence is not only a beginning but also a contribution to many possible conversations and explorations.

