The Continuing Quest for Principle

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I. Introduction

The judge's dilemma is that, he is, as Holmes put it, a "jobbist" with all too little time to read and reflect deeply, and yet he cannot escape the responsibility of developing some larger perspective and consistency. To the extent that he copes successfully, he moves from jobbist to craftsman and occasionally to master craftsman or even artist when he so develops his approach to a case, drawing on precedent, using logic (including pertinent analogy), the accepted facts of current society, and basic principles of justice (as they would be seen by rational persons), that the result is seen as expectable, fair, and perhaps even inevitable and therefore is accepted not only by the parties but by others as a guide to conduct.

The paradox of judicial philosophy is that, despite a rich literature -- the product of several generations of scholars -- it remains largely a scholarly vineyard, with all too few plantings by judges themselves. Rawls' "Theory of Justice" contains hardly more than a reference to judges, and no detailed linkage of his precepts to the judicial task. Judges themselves, probably prudently, seldom attempt to discourse on matters of legal or juridical philosophy; when they do, the result is likely to be a pronouncement, more remembered for its rhetoric than its wisdom, which seldom weathers the test of time.

With the judges largely quiet and the jurisprudes writing for each other, the public discussion, when it occurs -- in an occasional editorial or when a new Justice is annointed, resembles the rustling of dry corn stalks in a fall wind. The husks of phrases, long since made trite and never reexamined, are bandied about -- activism and restraint, loose and strict constructionism, liberal and conservative. The waving of banners is the beginning and the end of debate. Justice Blackmun, whom a Gallup poll would reveal as an apostle of judicial restraint, a strict constructionist, and a conservative, authored the abortion opinions, which a Gallup poll would reveal to be generally considered the apogee of activism, loose constructionism, and liberalism. Thayer, the apostle of judicial restraint, was a loose constructionist.

I do not say that all these terms are equally bereft of meaning. But even if I could pin a label from the three categories on myself, I would not know much of importance about myself as a judge. Nor would the labels give me any idea how I would approach any specific case.

What I want to fix more clearly in my mind is a larger framework which will give me some assurance that I shall face similar issues in both a sound and consistent manner. One might well ask if that was not covered in law school. To the extent that one could absorb into oneself the rigorous spirit of analysis that his teachers -- many of them superb -- tried to instill, and "think like a lawyer", this is true -- for the kinds of cases judges have traditionally wrestled with. And I suppose that Cardozo's "Nature of the Judicial Process" and Karl Llewellyn's "The Common Law Tradition-Deciding Appeals" are still viable markers for vast domains . . . particularly if salted with the still tentative (after 15 years) materials on "The Legal Process" creatively assembled by Hart and Sacks.

More elusive is identifying a philosophical gyroscope to steady a judge as he is called on to apply the Constitution to a wide spectrum of causes. The scope and limits of judicial review of acts of the legislature and the executive for constitutional compliance provide the one eternal enigma leading scholars on an endless quest for the Grail. That the federal judiciary has this

power is now accepted, from settled practice if not from scholarly proofs. But every effort to stake the boundaries has lasted no longer than has many a stout rail fence in a New England pasture.

II. The Classicists

Thayer, in a paper read in 1893 to the Congress on Jurisprudence and Law Reform, entitled "The Origin and Scope of the American Doctrine of Constitutional Law", collected the best thinking of the 19th century and put his trademark on the doctrine of judicial restraint which so influenced Frankfurter and Hand. In his view, "The judicial function is merely that of fixing the outside border of reasonable legislative action, the boundary beyond which the taxing power, the power of eminent domain, police power, and legislative power in general, cannot go without violating the prohibitions of the Constitution or crossing the line of its grants." 7 Harv. L. Rev. 148. This did not mean the simple office of construing two writings, a statute and the Constitution, and, if conflict were found, to declare the statute void. Although John Marshall had said this in Marbury v. Madison, in 1803, there had developed a "rule of administration" which Thayer states in these words: "[A court] can only disregard [an Act of a legislature] when those who have the right to make laws have not merely made a mistake, but have made a very clear one - so clear that it is not open to rational question." [144] In short, as he summarizes, "whatever choice is rational is constitutional." [144]

He closed by saying two things, which I can only construe as internally inconsistent: first, that "our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the minds of legislators with thoughts of mere legality, of what the Constitution allows"; and, second, that "even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it." He seems to be saying that legislators are at once thinking too much and too little of constitutional restraints.

At the very end of Justice Frankfurter's tape recorded conversations with Dr. Harlan P. Phillips, published as "Felix Frankfurter Reminisces", the Justice made this comment: "I am of the view that if I were to name one piece of writing on American Constitutional Law - a silly test maybe - I would pick . . . that essay [by Thayer] written 67 years ago. Why would I do that? Because from my point of view it's the great guide for judges and therefore, the great guide for understanding by non-judges of what the place of the judiciary is in relation to constitutional questions." (FFRem., p. 299-300) This statement was made in 1960 when the Justice was seventy-eight,

Two years earlier, Learned Hand delivered the Holmes Lecture at Harvard Law School. Then eighty-seven, Judge Hand, without mentioning Thayer, seeing the only justification for constitutional judicial review as the only means "to prevent the defeat of the venture at hand", i.e., to prevent impasse or totally unchecked departmental supremacy, (Bill of Rights, p. 14), said that he would "confine the power to the need that evoked it: that is, it was and always has been necessary to distinguish between the frontiers of another 'Department's' authority and the propriety of its choices within those frontiers." (p. 29-30) When he came to analyze under what circumstances courts should intervene to protect individual rights against governmental actions within their proper boundaries, he ended on a note of despond, saying, "I do not know what the doctrine is as to the scope of [the due process clauses of the Fifth and Fourteenth Amendments] .... I have never been able to understand on what basis it [court intervention in such cases] does or can rest except as a coup de main." (p. 55) His only addition to pure Thayer doctrine was a

recognition that "wide judicial review" (p. 69) was justifiable in respect to legislation affecting free speech.

That Thayer's formulation in all its simplicity could do so endorsed by two such eminent and reflective judges as late as thirteen and fifteen years ago provides a startling reminder of how much our society has changed in, certainly, two decades; how much the work of the courts has changed; and how thinking about constitutional judicial review has changed.

Indeed, Frankfurter was not always such an undiscriminating apostle of Thayer. In 1955, in his essay on "John Marshall and the Judicial Function", one does find ample obeisance to Marshall and reference to the "ambulant" due process and equal protection clauses whose very adaptability to change made "dubious their appropriateness for judicial enforcement" (p. 157), clauses which Hand described as conveying "a mood rather than a command". (p. 158) But Frankfurter salted the essay with some insights that pulled him beyond Thayer and beyond Hand. He referred to the "tornado of economic and social change" which had led to what he called the "vast enveloping present day role of law, a role which was "an essential accompaniment of the shift from "watchdog government" to "the service state". (pp. 152-53) I am not sure that he realized -- rather, I am quite sure that he could not have realized -- the full implications of what is to me a brilliant generalization. Of that, more, later. Unlike Hand's despair at the prospect of applying due process concepts except by a "coup de main", Frankfurter's cautious optimism encouraged the "[a]lert search for enduring standards", so long as we kept "the indispensable counterpoise of sturdy doubt that one has found those standards." (p. 159) And he bequeathed to judicial review perhaps more than many of his followers have recalled. He said, "the standards of what is fair and just set by courts in controversies appropriate for their adjudication are perhaps the single most powerful influence in promoting the spirit of law throughout government. These standards also help shape the dominant civic habits and attitudes which ultimately determine the ethos of a society." (pp. 173-74)

So these three giants of the law, while usually lumped together as the apostles of restraint, differed as the problems which they faced. Thayer's focus was wholly on that part of our Constitution which allocates powers. The problem he was addressing was the late nineteenth century preoccupation of the Court, as Professor Bickel has put it, with the "vigorous protection of the business community against government". (Least Dangerous Branch, p. 45) What he said was not wrong; it merely did not cover all occasions for constitutional interpretation. Specifically, it did not cover the case, so pessimistically treated by Hand, of a conflict between the action of a government department within its proper boundaries and right of an individual. Hand, whose major years of fruitful work were the 'teens, twenties, thirties, and forties, lived through the era of judicial excesses which Thayer had sought to forestall. If anything, he was more Thayer than Thayer himself. His concession to new attitudes and conditions was a deference to the First, but not the Fourteenth Amendment. Frankfurter, rhetorically often a disciple of Thayer, had found himself in the vortex of the emerging turbulence enveloping individuals and their grievances with society, and freely vouchsafed a vital role for the courts in monitoring not solely the boundaries of government but the manner in which government should act.

All three apostles, however, shared a gospel — that, to use Frankfurter's words, "Holding democracy in judicial tutelage is not the most promising way to foster disciplined responsibility in a people." (p. 157) Their basic thought was that legislative sensitivity and responsibility are stifled by judicial intervention; that, if only courts could restrain themselves, legislators would fulfill their coequal role as faithful interpreters of the Constitution. This is attractive and

hallowed doctrine. The only reflection that impels me to raise a small question is that, on this lone issue, I can speak from experience and my masters cannot.

My first chore as a freshman Congressman was to help shepherd through the House President Eisenhower's Middle East Resolution authorizing the President to do about anything he wanted to do in connection with a crisis in Lebanon. I am embarrassed to say that neither I, nor any of my colleagues, paused to think that there was a document called the Constitution. Only Senator Morse and a very few others thought that we ought at least to consult that document and any relevant Supreme Court decisions. And we treated them with condescension, which was not always even polite. I can say that our insensitivity was in no way attributable to any thought that if we were wrong, the Court could correct us. I could multiply the examples, without reflecting any disparaging opinion about the Congress -- which, I think, is in the main better than we deserve.

The structure and the work just do not lend themselves to predictably adequate constitutional analysis. The judiciary committees, of course, do have staff competent in this field. But other committees dealing with health, housing, welfare, pollution, consumers, taxes, the armed services and the draft, and a myriad other fields cannot all support constitutional experts. Yet each committee forges the laws under its jurisdiction. When a bill reaches the floor, there is no constitutionally oriented devil's advocate to probe either equality of treatment or procedural fairness. And, even if there were such a constitutional ombudsman, many problems encountered in applying a law to 215 million people could not possibly be foreseen.

In short, Congress -- and state legislatures -- have more than they can do without worrying about whether courts will strike down some of their acts. Were courts to sit back and wait for a resurgence of constitutional sensitivity, the wait would be long and not necessarily productive. The key to a more realistic relationship lies, I think, in courts doing what they think they have to do and legislatures doing what they think they have to do. While legislatures may not like their work undone, they are not powerless to work their will. If they care enough, they can accomplish their purposes -- within the constitution.

III. The Contemporary Search

A year after Judge Hand's Holmes lectures, a younger generation took up the quest for principle. Professor Wechsler, in his Holmes lecture, addressed the problem of criterion in weighing values in due process cases -- entering the very field on which Hand had posted an off limits sign because, as he said, the values were incommensurable. Wechsler's answer to Hand, was concluded in these words:

> "The courts have . . . the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices, as invariably action does. In doing so, however, they are bound to function otherwise than as a naked power organ; they participate as courts of law. This calls for facing how determinations of this kind can be asserted to have any legal quality. The answer, I suggest, inheres primarily in that they are - or are obliged to be - entirely principled. A principled decision ... is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." (73 H.L.R. 1, 19)

So the "theory of neutral principles" became part of our lexicon. It goes beyond a call to mere internal coherency, since Wechsler's neutral principles are value judgments, but judgments

tested by rigorous analysis to see if they would be applied in all cases. But, as Professor Bickel points out, the question left unanswered is how may a court choose between competing principles, both adequately neutral and general. (p. 55)

Bickel himself joins the quest for principle, finding Wechsler's approach too doctrinaire in the sense that a principled decision can leave no room for expediency. And for Bickel there is no neat dividing line between expediency and principle. He saw a potent role for principle in "affect[ing] the tendency of policies of expediency." (p. 64 LDB) That is, he saw value in the Supreme Court neither striking down or upholding a law and thus incarcerating a principle before it was ripe for final enunciation and acceptance. He catalogued what he called "the passive virtues", devices which leave to the Court considerable leeway in deciding "whether, when, and how much to adjudicate", a leeway permitting experimentation, seasoning, and evolving dialogue in the legitimating process of emerging values. When the Court does engage in "a continuing colloquy with the political institutions and with society at large" (p. 240), it can and sometimes does achieve a singular and valued accommodation "between authoritarian judicialism and the practice of democracy." (p. 244)

There is much prudential wisdom in this teaching of Bickel, but no contribution to the search for principle. It is only at the end of his substantial book, "The Least Dangerous Branch", that he states his own credo. He does it largely by quoting Justice Frankfurter in Sweezy v. New Hampshire, 354 U.S. 234, 266-67 (1957). In the course of holding that government may not force teachers to disclose political associations in such a way as to inhibit their freedom to teach and to learn, the Justice recognized that two rights were in conflict, the individual's right to political privacy and the state's right of self protection, and that striking the balance involved judgment, a task committed to the Court. In striving to insure that this judgment would not be one of whim or will, he wrote: "It must rest on fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed." To this Bickel says "Amen", adding only that the "fundamental presuppositions" will be extracted from "the evolving morality of our tradition" (p. 236) and that the principles should not be restricted to an existing national consensus -- a function better entrusted to a Gallup poll. They should include those which will "in time, but in a rather immediate foreseeable future - gain general assent." (p. 239) It is this nuance about sensing the future shape of value acceptance that at once distinguishes Bickel from Wechsler in their definitions of neutral principles and supports Bickel's view of the Court as a prophet of opinion with attendant responsibility to move in stages, stimulating colloquy, not in precipitate and premature formulations.

I have touched the highlights of what I would call the classical-centrist tradition regarding the scope of constitutional review. None of our spokesmen, from Thayer to Bickel, have been either textual literalists nor those who view the Court's role as the achievement of sound results by ad hoc intuition. We have seen how the concept of Thayer's border patrol has been enlarged, first, by Hand's concession of special responsibility in First Amendment cases; then by Frankfurter's recognition of the Court's role in setting standards of fair play for government agencies; then by Wechsler's theory of neutral principles; and finally by Bickel's concept of the Court as a prophet of values which are soon to be recognized as commonly shared. When all of the rhetoric and poesy have been distilled away, the residue of principled guidance appears very small. Perhaps this is all there is, but the nature of man is to continue with his questing.

IV. Conditions of the Current Quest

Our question is: where, if anywhere, do we go from here? Before addressing this question, I think it relevant to note how life and law have changed in the past decade and a half since Hand gave his Holmes lectures at the end of the fifties.

The country, of course, has grown. When I was a law student, we were 130 million people. We are now over half again as many. More significant than our quantitative growth is the change in the conditions under which life is lived. We are now intensely urban, interdependent, and dependent on services. As Frankfurter observed, we have passed from the watchdog state to the service state. As our options to move, live, work, play where and as we like become narrow, institutions arise to fill our need. A professor must not only teach well; he must be a cooperating part of his faculty. A lawyer is dependent on his bar association for his right to practice. A worker must follow the orders of his union. A doctor must work with the staff of the hospital which he uses. A businessman must follow the regulations and orders of a panoply of agencies, local, state, and national. From childhood on, we become creatures of institutions -- public school, universities, unions, professional associations, regulatory commissions, laws governing our occupations and our recreations. If we become ill, old, handicapped, or convicts, we live our lives in institutions.

As we increase in numbers, as institutions play a larger part in our lives, and as more and more of us satisfy our material needs and reach the point of modest affluence, our priorities undergo a subtle but significant sea change. We prize what is, for all we have gained, becoming a scarce commodity -- our personal liberty and privacy. Just because we have no choice but to buy from big corporations, we insist that they not mislead us. Just because we no longer have a hundred acres insulating our home, perhaps only an apartment in a high rise, we care deeply that the urban renewal project planned for our neighborhood does a thorough environmental impact study. We may be a teacher or a student in a large school or university, oppressed by the numbers surrounding us; we prize all the more the ability to communicate our views to the few kindred spirits we may find. We are tenants in a huge low income housing project; lacking a visible landlord, we want some way to complain about lack of heat, plumbing catastrophes, peeling plaster. We are on welfare; when our monthly check is reduced by a few crucial dollars, we want to know why. We are prisoners; we are called on the carpet for a disciplinary hearing; our shower and exercise privileges are reduced. We would like to have a chance to show we didn't do the things said of us.

In short, even since World War II, we have become an urbanized, affluent society, increasingly dependent on the workings of institutions, and, increasingly aware of the importance of receiving fair treatment by these institutions over which we have so little control. We are becoming a justice-oriented society.

These conclusions are not those of a behavioral scientist. They are the conclusions I draw from the particular vantage point of a federal appellate judge, noting the change in the work of the courts within the past decade. I see four kinds of functions which we perform. The first is gate keeping —--letting in only real controversies involving proper parties, within the court's jurisdiction and procedurally at the stage where review is appropriate. Here is the area where many of Bickel's passive virtues have their play. The second function is proctoring the justice dormitory -- overseeing the conduct of law enforcement officials, the prosecutors, the trial judges, juries, and the conduct of trials. A third is that of glossator of statutes and common law. The fourth is that of monitoring the institutions of society -- keeping governmental branches, departments, and levels within their constitutional and statutory boundaries and insuring equal treatment and fair play.

All of these categories represent work that courts have been doing for a long time. The significant growth, however, -- and perhaps "explosion" is a better word -- is in the last category, the monitoring of institutions. There has always been this function in Thayer's sense. We have had to examine whether the federal government was stretching the commerce power when it sought to proscribe even the intrastate manufacture of LSD or making of extortionate loans. We have had to rule on whether state welfare programs and unemployment compensation to strikers conflicted with the national policy of neutrality in labor-management disputes. And, since the thirties, we have had to scrutinize the operation of federal agencies such as the National Labor Relations Board to guard against capricious or arbitrary findings. But the judicial work of this nature was modest until the present decade. What we have experienced in the past four years can be described only as a quantum jump.

The opinions I authored eight years ago, when I joined our court, included perhaps two cases which could be brought under the monitoring label -- one involving a probationary employee protesting his discharge by the Department of Agriculture and one testing the propriety of the Civil Aeronautics Board's licensing of a freight forwarder. The next three years saw little change in our docket profile. Beginning in 1969, however, the review of institutional conduct has been a large and increasing part of our fare.

Servicemen have challenged the military for everything from discharge procedures to forbidding short hair wigs. Draftees have questioned draft board procedures at every step and level. Students and teachers have fought long hair rules, discharge or non-renewal of contracts, punishment for making controversial assignments, and failure to provide school lunches. Recipients of welfare have contested reduction of benefits without hearing, and a host of rules disqualifying various categories of needy persons. Tenants of public or subsidized housing projects have challenged residency requirements, rent increases without hearing, evictions for reporting building code violations, inadequate security measures. Civil servants or those who wished to be civil servants have challenged the qualifying examinations, age ceilings, disqualification of ex-convicts, rules forbidding them to run for office. Prisoners have fought rules hindering their communication with counsel, censorship of their mail, limitations on books they wished to read, disciplinary hearings without notice or opportunity to defend, summary transfers to other prisons. All kinds of people who require licenses to do their thing -- businessmen, doctors, lawyers, automobile drivers -- have challenged actions denying, limiting, or taking away their permits. Environmentalists have challenged work on an airport, a huge urban renewal project, completion of a highway, the financing of a residential development, the approval of state anti-pollution plans for lack of enough consideration of the impact on the environment. Citizens have sued hospitals to force them to perform sterilization operations and have enjoined states from prosecuting for abortion operations. Students have set aside residency requirements for voting and have attacked municipal voting dates as being aimed at disenfranchising the student voters in a college community. Authors of books have sued television networks for denying them free time to promote their thesis. And we recently faced a suit against Massachusetts to force it to provide more funds for courtrooms and judges so that long delayed cases could be tried.

One may place a value judgment on this kind of litigation and say it is good or bad that judges have to spend their time on such issues. Although cases bordering on fantasy are sometimes filed in the name of civil rights, this is neither novel nor unprecedented in other fields of the law. I suppose any judge over thirty -- as most of us are -- continues to be amazed at what hits the indignation nerve of people. Yet on the whole I cannot help but feel that this new breed

of litigation has been an engine for the improvement of institutions and thus society. Local draft boards perform far more fairly and sensitively than they did five years ago. Prisons, mental institutions, universities, local, state and federal agencies have developed much fairer procedures than would have been the case in the absence of gadflies who cared enough to go to court. And while old fashioned tort and contract cases are a welcome change of diet in their rare appearances, I am not so sure that priorities are being badly skewed by the large amount of time judges spend on the grievances citizens have with their institutions.

In any event, whether we are happy with the new workload or not, I suspect it is here to stay, simply because, as other goals of society approach fulfillment, the justice goal looms more important and always just beyond our grasp. The question I address is: can truly principled decisions be made by judges as they are asked to monitor institutions? Particularly, is there any guidance for making such decisions where what is affected by institutions is not all of one's life, liberty, or property, but only a part and perhaps a small part at that. Equity, according to the old precept, does not stoop to pick up pins. But the Constitution in these times does stoop on occasion to rectify or prevent pinpricks.

V. The Workability Factor

In my early search for guidance, I looked not so much to principle as to influential factors in appellate decision making. Cardozo in his Storrs Lectures (Nature of the Judicial Process) had identified four: logic (which he labelled "philosophy"), history, custom, and the pull toward social justice. My reflection the institution monitoring role of the courts led me to identify a fifth factor -- workability.

I defined this as the extent to which a rule protecting a right, enforcing a duty, or setting a standard of conduct -- which is consistent with and in the interests of social justice -- can be pronounced with reasonable expectation of effective observance without impairing the essential functioning of those to whom the rule applies. "Justice and Workability: Un Essai", V Suffolk University Law Review, p. 571 (1971).

I envisaged a set of concentric circles -- with the workability restraint being least confining in dealing with trial judges, slightly more so as we come to prosecutors -- but in general being not too large a restraint in the governance of the police, prosecutory court establishment. But the restraint on judicial review increased as applied to regulatory agencies, and increased still more as standards are sought to be applied to institutions beyond the judicial and regulatory systems. In overseeing the standards governing institutions the judge, I thought, must engage in balancing benefits and/or burdens for individuals against benefits and/or burdens for institutions.

I wrote:

> This balancing necessarily invokes the workability factor. But workability is no more a blueprint for decision than are logic, history, custom, or social justice. In the same breath one must add that it should not be a shield for solipsism, for unrestrained personal predilection. The problem for the judge is to try to remain faithful to his role as a principled decision-maker as he goes through the balancing process. It seems to me that this process is best done when conflicting rights and interests are identified with as much precision as possible, when the factors used in weighing the rights of the individual and the conflicting interest of the institution are fully exposed to light, and, if the right is deemed protectible,

when the protective judicial rule or standard is so tailored as to impose no greater burden on the institution than necessary. Id. at 572.

There were two deficiencies in my attempt, my "essai". The first was my lack of any focus on principle. I swept that under the rug in the clause, "if the right is deemed protectible". I was looking only at considerations restraining courts -- not at considerations pushing them. It was basically a negative formulation. A second deficiency was my implicit reliance on utilitarianism, assumed in the injunctive language that no greater burden should be put on an institution than "necessary".

All of this leads me to the question –

VI. Can Philosophy Contribute to Principled Decision Making?

We have recently been provided by John Rawls with his "A Theory of Justice", the systematic presentation of fifteen years of thinking and writing. It has been heralded by reviewers as "similar in scope and ambition to ... Spinoza, Locke, and Kant" (Joel Feinberg); "The most substantial and interesting contribution to moral philosophy since the war" (Stuart Hampshire); "a rare and valuable accomplishment" (Thomas Scanlon); "inevitable fate of being the most discussed book in its field for the next decade" (Hans Oberdiek). I threaded my way through this tome in the hope that any book so titled would have something to say to a practicing judge. I think he does -- perhaps more than I can presently divine.

His thesis (p. 23) is that "Justice is the first virtue of social institutions, as truth is of systems of thought." He is concerned with social justice, which deals with the basic structure of society -- the way in which the major social institutions distribute fundamental rights and duties, and determines the division of advantages from social cooperation. He adopts as his analytical device the concept of a social contract, at a higher level of abstraction than Locke, Rousseau, or Kant. He accepts and builds upon this basic concept of justice as fairness. The device is not to think of any particular age, society, or government but rather to ask us to conceive of principles of justice as the result of an original agreement, principles which "free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental interests of their association."

There are several things to be said in setting the stage for this kind of meeting of the minds -- which is used to justify his theory.

First -- the bargainers are rational. In large part the theory of justice is a theory of rational choice.

Second -- the bargainers are in the "original position" (not quite the same as the "state of nature" because hypothetical only); they operate behind a veil of ignorance, not knowing their place in society, their wealth, or talents. This condition of possessing no special advantage of foresight is a condition of fairness, insuring that pure procedural justice will yield just outcomes, and explains for Rawls the appropriateness of the rubric "justice as fairness".

Third -- the bargainers, while capable of a sense of justice, are not altruistic. They know that institutions have little to say about distributing such things as health, intelligence, and talent, but a great deal to say about what Rawls calls the social primary goods -- rights, liberties, powers, opportunities, income, wealth, and self respect. And they want these. In so attributing motive, Rawls deliberately is building on a weak assumption. He does not contemplate a society of saints. In so doing, he rejects perfectionism -- a teleological theory setting as the agreed upon end of society the realization of excellence in the various forms of culture.

More importantly, because it is the more realistic competitor of Rawls, he rejects utilitarianism. That is, in his simplest summary of his long assault, he argues "Since each desires to protect his interests, his capacity to advance his conception of the good, no one has a reason to acquiesce in an enduring loss for himself in order to bring about a greater net balance of satisfaction. In the absence of strong and lasting benevolent impulses, a rational man would not accept a basic structure merely because it maximized the algebraic sum of advantages irrespective of its permanent efforts on his own basic rights and interests." (p. 14)

One final note. The very construction of priority rules implies a rejection of still another philosophical approach -- in addition to perfectionism, and utilitarianism. This is intuitionism, which, according to Rawls, "holds that in our judgments of social justice we must eventually reach a plurality of first principles in regard to which we can only say that it seems to us more correct to balance them this way rather than that." (p. 39)

Fourth -- Rawls injects some pragmatism into identifying the principles of justice emerging from the hypothetical bargaining table. He also, as one reviewer notes, narrows the gap between ethical and scientific theory. For he is willing to back away from the bargaining table occasionally to see how the tentative principles "match our considered convictions of justice or extend them in an acceptable way." This process or, rather, condition in which a judgment is refined he calls "reflective equilibrium".

With these basic ground rules we sit down to hammer out an agreement on basic principles for "assigning rights and duties in the basic institutions of society and [/or] . . . the appropriate distribution of the benefits and burdens of social cooperation."

Rawls develops two principles of justice for an advanced society. (This he calls his "special" conception, reserving his rougher "general" conception for more primitive societies.) The first speaks to equality among all citizens in basic liberties. His catalogue of basic liberties is what we might except -- "political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure . . . . " (p. 61) The second principle speaks to the distribution of goods and allows inequalities to the extent that unequal distribution favors the least advantaged. Even this limited permission for inequality, which Rawls terms the "difference principle", applies only to distribution of goods, not basic liberties. As to liberties he assigns first importance, particularly as living conditions improve and "it becomes more important to secure the free internal life of the various communities of interests in which persons and groups seek to achieve . . . the ends and excellences to which they are drawn." (p. 543) His First Principle, accordingly, is: "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all." In a primitive society he conceives of rational persons in the original position as yielding an insistence on equal liberty only if "necessary to raise the level of civilization so that in due course true freedoms can be enjoyed." (p. 152) But in an advanced society, he argues, rational persons would forbid "exchanges between basic liberties and economic and social benefits." (p. 151) Indeed, his First Priority Rule would allow the restriction of liberty only for the sake of liberty, for example, when a less extensive liberty strengthens the total system of liberty, as when we restrict the liberty of the majority by a bill of rights.

So far, Rawls has been analyzed chiefly by other philosophers He has been challenged by perfectionists as leaving not enough room for altruism and winding up as an apologist for our present system. He has been criticized by utilitarians as being unfair to the most sophisticated of

them. He has been chided by intuitionists who, I think rightly, point out that Rawls contains no wisdom when one liberty is pitted against another. And by free spirits who think those in the original position might be willing to gamble on a highly unequal society -- hoping to land on the right side of the tracks.

I approach Rawls as a judge. This means that I am also an intuitionist -- but one seeking to diminish the area for the exercise of intuition. What does Rawls give me? This is a first, rought effort -- another "essai". I hope that others will follow. I have tried to distill what I have gotten from Rawls. It has two sides to it. He helps me understand some of the things judges have done, to put them in a philosophic framework; and he indicates a limited area where judges may move, slightly ahead of conventional wisdom.

Preliminarily -- I must ask if judges have any business borrowing from philosophers at all. The old question is: is the Constitution a closed document? I think it is not, for a number of reasons. The first and least substantive is that we have not operated on that basis for quite a long time. Nor did even the Classicists. Second -- history, while an uncertain litmus paper, gives adequate support for the proposition that the Founders were liberty-oriented as the studies of Miller, Bailyn, and others have documented. That is, if asked, they would not say that they had fully plumbed the depths of liberties which should be protected. They themselves were children of evolution -- as well as revolution. Third -- as Charles Black has observed -- the very structure of the Constitution -- with the most deliberate addition of the Bill of Rights -- supports a certain priority for concern over the rights of individuals. Finally, we as judicial custodians of this document, have to answer, after 200 years of nationhood, for whom is this document if not for us the living? I therefore subscribe to the two-clause theory -- that some clauses are limited and fixed, while others were deliberately left with resilience to bend with the ages. So, while part of the Constitution is fixed in time, until amended, another part invites the solemn and sensitive attention of posterity.

Secondly, while I am attracted to Rawls' demonstration of priority for liberty as a concept which in time, when more people have thought about it systematically, will be commonly shared, judges decide in an imperfect world. Were Rawls to be taken literally, a probationary teacher would be entitled to a full adversary hearing before the school board before dismissal. A prisoner also, before losing his shower privileges. A draft board would have to be unimpeachably exacting -- with proof that no person had ever been improperly deferred or exempted before a particular registrant was ordered to report for induction. And a criminal defendant would be entitled to an immediate trial.

This state of perfect justice overlooks the workability restraint. Or, to put it another way, judges generally are confined to enforcing society's justice and that justice is often founded on notions different from our considered judgments in "reflective equilibrium". We can also say that for judges to refrain from attempting to enforce the liberty priority with literalness comports with what those in the original position would say if they addressed the problem. They would presumably say that the notion of citizen draft boards is a good one. If so, then even the best constituted lay draft board must be given some leeway. And if they were held to the punctilio of perfection, they would simply not be able to carry out their function. So workability imposes two kinds of restraints: one -- that society's underlying concept of some laws and institutions differs from the concept of priority of liberty; and two -- that institutions, wholly apart from cost factors, have inherent limitations.

This is not to say that all particular arrangements and laws reflect society's views of justice and are therefore immune from judicial intervention. To break out of the circularity of this

position, a judge should, I think, recognize that to some extent society has delegated to him the function of reconciling laws and institutions with one another, and institutions with individuals, determining which arrangements are so inconsistent with the general scheme that they must be repudiated as unjust. The judge must on the one hand be sensitive to the pace and direction of societal evolution -- what Jan Deutsch calls "the community agenda" -- and on the other to his responsibility to stand for the principles of justice in that evolution. There is room at the margin for a moving edge of fairness -- fairness checked by workability.

If this is so, does Rawls, though watered down with these observations, suggest areas where a different judicial approach from our conventional ones might be taken? It seems to me that in dealing with institutions and individuals he offers two kinds of fruitful insights. The first has to do with the judicial task, recognized by Frankfurter, of balancing the interests of individuals and society, where he encouraged an "[a]lert search for enduring standards ... in enforcing those provisions of the Constitution that are expressed in what Ruskin called 'chameleon words' . . . ." (p. 159) Our inarticulated major premise has, through much of our history, been utilitarianism, modified by recognition of a small catalogue of principal liberties. Until quite recently only the egregious miscarriage of justice in trials where a defendant was unrepresented by counsel or was convicted by his own confession would have been rectified by courts. Recent years have seen many changes. Now many defendants in misdemeanor cases are assigned counsel and precise warnings are given before any confession is taken down. But our lexicon and our analysis are still bottomed on largely utilitarian assumptions.

If, but only if, a fundamental interest is at stake will government action be subjected to strict due process scrutiny. And only if such an interest is at stake or a classification is "suspect" will a law be voided under the Equal Protection Clause. Only then will courts require a lesser restrictive alternative response from government. In cases affecting other interests, or where classifications are not outrageous, government action may not be successfully challenged if a "rational" societal interest may be imagined. This is really applying Thayer's "clear mistake" rule for guarding the boundaries to reviewing the manner of institutional conduct. This, taken literally, results in a justice of plateaus rather than of gradation; in serious cases the strict scrutiny of courts will hold institutions to high standards -- as for all other cases practically anything on the nature of a prudential administrative, i.e., utilitarian, reason may justify the restraint. We seem, therefore, to be operating on a mixed philosophical basis -- with a limited priority for liberty jousting uneasily with utilitarianism.

It is the law that a public employee without contract, tenure, or expectancy of continuity, may be discharged without the right to have a statement of reasons from his employer, whether it be a university, hospital, or other government institution. This, of course is because he -- or she -- has nothing that rises to the level of a "right" or protectible interest. If one has a contract or an expectancy, one is entitled not only to a statement of reasons but a full hearing. So the gap is a wide one -- a full panoply of rights for a major interest; none for a lesser interest. Now if the values expressed by Rawls in his First Principle and First Priority Rule were to be taken by courts as reflecting what might reasonably soon be expected to be a shared consensus, the question would be: why not give reasons? A court might also dig beneath the principle to ask what rule a rational person in the original position, not knowing whether his lot in life would be that of employee or administrator, would chose to govern discharges. He would, I submit, have to say that in the general course institutional officials face no appreciable burden if they are required to give reasons. A literal Rawlsian, of course, would say that even if there were

considerable costs and administrative burden, such could not justify a restriction on an individual's interest in knowing why his services were no longer required.

That was an easy case. More difficult ones can easily be imagined. Are we to allow every prisoner who is unable to get the book he wants to read, because the warden thinks it obscene or a stimulus to riot, to make a federal case of his grievance? One may easily imagine such a flood of mini-liberty cases so pestering both courts and the other affected institutions that not only would judges and juries have no time to dispense justice to anyone else but the costs in money, time, and personnel would be so great as reduce the general opportunities of all.

This is the second area where Rawls' theory holds some promise of a fit with real life. This lies in his concept of formal justice, or "justice as regularity" -- the impartial and consistent administration of laws and institutions and his concept of pure procedural justice.

It would seem to me that Rawls suggests that one in the original position would say that he would be content to submit to institutional control if the institution itself had an internal system of distributing rights and privileges and of imposing sanctions, fairly and consistently administered under reasonable standards, without access to courts except in cases of flagrant arbitrariness. That is, the requirements of a just society (in an imperfect world) are met if sub-systems operate on the basis of fixed and known procedures, impartially administered, even if injustice is done in an individual case. Even though a court might do better in that case, taking that case would mean taking all cases and the system as a whole might flounder in the flood . . . with the diminution of liberties generally.

In fact, Judges since Attica in 1971 have been proceeding as if they accepted this teaching; they have been catalysts in stimulating in-prison justice systems. And in universities and secondary schools. And in public housing. At times they may ignore the workability factor and try to impose, unilaterally, detailed and unrealistic codes. But when judges succeed in involving the parties in working out institutional changes, more, much more is accomplished than settling the rights and liabilities of the parties to the dispute. Desegregation plans become reality. Minority recruitment and placement in public employment begin to achieve results. Courts do not have to pass on prison censorship of publications if a reasonable administrative screening body, operating on standards and communicating its reasons, has been established. Indeed much can be accomplished by an effective flow of information -- as to rules, reasons for the rules, penalties, procedures, methods of changing rules. With information and, where possible, participation in the rule making process, there is an increased likelihood of institutional decisions which will have the least restrictive impact on liberties and the greatest chance of acceptance without seeking ultimate access to the courts. This has been the experience with federal habeas corpus petitions from state prisoners; as the states have provided effective post-conviction remedies and have improved their own criminal justice systems, the tide has begun noticeably to ebb.

So the search began with the single duty of constitutional review being to police the boundaries of governmental units. The scope was enlarged to encompass First Amendment cases. Then, as Frankfurter realized, it had to oversee the setting of standards of fair play. Next came neutral principles and Bickel's accommodation to expediency on one hand and to values a bit ahead of their time on the other hand. Then, in this complex societal network, some realization of the limits of judicial oversight posed by considerations of workability. And now, through Rawls, we see a different kind of balancing for the smaller liberties, identifying partial protections, with restraint not being dictated by mere expense but by a view of an institution's ability to carry out its function while providing those protections for all. And we have articulated

the concept of courts sensitively using cases before them to initiate a colloquy between principle and expediency to the end of devising workable and fair subsystems.

This is all far short of a blueprint or a guarantee of principled justice. Principles are as yet no substitute for judges with wise intuition respecting the constraints of their craft. But if this were not so, computers could easily replace courts.