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THE MORAL ELEMENT IN SUPREME COURT DECISIONS*

SAMUEL ENOCH STUMPF†

Does the United States Supreme Court decide cases on the basis of moral and ethical value judgments? Such a question may reveal a misunderstanding of the nature of law as well as the nature of the judicial process. Moreover, to expect the Court to roam in the field of morals may indicate a failure to take into account the limitations placed upon the Court both by our federal system and by the division of powers. Indeed, a reading of the Supreme Court decisions for the past twenty years reveals a manful resistance on the part of the judges to intrude their moral and ethical judgments into their decisions; and their resistance is grounded on the double barrier of states' rights and congressional prerogative.

Yet, there is a persistent belief that law finds its deepest validation in its conformity with moral and ethical values and principles. As the highest organ of law in our society, the Supreme Court cannot avoid confronting from time to time this moral dimension of law. Wherever the destinies of men are involved a decent respect for their reason and conscience demands rationally articulated decisions in controversies. That the Supreme Court occupies such a strategic role in our society is beyond question. Over a century ago Chief Justice Marshall said that "The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all."[1] Aware of this unique status, the Court has frequently broken the restrictive bounds of technicality, feeling, as Justice Frankfurter once wrote, that "there comes a time when even the process of empiric adjudication calls for a more rational disposition than that the immediate case is not different from preceding cases."[2] Whenever this happens, the moral and ethical convictions of the judges, or of society as understood by the judges, begin to move into the reasoning of the Court.

What do we mean by the *moral element* in judicial opinions? The moral element of a decision is that portion of the argument or line of reasoning which rests primarily upon such moral and ethical conceptions as "right" and "wrong," "good" or "bad," "desirable" or "undesirable," or "preferable" or "not preferable." The moral element in an opinion has the effect of contrasting an action, a given conduct

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1. Chief Justice John Marshall, in the course of the debates of the Virginia State Convention of 1829-30, cited by Justice Sutherland in O'Donoghue v. United States, 289 U.S. 516, 532, 53 Sup. Ct. 740, 77 L. Ed. 1356 (1933).
2. New York v. United States, 326 U.S. 572, 575, 66 Sup. Ct. 310, 90 L. Ed. 326 (1944).

or a particular law as it "is" with what it "ought to be" in terms of moral as compared with legal standards. Whether the moral element is a legitimate or necessary element in judicial opinions is the subject of considerable controversy in many quarters including the Court itself. For example, in a dissenting opinion, Justice Frankfurter took issue with the majority decision in the *Mercoid* case on the non-technical grounds that "litigants and lower courts ought not to be embarrassed by gratuitous innuendoes against a principle of the law which, within its proper bounds, is accredited by legal history as well as ethics."[3] This dissent moved Justice Black to write a separate opinion, specifically to protest Frankfurter's reference to ethics, in which he said: "It seems to me that the judicial error[in this case] of discussing abstract questions is slight compared to the error of interpreting legislative enactments on the basis of the court's preconceived views on 'morals' and 'ethics.' "[4]

This disagreement over the propriety of judicial reference to morals and ethics is symptomatic of the ambivalent character of the Court's work, for the Court is conscious of its restricted sphere in our system of government and yet it cannot avoid periodic lapses into the realm of value judgments. In order to understand the status of the moral element in judicial decisions, three aspects of the problem need to be considered; namely, (1) the general question of the relation between law and morals, (2) the objectivity of the judge and (3) the decisions of the Court.

I. LAW AND MORALS

Since it is the *law* that the Supreme Court administers, any ambiguities lurking in men's conception of that law will plague the work of the Court. This is true not only when it is a question of interpreting the meaning of a particular statute, which long ago prompted Justice Brown to remark that "the province of [statutory] construction lies wholly within the domain of ambiguity. . . ."[5] or when the vague phrases of the Constitution are involved. It is more clearly true when, in light of our present concern, there is a suspension of agreement about the relation between law and morals. The Court could hardly be expected to fill its decisions with vignettes on ethical and moral responsibility if the dominant theory held that law and morals represent two mutually exclusive modes of social control. On the other hand, it would be unrealistic to expect the Court to refrain from considering the moral and ethical implications of controversies if it were held generally that the nature of law is such that to be valid

3. Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661, 678, 64 Sup. Ct. 268, 88 L. Ed. 376 (1944).
4. 320 U.S at 672.
5. Hamilton v. Rathbone, 175 U.S. 414, 421, 20 Sup. Ct. 1, 44 L. Ed. 49 (1899).

law needs more than proper enactment, that it must be in harmony with the ethical and moral insights of men. The uncertainty on the part of the Supreme Court in the area of value judgments is traceable to this fundamental disagreement about the nature of law.

The Interdependence of Law and Morals

The present problem needs to be viewed against the fact that in all periods law has been shaped to fit the contours of moral conviction. Dean Pound has said that "the attempt to make law and morals identical by covering the whole field of morals with legal precepts, and by conforming existing precepts to the requirements of a reasoned system of morals, made the modern law."[6] In a similar generalization, Justice Cardozo held that "The scope of legal duty has expanded in obedience to the urge of morals."[7] The law has never been able fully to dissociate itself from the notion that there is a difference between an arbitrary command and a law. For Plato every law had to have two parts, the substantive part and the preamble, where the preamble was to provide the rational and moral justification of the substance.[8] And it was this moral defensibility of the law which differentiated it from an arbitrary command.[9] Added to this classical view of law was the theological formulation of natural law which had its fullest expression in the middle ages. What concerns us here is not only the fact that the creation of law by the legitimate lawmaker had to follow the dictates of a higher law; more significant is the fact that the *judges* were to treat any law which was contrary to the higher law of nature as null and void.[10] Whereas in the middle ages judges were thus under formal obligation to pass on laws in terms of natural moral law, in our day judges have responded, as Justice Cardozo has said, merely to a "moral urge," but the phenomenon amounts to the same thing. A point of view which Kant stated further imbedded into legal thought this conception of the judge's dependence upon moral norms in adjudication. For although he distinguished sharply between a moral and legal duty[11] and firmly denied to the *people* the right to rebel against

6. POUND, LAW AND MORALS 31 (2d ed. 1926).
7. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 46 (1928).
8. *Cf.* PLATO'S LAWS 722D-723B (Jowett ed. 1892) and CALHOUN, INTRODUCTION TO GREEK LEGAL SCIENCE 82-83 (1944).
9. *Cf.* Kessler, *Natural Law, Justice and Democracy — Some Reflections on Three Types of Thinking about Law and Justice,* 19 TULANE L. REV. 32, 35 (1944).
10. *Cf.* GIERKE, POLITICAL THEORY OF THE MIDDLE AGES 84 (1938): "The properly Medieval and never completely obsolete theory declared that every act of the Sovereign which broke the bounds drawn by Natural Law was formally null and void. As null and void therefore every judge and every other magistrate who had to apply the law was to treat, not only every unlawful executive act, but every unlawful statute, even though it were published by Pope or Emperor."
11. KANT, LECTURES ON ETHICS 33, 34-36, 48, 69-70, 71 *et seq.* (Infield's transl. 1930).

unjust laws,[12] he did hold that: "The Science of Right . . . designates the philosophical and systematic knowledge of the principles of Natural Right. And it is from this science that the immutable principles of positive legislation must be derived by practical jurists and law-givers."[13] Whether such a systematic body of natural rights with a moral and ethical foundation is available today for the judge is questionable; but that the judge does from time to time adjudicate cases on the basis of some moral and ethical values seems to be beyond question.

Again, Justice Cardozo revealed the moral element in the judicial process when he wrote: "The judge stretches a point here in response to a moral urge, or makes a new application of a precedent there. Before long a new tradition has arisen. Duties that had been conceived of as moral only, without other human sanction than the opinion of society, are found to be such that they may effectively and wisely be subjected to another form of sanction, the power of society. The moral norm and the jurial have been brought together, and are one."[14] What Cardozo has here expressed, very likely after a close analysis of the working of his own mind on the bench, has been underscored by other students of the judicial process. The continential jurist Ehrlich has argued that no scientifically trained jurist could doubt that a great part of the law is even now not created by the state. Indeed, "There never was a time when the law promulgated by the state in statutory form was the only law, even for the courts . . . ."[15] The ambiguities of statute law leave considerable room for the independent reasoning of the judge. His reasoning frequently proceeds under the influence of the concept of justice, and "On the basis of this concept, the judge finds the norms for his decision . . . ."[16] Even where the law already embodies a particular concept of justice, the judge, moved by a deeper conception of justice, strives to bring the prevailing conception of justice into closer accord with the demands of moral and ethical values. Justice Cardozo could not have made this more ex-

12. KANT, PHILOSOPHY OF LAW 176-77 (Hastie's transl. 1887).
13. *Id.* at 43-44.
14. CARDOZO, PARADOXES OF LEGAL SCIENCE 43 (1928). An elaboration of this same point is made by Wm. E. Hocking: "It may clear up some of the difficulty if we remark that the bearing of ethical right on legal right is due not more to the specific nature of law than to human nature and the nature of ethics. It is due to the fact that the *same behaviour* which is the subject matter of law comes under or may come under the cognizance of ethics; and that the man who is behaving cannot divide himself into two personalities, a legal and a moral personality, for the purpose of an identical action. If he has to raise a moral question in regard to the act, the law is not the abstract action, but the man behaving; hence everything that enters necessarily into the man's consideration of a given deed enters by consequence into the law's consideration of the same deed." Hocking, *Ways of Thinking about Rights: A New Theory of the Relation between Law and Morals* in 2 LAW: A CENTURY OF PROGRESS, *1835-1935* 256 (1937).
15. EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 15 (Moll's transl. 1936).
16. *Id.* at 214.

plicit than when he wrote: "What we are seeking is not merely the justice that one receives when his rights and duties are determined by the law as it is; what we are seeking is the justice to which law in its making should conform."[17] Thus it is clear that at all times judges have considered the realm of moral ideas an intrinsic part of law.

The Tendency Toward Separation of Law and Morals

However formidable may have been these ideas of Cardozo, Kant, the natural law advocates and those who like Plato would rest the concept of justice on the contrast between what law *is* and what it *ought to be,* they are by no means the controlling ideas in contemporary juristic thought. There has been a gradual development of the notion that the law has no real concern for moral and ethical values. John Chipman Gray considered this development away from a moral concern the great gain in jurisprudence during the last century, for he argued that law "is not that which is in accordance with religion, or nature or morality; it is not that which ought to be, but that which is."[18]

One of the major reasons the judges of our Supreme Court do not indulge more frequently in overt value judgments is the restrictive effect of the separation of powers. Even in England as early as the eighteenth century the same effect was produced on judges by the growing doctrine of the separation of powers. For the division of the legislative powers from the judiciary led to the conception of judges as passive agents limited merely to "finding" the law. "Even the vigor of Lord Mansfield's injection of moral concepts into the law led to rebellion when his personality was removed from the scene."[19] The medieval echo in Lord Coke's decision in Dr. Bonham's case where an act of Parliament was declared null and void because it was contrary to common right and reason never did become the dominant note in the English judiciary.[20] The division of powers between the legislative and judicial branches had such a decisive effect upon the judges in the land of the common law that in our generation Percy Winfield could say that "there is not the faintest trace in current English case law of any attempt on the part of the judges to make the law conform to any ideal ethical standard. Where there is any scope for the application of morals to the law, what they do apply is the practical morality which is prevalent for the time being in the community. They have no general formula, whether utilitarian or otherwise, as to what

17. CARDOZO, THE GROWTH OF THE LAW 87 (1924).
18. GRAY, THE NATURE AND SOURCES OF THE LAW 94 (2d ed. 1921). *Cf.* Brecht, *The Myth of* Is *and* Ought, 54 HARV. L. REV. 811 (1941).
19. Landis, *Statutes and the Sources of Law,* in HARVARD LEGAL ESSAYS 213, 217 (Pound ed. 1934).
20. *Cf.* Plucknett, *Bonham's Case and Judicial Review,* 40 HARV. L. REV. 30 (1926).

morality *ought* to be. It is enough for them if they can keep abreast of what *is* now."[21]

To a great extent this separation of law and morals in the judicial process is a procedural matter. Theoretically this means that if moral and ethical values are to be injected into the law, the injecting must be done *not* by the judges but by the legislature. Moreover, to keep a watchful eye peeled for procedural irregularities is held by many to be more important than for the court to pronounce on the moral aspects of the case at hand. That is why the Supreme Court can dispose of so many cases which appear to involve grave moral questions without in the slightest degree evidencing any moral concern in their decisions. There is great merit in this procedural exactitude, for in most cases where a scrupulous obedience to procedure has been followed, the outcome has also measured up to moral demands. Indeed, Justice Frankfurter has said that "the history of American freedom is, in no small measure, the history of procedure."[22]

But this well-known limitation upon the Court does not entirely account for its reticence to indulge in moral judgments. There is another powerful pressure operating upon the judicial mind in this regard: it is that judges partake of the general contemporary uncertainty regarding the actual content of moral truth. Holmes' philosophical skepticism is familiar enough, though it is worth repeating that his judicial self-control was not so much a matter of procedural propriety[23] as it was uncertainty. "I enforce," he said, "whatever con-

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21. Winfield, *Ethics in English Case Law*, 45 Harv. L. Rev. 112, 132 (1931). *Cf.* Douglas, J., dissenting in McLeod v. J. E. Dilworth Co., 322 U.S. 327, 335, 64 Sup. Ct. 1023, 88 L. Ed. 1304 (1944): "I would make the result under the Commerce Clause turn on practical considerations and business realities rather than on dialectics." But see Justice Black's dissent in S.E.C. v. Chenery Corp., 318 U.S. 80, 97-98, 63 Sup. Ct. 454, 87 L. Ed. 626 (1943): "Entrusted as the Commission is with the responsibility of lifting the standard of transactions in the market place in order that managers of financial ventures may not impose upon the general investing public, it seems wholly appropriate that the Commission should have recognized the influence of admonitory language like the following it approvingly quoted from Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545: 'A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."

22. Malinski v. New York, 324 U.S. 401, 414, 65 Sup. Ct. 781, 89 L. Ed. 1029 (1945). *Cf.* Paul H. Douglas: "Most young men tend to be impatient with what the lawyers term procedural matters and to be far more interested instead in substantive issues. Only the latter seem to the young to have vitality. But as time passes and a man grows older, it dawns upon him that a great part of our progress has been made through transforming substantive issues of conflict into accepted matters of procedure. For it is in this way the society peacefully disposes of issues which, if not so handled, would tear it apart. May there not be a moral guide for action in this fact?" Douglas, *A Possible Method of Dealing with the Closed Shop Issue*, 14 U. of Chi. L. Rev. 386, 398 (1947).

23. Although Holmes emphasized propriety too: *e.g.*, "I cannot believe that the [14th] Amendment was intended to give us *carte blanche* to embody our economic and moral beliefs in its prohibitions." Baldwin v. Missouri, 281 U.S. 586, 595, 50 Sup. Ct. 436, 74 L. Ed. 1056 (1930) (dissenting opinion).

stitutional laws Congress or anybody sees fit to pass—and do it in good faith to the best of my ability . . . . I am so skeptical as to our knowledge of the goodness or badness of laws that I have no practical criticism except what the crowd wants."[24] Such an attitude, if consistently held, could have but one effect, for as Holmes' great friend Sir Frederick Pollock wrote in reply to this comment: "If you deny that any principles of conduct at all are common to and admitted by all men who try to behave reasonably—well, I don't see how you can have any ethics or any ethical background for law."[25] Nor is it surprising that Holmes conceived of the nature of law as a regime of force,[26] for whenever the moral dimension is eliminated from law what is frequently left is nothing more than coercion.

To be sure, skepticism is not a uniformly undesirable attitude. Important values have been preserved in our society precisely through the reluctance of judges to speak in terms of absolutes. Only recently Justice Learned Hand had occasion to remark in a significant decision that freedom of speech "rests upon a skepticism as to all political orthodoxy, upon a belief that there are no impregnable political absolutes, and that a flux of tentative doctrines is preferable to any authoritative creed."[27] But when this case moved up from the Court of Appeals to the United States Supreme Court, Chief Justice Vinson went considerably farther in expressing the theme of intellectual uncertainty than Justice Hand's remark on "political orthodoxy" and "political absolutes" were meant to encompass. "Nothing is more certain in modern society," said the Chief Justice, "than the principle that there are no absolutes . . . . [T]hat all concepts are relative."[28]

Inevitably this means that whereas the Court has the final word in adjudicating cases, it should not have the last word "in those basic conflicts of 'right and wrong—between whose endless jar justice resides.' "[29] Even Justice Cardozo who, as we have indicated above, argued that the judge responds to a "moral urge" in rendering a decision, was aware of the fact that however consciously the judge wanted to implement morals in his juristic reasoning, he faced a bewildering complex of conflicting moral standards, not only as between different communities but within the same community. There is still uncertainty, for a choice still must be made between one group stand-

24. 1 HOLMES-POLLOCK LETTERS 163 (Howe ed. 1941). For further light on Holmes' philosophy see the recent debate between Professor Howe and Hart on the *Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 & 929, 937 (1951).
25. 1 HOLMES-POLLOCK LETTERS 275 (Howe ed. 1941).
26. 2 *id.* at 36. *Cf.* HEGEL, PHILOSOPHY OF RIGHT 16 (Knox' transl. 1945): "That force and tyranny may be an element in law is accidental to law and has nothing to do with its nature."
27. United States v. Dennis, 183 F.2d 201, 207 (2d Cir. 1950).
28. Dennis v. United States, 341 U.S. 494, 508, 71 Sup. Ct. 857, 95 L. Ed. 1137 (1951).
29. Hand, *The Contribution of an Independent Judiciary to Civilization*, in THE SUPREME JUDICIAL COURT OF MASSACHUSETTS *1692-1942* 59, 66 (Mass. Bar Ass'n, 1942).

ard and another before the moral norm can be converted into the jural one.[30] It is no wonder that, faced with such a dilemma, the judges prefer to take a narrow view of their work and limit their concern as strictly as possible to procedural standards and statutory law.

The philosophers have done their share in bringing about this result in the judicial process. To the extent that judges depend upon a general knowledge of nature and its laws to inform them about the nature of law as applied to human conduct, the denial of any absolute laws in nature cannot avoid producing an unsettling effect upon the judges' conception of the nature of the laws with which they are concerned. Chief Justice Vinson's dictum that "all concepts are relative" is qualitatively no more horrendous than Alfred North Whitehead's statement that "since all laws of nature depend on the individual character of the things constituting nature, as the things change, then correspondingly the laws will change. . . . Thus the conception of the universe as evolving subject to fixed eternal laws regulating all behavior should be abandoned."[31] John Dewey has stated in forceful terms that the very health of the law depends upon ridding legal reasoning of all universal principles: "The sanctification of ready-made antecedent universal principles as methods of thinking is the chief obstacle to the kind of thinking which is the indispensible prerequisite of steady, secure and intelligent social reforms in general and social advance by means of law in particular. If this be so infiltration into law of a more experimental and flexible logic is a social as well as an intellectual need."[32] The effect of such philosophical notions has been to concentrate the attention of the judges upon the particular statute and to deflect it from principles or morals and ethics. The concept of right and wrong gives way to the notion of lawful or unlawful. And in extreme cases, though with increasing frequency, the right and lawful are identified as the same, the "right" being made so by the law rather than the law being considered "just" because of its conformity with "right." This is the residual influence of Hobbes who argued that "laws are the rules of just, and unjust; nothing being reputed unjust, that is not contrary to some law."[33]

One of the severest blows levelled at those who would argue that there are antecedent moral principles and natural rights to which the law must conform came from the powerful pen of the English legal reformer Jeremy Bentham:

> "All this talk about nature, natural rights, natural justice and injustice proves two things only, the heat of passion, and the darkness of understanding. . . .

30. CARDOZO, PARADOXES OF LEGAL SCIENCE 37 (1928).
31. WHITEHEAD, ADVENTURES OF IDEAS 143 (1933).
32. Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 27 (1924).
33. HOBBES, LEVIATHAN c. XXVI.

> "Property the creature of law?—Oh, no—Why not?—because if it were the law that gave everything, the law might take away every thing: if every thing were given by law, so might every thing be taken away.
> "The case is that in a society in any degree civilized, all the rights a man can have, all the expectation he can entertain of enjoying any thing that is said to be his is derived solely from the law. . . . Till law existed, property could scarcely be said to exist. Property and law were born and die together."[34]

And, long before Holmes said that the common law is not a brooding omnipresence in the sky but the articulate voice of a sovereign that could be identified, Bentham said that "customary law is a fiction . . . . Try to produce any such rule: if it appears in any shape it must clothe itself in the similitude of some particular provision of the nature of statute law . . . ."[35] It is not too much to say that the philosophical uncertainty about the content of moral truth has led to this preoccupation with statutes both in the theoretical and in the practical spheres of legal endeavour.

One of the most extensive contemporary treatments of the nature of law identifies law with the sum of the positive statutes of the state and in the opening section states that "the concept of law has no moral connotation whatsoever."[36] Kelsen means by this statement just what Hobbes meant, namely, that the validity of laws rests not on their conformity to moral principles but upon proper enactment. And again, to limit the area of legitimate law to properly legislated statutes rests on the assumption that laws cannot depend for their validity upon moral correctness since there are no pre-existing moral norms: "There are no *mala in se*, there are only *mala prohibita*, for a behaviour is a *malum* only if it is *prohibitum*."[37] Thus, the division of powers and philosophical uncertainty have led to an attempted separation of law and morals and to a greater preoccupation with statute law.

Impossibility of Separating Law and Morals

With this attempted separation of law and morals the strict adherence to precedents becomes a way of achieving certainty, stability and continuity, and consequently the process of stare decisis takes on greater importance. For, if the Court does not attempt to achieve justice by satisfying the demands of morals and ethics, it is felt that the Court can achieve a kind of justice by at least treating all people in similar circumstances alike. This is the importance of Brandeis' famous comment that "in most matters it is more important that the applicable rule of law be settled than that it be settled

34. BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED 84 (Everett ed. 1945).
35. *Id.* at 282.
36. KELSEN, GENERAL THEORY OF LAW AND STATE 5 (Wedberg's transl. 1945).
37. *Id.* at 52.

right,"[38] though it is instructive that Brandeis specifically exempted constitutional questions from this rule. Frankfurter has also said that for judges it is important to bear in mind that "continuity with the past is not only a necessity but even a duty."[39]

But over fifty years ago Mr. Justice Field stated in an opinion that "it is more important that the court should be right upon later and more elaborate consideration of the cases than to be consistent with previous declarations."[40] Justice Cardozo warned against the danger of depriving the judicial process of its "suppleness of adaptation to varying conditions."[41] And recently Justice Douglas elaborated extensively on this same theme, providing an impressive chart showing the Court's frequent overruling of major precedents and arguing that in constitutional law "*stare decisis* must give way before the dynamic component of history."[42] This conflict of opinion concerning stare decisis indicates the impossibility of resting the judicial process solely upon a systematic use of precedents. The compelling urge to achieve the morally right, instead of simply the technically correct, solution in controversies has led the judges to find ways of implementing moral convictions into their decisions.

Consequently, it cannot be said that the law moves in well-fixed grooves where precise statutes shore up the flow of judicial reasoning, preventing it from spilling over into the broad expanse of value judgments. In spite of the separation of powers, the restrictions of federalism and the force of moral skepticism, it cannot be said that a decisive breach has been achieved between law and morals, even though overt expressions of moral and ethical judgments in Supreme Court opinions are notoriously elusive, being found frequently only in "the accent and atmosphere of speech through which [the Court] conveys a particular decision."[43]

II. MORALS AND THE JUDGE

It is one thing to say that law contains a moral element; it is quite another thing to say that judges are bound to consider the moral element of law in the reasoning process which leads to their decisions. The recurring theme in the opinions of the Supreme Court is that the law admittedly embodies moral conceptions but that the validity of a law cannot depend upon the *judges'* appraisal of that moral

38. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406, 52 Sup. Ct. 443, 76 L. Ed. 815 (1932) (dissenting opinion).
39. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527, 535 (1947).
40. Barden v. Northern Pacific R.R., 154 U.S. 288, 322, 14 Sup. Ct. 1030, 38 L. Ed. 992 (1894).
41. Landis v. North American Co., 299 U.S. 248, 256, 57 Sup. Ct. 163, 81 L. Ed. 153 (1936).
42. Douglas, *Stare Decisis*, 49 COL. L. REV. 735, 737 (1949).
43. Frankfurter and Hart, *The Business of the Supreme Court at the October Term, 1934*, 49 HARV. L. REV. 68 (1935).

element. This amounts to saying that the law which the court handles is freighted with moral and ethical content, but that the manner in which the judges handle this law renders it morally neutral. Essentially this involves a contrast between the creation of law, which is the province of the legislature, and the judicial process, which operates under the aegis of the Constitution and the proliferation of its intent. The untenability of this distinction between the creation and interpretation of the law has been frequently urged, and much has been made of Bishop Hoadley's remark that "Whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is he who is truly the lawgiver to all intents and purposes, and not the person who first wrote or spoke them."[44] And the objectivity of the judges has often been seriously questioned, though rarely with the cynicism of William Graham Sumner who said about the Taney Court that "The effect of political appointments to the bench is easily traceable, after two or three years, in the reports, which come to read like a collection of old stump speeches."[45] Whatever may be the *de facto* lapses in judicial objectivity the judges theoretically consider their role as being objectively determined by the law of the land and not by moral and ethical principles.

The objectivity of the court is heightened by the fact that today most controversies have gradually come under some specific statute. Until these controversies were brought under the rule of statutes, they were left to a great extent to what Frankfurter has called "judicial lawmaking." But once a state had passed a statute bearing on a particular problem, it ceased to be the court's business to engage any further in such "lawmaking" nor was it "for us to assess the wisdom of the policy underlying the law of [a state or Congress]. Our duty is at an end when we find that the Fourteenth Amendment does not deny her the power to enact [a] policy into law."[46] In the early days of the Court, practically all questions were open ones, giving wide range to the creative and imaginative powers of the judges.[47] Even as late as 1875 over 40 percent of the controversies coming before the Supreme Court were common law litigation. By 1925, such litigation was reduced to five percent and by 1947 it had almost reached the vanishing point. This means that practically every case that comes before the Court has a statute at its core,[48] and this in turn reduces the scope for judicial application of moral and ethical principles.

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44. GRAY, NATURE AND SOURCES OF THE LAW 102, 125, 172 (2d ed. 1921).
45. Frankfurter, *Taney and the Commerce Clause*, 49 HARV. L. REV. 1286, 1287 (1936).
46. Carpenters & Joiners Union of America, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 728, 62 Sup. Ct. 807, 86 L. Ed. 1143 (1942).
47. *Cf.* Attorney General Jackson's speech to the Supreme Court on the occasion of the Court's 150th Anniversary. 309 U.S. v-vii (1939).
48. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527 (1947).

The Concern for Judicial Objectivity

The judges of the Supreme Court have never tired of reiterating the fact that their function is not to consider the goodness or the badness of laws or of conduct, nor the wisdom nor unwisdom of statutes. Constitutional and statutory interpretation has developed a frame of mind among them which by and large has weaned them away from the broader philosophical implications of their work. Justice Brandeis once said: "I have no general philosophy. All my life I have thought only in connection with the facts that came before me .... We need, not so much reason, as to see and understand facts and conditions."[49] That is why for him the function of the court was not to be "an exercise of the powers of a super-legislature . . . ."[50] Even when conditions in industry reached the point where those who were involved in the clash of interests could continue to engage in their struggle only by endangering the community, Brandeis held that it was not the function of the court to say that things had gone too far and then to set out the legitimate bounds for industrial warfare; such a task he felt was reserved for the legislatures.[51] If Brandeis added any liberal views to the law through his opinions, he achieved this without compromising his objectivity as a judge. This was true also of Cardozo, though in his case judicial objectivity was the more remarkable in light of his explicit and broad philosophical concerns. For Cardozo, the standard of judgment was not subjective except in a very limited area. The judge "may not," he said, "substitute his own reading [of the social mind] for one established by the legislature, acting within constitutional limitations, through the pronouncements of a statute."[52] Only when there were no such pronouncements and when objective tests failed could the judge "look within himself."[53]

Justice Frankfurter's opinions abound in reminders that the role of the judge is severely circumscribed, particularly when the judge would inject his own value judgments overtly into his decision. "It can never be emphasized too much," he wrote, "that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench."[54] Even if it could be demonstrated convincingly that a law is socially undesirable it is still not the business of the Court to say so. Judicial objectivity for Frank-

49. 317 U.S. ix, xxxix (1942).
50. Dissenting in Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 534, 44 Sup. Ct. 412, 68 L. Ed. 813 (1924).
51. Dissenting in Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488, 41 Sup. Ct. 172, 65 L. Ed. 349 (1921). "This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."
52. CARDOZO, GROWTH OF THE LAW 94 (1924).
53. CARDOZO, PARADOXES OF LEGAL SCIENCE 56 (1928).
54. West Virginia Board of Education v. Barnette, 319 U.S. 624, 647, 63 Sup. Ct. 1178, 87 L. Ed. 1628 (1943) (dissenting opinion).

furter is a primary requisite if there is to be a democratic order and if the Court is to escape the charge of being oligarchic. And "The Court is not saved from being oligarchic because it professes to act in the service of humane ends."[55] Nor must the failure of Congress to speak on a matter be construed by the Court as having any concrete meaning, for "The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions."[56] To stay thus within the bounds of proper judicial power calls for "the severest intellectual detachment and the most alert self-restraint," qualities which Frankfurter considers the unique marks of the greatest judges of the Court.[57] In another explicit disavowal of judicial competence in making value judgments, Frankfurter held: "Matters of policy . . . are by definition matters which demand the resolution of conflicts of value, and the elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of feeling; it is also an exercise in prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people. Its functions can be assumed by this Court only in disregard of the historic limits of the Constitution."[58]

Is Complete Judicial Objectivity Possible?

But the judicial process contains a recalcitrant element which prevents it from achieving the rarefied objectivity which Frankfurter has here sought to portray. And strangely enough no one seems to be more aware of this condition than Frankfurter himself. The Achilles heel in the objectivity of the judicial process reveals itself at many points. Whereas Brandeis liked to think that the great need was the marshalling of facts, Frankfurter makes the telling point that "facts do not assess themselves and that the decisive element is the attitude appropriate for judgment of the facts . . . ."[59] In a dissenting opinion he pointed out that facts do not automatically produce a satisfactory result; on the contrary, he felt that in this case "the Court's opinion seems to me to snarl a straight thread of facts into a confusing skein of legal principles."[60] Moreover, objectivity is somewhat modified when in light of the purpose of judicial review, it is

55. A.F. of L. v. American Sash & Door Co., 335 U.S. 538, 555, 69 Sup. Ct. 258, 93 L. Ed. 222 (1949) (concurring opinion).
56. Scripps-Howard Radio, Inc. v. F.C.C., 316 U.S. 4, 11, 62 Sup. Ct. 875, 86 L. Ed. 1229 (1942).
57. United States v. Lovett, 328 U.S. 303, 319, 66 Sup. Ct. 1073, 90 L. Ed. 1252 (1946) (concurring opinion).
58. A.F. of L. v. American Sash & Door Co., 335 U.S. 538, 557, 69 Sup. Ct. 258, 93 L. Ed. 222 (1949).
59. Baumgartner v. United States, 322 U.S. 665, 666-67, 64 Sup. Ct. 1240, 88 L. Ed. 1525 (1944).
60. Maggio v. Zeitz, 333 U.S. 56, 81, 68 Sup. Ct. 401, 92 L. Ed. 476 (1948).

necessary to ascertain whether lower courts have offended or observed the standards of justice, for the problem here is that "These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia."[61] That the subjective element is present is further revealed by Frankfurter's disagreement with Holmes' famous phrase that "general propositions do not decide concrete cases;"[62] to this Frankfurter has replied that "Whether they do or do not often depends on the strength of the conviction with which such 'general propositions' are held."[63] And after scrutinizing the hundreds of cases in which Holmes, Cardozo and Brandeis construed statutes, Frankfurter concluded that "the area of free judicial movement is considerable."[64] There is a last infirmity in the judicial process, for judges are human, the rational process is treacherous, "the ramparts of reason are fragile" and judgment can be influenced and confused by arousing passion.[65]

Strict objectivity is therefore an impossibility on the bench both because of the human limitations of judges as well as the ambiguity of the law itself. In spite of all the canons erected to insure the objective operation of the judicial process, subjective elements intrude, sometimes overtly but more frequently covertly, sometimes in the form of personal predilections and at other times through interpretations of natural law and justice. Moreover, disagreements develop between various members of the Court, and the Court at one time will rule in favor of one set of interests and at another time shift to a different set of interests. The fact that the Court will at one time exalt the right of property over personal rights and at a later date give civil liberties a preferred position as against property rights is indicative of many things about the law, not the least of which is the fact that law is dynamic and adjustable to changing circumstances and also that the judges are provided with no absolutely binding and objective set of ideas that will in all cases and at all times insure a uniform result. After all, the Court can and has reacted against its previous point of view. Indeed, the crisis of the Roosevelt Court which issued in a new line of decisions represented so marked a change in point of view that Justice Jackson took occasion to warn his brethren: "If the reaction of this Court against what many of us have regarded as an excessive judicial interference with legislative

61. Malinski v. New York, 324 U.S. 401, 417, 65 Sup. Ct. 781, 89 L. Ed. 1029 (1945).

62. Lochner v. New York, 198 U.S. 45, 76 25 Sup. Ct. 539, 49 L. Ed. 937 (1905).

63. Harris v. United States, 331 U.S. 145, 157, 67 Sup. Ct. 1098, 91 L. Ed. 1399 (1947).

64. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527, 533 (1947).

65. Frankfurter, J., in Pennekamp v. Florida, 328 U.S. 331, 350, 66 Sup. Ct. 1020, 90 L. Ed. 1295 (1946) (concurring opinion).

action is to yield wholesome results, we must be cautious lest we merely rush to other extremes."[66]

What we are concerned with here is the simple fact that the Court consciously changes its mind on important matters and consciously seeks to implement its judgments of value into the judicial process. Even if the values which the judge injects into the law are not his own in the sense that his reason demands that they become recognized by the law; even, that is, if the judge merely feels that society is seeking a change in the values which law will protect, it is nevertheless he who must decide to adjust his judgment to the new values in one way or another and in that sense his subjective action and reaction become a part of the law. Looking back over his juristic career Cardozo admitted that phenomenon when he said that "it has been an interesting time to live in, an interesting time in which to do my little share in translating into law the social and economic forces that throb and clamor for expressions."[67]

Whether the Supreme Court's shift of emphasis from one set of values to another represented a change in the substantive beliefs among the judges has been a much debated subject. The case can be argued two ways, though one cannot get the same explicit evidence to prove the case both ways. One argument is that as the New Deal developed, the Court did not change its economic philosophy or its moral judgments, it simply took a new attitude toward the right of state legislatures and the Congress to experiment in the social and economic fields. Or as Frankfurter said in a dissenting opinion, "when the tide turned, it was not merely because circumstances had changed and there had arisen a new order with new claims to divine origin. The opinion of Mr. Justice Brandeis in *Senn v. Tile Layers Union,* 301 U.S. 468, shows the current running strongly in the new direction—*the direction not of social dogma but of increased deference to the legislative judgment.*"[68] This amounts to saying that, if anything, the Court became even more objective since it deferred more completely to the will of the legislative branch. The other way of arguing this shift in the decisions is to say that the Court itself became imbued with dominant beliefs which superseded the old ideas. The evidence to support such a point of view is available only in scattered areas in the opinions for it is not necessary for the judge to say he believes in the substance of the new legislation; to sustain such a law, it is enough for him simply to rule that the law does not violate the Constitution. Even where some of the boldest social innovations were involved in cases at hand, the Court reduced these cases to their legal nexus, as in

66. Concurring in Duckworth v. Arkansas, 314 U.S. 390, 401, 62 Sup. Ct. 311, 86 L. Ed. 294 (1941).
67. Hughes, *Mr. Justice Cardozo,* 305 U.S. xiv, xxvii (1938).
68. A.F. of L. v. American Sash & Door Co., 335 U.S. 538, 544, 69 Sup. Ct. 258, 93 L. Ed. 222 (1949) (dissenting opinion). (Italics added).

the first T.V.A. case where the decision turned not upon the acceptibility of the social philosophy underlying the T.V.A. project but rather upon the validity of a contract.[69] Nevertheless, it does not stagger the imagination nor does it stretch the limits of credulity to say that one of the reasons that the Court deferred more readily to the new legislation is that it accepted the new and emerging system of values. We need not stop here to analyze any further the reasons for the shift in the Court's attitude of judgment, for our concern is with the factual question of whether there has been such a change and also to what extent there are evidences in the written opinions which indicate that the decisions turned on any overtly expressed value judgments in the form of moral or ethical principles.

So far we have discussed rather abstractly the question of the nature of law and the problem of the objectivity of the judge. For whether Supreme Court decisions turn on ethical or moral principles is determined to a great extent by whether law and morals are in any way related and whether the judges are free to indulge in value judgments in the normal course of their judging. We have said that the law the judges deal with contains implicit and frequently explicit references to moral and ethical principles, not only as side references but as their very justification. Similarly, we have argued that in spite of the several canons of objectivity, the judges still find ample room for their own value judgments. The question to which we now turn is to what extent these value judgments actually enter the reasoning of the written opinions and in general what values govern various decisions.

III. The Court and Morals: Some Cases

It helps in understanding the Supreme Court's attitude toward morals to remember that the function of the Court is to try *cases*. And no case can ever reach the Court if it involves merely a moral problem, for then by definition it is not a case. If, for example, a person is drowning and someone happens to be sitting on the shore watching the desperate struggle of the victim without lifting a finger to help rescue him, he cannot be held liable, for as Ames once said: "he took away nothing from the person in jeopardy, he simply failed to confer a benefit upon a stranger. . . . The law does not compel active benevolence between man and man. It is left to one's conscience whether he shall be the good Samaritan or not." [70] This is the primary datum in this problem for the heart of a case can never be, for the Court at least, a moral issue. Only insofar as a particular law embodies a moral concept can a case be tried on moral grounds because then

69. Ashwander v. T.V.A., 297 U.S. 288, 56 Sup. Ct. 466, 80 L. Ed. 688 (1936).
70. Ames, *Law and Morals*, 22 Harv. L. Rev. 97, 112 (1908).

in reality it is being tried on legal grounds; and in such a case the moral issue is taken for granted or is made by the Court to be either peripheral or absent altogether.

Yet, as the following cases will show, the question of morals lurks everywhere even though the cases are decided on the basis of pure *law*. Just how the moral element enters into the Court's reasoning and what is achieved by its inclusion varies from case to case. But the fact that discussions on moral themes *are* found in the opinions leads to the presumption that moral value judgments are operative in the reasoning of the Court.

To say that cases are decided on the basis of law and that the reasoning of the Court frequently contains discussions on morals and ethics calls for a clarification of the status of moral judgments in judicial opinions. In order to clarify this problem, reference will be made to cases for the purpose of seeking an answer to the question: How does the moral element enter judicial opinions?

How Does the Moral Element Enter Judicial Opinions?

There are, among others, six ways in which the moral element is referred to in the opinions of the Court. The following cases do not exhaust all the possibilities but they do indicate some characteristic ways in which the subject of morals arises and is treated in cases coming to the Supreme Court.

1. *A given action may lie well within the limits of the law but may be so questionable morally that a judge will consider the case from the moral standpoint.* When the *Bethlehem Steel Corporation* case[71] reached the Supreme Court, the judges were confronted with the fact that the steel company had made huge profits out of producing ships for the government during the first World War and the government was now refusing to pay what it considered abnormal profits. The technical basis on which the case really rested and in terms of which the steel company won the case was the fact that the government had entered into a contract with the company and had to live up to its bargain. In the majority opinion, Justice Black took cognizance of the 22 percent profits but was not particularly impressed, for in light of the much higher profits made by others whom he cited, this 22 percent was relatively puny. Besides, all the argument about these profits seemed to him to be beside the point: there was no concrete way in which the size of the profit could influence the reasoning toward a decision. To the government's argument that unconscionable profits ought not to be tolerated, Black replied: "if the Executive is in need of additional laws by which to protect the nation against war profiteer-

71. United States v. Bethlehem Steel Corp., 315 U.S. 289, 62 Sup. Ct. 581, 86 L. Ed. 855 (1942).

ing, the Constitution has given to Congress, not to this Court, the power to make them."[72] Inevitably, the discussion on the bench centered around the moral dimension of the case. In a concurring opinion, Justice Murphy felt moved to make clear the distinction between law and morals as it applied to this case in the following words: "The question before the Court. . . is not whether an arrangement like the one presented for review accords with our conceptions of business morality or with correct administration of the public business. Having made a bargain, the Government should be held to it unless there are valid and appropriate reasons known to the law for relieving it from its obligations. It is the duty and responsibility of the courts, not to re-write contracts according to their own views of what is practical and fair, but to enforce them in accordance with the evidence and recognized principles of law."[73]

But Justice Frankfurter refused to let the moral factor get such summary treatment. To him it made a serious difference that the steel company had assumed no risks of loss either in connection with the rising costs of labor, materials and transportation nor did Bethlehem have to make any capital expenditures since the government agreed to advance all the funds that were required for the performance of the contracts. So clear was the moral obligation of the company to Frankfurter in this case that not even the objectivity of the judicial process which Black invoked here and which Frankfurter himself had so frequently expounded could prevent him from a vigorous dissent: "However circumscribed the judicial area may be," he wrote, "we had best remain within it. But the function of the judiciary is not so limited that it must sanction the use of the federal courts as instruments of injustice in disregard of moral and equitable principles which have been part of the law for centuries."[74] Obviously there was a moral problem in this case but only Frankfurter's dissenting opinion would decide the issue on the moral element.

2. *There are times when, although there is agreement on the moral element in a case, the judges find themselves unable to translate this moral duty into legal rights.* The plight of the American Indian involves such a problem and was vividly revealed in the case of the *Shoshone Indians.* In a concurring opinion Justice Jackson said:

> "We would not be second to any in recognizing that—judgment or no judgment—a moral obligation of a high order rests upon this country to provide for decent shelter, clothing, education, and industrial advancement of the Indian. Nothing is gained by dwelling upon the unhappy conflicts that have prevailed between the Shoshones and the whites—conflicts which sometimes leaves one in doubt which side could make the better claim to be civilized.

72. 315 U.S. at 309.
73. *Id.* at 310 (concurring opinion).
74. *Id.* at 312 (dissenting opinion).

The generation of Indians who suffered the privations, indignities, and brutalities of the westward march of the whites have gone to the Happy Hunting Ground, and nothing that we can do can square the account with them. Whatever survives is a moral obligation resting on the descendants of the whites to do for the descendants of the Indians what in the conditions of the twentieth century is the decent thing.

"It is most unfortunate to try to measure this moral duty in terms of legal obligations and ask the Court to spell out Indian legal rights from written instruments made and probably broken long ago and to put our moral duty in figures as legal damages. The Indian problem is essentially a sociological problem, not a legal one."[75]

Here the moral element of the case was clearly admitted, but since there was no way for the Court to translate it into a legal remedy, the Indians left empty handed and once again it was made clear that the Supreme Court cannot right every wrong.

3. *The moral element enters most frequently in cases where there is a conflict of competing values.* Justice Cardozo admitted that he had worked out a system of priorities in cases which presented a conflict of values. He said: "There is no common denominator to which it is possible to reduce [opposing values]. . . . In general we may say that where conflict exists, moral values are to be preferred to economic, and economic to aesthetic."[76] In recent decades, the Court has resolved several conflicts among competing values by raising moral values above economic values.

In the conflict between civil liberties and property rights the Court has more and more emphasized the priority of civil rights. The written opinions seem to affirm this priority primarily on constitutional rather than moral grounds. This is of course based upon the judgment that the Constitutional rights laid out in the First Amendment lie at the heart of our form of government. In *Marsh v. Alabama,*[77] Justice Black said, "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men' and we must in all cases 'weigh the circumstances and. . . appraise the. . . reasons. . . in support of the regulation. . . of the rights'. *Schneider v. State,* 308 U.S. 147, 161."[78]

The phrase "preferred position" does not, of course, appear in the Constitution but is itself the result of "appraisal" and interpretation. As Justice Frankfurter has pointed out, the philosophy underlying

75. Shoshone Indians v. United States, 324 U.S. 335, 355, 65 Sup. Ct. 690, 89 L. Ed. 985 (1945).
76. CARDOZO, PARADOXES OF LEGAL SCIENCE 57 (1928).
77. 326 U.S. 501, 66 Sup. Ct. 276, 90 L. Ed. 265 (1946).
78. 326 U.S. at 509.

the phrase was developed in the opinions of Justice Holmes "for [whom]. . . the right to search for truth was of a different order than some transient economic dogma," and so Holmes "was far more ready to find legislative invasion [of the Constitution] where free inquiry was involved than in the debatable area of economics."[79] Furthermore, "those liberties of the individual which history has attested as the indispensible conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."[80] Brandeis held many years earlier that "Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of the liability is adequate."[81] Justice Rutledge implied that such a priority of values is the underlying philosophy of our law when in a concurring opinion he wrote: "Since in these cases the rights involved are rights of property, not of personal liberty or life as in criminal proceedings, the consequences, though serious, are not of the same moment under our system, as appears from the fact that they are not secured by the same procedural protections in trial. It is in this respect perhaps that our basic law, following the common law, most clearly places the rights to life and to liberty above those of property."[82] Justice Jackson made the same point when he said, again in a concurring opinion, that "Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights."[83]

Though these opinions provide us no sustained analysis of the reasons, apart from mere affirmation, for the priority of civil liberties, there is little doubt that such preferential treatment of civil rights grows out of a judicial value judgment since the Constitution does not indicate the position of various rights in the hierarchy of values. Faced with conflicting values, the judge has to decide on the "preferred position." It is at this point that moral judgments can enter the reasoning of the Court even though this may not be apparent in the written opinion.

Considering this same problem in other areas, it can hardly be doubted that in the minimum wage cases, the conflict between such values as freedom of contract, private property and the guarantee

79. Kovacs v. Cooper, 336 U.S. 77, 95, 69 Sup. Ct. 448, 93 L. Ed. 513 (1949) (concurring opinion).
80. *Ibid.*
81. Phillips v. Comm'r, 283 U.S. 589, 596, 51 Sup. Ct. 608, 75 L. Ed. 1289 (1931).
82. Bowles v. Willingham, 321 U.S. 503, 525, 64 Sup. Ct. 641, 88 L. Ed. 892 (1944).
83. Edwards v. California, 314 U.S. 160, 185, 62 Sup. Ct. 164, 86 L. Ed. 119 (1941).

of a wage adequate for a decent standard of living was resolved in favor of the latter value through the moral urge of the Court.[84] Similarly, the line of cases leading to the right of collective bargaining reveals a gradual modification of the doctrine of freedom of contract due largely to the moral concern of the Court.[85] The conflict between the individual's rights and the general welfare has likewise been resolved in terms of moral preference.[86] Whether the preferences employed here by the Court are good ones is not our chief concern at the moment. The point we wish to make is that in those cases which present a conflict of values, the Court inevitably indulges in value judgments of its own.

4. *In other cases, a moral end is achieved on technical legal grounds with no moral arguments appearing in the majority opinion.* Frequently, cases are decided on technical legal grounds where the net result is to uphold a moral value judgment though the opinions contain no reference at all to such a value judgment. In such a case it is not unusual to find one of the judges writing a separate opinion to point out that the real principle governing the case is not simply legal but something quite deeper. In this way the moral element is at least recognized. The issue in the *Bob-Lo Excursion Co.* case[87] was the validity of a Michigan statute which forbade racial discrimination both on boats taking people to an amusement park and while at the park. The reasoning of the Court was deflected from the civil rights issue by the circumstance that in this case the park was an island near Detroit but actually in Canada, so that the point for decision turned out to be whether Michigan could legislate in a situation where "foreign commerce" was involved. Justice Rutledge held in favor of the colored girl who had suffered discrimination on one of the boats going to this island, but his opinion was restricted to the technical question of Michigan's power to pass the statute here involved. Since the moral value of ending discrimination in this area was achieved by the Court's decision, albeit without any direct reference to the problem of values implicit in the case, the matter could have rested there. But Justice Douglas wished to make explicit the value judgment which controlled the case for him, and in a concurring opinion

84. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 Sup. Ct. 578, 81 L. Ed. 703 (1937); Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 56 Sup. Ct. 918, 80 L. Ed. 1347 (1936); Adkins v. Children's Hospital, 261 U.S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785 (1923).

85. Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 Sup. Ct. 251, 93 L. Ed. 212 (1949); Coppage v. Kansas, 236 U.S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441 (1915); Adair v. United States, 208 U.S. 161, 28 Sup. Ct. 227, 52 L. Ed. 436 (1908).

86. Helvering v. Davis, 301 U.S. 619, 57 Sup. Ct. 904, 81 L. Ed. 1307 (1937); Steward Machine Co. v. Davis, 301 U.S. 548, 57 Sup. Ct. 883, 81 L. Ed. 1279 (1937); Nebbia v. New York, 291 U.S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940 (1934).

87. Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28, 68 Sup. Ct. 358, 92 L. Ed. 455 (1948).

he wrote: "The case is, I think, controlled by a principle which cuts deeper than that announced by the Court and which is so important that it deserves to be stated separately. . . the question here is. . . whether a State can prevent a carrier in foreign commerce from denying passage to a person because of his race or color. For this is a case of a discrimination against a Negro by a carrier's complete denial of passage to her because of her race. It is unthinkable to me that we would strike down a state law which required all carriers — local and interstate — to transport persons regardless of their race or color."[88] This is a good example of a judge's concern to make the moral grounds of the Court's decision explicit even though the reasoning of the opinion based on technical law reached the same conclusion. But it is more often the case that a moral end will be achieved without any recognition in the opinions of the moral grounds of the decision. Nowhere, for example, is there any treatment of the moral evil of child labor in the opinions which finally abolished that practice.[89]

5. *Statutory interpretation provides another occasion for the inclusion of moral judgments in Supreme Court opinions.* The *Mercoid* case[90] involved a patent infringement and the argument was concerned chiefly with the matter of "contributory infringement." Justice Douglas' treatment of the doctrine of contributory infringement in the majority opinion led Justice Frankfurter to dissent on explicit moral grounds.[91] It was Frankfurter's dissent with its reference to the ethical basis of the legal doctrine of contributory infringement that prompted Justice Black to write a concurring opinion for the sole purpose of protesting against Frankfurter's attempt to rest a case on a moral interpretation of a statute, in which he said:

> "If there is such a wrong as contributory infringement, it must have been created by the federal patent statutes. Since they make no direct mention of such a wrong, its existence could only be rested on inferences as to Congressional intent. In searching for Congressional intent we ordinarily look to such sources as statutory language and legislative history. The dissent in question mentions neither of these guides; in fact, it mentions no statute at all. Instead, the chief reliance appears to be upon the law of torts, a quotation from a decision of a lower federal court which held that no infringement was shown, and the writer's personal views on 'morals' and 'ethics.' Not one of these references, unless it be the latter, throws enough light on the patent statutes to justify its use in construing these statutes as creating, in addition to a right of recovery for infringement, a more expansive right judicially characterized as a 'formula' of 'contributory infringement.' *And for judges*

88. 333 U.S. at 40-41.
89. United States v. Darby, 312 U.S. 100, 61 Sup. Ct. 451, 85 L. Ed. 609 (1941); Carter v. Carter Coal Co., 298 U.S. 238, 56 Sup. Ct. 855, 80 L. Ed. 1160 (1936); Hammer v. Dagenhart, 247 U.S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101 (1918).
90. Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661, 64 Sup. Ct. 268, 88 L. Ed. 376 (1944).
91. 320 U.S. at 676 (dissenting opinion).

to rest their interpretation of statutes on nothing but their own conceptions of 'morals' and 'ethics' is, to say the least, dangerous business.

"If the present case compelled consideration of the morals and ethics of contributory infringement, I should be most reluctant to conclude that the scales of moral value are weighted against the right of producers to sell their unpatented goods in a free market. At least since Adam Smith wrote, unhampered competition has not generally been considered immoral. While there have been objections to the Sherman Anti-Trust Act, few if any of the objectors have questioned its morality.

"It has long been recognized that a socially undesirable practice may seek acceptance under the guise of conventional moral symbols. And repeated judicial assertion that a bad practice is hallowed by morals may, if unchallenged, help it to receive the acceptance it seeks. With this in mind, I wish to make explicit my protest against talking about the judicial doctrine of 'contributory infringement' as though it were entitled to the same respect as a universally recognized moral truth."[92]

This case is particularly interesting because it involves a doctrine created not by a statute but by the courts. It could have grown out of an earlier court's moral urge but, as this opinion indicates, it did not have binding influence on members of a later court. That the doctrine of contributory infringement rested on a moral conviction did not give it more authority. Instead this made it a somewhat more precarious doctrine precisely because it grew out of a statutory interpretation based on conceptions of morals and ethics which, as Justice Black argued, is "dangerous business."

6. *Lastly, the doctrine of natural moral law continues to figure in the opinions of the Court, though not without vigorous intramural opposition. The Adamson* case is interesting because a natural law doctrine was employed by the majority of the Court to deny a defendant a right which the nonnatural law reasoning of Justice Black would uphold.[93] The technical question here was whether the Fifth Amendment guaranty that no person "shall be compelled in any criminal case to be a witness against himself" is made effective against state action by the Fourteenth Amendment.

It is Black's contention that the Fourteenth Amendment incorporates the Bill of Rights, and the importance of this lies in the fact that it supposedly spells out in detail the content of due process, thus eliminating the need for a subjective determination of fundamental rights. The majority argued that pure objectivity would not be achieved simply by saying that the Bill of Rights is applicable to state action, for it would still be necessary for the Court to select from among the first eight Amendments which were thus to be incorporated since clearly no one could argue that all the provisions embodied in those

92. *Id.* at 673-74 (italics added).

93. Adamson v. California, 332 U.S. 46, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947).

Amendments were carried over into the Fourteenth. Justice Frankfurter in a concurring opinion held that "in the history of thought 'natural law' has a much longer and much better founded meaning and justification than subjective selection of the first eight Amendments for incorporation into the Fourteenth. If all that is meant is that due process contains within itself certain minimal standards which are 'of the very essence of a scheme of ordered liberty' *Palko v. Connecticut,* 302 U.S. 319, 325, putting upon this Court the duty of applying these standards from time to time, then we have merely arrived at the insight which our predecessors long ago expressed."[94] But Justice Black held that the law ought to be declared void. Black's purpose, of course, was to limit the subjectivity of the Court for in his opinion the natural law formula announced in this case and its precedents could "license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals. . . ."[95]

But the Court cannot avoid considering the moral implications of cases, and not even a deliberate attempt to follow closely the Constitution can eliminate the occasion for turning to the vague phrases of natural law, and this for the simple reason that the laws or conduct can be considered unjust for reasons not indicated in the Constitution. Even Justice Black argued from what appears to be a moral concern when dissenting in *Muschany v. United States:*[96] "we are squarely confronted with the issues of fraud, unconscionable dealing, and unjust enrichment. I think we should remand the case to the Circuit Court so that it can pass upon *those* questions."[97] Even Justice Holmes referred to the fact that the common law required a judgment not to be contrary to "natural justice" and cautioned against letting constitutional fiction deny "fair play."[98] And in another case Justice Black disagreed with the reasoning of the Court on grounds other than legal. This was a case where the young parents of three children were killed on a train and the guardians were unable to receive compensation because the father was a railroad employee riding on a pass. In his dissent, Justice Black said that "the subjection of railroad employees while passengers to the hazards of uncompensated injuries is at war with the *basic philosophy* which has found expression in

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94. 332 U.S. at 65.
95. *Id.* at 90. Black sought to prove that the Bill of Rights were incorporated in the 14th Amendment by showing that such an incorporation was intended by the framers of the Amendment. After an extensive analysis of the history of the passage of the Amendment, Professor Fairman concludes, "In his [Black's] contention that Section I was intended and understood to impose Amendments I to VIII upon the states, the record of history is overwhelmingly against him." *Cf.* Fairman, *Does the 14th Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5, 139 (1949).
96. 324 U.S. 49, 65 Sup. Ct. 442, 89 L. Ed. 744 (1945) (italics added).
97. 324 U.S. at 78.
98. McDonald v. Mabee, 243 U.S. 90, 91, 37 Sup. Ct. 343, 61 L. Ed. 608 (1917).

other industrial and social legislation for many years."[99] This "basic philosophy" is not much different from the "natural justice" Black resents so much since neither one of these phrases is elucidated in any specific statute applicable to the instant case but is more akin to what Cardozo has called a "moral urge."

IV. Conclusion

The conclusion is unmistakable that the moral element permeates the judicial process. The purpose of this analysis has been to clarify the sense in which this conclusion can be correctly stated. The moral element enters law in the first instance through the legislative process where the moral and ethical value judgments of the people are translated into statutes. Since the moral element already resides in the law, the judge can remain silent about it in a particular case. That the judge's opinion does not contain an elaborate dilation on the moral point does not mean that there is no conscious concern on his part for the moral element. This can mean only that for the time being the Court is in accord with the value judgments implicit in the law, and in the particular case it simply *applies* the law. This accounts for the fact that there are so comparatively few discussions of moral issues in the opinions.

Yet, even the few cases referred to in this discussion reveal the frequency with which the Court finds itself arguing over the relevance of moral value judgments. The obvious reason for this is that the Constitution has to be interpreted and constitutional interpretation opens rather wide areas in which the Court's moral urge can come into play. The more significant point is, however, that not only the *Constitution* but *statutes* too have to be interpreted. The reduction of most cases to a particular statute has therefore not eliminated the possibility of viewing a case from a moral point of view. The remarkable thing is, as Professor Freund has already pointed out, that "the process of statutory construction has likewise become an aspect of political philosophy."[100]

The answer to the question, "Does the Supreme Court decide cases on the basis of moral and ethical principles?" must therefore be in the affirmative.

To the extent that it applies a law which contains a moral norm, the Court decides a case on a moral basis, albeit in a legal way. But the real question is not whether the Court upholds the legislature's judgments of value alone, but whether the Court employs its moral judgments in cases. That the Court does inject its moral concern is, once again, revealed in the many cases where statutes come under the Court's interpretative scrutiny.

99. Francis v. Southern Pacific Co. 333 U.S. 445, 468, 68 Sup. Ct. 611, 92 L. Ed. 798 (1948) (italics added).
100. Freund, On Understanding the Supreme Court 36 (1949).