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BOOK REVIEWS: Ethics at the Edges of Life / Samuel Johnson

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BOOK REVIEWS

ETHICS AT THE EDGES OF LIFE: MEDICAL AND LEGAL INTERSECTIONS. By Paul Ramsey. New Haven and London: Yale University Press, 1978. Pp. xvii, 353. $15.00.

*Reviewed by L. Harold Levinson**

Professor Paul Ramsey,[1] writing as a Christian ethicist,[2] has revised, extended, and updated the Bampton Lectures in America that he delivered in 1975 at Columbia University. The resulting book is *Ethics at the Edges of Life: Medical and Legal Intersections.* A substantial portion of the book is devoted to critical analysis of a number of landmark court decisions, all of which were rendered after his delivery of the Bampton lectures—*Planned Parenthood v. Danforth,*[3] on abortion; *Commonwealth v. Edelin,*[4] on the treatment of a fetus during or immediately after an abortion; *In re Quinlan,*[5] on the termination of life support; and *Superintendent of Belchertown State School v. Saikewicz,*[6] on the decision not to provide life-prolonging treatment. The book also analyzes a statutory post-Bampton development—the 1976 California Natural Death Act.[7]

The author's blending of the lectures with the subsequent cases and the statute is not completely smooth, but some major themes emerge from the book. Ramsey strongly criticizes the courts for disregarding the value of the lives of the fetus and the terminal patient. He views the court decisions as "a magnifying glass held up to the moral fabric of this nation, through which we can see clearly what is happening (or what *has* happened) to us as a people."[8] But while suggesting in this passage that the decisions reflect the moral decline of the country, he argues at other times that legislatures, rather than courts, reflect the will of the people. This latter argument could lead to the conclusion, although Ramsey does

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1. Professor Ramsey is Harrington Spear Paine Professor of Religion at Princeton University and author of numerous books and articles on medical ethics.

2. In his preface the author states: "I do not hesitate to write as a Christian ethicist." P. RAMSEY, ETHICS AT THE EDGES OF LIFE: MEDICAL AND LEGAL INTERSECTIONS xiii (1978).

3. 428 U.S. 52 (1976). Litigation about the constitutional aspects of abortion has continued, including the recent decision in Colautti v. Franklin, 99 S.Ct. 675 (1979).

4. 1976 Mass. Adv. Sh. 2795, 359 N.E.2d 4 (1976).

5. 70 N.J. 10, 355 A.2d 647 (1976).

6. 1977 Mass. Adv. Sh. 2461, 370 N.E.2d 417 (1977).

7. CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West Supp. 1979).

8. P. RAMSEY, *supra* note 2, at 4 (emphasis in original).

not pursue it, that the will of the people is reflected by the Missouri statute that prohibited abortion rather than by the court's decision in *Planned Parenthood* invalidating that statute. A significant part of the book is devoted to the advocacy of new legislation,[10] apparently based on the assumption that the moral decline of the country, while reflected in the unpalatable court decisions, will not be reflected in statutory law.

With regard to abortion in the aftermath of *Planned Parenthood,* Ramsey urges the enactment and enforcement of conscience clauses to free institutions and individuals from participating in abortions against their convictions.[11] Ramsey's conscience would be offended by any abortion after conception, except when necessary to protect the life or health of the mother.[12] As the fetus approached viability, his conscience would demand further than an abortion, if carried out at all, be done in a manner that maximizes the possibility of delivery of a live fetus, and that if this possibility materializes, the fetus must receive a standard of post-natal care equivalent to that given other newborns.[13]

At the other end of life, Ramsey urges a "medical indications policy" as the means of determining when to give or continue life-support measures. Although this term appears in numerous passages of the book,[14] no completely clear explanation can be found. Apparently, Ramsey's proposed medical indications policy would withhold treatment from patients whose death is imminent and inevitable, except to provide comfort and companionship. All other patients, including those incurably ill but not dying, would receive the type of treatment medically indicated. This does not necessarily mean the most aggressive possible treatment, because the risks involved may convince a physician that such treatment is inappropriate. It does mean that when medically indicated, treatment would be given even to patients who are incurably ill to "add life to their years" even though it may be impossible to "add years to their life."

After the rather discursive style of most of the book, Ramsey offers an extremely tight summary of his conclusions on "The Last of Life." He argues that it is essential to distinguish:

9. *See, e.g., id.* at 5-6, 26, 137, 329.
10. *See, e.g., id.* at 33, 61, 137, 329.
11. *Id.* at 43-93.
12. *Id.* at 46-48.
13. *Id.* at 26-39.
14. *See, e.g., id.* at 159, 181, 264.

> (1) between (a) conscious decision to refuse treatment in one's own case and (b) withholding treatment in the case of another; (2) between (a) "terminal" patients who are dying and (b) "terminal" patients who are simply incurable; (3) between (a) medical help and (b) prolonging dying; (4) between (a) biological indices for medical help and (b) socioeconomic measures of burden or advantage to come for the primary patient; or (5) between (a) medical help for a primary patient and (b) relieving the burden or serving the advantage of others.[15]

In a footnote accompanying the above text, the author presents a "tabulation" that "might be made of some of the conclusions suggested by the foregoing chapters."

> If 3a and 4a are the case, 1b is not morally permissible for 2b, 4b or 5b reasons; 1a may be morally permissible or even praiseworthy for 2b, 4b or 5b reasons even if 3a and 4a are the case; 1b is morally permissible if 2a; 2b patients, given that 1a is not the case, should be evaluated for treatment in terms of 4a and 5a and the availability of 3a; 1b is morally permissible even if 4a is the case, if there is no 3a or if to attempt 3a would likely do more harm; 1a is morally permissible if 2a.[16]

An important feature of Ramsey's argument is that a conscious decision to refuse treatment in one's own case (category 1a in his tabulation) is morally permissible in some but by no means all situations. This point is emphasized elsewhere in the book:

> [T]here are medically indicated treatments that a competent conscious patient has no moral right to refuse, just as no one has a moral right deliberately to ruin his health. Treatment refusal is a relative right, contrary to what is believed today by those who would reduce medical ethics to patient autonomy and a "right to die."[17]

Here, then, is a basic conflict between Ramsey's ethical values and the current state of American law. Although some exceptions can be found, the general legal principle is that a competent, conscious person has a right to choose his own lifestyle even if it is injurious to his health.[18] Moreover, an individual has the right to decide whether to seek professional health care,[19] and if he does seek such care, he has a right to know the diagnosis, the feasible alternative methods of treatment, and the method recommended in his case.[20]

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15. *Id.* at 330.

16. *Id.* at 330 n.17.

17. *Id.* at 156.

18. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 15-12 to 15-21 (1978). Obvious exceptions are found when a person's lifestyle is injurious to others in the sense traditionally prohibited by law, such as murder, robbery, and the like, or when the person is under a special institutional regime, such as military service, in which individual lifestyle preferences traditionally have been subordinated to the requirements of discipline, uniformity, and preparedness.

19. L. TRIBE, *supra* note 18, § 15-19. The obvious exception arises if the condition of a person's body, as a carrier of infection, endangers others.

20. The patient's right to know is fundamental to the contemporary law of informed

He also has a right to refuse treatment.[21] For a number of reasons, however, the patient does not have an absolute right to obtain whatever treatment he desires. First, the treatment may be prohibited by law.[22] Second, there may be no physician in the community capable of providing the treatment.[23] Third, a physician may decline giving the treatment because rendering such treatment to anyone would violate the physician's conscience.[24] Finally, a physician may decline to render the treatment because in his professional judgment the treatment is not medically appropriate in the particular case.[25] These matters will be discussed later in greater detail.

Starting with the notion of the autonomy of the competent, conscious person, the legal system has recognized that children, comatose, and other legally "voiceless" persons may be represented by surrogates—parents, legal guardians, guardians *ad litem,* or in some circumstances, court orders. The surrogate, however, does not have as free a hand as the competent, conscious person. For example, a competent adult is permitted to donate one of his own organs, but at least some case law prevents a guardian from consenting to the donation of a child's organ.[26] Moreover, when the patient is a pregnant woman, there are additional complexities because the rights of both the mother and the fetus must be considered.[27] Ramsey, like the legal system, acknowledges that surrogates speaking for the voiceless have less authority than the competent, conscious person possesses when speaking on his own behalf.[28] Ramsey also finds

consent. *See* G. ANNAS, THE RIGHTS OF HOSPITAL PATIENTS 57-58 (1975); Capron, *Informed Consent in Catastrophic Disease Research and Treatment,* 123 U. PA. L. REV. 340 (1974). Failure to advise parents of the risks involved in a pregnancy recently was held to subject the physician to liability in Becker v. Schwartz, 47 U.S.L.W. 2426 (N.Y. Dec. 27, 1978). The controversial exception to the patient's right to know involves the physician's "therapeutic privilege" to withhold information if the patient would be harmed by receiving the truth. Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972).

21. *See, e.g.,* Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972); Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972); Satz v. Perlmutter, 362 So. 2d 160 (Fla. App. 1978); G. ANNAS, *supra* note 20, at 79-91.

22. The Supreme Court's abortion decisions, for example, have left the states with considerable opportunity to regulate abortions after viability. Roe v. Wade, 410 U.S. 113, 163-64 (1973); L. TRIBE, *supra* note 18, § 15-10.

23. The size of the "community" in which medical care is sought in a particular case varies, no doubt, depending on the source of payments for travel, medical care, loss of earnings, and other expenses, and on the level of aggressiveness with which the patient seeks treatment.

24. For a discussion of the "conscience clauses" enacted by many jurisdictions, see P. RAMSEY, *supra* note 2, at 51-93.

25. AMA PRINCIPLES OF MEDICAL ETHICS § 6.

26. *See, e.g., In re* Richardson, 284 So. 2d 185 (La. App. 1973). *See also* Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969).

27. *See* note 22 *supra.*

28. P. RAMSEY, *supra* note 2, at 330 (item No. 1 of his tabulation).

special problems when dealing with fetal rights.[29] But consistent with his restrictive view of the autonomy of the competent, conscious person,[30] compared with the relatively broad autonomy recognized by the legal system with regard to such persons, Ramsey also believes that the moral choices available to surrogates and to pregnant women are narrower than the choices presently allowed by the legal system. Consequently, Ramsey sees patients and their surrogates as enjoying broader freedom under the law than they may morally exercise. In his scheme the moral constraints are to be managed by a "medical indications policy," which is, to a considerable extent, a version of "doctor knows best." Ramsey does not propose a rigorous set of guidelines for health care professionals in the exercise of this controlling function, since he appears to assume that sound medical practice, based upon the traditions and ethical standards of the health care professions, can be relied upon.[31]

Since health care professionals, specifically physicians, occupy such an influential position in Ramsey's system, Ramsey would have enhanced the value of the book by dealing at some length with the various rights enjoyed by such professionals, both under the legal system and according to the author's moral values. An analysis of the legal rights of professionals could be designed to parallel closely the general principles regarding the rights of patients. Without straining too much to achieve such parallelism, one could suggest that just as a potential patient has a right to choose his own lifestyle, a potential professional, if qualified, can decide whether to enter into a particular profession.[32] As a potential patient has a right to decide whether to seek professional health care, the potential provider of that care has a right to decide whether to accept the patient, except in emergency situations or special circumstances when the provider of health care services is under the obligation of an innkeeper or common carrier to accept all comers.[33] Once a patient has sought care from a willing professional provider, the patient's right to know is matched by the provider's right to receive from the patient such reasonable cooperation as a truthful medical history.[34] Finally, the patient's right to refuse treatment is matched

29. *Id.* at 46-48.

30. *See* text accompanying notes 17-18 *supra.*

31. This is inherent in his "medical indications policy." *See* text accompanying note 14 *supra. See also* P. RAMSEY, *supra* note 2, at 210.

32. L. TRIBE, *supra* note 18, § 15-14.

33. AMA PRINCIPLES OF MEDICAL ETHICS § 5.

34. Sometimes, however, the patient may be unable to rely on the privileged nature of his statements to the physician. *See, e.g.,* Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

by the provider's right to refuse to render services for any one or more of the reasons previously indicated—illegality, incapability, violation of conscience, or medical inappropriateness.

One could argue that traditional notions of the physician's right to refuse to render services are broad enough to permit the physician to consider many factors in deciding what treatment is medically appropriate, including some factors that do not focus solely upon the welfare of the patient. Practices such as the "benign neglect" of defective newborns,[35] the order "Do Not Resuscitate" on the chart of a hospitalized patient,[36] and the termination of life support in *Quinlan*-type situations[37] reveal that the physician's decision on "medical appropriateness" takes into account factors such as the financial and emotional burden to the family and to the community, rather than the welfare of the patient. If one regards the fetus while *in utero* as a "patient," the argument could be extended to assert that when a physician is asked to perform an abortion, he finds himself dealing with two patients—the pregnant woman speaking for herself and the "voiceless" fetus. The welfare of this latter patient is subordinated to that of the woman if the abortion is performed and the fetus does not survive.

This view of the loyalties of the physician—sometimes divided between multiple patients, sometimes between the patient and his family, and sometimes between the patient and the community—brings to mind the divided loyalties of the lawyer. The American Bar Association's *Code of Professional Responsibility* (*Code*) reflects the traditional view that within the bounds of the law and subject to the lawyer's obligation to serve the system as an officer of the court, the lawyer must be a zealous advocate for his client.[38] Occasionally, the *Code* requires the lawyer to give primacy to his role as officer of the court even though doing so may hurt the client.[39] One explanation of the major cases treated in Ramsey's book is that the courts, drawing upon their familiarity with the divided loyalties of the lawyer's practice and building upon the portion of the medical tradition that also recognizes divided loyalties in some situations, have established relatively permissive guidelines because they trust the physician to decide where his primary loyalty should be placed. This interpretation leads to the question

35. P. RAMSEY, *supra* note 2, at 189-227.

36. *Id.* at 228, 290, 322.

37. *Id.* at 269-99. *See also* Havighurst, Blumstein, & Bovbjerg, *Strategies in Underwriting the Costs of Catastrophic Disease*, 40 LAW & CONTEMP. PROBS. 122, 140-45 (1976).

38. ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (as amended Aug. 1977) [hereinafter cited as ABA CODE].

39. *See, e.g., id.* DR 7-102(B), DR 7-106(B)(1), DR 7-109(A).

whether Ramsey's "medical indications policy" or deference to the "doctor knows best" tradition is an effective guarantee that the welfare of the patient will always be paramount.

Ramsey fails to point out that when a person, whether a patient or a professional, makes a choice, this may narrow the range within which future choices can feasibly be made. In the abortion context, for example, the choice whether to abort, and if so by what method, is by no means the first choice facing the pregnant woman. She already has gone through a series of choices within the framework of the uncontrollable factors of her life. Each choice tends to limit the available range of future choice. Some choices such as general lifestyle, marital status, types of friends, and what hobbies or employment to pursue were made before conception. Another choice, except in cases of rape, was whether to engage in intercourse, and with whom,[40] and whether to take contraceptive precautions. Other choices remain available—whether to seek early information on pregnancy; whether to undergo amniocentesis to discover any anomaly in the fetus; whether to seek an abortion and, if so, how early in the term. Ramsey's moral outrage at the courts' permissive attitude toward abortion could be directed, in large part, against the earlier choices that lead to the point when abortion becomes one of the only feasible alternatives.

Ramsey's outrage could also be directed against a state of affairs that strangely is ignored throughout the book—the social surroundings that tend to make abortion an attractive option when compared with the alternatives. As Justice Blackmun observed in *Beal v. Doe*: "There is another world 'out there.' "[41] The same opinion sketches some of the considerations that are meaningful for pro-abortion advocates: "[T]he cost of a nontherapeutic abortion is far less than the cost of maternity care and delivery, and holds no comparison whatsoever with the welfare costs that will burden the State for the new indigents and their support in the long, long years ahead."[42] An ethicist certainly should say something about a society that appears to favor abortion because it costs less than maternity care and delivery or because a live birth will produce a new welfare recipient who over many years will drain society of far more resources than would be expended by obtaining an abortion at public expense. Mention is also surely required of the well-known argu-

40. This choice, of course, is subject to legal limitations established by laws in some jurisdictions prohibiting adultery and fornication. *See, e.g.*, State v. Saunders, 130 N.J. Super. 234, 326 A.2d 84 (1974); Annot., 41 A.L.R.3d 1338 (1972).

41. 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting).

42. *Id.*

ment that abortions will always take place, legally or otherwise, and that a law against abortion inevitably leads to the performance of illegal abortions under conditions posing serious hazards to the health of the pregnant woman.[43] This stark social background may not demonstrate that abortion is justifiable on moral grounds, but it at least demands consideration. Otherwise, the moralization can hardly be taken seriously by those who are "out there."

Ramsey's discussion of the moral problems of patients and physicians is not followed through by a discussion of lawyers' problems, although the book is subtitled "Medical and Legal Intersections." Lawyers will recognize quickly that the above analysis of the rights of the health care professional could be adapted as an outline of the rights of lawyers. Potential lawyers are free to decide whether to enter the profession, assuming they meet the necessary qualifications.[44] They generally are free to decide whether to accept proffered employment, except when in the position of a common carrier,[45] and they are entitled to reasonable cooperation from the client.[46] Lawyers are also free, even required, to decline to render services when their duties as officers of the court override their duties as zealous advocates.[47] Still unsettled is the extent to which a lawyer may or should decline to render services when he morally disapproves of the legally permissible end result his client seeks.[48] This problem is the lawyers' equivalent of the conscientious objection of physicians to

43. *See, e.g., id.* at 458 (Marshall, J., dissenting).

44. ABA CODE, *supra* note 37, DR 1-101(B).

45. *Id.* EC 2-26 to EC 2-33; DR 2-109.

46. *Id.* DR 2-110(C)(1).

47. *Id.* DR 2-110.

48. This question is, to some extent, an aspect of the lifestyle that the lawyer chooses during the course of his professional career, subject to occasional modification if the lawyer is requested by a court or other appropriate institution to serve as appointed counsel in a special situation. The *ABA Code of Professional Responsibility* implies the distinction between the general course of a lawyer's practice, when he is "under no obligation" to accept all comers but "should not lightly decline proffered employment," EC 2-26, and the special situation of appointment by a court or request by a bar association, when the lawyer

> should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendent in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of a civil case.

Id. EC 2-29.

Professor Murray Schwartz has recently proposed a distinction between the advocacy role and the nonadvocacy role of the lawyer. According to Schwartz, a lawyer acting as advocate is neither legally, professionally, nor morally accountable for the means used or the ends achieved, provided the lawyer abides by the established rules of professional behavior. By contrast, Schwartz favors adoption of a rule that would restrain the nonadvocate lawyer from using unconscionable means or working for unconscionable ends. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669 (1978).

rendering certain types of services.

Beyond these generalities, some specific questions of professional responsibility arise when lawyers encounter matters of the type addressed in Ramsey's book. A lawyer whose client is seriously ill arguably has the responsibility to make aggressive efforts to vindicate his client's right to know the diagnosis and the alternative treatments being considered, and to counsel with the client about obtaining additional medical opinions. He also has the duty to respect the client's wishes on the extent to which these matters may be revealed within the circle of family and friends, to advise the client regarding the preparation of wills, powers of attorney, and other dispositive instruments, and to act in the best interest of the client if incompetency or guardianship proceedings are instituted. Finally, he has a responsibility to interact with counsel for the hospital and physicians to minimize the risk of conflict.

Ramsey has failed to grapple with value conflicts between legislatures and courts, between a physician's loyalty to the welfare of his patient and his loyalty to other concerns, between an individual's theoretical freedom of choice at the time of crisis and the constraints that he has placed upon himself by a series of prior choices, between social realities and moral statements regarding abortion and life support, and between law and morality as applied to the matters addressed in the book. This criticism is not addressed to Ramsey's moral standards themselves. Rooted in the Judeo-Christian heritage, their value is unimpaired by time or technology.[49] But Ramsey's standards are not likely to convince the uncommitted unless weighed against the secular concerns of the individuals and communities involved. Ramsey does indeed engage in spirited criticism of other ethicists, but on a level of abstraction that does not permit this reviewer to relate Ramsey's moral values to the realities of life as lived by the consumers of professional services.[50]

49. For a contemporary commentary on orthodox Jewish family lifestyle, see Z. POSNER, THINK JEWISH 101-08 (1978). Ramsey frequently acknowledges that his values are derived from Judeo-Christian sources. He makes frequent and approving references to traditional Jewish sources of interpretation, and he relies upon some Christian sources while rejecting others. Though the theological aspects of Ramsey's book are beyond the scope of this Book Review, his values reflect the teachings of orthodox Judaism and of those segments of Christian teaching most closely aligned with it. Some contemporary Jewish and Christian scholars undoubtedly would take issue with these teachings and with Ramsey's conclusions. It also is obvious that valuable moral standards are found in many sources in addition to Judeo-Christian teachings.

50. One final comment must be made. Readers of Ramsey's book are likely to be distracted by the numerous typographical and syntactical errors it contains. Without making any effort to proofread, I noted the following errors. A suggested correction is added after each error: overboard (overbroad), p. 8; Justice Steward (Stewart), p. 29; overboard (overbroad),

SAMUEL JOHNSON. By W. Jackson Bate. New York and London: Harcourt Brace Jovanovich, 1975. Pp. xxii, 646. $20.00

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> "The applause of a single human being is of great consequence." This he said to me with great earnestness of manner, very near the time of his decease, on occasion of having desired me to read a letter addressed to him from some person in the North of England; which when I had done, and he asked me what the contents were, as I thought being particular upon it might fatigue him, it being of great length, I only told him in general that it was highly in his praise;—and then he expressed himself as above.[1]

I.

With the observation that "Samuel Johnson has fascinated more people than any other writer except Shakespeare,"[2] Professor W. Jackson Bate of Harvard University opens this profound biography. Now available to readers for more than three years, with the immediate excitement of its publication well-passed, the book clearly stands out as the quintessential presentation of the life of Johnson and as a monument of its genre. The force of Bate's book results from his ability to combine research and literary talents. From a vast amount of material, Professor Bate has ferreted out the essential data for the composition of a portrait that depicts Johnson as the whole man, his eccentricity and greatness blended to perfection. Moreover, Bate has compiled his findings in a manner both pleasant and instructive that makes his presentation an independent work of art. Consequently, Bate's book surely will attain the

p. 35; denied certification (certiorari), p. 83 n.34; alledged (alleged), p. 107; umblical cord (umbilical), p. 125; in now way (no), p. 127; He reading of the instructions (His reading), p. 128; kill the bady (baby), p. 128; Stanford Law Review 27, no. 2 (January 1973) ((1975)), p. 197 n.15; looses its force (loses), p. 216; convenant (covenant), p. 217 n.41; principle author (principal), p. 241; impell (impel), p. 245; superceded (superseded), p. 253; regretably (regrettably), p. 264; conceference (conference), p. 267; competent conscience patient (conscious), p. 273 n.10; Judge Muil (Muir), p. 273 n.10; sub silencio (silentio), p. 280 n.17 (three times); to us a wedge argument (use), p. 295 n.26; guardian of litem (ad), p. 305; precedental (precedential), p. 306; Judge Cardoza (Cardozo), p. 306 n.5; Saikewiczs (Saikewicz's), p. 315; supercede (supersede), p. 320; terminal conditional (condition), p. 322; application . . . serve only to postpone (serves), p. 325; dispensible (dispensable), p. 327. The moral legacy of the millenia deserves more careful expression.

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1. 7 J. BOSWELL, THE LIFE OF SAMUEL JOHNSON 64 (C. Shorter ed. 1922) (1st ed. London 1791).

2. W. BATE, SAMUEL JOHNSON 3 (1975). Bate continues: "Statesmen, lawyers, and physicians quote him, as do writers and scientists, philosophers and farmers, manufacturers and leaders of labor unions." *Id.*

rank of a classic in the literature of biographies. It will be placed alongside the study of Lord Melbourne by Lord David Cecil[3] and the two most important biographies in the English language, Johnson's life of the early eighteenth century poet Richard Savage[4] and James Boswell's *The Life of Samuel Johnson*.[5]

In achieving his results, Bate accepts and follows Johnson's advice. As to style, Bate develops his fresh twentieth-century English prose—no exaggerated adjectival embellishments and no sentimentality—from the eighteenth-century structure and rhetorical charm of Joseph Addison, of which Johnson wrote: "Whoever wishes to attain an English style, familiar but not coarse, and elegant but not ostentatious, must give his days and nights to the volumes of Addison."[6] Bate does not, it is true, display the magic with words that Thomas Macaulay wielded in his nineteenth-century essay on Johnson.[7] Bate has neither the conventional, anecdotal relief that led to the success of Joseph Krutch's *Samuel Johnson*,[8] nor the lively paced journalism of John Wain's more recent tribute.[9] Instead, Bate keeps himself off stage, eschews purple passages, and uses his lean style only for his main purpose, which is to demonstrate how Johnson achieved his own fulfillment.

Along the way, but only to develop the character of Johnson, Bate introduces other persons, beautifully delineated but always members of the supporting cast. Mrs. Hesther Thrale, for example, emerges as a perceptive, loyal friend who achieved fulfillment in part by observing her mentor, despite her having to keep Johnson from his wishes to possess her. One finally sees her worthy of Johnson's tribute that her "kindness . . . soothed twenty years of a life radically wretched."[10] Similarly, Bate looks carefully at David Garrick and Joshua Reynolds, not to introduce unamusing trivia about two of Johnson's famous friends, but rather to demonstrate how Johnson, with regard to them, overcame one of his principal vices, envy. This vice, for Johnson used a religious vocabulary rather than one drawn from modern psychology, along with sloth were his two chief shortcomings. With the use of willpower and reason Johnson

3. D. CECIL, MELBOURNE (1954).

4. JOHNSON, *Savage*, in 2 LIVES OF THE ENGLISH POETS 321 (G. Hill ed. 1905) (1st ed. London 1779).

5. *See* J. BOSWELL, *supra* note 1.

6. JOHNSON, *Addison*, in 2 LIVES OF THE ENGLISH POETS, *supra* note 4, at 79, 150.

7. Macaulay, *Life of Samuel Johnson*, in ENCYCLOPAEDIA BRITANNICA (8th ed. 1856), *reprinted in* MACAULAY: PROSE AND POETRY 548 (G. Young ed. 1952).

8. J. KRUTCH, SAMUEL JOHNSON (1944).

9. J. WAIN, SAMUEL JOHNSON (1975).

10. *Id.* at 363.

overcame his jealousy of the two artists who had been rich when he was poor.

Both Garrick and Reynolds became greater as they reacted to Johnson's intellect and honor. Bate recounts how Garrick, while studying under Johnson at the latter's Edial Hall grammar school in Lichfield, perfected the ability to mimic his teacher. Garrick observed Johnson carefully on many occasions; he even eavesdropped on Johnson in his bedroom. For entertainment, Garrick would enact some of Johnson's eccentricities, including a lovemaking scene between Johnson and his wife—one of Garrick's most successful routines. On the positive side was Garrick's recitation, at the opening of the Drury Lane Theatre, of his mentor's *Prologue* with its concluding injunction that "truth diffuse her radiance from the stage."[11] When Garrick died, Johnson wept and wrote, in a manner worthy of Shakespeare's tribute to Hotspur in Part One of *Henry the Fourth,* an obituary to his younger friend: "I am disappointed by that stroke of death, which has eclipsed the gaiety of nations, and impoverished the public stock of harmless pleasure."[12]

Another example of Johnson's capacity for sustained friendship was his relationship with Reynolds, who was earning 8,000 pounds a year when Johnson received his pension of 300 pounds. Despite this diversity of fortune, Reynolds always remained Johnson's closest friend. Reynolds gave his view in the noble portrait he painted of Johnson. From the painting one comprehends the intelligence and grace that enabled Johnson to transcend poverty and a physical appearance that caused him to appear to Horace Walpole as "an unfortunate monster trusting to his helpless deformity for indemnity for any impertinence that his arrogance suggests . . . ."[13] Reynolds' last tribute, spoken just days before Johnson's death, matches the portrait: "His work is almost done; and well has he done it!"[14]

Bate introduced other characters as well: Boswell, Johnson's unusual house guests who came to stay, and most importantly, two older men who Johnson admired in his youth—the Reverend Cornelius Ford, a comparatively rich cousin of Johnson, and Gilbert Walmesley, the son of a member of Parliament for Lichfield. These two fairly well-born men of the world helped to shape Johnson's abiding "establishment" orientation, his delight in affairs of state, his treat-

11. Johnson, *Prologue at the Opening of the Theatre in Drury Lane, (1747)* (line 62), *reprinted in* SAMUEL JOHNSON: SELECTED WRITINGS 46, 47 (R. Davies ed. 1965).

12. J. WAIN, *supra* note 9, at 351.

13. J. KRUTCH, *supra* note 8, at 351.

14. *Id.* at 554.

ment of social themes from within rather than from without society, and his ability to overcome that frequent curse of the self-made man, envy or resentment. Bate presents Johnson's youth among elderly parents in a Tennessee Williams setting—ill-directed talent in a vain fight for gentility, and an environment of poverty that was hard for those at the cruel bottom of the Johnsons' social class, especially when that class itself was at the periphery of worldly adequacy.

Bate acknowledges one great advantage that he had—the availability of enough raw material to reach the real Johnson.[15] Boswell's biography of Johnson was the first thorough attempt at what today is called oral history, a method by which the person being written about speaks for himself. Macaulay thus called Boswell "the first of biographers,"[16] and went on to say that because of Boswell's study, "Johnson grown old, Johnson in the fulness of his fame and in the enjoyment of a competent fortune, is better known to us than any other man in history."[17] This method is the key to the success of two present works that rank as minor classics: Paul B. Fay's intriguing study of President Kennedy, *The Pleasure of His Company,*[18] and Merle Miller's biography of President Truman.[19] Interestingly enough, Johnson understood the superiority of relying on this method of oral history. He remarked to Boswell that "nobody can write the life of a man, but those who have eat and drunk and lived in social intercourse with him."[20] There is indeed something disciples of a master (especially those of Jesus and Plato) can relate that later followers do not easily grasp; but even in this matter, despite the passage of two centuries, Bate comes close to equaling Boswell. In addition to having Boswell's recorded conversations, Bate puts to use a lesson he learned from the poet John Keats, who believed that Shakespeare and Johnson wrote allegories of their own lives. With a close reading of Johnson's writings, especially *The Vanity of Human Wishes*[21] and *Rasselas,*[22] Boswell and the other original sources, Bate assembles his own biography of

15. *See* W. BATE, *supra* note 2, at xx.

16. Macaulay, *Essay on Croker's Edition of Boswell's The Life of Samuel Johnson, L.L.D.* (1831), *reprinted in* 1 CRITICAL AND HISTORICAL ESSAYS CONTRIBUTED TO THE *Edinburgh Review* 347, 365 (F. Montague ed. 1903).

17. *Id.* at 370.

18. P. FAY, JR., THE PLEASURE OF HIS COMPANY (1966).

19. M. MILLER, PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN (1974).

20. 3 J. BOSWELL, *supra* note 1, at 198.

21. Johnson, *The Vanity of Human Wishes* (1749), *reprinted in* SAMUEL JOHNSON: SELECTED WRITINGS, *supra* note 11, at 48.

22. S. JOHNSON, THE HISTORY OF RASSELAS, PRINCE OF ABISSINIA (1971) (1st ed. London 1759).

which one can say, as Johnson said of John Milton's *Paradise Lost*, "[H]is work is not the greatest of heroick poems, only because it is not the first."[23]

II.

Today, approximately two hundred years after Johnson's death,[24] many in the legal profession may consider his life and work as both interesting and instructive, and may attempt a serious study of Johnson as a man and as a jurisprudential thinker. First, one may wish to reflect on Johnson as a man, not only as an eccentric man of letters, as a man about London, and as one of the greatest conversationalists known to the English language, but also, more importantly, as a model for each of us to follow as we seek to overcome obstacles and to produce something of value along the way. In writing his book, Bate follows the tradition of the study of the hero, a tradition encapsulated in Henry Wadsworth Longfellow's lines, "Lives of great men all remind us/We can make our lives sublime."[25] Bate offers a further philosophical basis for incorporating the hero into daily life by quoting his teacher, Alfred North Whitehead: "[M]oral education is impossible apart from the habitual vision of greatness."[26]

The variety of ways in which Johnson became a great man is the theme of Bate's long book. It is sufficient to note here that Johnson's most impressive achievement was keeping himself relatively free from mental breakdown. His written work and his care and nurture of others depended upon the maintenance of a sound mind. Even so, Bate suggests persuasively that at least twice Johnson suffered mental loss to a serious degree. With this challenge to his sanity always before him, Johnson set out to discover a way of life, a method for controlling his energy, for making choices, and for arranging priorities that would enable him to discover and to follow productive and sane directions. To give meaning to the world and to himself, he accepted in full faith the Christian religion, as it was defined by the best of the eighteenth-century Church of England divines.[27] In short, he discovered for himself both final principles

23. *See* Johnson, *Milton*, in 1 LIVES OF THE ENGLISH POETS, *supra* note 4, at 84, 194.

24. Johnson lived from 1709 until 1784.

25. H. LONGFELLOW, *A Psalm of Life* (1839) (lines 25-26), *reprinted in* THE POETICAL WORKS OF LONGFELLOW 2-3 (Cambridge ed. 1975).

26. W. BATE, THE ACHIEVEMENT OF SAMUEL JOHNSON x (1955). In this earlier work, Bate developed his view of the moral function of biography and in large part his view of Johnson. Bate's major work twenty years later is a richer development of his earlier book.

27. *See* 30 DICTIONARY OF NATIONAL BIOGRAPHY 31, 32 (1892). Johnson also was influenced by the writings of William Law. *See* W. LAW, SERIOUS CALL (London 1728). This book

and a method in which to apply these principles to daily situations. Much of this intellectual voyage is depicted allegorically in his poem, *The Vanity of Human Wishes,*[28] which he concludes by calling for "a healthful mind" to take action in small matters, actions to be taken as heaven declares the "measure." Despite his pessimistic belief that as to large matters all is vain, he called for action in both the Stoic and the Christian sense. In the Stoic sense, he not only captured the spirit of his Roman model, Juvenal, but also reflected something of the conclusion in Valery's great twentieth-century poem, "The wind rises/we must try to live!"[29] In *Rasselas* and in his biography of Savage, Johnson preached against daydreaming, against the unharnessed imagination, against romantic ventures, which being impossible to achieve and unconnected with reality, could lead to a split personality and, indeed, to the disintegration of the self. In his writings, Johnson called for action in small cases, for concern for individuals as distinct from causes, for the possibility of seeing the universe in the cell (or as Walt Whitman would put it later, in the blade of grass), for the challenge of meeting one new soul each day. His preoccupation for what one would call the case at hand, or the facts, kept him from bondage to his chief sin, as he called it, sloth. The force that permitted him to hold on and to keep going he labeled "Reason." By nature Johnson was not a reasonable man; he was a waif, a term Bate enjoys. Johnson wandered the streets, liked publicans and sinners, roamed about at night dropping coins into the hands of sleeping abandoned children, drank until he finally had to give up spirits altogether, talked with artists and especially with *artistes manques,* and somewhere in his consciousness at all times pondered the overwhelming thoughts of death, resurrection, and the last judgment. In achieving a successful personality in the psychological sense, he relied on reason. He predated Sigmund Freud with a startling self-analysis, and is as modern as Jean-Paul Sartre in his emphasis on free will.

Turning to the second point of continuing interest about Johnson, his contribution to jurisprudence and theories of social order, it is hard to characterize precisely his contribution because he did not put himself forward as a philosopher. Instead, he was the first successful journalist, or man of letters, or commentator, or anchor-

similarly influenced the Wesleys. One biographer of Law stated that "even [Sir Edward] Gibbon speaks of it [*Serious Call*] with high respect." 32 DICTIONARY OF NATIONAL BIOGRAPHY, 236, 239 (1892).

28. Johnson, *supra* note 21.

29. P. VALÉRY, *Le Cimetière Marin* (1920) (lines 139-40), *reprinted in* MORCEAUX CHOISIS 34, 39 (1930) ("Le vent se lève! . . . Il faut tenter de vivre!").

man. He more resembles Edmund Wilson than George Santayana. In truth, his type is better known in France, where he would be recognized as a moralist, with modern examples being Andre Gide, François Mauriac, Henry de Montherlant, Albert Camus, and, in one aspect, Sartre. Even in this area he was too much an activist, a public man, to develop a system of thought at the highest level. As a thinker, he cannot easily be placed alongside any of his three great contemporaries, David Hume, Jean-Jacques Rousseau, and Francois Marie Arouet de Voltaire. His was a public voice speaking to immediate issues. He did not develop an original point of view.

When Johnson achieved his greatness in England he spoke for the establishment, or at least a large part of it. The establishment was Christian and Protestant. The Johnsonian establishment was separated from the Catholic establishment in Europe and from the nonestablishment Catholics in Canada. Although Johnson concluded that no serious barrier existed between Protestants and Catholics, their differences being merely formal, he remained totally separated from two classes of persons who are especially prominent in present western society—"free-thinkers" and "enthusiastic Christians." Today, most jurisprudential scholars do not discuss their values in terms of Christian doctrine, as Johnson would. Nor do these scholars stress death and the final judgment after resurrection as their principal interest. Johnson felt that most human action kept people from thinking about these awesome matters, which to him were the real and vital questions.

In today's Christian community, Johnson would be uncomfortable with the large number of enthusiastic Christians who testify to special revelations, movings from within, and nonrational methods of learning. Since he had remarkable compassion for the poor, Johnson would approve of the social gospel to which these enthusiastic Christians are strongly committed. He would not have accepted, however, their minimization of the use of reason in arriving at justice and salvation because to Johnson reason was a chief instrument of the Holy Spirit. Johnson lived before he could study Immanuel Kant and long before the Christian thinkers had the help of Carl Jung and Karl Barth. Certainly, Johnson would have arrived at a broader interpretation of the faculty of reason, given the development a century later of the social sciences and psychology. He would have accepted the new disciplines, subject to critical scrutiny. Despite a shield of arrogance to cover his wounds, Johnson had the modesty of Isaac Newton, whom he revered as a scientist and as a Christian. Neither Johnson nor Newton thought he knew more than a little, and neither thought he could do, even at best, more than

small tasks. Johnson doubtless would have liked to repeat Newton's words:

> I do not know what I may appear to the world, but to myself I seem to have been only like a boy playing on the seashore, and diverting myself in now and then finding a smoother pebble or a prettier shell than ordinary, whilst the great ocean of truth lay all undiscovered before me.[30]

Johnson did not analyze alternative values because he believed that his values had been given or revealed by God. His enemy was Hume, not because Hume proved the impossibility of teaching ultimate values by reason, but because Hume would not affirm Johnson's view of revelation. To Johnson, the "hereafter" was true, not because its existence can be proved, but because the *Bible* revealed it. Hume would not accept this leap of faith. Johnson believed that the revelations of the *Bible*, refined by Church doctrine, could be applied to human experience. Some today reject this approach and use human happiness as the measure for their values, while others base their values on their understanding of man's fundamental nature.

In the same year, Johnson in *Rasselas*[31] and Voltaire in *Candide*[32] came to the same conclusion—one must cultivate his own garden. Johnson, however, did not accept Voltaire's belief in progress and in the utility of social action on a broad, planning stage. Voltaire stressed the here and now; Johnson stressed the future life. Johnson's message developed into W.H. Auden's injunction in his Phi Beta Kappa poem at Harvard: "[T]ake short views."[33] Johnson's rejection of large schemes as futile does not mean that he rejected large-scale principles or values. He was a believer in natural law, "truth," "justice," "love," and "duty." In his major poem he wrote that all men "from China to Peru" possess the same desires, passions, and human ingredients.[34] Johnson dismissed Rousseau's belief in innocence and the primal state of good because these observations ran against both Johnson's experience of iniquity and his belief in original sin. Bate seeks to put Johnson's development within the philosophy of Whitehead by writing: "To go back to the living and concrete nature of experience was the first principle of his [Whitehead's] thinking."[35] Again, with Whitehead and Johnson in

30. 40 DICTIONARY OF NATIONAL BIOGRAPHY 370, 392 (1894).

31. *See* S. JOHNSON, *supra* note 22.

32. F. VOLTAIRE, CANDIDE OU L'OPTIMISME (1759).

33. W. AUDEN, *Under Which Lyre* (line 174), *reprinted in* W.H. AUDEN: COLLECTED POEMS 259, 263 (E. Mendelson ed. 1976).

34. Johnson, *supra* note 21, at 48 (line 2).

35. W. BATE, *supra* note 26, at ix.

mind, Bate urges the reader to retain at all times an awakened sense of "the concrete achievement of a thing in its actuality."[36] Thus, although Johnson did not develop a position in jurisprudence or philosophy, he ranks with the great teachers of ethics—Ralph Waldo Emerson, Blaise Pascal, Andre Gide, Bertrand Russell, and even Michel de Montaigne. His total seriousness about the possibility of justice in daily life, combined with his pithy expression and trenchant observations, make him a good introduction for more rigorous minds such as Aristotle, Plato, and Kant, who operate on a more difficult plane. Although Johnson remains in a subordinate tier of thinkers, he is in the first ring of teachers.

Regarding Johnson's intellectual powers, it is interesting to speculate on the quality of his mind and to raise the question whether he was a genius, and even if he was not a genius, to surmise how to rank him with the best minds of the legal profession. The use of the term "genius" requires care and explanation. Johnson defined the word as one used to describe "a mind of large general powers, accidentally determined to some particular direction."[37] If we accept his definition, then it is clear to all that Johnson was a genius. He could have led a government, supervised a physics laboratory, managed the Ford Foundation or the World Bank, and commanded either General Motors or Sears & Roebuck. That he possessed the special endowment of Hume, Newton, Johann Sebastian Bach, or Albert Einstein is less certain. His closest American legal counterparts are Roscoe Pound and Chief Justice John Marshall. Felix Frankfurter reportedly described Pound as a quasi-genius; of Marshall, Daniel Webster said that he had never met a brighter man.[38] Johnson's friend, Mrs. Thrale, demonstrated remarkable understanding when she remarked that "[h]is soul was not different from that of another person, but . . . greater."[39]

To summarize, Johnson's two contributions to jurisprudence are the following: (1) he represents an articulate, even brilliant, position for a Christian lawyer who believes that the ultimate values on which legal systems ought to be based are values revealed by God to man in scripture and theological teaching; and (2) he represents, to a wider group, the power and success that a thinker can obtain by the use of reason in applying values to concrete situations.

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36. *Id.*

37. J. KRUTCH, *supra* note 8, at 68.

38. Smith, Book Review, 85 YALE L.J. 454, 458 (1976) (reviewing L. BAKER, JOHN MARSHALL: A LIFE IN LAW).

39. W. BATE, *supra* note 26, at 8.

III.

An interesting debate recently published in the *Arkansas Law Review*[40] conveniently illustrates in a contemporary context the method that Johnson would employ in solving constitutional questions. This debate concerns Professor Raoul Berger's view of the judicial function and Professor Robert E. Knowlton's larger view of the role of the Supreme Court. Berger, according to Knowlton, "believes that the sole basis for constitutional interpretation is the original intention of the draftsmen."[41] Berger, quoting Professor Philip Kurland, posits the issue in this debate as going to "the most immediate constitutional crisis of our present time . . . the usurpation by the judiciary of general powers on the pretext that its authority derives from the Fourteenth Amendment."[42] Without reviewing Berger's position, which is well-known through his writings, it suffices here to place him with the fundamentalists and the strict constructionists. Even Justice Hugo Black, a leading fundamentalist, is too broad for Berger because Black sought to incorporate the Bill of Rights into the fourteenth amendment without a clear understanding of the views of the persons who participated in the process of amending the basic document. Once Black accepted incorporation, he held on to the historical-fundamentalist dogma with the tenacity of an old-style evangelist making exegesis of scripture.

The purpose here is not to toss aside this view, which has had enough strength to hold the fort for liberty under successive attacks on the first amendment, but rather to stress Knowlton's view, which is in large measure the position to which Johnson indubitably would have arrived. Speaking eloquently for the American liberal tradition, Knowlton says: "[t]he words of the Constitution may be viewed as representing basic principles or values that the framers meant to protect. The role of the Court is to relate and to protect those principles and values in today's society."[43] The values of which Knowlton speaks, such as free speech, freedom from torture, and religious freedom, are identified clearly in the Bill of Rights. For many lawyers these rights are sufficiently discoverable in the Constitution; consequently, inquiry into the origin of these rights beyond the text of the Constitution is unnecessary. Nor is a search

40. The debate referred to was between Knowlton, Book Review, 32 ARK. L. REV. 157 (1978) (reviewing R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT), and Berger, *The Fourteenth Amendment: Facts vs. Generalities*, 32 ARK. L. REV. 280 (1978) (written in response to Knowlton's review).

41. Knowlton, *supra* note 40, at 158.

42. Berger, *supra* note 40, at 280.

43. Knowlton, *supra* note 40, at 162.

for the source of rights or the ultimate nature of justice required. More mature scholars, including of course Berger and Knowlton, understand that the founders siphoned these values into the Constitution from the ideas of the eighteenth-century Enlightenment in England and France. The debate between Knowlton and Berger is how to apply these values in a modern setting.

Johnson would have agreed with Knowlton that the values should be applied to the new setting with the fullest use of reason and experience and with the best knowledge possible of the changing historical environment. Johnson, always with a definition handy, declared that "the law is the last result of human wisdom acting upon human experience for the benefit of the public."[44] Johnson believed that values were "natural," God-given, and revealed through the Christian-classical tradition. According to Johnson, these values could be applied to solve problems, including judicial or legislative controversies. Johnson believed, however, that they could be applied with only limited success because the mind's corruption leads to delusion. This pessimism resulted from Johnson's understanding of original sin. Knowlton takes a more optimistic view of the possibility of improving the social order through the use of reason. But both Knowlton and Johnson would agree that the success, limited or great, depends upon the application of reason to a very specific, concrete situation. Knowlton and Johnson properly could reach different solutions to the same problem because each occupy different historic positions. The important point is that they would use the same process. It is Johnson's method of moving from principle to facts, or, conversely, from facts to principle, in the actual moment, that makes him a gifted teacher, thinker, and jurist.

IV.

Disinterested observers are noting an important phenomenon in the American legal profession—a resurgence of interest in jurisprudence. For a long period, the American legal profession—students, teachers, lawyers, and judges—to a great extent have based their understanding of law and justice on legal positivist methods and principles, which have been accepted and acted upon rather than articulated and questioned. New law school courses and current literature suggest a trend towards natural law. This lauda-

44. Piozzi, *Anecdotes of the Late Samuel Johnson, L.L.D.*, (London 1786), *reprinted in* 1 JOHNSONIAN MISCELLANIES 141, 223 (G. Hill ed. 1966). Mrs. Piozzi was none other than Mrs. Hesther Thrale, Johnson's longtime friend and hostess, who remarried shortly after her first husband's death.

ble movement for the construction of a strong, widely shared jurisprudential base is accompanied by a second important and complementary theme—a renaissance in the comparative study of law and literature.[45] This renaissance is indicated by an upswell of professional interest in the study of literature and humanitarianism as they relate to matters of justice. This dialogue between law and the liberal arts serves two functions. First, selected literature of the first rank, such as Plato's *Apologia,* Sophocles' *Antigone,* and Shakespeare's *Measure for Measure,* focus so sharply on some of the ultimate issues of justice that these works are indeed jurisprudential to the same degree as the technical masterpieces of John Austin, Hans Kelsen and H. L. A. Hart. Second, literature, such as the biographies of Johnson and some of his writings, serves as a vehicle for students who wish to begin coordinating positive law with larger considerations, and who wish to begin the long, hard, and rewarding study of jurisprudence or other branches of philosophy, the queen of sciences. In response to this movement, law schools are beginning to incorporate into the curriculum large servings of jurisprudence in different packages and wrappings. Educators are increasingly aware that what were once called "policy questions" need further emphasis and refinement. "Policy" under the emerging regime is not regarded as a hunch, or as an egocentric grasping for one's own way, but rather as a serious, systematic attempt to define the ends and means of justice.

Educators now must decide how to gain the most from this new interest in policy, values, justice, and jurisprudence, which appears in various forms and rubrics. Professor James C. N. Paul, for example, suggests that curriculum committees divide the courses in law school on a fifty-fifty basis between courses *on* law and courses *about* law.[46] Courses about law include: law and psychiatry, law and literature, law and sociology, law and anthropology, and jurisprudence, which can subsume the others. In mixing these elements in the crucible of legal education, Dean Peter Simmons of Rutgers University School of Law shares precious discretionary funds for experiments in the new jurisprudence by way of public lectures, seminars, and conferences. The undergraduate prelaw curriculum at the University of Massachusetts is gaining national and international attention because it builds a humanistic and jurisprudential foundation for further professional training. Some believe that for this humanistic movement selected literary figures, including Johnson

45. *See* Smith, *The Coming Renaissance in Law and Literature,* 7 MD. L.F. 84 (1977).

46. Based on an interview with James C. N. Paul, Professor of Law at Rutgers University, in Newark, New Jersey (May 15, 1978).

perhaps, are indispensable. These teachers believe that truth resides in Shakespeare, Alexander Pope, and John Milton, not in escapism, and that their verities can help solve practical questions.

The legal profession's increased interest in jurisprudence and literature as it relates to law is encouraging. Jurisprudence, however, must develop rigorously trained and articulate spokesmen; there are encouraging developments here as well. Four scholars, John Rawls, David A. J. Richards, Ronald Dworkin, and Roberto Manaberia Unger, now working in their prime, may be cited as a brilliant constellation in American scholarship. They differ so decidedly in background and personality that it would be inaccurate to suggest that they share a unified theory. For present purposes, however, it is helpful to call them neo-natural law thinkers to distinguish them from the prevailing English school of positivism. There is space in this essay for only a few comments to illustrate the richness of their work. Recently, in the *Vanderbilt Law Review,*[47] Professor John D. Hodson brilliantly reviewed Dworkin's book, *Taking Rights Seriously.*[48] Hodson suggests that Dworkin should draw closer to Kant to justify the finality of his policy choices. John Rawls is now America's leading *savant* in these matters, and his book, *A Theory of Justice,*[49] could reach the status of a classic. He relies heavily on Kant, as well as Rousseau, and in seeking the source of values, he looks to the Swiss and French structuralists.[50] In a key sentence he states: "We need a conception that enables us to envision our objective from afar: the intuitive notion of the original position is to do this for us."[51] Concerning the source of our values, Rawls states:

> It must be emphasized that a moral view is an extremely complex structure of principles, ideals, and precepts, and involves all the elements of thought, conduct, and feeling. Certainly many kinds of learning ranging from reinforcement and classical conditioning to highly abstract reasoning and the refined perception of exemplars enter into its development.[52]

Richards, whose ideas are similar to Rawls and who has established a separate equivalent system, gives his major book the appropriate title *The Moral Criticism of Law.*[53] Professor Stephen R. Munzer, who has recently reviewed this book, offers interesting observations to be considered when reading Rawls, Richards, and Dworkin. Mun-

47. Hodson, Book Review, 31 VAND. L. REV. 450 (1978).
48. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).
49. J. RAWLS, A THEORY OF JUSTICE (1971).
50. *See id.* at 460. Note especially Rawls' emphasis on Jean Piaget.
51. *Id.* at 22.
52. *Id.* at 461.
53. D. RICHARDS, THE MORAL CRITICISM OF LAW (1977).

zer demonstrates the weaknesses in all three as they seek to justify their moral (value) preference.[54] The careful, detailed criticism in the Hodson and Munzer reviews underscores the vigor of the jurisprudential movement.

Unger opened up American jurisprudence to Continental thought. In his approach he provides a place for what Johnson would call revelation. Despite his thorny style, which is not improved by a stream-of-consciousness veneer, Unger's work is magnificent. He is attempting to return the legal profession to its preliberal metaphysical underpinnings.[55] The last words in Unger's *Law in Modern Society* could have been written by Johnson: "[T]he deepest insight is likely to be gained when one is in passage from a more general to a more particular perception, or from the particular to the general."[56] Johnson would have emphasized that the *process* of deciding cases involves three key elements: (1) the clarification of values; (2) the understanding of the facts; and (3) the use of reason to apply values, principles, and truth to the facts. Johnson received his values and truths from his religion, from well-understood and clearly articulated theological tenets. By accepting these tenets, Johnson was able to spend most of his time with particulars, issues of the day, problems of neighbors, facts. Today, Christian lawyers must look to the neo-Kantian scholars and to thinkers of Unger's type to incorporate Christian principles into a jurisprudential system because modern law does not posit its values on the *Bible.* Since the ultimate values of Christians, now and in Johnson's time, are based on scripture and revelation, a modern Christian finds it difficult to work in systems that exclude metaphysics and transcendentalism. Although it would be foolish to speculate whether Johnson would completely approve of Unger, Johnson certainly would expect jurisprudence to account for love and would probably approve of Unger's conclusion: "Love differs from respect because it prizes the loved one's humanity in the unique form of his individual personality."[57] In reviewing Unger's *Knowledge and Politics,*[58] Professor Karsten Harries summarizes:

> Central to Unger's position is the assumption that there is "a unitary human nature"; this nature should not be thought of as a timeless essence; rather it "changes and develops in history." It is this nature which constitutes the final

54. Munzer, Book Review, 31 RUT. L. REV. 153 (1978). *See also* Munzer & Nickel, *Does the Constitution Mean What It's Always Meant?*, 77 COLUM. L. REV. 1029 (1977).

55. R. UNGER, LAW IN MODERN SOCIETY (1976).

56. *Id.* at 267-68.

57. *Id.* at 207.

58. R. UNGER, KNOWLEDGE AND POLITICS (1975).

> basis of moral judgment in the absence of objective values and in the silence of revelation.[59]

With Harries' aid one can begin to penetrate Unger's thicket of obtuse sentence structure to catch some of the spirit of Johnson and other metaphysical polemicists. It is of interest that Unger in his first chapter cites Professor Bate, who had earlier written on the learning process and the effect that great men have on succeeding generations.[60]

Regarding the new moralists as a group, Johnson would be able to comprehend readily their statements, digest all their thoughts, place his conclusions in computer form, and spike some of their darker passages with his aphorisms. Moreover, he would join them in testing the application of their systems to current issues such as sexual freedom, capital punishment, and reverse discrimination. With his encyclopedic mind, he would amass and marshall facts with the pertinacity of Chief Justice Charles Evans Hughes. He would not believe in these systems any more than he believed in the value of his own books, including his monumental dictionary and his impeccable edition of Shakespeare. But he would value them as the expansion of man's reason to make short gains. In their dislike and mistrust of all systems, an intriguing similarity exists between Johnson and Nietzsche. Nietzsche would believe that Rawls, Richards, Dworkin, and Unger each had devised systems simply to justify their feelings and sentiments. Along this line, Nietzsche wrote: "That which philosophers called 'giving a basis to morality,' and endeavoured to realise, has, . . . proved merely a learned form of good *faith* in prevailing morality, a new means of its *expression* . . . ."[61] As to the supremacy of sentiment, Johnson's rival Hume claimed, well before Nietzsche, that reason is the slave of passion.[62]

The system developed by Professors Harold D. Lasswell and Myres S. McDougal helps to overcome predilections, or at least to face up to them, and to move the study of policy in the direction of a science. It is the most useful contribution to jurisprudence of recent times. They describe this system as law, science, and policy. It is a creative and challenging analysis for lawyers who seek to reach results that are harmonious with democracy and human dignity. Operational indices bring this system to the aid of vast ma-

59. Harries, Book Review, 85 YALE L.J. 847, 853 (1976).

60. R. UNGER, *supra* note 55, at 1 n.1 (citing W. BATE, THE BURDEN OF THE PAST AND THE ENGLISH POET 3-11 (1972)).

61. F. NIETZSCHE, BEYOND GOOD AND EVIL 104 (H. Zimmern trans. 1967).

62. For an introductory essay on the problems of feeling and its connection with reason, see Passmore, *David Hume*, in 14 ENCYCLOPEDIA AMERICANA 491 (1968). *See also* Gardiner, *Hume's Theory of the Passions*, in DAVID HUME 31 (D. Pears ed. 1963).

terials in the positive law, such as property, crimes, and problems of world order. One of the system's chief features is that it requires the participants, as well as the observers, to clarify their values and to identify their sentiments, their feelings, and the "imaginations" that troubled Johnson. A short excerpt from an early statement gives a sample of the richness of the thinking of Lasswell and McDougal:

> A first indispensable step toward the effective reform of legal education is to clarify ultimate aim. We submit this basic proposition: if legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be conscious, efficient, and systematic *training for policy-making.* The proper function of our law schools is, in short, to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity.[63]

Among its values this system has rectitude. This is a rather awkward word, but it permits those among the legal community who hold religious and metaphysical beliefs, as did Johnson, to work within this system. Its genius has captivated not only American and English lawyers but also lawyers throughout the world.

Johnson died without a satisfactory philosophy, but with a sound faith. Even here, there is a touch of the pathos evident in the Reynolds portrait, for Johnson in his religion did not enjoy the full sense of salvation that came to the French Christian moralist, Francois Mauriac, who, in his last days, stated that any glory he received through winning the Nobel Prize was nothing compared to the glory that awaited him in heaven. Instead, towards his end, Johnson wrote a first-class short elegy on the death of an obscure pharmacist who served the poor. As Johnson lay dying, afraid of the last judgment, he called to the surgeons to bleed him, and cried: "Deeper, deeper,—*I want length of life,* and you are afraid of giving me pain, which I do not value."[64] If Johnson were alive today, he surely would find comfort and companionship from the writings of Jung and Barth, who had the stronger mental power that Johnson sensed in Hume. Johnson also would enjoy the neo-natural law thinkers who also are still struggling with Hume and would have brought their thoughts to the large, important audience of the legal profession. In his day, Johnson wrote the jurisprudential lectures that Sir Robert Chambers delivered as the Vinerian lectures at Oxford.[65] With what

63. Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 YALE L.J. 203, 206 (1943).

64. W. BATE, *supra* note 26, at 60.

65. When the professorship of law at Oxford was founded in 1758 by the bequest of Charles Viner, the first appointment to the endowed chair was William Blackstone. The first

zest Johnson would take on the legal profession today!

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volume of his *Commentaries on the Laws of England* was an expansion of his Vinerian lectures. When Blackstone resigned the professorship in 1766, he was succeeded by Robert Chambers, a timid 28 year-old scholar who had been Blackstone's understudy. As Bate describes the young man's dilemma:

> Over the summer [of 1766] Chambers began to panic. Try as he would, he could not get started [writing the lectures] . . . . He was paralyzed at the thought of the comparison people would make between his lectures and those of Blackstone. Moreover, since Blackstone had already covered the whole field so authoritatively, how could he avoid simply repeating Blackstone unless he fell back on one of the two alternatives, neither of them commendable, to which human nature resorts under such circumstances? That is, to give up comprehensiveness, and retreat to a specialized corner and develop that; or else to try to turn some of Blackstone upside down for the sake of novelty and carry on a running quibble with him.

W. BATE, *supra* note 2, at 419. At Chambers' desperate request, Johnson took a coach to Oxford in the fall of 1766 and stayed for a month, studying Chambers' books and notes and helping him overcome his "writer's block." Over the next three years, Johnson frequently visited Chambers in Oxford and borrowed the latter's books when working on the lectures at his London residence. *Id.* at 420. The extent of Johnson's contribution to the lectures is not known, as the two men kept their collaboration a closely guarded secret.

> [Chambers] was haunted with . . . fear—the profound humiliation if it were known that the Vinerian Professor at Oxford, the successor of Blackstone, had been forced to rely on a man who was not only without legal training but also one who had attended college for scarcely more than a year . . . . Johnson, completely understanding the situation, . . . conscientiously destroyed Chamber's letters to him . . . .

Id. at 420. Not even Boswell knew about Johnson's Vinerian project. *Id.* at 418. When Chambers stepped down from his chair in 1774, however, the manuscript of his Vinerian lectures totaled some 1600 pages, at least some of which bore the stamp of Johnson's "logical cleanliness and forcefulness of phrase." *Id.* at 420, 426.

The reason for Johnson's unremunerated support of the young professor is a matter of considerable speculation, but Bate explains that "[a]s so often when he met young men entering the law . . . [Johnson's] own frustrations at not entering the law led him to identify with them, and to take a generous, vicarious pleasure in their careers." *Id.* at 418. For an exhaustive treatment of Johnson's contribution to the law, authored by the man who discovered the Johnson-Chambers collaboration, see E. MCADAM, DR. JOHNSON AND THE ENGLISH LAW (1951) (cited in W. BATE, *supra* note 2, at 418 n.15).