Judicial and Political Decisions from a Critical Psychology Perspective

by

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A thesis submitted in conformity with the requirements for the degree of Doctor of Juridical Science

Faculty of Law
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ABSTRACT

I examine conflicting judicial and political decisions from the critical psychology perspective of Jung’s theory of different conscious functions and corresponding types of rational consciousness. I apply that theory as a realistic approach to refining judicial and political processes and the relationship between them. I do so in a thoroughly interdisciplinary way, aiming for accuracy and fullness in both the psychological and the institutional functions.

Judicial decision-making can uniquely provide a rational viewpoint of ‘concrete thinking’ (as Jung probingly defined it), guided by an ideal of Justice, well-developed by judges as experts in this task, within court processes designed to facilitate it. Political decision-making (legislative and executive) can uniquely provide a well-developed rational viewpoint of citizens’ shared ‘feeling evaluation’ (as Jung defined it), guided by any of a number of ideals, led by politicians, who have resources designed for carrying it out, and who should also practice as experts in their exclusive role. Their two distinct viewpoints (reflecting familiar ‘hallmarks’) are specialized, one-sided, ‘complementary opposites’: Potentially oppositional and inherently complementary, the brilliance of one precisely compensates a blind-spot in the other. An ‘interplay’ (or dialogue) between them on a contested topic enables them to refine each other’s viewpoints and together

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differentiate and extend the overall rational grasp of the topic, in their own decisions and, through them, in the conscious attitudes and actions of the society as a whole.

This shifts the perspective on difficult issues in positive and practical ways. It explains the importance of appreciating and refining what is distinct about judicial and political decisions, and about their dialogue. Among its helpful applications are the fresh reinforcements it gives to judicial decision-makers, to develop and apply a reasonable standard of care and skill in political practice, and to political decision-makers, to help make and meet such a standard.
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Introduction:
Judicial and Political Decisions in a Good Society

Why not shoot yourself, actually, rather than finish one more excellent manuscript on which to gag the world?

Annie Dillard, 1989

In this thesis, I address the problem of conflicting judicial and political decisions, and propose a new approach for understanding the conflict and the desirable focus of judicial review of political decision-making in a democracy. Decision-making is a psychological process, which judges and politicians carry out in making the major institutional decisions of our society, and the approach I propose is based on a psychological perspective.

That perspective is C.G. Jung’s theory of rational consciousness and how it develops – a ‘critical psychology’ approach commonly known as his theory of conscious functions. As I introduce in more detail below, Jung’s theory is that people make rational decisions, based not one psychological process which produces one type of rational viewpoint, but based on different types of psychological functions which produce distinctly different rational viewpoints. Each rational viewpoint is a one-sided ‘complementary opposite’ of the others. This means they are all – significantly – both potentially oppositional and inherently compensatory to each other.

I apply Jung’s theory to decisions made in the institutional context of courts and governments. I argue (as I also introduce in more detail below) that in judicial and political decision-making, different psychological functions are decisive, and they produce distinctly different types of rational viewpoints on any topic. This distinction between them is clearly established, as history and legal theory show. This distinction is also desirable, and essential to maintain and develop, as, I will argue, Jung’s critical psychology shows: It makes it possible for court and government decision-makers to provide two distinct types of specialized rational viewpoints, each a one-sided ‘complementary opposite’ of the other, on any topic that is new or uncertain and contested in society. Using the short-form terms of Jung’s theory (which have precise meanings that I explain): Judges are able to expertly develop a rational viewpoint of ‘concrete thinking’ guided by ‘Justice’ on a topic, and provide that to society. Politicians are
able to expertly develop a rational viewpoint of the citizens’ shared values or ‘feeling evaluation’ of the topic, guided by any of a range of goals and ideals in addition to or instead of Justice (such as Liberty, Security, Prosperity, and many others). The viewpoint that is decisive and honed or developed in one type of decision is neither decisive nor reliably honed in the other, and vice versa. Thus, if their viewpoints conflict, each decision is able to test the other and correct or compensate it precisely where its viewpoint is weaker. And thus, in an interplay (or dialogue) between them, they are able to pin-pointedly complement each other’s viewpoint, and together differentiate (or refine) the overall rational grasp of the contested topic, in the institutional decisions and, through them, in the society as a whole.

This critical psychology perspective offers a new approach to judicial and political decisions and conflicts between them. It helps re-think the relationship between court and government, and the way their decisions and conflicts between them are understood. It reframes long-standing debates about the court’s role respecting rights and democracy, and about the nature and problem of bias. It also shifts the analysis of these big issues to the broader context of the roles of these decisions in developing rational consciousness in a collective or society, and the distinct contribution each institutional decision is uniquely able to make to that. My hope is that it will contribute to the appreciation and refinement of court and government decisions, and an effective dialogue between them.

There are three parts to my thesis. Part One situates judicial and political decisions institutionally, describing historical and legal theory perspectives that define them. In Part Two, I introduce Jung’s theory of conscious functions, to lay the foundation for a critical psychology perspective on rational decision-making in general. In Part Three, I return to the institutions, and I move from a descriptive to a prescriptive approach to judicial and political decision-making: I apply this critical psychology perspective as a practical approach to identifying and reinforcing the distinction between them that is desirable, and to refining their relationship accordingly.

I begin Part One with an intellectual history of the distinct court and government decision-making processes that emerged in England. There are perils in such a broad overview, but it highlights a fundamental development: From one undifferentiated local forum for making all community decisions, separate institutions emerged whose members established unique ways for making their decisions. Court decisions came to be made by expert judges who sought to do
justice in resolving disputes by articulating facts and reasons based on evidence and arguments in principle and logic. Government decisions (both legislative and executive) came to be made by elected politicians who sought to lead the citizens based on democratic processes. The history highlights how distinct, and different, these institutional processes came to be. I note the gains to society, and the losses as well, that came with this institutional separation and specialization.

In surveying examples of conflicting decisions recurring in American and Canadian constitutional regimes, I note these same criteria (rather than others, such as rights protection *per se*) consistently articulated by judges to justify their decisions and distinguish them from political decisions. Judicial decisions were justified by facts and principled logic developed in trials of evidence and argument, and by a goal and guiding ideal of Justice. Political decisions were justified by the wishes and wellbeing of the citizens, and any of a range of goals and ideals in addition to or other than Justice, such as Peace, Liberty, Fraternity, Security, Prosperity, Privacy, and Happiness or Virtue. I note the varying results of the conflicts, describing uneasy truces following famous clashes, and fundamental principles forged in them. I also note instances where judges failed to carry out the distinct process they articulated to justify their decisions.

The legal theory perspective I take up is the idea of a ‘dialogue’ between courts and governments, as presented by two scholars addressing the ‘anti-democratic’ complaint in the Canadian context, Peter Hogg’s ‘final word’ dialogue study and Kent Roach’s ‘democratic’ dialogue argument. I suggest strengths in these theories, particularly in Roach’s attention to familiar hallmarks of political and judicial decisions (reflecting criteria highlighted in my historical overview, which are easily glossed over in legal theorizing and not plumbed further), and in his references to their ‘complementary voices’, their ability to ‘educate’ and ‘expand the horizon’ of each other, and the ‘conscious’ quality of their dialogue. I suggest that these dialogue theory strengths are reinforced and developed by Jung’s theory of conscious functions.

In Part Two, setting aside the institutional framework, I outline in careful detail Jung’s theory of conscious functions, using Jung’s precision and correcting popular misconceptions. The theory is based on four psychological functions through which people can consciously (or intentionally) process reality, both outer and inner: two perceptive functions of sensation and intuition, and two apperceptive or rational functions of thinking and valuing (or feeling, which is not emotion). The simplicity of this structure has made Jung’s theory easily accessible, and it is
widely used in various classifications of personality. It is more, however, than a static classification system. It is a dynamic model of what rational consciousness is, as an innate psychological process common to all people, and how it develops and changes.

Jung explains that different combinations of the four functions produce distinct conscious viewpoints on reality. Each viewpoint is one-sided, with its own brilliance and its blind-spots, providing information that the others do not and missing information the others provide. Thus, each is potentially oppositional and at the same time inherently compensatory or complementary to the others. All the viewpoints are necessary for the rational grasp of reality to be as complete and accurate as humanly possible at any particular point in time. Due to their complementarity, if viewpoints conflict on any aspect of reality, the distinct brilliance of each one compensates precisely what is a blind-spot in the others. Thus, in an interplay between them, they are able to mutually correct and compensate each other’s viewpoints and together develop a more refined and multi-faceted (or ‘differentiated’) conscious grasp of that reality. I give some examples to show how such an interplay differentiates rational understanding, on such topics as the nature of the sun, the essence of matter, the need for quark research, the legitimacy of vivisection, the fitting punishment for crime, and the scope of the right to vote.

While other psychological processes, such as symbolism and emotion, may play essential roles as aids in making decisions, they are not conscious functions and do not themselves provide rational viewpoints. This is the significance of the conscious functions, and their relationship as complementary opposites: They provide distinct rational viewpoints, each different and unique and indispensable to the grasp of reality, and the interplay between them on any topic makes it possible for rational consciousness on the topic to be developed, and occasionally to transform. This is the Archimedean point of Jung’s theory: The various types of decisions we make are measured from the vantage point of how they contribute to developing rational consciousness.

To illustrate each function, I give examples of different rational viewpoints which will later be relevant to distinguishing judicial and political decisions. I illustrate what Jung calls ‘concrete thinking’ for short, in Robert Mnookin’s negotiation method, and ‘abstract thinking’ in John Forbes Nash’s explanation of his solution to a mathematical puzzle. (This contrast was described by Jung in comparing, among other examples, Aristotle’s and Plato’s different ways of theorizing.) I illustrate the ‘valuing’ or ‘feeling’ function in an essay by social commentator
John Raulston Saul and in a campaign speech by Senator Barack Obama. These two examples highlight the equally ‘rational’ quality of thinking’s conceptual analysis and feeling’s evaluation, and their respective vulnerabilities. I illustrate the interplay between conscious functions in the evolution of atomic theory, and the effect of this interplay in differentiating the rational grasp of the topic of ‘matter’ or ‘the atom’, and I contrast a polarized quarrel over quarks, in which two prominent public speakers missed an opportunity for such an interplay.

In Part Three, I return to the institutions, now with Jung’s theory of conscious functions, to apply as a critical psychology approach to court and government decisions. I argue that different psychological functions should be exercised by judges and politicians, as decisive in making their respective decisions, in order to enable each decision to provide that institution’s distinct type of rational viewpoints on any topic, with its inherent differences and precise complementarity to the other. This approach reinforces the defining features of judicial and political decisions that were described in the historical and dialogue theory perspectives. And it elaborates these features further, and it gives them new meaning.

Applying this approach, in judicial decisions the decisive function is conceptual analysis combined with the sifting of material facts, a form of what Jung called ‘concrete thinking’ for short (extraverted thinking combined with sense perception), guided by an ideal of Justice. It is developed and applied by judges, as experts in this judicial task, in court processes designed to facilitate it. This is the distinct brilliance of judicial decisions: They seek to do justice in the concrete form of a factual conceptual analysis, with all its particularity, generalizability, and worldliness – its grounding in the experienced reality of life, not logic alone (as two eminent jurists famously observed). In contrast, in political decisions (both legislative and executive), the shared feeling evaluation of the citizens, seeking any of a range of ideals, is ultimately decisive. It is developed and applied by politicians, who, I argue, should similarly be seen as functioning as experts in their exclusive task, facilitated by unparalleled public resources.

The rational viewpoints of these two types of decisions are complementary: The same function that is decisive and can be well-developed in one (either concrete thinking or shared values) is non-decisive and inevitably relatively undeveloped in the other. Thus, if they conflict on a topic, in their interplay they can precisely test and correct or compensate each other, and together differentiate (or develop and refine) the overall rational grasp of the contested topic.
illustrate their interplay (or dialogue) in examples, including in the example of legislation mandating minimum sentences in criminal law, where I contrast the lack of interplay if a court simply defers to the legislative decision as a matter of social policy that is up to the government alone, with the interplay if the court instead judicially scrutinizes the decision’s concrete basis in the government’s political task of developing citizens’ shared felt values on the topic.

This critical psychology approach makes explicit the potential of a dialogue between conflicting judicial and political decisions to differentiate the overall rational grasp of contested topics. Governments can test and correct (based on the shared values of citizens) a judicial decision that errs in finding, as a social value on a topic, something that does not accurately reflect the citizens’ actual shared value as it was developed through the political process. Courts can test and correct (based on fact, principled logic, and justice) a political decision that errs in failing to reasonably develop and accurately carry out the citizens’ shared value on a topic.

Elaborating this approach, I argue that judicial and political decisions are specialized decisions which require specific expertise. They are more akin to the decisions of professionals, of experts and trustees, than of amateurs. Thus, it is necessary to ensure both decision-makers – politicians no less than judges – are able to expertly develop their institution’s distinct rational viewpoint, and do that, and bring that viewpoint rigorously to bear in a dialogue between them. These specialized processes do not preclude compassion in carrying them out, which is an asset, but they do preclude failing to hone or develop the respective decisive functions. It is no less important for politicians to exercise the special expertise required to make political decisions well, than it is for judges in making judicial decisions.

And this, I argue, calls for courts to address the question of what care and skill are reasonably required of politicians in carrying out their distinct political decision-making task, and to scrutinize political decisions on this basis. This requires politicians to go beyond merely parroting popular existing sentiments or fanning emotions, to expertly leading the development of citizens’ shared values – just as judges must go beyond merely pretending to develop facts and principled logic, and actually do so, expertly. Courts can carry out this scrutiny by using their distinct judicial process (with its characteristic features of concrete conceptual analysis) to establish such relevant principles as a ‘reasonable standard of care and skill’ in political practice, and by applying that standard to ensure – in facts, principled logic, and justice – that it is met by
a given political decision on a contested topic. In illustrating the interplay in some of my examples of contested topics, I also sketch how such a standard might be established by judges and what it might require. And governments, I argue, are similarly called upon to address judicial statements of society’s values, and to correct them if necessary, by providing courts with appropriate evidence as to the citizens’ actual values and the shared ground among them, and how this has been reasonably developed and established through the political process.

‘Dialogue’ is an apt metaphor for the relationship between judicial and political decisions, and it can be refined and developed. I highlight the importance of maintaining an effective dialogue between these two distinct viewpoints by recalling the losses that came with the social transition, from local folk assemblies where all community decisions were made in a communal customary process, to separate institutions of court and government where specialized judicial and political decisions are made by experts. And I highlight the gains that came with that transition, and the far-reaching significance of the dialogue between court and government, in the development of rational consciousness in the collective or society as a whole.

Part Three culminates with the application of these ideas in the example of the Sauvé case, in which a divided Supreme Court struck down federal legislation suspending prisoners’ right to vote. I suggest that even someone who agrees with the result would appreciate what makes this decision, from a critical psychology perspective, an unsatisfactory judicial scrutiny of an unsatisfactory political decision. The majority used logical inference and philosophical theory to justify its decision. If, instead, it had given careful and express attention to the concrete facts and principled logic that did exist in the case (including in witness testimony, legislative history, and the text and context of the Charter), and to the ideal of Justice itself, its decision would have been more effective, and accurate, in providing a distinct judicial viewpoint. And this would have enabled the Court to test the political decision precisely where it was weak, in its actual development – in concrete fact and logic – of citizens’ shared feeling values on the topics of the right to vote and the punishment for crime. I argue that this was an ideal case for the Court to begin developing a reasonable standard of care and skill for politicians and governments to meet in the practice of politics in a democracy. Doing so, I argue, would create more productive future dialogues between courts and governments, on this and other contested topics. Not having done so will undermine future dialogues, and risk polarizing rather than differentiating the rational grasp of such topics in our society.
In the Conclusion, I review the main points made, and then note some of the other issues on which I suggest this critical psychology perspective provides a stimulating new approach that would be helpful in practice.

Two questions have been asked of me respecting the critical psychology approach, which I wish to answer in this Introduction.

One question is whether the approach presents judges as uni-dimensional concrete thinkers or rational empiricists, oblivious to values and intuitions, devoid of compassion and emotion. It would be erroneous to take the approach that way, for a number of reasons. Compassion, and other qualities of character, are not conscious functions and, as noted above, are not precluded by any rational viewpoint; compassion enhances both judicial and political decisions, just as intelligence, experience, and knowledge do. As well, judicial decisions require judges to address values, intuitions, abstract theories, emotions, and symbolic motifs, whenever these are relevant to the facts or principled logic or justice in a case. And more fundamentally, the focus of the critical psychology approach is not the personality of judges, but the type of conscious decision they are called on to make – that is, the specific rational functions that must be decisive in their decisions, and be expertly exercised by them. An individual judge personally may have a well-developed intuitive or valuing function, which may indeed be helpful in better enabling the judge to use his or her own intuitions or values to test his or her concrete thinking, and thus hone or refine that rational viewpoint. But that rational viewpoint (now better honed), and not the personal value or intuitive insight, must remain decisive in the judicial decision.

Furthermore, even when judges consciously use their own other functions to hone their concrete thinking in a judicial decision, the effect of those others will inevitably be somewhat limited. The limited effect is in part because, in Jung’s observation, individuals generally do not develop and use all the conscious functions equally well. (When feeling evaluation is an undeveloped function, values tend to come out as shallow sentimentalism, and when thinking is undeveloped it tends to come out as shallow opinion. The most important factor in the degree to which judges (and politicians) can use their own other functions to hone the function that is decisive in their decisions, is probably their personal self-awareness.) The limited effect is also because the judicial process is designed to facilitate concrete thinking, and not other functions, and thus it is concrete thinking that is developed in it. While judges can use their own values on
a topic, or their own view of citizens’ values, to test and hone their concrete thinking on the topic, doing this cannot hone their judicial decision – and differentiate the overall rational grasp of the topic – as well or reliably as can a dialogue with a political decision, in which citizens’ values are the decisive function, and are facilitated by government structures and resources, and thus enabled to be expertly developed.

A point I want to note with this answer is that, based on Jung’s observations and his theory, it is unlikely that any judge or politician – not even an Earl Warren or Brian Dickson or a Gro Brundtland or Johanna Sigurdardottir – could produce a fully differentiated, integrated, and well-rounded rational decision on a contested topic. A judicial or political decision will have its distinct brilliance (in concrete thinking or in citizens’ shared felt values, respectively) and its blind-spots (in the reverse, respectively, and in intuition and abstract thinking), inevitably. This is why it is essential that judges and politicians not only expertly develop and hone their own distinct types of rational decisions, but also bring them into a mutual interplay, so that they can correct and complement each other’s viewpoints and, together, provide a more differentiated and holistic rational grasp of the topic in the collective consciousness of the society.

The second question is whether the critical psychology approach anthropomorphizes courts and governments, that is, treats these institutions as people with personality traits. Again, that would be an erroneous way to interpret the approach, and in any event, I suggest, it is not necessarily something to be concerned to avoid. It would be erroneous because the approach does not focus on any ‘personality’ of the institutions (any more than of judges and politicians), but on the decision-making processes carried out by judges and politicians in making these institutional decisions, the institutional structures designed to facilitate them, and the distinct types of rational viewpoints they foster. What the approach does is apply Jung’s theory of conscious functions, not in the general or personal context of people making rational decisions, but in the specific institutional context of judges and politicians making the specialized judicial and political decisions of courts and governments. In other words, it is a question of institutional function and design, not personality.

At the same time, however, would it necessarily be wrong to use anthropomorphizing metaphors to describe this approach? It seems we convey meaning by using analogies, and even more powerfully by using metaphoric figures of speech (‘the Mother Church’, ‘my Alma Mater’,
‘I am an island’), including ones that anthropomorphize. We know they are not literal, and that they highlight differences as well as similarities in what they point to, and we know the adage that ‘every analogy is lame’, and every metaphor too.\(^{10}\) While this is not the way I present my analysis or envision this approach to courts and governments, I would not be concerned by a metaphoric treatment of it, ascribing personalities or conscious functions to the institutional processes, such as by treating society figuratively as an individual, with judicial decision-making as its Solomonic or Dicksonian concrete-thinking-and-justice function, and political decision-making as its Churchillian or Brundtlandian shared-values function. This metaphor points up an important difference, too: In the societal or collective context, unlike in an individual person, both functions can be expertly well-developed and can dialogue with each other as equals.

To return to my own analysis of judicial and political decisions in this thesis, it is novel in certain respects. My thesis departs from political science theories, and to some extent from legal theories. I acknowledge the challenges in holding politicians responsible for expertly leading the development of shared values among citizens, and in establishing reasonable standards for the practice of politics, the possibilities for which I only sketch in the thesis. At the same time, however, I point to historical precedents that support a strong judicial approach to reasonable standards and responsibility in political practice, such as the famous common law doctrines boldly established by judges centuries ago to oversee the exercise of prerogative powers. I also point out respects in which my analysis reflects the strengths I examined in Roach’s legal theory, and reinforces them. And most importantly, my analysis aims to apply Jung’s well-reasoned theory that rational consciousness, individual and collective, develops through the interplay of complementary psychological functions, and aims to convey the significance of this far-reaching insight contained in the simple structure of this theory.

From the critical psychology perspective, judicial and political decisions are different from other rational decisions – different from philosophical speculation and aesthetic choices, from interpreting divine revelations and profiling insurance risks – and different from each other. Courts and governments are not simply two ‘talking heads’, two rational decision-makers applying the same criteria, or just any criteria. They decisively apply different conscious functions that create two distinct types of specialized decisions – which are both indispensable to a full grasp of any topic, which provide potentially conflicting but inherently complementary viewpoints on the topic, and which can thus uniquely test and correct each other and differentiate
the overall rational grasp of the topic. This perspective provides an approach for understanding, critiquing, and developing judicial and political decision-making, based on the distinct conscious functions and rational viewpoints that are decisive in them, and the expertise these require. And it measures their decisions and dialogues, ultimately, according to the contributions they make to the development of rational consciousness in their society.

Why write one more manuscript on which to choke the world?

Early in my doctoral work, I attended a seminar on the jurisprudence in First Nations cases, given by Professor John Borrows. In critiquing the decisions, Borrows imaginatively employed the symbolic figure of the Trickster to subversively disrupt the courts’ narrow judicial perspective, and he criticized the judicial refusal to permit traditional music to elucidate facts and arguments on trial. His talk brought home for me what made my project seem important to me, and at the same time gave me misgivings.

My ambivalent response to this talk was clarifying for me. Great injustices have been done in the judicial process in our system of justice, and in the political process in our system of democracy, and great justices as well. The desire for justice is so fundamental that to experience injustice makes people sick, and alienates them from each other and society. This is readily seen in the case of First Nations people, as Borrows illuminated. Bringing the Trickster into the judicial framework was meant to draw attention to injustice in the narrow judicial precedents in the treatment of First Nations people. And in doing this, Borrows gave to symbols and emotions an important attention rarely given to them in addressing issues of justice and judicial decisions.

At the same time, I was concerned that symbols used in a counter-contextual way might unintendedly disrupt the judicial process, and undermine the distinction between judicial and political decisions. These distinct institutional processes are hard-won, valuable, and vulnerable. Borrows recognized these processes and used them well himself, deftly pointing out weaknesses in facts and principles of logic and justice in the judicial analyses. To disrupt this judicial process might hurt rather than help the cause of justice, if the source of an injustice is not simply the judicial process itself, but blind-spots and unwanted biases in the consciousness of individual judges, or politicians, or other influential members of society, or society as a whole. And, while the text and context of a traditional song might be shown to provide valuable evidence, there can be unintended effects of using the power of music to arouse emotions and unconscious contents
– contents which may include personal and collective associations and biases that differ enormously among individuals and cultures and other groups. And these unintended effects can be difficult to address within the judicial context.

My concern was that in our society we have lost sight of the special nature of judicial (and political) decisions, what each is uniquely able to provide, what it requires to do that well, and what it cannot do. I felt torn between the need to raise awareness about an injustice and the need to recognize, and continually examine and refine, a judicial process that seeks to do concrete justice by developing facts and principled logic (and no less, a political process that seeks justice, and other goals, by developing shared feeling values among citizens). I preferred to couple these two concerns by addressing the judicial process according to its own terms, and working with its special conscious function – its dedication to making decisions based on facts found from evidence, arguments in principled logic, and a guiding ideal of Justice. Doing this requires treating the political process in the same way.

Walter Bagehot, wise analyst of civilizations, observed (as I note in the epigraph to the first chapter) that nations may fail from failing to comprehend the great institutions they have created. Such a thought fuels my concern that, in efforts to overcome injustice, the institutional processes of court and government not be blurred or undermined, but recognized for what they are, and improved and reinforced. My ambivalence served as a touchstone to which I returned many times in the course of my doctoral work. It kept me asking what is required of court and government decisions, especially in a multifaceted and complex society. It kept me asking when is it necessary (and when not necessary) to develop concrete facts and principled logic, shared feeling values, ideals such as Justice and Democracy, and rational consciousness on topics that are contested in society, and how best to do this when it is necessary.

To use the tree as a metaphor, my ambivalence reinforced for me the importance of remembering the trunk and main boughs of the tree of consciousness – the psychological functions and their distinct rational viewpoints – which are directly connected to the unconscious processes and contents that are the roots of the tree, and from which grow all the great variety of increasingly nuanced and complex conceptual analyses and feeling evaluations, that are the finer branches and twigs, bearing the flowers and fruit in the tree’s canopy.
Finally, I want to make some brief notes about terminology.

In referring to government decisions, as I explain in Part One, I use the term ‘political’ for both the ‘legislative’ decisions of Parliament and the ‘executive’ decisions of the Prime Minister in Cabinet. Thus, rather than focusing on the distinction between these decisions of governments, I focus on what they have in common. From a critical psychology perspective, the inclusive terms ‘political’ decisions of ‘governments’ provide a more useful and essential comparison with the ‘judicial’ decisions of ‘courts’. They highlight the function government decisions share, and court decisions do not. They reinforce the positive connotation of the term ‘politics’. And they signal the common hope and expectation that courts are independent of governments and stand outside the political sphere. On a different point, I capitalize words that refer to ideals (such as an ideal of Justice guiding the task of doing justice in a case).

In introducing Jung’s functions theory, I use Jung’s precise terms. I carefully define them, knowing, as I forge this interdisciplinary rapprochement, that they may initially pose challenges for readers in other fields. Jung’s theory has proved readily accessible, but translating from the language of psychology to the language of law is nonetheless sometimes difficult. Cognitive psychology dominates thinking about rational decision-making, and may skew my readers’ understanding of ‘rationality’ in some poorly generalized ways. As well, Jung gave such terms as ‘values’, ‘feeling’, and ‘reason’ a more probing and distinctive meaning than my readers may at first assume. Furthermore, Jung’s theory of consciousness, on which I build this approach, has been popularized and bowdlerized in some inadequate and erroneous ways. I have worked against these trends, striving to retain Jung’s carefully honed psychological precisions and to make explicit their implications for differentiating judicial and political decision-making and, through these decisions, developing rational consciousness on contested issues.

My intention in introducing this critical psychology perspective is to provide an approach to judicial and political decision-making that is psychologically – humanly – realistic, and that can contribute to developing the positive potentials of consciousness for society.
Chapter 1
A History of Two Institutions and their Decision-Making Processes

Great nations with long histories of creation may fail “from not comprehending the great institutions they have created.”

S. Strauss, 2003, quoting W. Bagehot, 1876

In this chapter, I trace the emergence of separate institutions of court and government in England, by giving an overview of the history outlined in John H. Baker’s introductory text, in which I focus on the unique and characteristic institutional decision-making processes created, and their recurrent conflicts. My focus is on distinguishing the ways in which they came to make their decisions on contested issues, and not on other distinctions between them, such as making law versus interpreting law, or formulating social policy versus resolving private disputes, or deliberating versus adjudicating, or promoting public welfare versus protecting individual rights on such issues. This is, necessarily, a very general, broad, and selective overview of the history. It is presented to show that courts and governments are not simply two rational decision-makers bringing the same rational criteria to an issue and providing the same type of rational viewpoint on it. Rather, the history shows, they created distinct types of rational processes for making their institutional decisions. They are different from other rational decisions – from aesthetic choices, philosophical speculations, actuarial calculations, visionary ideas. And their decisions are different from each other. As I will argue and elaborate in Part Three, based on a critical psychology approach presented in Part Two: The courts and governments that emerged over the course of English history as separate institutions make distinctly different types of specialized rational decisions, which I am calling ‘judicial’ and ‘political’ (both executive and legislative) decisions, and which are ‘complementary opposites’. Their divergent specializations over the course of this history are clear, and significant. The significance will come out in Part Three.

1. A Broad and Selective Historical Overview

The historical thread I trace will show that, from one undifferentiated forum for making all community decisions, a differentiation took place, resulting in separate institutions which
created their own new ways of making decisions. The thread starts in local folk assemblies of a thousand years ago, where community decisions were based on customs and sacred beliefs, supported by kings with their counsel, with no judges and politicians as we know them today. The thread runs through an expanding royal council, to judges in their chambers, absorbing the customary practices, and magnates in parlements, voicing their own interests. It runs through ‘The First Parliament’ of 1265 and ‘The Explosion’ of 1616, to today’s courts and Parliament. My focus will be on the two institutions of ‘court’ and ‘government’ (Parliament with its elected House of Commons and its Prime Minister and Cabinet), and the ways in which they came to justify their ‘judicial’ or ‘political’ decisions: Judges justified theirs based on facts and reasons determined in trials of evidence and ‘learned’ arguments, seeking to do justice; politicians justified theirs, whether by legislation or by prerogative or executive order, based on the will of the citizens determined by democratic processes, seeking their wellbeing.

English history is especially apt for my purpose for a number of reasons. England’s prerogative, judicial, and legislative processes were transported to Canada. Also, in England it is possible to trace the way of ‘doing justice’ back to ancient communal practices: Local folk assemblies were still active there as recently as 1,000 years ago, and written records exist from that time, allowing us to glimpse that communal process in action and follow the course of change as specialized judicial and political processes emerged. Furthermore, the communal practices in England have been described by a leading historian as ‘thoroughly characteristic of archaic legal systems in general’. This accords with the hypothesis, relevant to the approach I will introduce, that fundamental psychological processes recur, in people and societies across time and culture, in variations of what are recognizably the same phenomena. Thus, the unique details of the English history traced in this overview may make visible just such an underlying general phenomenon that is common to human societies.

I am not a historian or an expert in legal history. Nonetheless, I am acutely aware of a vast amount of detail that I have had to skim over. I have relied chiefly on Professor John H. Baker’s general introduction to English legal history, with other sources noted. Baker, who is a leading scholar in the field, calls his text ‘an elementary historical introduction’ to the English legal system. From his text I have selected and arranged what I want to highlight. Apart from my own limitations, the question remains of the accuracy of any historical perspective. The facts of history are often unknown and are never fully known. The ethos of a past time may be lost or
misunderstood. As research uncovers new evidence that opens up new interpretations, historical perspectives shift. Baker points out that ‘all history, meaning history as we see it rather than the bare facts of the past, is subject to change’. The inevitable limits to our grasp of the past were described by a great historian of law, Theodore F.T. Plucknett:

Legal history is a story which cannot be begun at the beginning. Moreover, the further back we push our investigations, the scantier become our sources, and the more controversial and doubtful their interpretation.

Furthermore, what ‘we see’, our selection and interpretation of the facts, does not exist in a psychological vacuum. The writer G.K. Chesterton stated this with his typical originality:

The truth is that history is so chaotic, and [humankind] so varied, that by judicious selection you can represent social evolution as having tended to anything you choose.

While not accepting Chesterton’s full exaggeration, I have indeed made my own discriminating selection, guided by what I view as significant and by my purpose of tracing the emergence of courts and governments and distinguishing their decisions.

Another preliminary point I want to make is a brief response to the objection that it is inaccurate and idealistic to define judicial decisions as turning on facts, reasoned arguments, and justice, because this ignores class, gender, and other biases on which judges’ decisions rest. It is true that biases – personal and cultural, conscious and unconscious, wanted and unwanted – are potential influences and concerns in all decision-making, including by judges. But I am first stripping away any focus on biases or other influences on judicial and political decisions, so that the underlying structure and process used to make and justify each decision can be seen. Only when that is clear, does it become clear which biases are unwanted in either specialized decision (and they will not all be the same biases). And only then is it possible to examine how those biases can be recognized and responded to most effectively in making that specialized decision, and thus go on to refine and improve the decision. In other words, if no specific type of decision is called for, then no specific bias is cause for concern. The practical importance of identifying the specific type of specialized decision-making process called for from judges and politicians will become even clearer when I apply (in Part Three) the critical psychology approach.
In addition, quite apart from biases, judicial decision-making requires specific skills, and thus depends on judges’ expertise in their task. This matter of skill, too, I have deliberately put outside the frame of my historical overview. The fact that a decision is justified according to a specialized process says nothing about skill or bias in making it. It will certainly be less prone to errors and unwanted biases the more skilled and self-aware the judge is. Thus, the quality of the decision will depend on having developed the specialized skills it requires and the self-awareness to exercise those skills as well as humanly possible at a given time. But I am focusing here on the decision-making process itself, and that is seen more clearly when it is looked at apart from issues of skill and bias in its exercise. Being clear on this will then make issues of skill and bias clear too, as I will elaborate in Part Three, and thus will further the ability to correct and refine the quality of these distinct types of decisions.

Respecting terminology, I chose the terms ‘political’ decisions of ‘governments’ to refer to legislative decisions made by Parliament and also to prerogative and other executive decisions made by a Prime Minister. These are not quite the same as the terms used in political science approaches (as I explain in Part Three). But they seem preferable, especially for this thesis, because they signify an essential distinction between political and judicial decisions. They highlight the ‘political’ function that all government decisions share, and court decisions do not, and thus that courts stand outside the political sphere to which legislative and executive decisions both belong. They also reflect the common use of the words ‘politics’ and ‘government’, in ordinary language, and the common hope and expectation that courts are independent of them.

A final note respecting my focus on judicial and political decisions: The broad thread of historical change that I will be tracing applies equally to criminal as to civil trials, to jury as to non-jury trials, and to provincial legislative assemblies and premiers, within their jurisdictions, as to Parliaments and Prime Ministers within theirs.

2. Folk Assemblies and the King with his Council

The earliest form of justice was not conceived of as emanating from a ruler or from learned judges. We do not hear of the king’s law or the lord’s law, but only of communal justice (folcriht) or the custom of the people. …

Professor J.H. Baker, 1979

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A collective decision-making system was already in place in Anglo-Saxon England before the arrival of the Normans in 1066. There were no expert judges and politicians, no courts and legislatures as we know them today. There were local folk assemblies with their communal practices, and there was the king with his council of personal advisors and administrators. The earliest known folk assemblies (called *moots*) were open-air meetings of small local communities. Over time, the country was organized into regions and units, and each had its own folk assembly, from large counties or shires with an assembly overseen by a sheriff, to towns or boroughs with a ward assembly, down to the smallest assemblies of villages and feudal manors.

In a folk assembly, as Baker describes the scene, a range of community affairs could be addressed. Agricultural and commercial questions might be decided, disputes resolved, crimes presented and punished. Issues brought by the people were settled, under the ‘chairmanship’ of a principal person of the place, such as the *ealdorman* of a shire or the lord of a manor. These assemblies offered a peaceful method for resolving disputes, and an alternative to family feuds and battles, but the method was not a judicial or political method as we know them today.

The assembled community listened to a dispute and either assisted the disputants to make an amicable settlement (*a love-day*), or sought a divine answer that would be revealed through the test (*proof*) of a physical ordeal or an oath. Proof by ordeal might, for example, require a person to be tied up and lowered into a pond of water: ‘if he sank,’ Baker explains, ‘the water was deemed to have “received him” with God’s blessing, and so he was quickly rescued.’ Proof by oath required a person to ‘swear to the truth of his case by the holy evangels’ and also ‘bring with him a number of neighbours to act as “oath-helpers” and back up his word; the oaths themselves were decisive, with no investigation into the facts or truth of what was sworn.’ Cooperation with the local assembly’s resolution could be enforced, ultimately, by banishment. These methods of resolving disputes rested on a community’s own customs and sacred beliefs, customs that were mostly unwritten and varied from place to place. Each assembly’s decisions were guided by the local customs of that place, by the particular traditions and beliefs of the people of that community.

This early ‘communal justice’ was clearly nothing like the judicial process of today, with trials of evidence and arguments. Tests by oath or ordeal, Baker stresses, were ‘absolute and
Their effect was precisely ‘to preclude human judgment on the merits of the case’. While there might be ‘room for argument and human discretion’ in matters of procedure and remedy (such as in deciding ‘when and how tests should be imposed on disputing parties, and what should be done when the result was known’), the resolution of the dispute itself rested on a divine response to a test by ordeal or oath.

The king with his council (the Anglo-Saxon *Witan*), was the other decision-making body existing in English society before 1066. The council was a small group of loyal supporters who attended the king, chosen by him as his personal advisors and administrators. The king, wanting to ensure that local assemblies worked effectively and their decisions were obeyed, relied on the oversight of his council members to see to that. He was also ‘the personalization of authority’ and might be called upon personally ‘to look into legal disputes if parties alleged a failure of justice elsewhere’. And the early kings also made written decrees, granted charters, and issued writs. However, none of this was seen as making or reforming laws or changing the way decisions were made. It was seen as affirming and protecting the existing laws of local custom and belief, and reinforcing the system of communal justice.

The people demanded ‘justice’, then as now. A note in the laws of Ine of Wessex, dating from about 690 C.E., refers to ‘justice (right) being demanded before the shire-man’. The local assembly was the forum for answering pleas for justice, in resolving disputes and in making all kinds of other community decisions. There were no judges and no legislators as such. In the local assemblies, as Baker summarizes it, ‘no distinctions could have been made between the processes of adjudication, administration, and legislation’.

### 3. Specialized Courts Emerged

This collective decision-making structure changed over the centuries through a process of increasing specialization and separation. The year 1066 is famous in England’s history as the year when Anglo-Saxon rule came to an end and Norman rule began. William the Conqueror, crowned king on Christmas Day, and his successors, with their well-recorded talent for ‘precise and orderly methods’ of government, centralized administration and stringently enforced royal power. Over time, rather than the king and his council travelling from county to county around England, county representatives were summoned to attend on them at the palace at Westminster.
The main body of the king’s personal council ceased to accompany him around the country and stayed permanently at Westminster. There, it functioned more and more independently, and it expanded, with its members carrying out different tasks with increasingly specialized expertise. For example, the king’s financial administrators settled at Westminster, and began carrying out revenue and treasury business in chambers which became a department called ‘Exchequer’, named after a distinctive checkered table in their chambers.41

The king’s personal council, expanded and increasingly specialized, became the medieval Royal Court or Curia Regis. It was not a court of law but a body of personal administrators and advisors to the king, also settled in the palace at Westminster. To his council the king delegated various aspects of his royal discretion or prerogative – his absolute authority as monarch to make decisions and take actions on behalf of the country. This included authority over ‘justice’ and what became ‘judicial’ matters, such as answering pleas for justice in disputes over rights. The breadth of the ‘prerogative to do justice’ is reflected in a fourteenth century Coronation Oath in which the king swore to do ‘equal and right justice and discretion in mercy and truth’.42 While a king could delegate this authority to do justice, the prerogative always remained in him, as ‘an overriding residuary power to administer justice outside the regular system’.43

This enhanced royal council offered people more than the local assemblies and their communal justice could – more effective processes, more reliable enforcement, better records of their disputes and affairs – while gaining for the king both revenue and control over the social order and welfare. As the reach of the king’s council at Westminster grew over time, recourse to local assemblies and communal practices waned. Within the royal council, the various advisors and administrators developed expertise in specific tasks. From these, over the centuries, there spun off an array of separate institutions: law courts with their expert judges, civil service departments with their experts, Parliament with its elected Commons, and the Prime Minister with his or her personal executive office.

The first ‘state departments’ created this way were Exchequer, noted above, and Chancery, the secretariat run by the Chancellor (usually a bishop or archbishop trained in canon and civil law) – the most powerful member of the king’s council, and appointed and removed at the king’s discretion.44 Courts arose from the royal council in the same manner as Exchequer and Chancery. Just as the king’s financial and secretarial experts became state departments at
Westminster, so the king’s administrators and advisors on judicial or ‘justice’ matters became ‘the Bench’ at Westminster. From this judicial Bench a host of courts spun off, one after another. Common Pleas and King’s Bench emerged first and developed as two separate courts, each with its own jurisdiction, judges, and procedures. The court of Common Pleas (ordinary civil lawsuits) had wide jurisdiction to conduct trials and to correct errors in local justice, and it was ‘the court which more than any other made the medieval common law’. Over time, the old communal justice system gave way to this system of justice carried out by Common Pleas and King’s Bench and a host of other ‘prerogative courts’ that had spun off from the royal council. The authority of all these courts rested on the royal ‘prerogative to do justice’ delegated by the king to members of his council.

Within a century of the Norman conquest, as Baker sums up, ‘the rudimentary court of the Anglo-Saxon kings’, the ancient Witan or royal council, had ‘grown to produce the two great departments of state, the Chancery and the Exchequer, and a judicial system whereby the king’s justice was dispensed regularly by members of his household.’ The ‘deep-rooted’ communal justice system with its local customs was ‘simply absorbed into the new system’ of justice.

4. Expert Judges with their Judicial Process

Specialized advocates and judges arose and evolved along with the royal courts. Judges were originally the king’s loyal personal administrators and advisors. Soon, however, the judges in the royal courts were drawn from a newly developing group of courts’ advocates, increasingly expert and increasingly independent of the king. They became a permanent body of professional experts in the rules of law and judging practiced in their particular court. This small elite of judicial experts created the practices and principles applied in the courts, that is, the judge-made court process and common law.

In their creation of a judicial process and judge-made law, three pivotal developments were the introduction of the jury, pleadings, and reported cases.

The jury arose out of the Norman practice of obtaining information by interrogation; that is, by making solemn inquiries, such as in the surveys of people sworn to tell the truth conducted in the monumental Domesday census compiled in the 1080’s. People were impressed by this effective new method of obtaining information and desired a similar method for trying their
disputes. Kings responded by commanding sheriffs to ‘cause twelve men of the neighbourhood, unrelated to the parties, to come before the court … to enquire into the matter and state the truth therein.’ These jurata were the first jury trials’, and they soon displaced the old methods of proof by ordeal and oath. The jury provided a way of resolving disputes, not by inscrutable ‘divine proofs’ or supportive ‘oath-helpers’, but by the ‘trial of facts’. Jury trials led to the separation of the task of finding facts from the task of stating principles of law relevant to them. And in order for jurors to make a decision, they often needed directions to clarify what facts mattered according to custom or law. Judges began deciding jurors’ questions, and their decisions on them settled principles of law, and these became ‘the common law’.

This new focus, separating facts from principles and applying them to each other, was central in the law and the process created by judges. Baker explains: ‘Human judgment did not play a significant part in the resolution of disputes until the development of the jury as a fact-finding tribunal’, which, ‘by forcing a separation of fact and law, led to the development of substantive principles of law.’ Milsom conveys the historical importance of this separation for the future: “Legal development consists in the increasingly detailed consideration of facts.”

Pleadings evolved, in response to trials by jury, as binding statements of the issues of fact and law in dispute. Once a jury had decided the facts, the principles of law could be argued without the jury, on motions to the judges at Westminster. The motions were argued on the basis of the issues of law stated in the pleadings and the facts found by the jury, as recorded in the judges’ notes of the evidence and jury findings. Thus, the motions turned not on jurors’ but on judges’ assessments of the facts found on the evidence. This led to reliance on judges to decide the facts as well as the principles of law (and thus, to the decline of the civil jury). Judges became experienced in assessing evidence, and they articulated authoritative principles of law based no longer on hypothetical discussions to answer jury questions, but on facts established by evidence at trial. And thus, judges came to exercise the fact-finding as well as the law-stating tasks of trials, and to elaborate and refine both tasks.

Notes were taken of points made by advocates and judges in individual cases; over time, these informal notes became case reports recording decisions and the judges’ reasons for them, and were consulted in other cases for the quality of the reasoning and as ‘evidence of what the
Thus, the method of dispute resolution in the courts changed in the wake of jury trials and pleadings and reports of decisions, from a process based on custom and sacred belief to a process based on human reasoning in facts and principles. This judgment was exercised by experts in the specialized practice of their courts, as a small group of full-time professional judges carrying out the royal prerogative to do justice. Judges initially applied local customs and practices, adapting and unifying them, but soon they were creating and refining principles of law themselves, by finding facts from evidence and applying their own reasoning to them. Their reasoning was developed in debate or ‘argument’ with advocates and among themselves. It was focused on articulating principles of law, ‘a particular system of rules with their own rational coherence’, and relating them to the facts found. Justice was done in resolving disputes in the context of a trial process of ‘the weighing up of evidence and arguments’ by professional judges.

5. Parliament with its Prerogative and Legislative Processes

Similarly to the way judicial tasks separated and then spun off from the king’s council into courts with their judges, and administrative tasks spun off into administrative departments, so the political tasks of governing spun off from the kings with their personal council and the larger councils they convened. Disputes arising in these greater councils led to a long series of battles and political contests between kings and noblemen. One of the most far-reaching early results of these contests was the greater council or ‘First Parliament’ convened in 1265. Given its importance to my thesis, in establishing a distinct political function, I will briefly describe it, noting its context and repercussions.

The Norman kings, in addition to their personal council or ‘inner ring of confidential royal advisers’, sometimes convened Great Councils: ‘large periodic assemblies of magnates’ or leading noblemen (including greater barons and chief members of their council) and clergy (archbishops, bishops, abbots). These Great Councils also became known, by the 1230s, as ‘parlements’ or ‘parliaments’ (from parliamenta in Latin, parler in French, meaning ‘an occasion for talk or discussion’)—initially, a compliant discussion in an occasion controlled by the king. The magnates were obliged to attend and support the king when summoned to a
Great Council, as part of their feudal duties. There is no record of commoners (the gentry of towns or burgesses of boroughs), or even lesser noblemen (the knights of counties or shires, lesser tenants-in-chief of the king, who also were leading members of their local communities), playing any role in early parlements called by kings.\textsuperscript{62}

In the 1200s, barons began rebelling against kings ‘whom they thought were governing the realm badly’, such as by promoting royal favourites and pursuing foreign wars of no benefit to the subjects who were, often with ruthless disregard for custom, ‘dunned to pay for all this’.\textsuperscript{63} Rebel barons took London in 1215, and forced King John to agree to a Magna Carta ‘reasserting the power of custom to limit despotic behaviour by the king’.\textsuperscript{64} Its signing at Runnymede was attended by twenty-five barons and thirty-two clergy.\textsuperscript{65} The Magna Carta famously declared protections under ‘the Law of the land’ that bound the king; it also required consent to new taxes from those to be taxed, and gave the barons a voice in selecting members of the king’s council.\textsuperscript{66} But this document, which became an inspiring model of agreed and customary legal rights in centuries to come, was short-lived in its time: The king had the Magna Carta annulled within weeks, and subsequent weaker versions of it had little such effect in the 1200s.\textsuperscript{67}

Kings continued to pursue unpopular policies, and to convene their parlements to grant the taxes they needed to pay for them. But hostile barons began refusing the king’s requests, and also raising grievances and criticizing his policies. Knights became hostile too:\textsuperscript{68}

Henry III’s government before 1258 had antagonised local interests as much as baronial interests. Local power had gone to the king’s friends, the courts had been used to screw money out of local communities, and extortionate local officials had been given free rein.

Knights began joining barons in refusing taxes.\textsuperscript{69} The parlements shifted from an occasion for compliant discussion to one for ‘political dispute’: By the mid-1200s, it was becoming what historian John Maddicott describes as ‘a political assembly characterized by real debate between the king and his great men’ (about fifty to eighty barons).\textsuperscript{70} And parliamentary confrontations between monarch and rebel barons were accompanied by recurring battles. Rebel barons took power in 1258, led by Simon de Montfort, 6th Earl of Leicester. They convened parlements, which by 1259 had promulgated major codes, addressing grievances over misgovernment and formalizing parliamentary processes and limits on royal power (such as by creating a governing council appointed equally by barons and king, and by requiring three fixed parlements a year to
discuss the common business of the realm and king together’). The intention, says Maddicott, was to ensure parlements were ‘the public voice of the political community’ and political business was ‘not simply settled by the king and a few cronies behind closed doors’. Competing ‘phantom parlements’ were called by Montfort and a resurgent Henry III. Then, in 1264, Montfort’s army defeated the king’s in battle and captured his son.

Next came the brief but far-reaching ‘First Parliament’. It was preceded by a parlement called to prepare a constitution, to which knights were invited (far outnumbering barons) and took part in ‘political affairs at the highest level’, in Maddicott’s words, in preparing a document that responded to the ‘great desire of the counties’ for ‘honest and equitable local government’: It affirmed the 1259 codes, and gave governing power to a baronial council and local power to local representatives. Under this constitution, what became known as ‘the First Parliament’ was convened in 1265. This time, knights and also local gentry from the increasingly wealthy towns were invited – and chosen, not by king’s sheriffs, but by local elections. In Montfort’s assembly were ‘very few magnates, very many friendly churchmen, two knights from each county, and [two] burgesses from [each of] the towns.’ The knights and gentry participated in such political business as deciding terms of a treaty to release the prince, which was declared as agreed upon by ‘the great men and the community of the land’ – the latter, Maddicott presumes, being ‘the knights and possibly the burgesses’.

The Parliament of 1265 thus represents numerous ‘firsts’. It was an assembly to be held on regular fixed dates, not at the king’s discretion. It was enlarged to include lesser noblemen and gentry or commoners. They were elected by their local communities, and thus represented ‘the community of the land’ as distinct from being magnates. They outnumbered the magnates. They were directly involved in the political business of the country. They curtailed the king’s prerogative, asserting customary practices and rights. 1265 is a story of dramatically clashing self-interests, shifting powers in society, and life and death battles, fueled by grievances over ‘twenty years of misgovernment’. 1265 created the model of a governing assembly of two chambers, tenured lords in a House of Lords and elected commoners in a House of Commons, separate from the king and his inner council. 1265 was the first practice of ‘democracy’, in England and medieval Europe, as government involving directly elected local representatives. They were included in ‘the public voice’ of a parliament which Maddicott describes as having
become ‘the periodic focus of the whole political system and the whole political community’. As one interested commentator summed it up quite well:

The men of 1258 and 1265 turned parliament from an occasion into an institution, an institution which they used as the fundamental source of authority for the government of England.

The short life of the First Parliament ended within months, repudiated by Henry III who won a new battle in which Montfort and his son and army were massacred. King Henry then called a Parliament (I now capitalize the term as is customary), and revoked most of the 1265 codes. The ‘ghost’ of 1265 may be seen in Henry’s early Parliaments, as Maddicott points out, but the tradition resumed of assemblies of king and magnates alone, calling knights if money was needed and gentry almost never again, that century. In the 1300s ‘the commons’ began to be summoned regularly. Of course, these gentlemen ‘commoners’ were only a small fraction of English subjects. The development of a representative Parliament was slow and piecemeal. Parliaments of the 1300s ‘looked nothing like the later institution’, and even those for centuries to come remained more aristocratic oligarchies than representative democracies.

In the meantime, the king’s personal council continued as his trusted inner circle of confidential supporters, functioning together as ‘the king in council’. As I have noted, his personal council became the ‘royal court’ or Curia Regis, and later the Privy Council. During the 1300’s, the terms ‘king in Parliament’ and ‘the king’s court of Parliament’ were used for assemblies of the king and parliament, and it became settled that laws could not be decreed by the king alone but must be consented to by both Houses of Parliament as well.

Within Parliament, contests for political power recurred in the 1500’s and 1600’s, now between the king or queen and the Houses of Parliament. Sometimes the monarch controlled Parliament, sometimes the House of Lords dominated, and sometimes the Commons prevailed over the lords and the monarch. Between the courts and Parliament, initially no real distinction was made between decisions of the judges in their courts and the king in Parliament, except that the latter were supreme. In the 1400’s, the king’s ‘court of Parliament’ could still be viewed as “so high and so mighty” that it had unlimited power to grant individual requests for justice: if judges or Chancellor failed to satisfy a litigant, the litigant could petition directly to the king to exercise his personal prerogative to do justice.
Then, in the 1500s, the Parliaments under the Tudor monarchs created a ‘new concept of legislation’, as a way to make and change laws, not simply re-state them.\textsuperscript{94} A ‘Bill’ was drafted, setting out the proposed law on a topic in a carefully-worded and comprehensive general text. The Bill was debated in the House of Commons, and if agreed to by a majority vote, passed as an ‘Act of Parliament’. That was then voted on in the House of Lords, and if agreed to there, it was brought to the monarch for royal assent or veto. Before the 1600’s were out, the monarch no longer had a veto. Today’s legislative process originated here, in this new process developed in the Parliaments of the 1500s. Legislation can be seen as hinted at or inchoate in the \textit{parlements leading up to 1265, then three centuries later coming to life in concrete reality.}

Of course, written decrees of kings are older than legislation, and older than judge-made common law. And they foreshadowed some aspects of legislation (such as preambles, as in the introduction to a code of King Alfred of Wessex in the 800s, which ‘claimed that he and his advisors had studied the laws of Aethelberht of Kent, Ine of Wessex, and Offa of Mercia, together with the Bible and the penitentials of the Church’ before embarking on their task).\textsuperscript{95} However, these documents were not intended to change law, or make law, or be comprehensive. They rested on a foundation of deep-rooted customs, sacred beliefs, and communal practices that they were intended to clarify and reinforce.\textsuperscript{96} Similarly, the written acts of the Norman kings were not seen as changing law but as announcing it. The early acts of ‘the king in Parliament’, too, were seen as recognizing both the existing customary law and the emerging judge-made law, and promising to protect them from interference, even from king and Parliament.\textsuperscript{97}

Thus, Parliament emerged as a separate and independent institution, as the courts had done. It too created its own distinct new process, of making law by legislation. With that, the institutional decision-making picture changed. Initially, there was still no strict distinction drawn between decisions on law by the king and the judges. The king participated in judges’ decisions, and judges were consulted in the drafting of legislation.\textsuperscript{98} But the new process of legislation as a way of making law soon had an enormous impact on the roles of government and court.\textsuperscript{99} It introduced legislation as an effective and comprehensive way to define and respond to social concerns, by making general laws to address them. This expanded and elevated the law-making role of Parliament and curtailed that of judges.\textsuperscript{100} Royal prerogative authority continued but was increasingly circumscribed as well, by both Parliaments and judges, though never eliminated, as I will note in the next sections.
Baker refers to Chief Justice Hale’s mid-1600s view of the judicial and legislative processes. Hale viewed both as making law, but in different ways, which he defined as exercising ‘judicative’ and ‘deliberative’ functions. And he posited a hierarchy between them: He argued that, since both functions had the effect of making law, they could not be exercised independently; one had to be the final authority on the law, and that one had to be Parliament because the final authority to resolve disputes should rest in the authority to make law, and not *vice versa*. These ideas, that there must be one final authority over the law, and it must be the government, are echoed in contemporary complaints about the anti-democratic effects of judicial review (as I discuss in the next two chapters). The critical psychology approach offers an alternative to these ideas (as I introduce and explain in Part Three).

A comment Baker makes effectively highlights the different reasoning of courts and legislatures: ‘Common lawyers liked to think of their law as an unchanging body of common sense and reasoning’, articulated by judges in a ‘slow revelation and refinement of doctrines essentially immutable’. This attitude did not reflect reality, as Baker points out. But it is partially accurate. Clearly, judge-made law was *not* immutable or unchanging or always slow in its development. But it *was* shaped by its own process into a distinct type of reasoning. Judges confined themselves to a specific framework of ‘common law reasoning’ – a framework that did not confine legislators. Legislators may make laws ‘irrationally or unreasonably’, Baker also comments, which is a provocative way of pointing out that legislative legitimacy does not turn ultimately on factual or logical acuity. In Part Three, in distinguishing these decisions from a critical psychology perspective, I will suggest that, unlike judicial decisions, political decisions may rest on values that defy principled logic but are not, for that, unreasonable.

6. ‘The Explosion of 1616’

With legislation added to the prerogative, and the consequent shift in the relationship between ‘the king in Parliament’ and the courts, came conflicts between them. These notoriously culminated in ‘the explosion of 1616’ between two pre-eminent spokespersons for each institution, King’s Bench Chief Justice Coke and the king’s Chancellor, Lord Ellesmere.

Two points about this confrontation are relevant to the critical functions approach. First, conflicts recurred between court and government (both Parliament and the king in council) over
the supremacy of their respective law-making authorities, judicial, legislative, and prerogative. Second, the conflicts led to polarizations and uneasy truces, and sometimes on to refining their decisions and processes. The Explosion of 1616, as we shall soon see below, resulted initially in a polarized and one-sided truce; later, came a strengthening of the judicial process, but within a narrower sphere, the expansion of the legislative sphere, and the curtailing of the prerogative.

As described above, by the 1300’s, Common Pleas and King’s Bench had emerged as separate institutions with their own judges and decision-making process. Judges had begun developing special expertise in this process – establishing their court’s procedures and principles for doing justice in resolving disputes – thereby creating both the common law and the judicial process they created it with. At the same time, pleas for justice were still being made directly to the king, in petitions asking him to personally exercise his ‘prerogative to do justice’. Usually, the king referred these petitions to the law courts. However, petitioners complaining of injustice in the courts themselves might be referred by the king to the Chancellor, to whom he had also delegated the prerogative to do justice. But the Chancellor, as both the representative of the Church and the king’s powerful ‘first minister’, combined his own ‘divine’ authority with the king’s ‘divine right’ to govern by prerogative. This powerful combination of divine authorities can be seen in Chancery’s rules of equity, justified by the Chancellor’s personal ‘conscience’ and considered to ‘transcend’ the mundane principles and procedures of the common law courts.

From the 1300’s to the 1600’s, more and more cases were diverted from the common law courts to Chancery. Judges, alarmed by this royal and religious intrusion into the authority of their courts, responded in a number of ways. They responded with improved procedures to encourage litigants to bring cases to them. They responded by asserting their authority to do justice over the authority of those acting on the royal prerogative, including the Chancellor and the king himself. And they responded by developing new judge-made laws and processes, creating principles of law that gave remedies in individual disputes brought to their courts, even against the royal prerogative. The judges’ responses resulted in two powerful new judicial creations: a ‘due process of law’ principle and a range of ‘extraordinary’ remedies that judges used to oversee and impose standards on the exercise of prerogative power.

The ‘due process of law’ doctrine was based on the royal promise, famously made in the Magna Carta, that no free man would be deprived of life, liberty, or property ‘except by the Law
of the land.'

Citing that promise, common law judges struck down exercises of prerogative power that they found did not comply with the law of their courts, that is to say, their law, the common law the judges made. This doctrine underlay the ‘extraordinary’ common law remedies (astutely named ‘prerogative’ remedies) judges created in the 1500’s and 1600’s. And they were extraordinary: If a complaint was made, for example, of abuse of power by an official in imprisoning a suspect, a judge could issue a writ of habeas corpus, demanding the prisoner be released unless the official proved that the imprisonment complied with common law ‘due process’. In doing this, judges made new laws. They protected rights that before rested on the king’s protection of customs. They set minimum standards of procedural justice. They developed a principle of ‘the rule of law’ that courts would maintain over the authority of kings and governments. And they did this by using their judicial process to exercise an authority – supervising officials appointed to carry out government tasks – that had once been exercised by kings (as a matter of prerogative discretion) and that was claimed by Parliament (as a matter of executive and legislative authority). Judges imposed their judicial authority on the political decision-making authority.

By the 1600’s, this brought the judiciary ‘into head-on collision with the Crown on several occasions’, culminating in ‘the explosion of 1616’ between Chief Justice Coke and Chancellor Ellesmere.

Coke asserted that judges had the authority to strike down legislation they found to be ‘against common right and reason, or repugnant, or impossible to perform’. He also claimed they had the authority to remedy ‘misgovernment’ and ‘extrajudicial’ wrongs and oppressions. He championed his court’s use of common law remedies to supervise government officials, in all prerogative courts and tribunals, including Chancery. And he ultimately told King James that kings themselves no longer had any say in the judgments of the law courts, having delegated to the judges all their prerogative judicial power. Ellesmere attacked Coke’s claim for judges to say what laws were right and reasonable, which he insisted was only for ‘the king in Parliament’. He criticized Coke’s assertion of an alternate absolute supremacy, of judges rather than the king in Parliament. He recognized it to be a legitimate judicial task to correct ‘impossibilities or direct repugnancies’ in legislation, but insisted that it remained for the king and Parliament to decide whether the laws they made accorded with ‘common right and reason’.
fuelled the intensity of the dispute by turning it into a sacred matter, treating any criticism of his view as ‘an attack on the monarchy as established by God.’

In 1616, the dispute was referred to King James. The judges were called before the King in Council to ‘say whether they would stay a suit if the king so ordered.’ Coke alone refused, answering that ‘when that case should be, he would do what should be fit for a judge to do.’ He was shortly afterwards removed from office, and a royal decree was issued authorizing the king’s Chancellor to hear cases that the common law courts had decided. However, this was not the lasting resolution. Ellesmere’s successor as Chancellor, Francis Bacon, reconciled with the judges. Over the course of the century, the common law system with its judge-made law and process prevailed over Chancery, canon law, and European civil law. By the end of the 1600’s, the decree giving the Chancellor authority over common law courts had been struck down as invalid. And the independence of judges had been established. Judges’ vulnerability to political pressure rose and fell during the century, as their terms of appointment shifted between ‘at the king’s pleasure’ and ‘for life’, but judicial independence gained acceptance as a valuable principle, and by 1700 legislation was passed making judicial appointment irrevocable ‘during good behaviour’.

Baker views the dispute between Chief Justice Coke and Chancellor Ellesmere as ‘largely caused by a clash of strong personalities’. But I would stress that it was also something more, which is reflected in its results. It was a conflict between different types of claims to law-making authority, one in common law courts with their judicial process, the other in Parliament and the king in council (today’s legislature and executive) with their political processes of legislation and prerogative discretion. The underlying nature of this conflict is integral to understanding why an always-uneasy truce followed 1616. The fundamental significance of 1616, I will argue in Part Three, lies in its crystallizing the inescapable potential opposition between judicial and political decisions, and the ongoing pressure to reconcile them on any contested topic. Australian Chief Justice J. J. Spigelman emphasizes this legacy in his recent address to a legal history society:

The conflicts between Coke, on the one hand and Ellesmere and Bacon on the other, would be repeated in the next generation …. Similar issues would be engaged between Blackstone and Bentham and between Jefferson and Marshall. They feature in contemporary debates over judicial activism, bills of rights, the scope of judicial review and the principles of statutory interpretation.
It is precisely this conflict between judicial and political decisions – recurring today in modern democracies, and igniting today’s debates over ‘judicial activism’ and the role of each institution in ‘the dialogue between courts and governments’ – that I examine in the next chapters in Part One, and will address with a critical psychology approach in Part Three.

7. Later Conflicts and Developments

Political and judicial processes continued to develop and change, in the tumultuous 1600s and the centuries following. Legislative law-making escalated in pace and scope. Judicial decision-making was strengthened with judicial independence, but was articulated as falling within a narrower sphere and as requiring deference to clear legislation. The prerogative was exercised widely when the 1600s began, to appoint and dismiss judges and take other executive actions, subject to the new common law of due process and extraordinary remedies; by the close of the century it could no longer be used to dismiss judges or to veto legislation.

In the 1700’s, legislative reforms of the judicial system focused, not on sweeping change, but on remedying problems in practice, particularly in evidence and pleadings. Courts had developed increasingly unified procedures and judicial views. Judges had security of tenure. Their common law system had incorporated Chancery’s rules of equity and prevailed over other systems of law. They were scrutinizing government authority with judge-made principles of ‘due process of law’ and ‘fundamental justice’. Governments, in the meantime, functioned in a Parliament that was still more aristocratic oligarchy than democracy. Of a population nearing ten million in the late 1700s, only about 3% – 300,000 wealthy men – had the right to vote. In Parliament, the majority were there due to social position or connection: in the House of Lords sat about 200 peers by right of birth, and about 200 of 588 members of the House of Commons gained their seats by ‘aristocratic patronage’. Women were barred from even entering the House of Commons. Social historian Amanda Foreman emphasizes that:

Britain was a democracy in the sense that every five years a general election took place …. However …. This was the age of oligarch politics, when the great landowning families enjoyed unchallenged pre-eminence in government.

Foreman goes on to explain that the aristocracy controlled most electoral boroughs, and describes machinations that recreated key circumstances of 1265:
While the two hundred or so peers sat in isolated splendour in the Lords, their sons, cousins, brothers-in-law, friends, and hangers-on filled up the House of Commons .... Since the right to vote could only be exercised by a man who owned a property worth at least forty shillings, wealthy families would buy up every house in their local constituency. When that proved impossible there were the usual sorts of inducements or threats that the biggest employer in the area could employ to encourage compliance among local voters. Land conferred wealth, wealth conferred power, and power, in eighteenth century terms, meant access to patronage, from lucrative government sinecures down to the local parish office ....

In the 1800’s, another great wave of sweeping legislative law-making took place. First came ‘individualist’ legislation, as the jurist Dicey called it, promoting individual rights, carrying on the prior century’s ethos. Then came a wave of ‘collectivist’ legislation, influenced by utilitarian philosophy, promoting group rights and state protections and vastly extending the role of Parliament. The legislative initiatives included major reforms in the judicial process. These were accomplished on the recommendations of law commissions and Parliamentary committees, and drafted in consultation with judges. The new legislation unified the courts, reformed court pleadings and procedures, and permitted civil trials by a judge without a jury. Juries became exceptional in civil trials and the task of assessing evidence to decide facts was increasingly left to judges alone.

In government, with the gradual extension of the right to vote and the growing influence of a democratic ideal, the authority in Parliament of monarchs and appointed Lords was replaced over time by the authority of elected politicians in the House of Commons, with the Political Party that commanded the majority forming the government, and that Party’s leader becoming Prime Minister. The king’s prerogative, increasingly circumscribed by courts and Parliament but never eliminated, became the Prime Minister’s. The king’s council became the Privy Council, as an inner circle or private council of advisors selected by the Prime Minister from the elected members of Parliament.

The judicial and political processes established in England were adopted, with some modifications, by the United States in 1787 and Canada in 1867 (as I briefly outline in the next chapter, in describing recurring conflicts in both countries). In Canada, the same judicial process created by judges in England is (with one exception) carried out in the courts.
same political processes are carried out in Parliament – descendant of the great councils or *parlements* of the 1200s – in which the government is formed by the Party supported by the majority of elected politicians, and its leader is Prime Minister, the head of government.\textsuperscript{146} Legislative decisions are made by the elected House of Commons, with the appointed Upper House or Senate having authority only to provide ‘sober second thoughts’ for the Commons to consider.\textsuperscript{147} Executive decisions (including prerogative ones) are made by the ‘Prime Minister in Cabinet’, that is, at the discretion of the Prime Minister in consultation with his personal executive or inner council of advisers, made up mainly (but not exclusively) of elected Members of Parliament. This executive authority includes the power to make decisions of enormous import to society, such as creating powerful boards and tribunals, appointing and dismissing their members, and entering into major public contracts and projects.\textsuperscript{148} The Prime Minister is supported as well by a personal ‘political staff’ of unelected Party loyalists, called the Prime Minister’s Office. In Canada, the Privy Council is the head of the civil service and its expert liaison with the government.

Recently, a Canadian Senator invoked ‘the high court of Parliament’ in railing against the ‘contemptuous’ actions of a Parliamentary Budget Officer who asked a court to order Parliament to produce spending records he required to carry out his independent audit.\textsuperscript{149} If there are ‘problems’, the Senator insisted:\textsuperscript{150}

\begin{quote}
[C]orrective action belongs to the Houses and to the members …
[the Parliamentary Budget Officer has] subjected the high court of Parliament to an inferior court which we respect, but admit no power of any court to trench on Senate internal proceedings.
\end{quote}

Here are ancient words, resurrected to assert an ancient prerogative of an unelected elite, as supreme over the judiciary, echoing past conflicts that still loom today.

8. **Losses and Gains with Differentiated Institutional Processes**

To conclude, I will summarize what I have identified as the distinguishing features of the judicial and political decisions created by the courts and governments that emerged in the course of English history, and I will note losses and gains that came with this differentiation.
In courts, judges developed their own judicial decision-making process, as the way to ‘do justice’ in resolving disputes under ‘the law of the land’: In trials of evidence given by witnesses and reasoned arguments by counsel, facts were found and conclusions of law drawn from them (including in ascertaining, interpreting, and formulating that law), by judges as experts in this process. These criteria, articulated by judges as justifying their decisions, became the familiar hallmarks of court trials: Contested issues of fact and law were precisely defined in pleadings, framing pleas for justice. Facts were ‘proved’ by evidence given by witnesses, whose testimony could be tested by cross-examination and challenged by other witness testimony.¹⁵¹ Reasons were given in the particular ‘rational coherence’ of a shared or common erudition applied to the facts. Trial rules and practices were repeatedly reformed, specifically in order to improve this distinct judicial decision-making process.

Governments developed two ways of making political decisions. In the legislative process, a general text was drafted to comprehensively address a topic, and debated and voted on by the elected politicians in Parliament. In the executive process, incorporating the residual royal prerogative, decisions came to be made in the personal discretion of the Prime Minister, typically after consulting with a Cabinet of elected Ministers and a private Executive Office of unelected partisan supporters. With the extension of the franchise and the authority to govern resting on electoral support, legislative and executive decisions came to be justified on the same ultimate foundation: the will of the citizens, demonstrated through democratic processes, and primarily through votes in periodic general elections. Parliament became, in Maddicott’s phrase, ‘the public voice’ of ‘the whole political community’. Unlike judicial decisions, political decisions need not rest on well-proved facts, logical acuity, or justice. Political decisions are justified by popular support, and they require politicians to carry out ‘the art or science of government’ on the citizens’ behalf.¹⁵² They may seek to do justice, but may just as well seek, for example, to increase prosperity, or to raise funds, or to provide security or liberty – all issues of concern to thirteenth century parlements and to Parliaments today.¹⁵³

Thus, courts and governments emerged as separate institutions which created their own distinct types of specialized decisions – ‘judicial’ and ‘political’. Their decisions differ from other rational decisions (as I elaborate in Parts Two and Three) – from aesthetic choices, philosophical speculations, visionary ideas – and from each other. Courts and governments are not two institutional decision-makers applying the same rational criteria in addressing a topic.
Their differentiation and divergent specializations over the course of history are clear. Clear too are their recurrent challenges to each other, and variations in the results. At times their conflicts resulted in polarizations and competing supremacies (such as sixteenth-century judges claiming to have ‘all the king’s judicial power’, and Parliament claiming ‘transcendent and absolute’ authority over the law in all circumstances). At times they resulted in new judicial doctrines (such as the ‘extraordinary remedies’ to control prerogative power), or extensions of political power (as in the expanding legislative and executive spheres and the assertion of the supremacy of ‘the democratic voice’), or new guiding principles (such as the ambiguous truce reached in the tension between the principles of ‘Parliamentary supremacy’ and ‘judicial independence’).

Identifying the different types of decisions made by courts and governments as the distinction between them that is definitive and consistent, shifts the focus away from viewing them simply as competing authorities or supremacies. It also shifts the focus away from such dichotomies as ‘judicating’ versus ‘deliberating’ (Hale’s distinction) or ‘interpreting’ versus ‘making’ law, away from assigning different topics to each, such as ‘individual rights’ versus ‘the common good’, and away even from ‘dispute resolution’ versus ‘social policy’. It directs the focus instead to the different contribution each decision is able to make to any topic. My point is not that either is superior or sufficient, but, as I will argue in Part Three, that each is unique and indispensable.

Gains and losses came with the differentiation of specialized judicial and political decisions. They came inevitably with the transformation of an undifferentiated communal system, ‘doing justice’ based on custom and sacred belief, into a system of separate institutions in which appointed judges and elected politicians carried out different decision-making processes requiring different types of expertise.

Among the losses, it is easy to imagine the sense of belonging and cohesion in a small community that shared customs and beliefs, and gathered to make communal decisions grounded in tradition and divine guidance rather than in the limited and fallible human intellect. It is easy to imagine, too, people in such communities being more understanding of each other, and less inclined to harsh and unequal treatment, than people can be in diverse urban communities. And yet, it is also easy to imagine the precarious position of anyone in such a community who was disliked, or who questioned an accepted custom or belief or the wisdom of the lord or elders, or
disputed a popular or favoured account of facts. Justice might depend on having friends willing to act as oath_helpers, or on pleasing an elder who could promote a love-day or select an ordeal. Under the threat of expulsion as an unprotected outlaw, the pressure to conform and appease might have been enormous.\textsuperscript{154}

Another loss is a sacred dimension and symbolic ritual in community decision-making, shared by its members and experienced as meaningful to them. No doubt religion and personal beliefs about a transcendent reality played a role, and even a major role, in the early ‘common erudition’ of judges, in prerogative decrees, contests for political power, parliamentary debates and votes. However, this included dimension, too, was separated out in the differentiation of community decision-making, and not developed in either the judicial or the political institution, but in independent religious institutions which created their own processes based on divine revelation. Their story parallels in this way that of courts and governments, and can be similarly approached from a critical psychology perspective based on Jung’s functions theory: Religious decisions provide the distinct viewpoint of yet another indispensable conscious function, and their conflicts with judicial or political decisions raise the same need for a continual dialogue or interplay rather than polarization. I do not address this topic in my thesis – it requires a thesis of its own – but I do discuss it in Chapter 10, where I canvass further topics to which the critical psychology approach offers an important new perspective. The point I make here is the loss of meaningful sacred beliefs and rituals, when separate specialized processes emerged from the inclusive communal decision-making process of England’s local folk assemblies.

The gains include, I will argue, the ability to extend the rational grasp of a topic that is contested in society, through courts refining facts, principled logic, and justice relating to the topic, and governments refining shared values relating to it. The emergence of specialized court and government decisions reflects a process of separation and differentiation, enabling each institution to provide an increasingly refined decision within a narrower framework or set of criteria. This differentiation process, according to Jung’s functions theory, as I will explain, is a necessary first step in developing rational consciousness. However, this important first step of differentiation comes at a high cost. It comes at the risk of a specialized decision ignoring or no longer appreciating the criteria now outside its framework (such as, in a judicial decision, criteria for developing shared values and future priorities, and in a political decision, criteria for proving facts, and in both decisions, criteria for a sacred dimension), which typically leads to polarizing
and rejecting such criteria and decisions that are based on them, and increasingly narrow and rigid specialized decisions. The indispensable second step, required to avoid this and to gain the benefit of differentiation, as I will also explain, is to continually re-engage in an interplay or dialogue between the specialized or ‘complementary opposite’ viewpoints of the distinct decisions, rather than isolating and polarizing them.

Another gain from the differentiation of judicial and political decisions is that it brings to the fore the idea that certain skills are needed for making each type of decision, and that certain biases impede them. In other words, the distinct decision-making processes that courts and governments established are what identified the specific skills needed for making either decision, and raised the concern about biases that could interfere with exercising those skills well.

I conclude this chapter by underlining that courts and governments became separate institutions which created their own processes for making their decisions, distinct and different from each other, that their decisions recurringly challenged each other, and that these conflicts led sometimes to stymieing polarizations and sometimes to mutual refinements.

The significance of these developments will be explained in Part Three, where I apply Jung’s functions theory as a critical psychology approach to judicial and political decisions. There, I will argue that the significance rests in the ability these two institutions have to refine each other’s decisions and to differentiate the rational grasp of a contested topic. They are able to do this because different conscious functions are decisive in each decision. This ensures that distinctly different and complementary rational viewpoints can be developed in each one, able to challenge each other effectively if they conflict on any topic, while their complementarity ensures there will be pressure to reconcile their conflicting decisions, and in their effort to do that they can refine each other’s decisions and differentiate the rational grasp of the contested topic. Thus, I will argue, the most significant distinction between judicial and political decisions is the different type of specialized rational viewpoint each is able to develop and provide.

Summary

In this chapter, I presented a broad historical overview and explained my purpose in presenting it, which is to show that in the characteristic decision-making processes created in courts and governments, distinct rational criteria became decisive in their decisions and different
From each other’s. I defined my terms and explained that I excluded issues of bias and skill in order to focus more clearly on the conscious structures or processes of the decisions themselves.

From early folk assemblies with their communal justice system and the king with his personal council, I described the slow emergence of separate court and government institutions. In courts, I described how council members overseeing ‘justice’ matters became expert judges, and developed a unique method for making and justifying their decisions, by conducting trials of evidence given in witness testimony and reasons argued on the basis of ‘common erudition’. I noted the roles of juries, pleadings, and case reports in creating this unique judicial process. In governments, I described how the king’s Witan or personal council became an inner executive, in which the monarch (later, the Prime Minister in Cabinet) made executive decisions in his or her discretion, based on an ancient Royal Prerogative. I described how the larger Great Councils or parlements convened by kings became Parliament, with its House of Commons making decisions by legislative enactment. I noted the impacts of ‘The First Parliament’ in 1265 and the unique ‘new concept’ of legislation created in the Tudor Parliaments of the 1500s. I explained that, over the course of time, government decisions (both prerogative and legislative) came to depend ultimately on the will of the citizens, expressed by their votes in periodic general elections, and carried out by their elected representatives in Parliament.

I described clashes over the centuries between these law-making authorities, such as the early contests between kings and rebel barons, and then Lords and Commons, and the protracted conflicts between decisions of common law judges and king’s chancellors, culminating in the ‘ Explosion of 1616’ between the king in Parliament and an eminent Chief Justice. These recurrent clashes resulted sometimes in one-sided or stymied polarizations and sometimes in uneasy truces and new developments: I noted the alternating victories of kings, nobles, and commoners; the sweeping legislative process that curtailed judicial and prerogative processes; the judge-made law and extraordinary remedies that curtailed the legislature and prerogative; the dismissal by prerogative order of a Chief Justice who asserted final judicial authority over ‘the law of the land’, and the somewhat inconclusive compromise forged in the dual principles of the supremacy of Parliament recognized by the courts and the independence of the judiciary legislated by Parliament. In the course of these events, legislative and judicial processes were strengthened and refined, and the prerogative was whittled down but never eliminated.
I concluded by noting losses that came with the transformation of an inclusive and undifferentiated communal decision-making system based on local customs and beliefs, into a system of separate institutions making new types of decisions based on human reason exercised in varied but specific ways. I summarized features of judicial and political decisions which I suggested are characteristic, consistent, and decisive, and which distinguish them as specialized decisions, unique and different from each other and from other types of rational decisions. This distinction shifts the focus, I stated, from seeing two competing supremacies over the law on any topic, to seeing two unique contributions to it. And I noted gains, underlining the importance, from the critical psychology perspective I will introduce, of the ability to identify and hone the specific skills required for each decision, to identify unwanted biases in them, and to refine and extend the conscious grasp of a topic, in institutional decision-makers and in society as a whole. Finally, I briefly previewed the significance of this overall historical development from the perspective of Jung’s functions theory and the critical psychology approach I will introduce.

In the next two chapters of Part One, this historical framework is elaborated – in Chapter 2 with examples of more recent conflicting court and government decisions in the American and Canadian contexts, and in Chapter 3 with the legal theory perspectives of two leading scholars on the dialogue between court and government in the Canadian Charter context. In Part Two, this legal and historical framework will be temporarily set aside, while I introduce Jung’s functions theory as a psychological approach to understanding conscious functioning and to distinguishing different types of rational decisions and their roles in developing rational consciousness. Then in Part Three, I will return to this legal and historical framework, to apply Jung’s theory to it as a critical psychology approach to decision-making in courts and governments. There, I will argue for the wisdom of deliberately maintaining and refining the distinction between judicial and political viewpoints on any contested topic, and applying them to each other as complementary opposites, so that they do not become polarized and unrelated, but challenge and refine each other’s viewpoints, and through them, differentiate the overall conscious grasp of the topic.
Chapter 2
Recurring Conflicts and Consistent Justifications

The meeting of two personalities is like the contact of two chemical substances: if there is any reaction, both are transformed.

C.G. Jung

In this Chapter, I carry forward my overview of English history with examples of conflicting judicial and political decisions in the more recent history in the United States and Canada, starting with the American context and then turning to the Canadian. I focus on the conscious criteria articulated by courts and governments to justify their respective decisions, and I do this to present clearly the institutional decision-making framework to which I will apply, in Part Three, a critical psychology approach based on Jung’s functions theory.

1. Conflicting Decisions in the United States and Canada

There are four basic points I use these examples to make. First, the same phenomenon of conflicting judicial and political decisions recurred in the American and Canadian contexts as in the English context, despite differences in constitutional structures; constitutions cannot fully explain the source of the recurring conflict. Secondly, I show a range of outcomes of the conflicts. Sometimes the judicial and sometimes the political decision prevailed, and sometimes there was a prolonged polarization, and the outcomes did not consistently turn on courts protecting rights: Rights were protected sometimes by courts, sometimes by governments, and sometimes courts rejected government protections of rights, including rights of vulnerable minorities. Thus, judicial protection of such rights also cannot fully explain the conflicts.

Thirdly, I note examples of the same criteria noted in my overview of English history, being articulated by judges and politicians to justify their decisions. Both invoked ‘the rule of law’ – and the distinct criteria of their own decision-making process in stating the law. Judges
articulated facts, principled logic, and justice as the basis for their judicial decisions on a topic, never treating these criteria as irrelevant. Politicians justified their political decisions (legislation passed by an elected Congress or Parliament, and prerogative or executive orders of President or Prime Minister), ultimately, on the will of the citizens demonstrated through democratic processes, never treating this as irrelevant. I suggest that this is the consistent and decisive distinction between the decisions of courts and governments, and that their recurring conflict has its source in the distinctly different criteria which justify their decisions.

The fourth point I make goes back to the touchstone of my responses to Borrows’ lecture, and the justice that courts could do. I note instances where I suggest courts failed to rigorously carry out the distinct process articulated to justify their decisions. I suggest there are instances of equivalent failings in political decisions. And I point out that, because distinct criteria are stated as justifying each unique type of decision, it is possible to identify specific skills wanted in them and specific biases unwanted in them.

In concluding, I underline that this distinction between judicial and political decisions has a history as old as the emergence of the separate institutions, and as recent as the latest conflict between them. It is a decisive, consistent, and highly significant distinction, according to the functions approach which I will introduce and apply in Part Three, which I briefly preview.

With respect to my sources, as in my historical overview, I rely in this overview on scholars in the field, as well as my reading of the cases. Again, I make my own selection as to what features are significant and I present my own emphases and critiques. To legal readers, these sagas of conflicting decisions are familiar; what will be new is my emphasis on features that are typically acknowledged but glossed over without deeper reflection on their distinct roles in conscious, rational decision-making. As noted, I explain the significance of the features, and the importance of recognizing and developing them, in Part Three, when I introduce and apply to them a critical psychology perspective based on Jung’s theory of conscious functions.

2. Conflicts under the American 18th Century Constitution

The United States and Canada were established almost a century apart, in 1776 and 1867, and their different constitutions reflect to some extent their different social contexts. The United
States became a nation by winning a war of independence, and in a social climate infused with a spirit of individualism and freedom, including freedom from government control.\textsuperscript{157}

The American Constitution, adopted in 1787, sets out a governing structure consisting of a legislature, an executive office, and a court system at both national and state levels.\textsuperscript{158} It declares that the Constitution and the laws made pursuant to it are ‘the supreme Law of the Land’, and to amend it requires more stringent or ‘super majority’ votes.\textsuperscript{159} A Bill of Rights was added in 1791, in ten constitutional amendments protecting a range of rights from government interference.\textsuperscript{160} Three rights have featured prominently in conflicting decisions:\textsuperscript{161} The First Amendment declares that the legislature ‘shall make no law’ abridging the rights listed (civil rights such as freedom of religion, speech, assembly). The Fifth prohibits interference with life, liberty, and property, except by ‘due process of law’. The Ninth protects a general category of unlisted ‘other rights’ which are ‘retained by the people’.

The American Constitution is silent on the respective authorities of courts and governments to state ‘the supreme Law of the Land’. No express power is given to courts to reject duly made executive and legislative decisions of governments, or to governments to reject decisions of the highest court.\textsuperscript{162} However, in its decision in Marbury v. Madison in 1803, the United States Supreme Court established decisively the relationship between executive, legislative, and judicial authorities.\textsuperscript{163}

The issue in Marbury v. Madison was whether the Court could order President Jefferson to honour a promised patronage appointment. The Court held it could not, exempting executive authority from judicial scrutiny, as one of the ‘important political powers’ which a President is free to exercise in his discretion, ‘accountable only to his country in his political character, and to his own conscience.’\textsuperscript{164} The case is better known for Chief Justice Marshall’s assertion of the Court’s authority over legislative decisions. Jefferson had not only claimed unfettered executive power but also that a President could act on his own interpretation of the Constitution and was not bound by the Court’s.\textsuperscript{165} On the contrary, Marshall USCJ held: ‘It is emphatically the province and duty of the judicial department to say what the law is.’\textsuperscript{166} He reasoned that to apply laws requires judges to resolve conflicts between them and the Constitution, and this requires judges to interpret the laws and the Constitution as ‘the very essence of the judicial duty’.\textsuperscript{167} He also reasoned that final Court authority over the law was necessary to ensure ‘a government of
laws and not of men’, and prevent Congress and the President from establishing an
‘omnipotence’ that would ‘subvert the very foundation’ of the nation.168

Little opposition was raised to the Court’s decision.169 Marbury v. Madison thus settled
early and firmly a hierarchy of authorities in the United States: The head of government has
unfettered ‘political power’ to make executive decisions, exempt from judicial scrutiny, while
the Court has final judicial authority over the legislature ‘to say what the law is’.

Conflicts recurred between court and government in the centuries since Marbury v.
Madison. In some of the most dramatic confrontations, they challenged each other’s decisions
on the law respecting poor workers, black Americans, and women. These conflicts had varying
outcomes or ‘final says’, and various criteria were articulated to justify the judicial and political
decisions. I will very briefly describe these sagas to make these two points clear.

The saga over workers’ protection laws began in the late 1870’s. Governments passed
laws to regulate working conditions, and the Court struck them down, one after another, for fifty
years.170 In Lochner v. New York in 1905, for example, a statute limiting bakery work to ten
hours a day was struck down as curtailing employers’ contractual ‘liberty’.171 Congress sought to
amend the Constitution to permit such social welfare laws, but failed to gain the super-majority
required.172 Its protective labour policy came to a halt. Even in the Depression, the ‘New Deal’
legislation enacted by President F.D. Roosevelt’s government, to carry out an election promise to
help millions of jobless poor, was struck down by the Court. Complaints escalated that judges
were dictating social policy.173 In the impasse, Roosevelt criticized the judges for interpreting
the Constitution according to their own personal views, thus imposing the rule of men and not
law, and he made a veiled threat to enlarge the Court and appoint additional judges sympathetic
to the government’s policy – a faint echo of King James’s response to an uncooperative Chief
Justice in 1616.174 The Court promptly reversed its decisions. In West Coast Hotel v. Parrish in
1937, a divided Court granted a maid’s claim to be paid a minimum wage set by statute.175

I want to highlight that the majority judges in West Coast Hotel pointedly articulated new
facts (my emphasis) – a severe Depression, a widespread enactment of this type of protective
legislation – and reasoned that these facts showed ‘a deep-seated conviction’ on the part of state
governments that workers were being exploited.176 And they reasoned that governments were
entitled to act on that conviction by pursuing a policy to further ‘the public interest’ by protecting
women and children from unscrupulous exploitation, regardless of whether courts thought the policy was wise or would be effective:¹⁷⁷

The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out this policy of protection. … [W]ith the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. … times without number we have said that the legislature is primarily the judge of the necessity of such an enactment …. 

Thus, the Court articulated new facts as justifying its changed decision. It also distinguished the government’s decision as a ‘policy’ decision furthering ‘the public interest’, lying outside the competence and authority of courts – and legitimate as a political decision even if, from a judicial perspective, it might be ‘irrational and unreasonable’.¹⁷⁸ The Court did not, however, make any further reference to the political or democratic basis for the government’s decision, including election campaign promises.¹⁷⁹

Another saga of confrontations and reversals between governments and the Court followed the now infamous judgment in *Dred Scott v. Sanford* in 1857, in which the Court upheld a slave-owner’s claim and struck down a law banning slavery, as an unconstitutional restriction of the ‘property’ right which it interpreted as including the right to own slaves.¹⁸⁰ President Lincoln, who had sought to define the Court decision as binding in that private dispute but not dictating policy ‘affecting the whole people’, strongly defended ‘the majority principle’ against ‘the rule of a minority’, within constitutional limits, and the supreme legislative authority of Congress to make laws based on majority ‘opinions and sentiments’.¹⁸¹

No foresight can anticipate nor any document of reasonable length contain express provisions for all possible questions. May Congress prohibit slavery in the Territories? The Constitution does not expressly say. … From questions of this class spring all our constitutional controversies, and we divide upon them into majorities and minorities. … A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. ... Unanimity is impossible. The rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left.
The judge-made slavery right remained until the Civil War victory enabled the government to amend the Constitution in 1870, to prohibit slavery and guarantee the vote and ‘equal protection of the laws’ regardless of race. But narrow judicial interpretations limited these rights, until 1954 when the ‘Warren Court’ in *Brown v. Board of Education* interpreted the ‘equality’ right as prohibiting racial segregation and requiring schools to be integrated. The judgment was widely opposed and strongly resisted; governments attempted to pass laws curtailing racial integration by Court-ordered busing, and many schools ignored the Court. But Warren USCJ, echoing Marshall USCJ’s assertion of the Court’s final authority to ‘say what the law is’ and declare ‘the supreme law of the land’, forcefully maintained the judge-made integration right, and courts enforced it by issuing specific orders to compel bussing and to admit black students.

In this saga, I want to emphasize Lincoln’s definition of legislative law-making authority in a democracy, resting not simply on ‘the public interest’ but more precisely on the majority will, or ‘popular opinions and sentiments’, within constitutional limits. And I want to note the unpopularity of the Court’s decision, which fuelled civil disobedience and political opposition, and a prolonged polarization between Court and government institutions, as did other civil rights formulated by the ‘liberal activist’ Warren Court. This raises the question of how a Court in such a case should approach the scrutiny and articulation of two distinct criteria: the facts respecting citizens’ shared values on the topic and government efforts to develop them, and the requirements of justice on the topic. I will return to this point in Part Three, when I examine judicial and political decisions in ‘pioneering’ cases, from the perspective of Jung’s functions theory. There, I will argue that if the ‘democratic will’ is in issue, the political task is to expertly ascertain and develop shared values among the citizens, and avoid merely galvanizing emotions, while the judicial task is to ensure, in facts, principled logic, and justice, that the government has reasonably carried out this expert political task, including in any response it makes to a necessary preliminary or pioneering judicial presumption about citizens’ values.

Conflicting decisions on women’s suffrage followed a somewhat similar course. Early Court decisions upheld the long-standing exclusion; it was political action and election results that led progressive governments to pass a constitutional amendment giving women the voting right in 1920. On the other hand, it was the Court that gave women the right to make their own pregnancy choices. In 1965, a divided Court held that wives had the right to obtain
contraceptives under a ‘marriage privacy’ right, described by majority judges as vital to ‘the traditional family relation’ and ‘as old and as fundamental as our entire civilization’.

In 1973 in *Roe v. Wade*, a divided Court extended this right to a ‘personal privacy’ right to make choices about abortion, striking down all abortion laws, spelling out how generally to regulate abortion in each trimester, in order to balance the privacy right with the state’s interest in protecting health and potential life. Two dissenting judges objected to such a new right being ‘read into’ the Constitution, calling this ‘judicial legislation’ which ignored the history of state abortion laws.

Here, I want to emphasize the nature of the objections by the minority judges to the majority decision in *Roe v. Wade*, which they articulated as a flawed factual analysis (ignoring the facts of history in finding this right had existed) and a legislative nature (that is, making law by instituting a new and comprehensive general policy) with no democratic authority to make law that way. Within the Court, the judges thus articulated criteria I have identified as at the source of the recurring conflict between court and governments. (Whether the majority or minority got it right on these criteria is a different matter, and often seen best, or differently, with time.) My point is that judges have always created law, and have always justified doing that on the basis of facts, principled logic, and justice; these criteria thus come into focus in their decisions. Cases such as *Roe v. Wade*, which must decide about rights not expressly addressed or even anticipated by governments or the Constitution, bring these judicial criteria even more sharply into focus. They are ‘pioneering’ cases, to which Lincoln’s words apply, and they require careful attention to the distinct judicial and political criteria, as I have just noted above.

Such sagas continue today. While theses cannot yet be assessed from the distance of time, the same criteria can be seen to be articulated by each institution, in conflicts of arguably increasing novelty and complexity. Conflicts continue over issues respecting rights of racialized people, religious and cultural minorities, women, impoverished and exploited people (including ‘the working poor’, the large proportion with disabilities, and ‘the 90 percent’ championed in ‘Occupiers Movements’). Conflicts have arisen over new issues (such as privacy and security in new technologies), and over long-standing issues that have just begun to raise more concern (such as rights of people associated with crime, whether accused, in prison, or on parole; single people outside the ‘family’ umbrella; old people; and animals other than humans).
The political process itself is coming under new scrutiny in recent conflicts. Errors in the voting system, and the corrections and standards required, were issues in *Gore v. Bush* in 2000, where the Court, like the electors, divided almost evenly and arguably also on a politically partisan basis.\(^{191}\) Free political speech and inequality of rich and poor in election campaigns were issues in *Citizens United* in 2010, where another closely divided Court struck down legislation limiting independent spending on campaign communications; in the aftermath of skyrocketing partisan spending by money-loaded ‘super-PAC’ associations, President Obama urged the ‘need to seriously consider mobilizing a constitutional amendment process to overturn *Citizens United* (assuming the Supreme Court doesn’t revisit it)’, and he stressed that the Court’s decision could undermine democracy: \(^{192}\)

Money has always been a factor in politics, but we are seeing something new in the no-holds-barred flow of seven- and eight-figure checks, most undisclosed, into super PACs; they fundamentally threaten to overwhelm the political process over the long run and drown out the voices of ordinary citizens.

3. **Conflicts under the Canadian 19th Century Constitution**

Canada’s 1867 Constitution differs from America’s in context and terms. It was a British statute negotiated by Canadian colonial and British politicians, in an era when dominant social concerns were shifting from individual freedom to government responsibility for general social welfare.\(^{193}\) It was ‘patriated’ to Canada in 1982, with a number of amendments, including a Charter of Rights and Freedoms.\(^{194}\) I will briefly outline relevant aspects of the 1867 Constitution and the conflicting decisions under it, and then turn to the 1982 Charter era.

The 1867 Constitution gives Canada ‘a Constitution similar in Principle to that of the United Kingdom’, with such fundamental principles as the rule of law, Parliamentary supremacy, and judicial independence.\(^{195}\) General elections are required at least once every five years.\(^{196}\) Legislative jurisdiction is divided between a federal Parliament and twelve provincial and territorial legislatures.\(^{197}\) Parliament is given authority to make laws for ‘the Peace, Order, and good Government of Canada’ respecting subjects not assigned to the provinces, as well as exclusive authority over a list of specific subjects, such as, ‘Trade and Commerce’, ‘Criminal Law’, and ‘Marriage and Divorce’.\(^{198}\) Provincial governments are given exclusive authority over another list of subjects, including ‘Property and Civil Rights’, ‘The Solemnization of Marriage’,
and ‘Generally All Matters of a merely Local or Private Nature’, in the province.\textsuperscript{199} Two rights only (certain minority language and religious education rights) were expressly protected in the Constitution.\textsuperscript{200} Further rights were given some protection, not constitutionally but by statute, in the decades following World War Two.\textsuperscript{201}

The judicial system established under the 1867 Constitution consists essentially of trial and appeal courts of inherent jurisdiction in each province, and a Supreme Court created by federal statute in 1875 as a national ‘general court of appeal’, whose judges are appointed by the Prime Minister, subject to certain eligibility and representation requirements.\textsuperscript{202} In 1949, when all appeals to Britain’s Judicial Committee of the Privy Council were abolished, the Supreme Court became Canada’s final appeal court.\textsuperscript{203} A special ‘reference’ jurisdiction is imposed by statute on the Supreme Court and provincial appeal courts, requiring them to answer ‘important questions of law or fact’ referred by the government.\textsuperscript{204}

The 1867 Constitution is silent on the judicial authority to invalidate laws duly enacted by governments. However, its backdrop was different from that of the American constitution, and from the outset, unlike in the United States, there was marked judicial deference from the Canadian Supreme Court and the Privy Council judges to the decisions of governments, and federal governments particularly, on subjects within their jurisdiction.\textsuperscript{205}

However, courts in Canadian cases developed common law, interpreted statutes, and enforced the Constitution, just as English and American courts did. They too explained their authority to do this as Marshall USCJ had in \textit{Marbury v. Madison}: The rule of law requires judges to apply laws in resolving disputes; inevitably, there will be unclear or inconsistent laws, or no law on an issue; thus, judges must interpret laws to define their meaning, and must modify or invalidate inconsistent laws to reconcile them, and must formulate laws where there are none. And they too developed judge-made rules and standards to guide their reasoning; for example, to decide the constitutional validity of legislation, court interpretations were guided by their judge-made principle that a statute must deal in ‘essence’ or ‘pith and substance’ with a subject assigned by the Constitution to the enacting government.\textsuperscript{206}

And court decisions, both interpreting laws and formulating laws, could and did have decisive effects on Canadian law and society. In the \textit{Persons} case in 1929, the Prime Minister, asked to boldly appoint a woman to the Senate, not-so-boldly asked the Court for its opinion
whether women were ‘persons qualified’ to hold public office under the law; the Privy Council judges, overturning the Supreme Court and refining the common law, interpreted ‘persons’ as including women.\textsuperscript{207} Canadian judges not only interpreted but also created laws, having a tremendous impact in many areas of law, as one constitutional scholar sums up well:\textsuperscript{208}

Long before the enactment of the Charter, Chief Justice Dickson … had creatively and boldly reshaped the criminal law, family law, and private law to take account of changing social and economic needs, the importance of not punishing the innocent, and other principles. … Justice Wilson … was a law-reformer; while still on the Ontario Court of Appeal she had invented a new tort of discrimination.

Those decisions did not challenge government decisions and provoke conflicts. But others did. In the Depression, the federal government legislated a national insurance scheme for protecting unemployed workers, reciting in a preamble that this was a supremely important international commitment and essential for Canada’s ‘peace, order and good government’.\textsuperscript{209} Just as in the United States, in 1937 the legislation was struck down.\textsuperscript{210} A divided Supreme Court followed by unanimous Privy Council judges interpreted it as ‘in essence’ dealing with exclusively provincial subject matters, and thus constitutionally invalid.\textsuperscript{211} The political outcry, against foreign as well as judicial interference in government policy, led to constitutional amendments giving the federal government jurisdiction over unemployment insurance (in 1940) and abolishing appeals to the Privy Council (in 1949).\textsuperscript{212} Court decisions thwarted provincial governments too. For example, in the 1950s the Supreme Court struck down popular provincial laws that permitted cities to prohibit shops from opening on Catholic holidays (struck down as a matter of ‘public morals’ coming under federal criminal law jurisdiction) and to prohibit public distribution of Jehovah’s Witness literature (as a matter of ‘speech’ or ‘religion’ under federal jurisdiction).\textsuperscript{213} In defining provincial authority, the courts also, ‘exceptionally’, the same scholar points out, formulated some fundamental ‘democratic’ principles – freedom of the press, free political discussion and criticism of the government, and freedom of minority religions from impartial laws singling them out – as judge-made or common law rights that were protected from infringement by provincial, but not necessarily federal, legislation.\textsuperscript{214}

The nature of the validity and impact of these law-making Court decisions are worthy of note, as I will elaborate in Part Three – including the ‘exceptional’ ones, despite their narrow constitutional context and departure from the norm of judicial deference to governments.\textsuperscript{215}
norm was based on the view that elected governments had unrestricted authority to make law within constitutional limits, under a Constitution which limited them only to subjects assigned to them, and that courts merely interpreted and applied laws.

4. Conflicts under the Canadian 20th Century Charter of Rights

The constitutional picture in Canada changed dramatically in 1982, when a Charter of Rights and Freedoms was included in the patriated Constitution. Four notable features of the Charter differ from America’s Bill of Rights: the supremacies declared, the rights guaranteed, the democratic limits permitted on rights, and the legislative over-ride permitted on some rights.

The Charter’s preamble refers to ‘the supremacy of God and the rule of law’ as founding principles of Canada. The Constitution and its Charter are declared to be ‘the supreme law of Canada’, to amend them requires a ‘super-majority’ vote spelled out in the 1982 Constitution, and any law inconsistent with them is invalid. Neither court nor government is given express authority over the other on the law; however, as I have noted, Canada inherited both the Parliamentary supremacy and judicial independence principles. Courts are also expressly given broad authority, if they find a Charter right is infringed, to order ‘such remedy as the court considers appropriate and just in the circumstances’.

Twelve categories of rights are guaranteed by the Charter, subject to its other terms, as rights no government may infringe. They are: Fundamental Freedoms (such as freedom of religion), Democratic Rights (such as the right to vote), Mobility Rights (such as to the right to work in any province), Legal Rights (such as to trial), Official Languages and Minority Language Educational Rights, Religious Education Rights, Equality Rights (prohibiting such grounds of discrimination as age and disability), ‘Gender Equality Rights’ (guaranteeing Charter rights equally to women and men), Aboriginal Rights (protecting treaty and other rights of aboriginal peoples), Others that Exist (not ‘denying the existence of any other rights or freedoms that exist in Canada’), and Multicultural Heritage (in that the Charter must be interpreted to accord with ‘the preservation and enhancement of the multicultural heritage of Canadians’). Not all potential rights are included; economic security and equal social benefits, for example, were deliberately excluded from the Charter.
At the same time, the Charter permits democratic limits on the rights guaranteed: The rights are protected under Section 1 ‘subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.\textsuperscript{223}

As well, the Charter permits government legislation to over-ride some rights for up to five years, by declaring that it operates ‘notwithstanding’ the right.\textsuperscript{224} This legislative over-ride can be renewed after five years (and thus at least one election). However, it can be used for only three of the twelve categories of rights – Fundamental Freedoms, Equality, and Legal Rights – and not for the rest. Thus, the Charter creates varying judicial and legislative ‘supremacies’, which vary with the right involved: For some rights, a judicial decision can simply be ignored and reversed by the government for renewable five year periods. For others, the traditional judicial authority – to interpret and apply laws, including the Charter, to formulate common law, and to provide the remedy the court considers ‘appropriate and just’ – remains decisive.

The Charter’s dramatic expansion of constitutional law led to a dramatic expansion in judicial decision-making on topics that are new or uncertain and highly contested in society, and to recurring challenges and conflicting decisions between courts and governments. There are two points I highlight in the following overview: the range of results of the conflicts, and the failing in some judicial decisions to fulfill the familiar criteria judges articulate as justifying them. I note cases where the government decision prevailed by using the override (the oft-cited \textit{Ford} case); where the court decision prevailed based on judicial interpretation, whether striking down the law or not (\textit{Winko, Sauvé, Judges’ Remuneration}); where the government reversed the court interpretation (\textit{Daviault, Mills}); where it deferred to the court (\textit{RJR-MacDonald Tobacco, Morgentaler}), and where the court deferred to the government without imposing rigorous judicial scrutiny (\textit{Latimer, Newfoundland Treasury Board}).

The 1988 \textit{Ford} case led to one of the rare instances to date of a government actually using a ‘notwithstanding clause’ to over-ride a court’s protection of a Charter right.\textsuperscript{225} Quebec passed a law banning any language but French on commercial signs, in a popular but divisive policy to protect the language.\textsuperscript{226} A unanimous Supreme Court struck down the law as going too far in limiting free speech, and indicated that a more moderate requirement that French be dominant rather than exclusive would still achieve the policy purpose and be a ‘reasonable’ limit under Section 1.\textsuperscript{227} The government rejected the Court decision by using an omnibus legislative
over-ride to maintain the law regardless of its effect on free speech. However, the over-ride was not re-enacted when it expired five years and an election later; the government quietly amended the language law then, to accord with the Court’s decision.

The next two cases are examples of ‘law-making’ decisions of the Court, invalidating legislation and replacing it with a judge-made law, against the wishes of the government. In *Sauvé v. Canada* in 2002, a divided Court struck down legislation suspending the voting rights of prisoners serving sentences of two years or more. In making its decision, the Court applied ‘the *Oakes* test’, a judge-made framework of analysis in facts and principled logic, developed by the Court to guide judicial interpretation of Section 1. The majority reasoned that voting is an especially important democratic right which cannot be denied for such vague and symbolic policy purposes as reinforcing moral values and penalizing serious crime, without proof that the law rationally and proportionately achieves those purposes. While the vote is not a right subject to the over-ride, the government could have responded by further amending or justifying the law; but it did not, perhaps because the majority appeared to interpret the vote as an absolute right which could not likely ever be limited on any basis. (I examine this decision in detail in Part Three, in illustrating the critical psychology approach I introduce.)

In the *Judges’ Remuneration* case, in contrast to the silence in *Sauvé*, the Court gave explicit and detailed guidance as to the changes to be made, when it struck down provincial laws cutting all public salaries, including judges’, as part of a general deficit-reduction policy. The Court held that judicial independence, an ‘unwritten foundational principle’ of the Constitution, requires financial security to ensure judges are free from political manipulation, and this requires an ‘independent, effective and objective’ process for setting their salaries – which it spelled out in detail: Independent ‘Judicial Compensation Commissions’ must be established to recommend judicial salaries, and these must be paid unless the government proves a ‘rational justification’ for paying less. Commissions were set up, but with members appointed by the two parties both standing to gain from generous compensation, and who potentially share their interests as well. The Court’s decision thus included a concrete application of the requirements of justice relating to judges’ salaries (inevitably, as the fundamental rationale behind judicial independence), in a detailed process for making budgetary decisions affecting judges’ salaries. However, the decision did not address the potential bias in the Commissions it mandated.
An example of a Court decision that changed the law through interpretation alone is *Winko v. British Columbia* in 1999, upholding a Criminal Code provision that an accused found ‘not criminally responsible by reason of mental disorder’ must be granted an Absolute Discharge where ‘in the opinion of the Review Board the accused is not a significant threat to the safety of the public’ (my emphasis). The law was challenged as violating Charter legal and equality rights, by placing the burden on the accused to prove that he or she did not pose such a threat. The Court agreed by a strong majority, but upheld the law. It did that by interpreting the law contrary to its unambiguous words and its intended meaning, on the principle that it must be read ‘in a manner that supports compliance with the Charter’, and that ‘properly read’ it required the Board to conduct an inquisitorial, not adversarial, process, and to grant an Absolute Discharge unless it found that an accused is such a threat to the public (my emphasis).

Thus, the Court’s interpretation reversed the plain and intended meaning of the law, but without altering its words. The government accepted the Court’s decision, not, as it could have, re-legislating with a strong justificatory preamble or a notwithstanding clause. *Winko* has had significant effects: It established a new approach to crimes precipitated by mental disability, and introduced a new and more vigilant (as well as apparently more compassionate and effective) standard of justice and inquisitorial process for such cases.

The government did reverse Court interpretations in the 1994 *Daviault* and 1999 *Mills* cases. In *Daviault*, a divided Court reinstated and refined a common law defence of ‘extraordinary intoxication’, overturning, as violating Charter legal rights, a judicial decision that disallowed it, and holding that a person charged with sexual assault was entitled to raise it. A public outcry followed, the government swiftly arranged studies and consultations on the topic, and amended the Criminal Code to prohibit a ‘self-induced intoxication’ defence, explaining in a preamble the social concerns motivating the law and the Charter provisions justifying it. Thus, it reversed the Court decision by enacting, not an over-ride, but a contrary law with a strong preamble explaining why. The aftermath is noteworthy: Controversy has recurred over the re-enacted law, the Court has not yet been asked to review it, and, in ‘an extremely unusual legal anomaly’, trial judges have refused to apply it and permitted the defence to be raised despite it.

The Court endorsed such a legislative reversal in *R. v. Mills*, upholding a Criminal Code amendment that restricted access to medical records of the complainant in sexual assault trials, in
a direct rejection of a prior Court decision that a fair trial required an accused to have access to these records.\textsuperscript{240} The amendment included a preamble explaining the social concerns, including the need to protect the privacy rights of complainants and the equality rights of women and children, the solution chosen, and the protections provided to ensure a fair trial. The Court characterized this reversal through a strong justificatory preamble as a legitimate legislative response to the Court’s judge-made law, reasoning that: \textsuperscript{241}

\begin{quote}
[I]f the common law were to be taken as establishing the only possible constitutional regime, then we could not speak of a dialogue with the legislature. Such a situation could only undermine rather than enhance democracy. … courts do not hold a monopoly on the protection and promotion of rights and freedoms.
\end{quote}

\textit{Mills} is thus a rare but powerful example of the Court’s sanction of a government’s explanatory preamble reversing a Court decision and restoring an invalidated law.\textsuperscript{242} What I want to highlight (and I will be elaborating) is the Court’s characterization of this as a dialogue that enhances democracy, and its clearly implicit view that neither common law nor legislation is the sole legitimate approach to law-making, even in the constitutional context.

A far more typical result of conflicts under the Charter has been government compliance with Court decisions, by doing nothing or by revising the law as advised by the Court, rather than trying to justify the law or using an over-ride to maintain it.\textsuperscript{243} Two examples of this are \textit{RJR-MacDonald Inc. v. Canada} (the \textit{Tobacco} case) in 1995 and \textit{R. v. Morgentaler} in 1988.\textsuperscript{244} In the \textit{Tobacco} case, a closely-divided Court struck down legislation banning tobacco advertising, as an unjustified limit on the free speech of tobacco companies, and indicated that restrictions confined to ‘life-style’ and ‘child-aimed’ advertisements would be justified.\textsuperscript{245} The government complied by enacting comprehensive new legislation, replacing the ban with the more moderate restrictions the Court had suggested.\textsuperscript{246}

A number of explanations have been given for a government’s compliance with a conflicting Court decision, rather than justifying its law or over-riding the right. It has been attributed to the ‘political fear’ of going against the high public regard for the Charter and the Court, but this seems unlikely with unpopular Court decisions such as \textit{Tobacco}.\textsuperscript{247} It has been attributed to politicians’ self-interest in avoiding ‘politically risky’ topics, to political respect for the fundamental principle of the rule of law, to ‘forces of inertia’ in the legislative system, to the
novelty and uncertain effects of the over-ride making governments reluctant to test it, and to the government sometimes having come to agree with a Court decision.248

Perhaps all these explanations capture factors at play in the government response to the divided Court decision in Morgentaler, striking down the Criminal Code offence of abortion for infringing liberty and security rights, while indicating that a narrower law might be valid.249 The public was intensely divided. A free vote in Parliament was a fractious disaster. An attempt to pass a narrower law was stalled by a tied Senate vote.250 The government then abandoned the ‘politically explosive’ issue, making no more attempt to develop public opinion or revise the law, or use a preamble or over-ride to reenact it, leaving abortion as a non-criminal personal and health care matter. I will stress in Part Three, respecting government responses to such cases as Morgentaler and Tobacco, the need to more critically assess the explanations and factors at play in our democratic government’s political process of developing shared social values.

Finally, I want to note cases where potential conflicts were avoided by judicial deference, giving a government wide political decision-making scope with little or no judicial scrutiny or contribution, on such matters as punishing crime, granting or withholding mercy, and allocating public debt burdens. Two examples are the 2001 Latimer and 2004 Treasury Board cases.251

In R. v. Latimer, a father was charged with murdering his child, who was helplessly disabled and suffering increasing relentless and untreatable pain. It was uncontested that he was a good father and killed his child to end her suffering.252 A jury, instructed that ‘mercy killing’ was not a defence but they could recommend a lenient sentence, convicted him of second-degree murder and recommended a one year sentence, which the trial judge ordered. The sentence was increased on appeal, to comply with the legislated minimum ten-year sentence for second-degree murder. The Supreme Court upheld the law mandating minimum sentences for specified crimes, regardless of the circumstances of a case, and upheld the conviction, reasoning that it was for the government to decide law and policy on matters of public morality and criminal law, and that this law did not infringe the Charter protection against ‘cruel and unusual punishment’.253 The Court also, while making comments in favour of clemency, expressly left it to the government to consider if and how to exercise its prerogative to grant mercy in the case.254

There were weaknesses in two key aspects of the judicial scrutiny in Latimer, from the perspective I will introduce. One is the factual scrutiny of the untreatable pain caused by the
ongoing non-consensual experimental surgery and of its likely effects. The other is whether a standard is required to be met in making prerogative decisions – an echo of the issue behind the First Parliament of 1265 and the ‘prerogative remedies’ of the 1500s (discussed in my overview of English history). The Court left this entirely to Prime Ministerial discretion. From a functions perspective (as I will be explaining), it is not necessary or helpful for either institution to simply hold back its unique contribution to a contested topic: A court’s judicial scrutiny of the topic (in facts, principled logic, and justice) can offer crucial information about it, whether the political decision on it is legislative or executive, just as can a government’s contribution of shared values relating to it. Even absolute discretion should not be exercised illogically or unjustly, or ignore citizens’ shared values, in a society that is, both judicially and politically, just and democratic.

In Newfoundland (Treasury Board) v. N.A.P.E., the government passed public spending cuts which legislated lower pay to women than men hospital workers, and thus breached its pay equalization contract with the women workers, retroactively extinguished arrears owing to them, and prolonged their unequal pay for three years.\(^{255}\) The Court upheld the law, finding that it infringed the women’s equality rights in gainful employment, but that, applying ‘the Oakes test’ analysis, it was reasonable and justifiable in a democratic society.\(^{256}\) Noting that their unequal pay was temporary and that other severe cuts were also made, the Court stressed two ‘compelling factors’: The province’s credit rating had been lowered and it was in a position where ‘an exceptional financial crisis called for an exceptional response’, and equal pay to these women workers would use up a significant portion of the budget.\(^{257}\)

In deferring to governments on public spending decisions, the Court has distinguished their two ‘institutional competences’, reasoning that such decisions require balancing multiple competing social and economic factors, which governments are better able to do; the Charter’s silence on economic rights has also influenced the Court’s ‘extremely cautious’ attitude about economic rights in general.\(^{258}\) However, of course, judicial decisions have often been expensive for society, and affected individual and public finances, and the making of government budgets: ‘Profound – and often costly – implications’ to society, one commentator has noted, have flowed from judge-made laws, including ones conflicting with government law and policy.\(^{259}\) And the Court cautioned in Treasury Board that government claims of financial straits must be closely scrutinized, since ‘there are always budgetary constraints and competing priorities’.\(^{260}\) Yet, its actual scrutiny of the government’s case was cursory: It accepted a spare, untested evidentiary
basis for key factual findings, on which the government bore the burden of proof, including facts related to the alternatives available and the priorities applied in selecting these cuts that denied Charter rights and disproportionately fell on some citizens and not all.  

A weakness in the *Treasury Board* decision, in addition to the scant government evidence on the contested issue of the political decision allocating public spending cuts, is the silence on the requirements of justice on the issue. This contrasts with *Judges’ Remuneration*, where, in a similar deficit-cutting context, the Court gave concrete form to justice, spelling out the rigorous ‘rational justification’ that justice required – inevitably, as the issue of judges’ salaries raises the fundamental principle that justice requires impartial judges, free of political control. But justice has requirements in other contexts, too. The *Treasury Board* decision did not spell out what justice requires of political decisions on public spending; perhaps this was implicit in its *Oakes* test findings of ‘proportionality’ or ‘more good than harm’, but the Court did not say. In *Sauvé* and *Latimer*, too, justice was not referred to – not concerning the legitimate purposes of criminal punishment or citizens’ rights, not concerning the imposition of experimental surgery causing a child unrelievable pain, not concerning principles guiding the executive discretion to grant clemency. In Part Three, where I apply a critical psychology approach, I will elaborate the role of ‘Justice’ as an ideal that is indispensable to the judicial function, which gives this ideal a concrete form in judicial decisions on every topic, including on prerogative decisions.

5. Observations and Hypotheses respecting the Conflicting Decisions

Before concluding, I will gather my observations about these recurring conflicts, and state my hypotheses respecting them. While different constitutional structures played a role in the topics of the conflicts and how they unfolded, clearly this was not the source of the conflicts and their varying substantive results. Clearly, too, rights were claimed both from courts and from governments, and neither institution consistently upheld them. A strong argument has been made that rights of ‘the truly unpopular’ depend on ‘anti-majoritarian’ courts rather than elected governments, but this does not mean courts protect such rights solely because the claimants are truly unpopular or courts are anti-majoritarian. Nor, as President Lincoln lamented, did courts always simply resolve private disputes without influencing policy ‘affecting the whole people’; clearly, both judicial and political decisions can affect both.
My reason for making these points is to highlight what I will argue, from a critical psychology perspective based on Jung’s functions theory, is significant about the ‘traditional hallmarks’ of judicial and political decisions as an important distinction to recognize and develop more fully: In judicial decisions, it is facts, principled logic, and Justice that are decisive; in political decisions, the citizens’ shared felt values. To give some support to this argument from the historical record, I collected examples of the criteria articulated by judges and politicians to justify their decisions, and suggest these were consistent and definitive: Never were facts, principled logic, and justice treated as not decisive or irrelevant to a contested judicial decision. Never were the citizens’ wishes and will treated as irrelevant to a contested political decision. I will argue that it is important to more fully appreciate the significance of these distinct and different criteria to their decisions and to the effect of the dialogue between them.

In American sagas, Chief Justices and Presidents alike invoked ‘the rule of law and not of men’ to justify their own decisions over the other, while articulating different approaches to the law. Judicial criteria stood out in *West Coast Hotel*, in the pointedly express articulation of logic based on new facts to explain the Court’s shift in its New Deal jurisprudence, and stood out also in *Brown*, in the irrelevance of unpopularity to the validity of the Court decision. Political criteria stood out in Lincoln’s stirring statement that ‘the only true sovereign of a free people’ is ‘a majority held in restraint by constitutional checks and limitations and always changing easily with deliberate changes of popular opinions and sentiments’. Executive decisions were ‘political powers’ in the elected leader’s discretion, and legislative decisions were passed by the elected politicians’ votes; both thus ultimately rested on a democratic process by which, as Lincoln said, ‘the people’ act as ‘their own rulers’.

In the Canadian cases there were varying outcomes of conflicting decisions, and both judicial and political ‘last words’, just as in the United States. Courts relied on the rule of law principle to ‘creatively and boldly’ formulate law in many fields, and, in constitutional law, even in the early era, to create decisive principles of interpretation and, exceptionally, to formulate democratic rights immune from provincial legislation. The Charter expanded constitutional rights and issues. Judicial ‘last words’ invalidated laws for limiting rights or not justifying the limits, or interpreted statutes contrary to a government’s intention and plain words, or deferred to a government on judicial grounds. Political ‘last words’ over-ride protected rights, or justified limits on them in preambles, or deferred to the Court for political reasons. Sometimes there
were prolonged periods of alternating or stymied decisions, including cases where judges simply ignored legislation that was not challenged or invalidated.

A fine line can exist between judicial and political criteria, particularly in applying facts and principled logic to determine shared values. This was clear in cases involving topics that were new or uncertain and highly contested in society, such as judicial ‘privacy right’ and ‘free political speech’ findings in the American abortion and super-PAC cases, and ‘unjustified limit in a democracy’ findings in the Canadian voting and tobacco industry cases. Such ‘pioneering cases’ require, I will argue in Part Three, explicit recognition of the difference between judicial and political criteria, and careful efforts not to blur them but to invite appropriate corrections.

By requiring that a decision be based on specific criteria, the skills wanted and biases unwanted in making it come into existence, and can be identified in failings in the quality or legitimacy of the defined specialized decision. Such apparent failings can be seen in examples where courts did not strictly apply the distinct criteria articulated to justify judicial decisions – decisions which were cursory in scrutinizing evidence, for example, or lax in principled logic, or inattentive to potential bias, or silent on the requirements of justice. These failings go back to the touchstone of my responses to Borrows’ lecture, respecting Justice especially – a distinct judicial criterion not developed or even named in such cases as Latimer and Treasury Board. Similar failings in skill and unwanted bias can be seen, I suggest, in political decisions that do not expertly develop and express citizens’ shared values on a topic – as democratic governments must do to carry out their political function, I will be arguing, just as courts must expertly develop the judicial function they carry out.269

Finally, I want to preview two main points of the critical psychology perspective that I will apply to judicial and political decision-making.

The perspective is based on Jung’s theory that rational consciousness consists in the exercise of four psychological functions (two perceptive functions of sensation and intuition, and two apperceptive functions of thinking or conceptual analysis and valuing or personally felt evaluation), which produce distinct and complementary viewpoints on any topic or aspect of reality, and that individuals develop rational consciousness through the mutual refinement and expansion of the different viewpoints in an interplay between them. If a function is left out of
the interplay, the individual has a blind spot there (practically inevitable in every person), and its viewpoint remains undeveloped or one-sidedly narrow in the individual’s rational outlook.

To adapt this theory as a critical psychology approach to judicial and political decision-making, I transpose it from decisions made in a personal context to those made in a collective or societal context. In a society, different institutions make such decisions, and the institutions of court and government each foster the exercise of different functions in making their decisions. I will argue – and explain what this means – that in judicial decisions the decisive functions to be fostered are sensation and thinking, guided by an ideal of justice, and developed by judges, while in political decisions it is the shared values of the citizens, guided by any of a range of ideals, and developed by politicians. (The other functions, and emotion, also play roles, but not as the consciously-selected decisive ground for the decision.) Thus, these are two types of specialized decisions, whose different functions produce distinct and complementary rational viewpoints.

This is the first main point. It is what I have sought to illustrate in history and case examples in this chapter. The second main point is that, when these distinct viewpoints conflict on a topic, their interplay is an innate route to refining or differentiating them both, and through them, to developing the rational grasp of the contested topic in the society as a whole.

Jung’s theory takes the development of rational consciousness as the ultimate measure of rational decision-making. The two institutional steps – the honing of judicial and political viewpoints and then the interplay between them – are significant because they are indispensable for developing rational consciousness in society. And this makes it crucial to hold to the distinct judicial and political functions, and hone each according to its specialized criteria, and not hold either back on any contested topic. To hold to and hone them requires that they be developed and clearly distinguished – by judges as experts in the skills needed for their judicial task, and by politicians as experts in the skills needed for their political task – not blurred, not glossed over (as familiar hallmarks can be), not distorted by unwanted bias. To not hold them back requires that they not be polarized in a mutually rejecting dichotomy, but brought into an interplay as a mutually challenging and mutually influential dichotomy of complementary opposites.

The epigraph to this chapter signals these ideas of Jung’s theory: When two individuals meet, ‘if there is any reaction, both are transformed’. Each individual’s viewpoint is formed by the conscious functions dominant in his or her own personality, and when they engage with each
other, their interaction refines and extends, or differentiates, their two distinct viewpoints. I will argue in Part Three that in our society as a whole, different institutional decision-making processes can be viewed as promoting the skillful exercise of certain functions, and not others, and thus as providing distinctly different types of specialized rational viewpoints. When their viewpoints conflict on a topic, the interaction or interplay between them transforms or differentiates them and, through them, the society’s conscious grasp of the topic.

Summary

In this chapter, I considered examples of conflicting court and government decisions in American and Canadian contexts. In the American examples, I noted the early precedent in *Marbury v. Madison* that established the absolute discretion of executive decision-making, free from judicial review, while subjecting legislative decision-making to judicial review. Looking at three well-known conflict sagas, I noted the range of decisions and outcomes in them, and the criteria articulated by Chief Justices and Presidents to justify their decisions as, respectively, factual and principled logic or the democratic will. I noted ‘pioneering cases’, involving topics upon which citizens’ values were uncertain or divided or in flux, and suggested they call for judges to explicitly invite from governments a reasonably well-developed viewpoint on them. In the Canadian context, I noted the contrast in eras and constitutional principles, the conflicts that also recurred, and six different scenarios of variations in conflicting decisions and outcomes.

I highlighted four points: Despite different cultures and constitutions, the same conflicts between court and government recurred. They resulted in a range of decisions and outcomes, with neither institution consistently protecting the rights of the most vulnerable or having the sole major effect on social policy. I suggested that the same types of criteria were consistently articulated by courts and governments in Canada and the United States, as in England, to justify their decisions – facts, principled logic, and justice in judicial decisions, and the citizens’ shared values and preferences in political decisions – and that this is the distinction between them that is the most significant. I described these criteria as creating two types of specialized decisions, each with its own distinct required skills and unwanted biases, and I discussed apparent failings in decisions which did not meet the criteria articulated to justify them. Finally, I previewed Jung’s functions theory, in order to indicate why I stress the points I do in this chapter. I
explained the significance of viewing these as specialized, which highlights the need for judges and politicians to expertly carry out their distinct tasks, and as complementary opposites, which highlights the indispensable role of their interplay for developing rational consciousness.

In the *Mills* case noted in this chapter, Canada’s Supreme Court referred to ‘a dialogue’ between courts and legislatures to explain its decision. In the next chapter, I will consider the perspective of legal scholars on conflicts between judicial and political decisions, in two influential dialogue theories put forward in the Canadian constitutional context.
Chapter 3
Dialogue Theory Perspectives on the Conflicting Decisions

‘Dialogue’ is a powerful idea. We like that metaphor, which has become ingrained in our thinking already. But is ‘dialogue’ an adequate conception of what is actually going on and what we want our governments and courts to do?

Professor R. Sullivan, 2002

We need to move beyond loaded labels and American-style debates about judicial activism to more complex discussions about the roles of judges, courts and legislatures in a democracy.

Professor K. Roach, 2001

In this chapter, I examine two legal perspectives on conflicting court and government decisions in the Canadian Charter review context. Professors Peter Hogg and Kent Roach have put forward two ‘dialogue’ theory responses to the complaint that it is anti-democratic for laws passed by elected governments to be struck down by courts based on judges’ interpretations of broad constitutional principles. I assess Hogg’s position that Charter review is democratic because it initiates a dialogue in which governments can almost always have ‘the final word’, and Roach’s argument that Charter review engages courts and governments in a ‘democratic dialogue’ rooted in common law tradition. I note strengths of these theories that I suggest are developed further by a critical psychology approach based on Jung’s functions theory, which I will introduce in Part Two and apply in Part Three.

1. Hogg’s ‘Final Word’ Dialogue Theory

The dialogue theory idea was first presented in the Canadian context by constitutional law scholar Peter Hogg and law student Alison Bushell, in a 1997 law journal article entitled ‘The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)’, which was further clarified, in reply to criticism, in a 1999 law
They responded to the criticisms of ‘judicial activism’ by seeking to show, from an empirical perspective, that Charter review is compatible with democracy. They conducted a survey of 66 sequels to cases in which courts struck down legislation under the Charter, finding that in 44 sequels the government modified its law (in several, making the changes suggested by the court), in 13 it took no action and the judicial invalidation stood, in 7 it repealed its law, and in 2 it enacted a notwithstanding clause to preserve its law. They conclude from this that court decisions invalidating a law did not normally end the matter, but rather initiated a dialogue with the government in which it could ‘almost always’ respond conclusively, and ‘usually’ did, by enacting legislation that reversed or ignored the court decision, or that modified the law only in minor ways sufficient to satisfy the court, while still wholly or at least ‘substantially’ achieving the original legislative goal. The final decision was thus normally a legislative decision, and substantially achieved the government’s goal.

Hogg explains that a legislative final word is facilitated by four Charter features, including the ability to justify reasonable limits under Section 1 and to over-ride a right under Section 33 (as discussed in Chapter 2). He notes that governments have also rejected Court decisions by re-enacting an invalidated law with a strongly-worded preamble explaining the government’s contrary view. He also stresses that revised legislation was often modified only in minor details, enough to satisfy a judicial interpretation of a Charter requirement while still substantially preserving the original goal. On the other hand, he notes that a legislative final word was prevented in three ‘rare exceptions’, two as a result of Charter terms, where a limit could not be justified or a right overridden to avoid a Court’s interpretation, or where a law was so ‘politically explosive that it eluded democratic consensus’ and ‘political forces’ prevented the government from responding. However, he stresses, these are not ‘the normal situation’.

An illustration Hogg gives of the ‘final democratic word’ is the Ford case, with its two sequels (discussed in Chapter 2). The Court, striking down legislation enacted to protect the French language in the province, indicated that a narrower limit, requiring French to be dominant rather than exclusive, would be reasonable limit on free speech. The government first rejected the Court decision by using an omnibus ‘notwithstanding clause’ and then, when the clause expired, amended its legislation as the Court had suggested. Thus, the Court decision initiated a dialogue on the topics of free speech and language protection, but was not the final word on them. No ‘major democratic objective’ was defeated by the Court decision, because both sequels
had legislative final words. The government had the final word, and achieved its goal of protecting the French language, wholly in its first response, and substantially in its second response. The Court influenced only a minor detail of the law, in the first instance by protecting free speech ‘formally’, giving it a more prominent place in the debate, and in the second, by protecting it in the more modest scope of the revised legislation.

2. Evaluating Hogg’s Conclusion

Hogg’s survey and empirical observations clarify the impact the Charter has on judicial and legislative decisions about Charter rights, and highlight that impact. What I want to point out are shortcomings in his conclusion, looking at it from the different perspective of the picture it presents of judicial and political decisions and what happens when they conflict.

One shortcoming is that the qualifications and exceptions to the legislative final word are potentially so significant that the survey cannot alleviate the anti-democratic complaint as Hogg hoped. Others have made this critique and I will not dwell on it.283 In concluding that legislatures almost always can and usually do have the final word and substantially achieve their policy goal, Hogg describes Charter constraints as ‘much less severe than is often asserted’ by critics.284 However, the survey seems to show that exceptions to such a final word could happen up to 30% or more of the time: The final word was clear in the few cases in which the law was maintained by using the override or a strong preamble, and in ‘most’ of the 44 sequels in which ‘relatively minor amendments’ were made to the law; it is unknown how many of the other 20 sequels reflect a government’s inability to respond.285 Hogg calls it ‘a mistake to focus on the specific number of cases’ in ‘the empirical part of the thesis’, but this many instances where there might have been a final judicial word undermines the qualification ‘usually’ democratic.286

As well, the narrow survey excluded cases where courts upheld legislation but interpreted it contrary to the government’s intent, as in Winko (referred to in the previous chapter), where the Court’s interpretation alone significantly altered the legislative provision.287 Courts may well ‘impugn legislative choices’ without striking them down, and – while Hogg notes that only the Court can ‘definitively’ say what the Charter means and that governments ‘have to obey’ what the Court says it means – the decisive effect of judicial interpretation and formulation of law, including Charter law, is downplayed in his conclusion.288
What the survey does not refute is that a ‘legislative final word’ is both enhanced and reduced by the Charter: It is enhanced respecting rights subject to Section 33, and reduced with respect to all other Charter rights. Thus, both ‘pro-democracy’ and ‘pro-judiciary’ advocates might find something reassuring and something concerning in the Charter’s terms.

A second shortcoming in Hogg’s conclusion is its narrow perspective on the judicial role. Judicial decisions usually affect only ‘minor details’ of legislation, Hogg says, not only arguably understating their effect, but also ignoring how their effect is achieved. This is reflected in his comment, in a law conference discussion, that ‘it does not matter on what basis’ a court makes its decision, as long as the government has the final word. This is the reverse of what I will argue in Part Three, which is that the effect of court decisions due to the way they are made – by applying a distinct type of rational viewpoint – is a significant feature of judicial (and political) decisions, in the Charter context as in any context.

A related shortcoming is the elevation of legislative over judicial decisions. Hogg does not dispute the idea that the final word in the institutional dialogue should be democratic. He says it is democratic, and thus, the Charter ‘Isn’t Such a Bad Thing After All’: a legitimate dialogue is one in which legislatures have the final word and courts only marginally influence the law on a topic. He stresses that the ‘extensive ability of legislative bodies to respond’ to judicial restraints by rejecting or departing from court decisions, means ‘the final decision is the democratic one’ – that is, the legislative decision. But this indicates an unequal or one-sided dialogue between judicial and political decisions, and shifts the concern to the other side, to an ‘anti-judicial’ concern that the Court’s voice in a dialogue can be curtailed by the ability of legislatures to engage or simply impose their decision as the final democratic word.

‘Legislative’ is often used interchangeably with ‘democracy’ by Hogg, assuming the link between governments’ legislative goals and ‘the democratic will’. But this assumed link obscure issues that are central to the dialogue, and easily glossed over, such as what that link requires, how the democratic will is realistically and expertly developed, and whether judicial decisions play a role in ensuring that it is. Also, Hogg uses the word ‘government’ broadly, to refer also to administrative functions and to the ruling Political Party, without addressing whether executive decisions are subject to the democratic will. These are both essential
issues, I will suggest and elaborate in Part Three, in considering what is significant about judicial and political decisions and the dialogue between them, and how to achieve it.

Another shortcoming is that focusing on the dialogue only in the Charter context, while it reflects the context of the debate and highlights the terms of the Charter, misses what happens in that dialogue that happens in *every* dialogue between court and government, whatever the law, statute, constitution, treaty, or activity involved. I will argue that what is significant in all dialogues is also significant in the Charter dialogue, and does not rest on the terms of legislation, even constitutional enactments, but on the different rational perspectives brought to them.

Finally, certain points made by Hogg lend themselves to the perspective on the dialogue which I will develop. These are strengths in his theory, from that perspective, which focuses on the distinctly different *types* of rational viewpoints consciously provided by these decisions. Hogg is not aiming for this, of course, but it is implicit in his references to traditional hallmarks of their decisions, as givens, and to the role of ‘consciousness’ in them.

Thus, he describes legislation as requiring ‘democratic consensus’ on policy choices made by ‘elected, accountable, representative, legislative bodies’ for ‘the benefit of the community as a whole’, so that ‘the wishes of the democratic institutions’ are ‘the wishes of the people’. The ‘political forces’ of public support or rejection can propel or halt legislative initiatives, and the determinative factor is ‘the democratic will’.

In the end, if the democratic will is there, the legislative objective will still be able to be accomplished, albeit with some new safeguards to protect [the contested right].

In contrast, the Supreme Court he describe as a ‘non-elected, unaccountable body of middle-aged lawyers’, who make decisions on the basis of ‘facts’, ‘law’, and ‘evidence’, and ‘lay down’ rules and ‘judicially-prescribed standards’ for analyzing them. Their special concern with ‘justice’ can be seen in Hogg’s comment that the Court may hear an appeal even under an obsolete law ‘if there is concern that an appellant has suffered an injustice on an important constitutional point.’ And in a general conclusion, he describes the dialogue simply as one about ‘how best to reconcile’ the protection of individualistic Charter values and the pursuit of democratic initiatives, not assigning a final word to either Court or government.
‘Conscious’ and ‘self-conscious’ are terms Hogg uses to qualify legislative responses. Legislators engage in ‘dialogue’ only if they make a ‘conscious response’ to the Court.\textsuperscript{300} Their response is ‘conscious’ if they consider the Court’s reasons and their options for responding, and deliberately decide to take ‘some action’ (to revise the legislation, to re-enact it with a preamble or an override, or to accept the Court decision).\textsuperscript{301} There is no conscious dialogue if legislators ‘merely acquiesce’ in a Court decision, with no option or effort to respond. Hogg is not looking at these decisions from a critical psychology perspective, nor is he developing the meaning such a perspective brings out. But this attention Hogg grants to the conscious quality of dialogue is important, I will argue, because it recognizes the psychological basis of these institutional decision-making processes, and hints at a most significant implication of this.

3. Roach’s ‘Democratic Dialogue’ Theory

In \textit{The Supreme Court on Trial: Judicial Activism or Democratic Dialogue} (2001), Kent Roach, a constitutional and criminal law scholar, reviews arguments made in the debate over ‘judicial activism’, in the United States and in Canada, and puts forward a ‘democratic dialogue’ perspective.\textsuperscript{302} He compares the American and Canadian constitutional structures, and in elaborating this dialogue theory he draws from the work of a number of American legal scholars, including especially Alexander Bickel, Lon Fuller, Ronald Dworkin, and Guido Calabresi. Roach accepts the premise of the ‘anti-democratic’ complaint, as Hogg does. He too seeks to show that Charter review is not undemocratic, and he too expressly confines his focus to the Charter context. However, Roach also notes that the same complaint is raised in other contexts, he also considers the nature of the decisions and what they (and particularly political decisions) require, and he argues that, while the Charter facilitates and shapes the dialogue about Charter rights, the dialogue itself has deeper roots in common law constitutionalism.

Roach argues that judicial review under the Charter ‘invites a democratic dialogue’ between the Supreme Court and the government.\textsuperscript{303} The Court decision puts a Charter right into ‘political play’, starting a dialogue with the government about ‘how rights are treated in our free and democratic society’.\textsuperscript{304} In this dialogue, the parties play two ‘distinct and complementary’ roles: The Court protects Charter rights (particularly, the rights of the ‘truly unpopular’) and the government promotes the democratic will (in particular, by limiting Charter rights).\textsuperscript{305} And in this dialogue, or ‘interplay’, a government can usually displace a Court decision quickly and
conclusively – but only ‘democratically’, by enacting express legislation, clear for all citizens to see, that justifies its law or over-rides the Court-protected right. The Charter dialogue is thus not merely compatible with democracy: It is necessary for democracy to thrive.

Roach’s argument differs from Hogg’s. Roach points out that governments can have the final word, not only on essential policy goals but also on the details of rights. He looks to the common law tradition behind the dialogue, not viewing it as defined solely by the terms of the Charter. He considers the nature of the government process in that tradition (confined to legislative decisions), emphasizing rather than disregarding the way governments must respond in the Charter dialogue: in explicit legislation, which makes it more likely citizens will be aware of the conflict over a Charter right and the government’s stand in it, and thereby in a position to hold politicians to account for it through the democratic process. Roach’s theory highlights the effect of judicial review in compelling governments to fulfill a democratic role. I will suggest in Part Three that this is an important aspect of a more general or two-way complementary effect between judicial and political decisions.

This is the Canadian reality, Roach stresses, not the American, where the Supreme Court successfully asserted ‘the final say’ (as described in Chapter 2) and a highly polarized debate has ensued. Roach argues that such a debate in Canada sets up a ‘false dichotomy of judicial supremacy or legislative supremacy’. At the same time, he argues that legislatures, not courts, should and do have the final say in ‘democratic’ Charter dialogues.

Many aspects of Roach’s theory merit discussion. I will focus on four. First, the central distinction between court and government decisions in the Charter dialogue, summarized above. Then, other descriptions of these decisions that he refers to, reflecting familiar ‘hallmarks’ which distinguish them differently. Next, the effects of dialogues under the Charter. Finally, the ideas touched on of a ‘three-party’ dialogue, which includes ‘society’ or ‘the people’ within the institutional dialogue, and of multiple ‘internal’ two-way dialogues.

4. A Voice for Rights and a Voice for Democratic Limits

The Charter ‘lends itself to a particular institutional division of labour’, Roach says, structuring a dialogue ‘about rights and democracy’ in which the institutions speak with ‘distinct
and complementary voices’, each championing a topic of its special concern: The court protects rights and the government takes democratic responsibility for denying court-protected rights:311

The Charter was a unique and innovative Canadian invention: it allowed strong courts interested in protecting rights to co-exist with strong legislatures, which could take democratic responsibility for limiting and even temporarily overriding rights as interpreted by the courts.

Courts protect the fundamental values and rights guaranteed by the Charter, Roach says, by ensuring society respects these by bringing them to the attention of governments which might otherwise neglect them, and of citizens who might not know what their government is doing.312 This role, facilitated by the Charter, is described by Roach as reflecting a judicial concern, rooted in the common law tradition, with protecting ‘fundamental rights’ and ‘disadvantaged minorities and the unpopular’, and with ensuring ‘fairness’.313 Governments, in contrast, are responsible for carrying out the democratic will, which may mean imposing democratic limits on Charter rights or temporarily overriding them, and taking democratic responsibility for doing that. Thus, if governments wish to ‘limit or even derogate from the rights that the fallible court has declared’, they must ‘make it clear why’ by limiting or overriding those rights in the ‘open and democratic fashion’ of enacting explicit legislation.314

This central distinction is refined and qualified by Roach. With respect to rights, he recognizes there is no judicial monopoly on protecting rights, that governments may do so and courts fail to (as seen in the range of outcomes of conflicts canvassed in Chapter 2).315 He notes that vulnerable groups have gained rights from governments, through ‘successful lobbying’ and ‘political influence’, and he cautions: ‘One of the greatest dangers of judicial review may be the idea that we can rely on the courts to protect rights.’316 He says that legislatures may interpret rights, using the Section 33 override, and cites former Premier Blakeney’s view that this ensures governments make the ‘ultimate social decisions’.317 He notes the interconnectedness of rights issues, quoting Blakeney’s stance (a one-sided stance that I will argue against) that measuring age discrimination against mandatory retirement is ‘a broad social question’ that is ‘the ultimate responsibility of the legislatures and not the courts’.318 Roach has further distinguished rights of ‘the truly unpopular’, which only ‘anti-majoritarian’ courts are likely to protect, from rights of ‘minorities in the mainstream’, which elected governments may well protect.319
With respect to democratic accountability, Roach also qualifies the distinction and blurs it somewhat (a blurring I will be arguing against). He notes ‘the dangers in stressing the Court’s accountability to legislatures and society’, but argues at one point (incorrectly, I will argue) that this dichotomy is faulty, describing courts as ‘not inherently un-democratic’ and judges as ‘not completely unaccountable to governments and the people’, noting (accurately) that judges are worldly people who will inevitably consider the public’s reception of their decisions:320

[It is popularly assumed] that, because the judiciary is not elected, it must be undemocratic. ... [Judges, however,] read the papers and live in the world, and it would be unrealistic to conclude that they do not consider how their decisions will be received by governments and by the public. ... judges are not completely unaccountable to governments and the people. ... The dichotomy between the undemocratic judiciary and the democratic legislature is as simplistic and inaccurate as the dichotomy between making and applying the law.

However, what Roach stresses, as the central distinction between court and government decisions in the Charter dialogue, is that courts are the voice for rights protection, particularly rights of vulnerable minorities and ‘the truly unpopular’, and governments are the voice for the democratic will, ensuring democratic accountability in limiting or denying Charter rights.

Roach bases his central distinction not only on the terms of the Charter but also on the common law tradition, and I want to briefly comment on both grounds.

Respecting the Charter, to look to its terms alone, as I argued respecting Hogg’s theory, narrows the view of the institutional decisions involved, overlooking their effects in dialogues in all contexts, including this one but not only this one. If the nature of a decision is defined by the terms of the law in issue, then, for example, judicial decisions might be defined as decisions that favour federal over provincial authority or that divide estates among heirs or that protect wild animals, if this is what the law provides, and the definition would change with different laws and changes in the law. On the other hand, if both institutions may address both topics of rights and democratic limits in making their Charter decisions – and the Charter is seen to facilitate their both doing this, not dividing the topics between them – then this invites further examination to distinguish the way each institution addresses the same topic.321 It is this distinction, which Roach does note, that I will argue holds for all dialogues and is highly significant.
Respecting the common law tradition, Roach describes the dialogue as rooted in a common law presumption that Parliament intends to respect judge-made norms and rights, unless it has enacted legislation that clearly ‘spelled out for the people and the court its intent to violate’ them.\textsuperscript{322} A strength of his theory is this attention to common law tradition (a tradition touched on in my historical overview in Chapter 1, insofar as it relates to the approach I will introduce). I discuss it below, where I note two refinements I would add to his description of that tradition. Another aspect of the common law tradition is the distinct decision-making process developed by the courts, which I will argue is the most significant aspect, and part of a larger historical picture that includes distinct legislative and prerogative processes, developing in tandem with the judicial process, in the Parliaments that became democratic governments.

5. Other ‘Distinct and Complementary’ Qualities

Roach focuses not only on the dichotomy of ‘rights protection and democratic limits’, and not only refines and qualifies that distinction, but also, as I have noted, refers to other qualities that distinguish court and government decisions.

Court decisions Roach describes as requiring ‘evidence and reasoned arguments’, and ‘enough facts’ to decide an issue.\textsuperscript{323} He refers to judge-made standards for assessing evidence, and to judges ‘interpreting’ laws and ‘defining’ rights, sometimes giving them broad and creative meanings, through their ‘own way of reasoning’.\textsuperscript{324} ‘Justice’ he notes repeatedly as a special judicial concern, both as a process matter and a general ideal – referring to the ‘fair process’ that courts champion and governments are liable to ignore, the long history of judges articulating common law ‘fairness values’ and ‘presumptions of fairness’, and to ‘our higher aspirations to justice’ that the Court reminds society of.\textsuperscript{325} He distinguishes justice issues within the Court’s ‘expertise’ from others within the legislature’s, and to the Court having ‘no incentives other than to achieve justice as best it can’.\textsuperscript{326} And, following Bickel, he describes judicial decisions as ‘deliberative’, bound by precedent, and ‘principled’.\textsuperscript{327} ‘Principled’ reasoning is captured in Bickel’s description of the ‘strong judicial voice that defends principles such as minority rights, fair process, and fundamental values’.\textsuperscript{328}

Roach cites Bickel’s view that the Court should make its constitutional decisions on the basis of ‘principle properly crafted and defended’.\textsuperscript{329} In the following passage, Roach reinforces
Bickel’s analogy of the Court to Socrates, likening the ‘judicial voice of principle’ to the philosopher’s wise words to his students (an analogy I will evaluate critically in Part Three):  

The Court’s use of principle also meant that Bickel did not believe that the dialogue between courts and legislatures was a conversation between equals in which the Court and the legislature had an equal right to act on its own interpretation of the Constitution. The Court played the role of Socrates, while the legislature and society played the role of the sometimes stubborn and strong-willed students. This analogy is not as paternalistic as it sounds, because Socrates’ students could always have refused to listen to their teacher, or simply overpowered him, if they had been prepared to ignore his words of wisdom.

Roach also states what judicial decisions are not, emphasizing their ‘anti-majoritarian’ nature, and that they cannot be justified by ‘public opinion’ or ‘majority sentiment’ or the ‘personal beliefs’ of judges. Judges may formulate ‘broad principles’ but not ‘the values of the community’ on ‘broad social questions’. Their decisions may be found by governments and the public to be ‘misguided or unacceptable’: Judges cannot be expected to reach ‘reliably right answers that are themselves consistent with democracy’ or majority sentiment.

Thus, Roach recognizes other features of judicial decisions, which point to a ‘judicial function’ that is not about protecting rights or fulfilling a task assigned by a constitution. I will be arguing that three of these features are definitive of judicial decisions, consistently distinguish them from political decisions, and are the most significant aspect of the dialogue between them: These three are ‘facts’ found from ‘evidence’, ‘principled’ ‘reasoned arguments’ formulated by judges through their ‘own way of reasoning’, both of which Roach refers to as required by courts to decide a case, and their special ‘justice’ concern, encompassing both our higher aspirations to fairness and a fair process in concrete practicality.

Looking at these features – the combination of facts, reasoned arguments, and justice – from the perspective of Jung’s functions theory, they can be seen as reflecting a unique form of the combination of conscious functions which produces a distinct conceptual viewpoint that Jung called for short ‘concrete thinking’ (a precise term for a process that is more complex than may be assumed, as I will explain and illustrate). A court, when it seeks to do justice ‘as best it can’, does so in a distinct fashion, giving an overarching ideal of ‘Justice’ concrete form in facts and principled logic in each particular case. One might see that precisely this definitive judicial concern with justice underpins the distinct common law protection of individual rights. And the
‘fallibilities’ of court decisions are similarly distinct, resting in lack of skill and biases that distort this distinct function, and in the inevitable blind-spots or missing viewpoints (such as the political viewpoint) of other functions which courts do not develop.

Some of the other features Roach refers to in distinguishing court decisions, however, are not consistent or exclusive to them, and are not the most significant features from the critical psychology perspective (as I will explain in Part Three). Being ‘deliberative’ is not unique to courts; legislatures deliberate too, as Chief Justice Hale argued in distinguishing legislative law-making as ‘deliberative’ rather than ‘judicative’.335 Being bound by their own earlier and higher precedents is also not wholly unique to courts, since governments are bound by their earlier or higher decisions (in their constitutional and legislative enactments, not Hansard records) and governments must, as courts must, follow a distinct process to change or depart from them.336 Courts are ‘non-majoritarian’ rather than ‘anti-majoritarian’, motivated neither to favour nor oppose the citizens’ will.337 Dispute resolution can be achieved through the political process, too; what is unique in judicial dispute resolution is the concrete human reality and particularity of the dispute, developed by the judicial decision, and the distinct trial structure, which is there for the sole purpose of supporting that distinct judicial process. ‘Principled’ reasoning, too, can be part of political deliberation: the ‘strong voice’ for cherished values, described by Bickel as belonging to a judge, could also belong to a politician.338

Government decision-making is also elaborated, outside the Charter, by Roach. He does not describe other features of political decisions, but clarifies and develops the ‘democratic’ idea that is central to his thesis, emphasizing that the citizens are ‘the ultimate reference point in a democracy’ and are ultimately responsible for the laws their governments make.339

Although his focus is on legislative decisions of governments, Roach also refers to ‘political’, ‘democratic’, ‘executive’, and ‘administrative’ decisions.340 Governments speak for the ‘values’, ‘wishes’, ‘sentiments’, and ‘interests’ of the citizens.341 Unlike judges, politicians are intended to be and are motivated to be sensitive to ‘public pressure’ and ‘popular support’, and to respond if a law or policy or court decision provokes ‘widespread or focused opposition in civil society’.342 Roach refers to the ‘majoritarian’ nature of democratic decisions, to the ‘majority will’ and the ‘strong majority’ required in order to legislate on divisive issues, and to governments having ‘an interest to maximize the rights of more popular groups … and to
minimize the rights of less popular groups’. It is ‘the discovery and reflection of majority sentiment’ and the accountability to the popular will on an issue that distinguishes legislature from court decisions. This is, of course, the basis for his central argument that democracy is served by an explicit legislative response in the dialogue. Roach also refers to a special ‘expertise’ governments have. Following Fuller and Dworkin, he describes governments as making policy on ‘broad social questions’ and ‘complex’ issues, such as the ‘morality’ and ‘wisdom’ of a law or the preferred ‘budgetary priorities’, and deciding what ‘policy goals’ and ‘regulatory objectives’ to adopt. This requires ‘difficult choices’ and assessments as to what ‘values’ to endorse, what goals are ‘wise or necessary’, what ‘alternatives’ will be most effective, what ‘obstacles’ must be overcome, and what ‘trade-offs and limitations to make on rights’. Legislatures have ‘certain advantages’ in making such choices, Roach says, and quotes former Premier Blakeney’s view on these: The essence of government is making a fair number of these choices and I say that judges are not well qualified to do this. They do not have the expertise or the staff. They cannot set up task forces and they cannot find out what the problems are. They are not terribly sensitive to what the people want. ... basically the courts are good places to decide individual cases of human rights issues, but bad places to decide broad social policies in the guise of deciding issues of human rights.

Thus, politicians are equipped, unlike judges, to ascertain ‘the social facts’ and the wishes and values of the citizens, and in particular of a majority, sometimes a strong majority, or a popular minority. Moreover, because they control the public treasury and civil service, governments have the resources and expertise for doing this.

Two important fallibilities in government decision-making are pointed out by Roach. The democratic process is inherently vulnerable to abuses of minority rights and other ‘unworthy inclinations’ of the majority, and to losing sight of the rights and fairness values that concern courts: These may be so politically ‘inconvenient’ to ‘politicians and bureaucrats’ that they are ‘likely to be ignored or finessed in the legislative and administrative processes’. With respect to this fallibility, Roach notes the limits that may be imposed on majority power by ‘fundamental rights’ and ‘principles of democracy’, such as the freedom of speech that is necessary for democracy to thrive (limits which have both constitutional and judicial sources, as I discussed in Chapter 2). The other fallibility is malfunctions in the democratic process itself that
undermine majority rule and the citizens’ voice – such ‘failures of democracy’ as decisions made with ‘little public debate’, or shaped not by citizens’ values and interests but by the ‘political power’ of corporations that ‘pump millions into the economy’, or governments ‘beset with paralysis’ and not carrying out their task. He notes that elected governments are ‘not perfectly’ accountable to the people (quoting constitutional law expert Paul Weiler):

‘[A] majority vote in the legislature is not a democratic talisman’, especially in the Canadian parliamentary system of strict party discipline and tight control by the prime minister. … In any event, governments are often not elected with a majority of the votes and, between elections, those with a majority in the legislature have significant freedom to enact legislation that may not accord with what the majority wants.

I want to especially underline this latter fallibility of government decisions, which Roach makes clear with two points. On one hand, he notes the sensitivity of governments to the values of citizens – their ‘ultimate reference point’ – and the advantages governments have in doing the tasks required to ascertain and develop citizens’ values. This makes it important not to blur the ‘democratic dichotomy’ (as Roach at one point does, though not in his central theory), because courts cannot carry out this political function: Courts can contribute to developing the quality of democratic decisions, through judicial scrutiny of what is reasonably required to make such decisions, but cannot make them. On the other hand, Roach accents the recognized ‘failures of democracy’ – when governments do not reflect citizens’ values, due not to limits on majority power in a democracy (to protect other values in addition to democracy), but to malfunctions in the process itself. These two points highlight the unique strengths of governments in making political decisions democratically, and yet the long-recognized weaknesses which allow them to fail to carry out this democratic function well or at all. It is crucial to address these weaknesses, according to Jung’s functions theory, as I will explain, in order to ensure that political decisions are as expertly honed in their specialized task, as judicial decisions are in their task.

6. How the Dialogues enhance Democracy

Roach describes dialogues between court and government under the Charter and also in the common law tradition, as I have noted. I want to examine his descriptions of their dialogue in both contexts, and how he says they enhance democracy.
The Charter structures two dialogues, Roach explains. Both begin with a judicial decision striking down a law for violating a Charter right, putting the right ‘into political play’ and drawing public attention to how it is being treated. The government can reassert its law in response, in explicit legislation that justifies the law under Section 1, as a ‘reasonable’ limit on the right ‘demonstrably justified in a free and democratic county’, or that overrides the right under Section 33, by enacting a notwithstanding clause.

In the main dialogue under Section 1, justifying the limit on a right, the government ‘educates’ the court about ‘objectives and obstacles that the court might otherwise have difficulty appreciating’, ‘explaining to the court and the people’ what concerns (such as majority sentiment or trade-offs involved) led to this limit. Social science research can be commissioned to demonstrate the need for the law and its effects, and other steps taken (such as those noted by Blakeney) to ‘consciously define’ what justifies the limit. Roach calls this a ‘constructive dialogue’ which promotes ‘a particular institutional division of labour’: The court’s voice for rights ‘asks why’ a Charter right needs to be limited, and the legislature’s voice for democracy ‘explains why’ by justifying the limit in explicit legislation. The institutions thus ‘expand the horizon of each other’, Roach explains: Each ‘listens to and learns from the other’ things it would ‘otherwise not appreciate’, while ‘also being true to its own concerns’ and thus able to ‘make contributions the other could not’ and ‘respond to the inevitable shortcomings of the other’ by introducing ‘new perspectives and new ways of looking at the problem’.

The extraordinary dialogue under Section 33, on the other hand, is ‘the equivalent of shouting to win an argument’: The government rejects the judicial decision by declaring the law will operate regardless of the Court-protected right. There is no attempt to justify the law, and no mutually-enriching conversation about it – just an ‘extraordinary’ claim that the judicial decision is unwise, misguided, or simply ‘unacceptable to society’. Section 33 provides an important ‘final democratic fail-safe’, Roach says, because it gives governments the final say if ‘a showdown’ looms, and it has restrictions protecting both democracy and rights. Democracy is protected because the override expires in five years, ensuring it cannot be re-enacted without an intervening election. Rights are protected because the override can be used for only some Charter rights – Fundamental, Legal, and Equality Rights – and not the rest, which include Democratic, Mobility, Official Language, Gender Equality, Aboriginal, and Other Rights.
Looking at these two dialogues from the perspective of Jung’s functions theory, the main dialogue, with its mutually educating contributions and its horizon-expanding potential, is a model of a constructive ‘interplay of complementary opposites’ between judicial and political viewpoints to a topic, according to Jung’s functions theory, as I will explain in Part Three, and it also indicates the significance of that interplay. The extraordinary dialogue under Section 33, however, as Roach points out, lets the government shout down the court, passing any dialogue to the next government when the override expires. It thus addresses the real problem of impasses by ending the dialogue in different ways, depending on the right involved: For rights subject to Section 33, it elevates the authority of governments (not democracy per se, which is deprived of judicial scrutiny and protection), while, for the other rights, the Court’s interpretation can prevail and can always be applied anew to new or revised legislation.

Roach refers to three arguments to explain how Charter dialogues enhance democracy. The central argument he advances, discussed above, is that a government’s legislative response to a Court decision striking down a law, or its silence, informs citizens about ‘what bureaucrats and the legislature are doing in their name’, and invites ‘public scrutiny’ of their treatment of a right. This enables citizens, who are ultimately responsible for what politicians do, to hold them to account, encouraging ‘active citizenship’ and ‘clearly focus[ing] political responsibility’ on politicians, who pay ‘the political price’ of defeat at the polls if they lack sufficient citizen support. The ‘truly democratic dialogue’ under the Charter, Roach says, is not a ‘professional debate’ but a ‘serious debate of citizens’ about the government’s power to limit Charter rights:

Truly democratic dialogue that occurs under a modern bill of rights is not the professional debate of professors and pundits … it is the democratic debate of citizens whether the power of their elected governments to place limits on the Court’s decisions or even to override them by ordinary legislation should be exercised. … Democracy is enhanced … by requiring legislatures to clearly articulate, justify, and be held accountable for their decisions to limit or depart from the constitutional or common law principles articulated by the Court.

A second argument Roach notes is that judicial decisions protect values and principles that are essential for a true or thriving democracy. He stresses that a purely majoritarian democracy as ‘an unrealistic and ultimately destructive myth’, and points out that Canada’s democracy has always included other ‘bedrock values of our democratic tradition’.
Democracy in Canada has never been about unfettered majority rule. Critics of judicial activism ... recast Canadian democracy in a purely majoritarian light that fails to explain other fundamental aspects of our society, including federalism, minority rights, and the common law.

This argument conditions ‘democracy’ itself on values in addition to majority wishes. These values might include free speech and the right to vote, fairness and the rule of law, individual dignity, mobility and equality rights, and a ‘faith in social and political institutions which enhance the participation of individuals and groups in society’ that is essential to ‘a free and democratic society’ (as defined by Dickson C.J. in Oakes, and included in a broad ‘concept of democracy’ by Iacobucci J. in Vriend). Some of these are clearly ‘preconditions to individuals making independent, informed, and intelligent decisions’. But not all are. As Roach also points out, it is ‘difficult to justify many Charter decisions’ as ‘absolutely and uncontroversibly necessary to maintain democracy’, and difficult to argue that all rights protected by ‘a robust form of judicial activism’ are ‘essential to a meaningful democracy’. He leaves this argument for the ‘simpler and less contentious approach’ of the argument he advances.

A third argument Roach notes is that Charter review enhances democracy because it enables courts to correct ‘malfunctions in the operation of the democratic process’ and to intervene when ‘the political process is deficient in some way’ (referring to such ‘failures of democracy’ as I have noted above). Roach did not stress or develop this ‘process-based’ argument in his initial theory. However, it can be seen as related to his central argument.

Respecting these three arguments, I will be suggesting that a critical psychology approach reinforces Roach’s central argument that the judicial decision enhances democracy, by showing that it can do this because it is able to challenge the democratic quality of a political decision from its well-refined complementary viewpoint. This approach also strengthens his argument, I will suggest, by showing that court and government decisions require specialized expertise, of two distinct types, and that this increases the positive potential of their dialogue. This approach also reinforces Roach’s caution about the second argument. Not all values in a good society can be defined as ‘democratic’: there are values and ideals that do not depend on democracy, and these need to be scrutinized separately from democracy and in relation to it, in a dialogue that is both ‘democratic’ and ‘judicial’. And this approach reinforces the third argument – and shows its significance: The dialogue enables courts to use their distinct process
to scrutinize and challenge government decisions for malfunctions or deficiencies in their distinct process, and *vice versa*, thus ensuring their mutual refinement and the contribution of two distinct and well-refined complementary viewpoints on the contested topic.

Respecting the common law, as noted above, Roach describes the Charter dialogues as rooted in a common law tradition framed by two principles – Parliamentary supremacy and the judicial presumption that Parliament accepts judge-made rights and norms unless it clearly states it does not. This created ‘dialogue’, Roach explains, because governments could respond by rejecting judge-made rights, and it was ‘democratic’ because they had to ‘take responsibility’ by doing so in clear legislation.³⁷⁴ The Charter improves upon this tradition, increasing democratic accountability by requiring explicit legislation stating *why* a court-protected right is rejected (in an explanatory preamble, or in a notwithstanding clause clearly claiming the court protection is unacceptable) – thus forcing legislatures to more carefully consider less drastic alternatives, and also better ensuring that citizens know what their government is doing in their name, so that Parliamentary supremacy is democratic supremacy – and at the same time, prohibiting some court-protected rights from being rejected by Parliament (those not subject to Section 33).³⁷⁵

Looking to the common law tradition, and not solely to the Charter’s terms, strengthens and deepens Roach’s theory.³⁷⁶ It leads him to consider the nature of the institutional processes, not disregarding the distinct *way* governments must respond, and the implications of this way with respect, ultimately, to political accountability and citizen responsibility for government decisions. There are some additions I would make to Roach’s description. Other aspects of the common law tradition are relevant (discussed in my historical overview), such as competing principles affecting law-making authority, common law court rejections of government authority, the intertwined or undifferentiated roots of rights protection, and the distinct judicial process that was created by the common law courts and used by them to create their common law.

To briefly note these additional aspects of the common law tradition, relevant to conflicts between courts and governments: Parliamentary supremacy is one, and judicial independence the other, of two sides of the truce following ‘the Explosion of 1616’, setting up competing principles which made ongoing challenges and dialogues between the institutions inevitable (as still seen, for example, in the existence of Section 33 and in judicial refusals to apply legislated laws).³⁷⁷ Court decisions did not always give way to Parliament’s express authority, as they did
not when they granted their ‘prerogative remedies’. And the rights protections of ‘the law of the Land’ go back to sources that are as political as judicial – to the treaty won by rebel barons in 1215 and implemented in the gentry-including parlement of 1265 – and back further, to folk assemblies with their community justice based on local customs and beliefs, supported by kings. It was this community process that was absorbed and developed by common law judges. And judges did that by creating a distinct judicial process for exercising a political authority, the delegated royal prerogative to do ‘equal and right justice and discretion in mercy and truth’. 378

These aspects of the common law tradition, along with those Roach introduces, lead me to the perspective of Jung’s functions theory on conflicts between judicial and political decisions.

7. Trialogues, Internal Dialogues, and Multiple Dialogues

Roach generally refers to a two-party dialogue. But sometimes he mentions a three-way dialogue, including ‘the people’ or ‘society’ as a separate party within the institutional dialogue itself – a trialogue idea proposed by other legal scholars, most prominently by Marilou McPhedran. 379 Thus, Roach refers to a dialogue ‘between the independent judiciary, the elected legislatures, and the people’. He refers to ‘the minority’ having its own ‘lines’ in this dialogue, and to ‘non-governmental groups’ bringing in their perspectives to balance the government’s ‘one perspective on the public interest’. 380 Such ‘trialogues’ present the voice and viewpoint of an organized group of citizens as directly engaging the viewpoints of these two public decision-makers, as equals in a single combined debate among the two institutions and that group.

Dialogues between court and government do typically (though not necessarily) start with court decisions in cases brought by individual litigants, and continue in government responses influenced by groups of active citizens. 381 These citizen engagements in court and government processes are vital in a democracy. However, although it may thus seem expansive to include these voices, such a view might undermine the dialogue, for at least four reasons. It ignores the expert and representative nature of the institutions, and the voices of citizens and litigants that were essential to their decisions and for whom they speak; it risks diffusing the institutional responsibilities; it detracts from other dialogues occurring within each institutional process, and it introduces a burden of social activism on citizens which citizens are unequally able to bear.
When Roach writes that the dialogue is not a ‘professional debate’ (quoted above), he might underplay the roles and obligations of judges and politicians. They are not ‘professors and pundits’, but not simply ‘citizens’ either. They are more akin to professionals than amateurs, since their decisions require expertise in specific decision-making processes – a judicial process and a political or democratic process (both legislative and executive). The dialogue should engage court and government as two specialized institutional decision-makers (I will argue in Part Three), each having unique expertise, authority, resources, and responsibilities to exercise on behalf of society. The voices of citizens and litigants, respectively, underlie their decisions and are essential to their legitimacy. But unlike voters, and like professionals and trustees, judges and politicians may and should, I will argue, be held to standards of ‘reasonable care and skill’ in their areas of expertise and responsibility, and not left free to act as oligarchs or demagogues. The government’s ‘one perspective on the public interest’, referred to by Roach, is not simply ‘one’: It is meant to be a rational perspective developed expertly by an exclusive representative of all citizens – a different category from individual citizen or group perspectives – and the Court’s judicial ‘lines’, too, are in a different category.

This aspect of the dialogue is significant. To ignore it diffuses institutional responsibilities, and may thus lessen the expectation and pressure on courts and governments to expertly refine their functions and their contributions to the dialogue. It also risks creating a cacophony of the public decision-making process, in which institutional failures can go unseen. And it detracts from the crucial underlying dialogues that must occur within the institutions – between courts and litigants and between citizens and governments – before each institution can make the decision that it contributes to the dialogue. Finally, respecting the voices of citizens, the triologue idea introduces a burden of social activism which might well privilege citizens with the ability and resources for effective social activism, and thus increase inequality in access to justice and democracy, within the existing institutional processes. Rather than privileging those citizens who are able to be effective activists, I will argue, the existing processes should be reformed to better provide that ability to all citizens.

Roach’s theory seems actually to incline more to the idea of multiple dialogues than to a triologue in the institutional dialogue. He refers sometimes to ‘dialogues’ in the plural, and to courts, not dialoguing with citizens, but turning government dialogues with citizens from ‘majoritarian monologues’ into dialogues ‘where the weak are at least heard’.
‘democratic debate’ involving ‘the media’, and to its impact on ‘the world’. Such references can be read to refer to multiple dialogues going on, outside the institutional dialogue between court and government. And Roach has introduced the idea of ‘internal’ dialogues, going on behind the institutional dialogue and instrumental in the institutional decisions themselves.

Certainly, the idea of multiple and internal dialogues – not third parties joining the dialogue between courts and governments, but other dialogues separate from the institutional dialogue – accords with Roach’s emphasis on the citizens as ‘the ultimate reference point in a democracy’ and on the ‘debate of citizens’ as the ‘truly democratic dialogue’. A ‘democratic dialogue’ is thus a dialogue of citizens with their governments, not governments with courts. It is behind the two institutional decisions that the ‘truly democratic’ dialogues of citizens with governments and what might be called ‘truly judicial’ dialogues of litigants in courts, occur. This accords with the approach to judicial and political decisions that I will be introducing. Litigants should press judges for well-refined judicial analyses of evidence and arguments and justice in concrete reality. Voters should press politicians for well-refined articulations of their values in legislative and executive decisions, developing a common ground that achieves, as well as reasonably possible, the best of what citizens share. If an institutional dialogue reaches an impasse, with court and government polarized on a topic, this will intensify those internal dialogues, of litigants in courts and citizens with their governments, and will also highlight social supports needed for society to endure these impasses and achieve their benefit.

8. Dialogue Theory Points that I will Develop

Having examined these two dialogue theories, I want to summarize how I will build on the strong points – in a critical psychology based on Jung’s functions theory – to develop a different understanding of the dialogue and precisely how to approach it.

While Roach’s theory, like Hogg’s, focuses on the Charter context and defines the dialogue as ‘democratic’ alone (reflecting the terms of the complaint they address), Roach also notes that the dialogue occurs in other contexts, and he explains how it enhances democracy. Developing these points further, I will argue that it is important to recognize the institutional dialogue as both ‘democratic’ and ‘judicial’, and enhancing both processes, and to seek effects that it has in all contexts, including the Charter context. Roach roots the dialogue in the common
law tradition, and I will include as relevant aspects of that tradition, in addition to common law and the principle of parliamentary supremacy, the distinct process judges created for making common law, and the sister principles of judicial independence and the rule of law (all three principles were part of the inconclusive ‘truce’ after 1616, as I described in Chapter 1).

The voices in the dialogue are distinguished in Roach’s central argument, as a court voice for protecting rights and a government voice for democratic limits on rights. However, Roach also refers to other qualities of court decisions. Some of these are not uniquely judicial (being deliberative and principled can pertain to political decisions, too, just as protecting rights can), and are not the most significant qualities, from a critical psychology perspective. But some of them are: ‘Facts’ found from ‘evidence’, their ‘own way of reasoning’, and ‘justice’ both as an inspiring ideal and a fair practice – these three qualities are consistent in judicial decisions and definitive of them. They are the familiar hallmarks of judicial decisions. And they are hidden in plain sight – stated simply as accepted givens, by both Roach and Hogg, then overlooked or obscured by other factors, rather than being brought to the forefront and examined further. As for government decisions, Roach elaborates its democratic basis, referring again to familiar hallmarks, such as ‘the discovery and reflection of majority sentiment’, the sensitivity to ‘public opinion’ and ‘values of the community’, the support of citizens as ‘the ultimate reference point’.

In his references to other qualities of judicial decisions, and his elaboration of democratic decisions, Roach is describing two unique types of rational decisions. Looking back to the history (in Chapter 1), these are the consistent ‘distinct and complementary voices’ (in Roach’s phrase) – not unique topics but unique ways to decide them. And these are specialized decisions, I will argue, involving exclusive authority and requiring expertise as professional decisions do. Roach refers to government expertise and resources (the ‘advantages’ that enable them to set up task forces, consult with citizens, find out the problems and what people want, and decide what values to endorse, policy goals to pursue, budgetary priorities to set on their behalf) – all no less specialized and demanding, I will argue, than the expertise and structure of courts. Looking ahead to the approach that I will introduce, their two unique types of specialized decisions are significant aspects of court and government roles in any dialogue – because these produce two distinctly different rational viewpoints on any topic, which are mutually correcting or compensating ‘complementary opposites’ (in Jung’s precise term, which I will explain).
With respect to the effect of the dialogue, while both Hogg and Roach emphasize the final legislative response, Roach further explains (as his central theory) that explicit legislation enhances democracy by ensuring citizens are informed and can hold politicians to account. He also refers to arguments that the dialogue protects values and principles essential to democracy, and that it enables courts to correct ‘malfunctions’ and ‘deficiencies’ in the democratic process. Roach’s central theory highlights an important ‘internal dialogue’ he has also described, between citizens and their government (along with such internal dialogues between government and ‘the media, academe, and other estates that enrich civil society’). The government’s dialogue with citizens is not its dialogue with the Court, but it underlies and informs the government voice in that dialogue. I will argue that it requires more than explicit legislation to address deficiencies in the political process and better attune government to the democratic ideal, and that establishing what is required, in concrete reality and justice, depends on the courts’ judicial contribution to the dialogue. I will advocate for the political process in democracy to be appreciated as, not simply a way to identify and reflect majority sentiment, but (using the terms of the approach that I will introduce and explain) a way to expertly uncover and develop ‘felt values’ that matter to citizens and are shared by them – just as courts expertly develop the essential criteria of their process. I will consider Bickel’s analogy to Socrates and the students, and whether it miscasts the dialogue, and whether other symbolic figures more aptly capture court and government and the relationship between them.

Roach also describes a mutual effect of the Section 1 dialogue: Court and government each educate and learn from the other, both making ‘contributions’ that ‘respond to the inevitable shortcomings’ and ‘expand the horizon’ of the other. I will develop this point especially, and emphasize that refining democracy is only half the dialogue and half the larger picture, in which both processes refine each other and expand the overall conscious grasp in society of any contested topic. I will argue that ‘consciousness’ (considered by Hogg and touched on by Roach in his reference to the dialogue making democracy more ‘self-aware, self-critical, and real’) is the lodestar of the dialogue: The ability to develop rational consciousness on a contested topic is what is most significant about the dialogue, and the judicial and political contributions to it. And I will note that addressing biases (also touched on by Roach in his reference to dialogues forcing citizens to confront their ‘prejudices and fears’) requires recognizing and refining, not blurring or
glossing over, the distinctly different and complementary types of specialized rational viewpoints that court and government can provide.

Criticisms of the dialogue metaphor have sometimes led to its being abandoned or downplayed. But I will argue in Part Three that ‘dialogue’ is an apt and powerful representation of the interplay or interaction between court and government decisions on a contested topic, and that it should be refined and developed, in response to well-justified critiques, in order to further the positive potential of conflicting judicial and political decisions.

Bagshot’s warning (quoted in the Chapter 1 epigraph) that a nation may fail from failing to comprehend the great institutions it has created, fuels my purpose in introducing a critical psychology approach to court and government decision-making, to reinforce and develop these important constructive points raised by dialogue theories.

Summary

In this chapter, I considered legal theory descriptions of the dialogue between courts and governments in the Canadian constitutional context, in Hogg’s ‘final word’ dialogue theory and Roach’s ‘democratic dialogue’ theory. I assessed strengths and limitations of both theories, from the perspective of the critical psychology approach I will introduce. I focused especially on Roach’s descriptions of other qualities of court and government decisions, apart from either protecting or limiting existing Charter rights, and other important effects of their dialogue, in addition to enhancing democracy through explicit legislation. I explained why ‘dialogue’ is an apt metaphor, both fitting and productive. Finally, I previewed how points raised by Roach’s theory will be developed in a critical psychology approach.

This concludes Part One of my thesis, setting out a legal and historical framework for viewing judicial and political decisions and the relationship between them. In Chapter 1, I gave a broad historical overview of the emergence in England of separate institutions, in which judges created a distinct decision-making process in courts, and politicians did the same in Parliament and the Prime Minister’s office. I described clashes between judicial, prerogative, and legislative decisions, and the enduring but inconclusive ‘truce’ after the Explosion of 1616. The conflicts were described further in Chapter 2, where I gave examples highlighting their varying results, and their inconsistency on topics (such as rights) but consistency respecting the different criteria.
articulated by judges and politicians to justify their decisions. In Chapter 3, I described how two leading legal scholars characterize court and government decisions and the relationship between them, in dialogue theory approaches to conflicts in the Charter context.

Now my thesis will shift to an entirely different framework. In Part Two, I will introduce a critical psychological theory of consciousness and, in particular, of how rational consciousness changes and develops. This is Jung’s theory of conscious functions, that is, those psychological processes that we can consciously select, exercise, and refine in order to take in and make sense of reality. I will explain this theory, describing the different functions and their distinct viewpoints or ways of making sense of reality, and illustrating them. Then, in Part Three, I will adapt this theory from the individual to the institutional decision-making context, as a critical psychology approach to understanding such institutional processes. Bringing back in the legal and historical framework set out in this Part, I will apply this approach to provide a different perspective on the nature of judicial and political decisions, their relationship to each other, and the significant and precise potential of conflicts and dialogues between them.
Chapter 4

Conscious Functions and their Complementary Viewpoints

The four functions are somewhat like the four points of the compass … I would not for anything dispense with this compass on my psychological journeys of discovery. This is not merely for the obvious, all-too-human reason that everyone is in love with his own ideas. I value the type theory for the objective reason that it offers a system of comparison and orientation which makes possible something that has long been lacking: a critical psychology.

C.G. Jung, 1933

In Part One, I traced judicial and political decision-making processes as far back in time in England as the historical date will bear, and I demonstrated the significance of that legacy to our time and in contemporary practice. Here in Part Two, I will outline a theoretical perspective that can be used to understand judicial and political decisions more precisely and fully. This is Jung’s theory of psychological functions, which is his attempt to set out ‘general principles and criteria’ that can serve effectively as ‘a critical psychology dealing with the organization and delimitation of psychic processes that can be shown to be typical.’ Jung’s critical psychology identifies thinking, valuing (or feeling, which is not emotion), sensation, and intuition as four different modes or types of conscious psychological functioning, producing four distinct and complementary ‘takes’ on outer and inner reality, which together provide the full array of rational viewpoints that are possible for us. In this chapter, I explain Jung’s theory of conscious functions, and in Chapter 5, I illustrate the theory with relevant examples of the functions and their viewpoints. In Part Three, I will apply this theory as the foundation for the approach I introduce to judicial and political decisions, and I sustain my argument with a case example.

This theory of Jung’s, which is easily accessible due to the simplicity of its structure, has far-reaching explanatory power and complexity. It has been influential in psychology and other fields, though often misused and misconstrued as a static classification system of personality. It is much more than a static typology, however. It is a dynamic model of rational consciousness and how it develops. As one author has described the conscious functions
theory, it is a perfect place to ‘dip one’s toe into the river of Jung’s thought’, and on into the fuller picture of the relationship between conscious and unconscious contents and processes.\(^{398}\)

And it also stands on its own, I hope to show, as a critical psychology that provides a precise, enlightening, and practical way to understand the ordinary nature of rational consciousness and how to develop it, in individuals and in society as a whole.\(^{399}\)

1. **Conscious Functions and Rational Decisions**

   Jung’s theory is built upon four psychological functions that create and constitute consciousness, which every person has, and which are the only tools or processes a person has for being conscious. These are two perceptive functions of ‘sensation’ and ‘intuition’ and two apperceptive functions of ‘thinking’ and ‘valuing’ (which Jung also called ‘feeling’, as I will discuss, and sharply distinguished from ‘emotion’, as I will also discuss). These functions are distinct, each different from the others, and all indispensable to the rational grasp of any topic if it is to be developed as fully and accurately as humanly possible at any point in time.

   Jung’s theory interests me because, as I will argue, it makes possible a more refined and practical understanding of these familiar concepts, of the psychological phenomena they refer to, and of how they work to produce and develop consciousness, including in making rational decisions. Placing the functions in a critical psychological context, Jung elucidated the distinct type of contribution each makes to rational consciousness – analyzing them with precision and rescuing them from Romantic and Modernist reductions. I will explain and illustrate this in detail in this and the next chapter, but a preliminary note here may be helpful.

   Scholarly analysis has elaborated the rational process involved in decision-making from a widening range of perspectives – philosophical, sociological, and neurological, for example. Jung’s approach, which starts with the idea of carefully distinguishing how thinking differs from feeling or valuing, may seem rudimentary at first glance. But I will argue that it provides a sophisticated way to enhance understanding of judicial and political decisions.

   If the distinction between thinking and valuing is blurred, or, in the opposite direction, too polarized through theoretical parsing, then the significant potential of both their distinctiveness and complementarity is lost. This distinction and complementarity are crucial to understanding the judicial and political contributions to the dialogue on any topic and to the
development of the shared consciousness of our society. These contributions, I argue in Part Three, based on Jung’s theory, are distinctly different specialized rational viewpoints: a judicial decision’s refined development of a concrete factual and conceptual viewpoint on a topic, guided by a goal and ideal of Justice, and a political decision’s refined development of the shared values of citizens on the topic, guided by any of many goals and ideals.

2. Four Psychological Functions of Consciousness

Jung made the simple but far-reaching observation that there is not just one single way in which we take in the world and make rational decisions about it, not one single way in which we are ‘conscious’. Nor are there numberless ways. We have certain distinct psychological processes at our disposal, each of which produces a unique type of consciousness or viewpoint on reality. Jung postulated, as the fundamentals of conscious functioning upon which our capacity for rational decision-making is structured, four psychological processes (which he called ‘conscious functions’ for short) and two psychological orientations.

The four ‘conscious functions’ are two perceptive functions of sensation and intuition which register reality, and two apperceptive or rational functions of thinking and valuing (or feeling, which is not emotion, as I have noted and will explain) which give sense or meaning to what is registered. The functions can be exercised in a variety of combinations: Thinking can be applied to a sense perception or an intuited insight, as can valuing. And each can be exercised in an extraverted or an introverted orientation; that is, applied to the phenomena of the external world or to those of the person’s internal psychological and physiological world. Each different combination produces a distinct viewpoint on any topic or aspect of reality, each with its own characteristic brilliance and blind-spots, each a ‘complementary opposite’ of the others.

Before describing the four functions and their roles in rational consciousness, I want to state what Jung means by ‘conscious functions’. ‘Function’ is another word for ‘faculty’ or ‘process’. ‘Conscious functions’ – or more fully, ‘psychological functions of consciousness’ – are those psychological processes through which we are conscious. They are the faculties we have that enable us to register and interpret our experience in the world, and thus to know and make sense of reality: to ‘be conscious’. We can exercise them at will, using them intentionally as our tools, or in psychological terms, as tools of the ‘ego’ or ‘I’. The ego is our conscious
personal identity: it is the ‘I’ that I know is ‘me’. It is more than we selectively present to others (our social ‘persona’), but not all that we are (only what we are conscious of about ourselves). Jung defined the ‘I’ or ego as the ‘center of consciousness’, not the totality of the psychological structures of the personality, which includes both conscious and unconscious.

Conscious functions differ from other psychological faculties. For example, memory and intelligence are indispensable to the ability to exercise the four functions well, but they must be made conscious through the four functions, and provide no conscious perspective themselves. The same is true of emotions and dreams: they are invaluable aids to conscious functioning, but cannot be exercised at the will of the ego, and can only be made conscious through the four functions. The four functions – sensation, thinking, intuition, and feeling/valuing – are the ways through which we can be conscious, and the only ways. We can consciously experience and make sense of any topic or aspect of reality only by these four means.

The idea of four functions has a long lineage. While it was Jung’s insight to recast them as innate processes that create the full possible range of our consciousness, the four terms were ‘culled from the history of psychology’, and ‘carry the ghosts of earlier meanings placed on them by many physicians and philosophers’. Based on observations made during many years’ experience as a psychiatrist and psychologist, Jung re-conceptualized them as four psychological processes, each irreducible and distinct, which provide all the ‘possibilities of consciousness’ available to us. It will be important to define carefully these four terms as Jung used them.

In Jung’s theory, sensation and intuition are defined as functions of ‘perception’, meaning they are ways to perceive or register what exists. Sensation registers what exists according to the five senses. Intuition registers what exists according to insights from what Jung described as ‘a kind of instinctive apprehension’, often referred to colloquially as a ‘sixth sense’. Jung’s view of intuition contrasts with conventional views about rational decision-making that treat intuition (if they treat it at all) as a form of thinking rather than perception, or a gut reaction based on expectation. Jung’s view is more precise, as I will elaborate below.

The other two functions, thinking and valuing or feeling (which is not emotion), Jung defined as ‘apperceptive’ or ‘rational’ functions, meaning they are ways to interpret or categorize the reality that is perceived, giving a perspective or viewpoint on it. They comprehend rather than apprehend; they assimilate or make sense of what is perceived by providing a viewpoint on
it. Both do this, but in different ways, by applying different selective criteria. Thinking uses concepts, such as principles of logic, for interpreting reality on the basis of conceptual analysis. Valuing or feeling uses an individual’s own personal values and preferences – how much a thing matters to them – for interpreting reality on the basis of personally felt evaluation. Jung insisted that both are ‘rational’ or ‘reasoning’ functions, because both give coherence and consistency to whatever is perceived. Both categorize reality and give a meaning to it, whether based on conceptual analysis or on personally felt value. Other theories of rational decision-making typically do not treat feeling or personal evaluation as a counterpart to conceptual analysis and, thus, as a different but equally ‘rational’ viewpoint. For Jung, thinking and feeling are two different but equally coherent, consistent, and meaningful ways for making rational decisions.

Jung concisely summed up the four functions this way:  

So far as my experience goes, these four basic functions seem to me sufficient to express and represent the various modes of conscious orientation. ... thinking should facilitate cognition and judgment, feeling should tell us how and to what extent a thing is important or unimportant for us, sensation should convey the concrete reality to us through seeing, hearing, tasting, etc., and intuition should enable us to divine the hidden possibilities in the background, since these too belong to the complete picture of a given situation.

Even more concisely: Sensation registers what exists in material reality, intuition registers what is inchoate, thinking defines both conceptually, and feeling assigns personal value to them. To take the sun, for example: Sensation registers a bright orb in the sky and warmth on the skin; thinking identifies the orb as a planet named the sun which creates the warmth; feeling evaluates warm days as more desirable than cool days; intuition gleans that the warmth can run machines. Or, the example of sorrow: Sensation registers a disruption in a physical and emotional state; thinking defines it as sorrow resulting from a certain loss; feeling evaluates it as a less desirable emotion than joy; intuition gleans that something of great import could arise from the sorrow.

Jung’s theory of consciousness starts with these four fundamentals: four different psychological functions that can be selected and exercised intentionally and that, uniquely among our psychological faculties, produce conscious perceptions and viewpoints on any topic or phenomenon of reality. Together they form our conscious awareness, including our rational viewpoints. They are our consciousness, and they are how we create and develop even more
consciousness, and our only means for doing so. They are the only kinds of consciousness we have. Using the analogy of the compass, Jung described these four functions as enabling us to ‘orient ourselves with respect to the immediate world as completely as when we locate a place geographically by latitude and longitude.’ He stressed the need to distinguish the functions and include all four, in order to have a complete and workable model of consciousness, one that can be critically and systematically tested and developed.  

3. The ‘Interplay of Complementary Opposites’ between Rational Viewpoints

The four functions are typically exercised, not individually, but in combinations of an apperceptive function applied to a perceptive function: that is, thinking or feeling combined with sensation or intuition. Thinking combined with sense perception produces what Jung called a ‘concrete’ thinking viewpoint. This is the conceptual analysis of material facts seen, for example, in ‘logical positivism’ and ‘the scientific method’. Thinking combined with intuition produces what Jung called an ‘abstract’ thinking viewpoint. This is the conceptual analysis seen, for example, in the speculative ‘grand unifying theories’ in physics and in the logical interpretations of symbolic dreams in the Bible. The same applies to feeling: It can be combined with either sensation or intuition, to produce both concrete and abstract feeling viewpoints.

The conscious viewpoint produced by each combination of functions is unique and different from the others. Each has its own distinct ‘take’ on any topic or aspect of reality, characteristic of its particular combination of functions. This means that each is also inevitably one-sided, with its own characteristic brilliance and its own blind-spots. The distinct conscious viewpoints are ‘complementary opposites’, in Jung’s theory, and an ‘interplay’ between all of them is necessary if the conscious grasp of any topic is to be as full and accurate as possible.

There is no intrinsic hierarchy among the functions and their viewpoints. This point is often overlooked or ignored, even by Jungian scholars. It is sometimes argued that sensation is primary because it is basic to any engagement with reality. Or it is argued that intuition comes first because it is closer to the unconscious that precedes and transcends the personal ‘I’ and its rational consciousness. Or that feeling or valuing is the most important, because it is intrinsic to what we care about and pursue in the world and in relationships with others. Or that thinking is the essential function because all experience is constructed by the way we define it and give it
conceptual meaning. Many other theories about rational consciousness posit hierarchies among psychological functions, explicitly or implicitly elevating some functions and minimizing others. For example, Carol Gilligan criticizes Lawrence Kohlberg’s theory of moral development for elevating ‘thinking’ and omitting what ‘intuition’ or ‘feeling’ might contribute to the quality of a rational decision, while Gilligan’s own theory of moral development privileges ‘abstract’ above ‘concrete’ viewpoints, and others do the reverse. But Jung emphasized that there is no intrinsic hierarchy among the functions and the viewpoints they produce. In his theory, no function is intrinsically more important or indispensable to consciousness. Jung’s analogy of the points of the compass emphasizes this: Just as no cardinal point is intrinsically more crucial than the others for determining geographic locations, so no function is intrinsically more crucial for establishing a conscious orientation within reality.

‘Complementary opposites’, as noted above, is a term used in Jungian theory to describe the different functions and combinations of functions and the distinct conscious viewpoints they produce. ‘Opposites’ indicates not simply that their viewpoints are distinctive – each one-sided or partial, with its own unique brilliance and its blindesses – but that they manifest as opposing contrasts, just as North and South, East and West, do on a compass. They are, inherently, potential opposites which can meaningfully conflict. So, for example, an empirical feeling or valuing viewpoint (feeling applied to an inner sensation) may render a sorrow as unwanted, while an abstract feeling viewpoint (feeling and intuition) may present the same sorrow as a gift to value because it presages the emergence of an as yet unknown greater joy. Empirical thinking can provide a sound conceptual viewpoint based on a logical deduction from tangible facts (the sorrow signifies a loss which is painfully disruptive) but be lacking in vision, while abstract thinking can provide a creative conceptual viewpoint based on intuitive insight (sorrow affirms what is lost and hints at something greater to gain) but lacks a grounding in concrete human reality. I argue that this structuring principle of Jung’s critical psychology carries important implications for rational decision-making.

Jung viewed the separating into opposites as a crucial process in the development of rational consciousness. Without this separation into opposites, there can be no increasingly nuanced refinement and extension in rational viewpoints. What causes problems is not so much the separation into opposites, since this is a more or less inevitable process in Jung’s view but, once separated, the subsequent rigid polarization and the attribution of hierarchies, so that one
viewpoint is identified as wholly right and the opposite as wholly wrong and increasingly distanced. Failing to continually re-engage in an ‘interplay’, or process of ‘comparison and orientation’ between the opposites, according to their distinct selective criteria, is the source of problems. What is needed in order to develop rational consciousness, according to Jung’s critical psychology, is to keep the separated viewpoints in creative opposition, just as with the cardinal points on a compass, in an ‘interplay’ process that I will explain below and illustrate in the next chapter.

‘Complementary’ means that these one-sided viewpoints, produced by the distinct combinations of conscious functions, are not disconnected from each other. They are not static binary pairs or fixed opposites, not mutually exclusive functions with nothing in common. Rather, they are inherently connected. They share the same substratum or field, they ‘belong’ together within that field, each fulfilling a distinct role that is a necessary and integral part of an interconnected process. As points on a compass interact in locating a position, so conscious functions interact in creating consciousness. Each is one-sided, providing information the others lack, and lacking information the others provide. They are mutually dependent and influential, able to address and respond precisely to each other, and together provide a conscious orientation or grasp of reality. Between them, these distinct viewpoints produce all the information about any topic or aspect of reality that we can consciously produce. If the viewpoint of any function is left out, then the overall conscious grasp of the topic will have its blind-spot there, and the viewpoints of the other functions will remain untested by it and less refined than they can be.

‘Interplay of complementary opposites’ is an evocative phrase used in Jungian theory to describe the interaction between the conscious functions. To return to the compass analogy, a traveler’s grasp of a changing geographical position requires the information from different compass points to be related to each other in order to pinpoint a specific location, such as, for example, 46 degrees North by 33 degrees West. So, too, with conscious functioning: All four functions must be brought to bear on a topic and their viewpoints related to each other, in order for the conscious grasp of the topic to be as complete and accurate, as precise and well-refined, as humanly possible at that point in time. In an ‘interplay of complementary opposites’, the conscious functions interact as in a ‘conversation between equals’ (as Roach describes ‘dialogue’ in a legal theory context) – one in which their viewpoints relate to and challenge each other,
adding and responding to new information on a topic, comparing and distinguishing and honing each other’s ‘takes’ on it, and thus enhancing the overall conscious grasp of the topic.\textsuperscript{417}

‘Differentiation’ is the term Jung used for this process of refinement. The interplay among distinct viewpoints on a topic increasingly differentiates the viewpoints, so that the contribution of each to consciousness is more precisely-honed and nuanced. Thus, the more functions that are applied to any topic or aspect of reality, the more complete, accurate, and refined will be the overall conscious grasp of it. All the functions must be brought to bear on a topic, each honed as well as possible and actively contributing its own distinct information, in order for the conscious grasp of the topic to be as well differentiated as possible.

4. Conscious Functions and Unconscious Contents

At the same time, however – while the viewpoints of all functions are needed for a well differentiated overall grasp of a topic – expert or specialized decisions rest on the viewpoints of certain functions and not others. For example, medical decisions may require physicians to develop well and use a particular empirical conceptual analysis, and not personally felt values (for example, not to decide medical care based on a personal antipathy towards drug addicts). I want to underline this point about specializations and expert decisions. It is central to the argument I make in Part Three, as I will preview in this chapter after setting out Jung’s theory.

Related to this central point is a caveat regarding Jung’s compass analogy: The analogy does not capture a crucial, indeed ground-breaking, aspect of Jung’s theory.\textsuperscript{418} In conscious functioning, an unused or unneeded function does not sit there waiting to be called upon, the way an unused cardinal point does: It produces its viewpoint, but in the unconscious, and if it is left unconscious it can influence a person’s thought and behaviour without the person realizing it. Thus, it cannot simply be ignored. This opens up some far-reaching implications of Jung’s theory of conscious functions, which I will briefly elaborate here.

In orienting oneself with a compass, some cardinal points will be sufficient to determine a location, and others unneeded. For example, if a location is pinpointed at 46North by 33West, South and East can be ignored. In conscious functioning, too, it is often the case that certain functions will be decisive and others unneeded or unused. Indeed, this is typical in ordinary life, Jung observed: Every person tends to have one or two functions that he or she uses and develops
best, one or two others that are fairly developed and used to assist the best-developed, and at least one that is undeveloped and rarely used and thus remains relatively unconscious. Jung called these, respectively, the primary or dominant functions, the auxiliary functions, and the inferior or unused function. Accordingly, in making specialized decisions (as I will propose when I adapt this approach to judicial and political decisions), some functions are absolutely required (what I will call decisive functions) in order to produce the specialized viewpoint, and others will be unneeded and even unwanted (unused or excluded functions).

However, an unneeded compass point can be ignored. Not so an inferior or excluded function: It still operates, continuing to produce its own perception or viewpoint. But because the function is not used and developed consciously, it works relatively unconsciously. This brings it into contact with the other contents in the unconscious with which it is intermingled – personal experiences, ideas, and other information that was forgotten or repressed, as well as new information that was never conscious before. This other information is picked up by the inferior function, so that its perception or viewpoint is imbued with those unconscious contents and the emotions associated with them. Those contents, unknown to the conscious ‘I’, can influence thought and action without the person knowing it. Thus, an inferior function can be uniquely helpful, if the unconscious information it has picked up is brought into consciousness by deliberately attending to this function’s perception or viewpoint, registering and interpreting it through the conscious viewpoints of the other functions. In other words, an inferior or excluded function can provide a bridge between unconscious contents and consciousness.419

This makes the inferior or excluded function’s viewpoint valuable in a unique way. It acts as a bridge to information that is overlooked or otherwise unconscious, enabling it to be brought to conscious attention. And this means that, by deliberately focusing on this function’s viewpoint in an interplay with the other functions, a person can uncover previously unconscious information. This information can then be used to prevent a decision from being unknowingly distorted by an unwanted bias and, equally, to sharpen the viewpoints and decisions of the other conscious functions by enriching them with helpful but hitherto-unconscious information.

In this way, Jung situated rational functioning within the psychological structure as a whole, through a further ‘interplay’ in which conscious functions (with their reality perceptions and rational viewpoints) deliberately engage an inferior or excluded viewpoint, with the
unconscious contents (forgotten, repressed, or never yet known) it carries, thus enabling them to respond to and influence each other. This interplay further differentiates the overall conscious grasp of a topic, preventing it from being distorted by unconscious unwanted bias, and enriching and sharpening it with information not consciously known before. This further interplay can also transform the conscious grasp of a topic: If opposing viewpoints have been highly differentiated but are nonetheless stymied in an irresolvable rational impasse, the tension can trigger what Jung called the ‘transcendent function’, which is an innate psychological response that synthesizes, reconciles, or supersedes such a polarization, through a symbolic image or motif that arises in response to the tension of such an impasse between highly-differentiated rational viewpoints.420 This explains the value of dreams, as symbolic responses that come from the unconscious during the sleeping state’s ‘abaissement du niveau mental’.421

That very briefly summarizes some more far-reaching implications of Jung’s theory, as it leads into his model of the psychological structure as one interrelated whole. Conscious functions and unconscious contents are connected and mutually influential, and each person possesses an innate capacity, inborn in their psychological structure itself, to regulate and develop their own rational consciousness. For the purpose of my argument in this thesis, my focus will be on Jung’s theory of conscious functioning alone. However, in concluding the thesis, I will touch on other issues (such as the problems of bias in judicial and political decisions, and of enduring impasses occurring in highly polarized conflicts between them), where more far-reaching implications of Jung’s theory come to the fore.

5. The Perceptive Functions of ‘Sensation’ and ‘Intuition’

The perceptive functions are one pair of the two pairs of basic building blocks of Jung’s theory of conscious functioning. The sensation and intuition functions are psychological processes that perceive what exists. They register the ‘givens’ of reality, conveying two different types or aspects of reality phenomena. Sensation perceives existing concrete facts, as tangible or material reality registered through the five senses. Intuition perceives existing but hidden or as-yet-unknown possibilities, as potentials that are latent or inchoate in material reality, in an immediate insight often colloquially called a ‘sixth sense’.
The sensation function tells us ‘what is, establishing what is actually given’.\textsuperscript{422} In an extraverted orientation, sensation registers outer world facts, which can be registered by others in the same outer world using their own sensation function.\textsuperscript{423} Introverted sensation registers the subjective facts of an individual’s own inner world, such as an emotion or a hunger pang. In the simple examples given above, extraverted sensation registers the light and warmth of the sun, while introverted sensation registers the inner physiological disturbances of sorrow.\textsuperscript{424} Sensation thus enables us to perceive what exists in material reality, whether in a shared external reality or a private internal reality. The material phenomena it registers are individual and specific; they are particular facts. Such external and internal facts were called by Jung, respectively, ‘objective’ and ‘subjective’ perceptions.

Facts as registered by sense perception are often treated as straight-forward, or, at the other extreme, as non-existent (as stage director Peter Sellars treats them when he asserts: ‘There are no facts, just our personal myths … no two of us see the same things’\textsuperscript{425}) Jung treated such facts as real but complex perceptions produced by one of our conscious functions. He compared the ‘physiological complexity’ of this perceptive function, residing in the five sense processes, to the ‘psychological complexity’ of apperceptive functions, residing in the conceptual and evaluative processes that are involved in thinking and feeling:\textsuperscript{426}

Consciousness seems to stream at us from outside in the form of sense-perceptions. We see, hear, taste, and smell the world, and so are conscious of the world. Sense-perceptions tell us that something is. But they do not tell us what it is. This is told to us not by the process of perception but by the process of apperception, and this has a highly complex structure. Not that sense-perception is anything simple; only, its complex nature is not so much psychological as physiological.

The facts of sense perception can be elusive and difficult to discern. For example, a stick might be seen as a snake due to poor visibility, poor eyesight, or fear. So-called ‘facts’ that are not perceived directly but in intermediate sources (such as media reports, surveys and polls, books, scientific experiments, social networks) can be distorted by flaws not only in our own perception, but also in the source (such as poor research, faulty data analysis, deliberate hoaxes). To accurately register the facts of concrete reality requires a well-developed sensation function.
Intuition is also a perceptive function, and equally necessary for ‘a complete picture of the world’.\textsuperscript{427} Intuition is ‘perception of the possibilities inherent in a situation’.\textsuperscript{428} It enables us to ‘divine’ what is ‘hidden in the background’ of material reality; it ‘points to the possibilities of the whence and the whither that lie within the immediate facts’.\textsuperscript{429} In a lecture to English psychiatrists given at the Tavistock Clinic in London, Jung described intuition as ‘what the Americans call a hunch.’\textsuperscript{430} Extraverted intuition perceives the engine-power latent in the sun, introverted intuition perceives the greater joy latent in sorrow. Intuition registers these not-yet-manifested realities as already-existing potentials, seeing them already as inchoate realities.

Just as sense perception registers a sight or sound all at once, so an intuited perception is all there all at once. Intuition instantly takes in an entire possibility, fully-formed and immediate. An intuitive perception comes with a convincing certainty, too, just as a sense perception does; the adage ‘seeing is believing’ also applies to intuitive sight. Intuitive knowledge possesses an intrinsic certainty; it is an immediate and total perception which comes as ‘a kind of instinctive apprehension’ and arises from a state of ‘psychic alertness’.\textsuperscript{431}

In intuition a content presents itself whole and complete, without our being able to explain or discover how this content came into existence. Intuition is a kind of instinctive apprehension, no matter of what contents. … As with sensation, its contents have the character of being ‘given’, in contrast to the ‘derived’ or ‘produced’ character of thinking and feeling contents. Intuitive knowledge possesses an intrinsic certainty and conviction …. Intuition shares this quality with sensation, whose certainty rests on its physical foundation. The certainty of intuition rests equally on a definite state, of psychic ‘alertness’ of whose origin the subject is unconscious.

Mathematicians describe how solutions to intractable puzzles come suddenly in a ‘flash of insight’ that they know at once ‘must be true’, long before they can think the matter through or present a whole ‘vision of the solution’.\textsuperscript{432} They describe seeing a solution as ‘a picture in the mind’ that comes ‘in an instant’, usually early in their explorations, and that is ‘unexpected’ and ‘not just novel but very mysterious’.\textsuperscript{433} And later proofs have satisfied them that they had indeed got it.\textsuperscript{434} This kind of intuitive genius, more often associated with music and art than with science, is not solely a matter of acute memory or intellectual skill, but a non-rational capacity.\textsuperscript{435}
Jung’s concept of intuition contrasts with the way other theorists use the term, as a gut reaction based on common sense, practical experience, or some other reasonable expectation. For example, in a lecture, philosopher Alan Lightman refers to increasing work pressure as a ‘counter-intuitive’ result of efficiency, on the basis that it contradicts logical expert forecasts. But in Jung’s theory, a result contrary to logical reasoning would be ‘counter-rational’, not ‘counter-intuitive’. Similarly, a Harvard law professor refers to the idea that legal negotiation can minimize costs and thus benefit both parties as ‘not intuitive’ because it does not reflect popular thinking. In another example, a newspaper reporter describes as ‘counter-intuitive’ the design of a morphine pump blamed for fatal errors by medical staff, to mean that the design did not reflect common sense and practical experience. But for Jung, intuition is not a gut reaction based on experience, thinking, or common sense expectations. It is non-rational. It may well pick up seemingly ‘illogical’, ‘unexpected’, even ‘subversive’ potentials, not yet manifest in existing material reality, or even yet graspable by thinking, perhaps even contradicting thinking. When Lightman (in the same lecture) describes a poem’s opening lines as ‘prescient in the way that poets and artists can often divine the future’, he aligns his argument more with Jung’s concept of intuition as a perceptive function.

Dictionaries define ‘intuition’ in ordinary language as ‘immediate apprehension by the mind without reasoning’ and ‘knowing or understanding something immediately without reasoning or being taught’. These denotations accord with Jung’s definition of intuition as perception rather than apperception. Just as sense perception does, intuition takes something in all at once, fully and immediately and with a convincing certainty that it is ‘there’, not as a rational construction but as an ‘a priori’ or ‘given’ of reality. Just as with sensation and with the two apperceptive functions, intuition is inherently fallible. It can be inaccurate. In the same way that a sense perception can be mistaken or distorted into an ‘illusion’ when a person ‘sees’ a stick as a snake, intuition can err, and can manifest negatively as paranoia. With regard to the fallibility of intuition, Jung noted:

[Intuition] is represented in consciousness by an attitude of expectancy, by vision and penetration; but only from the subsequent result can it be established how much of what was ‘seen’ was actually in the object, and how much was ‘read into’ it.

And intuition can be developed and refined consciously, or neglected, just as the other conscious functions can be. Jung refers to cultivating ‘an attitude of expectancy’ or ‘psychic alertness’ that
is receptive to intuitive insights, so that one can be ‘clever or quick enough’ to catch them.\textsuperscript{445} Scrutinizing such insights, and testing them with the other conscious functions, makes it possible over time how to sharpen one’s intuitive perception and to learn what facilitates or impedes it.\textsuperscript{446}

Intuition has a seemingly close connection or attunement to the unconscious. It is a perceptive function that consciously attunes to a reality not yet manifest.\textsuperscript{447} It picks up latent information that has not yet emerged into material reality and presents it consciously – but with an elusive, prescient, and mysterious quality, as something uncanny that we can experience and name but cannot fully explain conceptually, any more than we can explain instincts. Because of this attunement to the unconscious, intuition is able to operate as a bridge to the contents of the unconscious, in the same way that the sensation function operates as a bridge to the contents of material reality. It is also akin to the way any conscious function, if inferior, operates as a bridge to unconscious contents -- with the difference, however, that intuition may be a well-used and developed conscious function, and thus a primary function, not necessarily inferior.

Finally, I note that, while there may be no getting away from the subjectivity of all personal observations and interpretations, there is also no getting away from the possibility that what is observed is actually ‘there’, not projected or created by the observer but perceived as it is, regardless of the observer, and perceivable and sharable by others the same way.\textsuperscript{448} I suggest that ‘objective’ and ‘subjective’ are apt and useful terms, as used by Jung in the context of rational decision-making, to meaningfully distinguish types of perception and types of rational viewpoints based on them. Jung’s critical psychology emphasizes that this distinction should not be rejected but consciously and deliberately differentiated.

6. The Apperceptive Functions of ‘Thinking’ and ‘Valuing’ or ‘Feeling’

The other two functions of consciousness, the \textit{thinking} and \textit{feeling} or \textit{valuing} functions, Jung defined as ‘apperceptive’ functions that do not apprehend or perceive, but comprehend or assimilate whatever has been perceived.\textsuperscript{449} He defined these functions as, essentially, the capacity to give meaning or coherence to whatever topic or aspect of reality is perceived: They both apply a process of ‘comparison and differentiation with the help of memory’, organizing the reality perceived according to a specific selective criterion.\textsuperscript{450} This gives their two viewpoints
their ‘derived or produced’ character, as something that has been constructed, in contrast to the ‘given’ character of perceptions.\textsuperscript{451}

According to Jung, this is the essence of ‘rationality’, of ‘reasoning’: the meaningful organization of any topic or aspect of reality by applying to it a selective criterion. Hence, both thinking and feeling/valuing are ‘rational’ functions. They both do this, but in different ways. Thinking uses the criterion of conceptual norms to structure reality, thus providing a distinct rational viewpoint that I will call, for short, ‘conceptual analysis’. Feeling or valuing uses the criterion of personal values and preferences, thus providing a distinct rational viewpoint of ‘personally felt evaluation’ or what I will call, for short, a viewpoint of ‘felt values’.

Thinking is the psychological function that produces a rational viewpoint based on conceptual criteria. Concepts are intellectual or mental formations – ‘thoughts’, ‘ideas’, ‘notions’, ‘norms’ and ‘principles’ – defined in dictionaries as ‘objects of the mind’, ‘intellectual formulations’, ‘products of mental concentration or reflection’, ‘authoritative rules, or accepted premises or assumptions, for organizing through thought’.\textsuperscript{452} ‘Logic’ is a system or set of rules to classify valid or sound thinking, be it deductive or inductive.\textsuperscript{453} Theories about thinking that were developed in the classical age of Greek philosophy still dominate, particularly those of the ‘paragon of reason, Aristotle’ with their articulation of ‘a universal method of reasoning and the use of deductive inference, which came to be called categorical logic’, and with their distinctions between logos (logic, reason, or ideas), ethos (character), and pathos (emotion), and between dialectic (refining ideas through systematic discussion) and rhetoric (presenting ideas well).\textsuperscript{454}

‘Conceptual analysis’ is a general term I use specifically for the thinking process and the type of rational viewpoint it produces. By that term, I mean the employment of concepts as the selective criterion with which to organize whatever topic or aspect of reality is perceived, or in other words, as the specific way to identify, categorize, compare and distinguish it, and thus create a perspective about that reality that gives meaning or makes sense of it. Conceptual analysis is a language.\textsuperscript{455} By using ‘thinking’ to name this reasoning process, Jung took up the term that was, as he said, employed ‘in ordinary speech’.\textsuperscript{456} In academic and professional speech too, we typically say ‘I think’ to refer to our exercise of this type of reasoning.\textsuperscript{457}

However, Jung worked to get to the nub of ‘thinking’ and ‘feeling’ or ‘valuing’, to explain the irreducible essence of the ‘rational’ or ‘reasoning’ quality that is produced by these
processes of applying selective criteria to reality. We know from experience that we can find meaning and coherence in conceptual interpretation, in principles and logic. But, Jung asked:

From what source, in the last analysis, do we derive meaning? The forms we use for assigning meaning are historical categories that reach back into the mists of time. Interpretations make use of certain linguistic matrices that are themselves derived from primordial images. From whatever side we approach this question, everywhere we find ourselves confronted with the history of language, with images and motifs that lead straight back to the primordial wonder-world.

This leads to Jung’s broader theory, relating consciousness to a pre-existing ‘unconscious’ from which it emerges. He postulated that thinking must ultimately rest on a pre-conscious ‘archetype of meaning’, that is, on an organizing principle that forms what is meaningful to consciousness. Jung referred to Plato’s theory of archetypal templates, inborn in the psychological structure of each person and seen in recognizable variations of the same motif or image, recurring across time and place, just as physiological structures do. (These have been called ‘foundational image schemas’ in cognitive science today.) As Jung described the effect of such an archetype in the context of reasoning, if a new situation arises, and existing rational principles of science and philosophy and religion do not offer sufficient guidance to explain or comprehend it, then:

[T]he judging intellect with its categories proves itself powerless. Human interpretation fails, for a turbulent life-situation has arisen that refuses to fit any of the traditional meanings assigned to it. It is a moment of collapse. … Only when all props and crutches are broken … does it become possible for us to experience an archetype that up till then had lain hidden ... This is the archetype of meaning ….

The essence of the reasoning or rational quality of ‘thinking’, Jung concluded, is this ability to give meaning to any topic or aspect of reality by organizing it according to conceptual criteria.

Jung observed that thoughts occur in two ways in conscious life. They can drift freely in the spontaneous flow of ideas in fantasy and reverie, which he called ‘ideation’. Or they can be directed, by deliberately applying conceptual criteria to achieve a specific goal. This directed thought is ‘thinking’ as a rational, conscious function:

The term ‘thinking’ should, in my view, be confined to the linking up of ideas by means of a concept … I call directed thinking a rational function, because it arranges the contents of ideation
under concepts in accordance with a rational norm of which I am conscious.

Thinking defines an orb seen in the sky as the planet named the Sun that emanates heat, and it explains a state of painful disruption as the emotion of sorrow caused by a loss. Thinking can be seen in the concrete logic involved in weather forecasts or insurance risk profiles, and in the abstract speculation in pioneering ideas about the universe or the unconscious. Thinking can be seen in accounts of history, such as the historical precedents in my previous chapters, which I recounted in order to provide factual premises for a logical or conceptually coherent argument. ‘Empirical’ or ‘concrete thinking’ is conceptual analysis of facts registered by sense perception. It produces such characteristic viewpoints as ‘logical positivism’ or ‘the scientific method’, a conceptual understanding based on empirically verifiable or falsifiable facts; it defines Sun and sorrow, forecasts weather, profiles risks. ‘Abstract thinking’ is conceptual analysis of insights registered by intuitive perception. It produces such characteristic viewpoints as philosophical and even visionary speculation, seen in the purely abstract pioneering theories in physics and psychology. These two types of thinking are complementary opposites: Each produces a unique conceptual ‘take’ on a topic, with its own characteristic one-sided brilliance. Concrete thinking can test a hypothesis in a scientific proof, but it lacks creative vision. Abstract thinking can shift to a new paradigm in a pioneering vision, but it lacks grounding in concrete reality.

‘Generalization’, according to Jung’s theory, is thus a product of concrete or empirical, not abstract, thinking: To generalize is to conceptualize based on the recurrence of concrete facts. The more often and invariably a fact recurs, the stronger or more reliable is the generalization based on it. This type of thinking can attain all the detailed logic and structural complexity of Aristotle’s reasoning, but without the abstract leaps of Plato’s visionary ideas.

‘Cognition’ is a term used in psychiatry to refer to all ‘mental processes’ or ‘modes of knowing and reasoning’. The American Psychiatric Association Glossary, for example, defines cognition as a general term for ‘all the various modes of knowing and reasoning’, including ‘thinking, perceptions, and attitudes’ and ‘the mental processes of comprehension, judgment, memory, and reasoning, as contrasted with emotional and volitional processes’ (my emphases). Cognition here is a broad category, covering a very wide range of psychological functions and capacities, not precisely distinguished from each other: ‘Memory’ is included in the Glossary’s definition of cognition. ‘Perceptions’ are included in it too, but defined as
‘mental processes by which intellectual, sensory, and emotional data are organized logically or meaningfully’ (my emphasis); this, of course, is what Jung distinguished from perception as the apperception of ‘thinking’, a definition that seems more conceptually consistent and coherent.\(^{467}\)

‘Feeling’ or ‘valuing’ is not included or defined; ‘reasoning’ is equated with ‘thinking’ alone.\(^{468}\)

Neither is ‘intuition’ included or defined. ‘Conscious’ and ‘unconscious’ are defined in the Glossary, respectively, as ‘the contents of mind or mental functioning’ of which ‘one is aware’, and the contents which are ‘only rarely subject to awareness’, with no reference to their relationship and potential to interact and influence each other as part of ‘cognition’.\(^{469}\)

This term ‘cognition’ is less useful, I argue, than Jung’s differentiated terms of ‘thinking’ and ‘feeling’ apperception, for my specific purpose of understanding ‘rational consciousness’ in general and for refining rational decision-making in particular. ‘Cognition’ is a more disparate category, including such non-rational processes as ‘memory’ and ‘perceptions’, and at the same time is less complete than Jung’s ‘rational’ functions, since it excludes feeling’s personally felt evaluation as an equally coherent mode of making sense of reality, thus presenting ‘rationality’ and even ‘intelligence’ as matters of conceptual capacity alone. (As a result, for example, the Glossary would classify conceptual acuity with truncated moral feeling as ‘rational’, but not moral acuity with conceptual truncation.) In his theory of conscious functions, Jung brought out the irreducible essence of ‘rationality’, and the equally rational criteria of ‘conceptual analysis’ and ‘felt values’. And Jung did not isolate rational functioning but viewed it within the context of an ever-present interconnection with unconscious contents, the interplay between them being integral to his understanding of ‘reasoning’ as apperceptive functioning.

‘Volition’ and ‘emotion’ are expressly excluded from the Glossary’s definition of cognition. Jung, too, did not treat these as rational, or as conscious functioning at all – but as uniquely indispensable to it. Conscious functions depend on ‘volition’, as psychological processes that are selected and exercised intentionally or at will, in contrast to involuntary and often unconscious processes such as dreams, emotions, complexes, projections, memory, and instincts that drive our behaviour without our controlling them.\(^{470}\) Jung sharply distinguished ‘emotion’ from rational processes, both thinking and feeling, but he emphasized the vital role emotions play as signals to consciousness (as I explain below).
‘Valuing’ or ‘feeling’ is the other apperceptive or rational function distinguished by Jung. Feeling structures reality according to a personally felt evaluation. We use it ‘in order to attach a proper value to something’, to assign personal value or worth or preference, to determine ‘how and to what extent a thing is important or unimportant for us’. Valuing is as much a rational function as thinking is. As a ‘voluntary disposable function’, it can be directed, just as thinking can. The essence of ‘rationality’ in Jung’s theory is the meaningful organization of reality by applying to it a selective criterion. Both thinking and feeling ‘reason’ this way, but apply different selective criteria: Thinking applies conceptual analysis, while feeling applies felt values. Both criteria structure reality, producing a distinct type of rational viewpoint on it, giving it the coherence of either a conceptual analysis or a personal evaluation. Each of these two rational viewpoints is unique and one-sided, with its own brilliance and its blind spot. Each can be tested and refined by the other, and together they can provide a more complete and accurate overall viewpoint on a topic than either can alone.

Jung’s innovation – his departure from the thought of his time (and ours) – was to see the rational character of the feeling or valuing viewpoint. John Beebe (using the terms ‘irrational’ to mean ‘non-rational’ and ‘affect’ for ‘emotion’) emphasizes this:

Jung held that feeling and thinking are rational functions … He did not sustain the faculty psychologists’ opposition between reason and passion. Jung understood ‘feeling’ as a rational process, that is, as neither affect (or what we sometimes call ‘feelings’) nor the result of more unconscious emotion-based processes … Jung made clear that he took the process of assigning feeling value to be an ego-function that was just as rational in its operation as the process of defining and creating logical links (thinking). … By linking feeling with thinking as rational functions, and sensation with intuition as irrational functions, Jung broke with the nineteenth-century habit of lumping feeling with intuition as marking a ‘romantic’ temperament and thinking with sensation as the unmistakable signs of a ‘practical’ disposition. Rather, in Psychological Types, he convincingly makes the case that consciousness is for all of us the product of both rational and irrational processes of encountering and assessing reality.

And so, the preceding descriptions of the ‘rational’ and ‘reasoning’ quality of thinking apply equally to feeling. Jung described an evaluation based on feeling values as just as ‘reasonable’, ‘discriminating, logical and consistent’ as thinking’s conceptual analysis, explaining his critical psychology perspective (using ‘judgment’ as a general term for rational functioning).
In the same way that thinking organizes the contents of consciousness under concepts, feeling arranges them according to their value. … Feeling is an entirely subjective process … which expresses some sort of evaluation. Hence feeling is a kind of judgment, differing from intellectual judgment in that its aim is not to establish conceptual relations but to set up a subjective criterion of acceptance or rejection. … feeling values and judgments are not only reasonable, but are also as discriminating, logical and consistent as thinking.

Unfortunately, the term ‘feeling’ is ambiguous, as Jung was keenly aware. It possesses a variety of denotations in the vernacular and can refer to an emotion, intuition, or sensation, as easily as an evaluation. Jung settled on the word ‘feeling’ to designate the process of assigning subjectively or personally felt value, but only after struggling for years with the difficulty of conceptualizing and naming this function, due in part to this problem of ambiguity. 476

I must admit that this problem of feeling is one over which I have wracked my brain. … The chief difficulty lies in the fact that the word ‘feeling’ can be applied in all sorts of different ways.

Jung did not resolve this problem, nor did he object to terms other than ‘feeling’, as long as the distinct nature of the function was clearly indicated. 477 It is argued that ‘valuing’ is more apt for what Jung was getting at, while ‘feeling’ more clearly conveys the specifically personal or subjective basis of the evaluation. 478 I have not resolved this problem of ambiguity myself. In this thesis I will favour the term ‘valuing’, primarily to avoid confusion with ‘emotion’, while also referring to (as interchangeable) ‘feeling’, ‘feeling/valuing’, and ‘felt values’.

7. The Role of Emotion

‘Emotion’ Jung defined, not as feeling or valuing, or as a rational function at all, but as a non-rational process playing a vital role in the formation of consciousness concerning personally felt values. He defined emotion as an uncontrolled state ‘characterized by marked physical innervation on the one hand and a peculiar disturbance of the ideational process on the other.’ 479

Thus, emotion is experienced in physiological reactions, such as a pounding heart or trembling hands, and in psychological reactions, such as disruptions in thinking or memory, with a force we are helpless to control. 480 Emotions are not something we choose; rather, they happen to us. They are not exercised deliberately but arise spontaneously in us, without our intention. Their
autonomy can be seen in comparing feigned and ‘real’ emotions. Actors, for instance, are trained to conjure emotions and portray them convincingly, but a psychologically astute actor knows that these are not actual experiences of emotion.\textsuperscript{481} The actor Helen Mirren once described playing ‘crushing grief’ in a film, how she discussed with the director the best way to play it, whether to use tears, and so on. Then, as the scene was being filmed, Mirren explained how the ‘real’ emotion of her grief over her brother’s death unexpectedly ‘just came over’ her:\textsuperscript{482}

“That moment at the end [of the grieving scene] … my brother had died … and I had had to repress my emotions. … I was talking to [the director] about how I would do [the scene]. I said, ‘I don’t think I’ll cry, maybe some kind of vocalization, maybe just a low moan’, you know, intellectualizing it. And then we shoot the scene, and I hit the mark, and whoa, this thing just came over me, of complete emotional breakdown. So much so that I wanted to stop the camera. Because it was real. It wasn't acted. It was real.”

Emotion as ‘affect’ signals the existence of a personally felt value. It is aroused when something valued is touched or awakened or brought to the fore, and its intensity reflects how important or at risk the thing valued is to the person.\textsuperscript{483} Jung described this relationship of ‘feeling’ to ‘emotion’ as a continuum between the importance or intensity of a personally felt value and the intensity of an affective reaction aroused by that value:\textsuperscript{484}

When the intensity of feeling increases, it turns into affect, i.e., a feeling-state accompanied by marked physical innervations. Feeling is distinguished from affect by the fact that it produces no perceptible physical innervations, i.e., neither more nor less than an ordinary thinking process. … I distinguish ... feeling from affect, in spite of the fact that the dividing line between them is fluid, since every feeling, after attaining a certain strength, releases physical innervations, thus becoming an affect.

In other words, a personally felt value arouses an emotional reaction. The emotion intensifies with the intensity of the value, and the intensity increases if the thing of value is threatened, celebrated, or for any other reason brought to the fore.\textsuperscript{485} Jung thus gave a unique significance to the connection between the arousal of an emotion and the touching of a felt value, a connection that can be relatively unconscious: The emotion effectively serves as an autonomous signal that something of value is touched, and the emotion’s disruptive power stops a person in their tracks – signalling that there is a personally felt value that must be consciously attended to, and impedes conscious attention from going elsewhere. The more that a troublesome affect draws
our attention to what we value, and to what event has touched that value, the more likely it is that our valuing or feeling function (and thus, this personal value) becomes conscious.

This idea, that emotion signals a personally felt value and compels conscious attention to it, carries helpful practical implications for judges and other decision-makers, including as a starting point for addressing unconscious biases that might arise in making decisions.\textsuperscript{486} It also highlights the importance of pausing and attending to an emotion, and neither ignoring it nor acting blindly or swiftly on it without personal reflection. And at the same time, it relates to and highlights my ambivalent response to Borrows’s lecture, described in my Introduction: It can backfire to deliberately arouse emotions in a trial judge through, for example, traditional music, because the emotion may bring to the fore feeling values and unconscious contents unrelated to the traditional meanings intended, to the issues in the case, or to the feeling values and factual conceptual analysis related to the issues, in a context where the judge may have no opportunity to address them, judicially and effectively.\textsuperscript{487}

8. ‘Consciousness’ in Jung’s Theory and in Dialogue Theories

To conclude this chapter, I will compare Jung’s view of consciousness and how it develops, with the view in dialogue theory references, discussed in the previous chapter. (The building blocks of Jung’s theory, which I have just presented, are recapitulated in the Summary of this chapter that follows.)

The nature of ‘conscious’ decisions described in Hogg’s dialogue theory is consistent, so far as it goes, with consciousness as theorized by Jung in his psychological theory. Hogg refers to a legislative decision’s intentional and explanatory qualities as making it ‘conscious’ and ‘self-conscious’. But Hogg does not (naturally, as it is not his focus) distinguish the precise type of intentional explanation a legislative decision gives, or the ‘self’ it is conscious of, or how it differs from the consciousness of a court decision. In legal theories generally, the scrutiny of both decisions tends to focus on the acuity of conceptual analysis, overlooking the acuity of feeling evaluation, and treating the two types of decisions as simply, generically, ‘rational’.

These more precise distinctions, however, are meaningful. As Jung explains, turning from the nature of consciousness to how it develops, the interplay between different viewpoints makes it possible to differentiate and extend the conscious grasp of any topic. Both processes
are thus necessary for developing rational consciousness: the separation and honing of distinct rational viewpoints, and their interplay. If the viewpoints of thinking and feeling/valuing are blurred, their distinct brilliances will not come out. If either viewpoint is held back, their potential opposition and complementarity will not come out and their blind-spots will persist. If they are polarized, their interplay will be stymied, and so will be the conscious differentiation of the topic. Hence, the importance of recognizing and honing their different viewpoints, and avoiding both polarized rejection and mere deference by one to the other.

In his dialogue theory, Roach describes the effect of the dialogue between judicial and legislative decisions in terms that reflect precisely what makes the interplay significant according to Jung's theory. Hogg does not relate the conscious quality of a decision to the development of rational consciousness on a contested topic. Roach brings this out. Although Roach defines the 'distinct and complementary voices' of court and legislature in the Charter dialogue as protecting or limiting rights, in describing the effects of their dialogue he explains that they respond to 'the inevitable shortcomings of the other', educating each other by making 'contributions the other could not' and learning from the other what they would 'otherwise not appreciate', and thus are able to 'expand the horizon of each other'. Roach's explanation is consistent with Jung's theory that an interplay (or dialogue) between distinct rational viewpoints, in which the brilliance of each complements a blind-spot of the other, differentiates and extends rational consciousness.

Jung's theory places this dialogue within a critical psychology context. It elucidates the significance of precisely distinguishing the viewpoints produced by different functions, and their conflictual yet complementary contributions to an interplay whose Archimedean point is the development of consciousness. The straightforward simplicity of this theory should not belie the complexity of its practical implications and explanatory power. Jung's functions theory makes possible, as I have noted, a notably discriminating but inclusive critical understanding of these psychological phenomena and how they work to produce and develop rational consciousness.

Applying Jung's theory in a particular institutional context, in Part Three, I think it will enhance the understanding of court and government decisions. I will argue that these are not simply rational decisions, but two distinct types of specialized rational decisions, each providing a unique viewpoint that is characteristic of its decisive conscious functions. It is necessary to precisely distinguish thinking and valuing, and sensation and intuition, in order to better
appreciate the unique viewpoint each institutional decision can contribute to any topic that is contested in society. Their viewpoints may be oppositional, but they have the potential to be complementary if they are honed and consciously held in close proximity, one to the other, in a mutual interplay on the topic. This, based on Jung’s theory, is the most significant aspect of judicial and political decisions – the distinctly different and well-honed specialized rational viewpoint they each can contribute, as complementary opposites in such an interplay – because it makes possible the increasingly nuanced development of rational consciousness on contested topics, in the institutional decision-makers and in the society as a whole.

Summary

Jung’s theory of conscious functions is the foundation for the critical psychology approach to judicial and political decisions that I will introduce in Part Three. This theory has been widely used and, unfortunately, also reduced and misconstrued. In this chapter, I set out the building blocks of the theory, and its implications, relevant to the approach I will introduce.

Starting with Jung’s view that there is not one single type of rational consciousness, but a range of distinct types of rational viewpoints, created by four different psychological functions, I explained that these functions are part of the psychological structure of every individual, and are called ‘conscious functions’ by Jung because they can be exercised intentionally.

I described the four conscious functions delineated by Jung: the perceptive functions of sensation and intuition, and the apperceptive or rational functions of thinking and valuing (or feeling, which is not emotion). Sensation perceives the often elusive concrete facts of reality, while intuition perceives latent facts, in immediate insight independent of reasoning, experience, or common sense. I noted the complexity of concrete perception, and I contrasted Jung’s definition of intuitive perception with popular notions of intuition. Thinking gives meaning to what is perceived by structuring it through a conceptual analysis, while valuing does that through a personal feeling evaluation. I compared their selective criteria of conceptual norms and personally felt values. I underlined their equally ‘rational’ quality, which Jung posited as originating in an archetype of meaning. I explained Jung’s view that emotion and symbolic processes, such as dreaming, are non-rational signals to consciousness, not conscious functions themselves. I noted inadequacies, for some purposes, of the concept of ‘cognition’.
I explained Jung’s observation that the four conscious functions are exercised in typical combinations (of a perceptive and apperceptive function combined), which produce the further characteristically distinct rational viewpoints that are ‘concrete’ or ‘abstract’, ‘subjective’ or ‘objective’, and ‘introverted’ or ‘extraverted’. Each viewpoint is one-sided, with one unique brilliance and the rest inevitable blind-spots, and each is a ‘complementary opposite’ of the others – that is, distinct and different from the others, and at the same time, compensatory or complementary to them, providing information they are missing. Using the example of extraverted concrete thinking viewpoints (thinking applied to sense perception in an extraverted orientation) on a topic, I described the particularity and generalizations these uniquely make possible, without unexpected shifts or abstract leaps of intuition, without concrete facts of inner reality, and without personally felt evaluations of the topic.

Together, the four conscious functions provide all the distinctly different types of rational viewpoints possible on any topic, each one-sided, with its own brilliance and its blind-spots. The viewpoints of all functions are necessary, Jung explained, to provide a rational grasp of any topic or aspect of reality that is as complete or inclusive and as well-differentiated as possible. Thus, I explained, an ‘interplay of complementary opposites’ between them is indispensable, in order to continually differentiate and extend rational consciousness, and occasionally transform it, in individuals and, through them, in the collective or society as a whole.

At the same time, Jung observed that in every individual’s conscious personality at least one function usually remains inferior, and thus relatively undeveloped and unconscious. While not necessary for my thesis, I touched on the far-reaching implications of this aspect of Jung’s theory: The ability of an inferior function to act as a bridge to the unconscious, and convey symbols and reveal biases in the interplay with the other functions, situates conscious functioning within the larger framework of the contents and processes of the unconscious, from which consciousness arises. What is relevant to my thesis, however, is that this aspect of Jung’s theory highlights the value of a dialogue between individuals whose dominant and inferior functions, or brilliances and blind-spots, complement one another. And this aspect of Jung’s theory also helpfully, I explained, illuminates the strengths and limitations of specialized decisions – in which certain functions are decisive, and expertly honed and applied, while others are excluded and relatively undeveloped – and thus the indispensable role of an interplay between specialized decisions on any topic, in order to develop a fuller and more accurate, or
well-differentiated, overall rational grasp of the topic. This is an argument I will elaborate in Part Three, in the context of judicial and political decisions.

This is consciousness in Jung’s theory. These psychological functions are the means we have, and the only means, to take in and make sense of reality – to be conscious, and to develop consciousness. Jung carefully distinguished the four conscious functions from each other, and from other psychological faculties (such as memory, dream, and emotion or affect), analyzing with great precision the contribution each makes to consciousness. It is important to underline Jung’s innovative idea that thinking and feeling/valuing produce equally rational or reasoned viewpoints, but of different types. Jung probed to the essence of ‘reason’, and defined it as the meaningful organization of reality perceptions by applying a selective criterion to them. He recognized the equally reasoned effect of feeling/valuing and thinking, on this essential basis, along with their distinctly different criteria. Defining them as ‘complementary opposites’, he emphasized the importance of recognizing that both are rational viewpoints giving meaning to any topic or aspect of reality perceived, and that each gives it a unique type of meaning, produced by the different selective criterion of a conceptual analysis or a feeling evaluation of it.

I noted problems caused by failing to hone distinct viewpoints of different functions, by holding a viewpoint back or merely yielding to another viewpoint in an interplay, or by rigidly rejecting and polarizing opposing viewpoints. These all stymie the ability to find and develop complementarities in the interplay, and thus stymie the development of rational consciousness.

In the concluding section, I compared Jung’s theory to views of consciousness reflected in the dialogue theories discussed in the preceding chapter – to Hogg’s references to ‘conscious’ decisions and Roach’s references to the mutual influences of the ‘distinct and complementary voices’ of courts and legislatures. In the next chapter, I will give examples to illustrate the distinct rational viewpoints produced by different conscious functions, as theorized by Jung, pointing out the unique strengths and limits, or brilliances and blind-spots, of each viewpoint.
Chapter 5
Illustrations of Rational Viewpoints and their Interplay

The activity of consciousness is selective. Selection demands direction. But direction requires the exclusion of everything irrelevant. This is bound to make the conscious orientation one-sided. ... The definiteness and directedness of the conscious mind are extremely important acquisitions, which humanity has bought at a very heavy sacrifice, and which in turn have rendered humanity the highest service.

C.G. Jung, 1912, 1957

In this chapter, I illustrate the distinct rational viewpoints of the thinking and valuing (or feeling) functions, and the ‘interplay of complementary opposites’ between them, according to Jung’s theory of conscious functions (all defined in the previous chapter). I use examples that are not judicial and political decisions, to illustrate, independently of them, the selective criteria that characterize thinking’s ‘conceptual analysis’ and feeling’s ‘personally felt evaluation’, and the types of conscious viewpoints they produce on any topic, with their different strengths and limitations, or briliances and blind-spots. Thinking viewpoints are illustrated in examples of Robert Mnookin’s negotiation theory and John Forbes Nash’s solution to a mathematical problem; valuing viewpoints in John Ralston Saul’s essay on uncertainty and Barak Obama’s nomination campaign speech. The interplay is illustrated in two examples relating to quark theory, contrasting the ongoing differentiation of rational consciousness on the topic of ‘the atom’, to a polarized quarrel over quarks between two prominent public speakers, Richard Dawkins and Bernard Levin. In this way, I inscribe the equally ‘rational’ but distinctly different content of these two conscious viewpoints, and the differentiating effect of their ‘interplay’.

1. The Thinking Viewpoint of Conceptual Analysis

Jung distinguished two kinds of thinking, based on the type of perception to which its conceptual analysis is applied. ‘Empirical’ and ‘abstract’ thinking are short forms he used to refer to the application of thinking to sensation and intuition, respectively. In both, the same conceptual criterion is applied, but each combination produces a unique conceptual viewpoint.
In the American Psychiatric Glossary, as noted in Chapter 4, ‘concrete thinking’ is defined as an inability to generalize, and ‘abstract thinking’ as thinking in all modes, everything from ‘grasping the essentials of a whole and breaking it into parts and isolating them’, to ‘planning ahead ideationally’ and ‘thinking symbolically’. Unlike the Glossary terms, Jung’s quite distinct meanings possess no positive or negative connotations. He did not typify either mode of thinking as more sophisticated or better developed than the other; he saw in concrete thinking, for example, the capacities to particularize and generalize. Jung focused on the type of perception to which conceptual analysis is applied, thus differentiating two crucially different but equally important types of conceptual viewpoints of which rational consciousness is capable.

Jung illustrated the types of conceptual analysis by referring (among many examples) to the empirical thinking of Aristotle’s theorizing and the abstract thinking of Plato’s dialogues. I will illustrate empirical thinking in the example of an ‘options analysis’ method set out in Robert Mnookin’s collaborative negotiation theory, and abstract thinking in John Forbes Nash’s method for solving the puzzle of ‘the imbedding problem in Riemannian manifolds’.

2. Mnookin’s Negotiation: ‘Concrete’ Thinking in Forming an Analysis

Robert Mnookin is a law professor and senior author of a text on a dispute resolution method called ‘collaborative negotiation’. Mnookin proposes that lawyers can resolve disputes better if they switch from a ‘win-lose’ adversarial method to a ‘win-win’ method of ‘mutually beneficial problem-solving’. This means pursuing the interests of all parties, to make a bigger pie, and then pursuing your client’s own interest in getting the best possible slice of that pie. To do this, Mnookin proposes specific ‘rational decision-making’ and ‘communication’ skills. These skills reflect the ‘concrete thinking’ of Jung’s theory.

An ‘options analysis’ (as I will call it for short) is a particular method Mnookin proposes for assessing settlement options as fully and accurately as possible, to ensure the decision best serves the client’s ‘rational self-interest’. As Mnookin explains, the lawyer lays the groundwork by obtaining and verifying all information relevant to the dispute (such as contractual terms, monetary and other losses, needs and desires of each party, including concerns about reputation). Then, four benchmarks are determined. First, the client’s ‘Best Alternative to a Negotiated Agreement’ is estimated (say, $90,000 in a full court award, less unrecoverable
costs). Next, the client’s ‘Reservation Value’, as the lowest amount to accept rather than go to court (lowered to $50,000 to reflect the time and uncertainty of litigation). Third, the client’s ‘Aspiration Level’, as an ambitious but realistic idea of the best target to aim for in the negotiation ($70,000 plus an apology). The same is done for the other side (resulting in, say, their likely Aspiration Level of $40,000 and Reservation Value of $60,000). Finally, the ‘Zone of Possible Agreement’ is calculated. This is the range between the Aspiration Levels of the two parties, bounded by their Reservation Values – thus, in this example, a high of $70,000 plus apology (which the client aspires to), a low of $40,000 (which the other party aspires to), and a narrower likely range of $50-$60,000 (their respective Reservation Values). With these benchmarks in mind, the lawyer lays out the client’s offer (preferably after the other side), and the client decides in light of this Zone, knowing they would be well-advised to reject any offer below $50,000 and that anything above $60,000 would be a very successful result.

Mnookin’s method underlines the ‘rational’ to the degree that the lawyer leads the client to systematically ‘reason through’ uncertainty, rather than deciding on a mistaken basis by ‘defaulting to intuition alone’ or being influenced by ‘emotion’.\(^{495}\)

To avoid these mistakes, you need a systematic way to deal with uncertainty … [a way] that identifies the separate issues that bear on the net expected outcome of the case, estimates in percentage terms a client’s chance of prevailing on each of those issues, and isolates issues that require additional factual and legal research.

It is easy to see that this options analysis is based on the perception of concrete facts, on identifying particular information registered by the five senses, such as the terms of a contract, concern for reputation, and costs of litigation. Conceptual criteria are applied to this concrete information in order to construct the four benchmarks. Mnookin describes the benchmarks as facilitating ‘rational’ and ‘realistic’ decisions by helping clients ‘identify’ and ‘isolate’ issues, ‘compare’ risks and benefits, ‘distinguish’ major and minor factors, ‘estimate’ probabilities.\(^{496}\)

Mnookin derives his negotiation theory from cognitive-behavioral psychology, game theory in economics, and related social sciences – all approaches that strive for data that can be replicated, and validated or falsified, factually and logically. He assures readers that his theory has been tested in workshops and practice, and is a realistic rather than idealistic method that will work ‘in the real world in which men and women practice law, conduct business, and order their personal affairs’.\(^{497}\) His theory is a straightforward example of what Jung meant by ‘empirical’
or ‘concrete thinking’ as a distinct rational viewpoint, created by applying thinking to sensation to produce a conceptual ‘comparison and differentiation’ of concrete facts. Mnookin applies norms of logic, such as deduction, generalization, and arithmetical computation, to the perception of such facts. His descriptions of the particular beauty and the peculiar vulnerability of this model of collaborative negotiation call attention to its concrete or empirical foundation:  

The analysis is only as good as the judgments informing the probabilistic assessments incorporated. The caution about ‘garbage-in, garbage-out’ clearly applies. But the beauty of decision analysis is that it forces lawyers and clients to be explicit about critical judgments. … By requiring the lawyer to quantify his legal judgments, the client can more easily assess whether it is sensible to invest more in further litigation …

For Mnookin, ‘beauty’ resides in the explicit quantification, factual clarity and logical precision. The ‘garbage’ to which empirical thinking is vulnerable, whether flawed logical analyses or flawed factual premises, he also attributes to facts, in this case, inaccurate and incomplete ones.

Generalizations come from applying logic, not to an abstract hunch or intuited insight, but to existing material facts. Mnookin argues that, tested and proved in concrete reality, this negotiation method produces reliable (that is to say, repeatable) outcomes. Since an induction from facts is only as valid and strong as its factual premises, the more frequent the repetition of a successful outcome, the stronger the generalization.

What Mnookin excludes from his theorizing also highlights the empirical thinking that informs it. He does not include felt values or intuition in his options analysis. Values are conceptualized by Mnookin, not as rational criteria, but as facts vital to the conceptual analysis. The felt values of the parties, such as a concern for reputation or desire for an apology, are relevant quantifiable data in calculating benchmarks in the options analysis. The options analysis and negotiation success depend on the client’s ‘rational self-interest’, and a client’s values may irrationally prevail over the best settlement ‘rationally’ possible, Mnookin notes, advising that if an ideal such as fairness means more to a client than financial gain, there may be nothing to do but let the client decide on that non-rational basis. But personally felt evaluation is not the selective criterion applied to carry out the options analysis. The criterion is empirical thinking’s conceptual analysis, which identifies the facts (including values transposed into facts) and applies the logic which produces the rational conclusion of the options analysis. Intuition is
referred to by Mnookin as an unreliable element to guard against, as a kind of popular thinking that may ‘lead to errors’, not as a capacity that might contribute to a negotiated decision.  

Emotions are viewed by Mnookin as ‘psychological barriers’ that undermine negotiative strategies (along with ‘biases’, ‘beliefs’, and ‘irrationality’). Emotions are analogized to destructive elemental ‘forces’ that ‘drive’ people – like fire, flood, volcano, they are ‘hot’, they ‘make your blood boil’, make you ‘explode’; they are ‘gas’, ‘steam’, ‘poison’. They ‘distort’ thinking, ‘cloud judgment’, ‘get in the way’ of managing relationships, cause ‘ambivalence’, and produce ‘unstable’ priorities. Not treating these as potentially helpful signals, Mnookin proposes that lawyers manage emotions in negotiations by excluding them, through the use of systematic rational techniques such as options analysis, or by confining and isolating them. While he suggests that, when necessary, lawyers should use their ‘emotional intelligence’ to help clients explore, understand, and express their emotions, or stop a negotiation and counsel a very emotional client to seek other professional help, these suggestions are not developed but noted in a short chapter about ‘the barriers’ to success in negotiation. And yet, he describes a hugely antagonistic negotiation, concluded without taking into account the warning signals of emotion, whose empirically-thought-out conclusion soon blew apart.

Mnookin’s discussion of ‘empathy’ also shows the extent to which he excludes felt values from his empirical thinking. He describes ‘empathy’ as ‘the capacity to demonstrate your understanding of the other side’s needs, interests, and perspectives’. He defines empathy as a cognitive process of intellectual understanding and skill in communication that does not involve the valuing of another individual. One can express empathy, he says, for what one considers ‘outrageous nonsense and unjustified criticism’. Defined in this way, empathy requires neither sympathy nor agreement. Sympathy is feeling for someone – it is an emotional response to the other person’s predicament. Empathy does not require people to have sympathy for another’s plight – to ‘feel their pain’. Nor is empathy about being nice. Instead, we see empathy as a ‘value-neutral mode of observation’, a journey in which you explore and describe another’s perceptual world without commitment.

Mnookin employs a communication technique called an ‘empathy loop’ to collect all the relevant information possible from another party, to ‘uncover as much as you can about what drives the other side’. The empathy loop requires framing questions to show a genuine interest in the
person’s answers: ‘You loop your understanding of the other side’s story back to them’, paraphrasing it in a way that makes them confident you have got it.\textsuperscript{512} This use of empathy has ‘highly practical benefits’. It conveys concern and respect, which can inspire trust and openness and ‘loosen up’ the other person.\textsuperscript{513}

The strengths of Mnookin’s theory are clear, in its conceptual analysis of concrete facts, as is its one-sidedness. It is interesting to observe how ‘empathy’, for example, can be employed well in an empirical thinking argument as a tool for communicating intellectual understanding but without practical reference to the \textit{pathos} that is embedded in the word.\textsuperscript{514} Jung’s theory and compass analogy draw attention to the truncation of personally felt values and intuition, as well as emotion, in Mnookin’s theorizing. More specifically, they orient us and help to account for the strategic use of empathy, not to serve that other party’s interest alone, but to collect facts in service of the competing motive of the client’s interest.\textsuperscript{515} Mnookin’s negotiation theory hangs on a rational structural viewpoint of the conceptual analysis of concrete facts. Such a purely conceptual viewpoint is perfectly coherent and meaningful on its own terms, but because it is one-sided, relying on it alone can leave important gaps in the rational processing of a topic.

3. Nash’s Solution: ‘Abstract’ Thinking in Explaining an Insight

‘Abstract thinking’ is the conceptual analysis of intuited insights. It processes the data of intuition, not concrete facts but latent potentials, and theorizes seemingly \textit{before} there is proof. It posits not a logical hypothesis based on empirical data, but a whole vision of a solution not seen in any such data. Abstract thinking may appear to be pure ‘ideation’, insubstantial free-flowing thought itself, because its insights are not immediately concretely verifiable. Time and hindsight may establish that abstract thinking produced an accurate understanding of an emergent reality.

This can be seen in the theorizing of Nobel Prize-winning mathematician John Forbes Nash. In her biography of Nash, Sylvia Nasar describes how Nash struggled to put his intuited solutions to mathematical problems into logical theories.\textsuperscript{516} Intuitions would come to him whole, as flashes of insight in which he perceived an entire solution all at once, and knew with certainty that it was true. Others could not see what he saw, and Nash had to take ‘the laborious steps’ to work out logical proofs to ‘try to explain’ the abstract solutions that were incomprehensible to his colleagues.\textsuperscript{517} Although Nash ‘felt strongly that he knew the answer intuitively’, he
employed thinking to do the work, often as if in reverse, of constructing and communicating solid proofs.\textsuperscript{518}

Nash intuitively solved a mathematical puzzle known as ‘the embedding problem in Riemannian Manifolds’. He presented his insight in a lecture, but it mystified his colleagues, who could not understand how he got to it, and evaluate its accuracy, and needed Nash to delineate the steps that would lead them to his solution:\textsuperscript{519}

\begin{quote}
With his great intuition, he saw that certain things ought to be true. He’d come into my office and say, ‘This inequality must be true.’ His arguments were plausible but he didn’t have proofs for the individual lemmas – building blocks for the main proof. … But that’s not how the solution presents itself to him. Instead, it’s a bunch of intuitive threads that have to be woven together.
\end{quote}

It took Nash two years to work out and publish a logical theory to explain his solution.\textsuperscript{520} He had arrived at it in one immediate and complete leap of insight, then ‘worked backward in his head’, formulating ‘a series of logical steps that would lead one to his conclusion’.\textsuperscript{521} His theory was eventually accepted as correct, but his colleagues remained mystified as to how he had got to it, the result being so unexpected, and Nash’s methods so novel. As they recalled:\textsuperscript{522}

\begin{quote}
“Nobody believed his proof at first. People were very skeptical. It looked like a [beguiling] idea. But when there’s no technique, you are skeptical.” … “Nash’s solution was not just novel, but very mysterious, a mysterious set of weird inequalities that all came together. In my explication of it I sort of looked at what happened and could generalize and give an abstract form and realize it was applicable to situations other than the specific one he treated. But I didn’t quite get to the bottom of it either.” … “You couldn’t follow him. But his written paper was complete and correct.”
\end{quote}

Even though Nash formulated a logical analysis that correctly explained his intuited solution, his methods mystified the experts:\textsuperscript{523}

\begin{quote}
But even after he’d try to explain some astonishing result, the actual route he had taken remained a mystery to others who tried to follow his reasoning. Donald Newman, a mathematician who knew Nash at MIT in the 1950s, used to say about him that “everyone else would climb a peak by looking for a path somewhere in the mountain. Nash would climb another mountain altogether and from that distant peak would shine a searchlight back onto the first peak.”
\end{quote}
Nash’s formulation of logical proofs, guided by a solution he had already intuited, illustrates what Jung meant by ‘abstract thinking’. Nash employed conceptual analysis in the logic of mathematical language to explain an intuitive insight or ‘hidden fact’ that he had perceived all at once. This conceptual analysis was applied, not to concrete facts (as in ‘empirical thinking’) but to inchoate facts. It was not a ‘forward-moving’ conceptual analysis from empirical data to generalizations but a working ‘backwards’ from the vision of a fact. Intuition can be dismissed as groundless, and abstract thinking devalued as purely speculative. But when an abstract thinking argument is carefully and convincingly outlined, it can produce paradigm shifts, such as in the recent re-conceptualization of physical reality known as ‘String theory’, and in numerous stages of ‘atomic theory’ as I discuss later in this chapter.

A ‘subjective’ quality infuses Nash’s theory, in contrast to the ‘objectivity’ that Mnookin claims for his theory. His intuition was a personal insight, an experience that he described as just as visceral or real ‘psychologically’ as a sense perception is ‘physiologically’. It was also a private perception, a vision of his own inner or individual mind’s eye. While the abstract theory Nash constructed enabled others to follow him logically step-by-step, the theorizing could not recreate in others that inner perception nor convey the sense of conviction that accompanied the perception. His colleagues remained astonished and mystified, even after they concurred with the logical proof he offered to account for his solution.

4. The Valuing or Feeling Viewpoint of Personally Felt Evaluation

In Jung’s theory, ‘valuing’ (or ‘feeling’) is a distinct and ‘rational’ function. It is a psychological function that provides a conscious viewpoint that is as reasonable, discriminating, consistent, and coherent as thinking’s viewpoint. Only the selective criterion is different. It employs, not conceptual norms, but personally felt values, preferences, likes and dislikes. Valuing assesses how much a thing matters to us, what we feel it is worth, ‘how and to what extent it is important or unimportant for us’, thus enabling us ‘to attach a proper value’ to it.

In Mnookin’s negotiation theory, the thing valued and desired is the goal of gaining the best result or ‘rational self-interest’ of the client. For Nash and his colleagues, it was solving mathematics puzzles. As these examples suggest, feeling’s evaluative viewpoint, unlike thinking’s conceptual viewpoint, carries a ‘subjective’ rather than ‘objective’ connotation. It is
felt personally, as an ‘inner’ criterion, private to each individual, and not subject to verification or falsification by others using their own personally-felt evaluation (even if they personally have the same value). The assigning of value may not even be comprehended by others, and yet be just as valid or sound, whether it is shared or comprehended or not. Feeling or valuing can be ‘empirical’ or ‘abstract’, just as thinking can be, depending on whether the type of perception it evaluates is a fact from the material world of sensation or from the inner insight of intuition.

The American writer Samuel Clemens, better known as Mark Twain, employed his own feeling values, explicitly and solely, to argue his position against vivisection:

> I believe I am not interested to know whether Vivisection produces results that are profitable to the human race or doesn't. To know that the results are profitable to the race would not remove my hostility to it. The pains which it inflicts upon unconsenting animals are the basis of my enmity towards it, and it is to me sufficient justification of the enmity without looking further. It is so distinctly a matter of feeling with me, and is so strong and so deeply-rooted in my make and constitution, that I am sure I could not even see a vivisector vivisected with anything more than a sort of qualified satisfaction.

Clemens pinpointed the distinction between valuing and thinking, and the equally rational, meaningful, and coherent quality of both viewpoints. He stated solely his own personally-felt preference, to forego the benefits of vivisection rather than inflict its torments on other animals, to justify his position. And he gave his personally-felt values as a full and sufficient justification, regardless of contrasting values and counter-arguments formulated by conceptual analysis.

Neuroscientist Candace Pert provides another pithy example of a feeling viewpoint. Commenting on the ‘intolerable assumption’ of the theory that all reality is subjective – that a ‘world out there’ of material reality does not exist, that we are each locked inside our private bubble of projections with no actual world of shared existence, Pert stated simply:

> I’m interested in nice theories … and a nice theory postulates existence.

Pert’s preference for ‘nice theories’, her choice of what is ‘nice’, her rejection of the theory as ‘intolerable’, are all expressions of her personally felt values. She did not take up a conceptual analysis. She based her argument solely on what she herself desired and valued.
Clemens’s and Pert’s viewpoints are ‘rational’, providing the personal sense of clarity and coherence that comes from what has meaning to them. They also both happen to be good thinkers who articulate their positions well. This highlights that the quality or acuity of the feeling function has nothing to do with that of the thinking function or the ability to think or speak well: Felt values can be developed and thinking undeveloped, and *vice versa*. Indeed, Jung observed that it seems no person develops all four functions equally well. Individuals tend to develop and depend upon one or two functions, and at least one function tends to be relatively undeveloped. As I explained in the previous chapter, Jung identified these as, respectively, the person’s primary or dominant functions and their inferior function. If, as Jung argued, feeling and thinking are both rational functions, how might they impact on each other?

I will offer two examples of extended rational arguments structured on a feeling or valuing function’s viewpoint of personally felt values. The first is an essay by a Canadian social commentator, John Ralston Saul, in which strongly expressed felt values stand alone as the decisive criteria, unsupported by a well-developed conceptual analysis, so much so that the thinking might inadvertently weaken the rationality of the felt values-based argument. The other is a campaign speech given by Barack Obama, then an American Senator, in which the feeling viewpoint is well supported by conceptual conclusions and effective rhetoric, but is undermined by an ‘elect me’ message linked to it and potentially distorting it. For each example, I summarize the viewpoint and then use Jung’s critical psychology to examine it.

5. Saul’s Essay: ‘Deny Certainty’ to undo ‘Corporatist Loyalty’

In an essay entitled *A Wondrous Uncertainty*, Saul argues that our democratic society is being undermined by the loyalty of citizens to corporate managers and their professional experts who are driven merely by profit and self-interest. This happens because the ‘way we reason’ in our society is ‘distorted’: We ‘fear uncertainty’, which makes us ‘want answers’, and this prevents sophisticated thinking and mental advancement:

> Answers shut us down. In fact, it blocks our mental advance to produce answers all the time, because once you have an answer, you don’t have to think anymore.

Our need for answers reduces our thinking to simplistic and artificial ‘either/or’ ideologies, forcing us to make ‘stupid’ choices between such ‘false’ opposites as ‘simplified good and evil’, 


‘black and white, rational *versus* irrational, head *versus* heart, hard-nosed *versus* romantic’.

Saul gives the example of Mad Cow disease, caused by contaminated sheep brains in cattle feed. He argues that this happened because scientists were ‘too eager to get the answer’ for corporate managers and so settled for ‘false certainty’ by making an ‘inane, simplistic, and ridiculously juvenile’ choice ‘between two extremes, two artificial opposites’:

> [Scientists were] told that you can take the rational, hard-nosed, managerial, professional position – or, on the other hand, you can be soppy, soft, romantic, truthful, open … *ethical*.

This either/or approach in our ‘society’s intellectual methodology’ has ‘distorted our way of reasoning’ and turned us into self-loathing cynics; we therefore disengage from public debate and accept ‘corporatist loyalty’ as part of democratic behavior, producing a society driven by self-interest, profit, and expertise, which will inevitably fall apart. The solution, Saul argues, is to reverse our reasoning and use it to ‘deny certainty’, not to reach unnecessary answers but to raise ‘a lot of questions’, to create ‘a lot of uncertainty’ and ‘disagreement’.

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We can do that by taking the six ‘traits’ or ‘essential human qualities’ or ‘tools that we have’, which Saul identifies as *common sense, ethics, imagination, intuition, memory, and reason*, and using them to reject answers and deny certainty when we ‘think and decide’.

Reason will work only if we give up ‘our insistence on certainty’, common sense should be used to act ‘through uncertainty’, and ethics to make us ‘admire unpredictability and non-conformity’.

Taking up Jung’s compass of conscious functions, I want to examine Saul’s arguments in order to render explicit its feeling, not thinking, rational viewpoint. For instance, he identifies six specific human traits as the essential tools we have for thinking and deciding:

> These six are a pretty good approximation of pretty well everything that’s been argued in the past. It’s a larger list than most, but I think it actually glues together the arguments which have been made over the past 2,500 years.

Such a generalization, without facts or logic, is impossible to scrutinize conceptually. It is equally difficult to make conceptual sense of the six traits because Saul does not define them.

My argument is that we [should] not try to define [the six key human qualities]. I think that the false idea of formal philosophy involves defining your terms, defining reason, defining ethics. This won’t get you anywhere.
From the viewpoint of conceptual analysis, defining terms is not ‘a false idea’ that ‘won’t get you anywhere’. But Saul prefers describing to defining.

Of the six traits, intuition is the ‘most practical’ and ‘least romantic’, Saul says, and ‘almost everything we do is a kind of intuitive act’. It is drawn from imagination, which is at ‘the center’ of ‘everything we do’. As for how these two traits work and are related, he gives a somewhat circular description:

[Imagination] is pretty well what we imagine it to be – a great swirl of uncertainty going on inside individual minds, groups of minds, society’s mind, civilization’s mind. … Everything we do, everything in which we involve ourselves, all progress has imagination at its centre.

[When] we are really concentrating on [making a decision], we reach into our imaginations for a decision. And that decision is essentially intuitive. Almost everything we do is a kind of intuitive act drawn from out of our imagination, with the imagination itself having drawn upon our rational processes and our common sense and our other qualities.

These non-defining descriptions are dense but opaque. Saul says, for instance, that sculpting, like writing, is ‘more of an intuitive act’ than an imaginative act, because sculptors ‘reach up into the imagination and pull the sculpture out’.

Sometimes, descriptions of the traits become muddled. After noting two philosophical comments relating to memory, Saul summarizes:

Memory is all about consciousness, shape, contour, spatial layering. Memory can be cruel. We have difficulty retaining a useful memory of many things. That says a lot about the reasons for absence of memory in the marketplace. After all, this is one of the few areas where memory is formally discouraged. You are told to shred your financial records every five years or so.

Then he turns from the market’s disdain for memory, to memory’s disdain for the market: ‘In any case,’ he asks, ‘how important is the marketplace to human memory?’ The marketplace, he answers, given what archeologists on a particular dig focused on, is ‘essentially meaningless’ to memory. In Jung’s theorizing, these sentences are more akin to free-floating ‘ideation’ or a flight of ideas than a logical train of thought.
Reason functions to ‘deny certainty’. Saul dismisses ‘instrumental’ or ‘applied reason’ as a remnant of medieval religious dogma that is not only flawed but delusional. It is even, unlike intuition and other traits, damaged if we try to apply it:

Reason is thought and argument, and that is already a lot. … Thought and argument are not about application. You can get close to application through common sense or through ethics or intuition. We actually damage reason by attempting to apply it directly. What makes reason fail to work is our insistence on certainty, which is to say, our interest in the existence of instrumental reason. In my opinion, reason is the least utilitarian of the six qualities.

There is nothing controversial in differentiating thinking from applying thought, the development of a conceptual analysis from its application in the material world. But Saul is arguing, not just that thought and application are different realms, but that such concrete thinking ceases to be ‘thought’ at all.

Jung’s critical psychology can orient us inside Saul’s essay by identifying its arguments as formulations of personally felt values. For instance, within the list of six traits, Saul elevates intuition above reason, and his descriptions set up hierarchies based on personal preference (a privileging of certain functions over others that Jung would have deliberately compensated to avoid). This is rendered explicit in the trivial example of Saul’s preference for hockey over chess because hockey uses intuition rather than logic:

The role of intuition is one reason a sport like hockey is so much more interesting than chess. Of course chess is a wonderful game of logic, planning, and rational strategy, tightly confined to the board and the rules. But hockey, when it is played well, is a game of imagination and intuition. When you watch a genius of the game, like Wayne Gretzky, you understand how imagination, intuition, reason and memory, can all work together in an extraordinary way.

The problem with Saul’s essay is not that it hangs on a framework of personally felt values, but that it presents itself as a conceptual analysis, where it is faulty. The basic argument is syllogistic: Our society is undermined by corporatist loyalty; this loyalty is supported by our distorted reasoning based on false choices between polarized opposites; these choices are caused by our need for certainty; therefore, if we reverse our reasoning by using our six traits to reject certainty, we free ourselves from polarized choices and stand up to corporate interests. And the
very reasoning Saul rejected – making ‘unsophisticated’ choices between polarized opposites – is employed to make his argument: He sets up dichotomies without substantiating them, and then he polarizes them by advocating ‘either/or’ choices between them: uncertainty, not certainty; questions, not answers; thought, not application; hockey, not chess. The goal of the essay is important and desirable, but the conceptual analysis is flawed.

With respect to the conceptual analysis of concrete facts, Saul has stated (elsewhere) that he does not hold to the distinction between ‘fact’ and ‘fiction’ in writing:

> In my mind there’s not a great difference between what people call fiction and non-fiction. … I actually believe there’s one way of writing. … [My] approach is not at all the recognized approach of a non-fiction writer. It’s not linear. It isn’t pyramidally based on fact. It’s about scenes and atmosphere and often the ideas are the personalities. So, for me, there isn’t a gap.

Nor does Saul’s essay appear to rest on abstract thinking, or the conceptual analysis of intuitive insight. If the *modus operandi* were abstract thinking, then Saul would be working backwards in logical steps (as Nash did) from an intuitive perception of an emergent solution to the problem of corporatist loyalty. But there is no evidence of such steps in the essay. Saul does not set out his proposal in a conceptually coherent argument. Given his refusal to define terms and his view of *reason* as suspect, one might read the essay as ‘anti-conceptual’.

> However, a thread of felt values runs through Saul’s argument and gives it meaning, regardless of its conceptual flaws. He has structured the essay on what matters personally to him, on what he finds good or preferable, in morality as well as in the mundane: Democracy is a thing of great worth; people matter more than corporations; ethics matter more than efficiency; hockey is more interesting than chess; myth is more meaningful than commerce. Personally felt evaluations make this coherent. They are the criteria that organize the argument, linking the examples, emphasizing the conclusions. They are forcefully expressed, with a conviction that jumps off the pages, echoing the kind of personal valuing that convinced Clemens on vivisection and Pert on the existence of the material world. They stand on their own. The essay does not make a well-developed conceptual argument, but a strong personal statement. To those who recognize the same felt values or discover them in themselves, the essay will make sense and might be experienced as reinforcing, rather than persuasive.
But there is an important caution to take from Saul’s essay: In Jung’s critical theory, each of the four conscious functions has its brilliance and its blind-spots. Intuition may be fifty percent right but also fifty percent wrong, which is why one needs the other functions. In Saul’s essay, the valuing viewpoint is unchecked and unrefined by thinking’s conceptual viewpoint – and Saul’s flawed conceptual argument might even threaten the very values he promulgates. If, for example, a society strongly values equality alongside corporatist loyalty, it might backfire to simply promote non-conformity and disagreement in general.\textsuperscript{557} Would not democracy itself be undermined by a single-minded pursuit of ‘noisy disagreement’ and uncertainty, without the complementary pursuit of fellowship and agreement, and sometimes even efficiency and more than a ‘tertiary’ self-interest along with ethics and altruism?\textsuperscript{558}

This caution highlights the importance of recognizing conceptual analysis and felt values as equally legitimate one-sided ‘takes’ on a topic, and bringing their often contradictory positions into an interrelated and complementary interplay. In this way it is possible to respond to the inevitable blind-spots in either viewpoint and refine the rational grasp of a topic, including Saul’s important topic of how corporatist loyalty is eroding social well-being in our democracy.

6. Obama’s Speech: ‘Your Hopes, Your Dreams’ on a Campaign Trail

Barack Obama’s ‘Springfield speech’ provides another example of feeling’s rational viewpoint. Obama’s speeches are characterized by well-crafted feeling viewpoints that are also effectively buttressed by conceptual conclusions.\textsuperscript{559} The speech he delivered in Springfield, Illinois on February 10, 2007, announcing his candidacy for the Democratic nomination in the 2008 Presidential election, is a case in point.\textsuperscript{560}

Obama opened his speech by naming certain shared ‘beliefs’ – peace over war, hope over despair, unity over division, and the possibility of building a better nation – as the reasons why ‘we all are on the journey’ of his election campaign.\textsuperscript{561} He turned to his personal life, linking it to Lincoln’s with the refrain: ‘here in Springfield’.\textsuperscript{562} To ‘this great state’ Obama came as a young man with no family connections, worked for the church in poor neighbourhoods, motivated by the ‘single’ idea that ‘I might play a small part in building a better America’, and went to law school ‘to understand how the law should work for those in need’.\textsuperscript{563} Here in Springfield – ‘where Lincoln called on a divided house to stand together’ – Obama came as a
Senator, knowing ‘our cherished rights’ all ‘depend on the active participation of an awakened electorate’. Here, ‘we’ Senators gave needy children health care, made taxes fair, and passed ethics rules that ‘the cynics said could never, ever be passed’. Here, Obama ‘came to believe’ that ‘we can build a more hopeful America’ through ‘the essential decency of the American people’, and decided to run for President. He named what must be changed: the endless foreign war, dependence on oil, the erosion of schools and health care, the impoverishment of working people – and named obstacles to these changes: the distant and greedy corporate executives, the failed leadership of corrupt Washington politicians, the apathy of disillusioned citizens who gave up on politics. He outlined the solutions: the hard journey to change Washington’s ways will require citizens to hold the government to account, to unite and support each other, to sacrifice, take responsibility, be good parents and hard workers.

Then came the heart of his speech. After naming the hard road ahead, and Lincoln’s heroic example of ‘conviction’ and ‘hope’ that ‘unified a nation and set the captives free’, Obama recited an inspiring litany of goals, to another refrain: ‘Let us be the generation’. To ‘keep our country safe’, for example, he proposed ‘we’ can ‘track down terrorists’ with improved military and intelligence capacities, bring our troops home from ‘someone else’s civil war’ by March 2008, and ‘rebuild our alliances and export those ideals that bring hope and opportunity to millions around the globe’. This ‘let us be the generation’ litany led to the finale of Obama’s speech, a crescendo of inspirational reinforcements of his invitation to ‘shake off our slumber and slough off our fear’ and join his quest for these goals:

And if you will join me in this improbable quest, if you feel destiny calling, and see as I see, a future of endless possibility stretching before us … then I’m ready to take up the cause, and march with you, and work with you. Together, starting today, let us finish the work that needs to be done, and usher in a new birth of freedom on this Earth.

Obama’s speech has two core messages. One is a personally felt values message. The speech identifies specific ideals and goals, stressing them as values shared by Obama and his listeners – shared ‘hopes and dreams’ that led them on this quest together, their ‘convictions’ and ‘faith’ in specific ‘causes’ and ‘purposes’, in ‘principles’ and ‘cherished rights’, ‘priorities’ and ‘hard choices’. He speaks of being ‘motivated by a powerful idea’, of ‘taking heart’ even against
‘impossible odds’. The centrality of values is reflected in the emphasis on Lincoln as the president ‘who tells us there is power in conviction’.

Obama names his values, often repeatedly. Many are general ideals, such as Peace, Unity, Liberty, Equality, Opportunity, Justice; ‘better schools, and better jobs, and health care for all’; ending poverty. Some are more concretely detailed: ‘universal health care’ within four years, with costs kept down by better prevention and treatment and using technology to cut bureaucracy; alleviating poverty by allowing unions to ‘lift up the middle class again’; every single working person finding a job, earning a living wage, accessing safe child care, and saving for retirement; a more competitive economy, with broadband in every town, and developing alternative fuels and fuel-efficient cars to gain freedom from the tyranny of oil. Obama stresses not only that these values matter, but also how much they matter: They are ‘cherished’, they ‘can never be compromised’, they are worthy of sacrifice and hard work.

I want to emphasize that it is not simply values but personally felt values that Obama embraces in his speech. Obama speaks of specific values, justified in their own right, for what they are. Jung emphasized this quality of the feeling or valuing viewpoint, and it is typical of political speeches. Jung also included the whole range of personal evaluations in the feeling viewpoint, from sublime choices in transcendent possibilities and ethical choices in moral conflicts, to mundane choices in art and aesthetics and leisure activities. It is interesting that Jung, for whom issues of ethics and conscience were a fundamental and life-long preoccupation, treated all personal ‘values’ and ‘preferences’, ‘likes and dislikes’, as coming from the same conscious function. Whether deciding life-and-death priorities among human rights or what film to see, if the decision is made by feeling, it is based on the selective criterion of a personally felt value, not conceptual analysis but what personally matters most to an individual. The contrast between Obama’s felt values message and the conceptual analyses of Mnookin and Nash should by now be clear. Mnookin gives a detailed factual and logical explanation to demonstrate how a specific negotiation technique will work in concrete reality. Nash gives a similar proof in mathematical logic to explain the steps from his intuited solution back to the puzzle. They do not elaborate or even address the value of winning the negotiation or solving the puzzle.

The other core message in Obama’s speech is an ‘elect me’ or leadership message. His values message was much the same as that of his fellow Democratic candidate, Hilary Clinton,
but along with it and tied to it is a message about how to actualize the cherished values. His speech seeks to inspire confidence in Obama personally as the leader who can achieve these values. The speech deftly links Obama to Lincoln, as a new generation’s ‘tall, gangly, self-made Springfield lawyer’, here to gather a divided people together and take up the mission Lincoln began. It recounts life stories that link Obama to working people, to people of religious faith, and to young people. It emphasizes the character, the humble motives and noble ideals that led Obama to become a lawyer, professor, and Senator, cataloguing his impressive qualifications while highlighting them as altruistic and heroic.

Just as deftly, the speech distances Obama (Chicago politician though he is) from the corrupt world of political elites: he hasn’t spent a lot of time learning the ways of Washington but ‘enough to know that the ways of Washington must change’. He turns his inexperience to his advantage, offering himself as more trustworthy than an insider (such as Clinton). The speech highlights as well that Obama (brainy academic though he is) is a man of action, not an unworldly dreamer but a practical realist who can get things done. He has passed laws despite tough opposition, he has bested the cynics, he knows when to compromise and when not to.

In places, the values and leadership messages combine in a heady mix of rhetoric that transcends the mundane. The last note, for example – ‘to hear the call of destiny and usher in a new birth of freedom on this Earth’ – has a Messianic ring, not surprising in a campaign speech that commits to achieving shared values as a covenant of faith with the people. However, this raises an important caution about the reliability of the values message in Obama’s speech, and in any such speech. In the election campaign context, the values message is artfully ‘spun’ to bolster the ‘elect me’ message. But if that leadership message trumps the values message, then winning the election tips from being a precondition for achieving the championed values, to a matter of egotistic self-interest. I will return to this point in Part Three of the thesis, when I examine what is required to develop political decision-making (legislative and executive) in a democracy, and what scrutiny of it is called for from judicial decisions.

Obama’s speech can be examined in the light of Aristotle’s theory of rhetoric designed for a political setting with its necessary appeal to ethos and pathos, to personal character and emotional arousal. Obama’s rhetoric is, indeed, riveting and galvanizing. The speech is poetic, almost a canticle. It brims with metaphors and visceral analogies. It flows from ‘you’
to ‘I’ to ‘us’ and back again, tying electing Obama to building the nation as one quest.\textsuperscript{584} Emotions are referred to and aroused by the rhetoric. Listeners were surely touched by what Jung described as the ‘physical innervations’ of emotion, that draw the attention of consciousness to something valued that is at stake.\textsuperscript{585} That is to say, in the terms of Jung’s theory, the incited emotions spark and reinforce the conscious processing of specific personally felt values. In some contexts, these rhetorical techniques would be entirely detrimental. Such rhetoric could undermine a trial judgment, for example, or the presentation of a research protocol that aims to isolate material facts and apply logic to them.\textsuperscript{586} And in political decision-making, I will argue in Part Three, the rhetoric of election campaigns is at best one step in developing citizens’ shared feeling values, and a step that can be misused and badly counter-productive, as Plato saw and feared.\textsuperscript{587}

Conceptual viewpoints do play a role in Obama’s speech. He uses them, and effectively, as brief conclusions that play a secondary or supporting role to the values message, and to the leadership message as well. While the values do not depend on them – the values stand, coherent and consistent, whatever reason may say, even ‘in the face of impossible odds’ when facts and logic say they cannot be achieved – they are reinforced by Obama’s use of conceptual conclusions.\textsuperscript{588} These provide, again in the terms of Aristotle’s theory of rhetorical techniques, the power of a different appeal – to the reason of \textit{logos}. There are many instances of conceptual conclusions being employed to buttress the values championed (just two examples, noted above, are the concrete thinking proposals to alleviate poverty by encouraging unions, and to improve national safety by increasing military capacity and exporting American ideals). But there is no attempt to develop these as conceptual analyses of any complexity, or at all. In Aristotle’s terms, Obama’s use of conceptual viewpoints is \textit{rhetorical}, not \textit{dialectical}. Its effect is to strengthen the values message, and the audience’s capacity to trust and identify with that, not to turn it into a conceptual message. Should such a conceptual proposal prove faulty (if unions cannot lift the middle class out of poverty, or exporting ideals does not deter terrorism), it can be changed and even reversed, while the values (economic equality and national safety) remain the same.

A viewpoint of personally felt values is rational and coherent, but one-sided. In the context of the 2007 Democratic nomination campaign, the conceptual validity and reliability of Obama’s speech’s messages is untested and unrefined. How factually and logically realistic is it to expect unions to lift up the middle-class, in today’s world?\textsuperscript{589} How realistic, in the existing
health care system, to cut personnel while promoting more advanced technology, prevention, and treatment? Can every worker really get a good job, if the economy is to be more competitive and improved technology is to require fewer personnel? Will Obama bring the soldiers home and, at the same time, export American ideals around the world, and will that make America safer? Without a well-developed conceptual scrutiny in facts and logic, it is unclear whether Obama’s plans are more naïve than wise, whether his vision is grounded in human and worldly reality, or, rather, as one Democrat opponent criticized, irresponsibly raises ‘false hopes’.  

The conceptual limitations in Obama’s speech may well be more problematic in the leadership message, because the self-interested motivation of such a message means that its stated values message is not as reliable. Election campaigns always raise the question whether a message is sincere. It was this concern that fuelled Plato’s criticism of rhetoric as harmful to civil society. In his speech, Obama acknowledges the ‘power in words’ and the skepticism about campaign promises that are ‘too many times’ not kept, but then he adeptly salvages his own promises by stressing that he is not part of the Washington elite. The moral questions raised by rhetoric are beyond the scope of this chapter. It is sufficient for the moment to say that Jung’s theory creates a useful context for responding to such questions, in schematizing an integral ‘interplay of complementary opposites’ between rational viewpoints of valuing and thinking. In Part Three, I will show that such an interplay between judicial and political viewpoints, on a contested legislative or executive decision of a democratic government, makes possible the mutual scrutiny and refinement of both the society’s felt values and the conceptual analysis relating to the decision, thus refining or differentiating the decision itself.

7. Distinctly Different Types of Rational Viewpoints

Looking back on these four examples, I want to briefly underline how they illustrate the distinctly different apperceptive viewpoints posited in Jung’s theory of conscious functions.

With respect to thinking’s viewpoint of conceptual analysis, ‘concrete thinking’, as Jung calls it for short, clearly shapes the options analysis in Mnookin’s negotiation theory. It is easy to recognize in the meticulous focus on identifying and gathering material facts, from which generalizations are made by logical analysis. The one-sidedness of this ‘systematic’ approach to reasoning through uncertainty is also evident: It produces factual and logical clarity, but the data
of felt values and intuition are undeveloped, thus overlooking any helpful role these might play in a negotiation. ‘Abstract’ thinking is just as easy to recognize in Nash’s theory, with its logical analysis used to explain the novel conclusion he had already perceived in its entirety, as a latent fact or inchoate possibility his intuition saw. His analysis is less ‘forward-moving’ than Mnookin’s, because Nash works backwards from the intuited solution to the problem posed in the here and now. Nash’s theorizing still appeared to be ‘purely’ intellectual or speculative, to those who had not had the intuitive insight, unless and until it was grounded concretely.

Key differences between Jung’s functions theory and modern ‘cognitive function’ categories come out in these examples. I contrasted ‘concrete’ and ‘abstract’ reasoning in Jung’s theory with the American Psychiatric Association’s Glossary definitions, to show the extent to which Jung avoids constructing hierarchies and precisely defines the essence of ‘reasoning’, distinguishing different types of reasoning and underlining the one-sidedness of each one.

The feeling function’s ‘personally-felt evaluation’ is what shapes Saul’s essay and gives it rational coherence and consistency. His personally felt ‘take’ on the issues he raises – what he values and prefers, in such moral and mundane choices as ethics over efficiency, intuition over reason, ordinary people over corporate profiteers, hockey over chess – produce a discriminating conscious viewpoint that characterizes the entire essay. This shows again the contrast between Jung’s view of ‘reason’ and the Glossary’s, which neither defines feeling or valuing nor includes it as a cognitive function. Saul’s selective criterion of felt values stands alone, as a viewpoint that is rational, clear, strong, and sufficient in itself, with no need for conceptual analysis. At the same time, however, (mis)representing his essay as a conceptual analysis rather than a feeling evaluation, Saul’s argument comes across as faulty: its conceptual flaws undermine rather than complement and reinforce the essay’s rational feeling viewpoint.

Obama’s campaign speech is also shaped by specific felt values, which also are sufficient to give his speech its coherent, consistent, and discriminating conscious viewpoint, with no need for thinking’s conceptual analysis. In his speech, furthermore, conceptual conclusions work in service of the values message, not undermining but reinforcing it, as does his effective rhetoric (appealing to pathos and ethos, emotion and personal character, as well as to logos or conceptual reason). But a different caution arises: The values message in a campaign speech is potentially
undermined by the leadership message that is linked to it, and that provides a powerful impetus to use rhetoric and fan emotions to serve personal power rather than shared values.\textsuperscript{594}

Inevitably, in all these examples, a well-developed conscious viewpoint, like a lone compass point, is both indispensable and insufficient. In Jung’s critical psychology, the two apperceptive functions of thinking and valuing are ‘complementary opposites’, as are the two perceptive functions of sensation and intuition. No function alone can provide a complete and accurate overall grasp of any topic or aspect of reality. This explains the importance of the ‘interplay’ between opposing functions, with its complementing and differentiating effects.

8. Interplays of Conflicting Complementary Viewpoints

The ‘interplay of complementary opposites’ between different types of conscious viewpoints, defined in the previous chapter, is a fundamental aspect of Jung’s functions theory which I will apply in Part Three. Here, I illustrate what is meant by it and the effects it has, in two contrasting examples relating to quark theory. I take up quark theory not for an analogy but for a direct illustration. First, I illustrate how the interplay accounts for the development of atomic theory, and its ongoing differentiation in quark theory and beyond.\textsuperscript{595} Then, I outline an instance when a potential interplay was stymied, in a polarized quarrel between two prominent public intellectuals, Richard Dawkins, an evolutionary biologist and holder of an endowed chair at Oxford University, and Bernard Levin, a distinguished columnist for The Times of London.

9. From ‘Atomic Theory’ to ‘Quark Theory’: Differentiation

Quark theory reaches back to the ancient idea of ‘the atom’ articulated by the Greek polymath Democritus. Almost 2500 years ago, Democritus posited that all matter, if it could be deconstructed, would be found to be composed ultimately of ‘tiny discrete finite indivisible indestructible particles’, as the basic constituent in all matter.\textsuperscript{596} This primary particle was given the name ‘atom’, from the classical Greek word meaning ‘uncuttable’.\textsuperscript{597} Thus, ‘atom’ denoted the tiniest, irreducible unit of matter, out of which all things are made.

Two hundred years ago, an English scientist took up Democritus’s idea of the ‘atom’ and postulated that chemical elements are composed of particles, unique to each element, combined
to form more complex structures. But experimental observations and conceptual theorizing made clear that the particles scientists named ‘atoms’ were not uncuttable after all, but could be broken down into three smaller particles, which were named electrons, protons, and neutrons. 

Atoms were reconfigured as a nucleus formed by protons and neutrons, surrounded by a cloud of electrons. Thus, ‘the atom’, now consisting of ‘sub-atomic’ particles, no longer corresponded to its etymology. ‘Atomic’ theory became ‘sub-atomic’ or ‘particle’ theory, which posited that ‘the whole universe was constructed of the three particles.’ Concrete experimentation challenged and refined further hypotheses. However, sub-atomic particles are invisible to the eye, to the optic microscope, and even to the electron microscope, so the experiments had to be devised in such a way that the presence of particles could be traced through technologies that indicated their presence indirectly. In this way, sub-atomic theory developed more complex, extensive, and refined detail, with concrete proofs being obtained from increasingly sophisticated experimental technologies, under the constant scrutiny of specialized theoretical analyses, which were scrutinized in turn by more technological experiments.

The new sub-atomic theory was proved concretely, and gained fame and notoriety, in its applications. Sub-atomic particles were manipulated to create enormous, unprecedented energy. Fusion of atomic nuclei in the ‘atom bomb’ in 1945 obliterated whole urban worlds in an instant; fission (splitting them apart) in the ‘hydrogen bomb’ in 1952 tests produced explosions millions of times more powerful; non-military applications included life-saving medical technologies and domestic utilities such as electricity. But puzzling empirical observations and conceptual conundrums challenged the base-line notion that the three kinds of particles were the primary ‘uncuttable’ constituents of matter. By the 1960’s, physicists postulated further more-primary particles. A new model of the atom’s internal structure was developed, with two groups of primary particles: electrons were subsumed in a group of more-particles named ‘leptons’, while protons and neutrons were grouped with ‘hadrons’ as particles made up of various combinations of more-primary particles named ‘quarks’.

‘Quark theory’ thus developed out of sub-atomic theory, which developed out of atomic theory. Quark theory continued to develop, but through experiments increasingly remote from direct sense perception and conceptual analyses increasingly dependent on specialized expertise in particle physics. Whimsical names were employed, with no logical connection to phenomena posited or traced: The name ‘quark’ came from a rhyming word coined by James Joyce for the
line: ‘Three quarks for Master Mark!’, and six differentiated quarks eventually posited were named, with terms detached from their concrete meanings and conventional associations with sense perception, as six ‘flavours’ classified in three pairs (named ‘up’ and ‘down’, ‘top’ and ‘bottom’, ‘strange’ and ‘charm’) and three ‘colours’ (‘red’, ‘green’, and ‘blue’).609

Physicists confirmed the existence of the postulated ‘top quark’ from experimental observations of trace marks of its predicted activity.610 Experimental observations also led to the idea that quarks interact, not through the known forces of ‘gravity’ and ‘electro-magnetism’, but two other forces of attraction that physicists named ‘the strong force’ and ‘the weak force’. New theories about sub-atomic activity were developed with the aid of mathematical formulas in a sub-specialty of particle physics called ‘quantum mechanics’.611 The theory of the structure of matter moved from solely ‘atomic’ matter, to two kinds of matter: ‘atomic’ matter as a very small portion of matter, with quarks among its primary particles; and ‘non-atomic’ or ‘dark’ matter as the vast majority of ‘the stuff of the universe’, with other primary particles postulated as its building blocks.612 The idea of dark matter was proposed by a Swiss astronomer after observing swirling clusters of galaxies which, he reasoned, were spinning so fast that they ‘ought to fall apart’; he reasoned further that some unseen substance must be holding them together, and that, since no substance is visible even to a telescope, this substance must not absorb or reflect light, thus making it ‘dark’.613 Dark matter exists because logic says it must.614

Sub-atomic and non-atomic theories have been incorporated into developing hypotheses such as the ‘Big Bang theory’ of the creation of the universe and the ‘String theory’ version of a ‘grand unifying theory’ of the universe.615 Quark and particle theories continue to evolve, with physicists devising ever-more sophisticated and powerful techniques to detect predicted traces of postulated particles, to confirm concretely (in expert opinion) the existence of what conceptual analysis proposes through logic and intuitive insight through perception of a latent reality.616 Dramatic experiments are being conducted in huge particle-colliding machines designed to recreate ‘the moments after the Big Bang’.617 Near Geneva, ‘the world’s largest atom-smasher’ – built in a deep underground tunnel, chilled to ‘colder than space’, fitted with giant detectors – is a machine so complex that it is ‘pushing technologies towards their limits’, and so unique that it is ‘its own prototype’.618 The search for the original ‘make-up of matter’ – the original ‘atom’, really, that Democritus posited – is now a ‘massive multinational effort’ costing ‘billions of dollars’ in public funds a year, ‘the most expensive experiment in history’.619
The evolution of atomic theory to quark theory illustrates how an intensely invested interplay between different types of conscious viewpoints (in this case, abstract and concrete conceptualizations, with their complementary intuitive leaps and empirical proofs), is able to develop, change, and increasingly differentiate the rational grasp of a topic (in this case, the essence of matter). It also illustrates how increasingly specialized and sophisticated perceptive and rational processes may demand greater effort to maintain and hone the distinctions between them and their contributions to the interplay.

10. A Quarrel over Quarks: Polarization

And what is lost when such an interplay does not occur? A public quarrel over quarks took place in 1996 between Richard Dawkins, the Oxford University Charles Simonyi Professor of the Public Understanding of Science, and author of best-selling books such as *The Selfish Gene* (1976) and *The Magic of Reality* (2011), and Bernard Levin, a leading and gifted columnist for *The Times* of London. The quarrel began when Levin published a column entitled ‘God, me and Dr Dawkins: Scientists don’t know and nor do I – but at least I know I don’t know’, expressing his exasperation with quark research.

Despite their access to copious research funds, today's scientists have yet to prove that a quark is worth a bag of beans. The quarks are coming! The quarks are coming! Run for your lives …! Yes, I know I shouldn't jeer at science, noble science, which, after all, gave us mobile telephones, collapsible umbrellas and multi-striped toothpaste, but science really does ask for it … Now I must be serious. Can you eat quarks? Can you spread them on your bed when the cold weather comes?

Dawkins replied in similar tone, observing, ‘It is no mean task to plumb the full depths of what Mr Bernard Levin does not know’, and concluding that Levin’s column did not merit a reply. Levin and Dawkins came to quarrel about quarks from different types of rational viewpoints – specifically, concrete versus abstract thinking – as well as different grasps of facts and logic, and different personally felt values. Rejecting each other’s viewpoints and refusing to engage in an interplay between those viewpoints, they failed to differentiate and extend their mutual conscious grasp of the topic of quark theory and the issues raised by it, and in the process, betrayed their shared responsibility to inform and educate the public.
Certain aspects of quark theory at the time of their quarrel are striking. The conceptual theory was shifting quickly and growing in specialized complexity, at the same time that the huge cost of the research was rising exponentially, provoking debates about social values and priorities in public spending. As for the concrete aspects of the theory, no quarks could be perceived by the senses. Their existence was derived from experimental results interpreted by the specialists who had devised the experiments. In other words, the concrete reasoning itself consisted largely of expert conceptual analyses far removed from the human perception of material reality; even the physicists relied on recordings made by machines and interpreted in the light of finely-honed conceptual predictions. The remarkable reasoning about quarks was conceptually impressive but rarefied, with only the most remote grounding in direct sense perception. The theory’s detachment from concrete thinking is exemplified in the fanciful but disconcerting naming of quarks, such as ‘flavours’, a sensory word stripped of its denotation and forced into an arbitrary context.

Levin’s questions, delivered in a pose of naïveté, challenged the factual accuracy of the conceptualization of quarks. They drew attention to ‘quarks’ as virtually pure conceptualization, consistent and coherent perhaps, but insubstantial and inconsequent to an intelligent non-expert. Dawkins’s response did not address this. The distinguished Cambridge scientist, Sir Alan Cottrell, wrote the briefest of letters to the Editor of The Times in which he at least addressed the question of materiality: ‘Sir: Mr Bernard Levin asks ‘Can you eat quarks?’ I estimate that he eats 500,000,000,000,000,000,000 quarks a day.’

Subsequently, in a lecture in which he cited Levin’s column, Dawkins distinguished ‘scientific views’ from ‘aboriginal myths’. He explained that ‘scientific views’ range from ‘trained and organized common sense’ to strange ideas that are ‘an affront to common sense’, from ‘objective truths’ that ‘will never be superseded’ (such as that the earth orbits the sun) to ‘theories or models’ still being developed (such as the new particle physics). He emphasized both concrete and abstract thinking in science, and acknowledged that highly abstract ideas in science can be strange and impossible to understand, even for specialists.

Science runs the gamut from the tantalizingly surprising to the deeply strange, and ideas don’t come any stranger than Quantum Mechanics. More than one physicist has said something like: ‘If you think you understand quantum theory, you don’t understand quantum theory.’
But Dawkins’s descriptions of quantum theory as ‘deeply strange’ and inscrutable apply equally well, from a concrete thinking viewpoint, to aboriginal myths as to quark theory. From the perspective of Jung’s critical psychology, both are speculative, and myth, guided by intuitive vision rather than refined conceptualizing, is not less likely to one day prove concretely true.

At the time of the Levin-Dawkins quarrel, some details of quark theory had been verified concretely, by observations made in unprecedentedly novel experiments; other aspects remained in the realm of abstract reasoning: still others had the status of mysteries positioned outside the frame of conceptual analysis. The theory of numerous atomic and non-atomic primary particles was very much a ‘work in progress’. Leon Lederman, a Nobel Laureate in physics, made explicit the ‘remarkably accurate’ but nonetheless ‘incomplete’ and ‘internally inconsistent’ state of the latest model of the structure of matter:

‘Today ... we have the standard model, which reduces all of reality to a dozen or so particles and four forces. ... It’s a hard-won simplicity [...] remarkably accurate. But it is also incomplete and, in fact, internally inconsistent ....’

In the years since then, quark theory is still being called ‘unexplored territory’, mapped by computer simulations of ‘suspected’ phenomena, and ‘argued’ in attempts at ‘consensus’ among physicists. As a leading researcher in the field, Professor Brian Cox, explains:

[O]ur picture of the universe has fallen to bits. We’ve suddenly decided that 96% of the universe is made up of something that we’ve not yet discovered. Either that’s wrong and there’s something fundamental we don’t understand about our observation of the universe, or it’s right and we don’t understand 96% of the universe.

The enormous cost of developing particle theory, including quark theory, brings to the fore the essential point made by Levin. His criticism was not so much about the validity of quark theory as about its value. As another journalist recently noted:

The Large Hadron Collider is an expensive beast and in times of global financial meltdown and looming environmental problems, it’s not unfair to wonder whether this kind of basic research is a luxury we can’t afford. It’s a question the physicists ponder and perhaps never fully answer.

Cox debated this question with Britain’s Minister of Science and Defence, who opposed ‘pure’ research in favour of ‘goal-oriented’ research. On one side of the debate, supporters of publicly-funding pure research into the mystery of matter stress the value of such ‘blue skies’
research. The curiosity, the thrill of exploration, the quest for knowledge, the ‘sense of wonder’, the ingenuity in finding answers to perplexing questions – all these ‘make us human’, they argue, make civilization possible, and ‘distinguish us’ from other animals. Tailoring particle research to practical goals is ‘anti-innovative’ and would ‘restrict the creativity that defines science.’ Open-ended research brings new technologies and wealth in its wake. Discoveries that transform our understanding of ‘the way the universe works’ are ‘a prerequisite for our survival’. Fear fuels the opposition to particle research – an unrealistic, deep-rooted fear of the unknown which always goes hand-in-hand with any scientific progress.

On the other side of the debate, supporters of public funds only for desired ‘goal-oriented’ research argue that, considered historically, potential beneficial spin-off technologies from pure research are exaggerated: It has not been shown to produce more creative and productive results than goal-driven research, nor to be less costly. They argue that ‘pure’ scientists underestimate the potential harms and disastrous applications of their findings, and that fear is not simply naïve but valuable as a compensatory response to scientific hubris.

Eventually, what unites both sides of the debate is that, to the extent these are questions of the values and priorities of society, they must be determined, not by scientists, but by citizens in the context of political processes and personal conscience. Answering the question, ‘What is the scariest thing that science has already achieved?’ Cox made this explicit:

The scariest thing. I think the power we’ve got, for example in atomic weapons, perhaps exceeds our wisdom. But that’s not a problem for science really, that’s a problem for politics.

Dawkins describes a similar separation between science and moral values when he depicts science as creating ‘the most powerful tools’ which we can use for good or for evil:

People certainly blame science for nuclear weapons and similar horrors. It’s been said before but needs to be said again: if you want to do evil, science provides the most powerful weapons to do evil; but equally, if you want to do good, science puts into your hands the most powerful tools to do so. The trick is to want the right things, then science will provide you with the most effective methods of achieving them.

Dawkins did not see that Levin’s questions raised precisely this issue. In his column, Levin’s tone was angry but his values clear. He viewed the costly quark research as an over-hyped craze not ‘worth a bag of beans’. In the terms of Jung’s conscious functions theory, Levin expressed a
personally felt evaluation of quark research. In public spending decisions, he valued the human needs in the everyday lives of ordinary people over the physicists’ thrilling pursuit of luxurious scientific baubles. Levin worked from the expression of his aroused emotion to identifying its source in a personally felt value.

Curiously, in his lecture Dawkins did express intense personal felt values relating to quark theory, but quite different from Levin’s. He spoke rapturously about ‘the wonder of science’ and ‘scientific ways of thinking’, in contrast to the ‘dull and plodding’ laboratory work of ‘scientific practice’. He described the mystery of the world revealed by science as transcendent, with ‘so much that we don’t yet understand’, and asked whether physics itself will come to an end in ‘a final ‘theory of everything’, a nirvana of knowledge’. He paid tribute to an ‘aesthetic muse’ – the beauty of mystery – as his personal motivation.

I wish I could meet Keats or Blake to persuade them that mysteries don’t lose their poetry because they are solved. Quite the contrary. The solution often turns out more beautiful than the puzzle, and anyway the solution uncovers deeper mystery. “The most beautiful thing we can experience is the mysterious. It is the source of all true art and science”, [Einstein] said. It's hard to find a modern particle physicist who doesn't own to some such aesthetic motivation.

Thus, in the subtext of the quarrel between Levin and Dawkins, in addition to different types of thinking viewpoints, is a difference in personally felt values concerning social priorities, ordinary lives, and the thrill of pure science.

Could the quality of their interaction have been altered if these differences had been brought out explicitly in an interplay? In Jung’s theory, to develop a rational viewpoint, and sometimes even transform it, requires an individual or group to actively hold the tension between highly differentiated opposing perspectives, and to seek, or watch for the emergence of, potential complementarities and deeper or more complex formulations of the conflict. If Jung’s theory is correct, the quality of this interaction would have altered if, in response to Levin’s insistence on concretizing quarks and valuing the ordinary needs of people, Dawkins had countered with concrete viewpoints supporting quark theory and describing scientists plodding through endless records made by particle-smashing machines, and also introduced his feeling perspective that values the beauty of ‘the mystery’ in scientific exploration.
Summary

In this chapter, I illustrated Jung’s theory of conscious functions, set out in the previous chapter, by giving examples which distinguished the different rational viewpoints, and which showed the effect of an ‘interplay of complementary opposites’ between them.

To illustrate thinking’s conceptual viewpoint, I gave an example of ‘concrete thinking’, as Jung called it for short, in Mnookin’s negotiation method, with its gathering of relevant material facts and its logical analysis used to particularize and generalize from them, and an example of ‘abstract thinking’ in Nash’s mathematical solution, with its logical analysis used to explain a novel conclusion he had seen intuitively as an inchoate possibility or latent fact. I highlighted the one-sidedness of both types of thinking viewpoint, in the conceptual refinement of either concrete factual clarity or visionary intuitive clarity, and in their inattention to refining feeling values. To illustrate the valuing or feeling viewpoint of personal evaluation, I described the rational coherence given to Saul’s essay by the felt values that shaped it, quite apart from the flawed conceptual analysis that undermined his argument. I described the feeling values message that shaped Obama’s campaign speech, reinforced by conceptual conclusions, but undermined by the leadership message linked to it and potentially turning the rhetoric and emotional arousal to serve personal self-interest rather than shared values. I highlighted the one-sidedness of these rational viewpoints, with their clarity of feeling evaluation and their inattention to refining a conceptual analysis. I noted the important points of contrast between Jung’s functions theory and the modern ‘cognitive functions’ category.

To illustrate the interplay between the rational viewpoints of different functions, and its complementing and differentiating effects, I compared two examples. In the development and expansion of the idea of ‘the atom’ and the nature of matter, I pointed out the differentiating effect of interplays between sense and intuitive perceptions and between abstract and concrete thinking, functioning as complementary opposites. In the example of the barren public quarrel over quarks between Dawkins and Levin, I pointed out how rejection and polarizing of opposing viewpoints stymied the development of more refined perspectives on quark theory.

This concludes Part Two, in which I presented Jung’s theory of conscious functions, a ‘critical psychology’ approach to understanding the nature of rational consciousness and how it develops. In Chapter 4, I set out Jung’s theory, describing the four conscious functions and the
distinct perceptions and rational viewpoints they provide on reality, each with its one-sided brilliance and its blind-spots. I explained the significance of honing the distinctions between them, while also relating them to each other in an ‘interplay of complementary opposites’, in order to differentiate and extend the rational grasp of any topic or aspect of reality. In Chapter 5, I gave examples to illustrate these basic points of Jung’s functions theory.

This Part forms a bridge between Parts One and Three. In Part Three, judicial and political decisions were examined from historical and legal theory perspectives. I described the differentiation of court and government processes, and noted losses and gains that came with this specialization. I described the recurring conflicts between judicial and political decisions on contested topics, and the criteria consistently articulated to justify and distinguish their decisions. I considered two dialogue theory approaches to these conflicts, suggesting strengths in them which I would develop from a critical psychology approach based on Jung’s functions theory. Having now presented Jung’s functions theory in this Part, I will turn back in Part Three to the conflicting judicial and political decisions, bringing Jung’s theory with me. I will argue that this theory has important implications for understanding these decisions and the significant potential of an effective interplay between them.
Chapter 6
Judicial Decisions and the Ideal of Justice

The search must be for a function … which differs from the legislative and executive functions, which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it.

Alexander Bickel

In this chapter I present my adaptation of Jung’s theory of conscious functions as a critical psychology approach to judicial decision-making. Restating briefly Jung’s functions theory, I explain how I adapt it to the institutional context of courts and governments. From this perspective, and referring to the history and the dialogue theories discussed in Part One and to Jung’s functions theory outlined in Part Two, I define judicial decisions as specialized decisions produced by the expert exercise of a distinct combination of conscious functions, guided by an ideal of Justice, and providing a characteristically unique type of rational viewpoint on any topic. This is illustrated in examples from legend, legal theory, and practice.

1. Overview of a Critical Psychology Approach based on Jung’s Functions Theory

To briefly recapitulate Jung’s theory of conscious functions (as was explained, illustrated, and summarized in Part Two), in two paragraphs: It starts with the premise that people make rational decisions, not in one single way but in a variety of different ways, through the conscious exercise of different combinations of four psychological functions. Jung precisely distinguished these conscious functions from each other, and from other psychological processes such as emotion, dream, and memory. The perceptive functions of sensation and intuition combine with the apperceptive or rational functions of thinking and valuing or feeling to produce distinctly different types of viewpoints, each one-sided, with its own unique brilliance and its inevitable blind-spots. For example, thinking applied to sensation produces a conceptual analysis based on existing material facts (named by Jung, for short, ‘concrete thinking’), capable of the precision, generalizability, and complexity of Aristotelian thought; applied to intuition, it is the conceptual analysis of latent possibilities (‘abstract thinking’), capable of the leaps of Platonic vision. The
valuing function applied to these different perceptions produces similarly concrete and abstract felt values. Thinking and valuing are both rational functions, because both comprehend or make sense of reality by applying a selective criterion (whether conceptual analysis or personal feeling evaluation) that provides a reasonable, coherent, consistent, and discriminating basis for giving meaning to reality. Their viewpoints are ‘complementary opposites’, each able to compensate and correct the other by providing information that the other lacks. An ‘interplay’ between these complementary viewpoints, when they are opposed on any topic, enables people to refine both viewpoints, and thus differentiate their overall conscious grasp of the topic, as well as humanly possible at any given point in time. In this way, people develop their rational grasp of a topic, and through them, they develop the collective consciousness of the society as a whole.

Going a step further, Jung posited a dynamic inter-relationship between the conscious functions and unconscious contents of the mind. He observed that each person inevitably develops one or two primary functions, while at least one remains inferior, that is, relatively undeveloped and unconscious. The inferior function intermingles with other contents of the unconscious, consequently picking up and incorporating some into its viewpoint. Thus, these forgotten or unknown contents, missing from the conscious perspective, can be brought into it through an interplay focusing on the inferior function, in which its viewpoint is deliberately solicited by the primary functions and used to test them. This intentional engagement with the inferior function differentiates the conscious viewpoint further, by bringing in missing or new information that can refine, extend, and even creatively shift or transform it. Such a further interplay enhances the quality of conscious experience and viewpoints, and minimizes the effect of unconscious biases that otherwise inadvertently skew perspectives.

These are the basic elements of Jung’s functions theory. I adapt them to provide a critical psychology approach to judicial and political decisions, as follows.

Courts and governments make two distinct and different types of specialized decisions. Each provides a distinct rational viewpoint on any topic, characteristic of the conscious functions that are decisive in it and that can be developed well by that institution. Thus, a judicial decision is a unique type of specialized decision. It is not simply a ‘rational’ decision in the general sense of the term. Neither is it a rational decision of a ‘political’ or ‘democratic’ type, nor of a ‘philosophical’, ‘religious’, ‘aesthetic’, or other type. Other types of viewpoints can shed light
on a judicial decision, but they are not the same type of decision. The same applies, *mutatis mutandis*, to political decisions.

In judicial decision-making, sensation and thinking, not intuition or feeling evaluation, are the primary or *decisive* conscious functions. They are refined and articulated by judges as trained experts in the process, producing a specifically judicial viewpoint of *concrete thinking* on the topic, and they are guided by an ideal of Justice (I comment below on both of these aspects). In political decision-making, the shared felt values of the citizens are decisive. They are refined and articulated by the citizens’ elected representatives and they produce a specifically political viewpoint of the citizen’s shared *felt values* on the topic, guided by any of a range of ideals. As complementary opposites (I will argue and explain in the next chapter), these two specialized decisions are potentially conflictual but inherently complementary. As a result, if they conflict, an interplay (or dialogue) between them on the contested topic enables court and government to test and correct each other’s viewpoint and differentiate the overall conscious grasp of the topic. And the impact of their decisions, in turn, plays an important role in developing the shared rational consciousness on the topic in the society as a whole.

The decisive function in one decision is an *unused* or *unwanted* function in the other, and thus, as with an inferior function in an individual, relatively undeveloped. Accordingly, in their dialogue, the unused function in each decision can be tested effectively and precisely corrected or compensated by the other decision, in which it is the decisive and most-developed function: A court’s well-honed articulation of concrete thinking can provide facts or logic that are lacking or faulty in a government decision, and *vice versa*, a government’s well-honed articulation of the citizen’s shared values on a topic can correct this aspect of a court decision. Each non-decisive function is a decisive function in the other’s decision, making its flaws more evident to the other. A dialogue can reveal, for example, a faulty factual premise in a political decision, or a judge’s purely personal value in a judicial decision. This detection of mutual flaws and biases refines what might be called the ‘institutional self-awareness’ of the decision-makers, that is, judges’ and politicians’ awareness of their unique decision-making role, of the function or skills each specialized decision calls forth from them, and its inherent weaknesses or blind-spots, too.

The connection between undeveloped conscious functions and unconscious contents extends Jung’s critical psychology from a variation of cognitive theory of rational consciousness.
to a dynamic theory about its development and transformation in the larger context of the
interplay between conscious functioning and unconscious contents. However, for the purposes
of this thesis, my focus is on the conscious viewpoints of judicial and political decisions. I will
mention only in passing a critical psychology argument about the indirect processing of
unconscious contents that accompanies the interplay of conscious functions, and its implications
for legal theorizing on such topics as recognizing and addressing bias.645

A critical psychology approach to conscious functioning thus characterizes judicial and
political decisions as specialized decisions of two distinct and different types. Taking up Jung’s
analogy of the compass, I argue that both are rational viewpoints and, like North and South on a
compass, they function as related opposites. This analogy sets them up as poles, that is to say, as
potentially conflictual but inherently complementary and thus mutually influential. The interplay
between them on any topic can correct and refine both viewpoints and differentiate the overall
rational grasp of the topic. And because these institutional decisions have powerful influences
on society, their differentiation of a topic develops the rational grasp of the topic not only in the
institutional decision-makers, but also in the shared or dominant consciousness on the topic in
society as a whole. Assuming that developing rational consciousness is desirable, it is important
to reinforce and refine the distinctiveness of judicial and political decisions, and not blur or
minimize their differences, in order that they can both be brought rigorously and effectively to
bear on each other’s viewpoint on any topic that is uncertain or contested in society.

From the critical psychology perspective, judicial decisions are informed by highly
specialized concrete thinking, a combination of sensation and thinking functions, and guided by
an ideal of Justice. They are made in court trials structured, in effect, to facilitate the conscious
exercise of these functions and the conscious refinement of this rational viewpoint. And they are
made by experts in this particular process, by judges who are specially qualified to carry out this
task of developing, refining, and articulating the distinct judicial viewpoint.

2. Judicial Decision-Making in History and in Psychology

The historical or outward features of the judicial process will be familiar to legal readers.
The overview sketched in Chapter 1 highlighted these unique and defining features of judicial
decisions, as they developed in the course of English history. These features reflect a distinction
that the critical psychology approach presents as significant: a distinct, characteristic, conscious rational viewpoint of concrete thinking. The significance of this will emerge more clearly in the next chapter, when judicial decisions are contrasted with political decisions and viewed in the context of a dialogue or interplay between the two.

I want to highlight the distinct character of judicial decisions as they were established. The decision-making process developed by courts moved far from the early communal system. In folk assemblies, community decisions of all kinds were made through practices based on local customs and sacred beliefs, such as ‘love days’ and proofs by oath and ordeal, to resolve disputes and answer pleas for justice.\(^{646}\) No trials of evidence and argument, no facts found, no reasons given by judges; on the contrary, the effect of the communal justice system was ‘to preclude human judgment on the merits of the case’.\(^ {647}\) But what developed over time was just that, a system based on human judgment of a specific type. A group of royal delegates went from overseeing and applying communal practices to developing their own, becoming professional judges, thoroughly steeped in the law.\(^ {648}\) Their chambers in Westminster palace evolved into separate specialized institutions of King’s Bench, Common Pleas, and the other courts that followed.\(^ {649}\) In the wake of juries, pleadings, and case reports, judges developed a process of isolating facts and principles as two separate inquiries, focusing exclusively on finding facts and formulating related principles of law, and exercising these two tasks in trials of evidence and arguments, as professionally trained experts who continually honed or refined this process.\(^ {650}\) In exercising these tasks, judges created common law, the substantive principles they formulated as ‘the law of the land’ – and they created the very decision-making process itself through which they created the common law.

What judges did not do was consciously or deliberately focus on and develop intuitive perceptions, or divine revelations, or personally felt values of litigants or themselves.\(^ {651}\) Judges’ personal values no doubt played a major role, in their early decisions especially, as integral (even if unarticulated) to their formulation of the ‘common erudition’ of ‘the little intellectual world of Westminster Hall’. And judges, now as then, will have their own personally felt values and opinions, emotional responses, and life experiences, including perhaps compelling symbolic experiences, which all contribute to making them the people they are with the varied characters and insights they bring to their judicial task. But in the conscious process that was developed, judges’ personal values and self-interest were neither seen nor accepted nor defined as justifying
their decisions; rather, they came to be treated not only as non-decisive but as potentially undermining their decisions and distorting them with unwanted bias. Thus, the course of English history shows the emergence of courts as separate institutions that did justice in resolving disputes through ‘the weighing up of evidence and arguments by an intelligent tribunal’; that is, through the ‘human judgment’ of judges as professional experts who reasoned by finding facts from evidence and by articulating principles of law and logic formulated from the analysis of the facts in rational argument.

I want to clearly make this point. Judges are human, and have personal values, opinions, and all the other human qualities. The more compassionate, intelligent, knowledgeable, and experienced a judge (or a politician) is, the better their rational decisions will be. A judge might be a highly compassionate person insightfully attuned to the needs of others, or might be an inexperienced ‘ignorant tyrant’ (as an older and wiser judge described his young ‘red-necked’ self, looking back after three decades on the bench and after becoming ‘fed up with watching all the suffering coming through’ his courtroom, and with judging as ‘just an academic exercise’).

Their personal views and values, whatever they are, influence judges in exercising the decisive function in their decisions – but they are not substitutes for it: The decisive function must test and be tested by them, but not be replaced by them. Thus, a judge’s own felt value, or view of what the citizens’ shared value is, or own intuitive hunch, can be used – not as the decisive function that justifies their decision – but as a spur to concrete thinking: to prompt the judge to re-probe certain evidence, sharpen a factual assessment, reconsider an argument, re-examine the fairness of a result. While a judge who is sympathetic to protecting internet privacy or to experimenting on animals, for example, cannot use this sympathy to decide a case, it may well prod and inform the judge’s exercise of concrete thinking. But the judge must translate it into that function, developing and articulating it in concrete facts and principled logic – which can then be scrutinized, challenged, corrected, and refined on that basis, that is, on its factual accuracy and conceptual acuity.

When courts developed as separate institutions with their own distinct decision-making process, the transformation can be seen, from the perspective of Jung’s theory, as characteristic of the development of rational consciousness, occurring at an institutional or collective level much as it does within an individual. Just as an individual, over the course of life, develops a facility with one or two primary conscious functions while at least one remains relatively
inferior, so likewise, in society and among its institutions, a court develops sensation and thinking functions into a mature rational outlook. As decisive functions, they have given court decisions a distinctive viewpoint – a form of Jung’s ‘concrete thinking’. At the same time, historically, with the development of this distinct new process came distinct new concerns, such as concerns about distinct unwanted biases: Once judicial decisions came to require expertise in specific skills, then whatever undermined those skills became an issue, such as biases that might skew the assessment of facts or the formulation of principle and logic. Expertly exercising the specific skills of concrete thinking, and avoiding biases that interfered with doing that, became conditions of the quality and validity of judicial decisions.

This critical psychology approach emphasizes that the decisive facts in judicial decisions are the facts of existing material reality registered by the sensation function, the perception of the five senses. Reasoning, in the form of thinking’s conceptual analysis, is applied to such facts, creating a characteristic viewpoint of concrete or empirical thinking. The overview of English history shows how sensation came to be privileged, through the emphasis on concrete evidence that was given by witnesses testifying as to their experience or knowledge and tested by cross-examination and the testimony of other witnesses, and it shows how thinking came to be privileged through the emphasis on conceptual arguments in principle and logic.

The attempt to ensure the accuracy of such facts and reasoning is what justifies rules of evidence and procedure in court trials, and also reveals the flaws in them that require continual amendment. This is true not only of eye-witness testimony. Demonstrative evidence such as photographs or scale models, and opinion evidence such as expert engineering surveys or personal character assessments, require judges to register both the testimony and the witness, and to use conceptual analysis to assess what they register about them. Even judicial notice is based specifically on the indisputability of the concrete facts and logic attesting to the matter judicially noticed.

Concrete facts and analysis can be elusive and highly complex, as anyone knows who has grappled with the concrete thinking in sub-atomic theory, or wondered if a stranger is hostile or shy, or waded through the tides of mingled fact and fiction rolling in from ‘infotainment’ news reports and ‘spin-doctored’ election campaigns. Concrete thinking in Jung’s theory should not be reduced to the definition in the American Psychiatric Association’s Glossary (discussed in
Chapter 4). In Jung’s precise terms, concrete and abstract thinking employ the same intellectual mode of conceptual norms, and it is not abstract but concrete thinking that can particularize and generalize. To repeat an example that still speaks clearly: Concrete thinking can create the impressive structure and coherence of Aristotelian thought, without relying on a Platonic leap of intuition. Judges, in consciously striving to achieve and refine concrete thinking, give judicial decisions their distinct type of brilliance or ‘rational coherence’ as the historian Baker put it.656

Concrete thinking and material facts connote worldliness. They contribute a particularly ‘worldly wisdom’ to a topic, a practical knowledge of life experience in mundane reality (up to the edge of the ‘beautiful mysteries’ of material existence, as the scientist Dawkins describes it). This practical worldly knowledge is critical for addressing mundane topics, and it renders the most otherwise ordinary cases fascinating or tender in their particularity.657 As the English jurist Maitland noted, ‘Law is the point where life and logic meet’, a point that mediates between ‘abstract Latin logic’ and ‘the concrete needs and homely talk’ of humankind.658 The American jurist Oliver Wendell Holmes Jr. observed further that the ‘life’ of the law has been ‘experience’, rejecting the idea that the common law can be viewed as if it is a system of logic, containing ‘only the axioms and corollaries of a book of mathematics.’659 Jung similarly insisted on the need to realistically understand people and their lives, for anyone working with them, and warned against the folly of a purely intellectual approach to matters of psychology: ‘A human being can be transformed into a sick animal, but not moulded into an intellectual ideal.’660 In the concrete thinking of judicial decision-making, logic is joined to worldly knowledge about life.

Examining the dialogue theories of Hogg and Roach (discussed in Chapter 3) from the critical psychological perspective highlights certain features. On the one hand, Hogg, as a legal positivist seeking to demonstrate that the Charter dialogue is not anti-democratic, does not develop an account of the substantive nature and effect of judicial decisions in the dialogue. He does refer to judges deciding cases on the basis of ‘facts’, ‘law’, and ‘evidence’, and laying down ‘judicially-prescribed standards’ of analysis, and he describes the powerful influences they can have in compelling a government to address ‘a difficult issue’ about a Charter right. But Hogg very narrowly their role and effect, as modifying only minor details in the form or terms of a law, such as by reducing a limit on a right or extending a benefit to all.
On the other hand, Roach, while he focuses on the judicial ‘rights protecting’ role in the Charter dialogue and the common law tradition, refers in addition to other features of judicial decisions as fundamental ‘givens’. He refers to evidence and reasoned arguments, to judges needing ‘enough facts’ to decide an issue and having their ‘own way of reasoning’. From the critical psychology perspective, these features, and not rights protection per se, define judicial decisions. These features of concrete thinking, along with the ideal of Justice, are the significant judicial contributions to any dialogue.

When Roach refers to court decisions as ‘principled’, incorporating legal process thought, I read him to describe courts making decisions in which they formulate principles (such as the reasonable person standard or the Oakes test), rather than as defining judicial decisions as unique in being based on principle. From a critical psychology perspective, not only judicial decisions but all decisions that involve the thinking function may use conceptual norms such as principles and logic, despite having a pragmatic, visionary, or other dimension. Legislative, religious, and abstract philosophical decisions, for example, all differ from judicial decisions, not in the use of principle, but in deriving principles from felt values, divine revelations, or intuitive insights, rather than from concrete facts and law.

3. Excluded Functions and Pioneering Cases

Judicial decisions have another side. The conscious exercise and refinement of the functions that produce their concrete thinking viewpoint means, unavoidably, that other functions which are not decisive but rather unused, unwanted, and excluded from that distinct conscious viewpoint, will be more or less unrefined. These non-decisive functions, in Jung’s critical psychology perspective, are intuition, abstract thinking, and feeling/valuing. Intuition, to recall Jung’s theory, is the perception of an entire latent or inchoate possibility, in an insight whose prescience is inexplicable in fact and logic; this is not the conventional view of intuition as a gut expectation borne of experience and common sense, and this view better explains why judges reject intuition as a basis of judicial analysis. Abstract thinking is thinking applied to intuitive perception: it is directed conceptual analysis, just as concrete thinking is (neither is the pure ideation of undirected thinking), but is not grounded in existing material facts of sense perception. Valuing’s rational viewpoint is just as coherent as thinking’s, but neither the felt
values and preferences of judges, nor those of litigants or anyone else (unless they are relevant as concrete facts in a case), are decisive in judicial decisions.664

In contrast to concrete thinking, perceptions and viewpoints of non-decisive functions (such as intuitive visions, abstract philosophies, and personally felt values) simply cannot be well developed in the judicial process. This is because, not wanted to be decisive and thus not a focus of attention in court decisions, they have not been consciously exercised and refined there. As well, the structural process, expertise, and resources necessary for doing so are not there, as they may be in political, religious, psychotherapeutic, or other contexts in which these functions are decisive. Even if these other functions are primary in individual judges, they will be relatively unused within the judicial context. They are inevitable blind-spots, the missing or undeveloped takes on reality, in the necessarily one-sided specialization of judicial decision-making.

Lacking conscious development and refinement in the judicial context, these unwanted functions are especially vulnerable in that context to error and unconscious bias. Such flaws are not easily ascertained and scrutinized within the judicial context, precisely because, unlike flaws in concrete facts and conceptual analysis, flaws in intuition or abstract thinking or felt values are not on the judicial ‘radar screen’, as McLachlin CJC has put it, and so courts cannot ‘zero in’ on them.665 Yet, these unwanted viewpoints should not be ignored, since they are always there too and can be engaged when a judicial decision is made. Just as, in personal life, an inferior function does not sit quietly or disappear when an issue is raised (but may well respond to it with its unbidden perception or viewpoint), so too in a judicial decision, an issue or a witness, or a fact or argument, may well speak to a judge’s personal values and intuitions, arousing emotion and drawing a response from non-decisive and unwanted functions. And just as such an unbidden response, in personal life, can influence a decision unconsciously if it is not made conscious, so too in a judicial decision, it can influence a decision without the judge being aware of it.

This makes it important to consciously attend to any unwanted viewpoints in making a judicial decision. They might carry a bias that can then be identified and addressed. As well, they might carry information that is relevant but absent from the conscious process, such as the overlooked fact that is picked up by an odd hunch that a witness has more to testify to, or the erroneous logical deduction that is picked up by a protective concern for a cherished value. A judge might wisely pause and inquire further into evidence or an argument that seems to have
drawn out an unbidden viewpoint of an unwanted function. Such a viewpoint arising in a case may produce a positive effect if it is made conscious; it may lead to new ideas or information that challenge concrete thinking to look further or consider more, even though it is initially experienced as negative or erroneous and unwanted.

But the critical psychological approach emphasizes that such non-decisive viewpoints, used in this way, do not replace concrete thinking as the decisive function in a judicial decision. They are used by concrete thinking to test, correct, and enrich a factual and conceptual analysis. While they may be helpful in honing the decision, they remain non-decisive and unwanted as a basis for the decision itself. Other distinct viewpoints cannot be substituted for concrete thinking in judicial decisions, without undermining the distinct ‘judicial’ viewpoint.

Pioneering cases frequently challenge courts in this respect, to carry out their judicial function with precision despite the absence of needed facts or principles. Such cases call for the same attention to their specialized viewpoint, not for blindly substituting a political or any other viewpoint. By ‘pioneering’ cases, I mean cases where the topic is new or uncertain, and there is not yet available the evidence or principle required for a judicial analysis of it (such as evidence of a relevant medical fact relating to it, or of the democratic consensus or citizens’ shared values relating to it). These cases require judges to posit, provisionally and explicitly, the facts and principles needed to make a judicial decision, subject to correction from an authoritative source for these (such as from medical experts as to the fact of a drug’s effect, or from governments as to the fact of the citizens’ shared values on the topic).

For example, on many topics – genetic engineering, animal experiments, euthanasia, abortion, marijuana, Google glasses, privacy in public spaces, Tasers, waging a war with drone weaponry – the phenomenon or issue is new and there is not yet a law or policy or sufficient evidence on it, or society’s views about it are uncertain or polarized or in flux, or no principled framework of analysis has yet been formulated, or an existing framework has lost its meaning and is no longer acceptable. For courts to decide cases on such topics, evidence is required from non-judicial sources (such as a medical body’s viewpoint on a drug, or a government’s on the democratic consensus). And if this evidence is not yet realistically available or has not yet been developed by its authoritative source, judges will have to posit the relevant concrete fact (the effect of the drug, or the democratic consensus) themselves. In positing such a fact, since no
concrete evidence is available, a judge can only posit it based on another type of perception or viewpoint – for example, on his or her own personal preference or value, intuitive insight or belief, abstract theory or opinion, common sense or educated guess. To this ‘posited concrete fact’, the judge can then apply a conceptual analysis. Thus, the necessary fact or principle for deciding a pioneering case is posited by the judge, and the judge can only posit it by exercising a function that is not one of the decisive functions that distinguishes judicial decision-making.

Making it explicit that such a pioneering decision is based on a posited fact, not proved in evidence – deliberately and expressly making that clear in the decision – ensures that the provisional quality of the decision is understood, and that the distinct judicial role remains clear to society. It also invites any correction needed from an authoritative source for that fact. The judicial decision is authoritative only unless and until the posited fact is corrected in a subsequent judicial decision, through evidence provided by a source that has the ability and authority to expertly and reliably develop it (such as the expert medical body or the elected government, in the same examples). This is true of all judicial decisions, of course, but in such pioneering cases they are provisional at the moment they are made, since the factual basis is only posited, and the invitation for correction is explicit. Such judicial decisions invite correcting evidence, directly from authoritative sources, if the court has erred in a fact or principle it has had to posit in order to decide the case. This also makes the distinct role of other institutions clear to society.

To give a simple hypothetical, assume a judge is asked to halt a living animal experiment (or vivisection) as inhumane cruelty. If no law exists and no evidence is available to indicate the citizens’ shared value on the topic, then the judge can only posit that fact and formulate an original or pioneering conceptual analysis based on it, in order to make a decision. Assume the judge, relying on a personal commitment to Nobel Laureate Albert Schweitzer’s philosophy of ‘reverence for all life’, expressly uses that philosophy to construct an analytical framework based on the moral principle that no humane society inflicts suffering on other animals that it would not permit on humans, decides the experiment is inhumane because it inflicts such suffering, and orders an injunction. This decision invites correction if the posited fact (the moral principle of the society) is not accurate. Let us assume the decision is decried by some citizens and groups, and lauded by others, and the government legislates to permit such suffering for ‘beneficial scientific purposes’. In renewed litigation, a court corrects the fact of society’s moral priority, based on this law (and perhaps also, I will argue in the next chapter, on evidence
relating to the reasonable development of citizens’ shared felt values on the topic), corrects the analysis to include an additional step of weighing scientific benefit against suffering, and holds that a ‘probable medical benefit’ outweighs the suffering. This might be followed by a further polarized outcry, by new evidence being developed respecting the benefits, alternatives, and citizens’ values on the topic, and by another round of revised legislation and renewed litigation.

In other words, from the critical psychology perspective, a judge’s task is to exercise those functions that produce the distinct judicial viewpoint of concrete factual and conceptual analysis; the other functions, such as feeling values and intuitions, are non-decisive in judicial decisions and undeveloped by courts. But in pioneering cases (such as hypothesized above, and as frequently occur), the factual basis needed for a distinctly judicial decision is not available. A judge can then only decide by positing the needed facts, and can only posit them on the basis of a non-decisive function, such as a judge’s belief or preference or purely theoretical analysis (as in ‘reverence for all life’ being the guiding moral value of the society, which in the hypothetical came from the judge, not the society). The information introduced by the judge is not grounded in concrete evidence of the society’s moral priority, and is vulnerable to error and bias since it cannot be checked and honed in concrete thinking. The judicial decision can only be provisional or tentative in an aspect that is vital to it.

However, and importantly, the court has made this clear and invited correction in concrete evidence if it has erred. It has not unconsciously substituted a judge’s personal value for concrete evidence of the social value, but has expressly articulated that it has done so and why. In such a pioneering decision, the judge is not simply doing consciously what is done unconsciously in ordinary cases (although simply making the process conscious is itself a significant step). The judge is expressly identifying a necessary concrete fact that is lacking, and inviting a corrective response if there is one. Such a decision sharpens rather than blurs the bounds of the judicial viewpoint, and it sharpens the bounds of the political viewpoint as well. It reinforces the decisive role of concrete facts in judicial decision-making, making it more likely this will be consciously employed and developed in judicial decisions. It reinforces the decisive role of citizens’ shared values in political decision-making, with the express invitation to the government to authoritatively correct a posited shared value if the court has got it wrong; if the government does so, the court can renew its judicial scrutiny of the topic on the new evidence.
4. Justice as a Guiding Symbolic Ideal

Judicial decisions are also distinguished from other rational decisions by the overarching ideal of Justice that guides them – and is indispensable to them. Justice is both a symbolic and an applied ideal in judging. I will consider first the symbol of Justice (which I capitalize).

Symbols, in Jung’s theory, are not short-hand ‘signs’ standing for something known (as a red octagon stands for ‘stop’ or a bluebird for ‘Twitter’). Symbols express ‘more than they say’, in images and motifs pointing to something beyond the symbol itself, that is not yet fully comprehended and defined, and not yet expressible in a better way (the way Yin-Yang, Star of David, Cross, and Medicine Wheel convey an ultimate interconnected unity). Jung attributed the compelling numinosity of symbols to their coming from a source outside consciousness and transcending the existing rational grasp, and attributed the creative and revivifying effect of symbols on rational consciousness to their power to attract and motivate conscious thought and action, and direct them toward an expansive and still-to-be-attained possible goal.

‘Justice’ serves this powerful symbolic function in the rational process of judicial decision-making. The word ‘just’ comes from the Latin *jus*, which meant both ‘right’ and ‘law’ in the Roman world. The word ‘judge’ has the same origin, in the Latin *judicum*, formed from the combination of *jus* and *dicus*: ‘right-speaking’ and ‘law-speaking’. ‘Just’ is defined as ‘right’, ‘true’, ‘fair’, and ‘evenly balanced’. It is still used today as it was in the Medieval Latin expression *justa mensura* to mean ‘right measure’, and as it was 2,500 years ago by the Emperor Justinian: ‘Justice is the constant and perpetual wish to render to every one his due.’ Justice does not come from or depend on Democracy or Equality or Peace or Compassion or any other ideal; it may be related to them, and they may influence and reinforce each other, but each symbolic ideal exists in and of itself.

The extremely high value placed on Justice since antiquity is evident in the oldest known codifications of law. The Code of Lipit-Ishtar, stone tablets inscribed in Sumerian about 4,000 years ago, sets out atonements for wrongs (‘If a man enter the orchard of another and be seized there for stealing, he shall pay ten shekels of silver’) that derive their authority from a mandate given to Lipit-Ishtar, ‘the wise shepherd called to be prince’, specifically ‘to establish justice in the land’ and ‘bring well-being to the Sumerians and Akkadians’. The Code of Hammurabi, a Babylonian code of a century later, which also sets out atonements for wrongs (famous for
emphasizing fitting moderation in punishment: ‘An eye for an eye and no more’), describes the divine interest of ‘Entil, lord of heaven and earth,’ in the worldly ‘righteousness’ that underlies the atonement for wrongs. The penalties listed in both Codes are concrete ways devised to ‘atone’ (to ‘make one’) after a disruption or imbalance caused by a wrong, amending the wrong and restoring the ‘right measure’ through compensation or equal deprivation.

Justice, as a symbolic ideal rather than a rational concept, conveys the existence of an ultimate ‘right measure’, of a right or true order of things in which each person has ‘their due’. The image of balanced scales has long symbolized this idea, during three millennia and more in Egyptian, Greek, Roman, European, and other societies around the world. The balance as a metaphorical image reflects many nuances of the ideal – the perfect harmony and equilibrium of what is ‘just’, the subtle delicacy of its exactness, and its disturbance, and the effort to ‘restore to right order what has been disturbed’. Balanced scales are an almost invariable attribute of personified Figures of Justice: the Egyptian goddess Maat presiding over the scales that weigh the hearts of the dead to determine their afterlife fates; the scales borne by the Greek goddess Themis and the Roman goddess Justitia; the scales of the Christian archangel Michael and the Muslim archangel Gabriel that weigh souls and deeds on Judgment Day; the statues standing at many a courthouse, old and new, today, personifying Justice as a woman holding balanced scales aloft. The ‘remarkable ubiquity of the figure of justice around the world’ extends to courts in ‘Azerbaijan, Zambia, Iraq, Brazil and Japan.’ The ‘collective’ nature of the symbolic ideal of Justice can be seen in this widespread resonance, across cultures and societies, of a similar symbolic form and motif ‘touching a corresponding chord’.

These Figures of Justice reflect both mundane and divine aspects of the symbolic ideal. The mundane aspect of this ideal, and its association with judicial decisions in the concrete reality of worldly life, is evident in its appearance, for centuries past and in our own time, in the courthouse setting. At the same time, these figures reflect the notion of Justice as a supraordinate ideal associated with a transcendent reality: Justice as the domain of gods in Egyptian, Hindu, Greek, Jewish, and Buddhist traditions, as the inexpressibly exquisite measuring of divine judgment in the afterlife or on Judgment Day or on entering heaven, as the delightful ‘rightness’ in a perfectly merited ‘poetic justice’. This is an immanent Justice, a perfect balancing that is one facet of an ultimate, multi-faceted, unity. It is ‘archetypal’ in Jung’s theory, or in contemporary cognitive science, a ‘foundational image schema’ of the
human mind. The symbolic ideal of Justice does not require rational explanation to justify its validity; it is meaningful in and of itself.

Injustice makes us sick. This is what accumulating results of small behavioral and social science experiments seem to show. ‘Social injustice’, for example, set up in the deliberately unequal treatment of two people in a conflict resolution setting, tended to alienate people from each other and foster mutual negative reactions (anger, cynicism, hopelessness, withdrawal, and vengefulness in the person treated unfairly, and guilt, discomfort, and withdrawal in the favoured person). Subjects in a laboratory game had the very same physical reaction when they were treated unfairly – an involuntary grimace of disgust – as they had when they drank a bad-tasting liquid or looked at a revolting object. Other animals, too, might be sickened by what could be called injustice. For example, in one of many such studies, dogs showed an ‘inequity aversion’ to not being rewarded as a partnered dog was for the same task, becoming increasingly upset and nervous, and finally withdrawing, refusing to cooperate in the game or look at the researchers. Studies such as these reinforce the argument that the Justice motif functions physiologically as well as symbolically, that is to say, it influences behaviours and emotions much as it informs an intellectual outlook.

The ancient legend of Solomon’s judgment illustrates the creative direction that the symbolic ideal of Justice gives to the judicial process, and makes some important practical points about the distinctly concrete nature of judicial decision-making. In the story, first told sometime over 2,500 years ago, King Solomon has a dream in which God offers him anything he wants, and he asks for the wisdom to judge. One day, two mothers come to him to resolve a dispute: They both gave birth to a child in the same house, one child died in the night, and each claims the living child is hers. Solomon is stymied. He calls for a sword to cut the child in two and give half to each mother. With that, one mother cries out in agony to spare the child and give him to the other mother. Solomon orders that the child be given to the one who cried out, for ‘she is the mother’. His judgment fills the people with awe: ‘And all Israel heard of the judgment which the king had judged; and they feared the king: for they saw that the wisdom of God was in him, to do judgment.’
From the perspective of a critical psychology approach to judicial decision-making, two aspects of this story stand out: the distinct decision-making steps taken by Solomon, and the particular ‘wisdom’ and awe-inspiring effect of his judgment.

In making his decision, Solomon is shown exercising the characteristic concrete thinking of the judicial process. He hears testimony of their direct knowledge from each witness in turn; he seeks evidence of a decisive concrete fact; he finds such a fact in a credible demonstration of selfless love for the child. The sword that brings out this evidence, often seen symbolically as an image of discrimination, evokes the discriminating essence of a conceptual scrutiny of concrete facts. The worldly quality of this concrete conceptual analysis is clear, in its practical knowledge of human reactions and relationships. At the same time, this worldly judgment inspires awe. Awe is defined as an emotion combining ‘dread, veneration, and wonder’ inspired by ‘the sacred or sublime’, something beyond ordinary rational comprehension. The people’s awe is thus inspired, not simply by a worldly conceptual analysis, but by a sublime achievement, from a God-given ‘wisdom’ translated variously as ‘doing justice’ and ‘doing judgment’.

I want to particularly highlight both the worldly nature of Solomon’s judgment and its sublime or transcendent aspect. Its worldly nature, in its notably astute practical knowledge of human beings in mundane reality, distinguishes it from pure speculation or abstract philosophy. Bickel’s analogy of the judge to Socrates (cited by Roach in his dialogue theory, noted in Chapter 3) likens judicial thought to philosophical thought. But this is an erroneous analogy, from the critical psychology perspective, because it confuses the worldly and concrete nature of judicial analysis with philosophical dialectics, which may be purely intellectual or abstract. Whereas Socrates is the supreme questioner of philosophical truth – the archetypal Philosopher – Solomon is the archetypal Judge. The path to Justice or any other ideal through abstract thinking is utterly different from the path through the concrete thinking that must join logic with life. This is not simply an academic distinction. It has real implications for understanding and refining judicial decisions and what they can contribute to a dialogue with political decisions, as I will explain and illustrate in the next chapters.

Punishment is unmentioned in the legend of Solomon’s judgment. And interestingly, there is no lingering sense that it matters, that its absence makes his judgment incomplete or that justice was not done or depended on punishment. This untroubled silence says that Justice, as
both an ideal and its concrete application, does not require punishment of a wrongdoer \textit{per se}; some other way of atoning, or some other response altogether, might well ‘restore to right order what has been disturbed’. Justice and punishment are not synonyms. In the case Solomon tried, to make things right did not seem to call for punishing a wrongdoer at all.

What \textit{has} lingered about the legend, however, and generated centuries of debate, is the question of maternity: Was the caring woman truly the child’s mother?\textsuperscript{697} This lingering puzzle indicates the transcendent aspect of Solomon’s judgment. Biological parenthood is the factual issue that everyone knew the case turns on, and it seemed impossible to prove. If Solomon had resolved this issue, however, and by an intellectually astute application of concrete logic, his judgment would have prompted admiring satisfaction, but not awe.\textsuperscript{698} Solomon’s judgment does something else. It leaves the inquiry into biological rights behind, superseded by unselfish care as the relevant factual inquiry – as the concrete aspect of parenthood that concerns Justice. And it not only restores a right order that has been disturbed, but shifts the society’s conscious grasp of what the right order is, from an existing idea of biological rights to a new idea of ‘the best interests of the child’.

Awe is inspired because the judgment transcends the polarized positions and pierces a veil of accepted wisdom about the mundane world, bringing into it a more sublime wisdom, that not biology and cultural rights, but loving care and personal character, are what ‘our higher aspirations to justice’ (as Roach put it) depend on. The symbolic motif of Justice had an innovating and enlarging effect on Solomon’s decision, opening it up to this higher right order in which each finds his or her greater due (the child, the true mother, and not impossibly the bereft mother), and restoring to a disturbed order what will atone or ‘make it one’ again.

And on the other side, Solomon’s decision gives the transcendent ideal a particular material form in worldly reality: It articulates a conceptual analysis that particularizes and concretizes the sublime idea of Justice, and that can also be generalized: In a case of two parents claiming the same child, where parental rights are unclear, the disturbed order of things is restored by reliable concrete evidence – not of wealth or influence, or biology or cultural practice or popular opinion – but care for the child’s welfare.\textsuperscript{699} Solomon’s decision brings to the lofty ideal of Justice, and to the logical parsing of the ideal, the mundane facts of worldly life, in their endless fascination and moving tenderness.\textsuperscript{700} And as just noted, the legend of Solomon does not
tie Justice to punishment but separates them, opening the perspective to other ways to restore right order to disturbed lives, which might include caring support for a grieving mother just as for an innocent child. This is an important point, and it is relevant to assessing new theories of Justice and their practical applications, which I discuss below.

Are these aspects of the story, and the story itself, still relevant today? A symbol must be ‘living’ in order to have an effect. In Jung’s theory, if a symbol is no longer ‘pregnant with meaning’ but has been defined in a completely satisfying conceptual formulation, it has ‘died’: The symbol has now been superseded by the grasp of rational consciousness, and no longer has a suggestive, creative, numinous or inspiring influence:701

A symbol really lives only when it is the best and highest expression for something divined but not yet known to the observer. … But once its meaning has been born out of it, once that expression is found which formulates the thing sought, expected, or divined even better than the hitherto accepted symbol, then the symbol is dead, i.e., it possesses only an historical significance.

While Justice exists as a conceptually theorized symbolic ideal in Canada (as I discuss below), I pose the question: Is the figure of Justice as a symbolic image still powerful, or is it waning in its effect in the shared consciousness of our society?702 The evidence is mixed. Two courthouse statues in British Columbia do still carry the ancient attributes of the symbolic figure: ‘Themis, Goddess of Justice’ standing in the atrium of the Vancouver courthouse, dramatically holds the scales aloft.703 Another ‘Themis’, at the New Westminster courthouse, in more complete and ancient symbolic detail, stands not blindfolded but clear-sighted, holding scales in her right hand, with her sword at her side.704 However, the lovely statue that is the centerpiece of Osgoode Hall, home of Ontario’s highest court and Law Society, is not a figure of Justice but Hope, represented by a young woman holding her child aloft.705 Even more striking, at the door to the Supreme Court of Canada stands a dark shrouded figure, with not a single attribute of Justice: she is not ‘Justitia’ at all (though the Court’s website misidentifies her so), but ‘Mourning’, who might well inspire more foreboding than faith in those who enter seeking Justice.706

Perhaps it is the specific symbolic figures that no longer resonate in a society moving away from the cultural contexts in which they arose. Perhaps Solomon as Judge carries too many Judeo-Christian or patriarchal trappings for today. Perhaps the inspiring muse of Justice as
an idealized woman reinforces limiting stereotypes, in contemporary contexts where women also judge and men function as muses in real life and in art.\textsuperscript{707} Or is there a loss of ‘the symbolic’ in general, as a psychological function with real meaning and impact, in our society today (as Jung thought was so in post-modern times)? For not only these figures but also the central symbolic attribute of balanced scales has disappeared – unremarked – from the statuary at some prominent courthouses, and now manifests typically as a logo for legal associations.\textsuperscript{708}

5. **Justice in Concrete Theory and Practice**

Even if these images of Justice no longer carry symbolic significance, it is nonetheless clear that the ideal itself is not dead. There is no evidence that ‘the meaning [of justice] has been borne out’ of the symbolic and captured in a more satisfying conceptual formulation.\textsuperscript{709} On the contrary, the Justice ideal in our time can be seen as inspiring a perhaps unprecedented range of creative new theories about justice and what it requires in concrete reality.

Recently there has been an explosion in new conceptualizations of justice in various judicial contexts. The meaning and practice of ‘doing justice’ is being creatively shifted and extended, from the ‘punitive’ and ‘compensatory justice’ of local folk assemblies and the later notions of ‘procedural’ and ‘fundamental justice’, to new notions of ‘restorative justice’ and ‘transformative justice’ sought in ‘truth and reconciliation’ processes following overwhelming societal wrongs and upheavals.\textsuperscript{710} Some theories risk stretching Justice beyond itself, by fusing it with other ideals, such as Unity or Healing or Transformation, which are complementary but different, with their own symbolic meanings in and of themselves. Fusing them is problematic because it can bury separate attributes and vital distinctions that an interplay brings out: for example, can Justice alone, even in ‘transformative justice models’, as one commenter suggests, ‘repair the social fabric’, ‘reshape relationships’, and ‘reconcile communities’?\textsuperscript{711} Other ideals need to be recognized in their uniqueness, as does Justice, and brought into interplay with it.

The ‘therapeutic jurisprudence’ model developed in the Ontario Mental Health Court is an example of a creative new theory and its ongoing refinement, which takes Justice seriously as a guide to ‘doing justice’ in a judicial process, and gives it an effective concrete form in the worldly reality of the Court’s cases.\textsuperscript{712} The model was developed in response to the increasing criminalization of mental illnesses and inadequate mental health care and social supports.\textsuperscript{713} It
adopts the approach that doing justice, in the context of crimes committed by people with mental disorders, requires seeking not punitive goals but ‘therapeutic goals’ that respond to the problems and needs of these offenders and, in doing so, can reduce crime and also unjust, unproductive, and costly criminalization. In other words, as it is phrased by the authors of a text on the topic, justice is ‘reinvented’ as ‘just treatment’ rather than ‘just desserts’, aiming to produce beneficial results for the people involved as well as for society in general. This new model shows a Court consciously grappling with the nature of Justice in its concrete application, and with such issues as how to ensure the integrity of both justice and therapy, and their mutual reinforcement but not fusion, among the different experts of its interdisciplinary team. In this team, for example, the judges’ distinct task is to do justice – as ‘just treatment’ – in scrutinizing therapies, too, through a judicial process of concrete factual and conceptual analysis guided by an ideal of Justice, as I have described in this chapter.

This model highlights effectively that justice is not about punishing per se, but about restoring to a right order what is disturbed, or to paraphrase Justinian, about giving each person his or her due in such a right order. The Court’s focus on mental health care and social supports, so unevenly distributed by fate and society, is a revitalizing application of the ancient and fundamental ideal of Justice. This focus also demonstrates concretely that Justice is a guide, not only to what is required to do justice, but to what is not required or even countenanced, such as adding the misery of incarceration to the misfortune of mental illness, when that does not right a disturbed balance but exacerbates it.

Judges have expressly invoked justice in their decisions, for centuries, and never as inessential or inconsequential. As noted in my historical overview (in Chapter 1), pleas and demands specifically ‘for justice’ were brought to the early folk assemblies, and later courts with their expert judges were established on the prerogative authority ‘to do equal and right justice’. It was this authority to do justice that was exercised by judges when they formulated, interpreted, and applied ‘the law of the land’, and when they responded to injustices, including abuses of the royal prerogative, by creating ‘extraordinary’ remedies and wholly new doctrines of law such as ‘due process’ and ‘fundamental justice’. Even against ‘political pressure’ brought to bear on them, as the historian Baker noted, judges could assert the authority of their judicial process to decide what was ‘right’.
The ideal of justice is still invoked in judicial decisions today, as it always has been. Canadian courts are authorized by the Charter to remedy rights abuses by governments ‘as the court considers appropriate and just in the circumstances’.\textsuperscript{720} But quite apart from the Charter, judges have recognized their authority to do justice and the role it has in their decisions. Two simple examples of countless such cases are at my hand as I write: A 1917 Ontario Court of Appeal decision in a case concerning an escaped fox, in which a judge noted that another court’s decision had ‘much in abstract justice to commend it’, and a 1998 Supreme Court of Canada decision in a maritime case, in which the Court found the common law was not ‘in step with modern understandings of fairness and justice’, and changed the law ‘in order to achieve justice and to bring the law into harmony with changes in society’.\textsuperscript{721} Justice animates judicial decision-making, directing it toward the overarching goal of ‘doing justice’. It provides a vantage point outside the concrete rational analysis itself, which orients the analysis, focusing it on the search for justice, and measuring it by this external standard. Without Justice, a court’s decision would have nothing outside its own reasoning to guide that reasoning and give its concrete thinking viewpoint a unique, specialized, ‘judicial’ character and significance.

The judicial process, in turn, gives concrete form to the ideal of Justice. As a symbolic ideal, Justice has no specific content and is always receptive to new and changing understandings and applications. A judicial decision gives it content according to the concrete facts and analysis of a particular case, thus shaping it into that particular form.\textsuperscript{722} For example, such a concrete conceptual form is given to the ideal of Justice in a case about punishing crime, by a judicial decision that requires retribution to be, not unlimited vengeance, but a ‘measured’ punishment.\textsuperscript{723} Without the ideal of Justice, that analysis would not be compelling. Without the judicial analysis, Justice would not be manifested in that concrete conceptual form. In other words, judicial decisions resolve disputes by following a distinct rational process, and by doing justice in following that distinct process. Both aspects are integral to the unique viewpoint that judicial decisions provide and that is indispensable to rational consciousness on any topic.

**Summary**

In this chapter, I defined the essential features of judicial decisions, based on a critical psychology perspective adapted from Jung’s theory of conscious functions. First, I restated the basic points of Jung’s theory (as presented and illustrated in Part Two). Then I set out my
adaptation of them to the institutional decisions of courts and governments. I distinguished judicial and political decision-making as processes in which different conscious functions are decisive and produce two different types of specialized rational viewpoints on any topic.

Judicial decisions I defined as produced by the thinking and sensation functions – the combination Jung called for short ‘concrete thinking’ – guided by a symbolic ideal of Justice, and exercised by judges as experts in developing and articulating this distinct rational viewpoint. I described these decisive conscious functions, and the unique and characteristically ‘worldly’ and ‘concrete’ rational viewpoint they produce. I contrasted political decisions, in which the shared feeling values of the citizens, guided by any of a range of ideals, are decisive. (I turn to political decisions in the next chapter.) Referring to the historical overview given in Chapter 1 and to court practice today, I argued that this critical psychology perspective reflects the familiar hallmarks of judicial decisions, and further elaborates these as distinct conscious functions with special significance in the development of rational consciousness. I compared the effects of court decisions as posited in the dialogue theories of Hogg and Roach.

I highlighted also the features not included in judicial decision-making, and consequently the one-sidedness of its specialized viewpoint – identifying its brilliance in its decisive concrete thinking function and its blind-spots in the non-decisive intuition, abstract thinking, and valuing functions (as defined precisely and probingly by Jung). I noted the implications respecting bias, and the importance of a compensatory interplay with the complementary viewpoint of political decisions. In ‘pioneering’ cases, where a relevant fact (such as the social value given to a topic) is not yet available, I discussed the challenges both to the court, whose decision must then be based on a non-decisive function and be explicitly provisional, and to whatever source (such as the government) is distinctly able to develop and provide the court with that relevant fact.

Justice was elaborated as a guiding ideal that distinguishes judicial decisions and is indispensable to them. I noted the apparent psychological and physical toll of injustice, based on some small social science studies. I explained the role of Justice as a symbolic motif (not a sign or a rational concept), whose transcendent goal directs and animates judicial analysis, and is in turn given particular concrete forms by judicial decisions. I examined the legend of Solomon, as the Judge who does Justice, pointing out the mutual influences portrayed between the sublime symbol and worldly wisdom, and noting that punishment plays no role in this archetypal story of
justice. I explained why Bickel’s analogy to Socrates is not quite apt for understanding and refining the judicial process. I considered whether the ancient, ubiquitous, and long-standing symbolic images of Justice have lost their power today. Noting that the symbolic ideal itself has recently generated an explosion of conceptualizations of justice, I briefly assessed weaknesses and strengths, respectively, of particular ‘transformative’ and ‘therapeutic’ models. I concluded by noting the continuing invocation of Justice by courts today, never articulating the task of ‘doing justice’ as inessential to their decisions.

In the next chapter I will describe political decisions, from this critical psychology perspective, and then the interplay between judicial and political decisions. In the final chapter all will be illustrated in the example of the Supreme Court’s decision in the Sauvé case.
Chapter 7

Political Decisions and the Interplay of Complementary Opposites

I think [politicians] are actors …. But that kind of acting is not lying, as long as it refers to, and reflects, and exalts the essential commonly-held ideals of a culture. Those performances are part of our culture, even though they are performances, even though some of the actors themselves may be cynical about their performance. But what we have now cannot be excused in those terms.

Orson Welles, 1974

At the moment we’re passing more and more laws … rushed through because they’re too shameful to discuss. The people don’t get to have their say, and it’s not just slovenly, it’s decidedly undemocratic.

‘Former Prime Minister Nyborg’ in Borgen, 2013

In this chapter, I turn from judicial to political decisions. Political decisions (both legislative and executive), from the critical psychology approach, are decisions in which citizens’ personal values are decisive, and which should develop a distinct rational viewpoint of shared felt values on a topic. I explain what this means in Jung’s precise terms. I argue that these are specialized decisions, and that politicians must, just as judges must, exercise skill and integrity in carrying them out as expert practitioners. I note vulnerabilities in democratic systems which impede such a political function of expertly developing shared values among citizens. Turning to conflicting decisions of courts and governments, I define their opposing viewpoints as ‘complementary opposites’, and argue that the ‘interplay’ between them thus enables them to compensate each other’s one-sided viewpoint, and together differentiate the rational grasp of the contested topic. Finally, I compare this approach to other approaches to conflicting judicial and political decisions. I suggest that the critical psychology approach gives a new and meaningful reinforcement to the history and dialogue theories (discussed in Part One), by bringing out the distinct roles of courts and governments in developing rational consciousness, in the institutional decision-makers and, through them, in the collective consciousness of the society.
1. Political Decisions from a Critical Psychology Perspective

In the previous chapter, I restated Jung’s theory of conscious functions (from Part Two), with its two basic general ideas: Different combinations of four conscious functions produce distinctly different types of one-sided rational viewpoints on any topic, and the interplay between these ‘complementary opposites’ precisely differentiates the rational grasp of the topic.

I then presented a critical psychology approach, adapted from Jung’s theory, to apply to institutional decisions. To restate this approach: Court and government decisions can aptly be seen, I argue, as providing two conscious viewpoints that are complementary opposites: In each decision, different functions are decisive, and produce two distinct rational viewpoints; each viewpoint has its own one-sided brilliance and its blind-spots, providing information the other does not and lacking information the other provides; both are necessary for a complete and accurate rational grasp of any topic. As a result, when these decisions conflict on a topic, an interplay (or dialogue) between them enables the strength of each one to test and compensate the other’s viewpoint precisely where it is lacking, and in this way to differentiate the overall rational grasp of the topic.

In court decisions, which were my focus in the previous chapter, I argued that the decisive conscious functions are sensation and thinking (not intuition and not valuing), guided by an overarching ideal of Justice. These are developed by expert judges, in court structures and processes designed to facilitate them, and they produce the distinct ‘concrete thinking’ viewpoint (as precisely defined by Jung, with all its complexity) that is characteristic of judicial decisions – as unique, specialized decisions articulating a factual conceptual analysis of a contested topic and giving a concrete form to the ideal of Justice on that topic.

Applying this perspective to the complementary political decisions of governments (both legislative and executive), I argue that it is citizens’ shared personally felt values on a topic, not concrete thinking, that is the decisive conscious function. (Jung used both terms ‘valuing’ and ‘feeling’ for this function, and distinguished it from ‘emotion’, as explained in Chapter 4; to avoid confusion I refer to it most often as ‘valuing’.) It produces the distinct rational viewpoint of society’s shared values which justifies political decisions. It can be guided by any of many ideals, in addition to or instead of Justice. It is developed by elected politicians in governing processes structured to facilitate this specific task. And politicians, I argue – having exclusive
authority as well as the institutional structure and resources for this decision-making role – are fully able to function as experts in making their distinct specialized decisions on behalf of society, just as judges do in making theirs.

The word ‘political’ has two contrasting connotations. Defined as ‘the art and science of government’, politics is the ‘practice’, ‘profession’, or ‘business’ of ‘the activities associated with governance’, which include ‘policy-forming’ functions, and processes by which citizens ‘make collective decisions’. This meaning conveys the importance and breadth of the political function. It reflects the word’s origin in the Greek polis (‘city-state’) – thus politēs (‘citizen’) and politikos (affairs ‘of, for, or relating to citizens’ or ‘belonging to the state’, as Aristotle used it in his treatise Ta Politika). Defined differently, however, the word ‘political’ has a strong derogatory connotation in ordinary language, as the opportunistic use of clever tactics to gain power by manipulating people, even deceiving them to their detriment. This is the politics decried by Plato, concerned that such cynical use of rhetoric corrupts civil society (as discussed in Chapter 5 in the context of Obama’s campaign speech).

The positive connotation of political decisions, stated above, captures the critical psychology perspective of a distinct conscious function for developing felt values shared by the citizens on a topic, as crucial to good governance and also to developing rational consciousness in society. This connotation also reflects modern theories of democracy, as I discuss below. At the same time, however, the ability to carry out the political function is hindered by ‘the shadow’ of politics – the limitations, power abuses, and vulnerable ‘blind-spots’ – in common democratic practices which have invited the negative connotation and have long been criticized. The critical psychology perspective can help judges and politicians bring the positive potential of political decision-making out from its rightly-decried shadow.

The idea that personal evaluation – the shared values of the citizens – is the decisive conscious function in political decisions, reflects and reinforces the historical and legal theory perspectives I have presented: The ‘opinions and sentiments’ of the citizens (in President Lincoln’s words, noted in Chapter 2), or their ‘values’, ‘interests’, and ‘what they want’ (as Roach describes political policy choices, discussed in Chapter 3), are ultimately decisive in a democracy. The significant task of elected politicians, from the critical psychology perspective, and consistent with these other views, is not governance activities that could be
carried out even better by expert advisers and administrators; rather, I argue, it is to develop the citizens’ shared values on any topic, and to give that effect to rational viewpoint in political decisions. This cannot mean polling or parroting existing sentiments and opinions, or fanning emotion and ‘dumbing-down’ public political discussion: these are no ways to develop a rational function. It must mean skillfully leading citizens in developing their felt values and in finding common ground among them. Nor can this task be reduced to a political leader’s personal preference or discretion on a matter, unless this is how citizens want such a matter to be decided. Just as judges must expertly develop the factual and conceptual analysis of their judicial function, and not merely pretend to do that, so must politicians expertly carry out their political function of developing the citizens’ shared values.

Valuing or feeling, to recall Jung’s theory, is a psychological function that assesses any topic or aspect of reality according to its personal worth to the individual. It comprehends or makes sense of reality, just as thinking does, but based on a selective criterion of subjective evaluation rather than conceptual analysis. Valuing and thinking are equally rational – equally meaningful, reasonable, consistent, coherent, and discriminating grounds for making decisions. As Jung summarized it: ‘In the same way that thinking organizes the contents of consciousness under concepts, feeling arranges them according to their value.’ And in order to assign a value to something, we need to know ‘how and to what extent a thing is important or unimportant for us.’ This crux of valuing is not as easily or clearly achieved as it might seem, since a person can have conflicting valuing viewpoints, or be uncertain about their values, or be influenced by other concerns and viewpoints that obscure or actually conflict with their values.

Valuing’s personal evaluation or value judgment can be applied to any topic, from moral priorities in ethical dilemmas, to aesthetic choices in art or fashion, to preferences for mountains or seashores. It is interesting that for Jung, for whom the issue of ethics and personal conscience was a lifelong preoccupation, the same criterion of felt values underlies moral as all other evaluative decisions. All engage a conscious process of ‘personal valuing’ based on subjective sympathies and antipathies. Valuing determines the wide range of such preference choices people make, and is thus crucial in forming the values central to a culture and a society: Social values depend upon viewpoints provided by the dominant evaluations or felt values in the society, and thus, in a democracy, depend upon the ability of elected politicians to effectively attend to felt values and lead citizens to develop them and find their common ground.
Emotion is distinguished from valuing by Jung (as I explained in Chapter 4). Emotional responses are not conscious functions and cannot themselves be the basis for a rational decision. However, like symbolic motifs and dream contents, they can be essential aids to developing and checking rational decisions. Emotion is an autonomous physiological response: an affect (such as fear, joy, anger) accompanied by physical innervations (trembling hands, quick breath) that disrupts memory, thought, and other conscious processes. It signals that something of personal value has been awakened or disturbed and brought to the fore, drawing conscious energy. The emotion is not the thing of value itself, and it is not the basis for making a rational valuing decision. But it can be part of a vital starting point for such a decision. This is because its disruptive effects draw conscious attention from elsewhere to itself, compelling a person (if they do not try to over-ride it) to pause and attend to it, and then, depending on the context, to consider what aroused the emotion, to trace and examine the contents at its source, distinguishing what is personally valued from personal fears or biases or other contents that may be intertwined in the emotion, and then, to examine these contents rationally (that is, to apply conscious thinking and valuing functions to them) to decide how to respond to them.

This distinction between emotions and felt values, and the relationship between them, is important to recognize in the political context. Emotions are not values, but they signal them, and at the same time they are often powerfully intertwined with other psychological contents. If a political decision is to carry out the function of developing values, it becomes crucial for the political process not to fan or exploit emotions (which can lead far away from a person’s actual values). Rather, it must respond to emotions effectively, by enabling citizens to separate values from fears or concerns or other issues that need to be addressed – and addressing these – while seeking and developing the separated values and potential common grounds, and articulating such values in its legislative or executive decision. As a simple example: Anger aroused in a couple by a new immigration policy might come from their fear (a real emotion that has arisen in them, whether realistic or not in fact and logic) that it puts at risk their income and ability to pay for what is, underlying their fear, a high felt value for them, such as the best education for their children. To develop the underlying value (and the common ground that is more likely at this level), requires the ability and opportunity to recognize and separate the fear (about financial security) from the value (their children’s best interests), and then both to address the fear, effectively, and to probe and articulate the underlying value and its commonality.
As for goals and ideals: A political decision may pursue other concrete goals that matter to citizens besides justice, such as ensuring safety or prosperity, advancing creativity or health, aiding a war or peace. It may be guided on a particular topic by any of a range of ideals, in addition to Justice or other than Justice – such as the ‘Peace, Order, and Good Government’ in Canada’s Constitution, or the ‘Liberté, Egalité, Fraternité’ of France’s national motto, or the ‘Life, Liberty, and pursuit of Happiness’ (or ‘Virtue’) in America’s Declaration of Independence, or the cherished ‘Hope’ and ‘Unity’ exalted in Senator Obama’s speech (discussed in Chapter 5); Obama’s speech is not a political decision, but it eloquently demonstrates the concern for shared personally felt values of citizens that is the heart of political decision-making.735

Symbols and emotions may well play important roles in political decision-making, just as in judicial decision-making, but they are not conscious functions and do not themselves provide a rational viewpoint. I want to highlight this. An emotion signals something of personally felt value and brings it to conscious attention. A symbolic image or motif presents a compelling new view that can shift rational consciousness in new and creative or integrative directions (for good or ill, which underlines how important it is to apply the deliberate scrutiny of rational functions – conceptual analysis and felt values – to symbols, just as to emotions). Neither an emotion nor a symbolic motif is a conscious function that itself provides any specific rational viewpoint, and neither can be a decisive basis for a rational decision. Both can be given effect in rational consciousness only by being given a distinct form through the exercise of the four psychological functions of consciousness.

Turning to the conscious functions that are non-decisive in political decisions – the concrete facts and intuitions of perception, the conceptual analysis of thinking – they inevitably are underdeveloped in political decision-making. They are not excluded or unwanted in it, and they can play a supporting role in developing the citizens’ personally felt values on a topic: An intuitive vision or a logical theory can, for good or ill, move felt values in a society in new directions (as vision and logic were employed to do in Obama’s speech, discussed in Chapter 5). But it is valuing, not another function, that is decisive in political decisions. The other functions are not brought under the same scrutiny and pressure to be developed, nor facilitated by the same structures and processes that facilitate developing shared felt values. I want to especially emphasize that factual conceptual analysis is, inevitably, a relatively undeveloped function in political decisions – a blind spot that is the inherent counterpart to its brilliance in developing the
rational viewpoint of citizens’ felt values. Being undeveloped, this blind spot is more susceptible to error, and to the unrecognized influences of unwanted biases.

I emphasized this point in the previous chapter, and I want to make it clearly here too. A politician can be a highly skilled thinker with a fine intellectual analysis of justice concerns, and politicians, like judges, will have their own personally felt values, conceptual views, emotional responses, life experiences, compassion and abhorrence, preferences or likes and dislikes, and compelling dreams and visions. These contribute to making them the people they are and giving them the varied insights they bring to their political task. Their personal views and values will influence them in exercising the decisive political function of leading and developing citizens’ shared values – but they are not substitutes for that. A politician’s own conceptual analysis or felt value cannot replace citizens’ shared felt value, as the decisive basis for a political decision on a topic. But it can be used as a spur and aid to developing their shared value, and the political decision can then be scrutinized on that basis, that is, on how well or adequately it has developed and articulated their shared felt value. Judges cannot reliably develop the citizens’ shared value on a topic, and cannot test a political decision on it by simply replacing it, but they can use their well-developed concrete thinking viewpoint to test, in facts and principled logic and Justice, that a political decision has adequately developed that shared value, and is accurately articulating it. And similarly, politicians cannot reliably develop a court’s concrete conceptual analysis of a topic, and they cannot test such a judicial analysis simply by replacing it, but they can use their well-developed viewpoint of citizens’ shared felt values to test that a judicial assertion of social values on a topic is accurate from that viewpoint.

Maintaining this distinction ensures that judicial and political decisions are based on the conscious function that each process is able to develop best, and that each decision is justified and scrutinizes specifically by this distinct function. And it ensures that, as complements rather than substitutes or alternatives to each other, each is able to effectively test and precisely correct the other’s viewpoint where it is weakest, and thus together develop rational consciousness.

Thus, in political decisions, while other conscious functions, as well as emotions and symbols, may play roles, none of these is the decisive conscious basis for the rational decision. Valuing is a political decision’s decisive conscious function, producing its specialized viewpoint
of shared felt values. This viewpoint can be clarified and refined by a conceptual analysis, but it need not accord with that and, as I note below, might well defy logic.\textsuperscript{736}

2. Historical and Legal Theory Perspectives on Political Decisions

I employed a historical perspective (in Chapter 1) to differentiate the distinct rational viewpoint produced by political decisions. The brief overview of English legal history showed how political decision-making became established, and how different it became from judicial decision-making, not in the \textit{topics} addressed but in \textit{the way} it addressed them and the factors that were decisive in it. From ancient kings with their personal council and local folk assemblies (where ‘no distinctions could have been made between processes of adjudication, administration, and legislation’), separate institutions of court and Parliament emerged, and each established a unique decision-making process – not a unique sphere of topics but a unique way of deciding them, thus providing a unique viewpoint on them.\textsuperscript{737}

Prerogative discretion was the sole royal decision-making process existing when citizens first asserted their right to a voice in the king’s decisions. The prerogative, the king’s absolute personal authority to act for the country, formally conferred in coronation rites, was the force behind early unilateral royal decrees, and was exercised in every aspect of the social structure, including in creating state departments, delegating powers to them, appointing and dismissing their members (including the judges), imposing taxes, and going to war. The prerogative was first curtailed by a small group of noblemen asserting their right to a say on laws and taxes, on paper with the Magna Carta in 1215 and in practice with they summoned the great council to a \textit{parlement} in 1265 and expanded it to include gentry. The prerogative, curtailed further (but never eliminated) by Parliament through legislation and by the courts through judicial doctrines to remedy what judges held were abuses of prerogative authority, was eventually taken over by democratic governments as part of their executive authority.\textsuperscript{738}

The other method of making government decisions – the ‘new concept of legislation’ – was an original creation of Parliament, by which law was enacted by debating and voting on a carefully-drafted general text on a topic.\textsuperscript{739} Legislative lawmaking vastly extended the reach of government. It was the vehicle for ‘revolutionary law reform’ in practically every sphere of life, including the legislated ‘individualist’ rights in the 1700s, the ‘collectivist’ group rights in the
1800s, and the major reforms of the judicial system in the 1800s, made by legislation enacted following law commission and Parliamentary committee reports.740

These two decision-making processes are both carried out in the institution that began as the king’s inner council of noblemen and transformed into Parliament with its two Houses, an appointed Lords (Senate in Canada), eventually sapped of power, and an elected Commons, in which the Party of the majority forms the government and its leader is the head of government or Prime Minister.741 Political decision-making thus transformed from communal decisions of local assemblies and prerogative decrees of kings, to decisions of elected politicians, both legislative decisions of the House of Commons and executive decisions (including prerogative ones) of the Prime Minister supported by his or her Cabinet.

The voice of the people (in which might be heard the echo of an ancient community gathered in a local assembly) became the express basis of legitimacy for a government’s political decisions.742 ‘The people’ expanded from the small elite attending the parlement in 1265, as England’s political structure transformed from a monarchy into an aristocracy, an oligarchy, and now a modern ‘representative democracy’, that is, a system in which political power is vested in all adult citizens and exercised by their representatives.743 Thus, the peoples’ voice became the voice of a very broadly inclusive ‘whole political community’ (in historian Maddicott’s words, discussed in Chapter 1).744 The citizens became, as Roach put it, ‘the ultimate reference point’ of the political process, or, as President Lincoln famously defined American self-government, the political voice became the voice ‘of the people, by the people, for the people.’745

Democracy might be seen as a significant development from a critical psychology perspective, because it brings into a society’s institutional decision-making process the rational viewpoint of citizens’ shared felt values – a complementary opposite to the judicial viewpoint. This applies no less to executive than legislative decisions, I argue: In both, in a democracy, the citizens’ shared values are ultimately decisive, as the rational viewpoint to be developed and served by the decision. It might be that on some topics, citizens wish the decision to be made in the personal discretion of a Prime Minister or politician, not hemming the decision in with standards and principles, and not burdening citizens with trying to assess complex issues, while on other topics they wish the decision to accord with their personal values and interests. In either case, it is the shared values and preferences of the citizens are the decisive criterion.
Thus, I argue the identical ‘political’ quality of legislative and executive (including prerogative) decisions, from the critical psychology perspective. This differs from the view of the American Supreme Court in *Marbury v. Madison* in 1803 (discussed in Chapter 2), defining executive decisions alone as ‘political’, and exempt from the scrutiny given legislative decisions, and perhaps from the theories of Hogg and Roach (discussed in Chapter 3), which focus on legislative decisions in the dialogue between court and government. But prerogative decisions did not exit when legislative decisions entered. They remained – now in the hands of elected politicians – as the executive authority of the government, used to make a wide range of major decisions in the discretion of ‘the Prime Minister in Cabinet’, such as creating powerful tribunals and controlling their members, and entering into enormously impactful contracts and projects. What I stress is that these decisions are justified, just as legislative decisions are justified, by the voice of the citizens, as carrying out their will and wishes.

I have proposed that the decisive viewpoint in political decisions is valuing, and thus factual conceptual analysis will not be similarly refined in them. The historical and legal perspectives support this observation provided by critical psychology. Unlike judges, who are confined to making law through concrete reasoning, politicians may, as the historian Baker phrased it, ‘legislate irrationally or unreasonably’. Thus, for example (as has happened), a judge, employing a flawless concrete conceptual analysis of facts and Justice, may find it was not negligent to give patients tainted blood before a risk could reasonably have been suspected; nonetheless, a government may decide to compensate patients from public funds, based on the citizens’ shared felt values and such guiding ideals as Fraternity and Compassion.

In their dialogue theories, both Hogg and Roach stress the citizens’ voice as the decisive factor in legislative decisions. Hogg refers to legislative choices as ‘the wishes of the people’, tested by ‘public debate’ and made ‘for the benefit of the community as a whole’, and notes that ‘public opinion’ can compel governments to pursue or abandon legislative initiatives. Roach even more strongly emphasizes the citizens as ‘the ultimate reference point’ in a democracy. Roach argues that explicit legislation furthers ‘democratic responsibility’ precisely because it makes it more likely citizens will know the government’s position on a topic and be in a position to hold it to account. He refers to ‘broad social questions’ requiring pragmatic choices rather than principled decisions (such as what ‘values’ to endorse, what ‘budgetary priorities’ to set, what ‘alternatives’ and ‘trade-offs’ to consider), and he consistently relates those choices to the
citizens – to their ‘values’, ‘wishes’, ‘sentiments’ and ‘will’ – and to the government’s responsibility for ‘the discovery and reflection of majority sentiment’.\(^{751}\)

Roach refers to advantages democratic governments have in making policy decisions, and also to failings and limitations in the democratic process. I want to consider these important points in more detail, especially long-standing flaws or blind-spots in political decision-making in a democratic system such as Canada’s.

3. Blind-Spots and Vulnerabilities of the Political Function

A major advantage politicians have in making political decisions is the wealth of public resources at their disposal. Governments have the expert civil service to advise and inform them, and they can set up task forces to investigate issues that concern citizens and report on the ‘social facts’ relating to them. At the same time, as Roach notes, failings in our political system permit politicians to make decisions heedless of citizens’ values and interests, to serve powerful elites, avoid public debate, and put off tough decisions that are called for.\(^{752}\) And Roach notes that ‘successful lobbying’ and ‘political influence’ can gain rights from politicians which, of course, may not reflect a democratic consensus or serve the values or wishes of groups and individuals, and even of most citizens, who lack such access.\(^{753}\)

Before looking at the critical psychology approach, and how an interplay (or dialogue) between court and government decisions can address such failings, I want to briefly consider ‘modern theories of democracy’ and concerns about democratic political systems.\(^{754}\)

According to such theories, individual freedom, the rule of law, fair and free elections, the majority vote (in elections and legislative decisions), and equality (of citizens, votes, access to government, and the right to run for political office), are all essential attributes of the political system in a modern representative democracy. Modern or ‘liberal’ democracy is distinguished by some further attributes – including independent judges, deliberation by legislators, pluralism (diverse political parties, cultures, religions, and so on), and basic rights that are constitutionally guaranteed and enforced (human rights such as security of the person, legal rights such as due process, political rights such as an equal vote, civil liberties such as free speech, and similar rights ‘that allow eligible citizens to be adequately informed and able to vote according to their own interests’).\(^{755}\) Liberal democracy has also been described as ensuring ethics in government,
as having other institutions which enhance ‘civil society’ and individual self-expression, and as requiring relatively high levels of security, education, income, and shared values.\textsuperscript{756} A broad concept of democracy was described by Dickson CJC in the Charter context:\textsuperscript{757}

\begin{quote}
I believe [the values and principles essential to a free and democratic society] embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.
\end{quote}

Roach notes the need to distinguish which values are ‘preconditions’ to citizens making the ‘independent, informed, and intelligent decisions’ required for a thriving democracy.\textsuperscript{758} I advocated similarly in the previous chapter (in the context of Justice and judicial decisions) for the need to distinguish and interrelate, not fuse, different symbolic ideals. This applies equally to values in the political context. Not all values in a ‘Good Society’ (in the name given Lorenzetti’s famous fresco portraying this ideal) are uniquely ‘democratic’; many rights listed above were developed and can exist in theocracies, monarchies, and aristocracies.\textsuperscript{759} Nor necessarily do liberal democracies provide or protect all cherished values of citizens (such as an equal or fair share in society’s resources of food, housing, health care, education, and so on).

The democratic system has famously been praised as ‘the worst form of government except all those other forms of government that have been tried’.\textsuperscript{760} It has also been criticized as an unattainable ‘myth’, on the theory that powerfully effective elites inevitably rule the masses, under any political system including ‘rule by the people’, through manipulation if not outright oppression.\textsuperscript{761} Democracy’s instability and inefficiency is undeniable, with its dependence on often hapless voters and partisan politicians, its distracting frequent elections, its discontinuities in policies and practices.\textsuperscript{762} It seems clear that it is the most challenging form of government, but perhaps not that it is always, as it exists, ‘the least bad way’ to make political decisions.

There are numerous recognized concerns about electoral, legislative, and executive processes in democratic political systems. ‘Tyrannies’ of the majority or of a powerful minority (in society and in Parliament) are two long-debated risks, imperfectly countered so far by constitutional rights protection, limits on legislative power, lax transparency and accountability rules.\textsuperscript{763} Elections are prey to fraud and manipulation (as in a Canadian election I describe in the
next chapter), and they are unreliable contexts for evaluating issues, notorious for exploiting emotions, for simplistically reducing issues and polarizing debates, and for ‘puffed-up’ promises (as I noted in discussing Obama’s speech in Chapter 5).\textsuperscript{764} An opinion piece writer underlined this problem in ‘a bit of political wisdom’ about election campaigns:\textsuperscript{765}

[A Prime Minister once] famously declared that an election campaign is no time to be discussing complicated issues. … It’s not actually that issues can’t be discussed, it’s that debates and advertising in elections aren’t about seeking truth, they are about winning. … a politician willing to ignore the truth can easily twist a complicated issue to his or her advantage when winning is all that matters.

Private donations can be made to a politician or Party (and reimbursed by all taxpayers, even non-supporters) – something that would never be permitted in the judicial system.\textsuperscript{766} The Party system itself can hinder rather than help developing shared values among citizens, by interposing a layer of Party self-interest between citizens and their government, and can motivate politicians to give special access to Party supporters, and to ‘dumb-down’ debate rather than develop values and common ground.\textsuperscript{767} This problem was described by a political commentator who contrasted the shallow position of all Parties on the nation’s response to a Middle East crisis, with a Toronto restaurateur’s support of both Israeli and Palestinian local film festivals:\textsuperscript{768}

In Canada our partisan political discourse is very, very narrow. I don’t think it necessarily reflects the way the people in Canada feel. … The mood of the public of Canada is probably better captured by Mr. Caplansky than by what our politicians are saying.

Yet elections and partisan politicians are held out as the vehicles for the citizens’ voice, as in this definition of ‘the party system’ on a Government of Canada website, explaining that ‘members of different parties often have different opinions’, and that:\textsuperscript{769}

Canadians have a choice in expressing different views by voting for a member from a specific party during election time.

In Parliament, omnibus bills crammed with hundreds of pages of unrelated provisions (such as rules for judicial appointment buried in a bill entitled ‘Economic Action Plan’) can be rushed through debate – a far cry from bills carefully drafted on discrete topics, as refined over centuries since the idea of legislation was introduced.\textsuperscript{770} Parliamentary Committee proceedings (said to be where the legislature’s real work is done) can descend to such farcical and partisan incompetence as to be dismissed as ‘kangaroo courts’ by Parliamentarians themselves.\textsuperscript{771} As can Parliament:
A major Party belittled Parliament as a ‘political circus’, in defending its leader’s poor attendance record, in this newsletter, with its ellipses and all (but without its Party and politician names):  

The real hard work (doesn’t always happen in Ottawa). That’s why our Party’s leader has attended: 520 events in 105 cities in only 387 days as leader. And he’s spent 141 days on the road in 115 ridings … and 35 town halls. So when the Opposition Party’s leader asks 5 questions in the House and gets the usual Governing Party non-answers … Let others focus on the political circus. Because our leader is focused on you.

The executive process has raised concerns, too. Powerful appointments – including to courts, major boards and tribunals, public media and services, police forces and the military – can be made for partisan reasons rather than merit or citizens’ interests. The quality of such decisions has been questioned, and so has the political control of appointees (only judges have security of tenure), the poor oversight of them, and even the need for them. Similar problems arise over executive agreements and projects, some hugely impactful. ‘Political staffers’ permeate Parliament, including in a ballooning Prime Minister’s Office of personal partisans there to keep the government aligned with the Party.  

Parliament may be prorogued, in a private meeting of Prime Minister and Governor General, to avoid a minority government losing a non-confidence vote. Clemency and pardons may be granted, or ignored despite the urging of a judge and jury – without reasons, in the Prime Minister’s discretionary ‘Royal Prerogative of Mercy’. A billion dollars might be drained by a government to pay for an abrupt ‘back-room’ decision made in the midst of an election campaign, perhaps even made recklessly and to help its Party win.

The ‘black hole’ of government accountability conceals other vital information, too. Taxpayers ultimately pay most Party expenses – exceeding $100 million dollars one year for three federal parties alone – all ‘self-exempted’ from detailed public scrutiny and control. This small matter is symptomatic of a big problem. There is similarly lax control over conflicts of interest, unwanted biases, and ‘inappropriate’ activities (in the delicate word of the Oliphant Commission finding that the conduct of a leading politician, who secretly took ‘cash-stuffed envelopes’ from a businessman, did not ‘bear the closest public scrutiny’). Again, such serious threats to its function, so weakly addressed, would never be tolerated in the judicial system, yet a well-functioning political system is equally indispensable to society.
What is the position of ordinary citizens in such a political system? Voting for a Political Party in periodic general elections is their chief means to voice their values and wishes. But the complexity of social and economic issues (sometimes akin to the complexity of the ‘facts’ in evolving sub-particle theory, discussed in Chapter 5) can far exceed most citizens’ opportunity and ability to inform themselves on the issues and develop preferences about them. Even some of the most successful and wealthy democracies today have evidently not remedied problems and achieved goals that would seem desirable to citizens widely, and doable (even given their complexity), such as narrowing the gap between rich and poor, or more equally apportioning social benefits and burdens, or ensuring protection from exploitation and abuse, especially by powerful monopolies. Nor has it provided citizens with equal opportunities for political clout and access to government; this is a point I argued (in examining Roach’s dialogue theory in Chapter 3) against the ‘tri-ilogue’ idea of private citizens engaging as parties (not as litigants or voters or social activists) directly in the institutional dialogue between court and government. As President Obama warned in the American context, the inequality of wealth and influence threatens to ‘drown out the voices of ordinary citizens’.

From the critical psychology perspective, these problems in political decision-making in a democracy, and the strengths also described above, highlight the blind-spots and the brilliance of its rational viewpoint of shared felt values. Some problems, I argue, show a lack of skill or a deficiency in the processes required to carry out the political function. Other problems show its inherent one-sidedness, such as, for example, its blindness to concrete flaws or ‘black holes’ in accountability. A court’s well-developed factual conceptual analysis can pick up such concrete flaws, and also pick up the concrete risk, if they are not remedied, that a politician or Party’s self-interest might defeat the development and realization of citizens’ shared values.

4. Political and Judicial Decisions as ‘Complementary Opposites’

How can the failings of political decisions be remedied, and their strengths reinforced, to ensure they carry out their distinct and important political function? The answer, I argue, lies in the concept of the ‘interplay of complementary opposites’. In Chapter 6, I explained how I apply this concept in the context of conflicting court and government decisions. Here, I will elaborate that, and sketch a potential interplay in two examples of controversial topics, mandatory minimum sentences in criminal law, and the hypothetical vivisection case used in Chapter 6.
To recall ‘complementary opposites’ and their ‘interplay’ in Jung’s theory: Different combinations of four psychological functions produce distinct one-sided rational viewpoints, each with its own brilliance and its blind-spots, each potentially oppositional but inherently complementary to the others. An ‘interplay’ between them enables them to compensate each other’s viewpoint on a topic, precisely where it is weak (since the brilliance of one will match and compensate the other’s blind-spot), and thus together to differentiate the overall rational grasp of the topic. Both steps – both the separation into one-sided complementary opposites and the interplay between them – are indispensable for the development of rational consciousness.

Adapting Jung’s theory as a critical psychology of institutional decision-making, I defined judicial and political decisions as two distinctly different types of rational decisions. In judicial decisions, the decisive function is concrete thinking, consciously developed by expert judges to produce a rational viewpoint of factual conceptual analysis, guided by an ideal of Justice. In political decisions, the valuing function of citizens is decisive, consciously developed by elected politicians to produce a rational viewpoint of shared felt values, guided by any of a range of ideals. The non-decisive functions in judicial decisions are valuing and intuition; in political decisions, thinking and intuition. (And to highlight again: the focus is on the decision, not on the judges or politicians themselves who make it). While its decisive function will be relatively well-developed in each decision, its non-decisive functions will not be – because these are not determinative in making that decision, and therefore there is neither the same imperative to develop it in the decision, nor practice in doing so, nor the institutional process to facilitate it. (Thus, it would be inaccurate to view such a blind-spot as an integral fault; rather, the fault would be in not recognizing that this blind-spot is inherent in this viewpoint, as the inevitable corollary of its brilliance, and is complemented by the other viewpoint.)

Political and judicial decisions thus produce two one-sided and complementary rational viewpoints: The brilliance of one (its well-developed decisive function) matches a blind-spot of the other (in which the same function is non-decisive and less well-developed). In other words, a judicial decision’s well-developed concrete thinking is able to test and compensate or correct the concrete thinking in a political decision, precisely where the political decision is weak, and vice versa, a political decision’s well-developed viewpoint of society’s shared values can compensate precisely that weak or excluded function of judicial decisions.
Their complementarity highlights that judicial and political viewpoints are not the same type, or a general rational type, or simply any type of viewpoint at all. They are different from other rational decisions: neither process, for example, takes up refined philosophical speculation or doctrinal tenets from divine revelation. And they are different from each other. Court and government are not simply two ‘talking heads’ producing two versions of one rational ‘take’ on a topic. As complementary opposites, they produce two distinct one-sided rational viewpoints that are potentially oppositional but inherently compensatory to each other. And as such, as I have described and will elaborate below, they are able to engage in an interplay from which can emerge something greater than the mere sum of its parts.

These are specialized decisions, I argue further, and require distinct expertise. This has long been accepted for judicial decisions: For centuries, judges have been trained in law and practiced as expert professionals, with court processes designed to facilitate their distinct tasks. Politicians can aptly be viewed similarly, as specially placed to expertly carry out the tasks required for the political function of leading and developing citizens’ values and common ground among them. This is significant, from the perspective of Jung’s theory, as the distinct conscious function that politicians can develop. It is exclusive to them (no other institution can do it if they do not), they have unparalleled resources at their disposal to do it, and it is crucial to society that they do it. Politicians are more akin to professionals than amateurs or ordinary citizens (as I suggested in discussing Roach’s theory in Chapter 3), and exercising their function requires expert skill in its tasks. This expertise is no less natural and necessary for politicians than for judges, however different and difficult their tasks may be.

In the previous chapter, I elaborated, from a critical psychology perspective, the unique rational viewpoint of judicial decisions. Political decisions are different in distinct ways. They bind all citizens, present and future, to pay for and be accountable for what governments do. They do not rest strictly on a politician’s own personally felt values, as judicial decisions rest on a judge’s own concrete thinking, but rather on a politician’s expertise in leading and developing the values of citizens and finding common ground among them. They are not confined to facts and logic and one guiding ideal of Justice: No matter how good a factual or logical argument may be, shared values of the citizens are the decisive criterion. (If these go against a politician’s conscience, the politician faces the same ethical dilemma that a judge in a similar position faces, something I have written about elsewhere.) In other words, as a complementary opposite to
judicial decisions (where a personally felt evaluation is not decisive, not required to be developed by judges, and not wanted as a basis for deciding), in political decisions a factual conceptual analysis is not decisive (not unwanted, but neither necessary nor conclusive).

Political decision-making, from this perspective, is thus not essentially about charismatic leadership in itself, or strong administrative or military or financial leadership, although these are vital tasks of governments. Neither is it about statesmanship or overseeing social services per se, although these are also vital tasks of governments. These other roles, which can contribute to political decision-making, can be filled just as well without election campaigns, by monarchs or expert administrators or influential heroes. The role that only political decisions fulfill is to develop citizens’ shared values on a topic, and bring that viewpoint to the conscious attitudes and actions relating to the topic. In the illustrations of different rational viewpoints (in Chapter 5), none is a political viewpoint. Any skilled negotiator can calculate a likely settlement range by applying Mnookin’s negotiation theory; any dedicated essayist can present his personal values as an agenda for social change as Saul did in his essay; any masterful orator can use rhetoric to stir emotion and rouse action against privilege and poverty, as Obama did in his Springfield speech. These are all different from developing values and finding common ground in them. However: They all suggest that other psychological processes may well bury personal valuing or betray it to another purpose (as I discussed in Chapter 5).

Identifying this distinct and complementary political function, and its significance in developing rational consciousness, highlights the need to ensure that political decisions fulfill it, and to determine what tasks and skills it requires. I will address this in sketching an interplay, but some basic general points are obvious: The tasks will be those required to further the conscious discrimination and development of their own felt values by the citizens, and to find what common ground exists among them, as the basis for formulating and justifying legislative and executive decisions. Lack of skill in those tasks, processes that do not facilitate them, and biases that interfere with them, will impair this political function and be unwanted in it.

5. The ‘Interplay’ of Political and Judicial Decisions

The ‘interplay’ is the other of the two basic steps indispensable in developing rational consciousness. If court and government decisions should be opposed on a topic, they must be
held onto and related to each other, not abandoned and not polarized. Both are necessary to refine and round the understanding of the topic. Each has a well-developed decisive function which can test and correct its less-developed counterpart in the other. Their interplay or dialogue enables them to do this: Underlying the dialogue between the two conflicting decisions is an ‘interplay of complementary opposites’ between their two specialized rational viewpoints, and underlying that, between the distinct functions that produce these viewpoints, opposed on a topic but inherently complementary to each other. In such an interplay, a court’s well-developed concrete thinking can correct facts or logic or injustice in a political decision, bringing to light a faulty factual premise, such as contradictory evidence of citizens’ actual shared values on the topic, for example, or an overlooked fact, such as a conflicting partisan interest actually being served. And vice versa, a government’s well-developed viewpoint of the citizens’ shared values can bring to light a judicial decision’s reliance on a purely personal felt value or its erroneous articulation of the citizens’ felt value relating to the topic. (Something also shown by this interplay and by the political function, which is often overlooked in the intertwining of emotions with felt values, is that felt values can change and develop just as conceptual analysis can.)

I want to recall the striking effect of the interplay on the essence of ‘matter’ (an example used in Chapter 5), in the increasing differentiation of the rational grasp of the topic, from atoms to sub-atomic particles to dark and light matter, and to hints of a shift from the dichotomy of ‘matter’ and ‘energy’ itself to a wholly new gasp of material reality. This interplay is instructive in numerous ways. The conscious functions at play in particle theory are concrete and abstract thinking; when personally felt values came in, the interplay became more challenging (as seen in the quarrel over quarks), and the potential differentiation more complex and complete. This interplay also suggests that increasing differentiation can occasionally lead to a transformative shift, transcending an existing dichotomy (such as matter and energy) by subsuming it within a more inclusive and expansive new grasp of the topic in rational consciousness. And it shows how important it is, in enabling this to happen, that each viewpoint be developed or honed as well as possible by its maker, and brought rigorously to the interplay between them.

Considering this interplay in the context of political and judicial decisions, politicians and judges can use their own non-decisive functions as spurs to hone their exercise of the decisive function of their decisions, as I have described, so that their respective specialized viewpoint of concrete thinking or personally felt evaluation is well-developed by each of them. But neither
can do this – test and correct its own viewpoint ‘internally’ – in as thorough and precise a way as it can be done from ‘outside’ by the complementary other, in which flaws in this viewpoint will be more easily evident because this function is its brilliance.\textsuperscript{791} In an ‘outer’ interplay between their viewpoints on a topic, judicial and political decisions can effectively differentiate rational consciousness on the topic, and occasionally transform it, in the institutional decision-makers and, through their decisions, in the society as a whole.

The question posed at the outset of the previous section in this chapter can thus be reframed: How can courts and governments mutually test and refine their decisions in this interplay (or dialogue) between them? I want to describe that by briefly illustrating it in two examples of controversial topics, first, mandatory minimum sentences legislated in criminal law, and second, the practice of vivisection used as a hypothetical in Chapter 6.

In the first example, if a government legislates mandatory minimum sentences for certain crimes, and a court decides that this is a political policy matter outside judicial review, there is no interplay in which political and judicial viewpoints test and precisely correct or compensate each other.\textsuperscript{792} There is such a mutual interplay, however, if a court scrutinizes judicially (that is, in concrete facts, principled logic, and Justice) whether the political decision articulates shared values of the citizens that were developed reasonably well, and if a government scrutinizes politically (that is, based on the well-developed shared values of the citizens) whether a premised social value or principle in a court’s concrete judicial analysis accurately states such values. This interplay could lead the government to refine its legislation if, for example, the citizens’ shared values should prove – when reasonably well developed – to favour other more effective and less costly responses to crime.\textsuperscript{793} And it could lead the court to refine its decision and, rather than withholding a judicial viewpoint and deferring to a policy decision, scrutinize judicially the expertise and integrity of the political process carried out in making the policy, and ensure its judicial statement of values or principles accords with the citizens’ shared values that have been well developed by the government. The result is a more differentiated and accurate or true overall rational grasp of the topics of crime and punishment, in the attitudes and actions of the society, brought home to the citizens who will bear the burden and responsibility for them.

Political decision-making cannot mean simply parroting popular opinion and sentiment or fanning emotions – not simply ‘catering to preconceived impressions’ and ‘exacerbating
This is no way to develop a shared rational viewpoint. It cannot mean simply soliciting existing personally felt values, without developing them and seeking common ground. The difference can be seen in the example of legislation mandating minimum sentences. It may have been presented by the government as reflecting public concern that judges are too lenient and public desire for a ‘tough-on-crime’ policy. However, if a survey of a ‘decade’s worth of opinion polls and research’ on the topic shows that, just as much as citizens were concerned about lenient sentencing, they were concerned about two other problems: prisons not rehabilitating prisoners and victims of crime not being helped. This potential common ground (the shared value that what matters is helping victims and preventing crime) is misrepresented or avoided by a government that responds to only one of the expressed concerns – taken out of context, without going further to identify an underlying shared desire to prevent crime and victimization, and to develop that shared value, rather than acting on a superficial and apparently erroneous ‘shared value’ of imprisoning people per se. This is the sort of blind-spot in fact and logic that judicial scrutiny can reveal in a political decision, and invite a government to respond to and correct.

Courts have stepped in before, to scrutinize and oversee the political process (such as in creating extraordinary remedies, discussed in Chapter 1). They have a well-established tool for judicially scrutinizing and overseeing not only abuses but expertise and integrity in the political function, and one that is the epitome of concrete thinking and justice: the judge-made doctrine of a ‘reasonable standard of care and skill’.

Standards of reasonable care and skill have been established for specialized practices in trades and professions, such as those of engineers, restaurateurs, teachers, physicians, and trustees of all kinds. I have argued that politicians and judges should be viewed as experts, more akin to professionals and trustees than amateurs. Thus, a reasonable standard could appropriately guide their decisions, for which they are personally accountable. When it comes to court decisions, such standards have been established to try to ensure that they are made reasonably well. It has never been enough that judges are formally authorized to make court decisions, qualified by training and appointment, or enough that they simply give some reason for their decision, however dumbed-down it might be. They have been positively required to expertly develop facts from evidence and conceptual analyses in principled logic, and to adhere to trial and appeal processes designed to facilitate these tasks.
In the same way, it cannot be enough that politicians are elected, or that laws are duly passed in a legislature, to ensure that the political function of developing shared felt values of the citizens has been carried out reasonably well. What care and skill are reasonably required of elected politicians in carrying out their specialized function of developing the felt values of the citizens and finding common ground among them? To establish a reasonable standard of care and skill in the practice of politics, that courts can apply to scrutinize political decisions, requires determining what principles and practices such a standard would set, what evidence and arguments are necessary or available to establish them, and what responsibilities and liabilities politicians and Political Parties will carry for them. I will simply sketch some considerations relevant to establishing such a standard.

What might a reasonable standard of care and skill in political practice be? Above, I reviewed both positive hallmarks and well-known flaws in the political process in democracies. These help determine what is required to ensure reasonable care and skill in conducting ‘the art and science of government’. What will concretely protect citizens from ‘failures of democracy’, and concretely further ‘active citizens’ making ‘informed and intelligent decisions’ respecting their ‘values’, ‘interests’, and ‘what they want’ (in Roach’s words)? Many ideas could be proposed, and have been. Concrete ways to avoid bias and conflicts of interest might include independent citizen control and funding of all aspects of the political process (from election campaigns to debates and town halls to providing information), to replace partisan Party control, commercials, private donations (reimbursed by all taxpayers), and third-rate media. Transparency rules might be established to concretely prevent unprincipled back-scratching in backroom deals – to rescue politics from its ‘shadow’ of vulnerable blind-spots, power abuse, and opportunism – and to concretely ensure personal and Party accountability to citizens for negligence or worse in practicing politics. Rules on social justice might be set to ensure citizens are not sickened by unfairness (as discussed in Chapter 6) in the distribution of society’s burdens and benefits. Educational, financial, and other social supports might be required to ensure all citizens who wish to can become informed and participate effectively in the political process, which demands opportunities and resources that citizens do not equally have.

What evidence and arguments might courts rely on to establish such a standard? Such proposals can be presented and scrutinized in courts, in evidence of witnesses and in arguments of governments and other interested parties, and a standard developed incrementally through the
judicial process, as issues and facts are raised in cases over the course of time and experience. Comparative experience in political and related processes, examples from history (including the English history canvassed in Chapter 1), and research studies and opinions of experts in theory and practice in relevant fields, including in politics and other social sciences, in law and dispute resolution, in group and other types of decision-making processes, in education and leadership, in communication and economics. Evidence and arguments from the field of psychology will also be relevant, and from a depth psychology such as Jung’s in addition to cognitive, behavioral, and developmental psychologies. A critical psychology based on Jung’s theory emphasizes as crucial that political decisions develop personally felt values, and this requires separating values from intertwined emotions and concerns, addressing those, and developing the values and the common ground that is then often found. Jung’s theory can provide evidence and argument in theory and practice as to how to do that. Jung’s theory can also provide an explanation of the potential influences of symbols and emotions in developing values, and the importance of neither tightly yoking emotional and symbolic responses, nor recklessly following them, but rather working productively and discriminatingly with them in an interplay with conscious functions. And it explains the risk, in developing values as well as conceptual analyses, of an overemphasis on fast-paced ingenuity and a loss of slowness and depth.800

The idea of ensuring an informed and politically effective citizenry is not new, though the concrete analyses and applications of the idea change over time. The concern that voters be knowledgeable and responsible was the conscious rationale for such voting conditions as, in past times, wealth, education, gender, and race (as ignorantly biased and deplorable as these are to us today) and in our time, minimum age and local residency. It is reflected in election campaign speeches asking voters to choose, not simply a leader or representative to make decisions for them, but one who promises to make decisions they want.801 The philosopher (and sometime politician) J. S. Mill argued that it is crucial to democracy that citizens have the opportunity to be educated about the political system and informed about current issues.802 It seems unquestionably necessary, for democracy, that governments facilitate meaningful citizen engagement, with effective information and response processes and equal access to all citizens, in order to expertly develop citizens’ values on a topic and common ground among them.803
To turn to the second example, the vivisection case hypothesis (in Chapter 6) suggested a potential interplay in a pioneering case. I want to return to that hypothetical, to sketch how court and government might test and correct each other’s opposing decisions in such an interplay.

In that hypothetical case, I posited that a court granted an injunction to halt a living animal experiment, by formulating a common law rule against vivisection based on a principle of ‘reverence for life’. I posited that the government then passed legislation permitting vivisection for ‘scientific benefits’, and this law was challenged in renewed litigation. (The reverse scenario could be posited, of a court permitting vivisection and legislation prohibiting it.) In the renewed litigation, the court, accepting the legislation as an authoritative statement of the citizens’ shared felt values on the morality of vivisection, could correct the principle it had used and revise its judicial formulation accordingly, to require the suffering of vivisection to be weighed against scientific benefits, and, for example, might then refuse an injunction on the basis that ‘a probable life-saving benefit’ outweighed the suffering.

But suppose questions were raised concerning the quality or accuracy of this legislative statement of citizens’ shared felt values. Suppose the law broke an election promise to end vivisection, or ignored Public Inquiry and Parliamentary Committee recommendations on the topic, or was buried in an ‘omnibus bill’ rushed through Parliament, or was widely opposed by citizen groups, or served the special interest of an influential supporter of the governing party. In circumstances such as these, I argue, courts could effectively use their distinct judicial viewpoint to test this aspect of the political decision – that is, they can test and correct precisely the factual, logical, and justice basis of the legislative statement that this is the shared felt value of citizens. Courts can do this uniquely well because this is their well-developed decisive function. And they ought to do it, because such a concrete analysis is not a decisive function in political decisions, and thus will otherwise be lacking in the society’s rational grasp of the topic.

In the vivisection case hypothetical, if a reasonable standard of care and skill in practicing politics was established by the court, it would then be for the government to provide sufficient evidence and argument to show that that standard is met by the law, as an articulation of the distinct political viewpoint of the shared values of citizens. In doing so, the government would also be testing this aspect of the court decision, correcting any error in the court’s finding of social values or principles relating to vivisection. For example, the government might explain
the steps taken to ascertain citizens’ values (such as, perhaps, in consultations and studies demonstrating ‘the strong moral view’ of citizens, as was done following the Daviault case), and to develop them (such as, perhaps, in individual and group counseling methods to identify, separate, and respond to emotions and concerns intertwined with values) and to find common ground among them (again, explaining methods designed to do it used, and why, and what the results were). Or the government might show and explain that despite reasonable efforts, the citizens remained closely divided on the topic, some decision had to be made, and the choice or compromise made in the legislation was an appropriate one.

Another potential interplay in the vivisection case hypothesis is one between judicial and executive decisions. The government might, for example, decide to set up a board to approve and oversee animal experiments, and appoint its members for short renewable terms. A record of consistently lax board decisions might lead to concerns about whether its rules and members’ attitudes reflect citizens’ values on vivisection. An executive decision, such as an appointment to a court or another powerful public position, or an agreement to enter into a major project, is a ‘political’ decision, just as a legislative decision is. It carries the same distinct function, to develop and express the shared felt values of the citizens, and it can be tested and corrected or compensated in the same way by the court’s complementary concrete thinking function. Courts should bring the same judicial scrutiny to executive decisions as to legislative decisions, and the standard of reasonable care and skill in practicing politics should apply to them as well. Here, the critical psychology perspective – while it is not aligned with Marshall U.S.C.J.’s nineteenth century view in Marbury v. Madison – can be seen to be aligned with a sixteenth century judicial view that courts can and should oversee and remedy abuses of prerogative power.

6. Comparing Critical Psychology with Other Perspectives

Finally, I want to compare this critical psychology perspective to other perspectives on judicial and political decisions, on their strengths and vulnerabilities, and on the relationship between them. It is axiomatic that judicial and political roles are different. As Binnie J. stated in the Newfoundland Treasury Board case (discussed in Chapter 2): ‘No one doubts that the courts and the legislatures have different roles to play’. However, their roles are defined in theories of modern democracy, philosophy, political science, and law in ways that can obscure what, from the critical psychology perspective, is most essential about them.
Characterizing courts as a ‘branch of government’ and a ‘political institution’, for example, portrays their interplay as a matter of internal power relations. In one such political science perspective, Professor Rainer Knopff described politics (citing Plato and James Madison) as ‘belligerent partisanship’ driven by the ‘lust for victory’. On controversial moral issues, he argued, the judicial role is to moderate political extremism and support ‘political compromise’; however, he also argued that moderation is less likely to result from ‘the strict standards of judicial rationality’ than from ‘messy compromise’ between self-interested ‘partisan foes’ (and ‘bullies’). This treats courts as engaged in and serving (poorly) the political process, and says nothing of governments serving the judicial process. It brings to mind King James’s insistence in 1616 (discussed in the historical overview in Chapter 1) that judges must judge in harmony with the will of the king in council. Treating the judicial process as part of ‘the political game’ (in Welles’s phrase) obscures the judicial process and the interplay as well. Such a one-sided interaction is less likely to develop the rational grasp of the contested issue; it is more akin to the quarrel over quarks between Levin and Dworkin, than to the productive interplay underlying the development of quark theory (in the two contrasting interplays illustrated in Chapter 5).

The interplay between courts and governments is also obscured by theories that distinguish their decisions as ‘adjudicative’ or ‘deliberative’, ‘principled’ or ‘pragmatic’, ‘interpreting’ law or ‘making’ law, ‘resolving private disputes’ or ‘making general policy’, ‘protecting rights’ per se or ‘promoting the common good’. While courts do adjudicate private disputes, their decisions need be no less deliberative and no more principled than government decisions, and an adversarial process pertains to legislative decisions, too. Both can affect private disputes or the common good, and rights are not uniquely or consistently protected by courts (as discussed in the context of dialogue theories in Chapter 3). Nor can the distinguishing criterion be ‘punishment’, or even the ideal of ‘Justice’ in isolation, since both governments and courts may be concerned with these.

Legal theories can obscure the interplay by glossing over the ‘familiar hallmarks’ of both processes (as I noted in discussing dialogue theories in Chapter 3), rather than developing the significant implications of the hallmarks. And legal thinkers often curtail the judicial role when it comes to political decisions. In a short published paper, for example, McLachlin C.J.C. described the legislature’s role ‘to enact laws that reflect the will and interests of the people’ as involving ‘delicate’ tasks of ‘accommodating conflicting interests’ and making ‘compromises’
and ‘balances’ necessary for ‘a workable law acceptable to society as a whole’. Referring to judicial decision-making as ‘incapable’ of performing such legislative tasks (my emphasis), and noting that ‘it is not the court’s role to strike the policy compromises that are essential to modern legislation’, she described the judicial task as grounded in ‘principle’ and ‘appropriate respect’ for ‘the choices of Parliament’. This, in effect, withholds rigorous judicial scrutiny (of facts, logic, and justice) from specialized decisions that the court could not make. It also might imply that legislative decisions and government choices need not be principled. Curtailing judicial scrutiny of political decisions lessens the pressure for political accountability in concrete reality, and may contribute to ‘dumbing down’ the political role; Knopff’s description of politics as a battle of bullies might be accurate, but not desirable and not necessary.

Other approaches do not highlight what critical psychology highlights as most significant about opposing judicial and political decisions: The complementarity of their decisive functions of concrete thinking and personal evaluation, which enables them to precisely refine each other’s viewpoint on a contested topic and thus differentiate the rational grasp of it. The enhanced ability to recognize bias and faulty skill in the other decision, through the interplay (which I have noted in this thesis), is also not highlighted in other approaches. Non-psychological approaches to judicial and political decision-making do not, of course, develop psychological ideas, but may draw from them uncritically. Knopff, for example, relies on Madison’s views on psychology (such as his view that ‘political zealotry’ is ‘rooted in human nature’ and ‘stems from the fact that reason is connected to self-love’), which accent the lowest common denominator in human behaviour, to be guided by and protected against, while ignoring the positive potential to be supported and developed. This use of an eighteenth view of psychology is also a reminder that insights of other times, which might well be highly instructive and even wiser than ours, still must be assessed against any relevant new or different insights developed in our times.

Two challenges that have always daunted political decision-making in democracies are the potential tyrannies of majorities and elites, and the need for pragmatism. While I cannot address these challenges here, I would like to suggest the possibility that the critical psychology approach can provide a fresh and creative response to them.

With regard to the tyrannies, constitutional limits and rights have been used to navigate the Scylla and Charybdis of majority governments abusing democratic power, and small elites
achieving their interests against those of the majority. President Lincoln stressed that, within constitutional boundaries, ‘the majority principle’ cannot be rejected in a democracy. But from a critical psychology perspective, the significance of political decisions is to develop the rational viewpoint of citizens’ shared values, and contribute that to a contested topic, and the question is thus how to ensure political decision-making actually functions as well as reasonably possible in developing personally felt values and finding common ground in them; a majority may be the lowest acceptable level of commonality but not the goal to aim for, and not sufficient unless it is the best that can reasonably be developed at a particular point in time.

As for pragmatism, it is a given in political decision-making. It no doubt explains the shift in Chief Justice Coke’s stand on legislative power after he became a Member of Parliament (referred to in Chapter 1). However, as the philosopher J. S. Mill famously modeled when he became a Member of Parliament, practical compromise need not be unprincipled. I argue that the critical psychology I have presented provides an essential criterion for shaping pragmatism.

7. Separation and Differentiation, Losses and Gains

In concluding, I want to return to the epigraphs at the outset of this chapter, and then consider further what I discussed in Chapter 1: the losses and gains that came with the separation and specialization of judicial and political decisions.

Slovenly. Rushed. Actors playing a political game. These descriptions, from the Borgen scriptwriters and Orson Welles, capture some of the well-known failings in political practice in our democracy. Other descriptions in these two epigraphs hint at its positive potential: Not only that citizens ‘get to have their say’, but that political action ‘refers to, and reflects, and exalts the essential commonly-held ideals of a culture’ – which requires, from the critical psychology perspective, developing the felt values of citizens and common ground among them, and not simply polling existing sentiments or fanning emotions. The centrality of citizens’ voices – their values, wishes, interests, preferences – to political decisions in a democracy has been asserted consistently, in centuries of legal and political thought, including in J.S. Mill’s philosophy in the 1800s and Kent Roach’s legal theory today. So, too, has been the centrality to court decisions of the judicial voice of concrete facts, principled logic, and Justice. What do these assertions mean?
Professor Ruth Sullivan asked: ‘Is ‘dialogue’ an adequate conception of what we want our governments and courts to do?’ 819 Professor Roach views ‘democratic dialogue’ as capturing the interaction but ‘not the essence of the political and judicial role and the need for them to interact’. 820 My argument, based on the critical psychology perspective, is that ‘dialogue’ is indeed an apt way to conceive of the interplay of judicial and political decisions, but that a greater appreciation is required of their roles in providing distinct rational viewpoints, and of the potential of their dialogue, in order for it to be more productive for society than it has so far sometimes been. Theirs is not a dialogue between ordinary citizens, or interested amateurs, or guests conversing around a dinner table. It is not a dialogue between specialists in sports and physics, or ethics and high finance. It is not a dialogue between priest and penitent, therapist and patient, philosopher and pupil. It is a dialogue between expert politicians and judges.

I have argued for politicians and judges to be viewed, in making crucial decisions on behalf of society, as professionals and skilled trades people are viewed, as experts and trustees are viewed. I have argued for them both to be held to a reasonable standard of care and skill in exercising the specific expertise required to make their respective decisions well. And I have argued for their dialogue to be understood as an interplay of two distinct types of specialized decisions, each resting on different decisive conscious functions, each providing a different and characteristic rational viewpoint on a contested topic: Each viewpoint is one-sided, with its own brilliance and blind-spots, providing information that the other does not; each is complementary to the other, and can oppose the other, and can test and precisely correct or compensate it where it is weak; both are necessary for the rational grasp of the topic to be as complete and accurate, or as well refined or differentiated, as humanly possible at a particular moment in time. More specifically, I have argued, in the specialized political and judicial dialogue, it is the rational viewpoints of shared felt values of the citizens and concrete thinking relating to the topic that can be developed and differentiated, along with Justice and other ideals, in the rational consciousness of the institutional decision-makers and, through their decisions, in the society as a whole.

This perspective on judicial and political decisions – which is not inconsistent with the historical and legal theory perspectives on their hallmarks – is the basis for my argument that to analogize court and government to Socrates and his students (proposed by law professor Bickel, as discussed in Chapter 3) is not quite apt, and that this matters. The misattunement is clearer when both judicial and political decisions are considered, and seen in dialogue with each other.
To envision the Judge as a Socrates, a wise philosopher teaching his Pupil, the Politician, shifts the judicial role away from the context of doing justice through the worldly and concrete wisdom of a Solomon, and obscures the complementary ‘words of wisdom’ of political decisions and the ultimate reference point and responsibility of the citizens. The importance of such symbolic figures was described in the previous chapter. I also discussed there the possibility that, in our society today, the longstanding figure of Justice and image of balanced scales have lost their numinous or symbolic power. Perhaps the same pertains to the figure of Solomon as the Judge. Perhaps, out of the impoverishment or absence of symbolic images for the Judge and Justice, and for the Politician and Democracy, new images will arise that speak to people today, and that spur on new theories and practices and approaches to these still vitally important roles and ideals.

Finally, I want to consider further the losses and gains that came with the separation and specialization of judicial and political decision-making processes.

In the history (in Chapter 1), I described folk assemblies of a thousand years ago in England, in which the local people gathered to make community decisions of all kinds, in practices based on custom and sacred beliefs (such as ‘love days’ and ‘oath-helpers’), and then the society’s gradual transformation into one where that unified communal system was replaced by a system of separate institutions in which judges and politicians created different types of specialized decision-making processes and structures. I described losses that came inevitably with this differentiation: The loss of a sense of community cohesion and belonging, and of the meaningful rituals and shared sacred and symbolic dimensions of life in communal decisions. I also described gains, in the enhanced ability to refine and extend rational analysis on a topic in discrete specialized areas, such as in concrete or abstract thinking or in personal evaluation, and the ability to identify and protect against lack of skill or unwanted bias in the decision-makers.

Jung stressed the need to appreciate the hard-won benefits gained by differentiating rational consciousness (echoing Bagehot’s caution to us to appreciate our hard-won institutions) – and also to appreciate what has been unavoidably lost in the course of that differentiation process. I have quoted in part the following comment made by Jung on this point (in Chapter 5), and quote it more fully here:821

The activity of consciousness is selective. Selection demands direction. But direction requires the exclusion of everything irrelevant. This is bound to make the conscious orientation one-sided. The contents that are excluded and inhibited by the chosen
direction sink into the unconscious, where they form a counterweight to the conscious orientation. The strengthening of this counter-position keeps pace with the increase of conscious one-sidedness until finally ... the repressed unconscious breaks through in the form of dreams and spontaneous images ... As a rule, the unconscious compensation does not run counter to consciousness, but is rather a balancing or supplementing of the conscious orientation. In dreams, for example, the unconscious supplies all those contents that are constellated by the conscious situation but are inhibited by conscious selection, although a knowledge of them would be indispensable for complete adaptation.

The definiteness and directedness of the conscious mind are extremely important acquisitions which humanity has bought at a very heavy sacrifice, and which in turn have rendered humanity the highest service. Without them, science, technology, and civilization would be impossible, for they all presuppose the reliable continuity and directedness of the conscious process. For the statesperson, the doctor, and the engineer as well as for the simplest labourer, these qualities are absolutely indispensable. ... But this involves a certain disadvantage: the quality of directedness makes for the inhibition or exclusion of all those psychic elements which appear to be or really are incompatible with it, i.e. likely to bias the intended direction to suit their purpose and so lead to an undesired goal.

Thus, Jung stressed the concomitant need, in developing consciousness, to consciously maintain an interplay between the different rational viewpoints, in order to avoid narrow and uncorrected one-sided extremes, and the need to find places to bring in excluded functions and their viewpoints, and to attend to the range of symbolic motifs and emotional responses that arise in the course of rational functioning. To return to the touchstone of my response to Professor Borrows’s lecture (referred to in the Introduction to my thesis), his attention to the symbolic figure of the Trickster and to tradition in music recalls their vital and too-often overlooked roles – not vital or wanted in making judicial decisions in the court process – but also indispensable in developing consciousness and that also must have their own important place in the lives of individuals and societies.
Chapter 8
The Sauvé Case: Conflicting Decisions on the Right to Vote

“At least I stick to my own music,” said the harpsichord to the piano, “and don’t foolishly try to play yours.”
Douglas Moore

“Be fair, be just. Respect your people.”
Demonstrator, 2014

In this chapter, I apply the critical psychology approach to examine the judicial and political decisions involved in the Sauvé 2 case. This case concerned a provision of the Canada Elections Act suspending the voting rights of prisoners serving sentences of two years or more. The law was challenged as an unlawful violation of their right to vote, guaranteed in Section 3 of the Charter of Rights and Freedoms. It was defended by the government as a reasonable limit in a democratic society, permitted under Section 1 the Charter. The law was struck down by the Supreme Court of Canada in 2002, in a close decision of five to four, in which the majority and dissenting judges gave strongly opposing reasons.

1. The Political and Judicial Context of Sauvé 2

Some context is necessary in order to examine the Court’s decision in Sauvé 2. Following is a summary of the relevant background respecting the right to vote in Canada and the legislative and judicial history leading to Sauvé 2.

The broad franchise in Canada today – in which almost all adult citizens are entitled to vote – is the relatively recent product of piecemeal expansions and contractions in the right to vote, as it lurched through a patchwork of raising and lowering barriers, until the enactment of the Charter in 1982. Changes in the franchise reflected changes in dominant social attitudes, including ‘collective hysteria’ in times of war and economic crisis, and also, in some striking examples, the self-interest of the governing political party.
‘For a long time before and after Confederation, fewer people were entitled to vote than were disenfranchised,’ a Chief Electoral Officer notes in a historical overview of the right to vote.\textsuperscript{828} At Confederation, typical of nineteenth century democracies, voting was the privilege of a small class ‘affluent enough to own land or pay taxes’, restricted on the basis of wealth, gender, race, religion, and age, and at varying times also government-paid employment, national origin, mental disability, and criminal conviction.\textsuperscript{829} In 1885, Prime Minister Macdonald’s ‘centrist’ Conservative government passed a national law to govern the franchise, which lasted until 1898 when Laurier’s ‘de-centrist’ Liberal government returned the matter to the provinces, with some conditions, until 1920 when Borden’s Conservative government passed the *Dominion Elections Act*, conclusively establishing Parliament’s control over the federal franchise.\textsuperscript{830}

In successive changes to what became the *Canada Elections Act*, the vote was extended, and sometimes withdrawn, group by group. Wealth conditions were removed. Women, Indians, and 18-year-olds in the military, and their ‘spouses, widows, mothers, sisters and daughters’, gained the right to vote during the war, and all women in 1918.\textsuperscript{831} Indians who gave up Indian status rights gained the vote in 1920.\textsuperscript{832} People receiving public assistance gained it in 1929.\textsuperscript{833} Conscientious objectors (notably religious minorities) lost the vote in 1917, regained it in 1920, lost it again in 1934.\textsuperscript{834} In a replay of the treatment of Germanic Canadians in World War I, Japanese Canadians lost the vote in 1944 (and many were interned or deported), and regained it in 1948.\textsuperscript{835} Inuit Canadians gained the vote in 1950.\textsuperscript{836} Conscientious objectors regained the vote in 1955 – ending ‘the last vestige’ of religious exclusion.\textsuperscript{837} All ‘registered Indians’ gained the vote in 1960 – ending the last voting restriction on any race or ethnicity of Canadians.\textsuperscript{838} The voting age limit was lowered from twenty-one years to eighteen in 1970.\textsuperscript{839}

Prisoner disqualification has its own history within this general context. Its roots can be seen in England a thousand years ago (as noted in Chapter 2), in the expulsion of uncooperative members, who lost not only their voice but their place in the community and all its protections, and in the ‘outlawry’ and ‘civil death’ of convicted felons.\textsuperscript{840} In colonial Canada, prisoner disqualification turns up in the patchwork of laws – although not invariably, and possibly not always followed in practice.\textsuperscript{841} At Confederation, various existing prisoner disqualifications were maintained, and then imposed nation-wide in 1898 when the law passed by Laurier’s government disqualified any ‘prisoner in a jail or prison undergoing punishment for a criminal offence’.\textsuperscript{842} When the Charter was enacted in 1982, the Criminal Code disenfranchised public
office-holders serving sentences of two years or more, and the \textit{Canada Elections Act} still contained, in its voting exclusions, a blanket disqualification of all prisoners:\footnote{843}

The following persons are not qualified to vote at an election, and shall not vote at an election: … Every person undergoing punishment as an inmate in any penal institution for the commission of any offence ….

The Charter guaranteed every citizen the right to vote, subject only to reasonable democratic limits, as follows:\footnote{844}

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

\textit{Democratic rights of citizens}

…

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Further extensions of the franchise then came relatively swiftly, and through the courts. Successive Conservative and Liberal governments continued the pre-existing restrictions on the right to vote – including age and constituency residence requirements, and exclusions of top electoral officials, judges, non-residents of the country, some people with mental disabilities, and prisoners.\footnote{845} Four of the excluded groups gained the vote through litigation in the first decade of the Charter: Courts struck down the disqualifications of all temporary non-residents, in the 1985 \textit{Hoogbruin} case; of judges, in the 1988 \textit{Muldoon} case; people with mental disabilities, in the 1988 \textit{Canadian Disability Rights Council} case, and then prisoners, in the 1993 \textit{Sauvé 1} case.\footnote{846}

Prisoner disenfranchiseements aroused little political or public comment over the years, until Charter cases went to court.\footnote{847} In three cases brought by prisoners claiming their Charter right to vote, the blanket disqualification was first upheld and then struck down, in decisions with, as one judge described it, ‘little unanimity of reasoning’.\footnote{848} In 1988, the Manitoba Court of Appeal upheld the law in \textit{Badger v. Canada}, holding the right to vote is ‘not an absolute one although it is essential in a democracy’, and the same year an Ontario trial judge upheld the law in \textit{Sauvé v. Canada (‘Sauvé 1’)}, as justified, not for punitive purposes, but to ensure the ‘decent and responsible citizenry’ essential to a ‘liberal democracy’.\footnote{849} But in 1991, the law was struck
down by a Federal Court judge in Belczowski v. Canada, affirmed on appeal in 1992, as failing every aspect of justification: A ‘merely symbolic’ purpose with no ‘real benefit’ was unlikely ever to justify disenfranchising all prisoners, and the disenfranchisement was not rationally connected to ‘decency and responsibility’, was over-broad and arbitrary, and was contrary to contemporary corrections priorities of rehabilitation and reintegration rather than punishment.\textsuperscript{850} And then in 1992, the Sauvé \textit{1} judgment was reversed on appeal, with Arbour J.A. agreeing substantially with the reasons in Belczowski, and rejecting in \textit{obiter} the idea that the vote could, at this point in Canada’s history, be restricted to a ‘decent and responsible’ citizenry or be withheld even from ‘domestic enemies of the state’.\textsuperscript{851}

The strongly-worded appellate decisions in Sauvé \textit{1} and Belczowski, striking down the blanket prisoner disenfranchisement, were appealed further to the Supreme Court, and heard together.\textsuperscript{852} However, before the Court gave its decision in 1993, an amended \textit{Canada Elections Act} came into force.\textsuperscript{853} The new Act, which removed the voting disqualifications of judges, all citizens with mental disabilities, and citizens residing out of the country for less than five years, narrowed the prisoner disqualification to those serving sentences of two years or more.\textsuperscript{854}

The following persons are not qualified to vote at an election and shall not vote at an election: … (e) Every person who is imprisoned in a correctional institution serving a sentence of two years or more;

The Court dismissed the appeals in Sauvé \textit{1} and Belczowski, stating simply – in very brief reasons relating to the now-obsolete law – that the blanket disqualification of all prisoners was ‘drawn too broadly’ to be a justified limit on the Charter right to vote.\textsuperscript{855}

\textbf{A Note on ‘The Oakes Test’ framework of analysis}

The judicial reasoning in Sauvé \textit{2}, as in earlier cases, followed ‘the familiar stages of the Oakes test’, a framework of analysis developed by the Court to guide its application of Section 1 of the Charter.\textsuperscript{856} The judge-made test sets out steps for analyzing whether a law infringing a Charter right is valid as a ‘reasonable limit prescribed by law’ that can be ‘demonstrably justified in a free and democratic society’. The ‘test’ and its ‘requirements’ are treated by judges, as with all such common law rules, as a general approach to analysis that is applied flexibly, sensitivity to the particular factual context of each case, and it has been restated and refined in the cases.\textsuperscript{857}
The *Oakes* test sets out a ‘two-stage inquiry’. The first stage concerns the government’s purpose in enacting the law, and requires the judge to consider if its objective is ‘legitimate’ and ‘sufficiently important’ or ‘pressing and substantial’ to justify limiting the right. The second stage concerns the ‘proportionality’ of the means chosen in the law to achieve the objective, and involves three sub-inquiries: Is the law ‘rationally connected’ to the objective? Is the law ‘carefully tailored’ to ‘minimally impair’ the right? Is the overall benefit of the law sufficient to outweigh its harm to those whose rights it limits, and not ‘disproportionately’ severe on them? The burden of proof is on the government to satisfy the court, on all inquiries, according to a somewhat flexible application of the ‘balance of probabilities’ standard.

The *Oakes* test gave this specific analytic structure to the Court’s reasoning in *Sauvé 2*. It is a contemporary instance of ‘judge-made’ reasoning – that distinct form of reasoning which I have characterized as ‘concrete thinking’, from a critical psychology perspective, and which is characteristic of the judicial decision-making process that developed in England over centuries from what began as the shared erudition of, in Professor Baker’s words, ‘the little intellectual world of Westminster Hall’.

2. **The Supreme Court’s Decision in *Sauvé 2***

This was the state of the law when the *Sauvé 2* case went to court. A spotlight was shone on the intersecting issues of the right to vote, the punishment for crime, and the responsibilities of citizens in Canada’s democratic society.

The plaintiffs were eight current or former prison inmates and two inmate associations. There were a number of interveners, including two national associations for prisoner advocacy and support, and three law and justice associations. Two individual plaintiffs, Richard Sauvé and Aaron Spence, testified at trial. Sauvé had been sentenced to twenty-five years in prison, and granted early release on parole, on a conviction of murder in the aiding and abetting of the shooting death of a rival bike-gang member in 1978. Spence was serving a four year sentence for conviction on numerous offences, including break and enter, theft, assault, and breach of a recognizance. Spence was also the president of the plaintiff Native Brotherhood Organization, and one of almost 2000 Aboriginals among the almost 15,000 prisoners disenfranchised at that
Numerous other witnesses testified at trial, most giving opinion evidence in the fields of social science and political philosophy.

The government conceded that the law violated the Section 3 right to vote, and defended it under Section 1, as a reasonable limit on the right that was justifiable in a free and democratic society, based on the argument that it was enacted to achieve two social policy objectives: to promote civic responsibility and respect for the law, and to enhance the general purposes of the criminal sanction by imposing appropriate punishment for serious crime.

Following a thirteen-day trial in 1995, the law was struck down by Wetston J. Applying the Oakes analysis, he held that, while the objectives were important enough to justify limiting the right to vote, and the law was rationally connected to them, it was overbroad and its harm was disproportionate to its benefit. He suggested that disenfranchisement should be decided by the sentencing judges on a case by case basis. The Federal Court of Appeal reversed the trial judgment and upheld the law, in a decision of two judges to one. Giving the majority reasons, Linden J.A. held that the objectives were important, the law was rationally connected to them, and it was proportional: The new law was now carefully tailored to affect only the most serious offenders, and its harm in depriving them of the vote was outweighed by its benefit in signalling, as an important value of Canadian society not signalled by imprisonment alone, that people being punished for serious anti-societal crimes are not entitled to an equal political voice with their victims and other citizens. He described disenfranchisement as ‘a gentler, more humane’ punishment than imprisonment, and took judicial notice of the fact that Parliament must not be limited to ‘a single punitive tool’ but ‘be allowed to search for better alternatives’. In his dissent, Desjardins J.A. referred to the ‘outdated stereotypes concerning the social status of prisoners’ and ‘this last remnant’ of the ‘anachronistic concept’ of denying prisoners the vote.

On the final appeal, the Supreme Court reversed the Federal Court of Appeal and struck down the law, in a close and polarized decision of five judges to four.

In her reasons for the majority, McLachlin C.J.C., noted that where ‘concrete evidence’ is not realistically available, such as on ‘matters involving philosophical, political and social considerations’, justification may be demonstrated in ‘common sense and inferential reasoning’ or ‘reason and logic’ alone. She stressed, on the first inquiry into the government’s policy objectives, the difficulty of finding that ‘vague and symbolic’ objectives, not ‘directed at a
specific problem or concern’, could be sufficiently pressing or important to justify limiting a ‘core democratic right’ that was ‘specially protected’ by the Charter. She accepted provisionally – out of ‘prudence’ – that they could be, and turned to the next stage of the Oakes analysis.\textsuperscript{874}

At the second stage of the analysis, ‘the difficulties inherent’ in symbolic objectives were manifested: the law could not be shown to be rationally connected to them. As for the first objective, the law was more likely to undermine civic responsibility and respect for the law, because it removed the important route the vote provides for teaching those values, and because it rested on an ‘attributed moral unworthiness’ which was inconsistent with our democratic commitment to the dignity and worth of every person, with the Charter’s absolute guarantee of the right to vote and special protection of the vote, and with the principle that the legitimacy of the law and the duty to obey it flow directly from the right of every citizen to vote. As for the second objective, the law was not an appropriate punishment because it was arbitrary (not being tailored to the particular crime and offender) and it did not serve a legitimate penal purpose (of deterrence, rehabilitation, retribution, or denunciation).

She held, on the second inquiry under the second stage of the Oakes analysis, that the law was overbroad, as a two year sentence catches many prisoners whose crimes are ‘relatively minor’.\textsuperscript{875} And on the third inquiry, she held that any ‘tenuous benefits’ provided by the law were outweighed by its harm, because, again, denying prisoners the vote undermines the legitimacy and effectiveness of government and the rule of law, the message that ‘everybody counts’, the route provided by voting for learning social values, and the ‘sentencing goals of deterrence and rehabilitation’.\textsuperscript{876} She also noted that the law disproportionately harmed Aboriginal Canadians, and that this, to the extent it reflects factors such as ‘higher rates of poverty and institutionalized alienation from mainstream society’, indicates that a prison sentence ‘may not be a fair or appropriate marker of the degree of individual culpability’.\textsuperscript{877}

The dissenting judges, in reasons given by Gonthier J., would have upheld the law as a reasonable limit on the right to vote which was demonstrably justified in a democratic society. The objectives signalled core social values – reflecting a ‘moral choice by Parliament’ based on a ‘reasonable social or political philosophy’ and having ‘great symbolic importance and effect’ – which were sufficiently important to justify limiting the right.\textsuperscript{878} The law rationally furthered the objectives, in ‘reason, logic and common sense, as well as in extensive expert evidence’, and it
neither overly impaired these prisoners’ right to vote, nor caused them harm that outweighed its beneficial ‘symbolic and concrete’ effects.\textsuperscript{879}

Stressing that he disagreed with the majority ‘at a more fundamental level’ than differing \textit{Oakes} analyses, Gonthier J. characterized the majority judges’ decision as based simply on their own preference for one theory of ‘social or political philosophy’ over another theory which was equally reasonable and which had been adopted by the government.\textsuperscript{880} He also disagreed with the downplaying of symbolic objectives as if they could not be ‘valid of their own accord’, and with the elevation of the vote to an absolute right that was ‘specially protected’ from democratic limits.\textsuperscript{881} Referring in addition to the law’s legislative history and the Court’s reasons in the prior \textit{Sauvé 1} case, and having found that the law came well within the range of such laws in other liberal democracies across Canada and around the world, Gonthier J. characterized this as a point in the dialogue where ‘deference’ was owed by the Court to the government.\textsuperscript{882}

The Court’s majority decision gives the impression that no law limiting the right to vote is likely to be valid under Section 1, and since the right to vote is not subject to the temporary legislative override under Section 33 of the Charter, the government could not reassert the law. More than a decade later, there has been no legislative initiative respecting prisoners’ voting rights. There have, however, now been other initiatives by the government to legislate both tougher electoral laws and tougher criminal punishments.\textsuperscript{883}


Even a person who agrees with the particular result in this case might, I think, find it an unsatisfying judicial response to an unsatisfying legislative decision, as it is from a critical psychology perspective. To explain why, I will use that perspective to examine central aspects of the Court’s reasons, and suggest how these could be strengthened and developed.

To briefly restate the two main points of this perspective, in the precise terms of Jung’s conscious functions theory, and in the \textit{Sauvé} case context: The judicial and legislative decisions are two specialized decisions bringing two distinctly different ‘complementary opposite’ rational viewpoints to the issue of the right of prisoners to vote. In the judicial decision, the facts and principled logic of concrete thinking are the decisive functions, which the court is best able to develop well. In the legislative decision, the feeling evaluation of the citizens is the decisive
function, which the government is best able to develop well. Thus, the judicial decision can expertly provide a factual conceptual analysis of this issue, guided by an ideal of Justice, while the legislative decision can expertly provide the citizens’ shared felt values on the same issue, guided by ideals identified as the Rule of Law, Civic Responsibility, and Punishment for Crime.

The second main point of this perspective is that an ‘interplay’ (or dialogue) between their viewpoints enables them to precisely test and correct each other, because the brilliance of one inherently complements or compensates an inevitable blind-spot of the other. In this way, they can refine and extend, or differentiate, the rational grasp of the issue of prisoners’ voting rights, and the attitudes and actions respecting it, in their institutional decisions and, through them, in the society as a whole. In sketching two interplays (in the previous chapter), I suggested that one way courts can test a political decision in such an interplay, is to use their distinct (and traditional) judicial function to establish a reasonable standard of care and skill to be met in carrying out the political function of developing the citizens’ shared felt values on the contested issue, and that governments can, in turn, use the citizens’ shared values they have expertly developed to test the values premise in a judicial decision’s concrete analysis.

The aspects of the Court decision I will focus on are the majority’s finding that the Charter right to vote is a special and absolute right under the Charter, the contrasting majority and dissenting assessments of the political process followed in enacting the legislation, and the absence of concrete facts in the Court’s judicial analysis, particularly respecting the evidence of the two prisoners who testified at the trial.

4. The Charter Right to Vote

The Canadian ‘vision of democracy embodied in the Charter’ was defined expansively by McLachlin C.J.C., as a ‘participatory’, ‘representative’, ‘pluralist’, and ‘inclusive’ political system of a ‘self-governing citizenry’, which respects the ‘equal rights and equal membership’ of all citizens and the ‘inherent worth and dignity of every individual’.\textsuperscript{884} This necessarily requires a universal franchise, she reasoned, referring to dicta of South Africa’s Constitutional Court:\textsuperscript{885}

[D]enying citizens the right to vote runs counter to our constitutional commitment to the inherent worth and dignity of every individual. As the South African Constitutional Court said in \textit{August v. Electoral Commission} … “[t]he vote
of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.”

The right to vote thus has ‘special importance’, McLachlin C.J.C. stressed: It is ‘the heart’ and ‘cornerstone’ of our democracy and the basis of the government’s ‘legitimacy’.886 It reflects a person’s ‘inherent worth and dignity’, and is a precondition to the rule of law and the duty to obey the law, which rest on a citizen having ‘a voice at the ballot box and, by proxy, in Parliament’.887 It has a special place among Charter rights: It is a right of ‘seminal importance’ in ‘the constellation of rights’ and ‘one of the most fundamental rights guaranteed by the Charter’.888 The ‘framers of the Charter signalled the special importance of this right’, she explained, by giving it the ‘special protections’ of unqualified wording in Section 3 and exemption from the Section 33 legislative over-ride.889 And she held that the right to vote is absolute, in that it cannot be denied to any citizen on any ground other than ‘modality’, and specifically not on the grounds of irresponsibility or moral unworthiness.

I want to note some weaknesses in the concrete grounding of this judicial analysis of the Charter right to vote. The conclusion that the vote has special importance among Charter rights, due to its absolute wording and its being ‘specially’ exempted from Section 33, is hard to reconcile with the Charter text and the citizens’ values it reflects. Many Charter rights are stated in similarly absolute terms. And seven of the ten categories of Charter rights are similarly exempt from Section 33. Nothing is evidently more special about these exempted rights in themselves (which include Mobility, Official Languages, and Minority Language Education Rights, in addition to Democratic Rights) than about the three categories of non-exempted rights – Fundamental Freedoms (such as freedom of speech), Equality Rights, and Legal Rights (such as life, liberty, and security of the person). Yet, McLachlin C.J.C. reasoned that:

In recognition of the seminal importance of the right to vote in the constellation of rights, the framers of the Charter accorded it special protections. Unlike other rights, the right of every citizen to vote cannot be suspended under the “notwithstanding clause”.

In doing so, she cited dicta from the reasons in Sauvé 1 – which give a different explanation for the exemptions from Section 33:

As Arbour J.A. said in Sauvé No. 1 . . .:

It is indeed significant that s. 3 of the Charter is immune from the notwithstanding clause
contained in s. 33 …. It confirms that the right to vote must be protected against those who have the capacity, and often the interest, to limit the franchise.

In other words, Arbour J.A. is saying that the right to vote is exempt from the override, not because it is more special, but because it is more vulnerable to political manipulation. The same vulnerability can be seen in the other exempted rights, and it is illustrated, over and over again, in the facts of Canadian history. (One example, striking in its crafty thoroughness, is the Borden government’s manipulation of the vote during World War 1. His Party won fourteen ridings by finessing, in the *War-time Elections Act* of 1917, who could vote, and where and when their votes were counted: The ulterior motive behind the Act was to ensure the re-election of the government, which it did by selectively disenfranchising some groups of citizens, assigning the enumeration to partisan appointees, and then going even further, enfranchising overseas soldiers and their extended families (predictably Party supporters), and permitting the overseas vote to be counted last and then distributed to ridings the government chose – thus enabling it to choose ridings where these votes could defeat opposition candidates who had a slight lead.890)

The conclusion that the right to vote is absolute is also weak as a concrete factual analysis. This can be seen in the analysis of the age and local residency restrictions on the vote, which McLachlin C.J.C. does not adequately, or perhaps clearly, address. The exclusion of young people she explains as ‘an experiential situation of all citizens when they are young’, and as ‘regulating a modality’ of the franchise, presumably akin to such practicalities as advance voting or, in an example she gives of a ‘modality’, the possible ‘practical problems’ of prisoners holding office.891 However, McLachlin C.J.C. also explains that, unlike young people, prisoners are excluded on the basis that they are ‘people who, whatever their abilities, are not morally worthy to vote’ (my emphasis); this must be read, I suggest, as indicating that the age restriction is not just a modality but is related to abilities that voting requires, such as making decisions about social issues and being responsible for them.892 This makes it difficult to maintain, as a factual conceptual analysis, that no substantive conditions on the right to vote (relating to ability and responsibility, not to moral worthiness) do or ever can exist in Canada’s democracy.

Similarly, local residency requirements seem to be more than a ‘modality’ but to indicate that voters are expected to have knowledge and a direct interest in the issues at stake – and thus,
again, that voting is not an absolute right but is premised on conditions indicating personal knowledge, interest, and capacity for responsibility.\textsuperscript{893}

The majority’s comment that it is a ‘novel political theory’ that an elected government may ‘disenfranchise a segment of the population’ reflects progressive thinking more than concrete fact, given the history of waxing and waning enfranchisements, the recurring prisoner disenfranchisement, and the varying views in courts and in democracies around the world about prisoner disenfranchisement (canvassed in the dissenting reasons of Gonthier J.).\textsuperscript{894} Similarly, citing J.S. Mill’s view for the propositions that disenfranchising prisoners ‘removes a route to social rehabilitation and development’ and deprives society of ‘a valuable means of teaching democratic values and civic responsibility’, presents philosophical conclusions potentially resting on felt values or intuitions, rather than concrete conclusions developed in facts and principled logic.\textsuperscript{895} This is not a judicial viewpoint; it can be helpful in inviting a correcting political response from the government (as I discuss below), but it should expressly do so.

These points themselves do not determine the issue of prisoner voting rights. However, they matter to the dialogue’s potential to refine and extend the rational grasp of this issue, which requires that the judicial decision contribute a well-developed concrete conceptual viewpoint (or, if necessary evidence or factual premises are unavailable, expressly posits them provisionally, as in pioneering cases discussed in Chapter 6). There are important concrete facts to be brought out, I argue, by the judicial viewpoint in this dialogue. Two of these facts are the age and local residency restrictions on the vote, just discussed, which arguably show an accepted association between the right to vote and a general likelihood of knowledge, interest, and responsibility. I will return to this point below, when I discuss the trial testimony.

5. The Legislative Decision-Making Process

Very different assessments of the government process in enacting this law were made in the majority and dissenting reasons. As I have just described, McLachlin C.J.C. stressed the importance of democracy, defining it expansively as encompassing all the important ‘values and principles’ attributed to liberal democracies (as described in the previous chapter), and as giving the right to vote its special importance.\textsuperscript{896}
However, in contrast to these strong statements about democracy in theory, she gave short shrift to the practice of democracy and the value of the vote in the concrete reality of this case. Describing pejoratively ‘the shifting winds of public opinion and electoral interests’ that influence political policy, she dismissed the process actually followed in enacting this law. She criticized the objectives advanced by the government as ‘suspect’ and ‘ostensible’ and little more than a ‘façade of rhetoric’, and as debasing this second round of the dialogue by reducing it to a rule of “if at first you don’t succeed, try, try again” and ‘a contest of “our symbols are better than your symbols”’. She doubted the sincerity of the government’s stated reasons for enacting the legislation, and the quality of the Parliamentary debates.

The record leaves in doubt how much these goals actually motivated Parliament; the Parliamentary debates offer more fulmination than illumination.

This critical dismissal contrasts with Gonthier J.’s positive assessment of the legislative process involved in enacting this law; he endorsed the lower court assessments of it as ‘rigorous’ and ‘carefully considered’. But what is more, McLachlin C.J.C., having so critically dismissed the process actually carried out by the government in this case, made no further comment about this failing and its impact in assessing the adequacy of the legislation.

What was the process actually followed by the government in deciding on the particular suspension of prisoners’ voting rights enacted in this law, assessed in such opposite ways by the majority and dissent? Following is a brief summary of the steps the government took, gleaned from the lower courts reasons and the Minutes of Parliamentary discussions, debates, and votes on this provision. This legislative history, from the critical psychology perspective, is significant as part of the political function of developing the citizens’ shared felt values on the issue.

The government appointed a Royal Commission on Electoral Reform and Party Financing (the ‘Lortie Commission’) in 1989, to inquire into a wide range of electoral system issues, including the right of prisoners to vote. Volumes of research studies were prepared for the Lortie Commission over the next few years, including a study by two researchers entitled Voting Rights for Prison Inmates’, which ‘recommended that all prisoners be granted the right to vote’. The Lortie Commission submitted a comprehensive Report to Cabinet in 1991. On prisoner voting, it rejected the researchers’ recommendation, and instead recommended prisoners be disqualified from voting while serving sentences of ten years or more for offences punishable
by life in prison.\textsuperscript{905} The Lortie Report was reviewed by a Special Parliamentary Committee on Electoral Reform (the ‘Hawkes Committee’).\textsuperscript{906} In 1992, a divided Hawkes Committee rejected the Lortie Report recommendation on prisoner voting, in favour of a lower threshold of prison sentences of two years or more. A draft Bill was prepared, containing the prisoner voting provision; the Bill was debated in both the House of Commons and the Senate in 1993 (under pressure to enact the law before the upcoming election). The House of Commons voted on three motions: it rejected a motion to repeal prisoner disenfranchisement altogether and a second motion to raise the threshold to five years or more, before passing the motion to set the threshold at two years, which was the law proclaimed in May 1993.\textsuperscript{907}

The trial judge described the Hawkes Committee as conducting ‘an extensive review’ in which its members ‘expressed anxiety over the fact that the most serious offenders could be given the right to vote’, concern that ‘courts should defer to Parliament on the issue’, and ‘spent a great deal of time trying to determine’ whether a two, five, seven, or ten year cut-off was ‘more justifiable’, before deciding on the lower threshold ‘since, in their view, serious offenders may be considered to be those individuals who have been sentenced to a term of two years or more’.\textsuperscript{908} The trial judge referred to ‘considerable discussion of the prisoner voting rights issue’ in the debates, noting various assertions made, ‘considerable ambivalence’, and ‘differences of opinion expected when Parliamentarians are dealing with a knotty social policy question’. However, the quality of the Committee review and Parliamentary debates are difficult to confirm. They did not take up many pages of Hansard, they focused largely only on the issue of how low the threshold sentence should be, and they elicited, with a few notable exceptions, only general opinions not obviously relevant to that issue, such as ‘my constituents won’t be bothered if Clifford Olsen loses the right to vote’ – Olsen, as a prisoner serving a life sentence for conviction of sociopathic murders, having no bearing on two, five, or ten year sentence limits.\textsuperscript{909} The trial judge noted of the Senate Debates what could be said of the Parliamentary debates, at a minimum, that they ‘do not illuminate the objectives clearly enough.’\textsuperscript{910}

Something that can be seen from this legislative history is the progression of the viewpoint on prisoner voting rights through this political process, from no disenfranchisement, recommended by the two researchers; to disenfranchisement of prisoners serving sentences of ten years or more for crimes punishable by life imprisonment, recommended by the Lortie Commission; to disenfranchisement at the two year threshold, recommended by the Hawkes
Committee, and passed. What cannot be seen from this legislative history – despite all the time, expertise, and resources invested in it – is what connection this changing viewpoint has to the development of the citizens’ shared values on this topic. This is the essence of the political function, from the critical psychology perspective, underlying the high value given to democracy and the special importance given to the right to vote. This is the evidence the court needs from the government. It is the indispensable rational viewpoint that the government can uniquely develop and contribute to their dialogue on the issue of prisoners’ voting rights.

The Court, in bringing its judicial viewpoint to the dialogue over the law suspending prisoners’ votes, should use its concrete factual analysis to scrutinize the political viewpoint and hold the government to its political task, by clarifying what shared felt values it has established, or not established, and what is needed to do that, in facts, principled logic, and Justice. I argued in the previous chapter that the courts already have their judicial doctrine of the ‘reasonable standard of care and skill’ to be met by those exercising a particular skilled trade or professional practice, which the courts have developed over the years in the very epitome of their process of factual and conceptual analysis. Applying this judicial standard to the practice of politics would help ensure what Roach emphasizes about the dialogue: It would enable governments to respond to courts, as only they can, if a legislative (or executive) decision is contested as not serving citizens’ values on the topic, by showing that the decision does serve the shared felt values of the citizens – the ‘ultimate reference point in a democracy’ – in appropriate evidence and argument of the steps taken to develop their felt values and to find common ground among them, and how those steps demonstrate reasonable care and skill in political practice.

I will not attempt in this thesis to sketch what a reasonable standard of care and skill would require in the practice of politics – more particularly, in carrying out the political function of developing the felt values of citizens and common ground among them – and what evidence and arguments would establish the standard and would show it was met. But I will make a few general comments, to add to those I made in Chapter 7. The Constitution and Charter set out fundamental values of our society in broad and general terms. They must inevitably be given detailed substance on particular issues that arise over time, such as the issue of prisoners’ voting rights. This is something both judicial and political decisions contribute to in their dialogue, thereby differentiating or refining and extending the rational grasp of the particular issue.
In establishing the care and skill reasonably required in political practice, courts will need to be provided with evidence (including expert opinions) and reasoned arguments concerning, for example, what processes would likely be effective and realistic for carrying out this practice, what its practical limits would be, what resources and public spending priorities it would require. Courts may have to examine, in concrete facts and principled logic, such issues as whether seeking private donations impairs the political function, or what effect omnibus bills and partisan committee processes have on the function, or where transparency and accountability are required and what will ensure them. Public inquiries and expert research studies have long been relied on by governments, and how these are conducted, and used, as well as new methods for developing feeling values and common ground in groups, may have to be examined. Courts may even have to consider whether Justice, as well as concrete facts and logic, require social supports to ensure all citizens, who wish to be informed and to participate in the democratic process, have the time and resources necessary to do so. The examples can be multiplied, and applied to executive and prerogative decision-making as well as legislative.

When the shared felt values of citizens are in issue, the court should not dismiss and ignore a legislative or other political process, or assess it superficially, but treat it meaningfully and bring the judicial viewpoint rigorously to bear on it. For courts to develop a standard of reasonable care and skill in political practice, in a strong and realistic form, is not unprecedented. They are in no more difficult position than the sixteenth century courts were in when they created ‘extraordinary’ prerogative remedies (discussed in Chapter 1). Today, courts would be developing standards of political practice to ensure, not only that political power is not abused, but that it is exercised reasonably well and effectively in developing citizens’ felt values and finding common ground and shared values among them. And today, courts would be applying a standard that has already been established and refined judicially, and giving it, I argue, a necessary and revitalizing new application.

Public popularity alone may not always satisfy such a standard. The courts at all levels in Sauvé 2 made general comments respecting popular support for ‘tough on crime’ laws. The trial judge quoted from a criminal law treatise published in 1995:

Professor Stuart goes on to state, at page 58: ‘However we live in law and order times. There are widespread calls for toughening the criminal law, especially as it relates to
violence, and voices favouring restraint have been drowned out. Instead there are pleas for "zero tolerance" and concern that criminals have too many rights at the expense of victims. . . . There are no votes in being soft on crime.'

In the Federal Court of Appeal, Linden J.A. referred to ‘the views of Canadians regarding the penal sanction’, as reflected in government actions, and essentially took judicial notice of the citizens’ values on this issue on the basis of general election results and government policies:

This Court can appropriately note that since 1992 Canada has seen two federal elections in which views of crime and punishment were important. Since 1992, Canada's denunciation of crime and criminal behaviour has grown louder. The federal government has strengthened many aspects of the criminal law in an attempt to reflect the growing intolerance of crime in our communities.

And Gonthier J., in his dissent in the Supreme Court, referred to Linden J.A.’s ‘appropriate comment that the recent evolution of penal policy has been an issue attracting significant political attention.’ But developing the shared felt values on a topic, and establishing this when it is contested in court, requires more than asking a court to take judicial notice of general public attitudes gleaned from media or personal discussions or even the policy of the government. It is the policy that must be shown to reflect citizens’ shared values. Nor might surveys and opinion polls be sufficient for the expert practice of developing citizens’ values and finding common ground among them. (Although they might be a good starting point: It is interesting that, as noted in Chapter 7, apparently a simple survey of social science opinion polls and research was able to demonstrate both a range of differing views on the issue of crime and punishment, and a potential underlying shared concern to prevent crime and victimization, and perhaps even a shared preference for rehabilitation over imprisonment per se, which could focus the task of developing felt values and common ground on the topic.)

Another general point I want to make concerns ideals. In scrutinizing a political decision, ‘the shifting winds of public opinion’ are not something to treat lightly or dismiss, for reasons I have discussed. Nor should a steadfast ideal guiding a political decision be dismissed, as a symbolic expression of a higher aspiration the decision is aiming for and seeking to give shape in shared feeling values. This does not determine the Oakes test or eliminate the need for the decisive concrete facts and principled logic sought by courts. But it assists that analysis. An
ideal can guide a political decision, just as Justice guides judicial decisions, and thus shape and clarify what shared feeling values matter and are being served. In responding to a concrete judicial scrutiny relating to a stated ideal, a government might find and clarify, for example, that Safety and Healing, or victim protection and effective rehabilitation, rather than Punishment, are the ideals that matter most to citizens. It is necessary to appreciate the reality of ideals, and at the same time to be discriminating about them (as discussed respecting Justice in Chapter 6), and to engage in an interplay between the different ideals that are all part of a ‘Good Society’, rather than fusing them all with Democracy.917

In the Sauvé case, how might the political decision-making process behind the law stand up to judicial scrutiny according to a standard of reasonable care and skill in political practice? Were the research study, the work of the Lortie Commission and Hawkes Committee, and the Parliamentary debates, conducted and used reasonably, sufficiently to meet such a standard? Was any such standard unmet, or were any other steps reasonably required918 This is a concrete factual inquiry the Court did not bring out, and that might have tested and refined the political decision in this dialogue. It is somewhat striking, in a case concerned with the importance of democracy and the vote, that the Court criticized and dismissed a central part of the political process actually followed, without attaching real significance to this inadequacy.

6. The Witness Testimony

The final aspect of the Sauvé case that I will address is the evidence of two prisoners who testified at the trial. There were thirteen days of trial. Numerous witnesses testified, as I have noted, most giving opinion evidence as experts in social and political science. This evidence was conflictual and highly theoretical, and the Court did not attempt to assess it: McLachlin C.J.C. referred to two of the many differing opinions, without explaining why she gave those opinions weight over the others, and Gonthier J. explained why he did not find the opinion evidence very helpful. Two of the plaintiff inmates also testified: Aaron Spence and Richard Sauvé. From the reasons of the other courts in the case, it seems clear that their evidence was relevant, and that their human stories brought the mundane reality of life and experience to the reasoned arguments about the importance of the right to vote.
Aaron Spence testified in simple and moving words about his concern for his family and their life in the community, while he was in prison and unable to be there for them. This was an eloquent statement of the importance of the vote as a voice in political life for citizens deprived of any other community presence. As for Richard Sauvé, who it was apparent was informed and active politically, his testimony underlined how seriously he took the right to vote, and also what advantages he had, in time to read and reflect upon and discuss social issues, which prisoners might have over many other citizens. His testimony was relevant to the consideration, not only of what restrictions might or might not be put on the vote in a democratic society, but of what might be required generally in order to ably and effectively exercise their right to vote. Not to make light at all of the misery of imprisonment, but in this respect it is possible that prisoners provide an example of what is required for people to be informed and participating citizens.

The majority judges did not refer to the evidence of Spence and Sauvé. It would have strengthened the decision enormously to have done so. Instead, they decided the appeal somewhat as if it was a reference case, reciting extracts from Mill’s philosophy and from legal doctrines of other countries, with no context or explanation relating them to this legislation and the position of these litigants and the shared felt values of the citizens of Canada. By ignoring the human story, and the facts of life such stories inevitably bring to the logic of law – and often unexpectedly, as the story of Solomon still reminds us – the conceptual analysis of the issues was more intellectual than concrete, more ‘Socratic’ than ‘Solomonic’. The same point applies to the analysis of the vote as a specially protected right, discussed above: Their interpretation of the Charter did not refer to facts of history that help explain it concretely.

Recalling, to clarify by comparison, the examples of different psychological types of decisions (given as illustrations in Chapter 6): None of those types is judicial or political, but they stand as benchmarks in assessing how close or how far from its distinct type a judicial or political decision may be. By not relating conceptual analysis directly to the relevant facts that do exist, judicial reasoning can become akin to Nash’s abstract theorizing, or Saul’s opinionated feeling, rather than akin to Mnookin’s concrete approach. And failing to ground a judicial decision in concrete facts can also, given the checking effect of a judicial decision on a political decision, leave governments free to stir emotion and action through the masterful rhetoric of an Obama campaign speech, instead of bringing them effectively and concretely back to their function of developing the citizens’ shared felt values.
In drawing ‘inferences’ using ‘common sense’ and ‘logic’ alone, as McLachlin C.J.C. explained courts must do when relevant facts are not realistically available, judges necessarily will base these conceptual modes on some premise other than facts, such as a personal value or philosophical preference. But this is not a decisive conscious function desired and uniquely well-developed in judicial decision-making. Not a Socrates but a Solomon is wanted in judging. A Solomon would not engage in probing truth through philosophical theorizing, but would seek decisive concrete facts and principled logic (such as evidence of the felt values on a topic, if that is a relevant fact or principle) as the way to do justice in resolving a dispute. By not attending to the human stories, the majority decision was (as the jurists Maitland and Holmes Jr. might put it) long on the ‘logic’ of inferential reasoning and philosophical wisdom, and short on the ‘life’ of the worldly reality of the prisoners, just as of the citizens. Where such facts relevant to a case are not realistically available, rather than ending a dialogue with the government, the court should make it clear that its pioneering decision invites a response if a posited fact, principle, or value requires correcting (as discussed in Chapter 6).

Not addressing facts in a judicial decision creates a concrete weakness which can be seen in this case in the uncertainty over the simple question of what crimes are captured by a two year prison sentence. The facts are not clear, even here at the Supreme Court level. McLachlin C.J.C. observed, somewhat alarmingly, that people may be sentenced to two years – in ‘the living hell’ of prison, as Spence described it in his testimony – for ‘relatively minor’ crimes, including ‘motor vehicle and regulatory offences’ and ‘negligent’ acts.919 Gonthier J. concluded to the contrary, that two year sentences caught only ‘serious crimes’, noting the trial judge’s comment that ‘generally that means a federal penitentiary’, and noting the very general statistical data referred to by the courts below, which listed categories of offences and numbers for each (from murder to, in 13% of the cases, drug-related offences), and the level of repeat offenders among such prisoners (on average 29.5 offences each).920 These statistics are obviously insufficient for the purpose of showing what crimes result in two year sentences and how serious they may or may not be. This is another instance where the human stories told by Spence and Sauvé can give dry statistics life and substance, and perhaps, in illuminating the circumstances of these two citizens, in facts, principled logic, and justice, make apparent the difference between past offences and the ability to contribute to society as thoughtful voters.
The reasons of McLachlin C.J.C. and Gonthier J. brim with justice concerns, in references, for example, to the disproportionate poverty and social alienation among prisoners, and to the need for punishment to fit the crime (related by McLachlin C.J.C., not to the words of the ancient Codes, but to a modern Gilbert and Sullivan musical). However, their consideration of justice was focused on existing concrete forms of justice, such as the principles of sentencing. The ideal of Justice was never expressly invoked – even the term ‘justice’ was not used. This overarching guiding ideal belongs explicitly in a judicial decision dealing with punishment for crime – and a punishment that arguably, by contrast, throws into stark relief the ‘living hell’ of existing punishment by imprisonment, and its use to punish what the Chief Justice characterized as ‘relatively minor’ crimes. Being explicit about Justice makes it more likely it will be attended to and renewed, given new concrete forms as society changes and new issues arise, as, for example, in the ‘therapeutic jurisprudence’ of the Mental Health Court (discussed in Chapter 6).

The three concrete factual inquiries not pursued in the majority reasons – the age and local residency conditions of the right to vote; the reasonable care and skill required in the political practice of developing and carrying out the citizens’ shared felt values relating to the issue of prisoner voting, and the evidence of the prisoners, disproportionately Aboriginal, respecting the impact of losing their right to vote and the ample ability they had for exercising it – provide information that could enrich the dialogue and produce a more complete and differentiated grasp of the issue. For example, an instructive aspect of the prisoners’ stories is that they might be in a better position than many citizens to become informed and responsible voters; if these qualities are desired, as the age and local residency conditions on voting seem to indicate, then a reasonable political process might well be one that provides the social supports necessary to ensure all citizens who wish to can become informed and actively engaged voters.

7. The Next Dialogues: Differentiation or Polarization?

The aftermath of the Sauvé case is perhaps instructive. The government could not proceed with the law invalidated by the Court, since the right to vote is not subject to the Section 33 override. The government did not respond by revising the law to further narrow the voting suspension, for example, to prisoners serving long sentences for very serious crimes, as the Lortie Commission had recommended, or who had committed offences against the democratic process, more in line with the Criminal Code disenfranchisement. Nor did it respond by re-
enacting the law with an explanatory preamble, although this has been done before, with an intense process of public consultations and highlighting the serious public concern at stake.\textsuperscript{921}

Perhaps the government did not respond in these ways because it viewed the Court’s reasons as precluding any limit on the right to vote whatsoever. Or it may have found there was little public interest or outcry against the Court decision, and inadequate citizen support for pursuing the law. This is not an unreasonable possibility, and it is telling that the government’s hard-fought law could have so little concrete resonance among the citizens. Or perhaps the government decided to achieve its policy goals by other means, such as ‘tough-on-crime’ legislation increasing imprisonment rates and terms, imposing mandatory minimum sentences that the Court had deferred to in the past, and setting up more prisons to carry them out.

One thing is clear: The government did not come away from the dialogue with a new standard of reasonable care and skill to guide it in making more concretely democratic political decisions on this or any contested topic. And the Court did not come away with a new assurance that they would be provided with reliable evidence of the citizens’ shared values on contested issues in future cases. The risk is raised of increasingly polarized court and government decisions on the issues in the \textit{Sauvé} case, turning their dialogue from a productive differentiation process into ‘a quarrel over quarks’, a quarrel between an increasingly absolute right to vote (not necessarily reflecting reasonably well developed citizens’ shared felt values, since this has not been required to be shown concretely in the political process) and an increasingly harsh response to crime (again, not necessarily reflecting citizens’ shared felt values). This polarization might already be seen in the government’s recent pursuit of tougher imprisonment and electoral laws, and in the judicial decision in \textit{Frank v. Canada}, where a judge struck down the law denying the vote to citizens living out of Canada for five years or more; in doing so, the judge echoed the majority reasons in \textit{Sauvé} by criticizing the policy objectives – such as ensuring ‘fairness to resident voters’ – as ‘so abstract, broad and symbolic that they barely qualified, if at all, as pressing and substantial’, and finding the five-year non-residency limit ‘overly drastic’.\textsuperscript{922}

Viewing their dialogue from the critical psychology perspective, and thus focusing on the potential development of rational consciousness in society on the contested topics, I argue that this case would have been an ideal starting point for the Court to develop a reasonable standard of care and skill in the practice of politics in our democracy – to shape in concrete human and
worldly reality the *raison d’être* of the vote, the very issue in the case. A court’s judicial scrutiny in concrete thinking and a government’s political response in shared feeling values would lead to greater refinement in the understanding of voting and democracy, and crime and punishment. It could also lead, for example, to recognizing the need – not for voters to *be* knowledgeable and responsible as a condition of voting – but for them to have the opportunity, in concrete reality, to *become* knowledgeable about political issues, and to participate in developing and refining shared values and wishes respecting them. This accords with the description in Roach’s dialogue theory of actively engaged citizens at the center of a thriving democracy, and with J.S. Mill’s concern (referred to in the previous chapter) that democracy requires a knowledgeable and informed electorate, and with his personal efforts towards practicing a principled pragmatism in politics. And this would require public resources and supports, and politicians who practice ‘the art or science of government’, not only with the necessary and admirable pragmatism, but with the expertise and responsibility that is equally important in that important art.

A polarization of court and government decisions undermines their ability to refine their political and judicial viewpoints on contested topics, such as voting rights and punishment for crime, and thus the potential for refining and extending the rational grasp of these topics in the attitudes and actions of our society. If Jung’s theory and my adaptation of it are correct, a more rigorously concrete analysis than in the *Sauvé 2* case, and an explicit judicial recognition of the need for the government to provide it with a well-developed viewpoint of the citizens’ shared values on such topics, as I have described, would invite a more nuanced contribution from the government, and further the refinement of their decisions and more productive differentiating dialogues between them.

The lyrics to the children’s song, ‘Said the Piano to the Harpsichord’ (quoted in the epigraph), reflect well the idea that court and government should ‘stick to their own music’ and not foolishly try to play the other’s. That is foolish because, of course, neither can play the other’s judicial or political music well. Unspoken in the quoted words, but as happens in the story, the distinct music of both is needed for a duet together that neither can play alone.
Conclusion:
Main Points, Other Issues, and Future Applications

Enslavement to the chart and compass
gives the freedom of the seas.
Sailor’s Proverb

In this thesis, I introduced a different perspective on the decisions of courts and
governments and the relationship between them. It is a critical psychology perspective, based on
C.G. Jung’s theory of different conscious functions and how rational consciousness develops
through their interplay. As I explained in the Introduction, I hope it will provide an effective
new approach for re-thinking positively the hard issues raised by conflicting judicial and political
decisions, and for re-framing debates about rights and democracy. It shifts these big questions to
the broader context of the unique contributions each institution can make to the development of
rational consciousness, a task they have in common: Courts and governments can bring, to any
topic that is new or uncertain and contested in society, two distinctly different viewpoints – two
rational viewpoints that are specialized, expertly-developed ‘complementary opposites’. This
enables them together to differentiate the overall rational grasp of the topic, in their institutional
decisions and, through them, in the conscious attitudes and actions of the society as a whole.

Concluding my thesis now, I will review the main points I have made in presenting this
approach. Then I will note further issues, in law and other fields, to which a similar shift in the
context and analysis might be offered by this critical psychology perspective.

Each chapter in the thesis concluded with a summary of its contents or a synthesis of the
significance of the points made. Some chapters also began with a summary of points made in
earlier chapters that are applied in it. In once again summarizing, rather than recapitulate the
summaries, I will state the main points that I took or made from the material covered in each
chapter, and how it relates to this critical psychology approach to judicial and political decisions.
In Part One, to situate courts and governments institutionally, I described historical and legal theory perspectives on the nature of their decisions and their effects on each other.

A historical perspective was presented in Chapter 1, in a broad overview of the emergence of courts and governments in England. There are four main points I took from this history. The ‘judicial’ and ‘political’ decisions of today did not exist a thousand years ago in England, where community decisions of all kinds were made in folk assemblies, based on local customs and sacred beliefs, backed up by kings. Separate institutions of court and government then gradually emerged, whose members created their own distinct ways of making decisions, and became adept at them: Judges came to make decisions by conducting court trials, based on facts found from the evidence of witnesses, arguments in principle and logic, and the goal of doing justice; politicians came to make decisions by prerogative or executive discretion and by legislative enactment, based ultimately on serving the wishes and welfare of the citizens as a whole. Conflicts recurred between their decisions, leading sometimes to stymieing polarizations and sometimes to new or more refined principles, such as when courts created judicial doctrines to control political power, and when court and government reached inconclusive truces in the tension between the principles of Parliamentary supremacy and judicial independence.

These familiar historical or ‘traditional hallmarks’ of judicial and political decisions can be put in terms of the psychological approach I introduce: Judicial decisions develop a rational viewpoint of ‘concrete thinking’ and Justice on contested topics, providing that to society, and political decisions develop and provide a rational viewpoint of citizens’ shared ‘feeling values’ and any of a range of goals and ideals. This conscious distinction that emerged can be seen as reflecting the gradual differentiation of rational consciousness that occurs over the course of life in an individual and in a society as a whole (combining Jung’s and developmental psychology and historical perspectives). With this differentiation came the loss of cohesion in community life and the symbolic and sacred dimensions in communal decision-making, and came the gain of the ability to refine rational viewpoints (such as in developing fact-finding, principled logic, and felt values) and to identify and address biases (such as unwanted sympathies, antipathies, and conflicting self-interests).

In Chapter 2, I considered examples of conflicting judicial and political decisions in the American and Canadian contexts. There are again four main points I made or took from these
examples. The same conflicts recurred, despite different cultures and constitutions and different emphases on judicial and political authority over the law, and they resulted in varying outcomes, with neither institution being the sole law-maker or protector of rights or influencer of social policy or private disputes. Rather, I suggested, the consistent distinction between them lay in the same rational criteria consciously articulated by judges and politicians, in Canada and the United States as in England, to justify their respective decisions: Judicial decisions were justified on the basis of facts, principled logic, and an ideal of Justice; political decisions were justified on the basis of the citizens’ wishes and welfare and a range of ideals in addition to or other than Justice, such as Liberty, Privacy, or Security. I pointed out flaws, where decisions failed to meet the criteria consciously articulated as justifying them. Never were facts, principled logic, or Justice articulated as inessential or irrelevant to a judicial decision; never were citizens’ wishes and welfare articulated as irrelevant to a political decision. Even executive decisions, agreed by court and government to be purely discretionary decisions lying outside judicial review, were seen as subject ultimately to political accountability.

From the perspective of a critical psychology approach based on Jung’s functions theory, this consistently articulated conscious distinction is highly significant, not only for achieving good government and good dispute resolution, but for developing rational consciousness. The different criteria asserted for making judicial and political decisions reflect different conscious functions and the characteristically distinct, indispensable, one-sided rational viewpoint each provides. In the examples of conflicts can also be seen varying results of the interaction of such viewpoints, such as stymied polarizations, increasingly refined laws on a contested topic, and biases revealed by this conscious articulation of specific decision-making criteria.

Chapter 3 examined legal perspectives on conflicting judicial and political decisions, in two leading dialogue theories put forward by law professors Peter Hogg and Kent Roach in the Charter context. In their treatment of ‘dialogue’, these two different theories capture the idea of a rational interaction, but not ‘the essence of the political and judicial roles and the need for them to interact’. Nonetheless, from their theories I took a number of points respecting the essence of these decisions and the significance of their interaction – points I suggested are consistent with a critical psychology perspective and developed further by it. The traditional judicial hallmarks are clear ‘givens’ to Roach. The traditional political or democratic hallmarks are central to his theory: the task of ‘discovery and reflection of majority sentiment’, the sensitivity
to ‘public opinion’ and ‘the values of the community’, the need for ‘active citizenship’ and ‘individuals making independent, informed, and intelligent decisions’, with the citizens as ‘the ultimate reference point’. He notes ‘advantages’ governments have for carrying out their task, and he notes ‘failures’, ‘deficiencies’, and ‘malfunctions’ of the democratic process. Roach refers to courts and governments as having ‘distinct and complementary voices’ in the dialogue. He takes up Bickel’s analogy of court and government to Socrates and his students. He refers to the dialogue as enhancing democracy by requiring express legislation if Charter rights are limited or denied, and also as enabling court and government to each make ‘contributions the other could not’, respond to ‘the inevitable shortcomings of the other’, and thus ‘educate’ and ‘expand the horizon of each other’. Both dialogue theories refer to the ‘conscious’ quality of the decisions, and Roach also refers to biases that the dialogue brings out.

When I came to elaborating a critical psychology perspective, I referred back to Roach’s theory, pointing out resonances, further issues raised, and how they could be addressed. I explained the significance of the traditional hallmarks of judicial and political decisions, seen in a psychological context which highlights the development of rational consciousness, and thus viewing them as reflecting two distinct rational viewpoints, produced by different conscious functions and requiring different types of expertise, and viewing their dialogue as an ‘interplay’ of two such ‘complementary opposites’. I stressed the mutuality of the dialogue, which can refine Justice and the judicial viewpoint as well as Democracy and the political viewpoint. I argued that better insight into the court’s role and its relationship to government is provided by the more fitting symbolic figure of the judge as Solomon rather than Socrates. I explored the potential of the court’s judicial voice in the dialogue to test the government’s political voice and compel it to go beyond reflecting existing sentiments, or responding to powerful citizen activists, or asserting executive discretion or charismatic leadership, or even enacting explicit legislation.

In Part Two, I moved to the framework of a psychological perspective, introducing Jung’s theory of the psychological functions of consciousness and how consciousness develops.

In Chapter 4, I explained the simple structure of this theory, using Jung’s precision, and I noted its far-reaching implications. Following are the main points I made. Rational decisions are not made in just one way, but in a variety of ways resting on different conscious functions. There are four psychological functions people can use consciously, or intentionally, to take in
and make sense of reality (outer or inner, in an extraverted or introverted orientation). Two are perceptive functions of sensation and intuition, which register, respectively, concrete facts and latent facts. Two are apperceptive functions of thinking and valuing or feeling (not emotion), which give meaning to what is perceived based on a selective criterion of either conceptual analysis or feeling evaluation (both rational criteria). The four functions are exercised in characteristic combinations, each producing a one-sided rational viewpoint, with its own distinct brilliance (in the functions used) and its blind-spots (in the functions not included). For example, thinking combined with sensation produces ‘concrete thinking’, capable of developing all the complex particularity and generalizability of a concrete conceptual analysis (this is its brilliance), but not personally felt preferences and not abstract conceptual analysis based on intuitive insight (its blind-spots). Thinking and intuition produce ‘abstract thinking’, feeling and sensation ‘concrete felt values’, and so on, each with its brilliance and blind-spots. The different rational viewpoints operate as ‘complementary opposites’: They are potentially oppositional, and at the same time inherently complementary, each able to compensate or complete the other precisely where the other is weak and it is strong, because its own brilliance is a blind-spot in the other.

Turning to how rational consciousness changes and develops, complementary opposite functions can precisely and effectively compensate each other by engaging in an interplay (or dialogue) on any aspect or phenomenon of reality, in which they challenge, test, correct, and complete or complement each other’s viewpoints on it, and thereby together refine and expand, or differentiate, the overall rational grasp of that reality. All the viewpoints are necessary for the rational grasp of reality to be as complete and accurate as humanly possible at the particular point in time. Therefore, it is crucial that each viewpoint be honed and be brought into the interplay. Both steps are necessary, in order for rational consciousness to be developed: the separation into complementary opposites, and the interplay between the distinctly different rational viewpoints. If any viewpoint is undeveloped or held back, its distinct brilliance will be missing, and this will be a blind-spot in the overall rational grasp of reality. If viewpoints are polarized, rejecting each other rather than responding to each other as mutually compensatory, the development of consciousness will be stymied in a rigid and narrowing dichotomy.

Other psychological faculties – such as memory, dreaming, symbolizing, and emotion – play essential roles, not in providing rational viewpoints but in aiding conscious functioning and its development. An emotion signals that a matter of personally felt value requires conscious
attention, and draws energy away from other conscious focuses. A symbolic image or motif presents a new viewpoint to consciousness, and its non-conscious source gives it compelling power; arising in the course of an interplay, it can shift consciousness in creative and integrative directions. While this aspect of Jung’s theory is not necessary to my thesis and not developed in it, I touched on it: Conscious functions and unconscious processes and contents (including personal and archetypal symbolic expressions) are integral and interconnected parts of our psychological structure as a whole, and Jung’s theory also incorporates the inevitable mutual influences between rational consciousness and the unconscious (for good or for ill), and the opening this provides for recognizing unconscious biases, and for transforming or transcending rational viewpoints that have become highly-differentiated and polarized.930

In Chapter 5, I illustrated the two basic ideas of this theory: Rational consciousness is ‘differentiated’ through the interplay of ‘complementary opposite’ rational viewpoints. I gave examples of some different types of rational viewpoints, showing their complementary strengths and weaknesses, or brilliances and blind-spots. I later used these examples as benchmarks to help show the distinction between judicial and political decisions, and to assess how well they carried out their distinct rational functions, from the critical psychology perspective.

In the ‘concrete thinking’ of Robert Mnookin’s negotiation method and the ‘abstract thinking’ of John Forbes Nash’s mathematics puzzle solution, I contrasted the detailed building up of facts in the former with the leap of intuitive insight in the latter, which was impossible for Nash’s colleagues to follow and scrutinize outside a meticulous logic. This contrast echoes the typical comparison between Aristotelian and Platonic theories. It highlights the one-sided strengths of both types of thinking, in the conceptual refinement of either concrete facts or visionary insights, and also the inattention of both to developing felt values. In the ‘valuing’ or ‘feeling’ viewpoints of John Ralston Saul’s opinion essay and Barack Obama’s campaign speech, I noted the rational coherence given by the felt values that shaped them, and contrasted the undermining effect of a flawed conceptual analysis in Saul’s essay with the bolstering effect of an effective use of conceptual conclusions in Obama’s speech, which was however undermined by its election purpose and thus the unreliability of rhetoric and emotional arousal that potentially served a conflicting self-interest. Again, I highlighted the one-sidedness of these two rational viewpoints, with their strength and clarity in value judgments and their lack of attention to developing conceptual analysis.
To illustrate the potential of the interplay between complementary rational viewpoints, I compared two examples. I described the increasingly differentiated rational grasp of the essence of ‘matter’ – from an abstract idea of the ‘atom’ to concrete applications of ‘atomic theory’ and ever-more-complex ‘sub-atomic’, ‘particle’ and ‘dark and light matter’ theories – underlying which can be seen a recurring interplay between the perceptions of sensation and intuition and the apperceptions of concrete and abstract thinking, functioning as complementary opposites. In contrast, in the polarized quarrel over quarks between Richard Dawkins and Bernard Levin, they rejected each other’s opposing rational viewpoints, and stymied their joint potential to develop a more well-refined conceptual understanding and personal evaluation of quark research.

In Part Three, I returned to courts and governments, and adapted the psychological perspective introduced in Part Two to the institutional decisions described in Part One. I applied this critical psychology perspective to judicial decisions in Chapter 6, and political decisions in Chapter 7, defining them on the basis of their decisive conscious functions – reflecting their respective ‘traditional hallmarks’, but shifting the appreciation of this distinction between them by viewing it in the context of developing rational consciousness. I then applied this critical psychology perspective to the interaction between conflicting judicial and political decisions, explaining the nature of their dialogue as an ‘interplay of complementary opposites’ and its potential to differentiate the rational grasp of the contested topic. Finally, in Chapter 8, these ideas were elaborated in the example of the Supreme Court’s 2002 decision in the Sauvé case. Following are the main points I made in this third part of the thesis.

In judicial decisions, the decisive conscious functions are thinking and sensation, which produce the rational viewpoint of ‘concrete thinking’ with its characteristic factual conceptual analysis of any topic. It is guided by an ideal of Justice, and developed by judges as specially qualified experts in this distinct task, within court processes designed to facilitate it. This is the one-sided brilliance of a judicial decision, which courts are able to develop well; its inevitable blind-spots are the viewpoints of its non-decisive functions of intuition, abstract thinking, and personal valuing/feeling. In ‘pioneering cases’, where the social value on a topic is a fact or principle that is necessary as the premise for a concrete conceptual analysis, but that is unclear or unknown, the court must posit it in order to make any judicial decision, thus unavoidably using a non-decisive function to do that – and expressly inviting correction from the government as to the citizens’ actual shared value on the topic. In seeking to do justice, courts give concrete form
to an overarching symbolic ideal of Justice, grounding it in the human or worldly reality of life in each particular case, as epitomized in powerful detail in the legendary judgment of Solomon. It appears in Canada today that the long-standing symbolic motifs and figures of Justice have lost that evocative power. However, the rational grasp of the idea of Justice itself is still an evolving and lively work in progress, seen in the burgeoning array of new justice theories and practices, and thus a symbolic image of Justice may arise anew.

In political decisions, the decisive conscious function is the valuing or feeling function of the citizens, producing the rational viewpoint of the citizens’ shared ‘feeling values’, guided by any of a range of goals and ideals in addition to or instead of Justice, such as Peace, Prosperity, Security, Liberty, Fraternity, Equality, and Happiness (or Virtue). This rational viewpoint is developed by politicians, elected to carry out the task of governing through democratic political processes, and provided with unparalleled public resources and expertise for carrying out their political task. The citizens are ‘the ultimate reference point’ in their decisions (both legislative and democratic): It is the citizens’ voice, values, wishes, and interests that politicians develop and express. The ‘brilliance’ provided by political decisions is thus the rational viewpoint of the citizens’ shared felt values, and the non-decisive functions or blind-spots are intuition, concrete thinking, and abstract thinking. I argued that politicians, in developing the shared felt values of citizens, function as professionals making specialized decisions on behalf of society, just as judges do. The positive connotation of ‘politics’ and the hallmarks of ‘modern democracy’ are reinforced by the critical psychology perspective; the negative connotation and well-known failings reflect the vulnerable blind-spot of concrete thinking that is the ‘shadow’ of politics, as well as lack of skill and unchecked bias, power abuse, and conflicts of interest.

Judicial and political decisions are ‘complementary opposites’: They produce different rational viewpoints which are potentially oppositional but inherently complementary, each able to test and compensate the other precisely where it is weak, because the other’s non-decisive and undeveloped function (concrete thinking or feeling evaluation) is its own decisive and well-developed function. This means that in an interplay (or dialogue), they can refine each other’s viewpoints and together differentiate the overall rational grasp of the contested topic. In using the concrete scrutiny of judicial decisions to test and correct failings in the political process, I argued that one of the powerful tools courts have is the doctrine of a reasonable standard of care and skill, which they can develop and apply to the practice of politics.
I illustrated the interplay in sketching two examples. I stressed the importance of recognizing that courts and governments make these two distinct and specialized rational decisions – not just any type or the same type of rational decisions, and not just rational decisions in a generic sense. I stressed the importance of their honing and maintaining the distinction between them, so that they can effectively function as complementary opposites, and of their not holding back their distinct viewpoint and not rejecting and polarizing the other, but relating them to each other receptively in a dialogue on any contested topic. I distinguished this critical psychology approach from other approaches to judicial and political decisions and conflicts and dialogues between them. On the topic of symbolic motifs, I noted that when judicial and political decisions are viewed as complementary opposites in dialogue with each other, the misfit of the analogy to Socrates and his students becomes clearer. At the same time, the question is raised of what figures today, if any yet, resonate symbolically as The Judge and The Politician.

In the final chapter, I applied this critical psychology approach to the judicial and political decisions involved in the Sauvé 2 case, in which a closely and fundamentally divided Supreme Court of Canada struck down legislation suspending the right of prisoners to vote as an unreasonable limit of the Charter right. I argued that the decisions of both institutions were unsatisfactory. The Court relied on logical and inferential reasoning, failing to attend carefully or at all to relevant concrete facts, including in the witness testimony and the electoral and legislative histories. The government failed to show that its contested legislation represented well-developed shared felt values of the citizens (something not found in the legislative history and Parliamentary record). I suggested that Sauvé would have been an ideal case for the Court to invite evidence and argument to establish a reasonable standard of care and skill to be met by governments in practicing politics, as the ‘art or science’ of leading the development of shard felt values of the citizens on the topics contested in the case. There was no productive interplay, and the two institutions neither helped refine each other’s viewpoints nor differentiated the overall rational grasp of the contested topics, as they could have had they functioned as complementary opposites. The result is a harbinger of future polarizations between Court and government on these topics.

Those are the main points, some very briefly stated, that I have made or taken from other perspectives and that I have introduced from the critical psychology perspective.
Finally, I will state a few of many other issues to which I suggest this critical psychology perspective could provide a creative and practical new approach.

In the fields of law and politics, these issues include what principles and standards should govern such critical executive decisions of governments as the appointment of judges, the creation of boards, agencies, and quasi-judicial tribunals (or ‘judicial tribunals’ as Ron Ellis has proposed called them in his critical examination), the appointment and tenure of members of such judicial tribunals, and what role courts should play in establishing and overseeing such standards. They include issues of access to justice and to democracy, the increasing complexity of topics addressed by courts and governments, and how to discriminate well between matters that require a rigorous judicial or political decision, and matters that do not. They include problems of bias, conscious and unconscious, and how to identify what biases are unwanted in each institutional process, and respond most effectively to them.

In the fields of psychology and psychiatry, these issues include examining the roles of emotions, dreams, and symbols in the development of rational consciousness; ‘valuing’ or ‘feeling’ as a rational function alongside ‘thinking’, and the relationship of both to ‘cognition’ and to emerging neurological insights. They include examining how to address ‘implicit biases’ respecting old people and other marginalized groups, the relationship of age to cultural development and continuity, and the problem of pathologizing age and old people (Jung’s special interest in ‘the second half of life’ grew out of his observations respecting the potential development of a mature rational consciousness over the course of life and into old age). They include examining how Jung’s conscious functions or ‘personality types’ can bridge such divisions as gender, culture, race, historical experience, and age. They include the question of how consciousness and self-awareness relate to personal conscience and ethical action.

Religious decisions are another topic that might be creatively considered anew from a critical psychology perspective. If Jung’s theory is correct, it may be helpful to apply it in considering what is the nature of religious decision-making, or the decisions made by religious authorities, what connection they have to divine revelation, and what role or place they have in a complex secular society.
To conclude this Conclusion, I return to Jung’s compass analogy, in light of the old sailor’s proverb that is the epigraph of this chapter: ‘Enslavement to the chart and compass gives the freedom of the seas.’

Jung schematically represented the four conscious functions as the cardinal poles on a compass (as described in Chapter 4), designating them as opposites that are potentially conflictual but inherently complementary, in order to convey that each provides information that no other does and lacks what others provide. Like the points of the compass, the conscious functions and their distinct viewpoints are interrelated fellow-poles, sharing the same field or task, which is the psychological activity of creating consciousness. And like the compass points, all the viewpoints contribute to making the conscious ‘mapping’ of any topic or aspect of reality as complete and accurate as humanly possible at any given time. I have stressed the importance of courts and governments sticking to their own rational viewpoints, and honing them rather than blurring or abandoning them or adopting another’s viewpoint. Perhaps the sailor’s proverb can serve as a reminder of that compass, putting it in another light: By each staying true to its decisive conscious function – sticking to its own music – and developing it strictly and well, and responding receptively to compensatory information from the other, judicial and political decisions play unique and indispensable roles in together furthering the journey to develop, and occasionally transform, individual and collective consciousness.
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NOTES TO INTRODUCTION:

1 By the term ‘a Good Society’, I refer to the name given to one of Ambrogio Lorenzetti’s famous frescoes in the Siena city hall, which portrays the ideals and life in ‘the good city’ in contrast to those in ‘the bad city’, depicting a particular rivalry between Siena and Florence, but also more generally the interrelationship of Justice, Judging, and Good Government in a good society. I have discussed this in a paper: K. Arnet Connidis, ‘Variations on Justice in a Good Society: Lorenzetti’s Frescoes in the Siena City Hall’, delivered at the 3rd Multidisciplinary Academic Conference of the International Association for Analytical Psychology, at Zurich, July 3, 2008. See, for illustrations and commentary, Randolph Starn, *Ambrogio Lorenzetti: The Palazzo Pubblico, Siena* (New York: George Braziller, 1994).


3 Decision-making is a psychological process: For theorizing about judicial and political decision-making to be realistic, and effective in practice, it must be attuned to psychological reality. This point was made in the context of the disastrous failure of the peace accord in Sierra Leone, by an experienced war commentator, Ralph Peters, who stated, as quoted in an interview reported in *National Post*, May 15, 2000, pg. A16 (condensed slightly):

> The foundations of peace were built on the quicksand of hope, not on the bedrock of a real appreciation of human nature. Reality frustrates amateur statesmen, lazy politicians and all idealists. We refused to come to grips with human nature [and pursued] a vision utterly at odds with human reality.

Peters’ comments, in full rather than condensed, as quoted in the newspaper report:

> “The foundations of peace were built on the quicksand of hope, not on the bedrock of a real appreciation of human nature.”
> “Reality frustrates amateur statesmen, lazy politicians and all idealists.”
> “We refused to come to grips with human nature.”
> “But it is a vision utterly at odds with human reality.”

The problem of non-attunement to psychology is not simply that no statistical logic ever captured the reality of a single human life, but that psychological reality involves more than logic, which might, for example, dismiss emotional responses and thereby miss the unique information provided them (as I illustrate in an example in Chapter 5), rather than treating emotions as signaling to rational consciousness that something of value is at stake and must be attended to. This basic point was made by Jung in a lecture in which he urged working with psychological responses, even unwanted ones, rather than using purely intellectual goals to exclude or tightly yoke them. He warned against acting as if the psyche – our psychological structure, as the counterpart of our physical structure, the body – ‘could be completely remodelled’ by the intellect ‘to suit our purpose’: C.G. Jung, ‘A Psychological View of Conscience’, in *Civilization in Transition*, CW 10, at para 831 [I have changed the English translation ‘man’ to ‘human being’]:

> If the unconscious were dependent on consciousness, we could, by insight and application of the will, finally get the better of the unconscious, and … the psyche could be completely remodelled to suit our purpose. Only unworldly idealists, rationalists and other fanatics can indulge in such dreams. The psyche is a phenomenon not subject to our will; it is nature, and though nature can, by skill, knowledge and patience, be modified at a few points, it cannot be changed into something artificial without profound injury to our humanity. A human being can be transformed into a sick animal, but not moulded into an intellectual ideal.

4 Jung’s theory of conscious functions is easily accessible while being far-reaching in its explanatory power and complexity. It is easily accessible due to the simplicity of its basic structure (not unlike the simplicity of the double-
helix structure of DNA, the macromolecule that encodes genetic information). It is far-reaching due to the inclusion of unconscious processes and contents, and of the interconnection and mutual influences between conscious and unconscious processes and contents, which are integrated in the model.

In other words, Jung’s theory does not isolate rational consciousness but situates it and its development within the psychological structure as a whole, with conscious and unconscious processes and contents as two integral and inherently interrelated parts of it, and his theory seeks to explain both conscious and unconscious, and the interactions and influences between them. However, for the purpose of my thesis, this larger whole of Jung’s theory (the unconscious and the interconnection between conscious and unconscious) is not necessary to the approach I introduce, and, although I briefly outline, I do not elaborate or rely on it. The conscious aspect of his theory stands on its own. At the same time, however, if Jung’s theory is correct, then its far-reaching implications exist and are likely to come to the fore as practice and theory develop.

Jung’s theory has been used in numerous personality classification systems, in education, employment, relationship counseling, and many other settings. See, e.g., for one early and still well-known and popular such system, ‘the Myers-Briggs Personality Type Indicator’, which is described as a ‘personality inventory’ designed ‘to make the theory of psychological types described by C.G. Jung understandable and useful in people’s lives’, on the Myers and Briggs Foundation website, URL accessed August 20, 2014: <http://www.myersbriggs.org/my-mbti-personality-type/mbti-basics/>. Some of these systems reflect Jung’s theory better than others, and both his theory and its terms have been popularly misconstrued and misused, including as a static classification of personality types rather than a dynamic model of the nature of conscious functioning in all people and personalities (as I discuss in Part Two, Chapter 4). These are mistakes I hope to correct in the thesis.

5 The example of ‘the sun’ I give in Chapter 4, describing each unique facet of this phenomenon of reality that is brought out by each of the distinctly different viewpoints of the four functions. The example of the essence of ‘matter’ I give in Chapter 5, in illustrating the increasingly differentiated grasp of this topic as the idea of ‘the atom’ and atomic theory developed into particle theory through the interplay of complementary abstract and concrete types of thinking. There are many examples in applied research of the interplay of these two particular viewpoints and their distinctly different combinations of conscious functions. The examples of mandatory minimum sentences and the hypothetical of what rights are pertinent to vivisection, I give in Chapter 6 and develop further in Chapter 7. The example of what laws should govern citizens’ right to vote I discuss in Chapter 8 in applying the critical psychology approach to the Supreme Court decisions in the Sauvé case.

6 ‘Concrete’ and ‘abstract’ thinking: It is important to note, as I explain in Chapter 4, that these two terms have other meanings in cognitive psychology theory today than the meanings which Jung had carefully developed, and which I argue are more useful for the purpose of my thesis, being both more inclusive and also more precise or discriminating than the definitions developed in cognitive psychology. Jung carefully and precisely defined and contrasted these two types of thinking – without reducing either one: Concrete thought can attain all the acuity of an Aristotelian analysis, with its particularity and generalizability, without the conceptual leaps of a Platonic vision, while such Platonic abstract thought lacks grounding in existing concrete reality. See my discussion and references in Part Two, Chapters 4 and 5.

7 As I explain in Chapter 4 and illustrate in Chapter 5, Jung similarly examined and defined personal ‘feeling’ or ‘valuing’ (which he distinguished sharply from ‘emotion’ or ‘affect’) as a function that is just as rational as thinking, but uses a different selective criterion (personally felt value or preference, rather than conceptual analysis) to make sense of or assign meaning to any topic or aspect of reality perception.

8 ‘Worldliness’ as the practical reality of life, not simply logic: The famous observations of two great jurists, discussed briefly in Chapter 6 of my thesis, infra note 658: the English jurist F.W. Maitland (‘Law is the point where life and logic meet’, in ‘Introduction’, Year Books 1 & 2 Edward II (17 Seldon Society, 1903), p. xxxvii), and the American jurist O.W. Holmes Jr. (‘The life of the law has not been logic, it has been experience … [the law cannot be treated as if it is a system of logic containing] only the axioms and corollaries of a book of mathematics’, in The Common Law (1881) pg 1 (Toronto: University of Toronto Typographical Society reprint, Paulo J.S. Pereira & Diego M. Beltran, eds., 2011), pg 5).

Facts and reasons, from evidence and argument tested at trial: Briefly to summarize the decisive aspects of judicial decision-making as it developed, which I describe in the historical overview and the dialogue theories
considered in Part One of my thesis: Facts are found by judges from evidence proved and assessed at trial, in the testimony of witnesses with direct personal knowledge of the facts or expertise in the field of opinion they testify to and are cross-examined on (such as a signature on a letter, a forensic analysis of a fingerprint, a voice that was heard; even the weather, foreign law, domestic legislation, executive decision, common law principle, and any other fact must be proved that way if it is contested and cannot simply be judicially noticed). Reasoning by judges is a conceptual analysis, as a skill developed in training and practice, that rests on the facts found, and that is tested in the parties’ arguments in principle and logic.

9 Politicians hone the shared feeling values of citizens: As I introduce and explain in Chapter 7, my argument (based on Jung’s theory, as I have adapted it to this specific institutional decision-making context) is that the political decision-making task is not simply to conduct polls or otherwise ascertain and reflect existing values, and much less to fan emotions (such as fear or anger), which may well obscure or distort underlying values, and which must themselves be addressed effectively before underlying values can be brought out and developed. The political task is to bring out citizens’ underlying felt values, differentiating them from emotions, and to lead and assist citizens in developing and refining them, and to seek common ground among the citizens in them (which may well be there, according to Jung’s full theory and model of our psychological structure and processes, which includes the collective unconscious with contents that are widely shared across time and culture, and in which conscious and unconscious contents are mutually influential). And I argue that politicians carry out this political task as specialized experts in it – and with the vast resources of Parliament, the civil service, and the public treasury at their disposal. Of course, it may well sometimes be that the shared felt value of citizens is that the government leader make a particular social or economic decision in his or her personal discretion, rather than oblige citizens to grapple with it: This, too, is a felt value for politicians to bring out and hone, and articulate and act on, as the shared value of citizens. I elaborate this point, with particular reference to prerogative and other executive decisions of government, in Chapter 7.


11 Professor Borrows’ remarks were made in his seminar given in the Alternative Approaches to Legal Scholarship course, in the University of Toronto Faculty of Law, on October 14, 1998, and again in a class on February 3, 1999, in a lively and enlightening elaboration of his approach in his article, ‘Frozen Rights in Canada: Constitutional Interpretation and the Trickster’, 22(1) American Indian L.R. 37-64.

12 This is so even for people who unfairly benefit rather than suffer from an injustice; I discuss this point, and social science studies relating to it, in Part Three, Chapter 6.

13 See epigraph of Chapter 1, taken from an 1876 essay by Walter Bagehot: Lord Althorp and the Reform Act of 1832 (1876), published in Bagehot’s Historical Essays (Anchor, Garden City, N.Y., 1965), pgs. 147-179, at pg. 150: The characteristic danger of great nations … is that they may at last fail from not comprehending the great institutions they have created.

CHAPTER 1 NOTES:

14 Stephen Strauss, ‘The scientist as beaver’, The Globe & Mail, March 1, 2003, pg D9, reviewing Gerhard Herzberg: An Illustrious Life in Science by Boris Stoicheff: Stoicheff sagely quotes Walter Bagehot’s remark that great nations with long histories of creation may fail “from not comprehending the great institutions they have created.” Strauss is quoting the remark, quoted by Stoicheff, in Bagehot’s 1876 essay, Lord Althorp and the Reform Act of 1832 (1876), published in Bagehot’s Historical Essays (Garden City, N.Y.: Anchor, 1965), pgs. 147-179, at pg. 150: “The characteristic danger of great nations … is that they may at last fail from not comprehending the great institutions they have created.”
Written records ‘well over 1,000 years’: Plucknett, Concise History, infra note 5, refers to ‘a steady stream’ of Anglo-Saxon legal sources beginning about 600 C.E. (pg 8); Baker, infra note 5, refers to the ‘first surviving’ written English law as the legislation ‘of King Aethelberht I of Kent’ which appeared in about 600 C.E. (pg 2), and he also refers – to give just two other early examples – to the laws of Ine of Wessex dating from about 690 C.E. (pg 7), and – of the most relevance to the point made here – to the record of a folk assembly in the Kentish laws of the 700’s (pg 4). England’s communal justice system was still active long after more differentiated structures had developed in other societies; Roman civil law systems were centuries ahead of English common law in this respect.

FW Maitland, who went on to also describe the substantive rules or subject-matters of Anglo-Saxon customary law as having ‘the usual archaic features’, in Pollock & Maitland, The History, infra note 5, Volume 1, pg 43, which is quoted by Baker, infra note 5, at pg. 5, and put by Baker into the context of what is known of that history: “Maitland described what could be seen as “thoroughly characteristic of archaic legal systems in general. Nothing in it is peculiarly English, not much is peculiarly German.” The communal justice processes in England of 1,000 years ago might have been typical of such processes in human societies in general, from what these historians say. But the precise details of the course of change, as specialized judicial and political processes emerged in English society, may be unique. Either way, the English history is helpful for comparative purposes. It may show how English society differs in particulars from others, throwing them all into clearer relief, or highlighting different phases. And also, alongside particularities of English history and society, it should show what is fundamental and common to many societies.

Legal history is not completely foreign to me, though I have no expertise in it. For my master’s law degree, I studied the history of English law and legal processes, and the broader history of public law and government, in lecture and seminar courses given at Cambridge University in 1978-79 by Professors JH Baker (now Sir JH Baker), SFC Milsom, and Walter Ullmann.


I have relied as well on Theodore F.T. Plucknett, A Concise History of the Common Law (Boston: Little, Brown & Co., 1956) [herein referred to as ‘Plucknett, Concise History’].

Baker, pg v: Baker describes his book as ‘an elementary historical introduction’ [pg v], ‘not designed for the student specializing in legal history, but for the student who requires a short history, in brief outline, of the principal English legal institutions and doctrines.’ He refers readers who wish ‘to understand the history of English law at a deeper level’ to Milsom’s Historical Foundations [pg vii]. As I have noted in my text, I have made my own emphases and selections from the history to bring out the thread I want to show.

Baker, pg v

Plucknett, Concise History, pg 3; the quotation continues: ‘The comparatively short period of recorded history based upon documents soon leads us back to the immensely long ages of which we know nothing save through the methods of the archaeologist.’ S.F.C. Milsom, in Milsom, Introduction, agreed that ‘any picture of early legal development must remain uncertain’ [pg xxv], and also lamented that the rich trove of documentary evidence of the development of English law had been relatively neglected [pg xxiii]: ‘It has become clearer than ever that we can hope to understand the growth of the common law, almost from its beginning as an intellectual system, in a detail unimaginable for its great rival in the Western world. And yet, while every syllable of the Roman texts has attracted prolonged scrutiny, our own great stores of evidence are largely neglected.’

23 Extrapolating beyond the parameters of this thesis, on the topic of bias (touched on as a future topic in the Conclusion), I have described elsewhere a psychological approach to addressing potential unwanted bias, as an indispensable prerequisite to ethical decision-making by individuals: KA Conndis, ‘A Dream of Dirty Hands: Personal Conscience and Ethical Action’ (2004), in DC Thomasma & DN Weisstub (eds.), The Variables of Moral Capacity (Dordrecht: Kluwer Academic Publishers, 2004), pgs 95-111

24 Baker, pg 8

25 Local folk assemblies were of ‘prehistoric origin’; Baker, pg 4, noting that the first written record of a folk assembly is in the Kentish laws of the 700s, and that ‘very little is known about the growth of communal organization in England.’ However, Baker repeats Maitland’s description that local folk assemblies were probably ‘thoroughly characteristic of archaic legal systems in general’: pg 5, quoting Pollock &Maitland, The History, vol. 1, pg 43 (see supra notes 15, 16).

26 The basic geographic divisions into which the country was organized under the Anglo-Saxon and Danish kings, were shire, hundred, and tithing (or in cities such as London, borough and ward), each with their assembly, and their shire-man, hundred-man, or tithing-man in charge or exercising some level of authority between the people of the place and the king or his assigned representative.

See Baker’s description, pg. 8, of assemblies of shire, manor, and vill: A shire moot might be held twice a year and deal with the more important affairs of the shire, while a small manor moot might be held more frequently to deal with immediate concerns arising in the village of that lord. The shire moot would be attended by the king’s appointed ealdorman and the bishop; in the hall moot of a feudal lord – the court of a manor – the free men of the village had a voice, and in many places could make byelaws, punish minor crimes, consider agricultural and feudal business; while the small vill community exercised police functions independently of manorial feudalism.

27 Re: ‘ealdormen’ & ‘chairmanship’, see Baker, pg 8: ‘The business [at the local assembly] was transacted by those attending … under the chairmanship of the lord … or his deputy … the elders or leaders of the community …’, and: ‘Some ealdormen probably represented ancient royal families – or lordship developed from prehistoric notions of chieftainship – or delegation from the king …’.

28 Baker, pg 5, where he also briefly describes ordeals by hot iron and hot water, and notes that ‘Doubtless pre-Christian in their inception, several forms of ordeal were sanctioned by the early Christian Church.’, and that it appears people had begun to lose faith in ordeals and clerics to feel moral opposition to them, before 1215 when the Lateran Council prohibited clerical participation in them.

29 Baker, pg 5, noting that: ‘Perhaps more widespread as a test, after the advent of Christianity, was the oath’, and that it was not formally abolished (as ‘wager of law’) until 1833.

30 Baker, pg 4. Banishment from the community is an ‘ancient practice’, which it might be is being followed or revived (in a temporary or rehabilitative form of banishment) by some First Nations in Canada today. See, e.g., proposal by Samson Cree Nation described in a newspaper report as ‘turning to an ancient practice to deal with modern day ills: Katherine Harding & Dawn Walton, ‘Natives try ‘banishment’ to fight crime’, Globe and Mail, February 8, 2006, updated April 5, 2009, The Globe and Mail website, URL: <http://www.theglobeandmail.com/news/national/natives-try-banishment-to-fight-crime/article1094479/>: the non-full-text report: ‘- - - Fed up with the drug running and gang violence plaguing Samson Cree Nation, the Alberta band is turning to an ancient practice to deal with modern day ills: banishment. “It’s not the Indian way for them to be doing the things they are doing now, and it is the Indian way for us to ban them from the community or from the collective,” explained Mel Buffalo, a Samson band director.’ See also: The Canadian Press, ‘Six Nations leaders express regret over beating of construction worker’, Sept 14, 2007, CBC News website, URL: <http://www.cbc.ca/news/canada/toronto/six-nations-leaders-express-regret-over-beating-of-construction-worker-1.633724> in the context of a land-claims demonstration, the CBC news report quotes a statement by Six Nations Haudenoniso confederacy council sub-chief Leroy Hill: ‘Hill said the Haudenoniso people are committed to
peaceful discussions concerning land rights. "Those of our people who refuse to respect and honour this arrangement that was made in good faith ... are in violation of the peace and are on their own," Hill said.

31 Baker describes the customs as varying from local place to local place, and he speculates (pg 2), making a suggestion that I would stress from the perspective of Jung’s broader psychological theorizing as a whole, that if there were common features in the customs of different people and places, ‘the unifying force is not the law but the general social and moral assumptions of the age, or even the natural instincts of mankind at particular stages of development; the parallels often transcend national and geographic boundaries’.

32 Baker, pg 63

33 Baker, pg 5, where he also writes: ‘The procedure in contentious matters was calculated to avoid decision-making.’

34 Baker, pg 6 – at least, unless and until the answers were manipulated by concerned clerics or others in charge of the process (see Baker, pg 5)

35 The Witan or Witenagemot – Baker uses the term ‘Witan’.

36 Baker, pgs 3, 6, 9. The ‘personalization of authority’ – associating authority with people rather than a community body – came about as a matter of practical reality, as Baker concisely explains it: ‘such is the dependency of good administration and effective justice upon the energy of elders or leaders of a community, that almost as soon as these institutions are noticed in written sources, jurisdiction seems to be a duty vested in persons rather than in the community at large’. The early Anglo-Saxon and Danish kings set up a monarchial structure based on this ‘personalization of authority’ in the king, and on what was to become ‘the constitutional ascendancy of the king’. Baker also notes (pg 9) that King Alfred of Wessex (d. 899 A.D.) ‘is reputed to have taken a deep interest in justice, and to have taken on himself the occasional review of decisions made by subjects’.

37 Baker, id. These royal decrees, of various kinds, affirmed existing customary rules and practices, clarifying and unifying them in some matters or offering specific responses to specific problems (for example, setting out guidelines for punishing wrongs by stating ‘fixed rules to govern situations which must previously have rested on discretion’, such as ‘the fixing of the blood-money payable in lieu of feuding’). Thus, the kings preserved and reinforced the customs and beliefs of the people and the communal decision-making practices of their local assemblies.

38 Baker, pg 7; the definition ‘(right)’ is Baker’s.

39 Baker, pgs 1, 7

40 The English historian Plucknett describes the Normans as introducing ‘precise and orderly methods into the government and law of England’, by bringing to England the administrative and accounting talents with which they had made Normandy ‘the best-ruled state in Europe’, in Plucknett, Concise History, pg 11: ‘The greatest result of the Norman Conquest was the introduction of precise and orderly methods into the government and law of England. The Norse invaders who had settled in Normandy had made it a century and a half (911-1066) the best-ruled state in Europe, and the gifts for strong administration and for orderly accounting and finance which had been displayed in the duchy were to have fuller opportunities in the conquered kingdom.’

41 Baker, pg 22: ‘As early as the 1120’s we hear of’ the distinct chamber of the Exchequer, citing, in fn 22, J.H. Round, The Commune of London (1809), pg 123. In the Exchequer, the administrators scrutinized sheriffs’ accounts and systematically exercised their delegated royal authority to look after the royal revenue: Baker notes (id) a description of a sheriff, ‘fearsome and mighty in his own county, trembling in his boots when the time came for his reckoning at the chequered table.’


43 Baker, pg 84, in his words

44 Exchequer was, as just noted, the king’s revenue department. Chancery was the king’s secretariat, where royal charters and other documents were prepared and authenticated with the seal of England, under the authority of a Chancellor appointed by the king. The Chancellor, who was usually a bishop or archbishop trained in canon and
civil law, was the most powerful member of the king’s council, although he too was appointed and removed at the king’s pleasure.

45 The Court of Common Pleas (that is, ordinary civil lawsuits) was established at Westminster, following the king’s promise, in the Great Charter (Magna Carta) of 1215, that: “Common pleas shall not follow our court but shall be held in some fixed place.” Common Pleas was given wide jurisdiction over private lawsuits and supervisory jurisdiction to correct errors in matters of local justice; it was ‘the court which more than any other made the medieval common law’.45: Baker, pg 35; King’s Bench became more prominent in the 1500s, with its more effective responses to the authority asserted by the Court of Chancery and the king in Parliament – see my discussion below of the ‘explosion of 1616’. The Court of King’s Bench arose from the royal council’s exercise of the king’s residual prerogative over judicial matters in which there was a royal interest. Its jurisdiction was divided into a Crown side in charge of criminal cases and a Civil or Plea side in charge of a small range of civil cases, including correcting errors in Common Pleas. By the 1300’s, King’s Bench was also stationed permanently at Westminster as a separate court.

46 Baker, pgs 104 (the Court of Requests was one of numerous ‘sub-courts’) and 105 (‘prerogative tribunals’). In the case of the other conciliar courts, distinctions did not clearly emerge until the 1500s, per Baker, pg 101: ‘Until about 1540 the council was one body with one series of records; but its work was divided as convenience dictated, often by means of informal expedients.’ In addition to Common Pleas, King’s Bench, there were circuit courts or assizes, and specialized courts of Chancery, the Exchequer, the Star Chamber, the Admiral, and numerous others.46 The Court of Chancery played a pivotal role in the development of the common law and the judicial and political processes, by sparking conflicts which highlighted the competing authorities of judges and the king, as I discuss later in this Chapter. The last English court to be delegated a residual prerogative to do justice was the Judicial Committee of the Privy Council. Today, the residual prerogative power to do justice has also been delegated to a host of ‘quasi-judicial tribunals’, or ‘judicial tribunals’ as R Ellis has recently been proposed they should be called, in Unjust by Design: Canada’s Administrative Justice System (Vancouver: UBC Press, 2013).

47 Baker, pg 11, referring to the first century after the Norman conquest, when the basic institutions were developed from what already existed in an undeveloped state – king’s council, a unified nation with a central government ruling through sheriffs answerable to the king, and the beginnings of a bureaucratic administration operating through written instruments under the king’s seal.

48 Baker, pg 21: ‘Communal justice was too deep-rooted for anyone to think of abolition; it was simply absorbed into the new system.’ Baker describes [pg 25] how communal jurisdictions waned as centralized royal jurisdiction waxed: the leading men of the shire ‘still served the shire but in different roles’, as representatives of the shire to the king, and eventually to Parliament; the old assemblies were ignored and became a nuisance, the ‘multifarious county customs … disappeared in the process’, and thus ‘a stream of expedients had gradually produced a situation in which the old ways of doing things died a natural death.’ Baker notes [pg 26] that in the ‘trends to royal control’ even feudal rights ‘apparently assured to lords by Magna Carta’ were ‘overtaken by common law’, with feudal land law becoming the cornerstone of the common law, and that the borough and manor moots lasted the longest – into the 1400’s – but these communal jurisdictions, too, were eventually absorbed into the common law.

49 Baker, pg 144; in this way, as Baker describes it, ‘the professional training of the judiciary [coupled with the notion of a constitutional monarchy] … transformed the personal loyalty which judges owed to the king into a more objective form of loyalty to an impersonal Crown and to the king’s common law.’

50 Baker, pg 64; the customary practices lacked, among other things, written records and effective enforcement processes, other than banishment from the community.

51 ‘This body of twelve, being sworn to say the truth, was called a jury (jurata), and its members were juratores, persons who have been sworn’: Baker, pg 64. See also Baker pgs 63-65: Juries displaced a ‘quasi-ordal’ of combat, which the Normans had introduced for a time, as another dispute resolution method. Ordeals fell into disfavour and were stopped by the Church in 1215, and juries were introduced in criminal cases as well as civil; judicial combat was ‘scathingly’ criticized in the late 1100s and ‘became a rare anachronism even in medieval times’; wager of law with ‘oath-helpers’ evolved into the personal oath of the defendant.
Baker, pg 62: ‘Matters which judges decided without juries became the common law, and the discussions which occurred before the jury was summoned helped to refine and clarify the law.’

Baker, pgs 116, 81-82

This is as Baker quotes, pg 63, citing S.F.C. Milsom, 'Law and Fact in Legal Development', (1967) 17:1 U. Toronto L.J. 1

Baker, pg 72

See Baker, pg 172: ‘The law which emerged in the course of argument was not law laid down by the court so much as law which was accepted learning within the profession: ‘common erudition’ as it is called in the old books. The judges were the chief repositories of this common learning, but what they said as a body was law decision could make it so; judgment was accordingly withheld. … To this extent it was true that mainly because it conformed to the reasoning of the little intellectual world of Westminster Hall. … if the judges could not agree on the law, the point under discussion could hardly be common learning and no majority judicial judges did not make law. Their decisions were not sources of law but simply evidence of what the law was.’ See also Baker, pg 173, quoting Parke J’s reasons in an 1800s case: ‘Parke J only said that precedents were to be followed “when they are not plainly unreasonable and inconvenient”’. Over time, the ratio decidendi and obiter reasons were distinguished, and the doctrine of binding precedent or stare decisis were established.

As Milsom writes, in his Introduction to Pollock & Maitland, respecting the basis of the judges’ reasoning in the nascent royal courts (pg xxvii): ‘to the extent the king’s courts were not inventing law but adopting customs enforced by other courts, their elementary concepts and categories must have been formed in those other courts.’ Along the same line, Baker notes (pg 63): ‘the king’s judges did not start out with an inspired vision of a new way of doing things; they simply took over and continued what had gone before’.

Respecting the ‘rational coherence’ of judge-made common law, see Baker, pgs 1 (for us today, ‘law consists in rules laid down by judicial or legislative authority; and the common law embodies a particular system of rules, with their own rational coherence.’) and 12 (‘Glanvill and his fellow judges produced a coherent system of English law deriv[ing] ultimate authority from the king’). See also Baker, pgs 21, 28, 41 (‘the Curia Regis in the eleventh century gave England a common law, which was developed and refined by the medieval Common Pleases’, ‘the recovery of the King’s Bench in the sixteenth century brought about a recasting of the law into a form which would last until the nineteenth century and beyond.’, and ‘most of the innovations they [i.e. the Tudor judges and clerks] made during the early sixteenth century have been accepted and embedded in our law ever since.’), 110 (‘the common law of England was … fashioned by the centralization of English justice’), 116, and 133 (the judges and advocates ‘made the administration of royal justice into a distinct profession. They devoted their working lives to the system they were helping to establish, and they handed on the traditions of the king’s justice to their successors.’).

Baker, pgs 63, 5: ‘The older methods of ending disputes are better referred to as methods of ‘proof’ than of ‘trial’, because trial suggests the weighing up of evidence and arguments by an intelligent tribunal.’ Baker also calls this ‘a different, rational approach’ (pg 63); divine proofs ‘precluded human judgment on the merits of the case’ (pg 5).

J. Maddicott (former Fellow in Medieval History at Exeter College, Oxford), Simon de Montfort, the Battle of Lewes and the Development of Parliament, talk given at The Battle of Lewes Conference, April 14, 2012, Lewes England, available on The Sussex Archaeological Society website, URL: <http://sussexpast.co.uk/wp-content/uploads/2012/05/Simon-de-Montfort-the-Battle-of-Lewes-and-the-development-of-Parliament.pdf> [herein referred to as ‘Maddicott’], at pgs 1-2, describes both the small personal council of the Norman kings (as a ‘small inner circle’ or ‘inner ring of confidential royal advisers which was known as the ‘council’) and the Great Councils (soon called ‘Parliaments’, comprised of the magnates or leading nobility, clergy and some other prominent men) that were being convened in the early 1200s.

‘Parliament’ or parlement meaning ‘an occasion for talk or discussion, from parler’: Maddicott, id, pg 1

Knights were lesser cousins to their ‘greater cousins’ the great barons, per Maddicott, pgs 2, 8. In the hierarchy of noble or aristocratic titles, relevant to the events of 1265 and still meaningful in eighteenth century and later England, is listed in Amanda Foreman, Georgiana, Duchess of Devonshire (New York: Random House, 1998), pg
‘During the thirteenth century, the barons were frequently in revolt against the kings, whom they thought were governing the realm badly, that is, against the barons’ own wishes.’: The UK Parliament Website, URL <http://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/overview/firstparliaments/>. Kings (such as Henry III) pursued costly foreign wars and their own private interests (such as promoting their personal favourites to local positions in which they could engage in relatively unrestrained exploitation), of no benefit to the noblemen who were exploited and ‘dunned’ to pay for them: Maddicott, pg 6.

64 Magna Carta Libertatum (Latin in full), or The Great Charter of the Liberties of England (English translation), was sealed under oath by King John at Runnymede, near Windsor, on June 15, 1215, after London had been captured by rebel barons on May 17, 1215. For one articulation of the view that Magna Carta was not a document making law but ‘reasserting the power of custom’ (which accords with Baker’s view), see ‘Treasures in Full: Magna Carta, The Document’, The British Library, URL: <http://www.bl.uk/treasures/magnacarta/document/index.html>

Present were 25 barons (as parties and sureties for its enforcement, who renewed their oaths of fealty to King John), and 2 archbishops, 10 bishops, and 20 abbots (who signed as witnesses): See ‘Treasures in Full: Magna Carta, The Document’, The British Library, URL: <http://www.bl.uk/treasures/magnacarta/document/index.html>

65 Magna Carta of 1215: Respecting consent to taxation, Clauses 12 and 14 effectively meant that the monarch had to ask before raising new taxes; see contemporary translation and explanation, on the British Library website, URL http://www.bl.uk/treasures/magnacarta/translation/mc_trans.html>. Respecting ‘the law of the land’: Clauses 39-40 (maintained but in somewhat revised form in subsequent versions of the Magna Carta, and among the three of its provisions still law in England today), provide, in a contemporary translation, from the British Library website, URL <http://www.bl.uk/treasures/magnacarta/translation/mc_trans.html>:

‘39. No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.

‘40. To no one will we sell, to no one deny or delay right or justice.’

As summarized well on the same British Library website – ‘Treasures in Full: Magna Carta’, The British Library website, URL: <http://www.bl.uk/treasures/magnacarta/basics/basics.html>: ‘This statement of principle [Clauses 39-40], buried deep in Magna Carta, was given no particular prominence in 1215, but its intrinsic adaptability has allowed succeeding generations to reinterpret it for their own purposes and this has ensured its longevity. In the fourteenth century Parliament saw it as guaranteeing trial by jury. Sir Edward Coke interpreted it as a declaration of individual liberty in his conflict with the early Stuart kings and it has resonant echoes in the American Bill of Rights and the Universal Declaration of Human Rights.’ Respecting the baronial voice in selection of members of councils: Clause 61 was removed in later versions of the Magna Carta, and briefly reinstated in the Provisions of Oxford before it was annulled by King Henry III. The councils described were a council of 24 members (half selected by the barons and half by the king) which in turn selected a royal council of 15 members.

67 In reality, historians and other scholars have argued, the Magna Carta of 1215 was neither unique nor especially effective in its time: It was directly influenced, for example, by the Charter of Liberties in 1100, in which King Henry I stated specific areas wherein his powers were limited. And King Henry III had it annulled by the Pope within weeks. It was watered down in subsequent modified versions in the thirteenth century – in 1216, 1217, 1225 (when it was first passed as law), and 1297. At the same time, it is recognized as a fundamental and far-reaching constitutional document and inspirational model, in England and in countries which were former English colonies. As Plucknett stresses, in Concise History, supra, pgs 23, 25-26, the Magna Carta has been highly important as an enduring myth of political rights gained by treaty, and as a model for reforming the law by means of a written document: This ‘sober, practical, and highly technical document’ has ‘from that day to this … been held in the deepest respect both in England and America’, both for the powerful myth it inspired of a ‘successful opposition to the Crown which resulted in a negotiated peace representing a reasonable compromise’, and for ‘the idea that by means of a written document it was possible to make notable changes in the law’.

68 Maddicott, pg 8
Knights were also apparently joining barons in raising other grievances too: According to Maddicott, *supra*, pg 8, the records show that, after Magna Carta, knights were clearly attending *parlements*, and joining barons in refusing consent to taxes, and no doubt also in raising grievances and claiming customary rights; until 1265, they were summoned to attend by Sheriffs (appointed by the king), and after that date, selected by election by their local communities.

Maddicott (pgs 1-2) describes this debate as creating a ‘parliamentary politics’ that was ‘the periodic focus of the whole political system and the whole political community’, and describes (pg 1) a typical Great Council or parliament of the ‘years around 1240, the middle years of Henry III’: ‘What was parliament like at this stage? Well, it was primarily an assembly of the king’s great men: about 50 to 80 magnates, the leading churchmen, and the king’s chief ministers, like the chancellor and the treasurer. It met regularly at Westminster, usually two or three times a year, to advise the king and discuss the nation’s business – so it was already a political assembly, thoroughly involved in affairs of state.’ Maddicott also describes (pg 3) ‘two interesting points’ about the famous ‘non-baronial’ *parlement* of April 1254, called by the regents of the king who was out of the country – first, that two knights had been summoned from each county, chosen for the first time by local election rather than by a sheriff, and second, that the tax money the king requested was not paid – as indicating that ‘knights were identified with fairer local government and also reckoned to be a force in politics, men who could bring forward the grievances of their constituents and were not pushovers when it came to granting taxes.’

Maddicott (pgs 3-4) describes the main features of the ‘baronial reform movement’ (the establishment of the ‘baronial council of fifteen’ which ‘took power out of the king’s hands’) as a ‘revolutionary change’ in the country’s government which produced, in the baronial *parlements* of 1258-59, two major constitutional documents (the Provisions of Oxford of 1258 and Westminster of 1259) which addressed local grievances about the king’s misgovernment and formalized parliamentary processes and the limits of royal power – and as evidence that ‘parliament was central to the reformers’ plans. It was part and parcel of their scheme for imposing *checks on royal power*; it provided a platform for the working out of legal reforms; and its meetings three times a year created opportunities for the voice of the political community to be regularly heard.’

‘Phantom *parlements*’, per Maddicott (pg 5): Competing *parlements* were called in 1261, first by Montfort to assemble at St. Albans and then by the resurgent King Henry III for the same time at Windsor. It is unknown whether either actually occurred. But what is significant about this competition is that (1) the knights’ support was sought by both sides (a large body of knights were summoned to these *parlements*, Montfort inviting not two as had been previously done but three per county, and they were most probably to be selected by local election), and that (2) the knights were not there to grant taxes (in accordance with their feudal duty and their customary or Magna Carta rights) but to discuss political business.

This was the battle of Lewes, following which King Henry III ‘agreed to the "settlement" or Mise of Lewes (May 14, 1264), the terms of which have been lost to history but which functioned as a kind of constitution of government going forward’: Constitution Society website, URL <http://www.constitution.org/sdm/sdm_reforms.html> (updated 2013/3/31). But battles between absolute monarch and rebel barons continued throughout the 1250s and 1260s, and baronial codes were repeatedly prepared, agreed to, and then annulled by the king: *id.*

Maddicott (pg 6) points out that Montfort’s baronial support had fallen away and he was obliged to seek knightly support, and elaborates that the knights were now ‘playing a political role which has nothing to do with their tax-granting role’ and which involved them in ‘political affairs at the highest level’, and that Montfort was ‘prepared to go a long way’ to meet the counties’ demand for ‘fair and equitable government’, including by granting them the power to nominate the county sheriff (the ‘key figure in local government, and usually the most unpopular’). The new constitution affirmed the earlier Provisions of Westminster, which had addressed such local grievances. With respect to numbers, Maddicott puts it that the number of knights was ‘far more than the likely number of magnates and churchmen’: Four knights were summoned from each county, more than the two knights per county usually summoned before, and more even than the number of three knights per county that had been summoned to the 1254 *parlement*. 
The 1265 parlement was summoned on December 14, 1264, to convene on January 20, 1265 at Westminster Hall in London, which it did. It dissolved after less than a month on February 15. Time was required before it could convene, for conducting elections, communication, and transportation: Montfort sent writs out to each county and a select list of boroughs or towns, requesting each to elect two representatives (2 knights from each county, 2 burgesses or gentry from the boroughs or towns) to send as their representatives to the parlement: Constitution Society website, maintained by Jon Roland of the Constitution Society: URL (updated 2013/3/31): http://www.constitution.org/sdm/sdm_reforms.html>

Respecting the wealthy towns, Maddicott, (pg. 8) speculates that gentry or burgesses ‘may well have been summoned to at least some of the pre-1256 parlements when taxation was up for discussion’, because ‘towns were such an important source of taxable wealth’.

Maddicott (pg 7), describes two knights from each county and two gentry from each town attending as representatives of their local communities, while only 23 magnates were summoned, and further describes the composition of this parlement as ‘a partisan body of Montfortian supporters’.

Maddicott, (pgs 7-8), where he describes the ‘two main themes’ of the 1265 parlement as (1) ‘the nurturing and maintenance of the Provisions of Westminster, which embodied the main local government reforms of 1259’, and thus included affirming measures to restrain officials and promote justice in local government, and (2) ‘the working out of terms of release of King Henry III’s son Edward’. Respecting the first theme, Maddicott describes the Provisions of Westminster as having ‘come to embody all the aspirations of the localities for justice in local government and in particular for restraint on local officials.’ Maddicott again notes the special interest in the Provisions of Oxford which local representatives had – they raised, for example, the grievances of counties that ‘felt themselves heavily burdened by defence costs incurred in the French invasion’ – and he notes Montfort’s care to respond to them, including by paying for their representatives to attend the parlement.

Maddicott’s focus is on the importance of the change in the position of the knights, as lesser noblemen who appear not to have been present or influential in the early Great Councils and parlements, but became increasingly prominent members of them (in the 1250’s parlements and clearly in 1265), supported and elected by their local communities. Many centuries later, this important change shifted to ‘commoners’ – the vast majority of citizens.

The numbers of knights and gentry increased from two knights from each county, to three knights, to two knights and two gentry or commons, while the numbers of magnates or great barons decreased: Maddicott, pg 7.

Madison’s point (pg 3), respecting the baronial council of 1258-59: this revolutionary change ‘resulted from the misgovernment of the country, as the reformers saw it, over the previous twenty years.’

Maddicott (pg 3): the longer-term importance of the 1265 parliament is its part in a continuum of developments in the history of the medieval Parliament: Parliament had evolved from ‘the great councils of Anglo-Norman and Angevine England’, in the reigns from William to Edward I, when noblemen were summoned on the basis of tenure, as the king’s tenants-in-chief, and were involved in largely consensual discussions and the granting of taxes. The parlement called by de Montfort in 1265 was the forerunner of the so-called Model Parliament called by Edward I in 1295 (often credited as the first ‘representative’ Parliament), by first summoning a Commons of locally-elected gentry or burgesses to represent their local county or town.

Maddicott, pgs 10-11

Maddicott, pg 2: ‘So what we can see here is how, from the 1230s onwards, parliament is becoming an occasion, not just for political discussion, as in the twelfth century, but for political disputes. It’s a political assembly characterised by real debate between the king and his great men. This is the origin of what you could call ‘parliamentary politics’ – and the result is that parliament acquires a much higher public profile than the twelfth-century council had ever had. Its proceedings were reported by the chroniclers, especially by Matthew Paris, and it became the periodic focus of the whole political system and the whole political community.’

Malden Capell, apparently a young student keeping a personal blog, The Morning Constitutional: A commentary on the history and constitution of the United Kingdom, URL: http://maldencapell.wordpress.com/2010/05/24/de-montforts-parliament/>, citing as source: Carpenter, D (1994) From King John to the first English Duke: 1215-1337
in Smith, R (ed., 1994) The House of Lords: A Thousand Years of British Tradition, Smith’s Peerage Publications. Quoted paragraph in full:

The men of 1258 and 1265 turned parliament from an occasion into an institution, an institution which they used as the fundamental source of authority for the government of England. Parliament moved from being a meeting which received judicial pleas and considered fiscal matters, into one in which the King met with his subjects and together considered the needs of himself and his realm and people. Parliament was the seat of discussion and decision, and the source of all reform. The ramifications of the short-lived event were enormous.

This comment seems to be inspired by Maddicott, and by the UK Parliament Website, URL: <http://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/overview/firstparliaments/>: ‘For the first few centuries of its existence, P was only an occasion and not an institution. It was called at the whim of the monarch and consisted of whoever he wanted to speak with, met wherever he happened to be, cd last as long as he wanted, and had no independent officials of its own.’

87 Henry III repudiated the 1265 parliament and resumed battle, and his army decisively defeated Montfort’s at Evesham on August 2, 1265 – where Montfort’s army was slaughtered, and he and his son were killed.

88 The king reclaimed absolute power: He summoned a parliament in a field near Kenilworth Castle, Warwickshire, which revoked most of the agreements and codes of Montfort’s 1258 and 1265 parlements, including the Provisions of Westminster, which were ‘annulled for the last time by the Dictum of Kenilworth’ in 1266: Constitution Society website, URL: http://www.constitution.org/sdm/sdm_reforms.html (updated 2013/3/31).

89 The ‘ghost of Simon de Montfort at work’; Maddicott (pg 9): Knights were likely present in Henry III’s first major parliament, in Marlborough in 1267 (since it enacted ‘the statute of Marlborough, which effectively confirmed the Provisions of Westminster’, which was very much in the interests of the knights and their communities), and knights were present in ‘most’ of Henry’s seven parliaments between 1268-1270 – no doubt due to the king’s need for their consent to taxes: ‘These parliaments were intended by the king to make money available to enable his son Edward to go on crusade. To get this money Henry had to bargain, and one major party to the bargaining were the parliamentary knights. Knights were present in most of these seven parliaments and in at least one as the elected representatives of their counties.’ (Maddicott (id), where he also notes that the knights too were interested in money matters, and in particular in ‘relief from Jewish debts’). However, Henry’s ‘last ten parliaments, in stable social conditions between 1270 and 1272, were entirely magnate assemblies’. His son Edward I ‘developed parliament into an institution for his own purposes’, continuing the tradition of magnate assemblies and summoning knights if taxes were required: in thirty parliaments held from 1274 to 1294, knights were summoned only to four, and gentry only to two of those. Note, however, that it can nonetheless be said that ‘Parliament did take on a greater role in English government under Edward I (1272-1307)’: Britannia website, URL: <http://www.britannia.com/history/docs/parliamt.html>. The ‘Model Parliament’ of 1295 is sometimes seen as the start of regular attendance by commoners: It was the first time knights were summoned after the Marlborough Parliament of 1267, and summoned as elected representatives: Constitution Society website, URL: <http://www.constitution.org/sdm/sdm_reforms.html> (updated 2013/3/31). See the writs of summons to this parliament, sent to summons 7 earls, 41 barons, 2 archbishops, 18 bishops, and 70 abbots, and also to Sheriffs to summon ‘representatives of shires and towns’ – 2 knights from each county, 2 citizens from each city, and 2 burgesses from each borough identified – ‘to be elected without delay’: Britannia.com website, Sources of British History, reproduced from The Medieval Source Book, URL: http://www.britannia.com/history/docs/parliamt.html>.

90 Maddicott, pg 10: ‘it was only in the fourteenth century that the commons, as they were then beginning to be called, were summoned regularly to parliament.’ See also Constitution Society website, URL (updated 2013/3/31): <http://www.constitution.org/sdm/sdm_reforms.html>: ‘It took some time for knights and burgesses to become a regular part of the composition of Parliament’, but ‘by 1320 commoners became an invariable part of Parliament.’

91 ‘Parliamentary reform and representation of the commons proceeded very slowly for the next several centuries’, with progress ‘impeded by four centuries of civil conflict among contending factions’: Constitution Society website, URL (updated 2013/3/31) <http://www.constitution.org/sdm/sdm_reforms.html>. ‘The evolution of Parliament was complex and long. The Parliament of 1265, and even those of the early 14th century, looked nothing
like the later institution.’: Britannia website, URL <http://www.britannia.com/history/docs/parliamt.html>. s (pg xvii) describes the English government as it was still in the 1700s, and long afterwards: In an England with a population of fewer than 10 million, of whom only about 3% could vote, ‘the country was small enough to be governed by an aristocratic oligarchy’: Parliament consisted of a House of Lords of about 200 life peers (dukes, marquises, earls, viscounts, and lords) and a House of Commons of 588 members, up to 200 of whom were there due to ‘aristocratic patronage (for example, as family, friends, and hangers-on of the peers) and the rest were there as the result of ‘some sort of contest’.

92 For example, Henry VIII wielded enormous political power, pushing laws and new taxes through a subservient Parliament; then, under Elizabeth I, Parliament strongly asserted its authority to decide law and policy.

93 Baker, pg 181: ‘English lawyers never doubted the authority of parliament to make new laws and to bind all courts, excepting only future parliaments. … Sir John Fortescue said in 1453 that ‘this high court of parliament … is so high and so mighty in its nature, that it may make law’. And Baker also relates (pg 101): ‘Until about 1540 the council was one body with one series of records; but its work was divided as convenience dictated, often by means of informal expedients.’

94 Baker, pg 179, citing ‘TFT Plucknett, 60 Law Quarterly Review at 248. (The era of the Tudor monarchs takes in the late 1400s to the early 1600s, including Henry V111, 1509-1547 and Elizabeth 1, 1558-1603.) Note that some historians, including Plucknett and Maddicott, identify the source of the concept of ‘legislation’ farther back, in the 1200s – in the Magna Carta of 1215 (and the later versions that century) and the provisions, codes, and agreements promulgated by the parlements of 1254, 1258-59, 1264, 1265, and 1297. E.g.: Plucknett describes the Magna Carta as a ‘sober, practical, and highly technical document’ which has ‘from that day to this … been held in the deepest respect’, and as standing for ‘the idea that by means of a written document it was possible to make notable changes in the law’: Plucknett, Concise History, pgs 23, 25-26. However, Baker’s perspective (that legislative decision-making originated with the Tudor Parliaments) gives meaning to the reality that the Magna Carta was nether unique nor especially effective in its time (as I have just described), and it was not until the Parliaments of a few centuries later, under the Tudors, that the legislative idea was recognized as such and put into specific and effective concrete practice. And see my text that follows and the next endnote.

95 Baker, pgs 3-4. The approach was adopted by later kings – including the Danish King Knut (1016-35). To briefly elaborate this point, which will be relevant to distinguishing political from judicial decisions and to the judicial determination of a standard of reasonable care and skill in political decision-making: Baker notes (pgs 3, 4, 9, 178) that written decrees of a sovereign have older roots in England, older than legislation and older than judge-made common law. Early Anglo-Saxon and Danish kings decreed or stated laws in writs and charters and codes of many kinds. Codes typically clarified general rules to govern specific matters, such as fixing punishments for certain wrongs, as in the earliest surviving code of King Aethelberht of Kent from about 600. And (Baker, pgs 20, 23) they could have preambles, as in a code of King Alfred of Wessex in the late 800’s, also setting out general guidelines, which started with an introduction in which the king ‘claimed that he and his advisors had studied the laws of Aethelberht of Kent, Ine of Wessex, and Offa of Mercia, together with the Bible and the penitentials of the Church, before embarking on their task.’ This approach was adopted by later kings and foreshadows some key aspects of modern legislative drafting’.

96 Baker, pgs 3-4, 9, 178: Anglo-Saxon England was then ‘still governed by custom rather than by universal legal principles’, and ‘there was no king’s law’.

97 For example, a series of statutes in the late 1200’s and early 1300’s specified certain judge-made legal processes that the king was bound to honour and preserve (Baker, pgs 20, 23). Baker also notes (pg 83) that ‘a steady stream of medieval statutes from Magna Carta onwards guaranteed that no free man should be deprived of life, liberty or property save by ‘due process of law’. These statutes were intended as legal restraints on the power of the Crown to erect new courts and jurisdictions, on the very power which had introduced the common law and its due process as an extraordinary alternative to regular local justice.’

98 The king participated in judges’ decisions: ‘the judges could reserve difficult cases for the king to decide in person or in council … [and] the king and council could give general directions to the judges’ (Baker, pg 178). The judges participated in legislative decisions: they could be consulted in drafting statutes, and the authority they
exercised in interpreting and applying legislation was akin to their authority in creating their own common law (Baker, pg 181, citing Plowden J. at fns 49 & 50).


100 Baker, pg 179

101 Sir Matthew Hale (Chief Justice of the King’s Bench 1671-1676, also a Member of Parliament, elected to the House of Commons in 1654), ‘distinguished the legislative or ‘deliberative’ function of parliament from the contentious or ‘judicative’ function.’ (Baker, pgs 180-81)

102 I.e., according to Jung’s theory of conscious functions (which I introduce and explain in Part III), an ongoing interplay between mutually influential but distinctly-different types of law-stating functions is a healthy and desirable reality, inevitable in a well-developing system, and indispensable to the differentiation of the collective consciousness or the dominant attitudes of a society.

103 Baker, pg 169; and see pg 170 (infra, note 104). An aspect of this view that has remained is, not that common law doctrine is ‘essentially immutable’, but that it is articulated in a ‘slow refinement’, and thus, with rare exceptions, only ‘incrementally’ developing or changing the law. Thus, for example, Canada’s Chief Justice wrote, in an article discussing the appropriate approach of judges to judicial review under the recently-enacted Canadian Charter, and referring to jurisprudence interpreting the Charter: ‘Where previous authority exists, changes should follow incrementally – absent the rare case where manifest error is demonstrated, such as, for example, in the Persons case.’: Hon. Beverley McLachlin, ‘Courts, Legislatures and Executives in the Post-Charter Era’, in Paul Howe & Peter H. Russell, eds., Judicial Power and Canadian Democracy (McGill-Queen’s University Press: Montreal & Kingston, 2001), pgs 63-72, at 71.

104 Baker, pg 170: ‘This view of the common law and its relation to legislation is a reflection of lawyer’s attitudes rather than of historical fact. … At no time has the common law stood still. … Changes in the law have sometimes come about through barely perceptible modifications and clarifications from case to case; at other times they have occurred swiftly and deliberately, through bold judicial decisions or reforming legislation. But never has the law been exempt from the ceaseless alteration to which all human creations are subject. Even the distinction between judicial and legislative change has not always been as fundamental as modern theory supposes. It is one of degree. The courts do make new law, but they do so within the framework of common law reasoning, whereas a sovereign legislature may legislate irrationally or unreasonably. Yet parliament has not always acted in a despotic manner. …’

105 Baker, pg 170

106 Baker, pg 170; see also pg 183: ‘Parliament cannot make bad good, nor can it make possible the impossible. But it can make bad law, and it can prescribe punishment for those who fail to do the impossible.’

107 Legislation may be based on a popular wish to use public funds to compensate everyone suffering a harm, through no fault of the public or government, but through compassion and fellow-feeling or a desire for a certain kind of equality. An example of such legislation, based not on the well-developed facts and logic of a judicial inquiry, but on the compassion and fellow-feeling of wanting to look after every person harmed by tainted blood, regardless of fault or legal responsibility, is the legislation that followed the ‘Krever Commission’ inquiry into the tainted blood scandal. The Commission found that in some cases public authorities were negligent and public compensation should be provided, while in other earlier cases they were not. The government decided, however, to compensate all those harmed by tainted blood transfusions, regardless of fault and legal responsibility, in response to a public outcry against the judicial distinction based on the factual logic of fault and responsibility. See Final Report of the Commission of Inquiry on the Blood System in Canada, November 26, 1997, Government of Canada Publications website, URL <http://publications.gc.ca/pub?id=72717&sl=0>, and Allan Rock, Minister of Health, as quoted in ‘Tainted blood scandal’, February 27, 1998, CBC News website, URL: <http://www.cbc.ca/news/background/taintedblood/>.

The Ontario government’s ‘Pit Bull Dog Legislation’ is another example of laws designed to please the public, without necessarily being sound or well-developed in facts and logic: Dog Owners’ Liability Act, R.S.O. 1990, c. D.16, as amended 2006, c. 32, Sched. C, s. 13.
Sir Edward Coke served as Chief Justice of the King’s Bench from 1613 to 1616. Coke had a ‘reputation as the greatest lawyer of the time’ (Baker, pg 145). He wrote two of the most significant and longstanding contributions to English law, the compilation of case law in *The Reports*, and the statement of the common law in *The Institutes*. He served Queen Elizabeth I and King James as Solicitor General and Attorney General, before being appointed Chief Justice of Common Pleas in 1606, and then Chief Justice of the King’s Bench in 1613. After his dismissal from the Bench in 1616, he took up a political career as an elected Member of Parliament.

Lord Ellesmere served as Chancellor from 1596 to his death in 1617. He too was an accomplished lawyer and judge, as well as a prominent diplomat and patron of arts and letters. He preceded Coke as Solicitor General and Attorney General, before being made Master of the Rolls in 1594, and then Chancellor in 1596.

Chancery had regularly decided legal questions relating to its jurisdiction over royal documents. Then the king began also referring to the Chancellor petitions he received complaining of injustice in the royal courts. Eventually these petitions were made directly to the Chancellor, as the delegate authorized by the king to exercise the residual royal prerogative to do justice. The Chancery or Chancellor’s court had become separate from the king’s council by the second half of the 1400s: the Chancellor saw his role as correcting injustice, or restoring justice when it was thwarted by the rigid common law of the royal courts, by granting remedies based on ‘conscience’, and this ‘transcendent justice’ acquired the name ‘equity’, and turned Chancery into a forum in which justice was done in individual cases by the combination of the royal prerogative and authority of religious precepts: see Baker, pgs 90, 101.)

Cases were also being brought to other new prerogative tribunals, but my focus is on Chancery, and on the point that justice in resolving disputes was based, in Chancery, not on ‘the framework of common law reasoning’ established by the judges in their courts, but on religious precepts and the ‘divine’ conscience or personal discretion of king and Chancellor.

Baker, pg 83, citing clause 39 of the *Magna Carta* of 1215, and statutes passed under Edward III, Richard II, Henry IV, and Henry VI, in his more comprehensive description of the source for this doctrine in the promise made in ‘a steady stream of medieval statutes from Magna Carta onwards’. Baker translates the guarantee as: ‘no free man should be deprived of life, liberty or property save by “due process of law”.’ See translation of Clauses 39 and 40 in *supra*, endnote - - - [45 endnotes above!]

Baker, pg 83: ‘In 1406, Gascoigne CJ said that ‘the king has committed all his judicial powers to divers courts’, and in the same year the King’s Bench declared unconstitutional the courts of the University of Oxford which by royal charter proceeded according to the Civil law of Rome’, citing the case and adding in footnote that the university courts were subsequently confirmed by statute, and abolished in 1977. Baker (also pg 83) gives another example, from the late mid-1300s: ‘In 1368 the justices at Chelmsford held void a commission to seize a man and his goods without due process.’

So, for example, when government officials exercised the prerogative authority to imprison suspects, the court responded to complaints by issuing a writ of *habeas corpus*, requiring the officials to show proof that the imprisonment complied with the guarantee that no free man would be deprived of liberty except by due process of law. If due process according to the court’s common law was not proved, the court ordered the prisoner’s release. Thus, judges responded to the exercise of prerogative power with a judge-made doctrine and judge-made remedies that asserted their judicial authority over the laws and actions of monarchs and governments. The judges named their judicial doctrines ‘prerogative’ remedies: As Baker notes (pg. 124): ‘the extended role of these writs was based on equity, but it was more conveniently attributed by common law courts to the royal prerogative’. And (pgs 126-27, citing a 1619 case): ‘Coke’s successor, Montague CJ, tried to dispel the feeling that the writ [of *habeas corpus*] was being used to counter prerogative power by explaining that it was itself “a prerogative writ, which concerns the king’s justice to be administered to his subjects; for the king ought to have an account why any of his subjects are imprisoned.”’ Thus, the name ‘prerogative’ was a strategic but misleading one for the judges to use, as the writs were equitable remedies developed by the common law judges, rather than exercises by the king of the prerogative – the very law-making power the writs were used to curtail.

See Baker’s comments (pgs 123-24) on the common law development of the principle of ‘the rule of law’.
See Baker, pg 123: ‘From about 1600 there was a tendency to transfer this surveillance [of prerogative government and judicial actions] to the King’s Bench [from the council].’

Baker, pg 145: ‘In the 17th century the judiciary came into head-on collision with the Crown on several occasions.’ As Baker points out, at pg. 36: ‘the superiority of the ancient common law courts was threatened by the jurisdiction exercised by the king’s chancellor’. This was a very practical and mundane reality behind the struggle between the common law and Chancery courts (and between the two common law courts of King’s Bench and Common Pleas themselves). It echoes what I am focusing on, which is the law-making conflict at the heart of that struggle, between the established courts with their judicial process, and the newer courts such as Chancery, claiming the authority of the king’s prerogative or executive power and applying various forms of that political authority and process of law-making. Biographies of Coke and Ellesmere are summarized supra, note 108.

Coke made the assertion in the report of a 1610 case: Baker, pg 182, notes that this bold statement ‘has been found written out twice in his own hand’, citing, in fn 52, Dr Bonham’s Case (1610) 8 Co Rep 114, 118.

As quoted by Baker, pg 123, citing case in fn 16; words in square brackets are my own summary of Baker’s.

Baker, pg 83, citing cases, and pgs 144-45, citing Acts of the Privy Council 1615-16 (1925) at pg 607.

As quoted by Baker, pg 124, citing text sources, spelling modernized

Baker, pg 182, fn 53, 54.

Baker, pg 92: ‘Lord Ellesmere … repeated Wolsey’s error of antagonizing the judges. He encouraged suits in Chancery after judgment had been given at common law, and a backlog of thousands of cases piled up. Any criticism of himself he represented as an attack on the monarchy as established by God.’

Baker, pgs 93, 144


All done in 1616, within months of Coke’s answer. Coke was removed from office without reasons but clearly for defying royal authority: Baker, pgs 93, 145

Francis Bacon (1561-1626) is better known today as a scientist and essayist than as a common law lawyer and Chancellor. As with Ellesmere and Coke, Bacon served as Solicitor General and Attorney General before his appointment. He was Chancellor from 1618 to 1621, when he was removed from his position, fined, and briefly imprisoned, upon conviction of bribery in a corruption scandal; he later insisted on his innocence and described his confession as having been made to protect the king.

The common law courts also prevailed in the 1600s over other conciliar courts closely tied to government, such as the Court of Star Chamber, as Baker notes, pgs 101-02: ‘In 1641, after an unfortunate decade in which the Star Chamber became too closely involved in politics, conciliar jurisdiction in the old sense was swept away forever.’

Baker, pg 93, citing an 1670 case.

Baker, pg 145-46: ‘Contemporaries saw the solution to be the granting of life tenure to judges. … In 1642 Charles I was persuaded to appoint judges during good behaviour … but from 1668 there was a quiet return to grants during pleasure’, until eventually ‘… after 1700 tenure during good behaviour was guaranteed by statute.’ (citing, at pg. 145, Act of Settlement, 12 & 13 Will III, c. 2] … ‘and since 1760 continuity in office after the death of the sovereign has been secured by statute.’

Baker, pgs 92, 93, noting Ellesmere’s collusion in Coke’s downfall: By 1616 Coke was in ‘political disfavour’ and Ellesmere ‘combined with Bacon and Buckingham to engineer his downfall’ and, together with Bacon, ‘persuaded the king’ to issue the royal decree confirming the Chancellor’s judicial authority to decide cases after common law judgments. Baker also focuses on the dispute as one between courts over the division of judicial functions between them; e.g. at pg 93: ‘never again did the relations with the other courts become so strained that the division of functions led to any hostility’.

J.J. Spigelman, C.J.N.S.W. (Chief Justice of New South Wales, Australia), Lions in Conflict: Ellesmere, Bacon and Coke: The Years of Elizabeth (address to St. Thomas More Society, Sydney, Australia, 14 Nov 2006, URL

The conflicts between Coke, on the one hand and Ellesmere and Bacon on the other, would be repeated in the next generation in a vitriolic dispute between Thomas Hobbes, who had been Bacon’s secretary, and Sir Mathew Hale, Coke’s successor as Lord Chief Justice. Similar issues would be engaged [in the next century] between Blackstone and Bentham and between Jefferson and Marshall.

They feature in contemporary debates over judicial activism, bills of rights, the scope of judicial review and the principles of statutory interpretation.

Hobbes and Hale: Thomas Hobbes (1588–1679, Chancellor Bacon’s secretary 1623-24), among England’s most controversial and influential philosophers, was critical of the dangers inherent in democracy and advocated the absolute authority of the monarch and the supremacy of state over religious authority. Protected by the king and threatened by a hostile Parliament, his major work, Leviathan (1651), was written in exile in Paris. Matthew Hale (1609-1676, Chief Justice 1671-1676) had been a prodigious lawyer and scholar, a Member of the Cromwell Parliaments, and a pious, traditionalist judge who conducted some of the last witchcraft trials, convicting and condemning to death two accused women in 1664.

Blackstone and Bentham: William Blackstone (1723-1780) – judge of the Court of Common Pleas (in the 1770s), as well as a law lecturer, Member of Parliament, and author of the highly successful Commentaries on the Laws of England (1765-69) – opposed elevating ‘the judicial power above that of the legislature’ as something that would be ‘subversive of all government’ [as quoted by Baker, pg. 183, citing Blackstone’s Commentaries, vol. 1, p. 90]. Jeremy Bentham (1748-1832), philosopher and great social reformer (and ‘eccentric genius’, in Baker’s phrase, pg. 186), trained as a lawyer but never practiced law, advocated a ‘utilitarian’ theory of government, and proposed a wide range of highly original and radical social reforms (such as equal rights for women, abolition of slavery, decriminalization of homosexuality, animal rights, secularization of education). He was frustrated with the ineffectual complications of the judge-made common law and derisively critical of Blackstone’s conservative view of the role of the courts.

Jefferson and Marshall: The conflict between President Jefferson and Chief Justice Marshall is reflected in Marshall’s reasons in the seminal judgment of the United States Supreme Court in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), which I discuss in Chapter 2. In the Marbury case, the Court held that a presidential promise of appointment could be withdrawn at a president’s will, because political appointment-making was a discretionary prerogative or executive power. At the same time, Marshall also reasoned that, in interpreting and applying the law set out in the Constitution, it was up to the court, not the government, ‘to say what the law is’ (5 U.S. (at 163).

132 The tumultuous 1600s in England included transformative events which bear on the establishment of such principles as the supremacy of Parliament – the civil war, the trial and execution of the king, the restoration of the monarchy, the Glorious Revolution – but which I do not touch on in my thesis.

133 Baker, pgs 45-46, the courts being Common Pleas and King’s Bench

134 Foreman, supra note 62, pgs vxii-vxiii

135 Foreman, supra note 62, pgs xviii (‘roughly 200’ peers), 74 (‘only 150’ peers), during the late 1700s

136 Foreman, supra note 62, pgs xviii, 58: ‘… women did not have the vote, were barred from the House of Commons, and could not hold an official position’ (xv111); ‘women were banned from the gallery [the visitors’ gallery in the House of Commons] in 1778’ (58) – although a woman such as Georgiana Spenser, the Duchess of Devonshire, could be ‘a passionate contestant in the political arena’, by ‘campaigning, scheming, fund-raising, and recruiting’ for a political party.

137 Foreman, supra note 62, pgs vxii-vxiii, 6; in full:

‘While the two hundred or so peers sat in isolated splendour in the Lords, their sons, cousins, brothers-in-law, friends, and hangers-on filled up the House of Commons, the lower chamber of Parliament. Britain was a democracy in the sense that every five years a general election took place and voters elected 588 members of Parliament, known as MPs, to sit in the Commons. However, property restrictions kept the number of voters small – roughly three hundred thousand, or 3 percent of the population. There were all kinds of legal anomalies and customs which enabled peers of sufficient
wealth to actually own a seat outright, or have so much influence in the constituency, that democracy did not enter into the equation at all. The peerage spent a great deal of money and effort trying to control as many seats in the Commons as possible. But aristocratic patronage never extended to more than 200 MPs, leaving the majority open to some form of contest.’ (pgs xvii–viii)

‘This was the age of oligarch politics, when the great landowning families enjoyed unchallenged pre-eminence in government. While the Lords sat in the Chamber known as the Upper House, or the House of Lords, their younger brothers, sons, and nephews made up most of the Lower House, known as the House of Commons. There were very few electoral boroughs in Britain which the aristocracy did not own or at least have a controlling interest in. Since the right to vote could only be exercised by a man who owned a property worth at least forty shillings, wealthy families would buy up every house in their local constituency. When that proved impossible there were the usual sort of inducements or threats that the biggest employer in the area could employ to encourage compliance among local voters. Land conferred wealth, wealth conferred power, and power, in eighteenth century terms, meant access to patronage, from lucrative government sinecures down to the local parish office, worth [pounds] 20 ($1,980 today) per annum.’ (pg 6)

138 Baker (pg 187) refers to the terms developed by law professor Albert Venn Dicey (1835-1922), in Dicey’s characterization of this as an era of legislative initiatives of two types: First came a wave of “individualist” legislation promoting individual rights (about 1825-1870); then came an extensive wave of “collectivist” legislation promoting group rights and state protections (from about 1865), which vastly extended Parliament’s role.

139 This ‘collectivist’ legislation (Dicey’s term quoted by Baker, id) was associated with the abstract theory of Jeremy Bentham, the ‘eccentric genius’ (1748-1832), who sought to replace the clumsy messiness of the common law with a purely rational legal system structured on “utilitarianism”, or the basic principle that the goal of all law should be to provide the greatest good for the greatest number of people (see Baker, pg 186). Bentham’s theory was influential after his death, in the reforms that began in the latter half of the 1800s.

140 By late century, following a law commission recommendation, Chancery’s jurisdiction was abolished, its equitable principles were incorporated into the law applied by the common law courts, and the main courts were unified into one High Court (initially with various divisions, such as Queen’s Bench Division and Chancery Division). The rules governing pleadings were reformed, following the report of a Parliamentary committee, first by judges and then more thoroughly by Parliament. The unifying of courts and reform of pleadings were accompanied by a movement away from civil juries. Baker (pg 98): The Common Law Procedure Act 1854 assimilated the work of the various courts to a large extent; a Judicial Commission reported in 1869 that the division of jurisdictions itself should be abolished and law and equity fused; procedural fusion was the main object of the Judicature Acts of 1873 & 1875, which abolished both Chancery and common law Courts, and established a single High Court. Baker (pgs 78-80): details of series of reforms, culminating in the Rules of Court attached as a schedule to the Judicature Act 1875, which set out a system of pleadings still in use over a century later, with its long-familiar general rule governing pleadings: statements of claim and defence which contain in numbered paragraphs ‘as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved’. The House of Lords was given supreme appellate jurisdiction, as a specific and independent judicial bench rather than a parliamentary chamber, by statute in the 1870’s (Baker pg 123). As noted earlier in my text, most of Chancery’s equitable procedure ultimately prevailed over the common law process (e.g., use of affidavits, trial by judge alone, examination of parties as witnesses, remedies other than damages) (Baker, pgs 96-97). And as Baker put it (pg 25): The ‘axe of uniformity’ fell on England’s remaining local courts – city and borough courts – a century later, with the Courts Act 1971. The particular divisions within the High Court changed by statute over time, e.g., the Probate Divorce and Admiralty Division was abolished by statute in 1970 and its jurisdiction transferred to the Queen’s Bench Division (Baker pg. 108).

141 Baker, pgs 80-81: The Common Law Procedure Act, of 1854, enabled parties to consent to leave issues of fact to the court, reflecting experience which ‘suggested judges were more likely to understand the factual issues than laymen and were as competent to assess evidence’. Trials by judge alone were agreed to so often that ‘by the end of the 1800s only half the civil trials in the High Court were by jury’ (pg 80), and in the 1900s civil jury trials largely
disappeared. Interestingly (pg 81): ‘Some judges were bewildered by the dual role imposed on them, and for some years it was possible to speak of a judge ‘misdirecting himself’.’

142 ‘The people’ – see my comments earlier in this chapter on the gradual expansion of the electorate to include essentially all adult citizens.

143 Kings and queens came to be restricted to the role of constitutional monarchs, as heads of state rather than heads of government, with their executive authority limited to mostly ceremonial and symbolic aspects of the ancient royal prerogative. It is the Prime Minister who now holds the residue of the royal prerogative – the monarch’s original inherent, absolute, exclusive, personal discretion – and who has his or her own private inner circle of loyal advisers.

144 The American and Canadian nations, established in two different centuries, separated by eighty years, began, in some notable respects, with a different inheritance from the English cultural and social structure. The American Constitution was adopted in 1787, the new nation coming into existence on March 4, 1789; the Canadian Constitution was enacted in 1867, the new nation coming into existence on July 1, 1867. Respecting the different cultural contexts underlying the Canadian and American constitutions, see the comparison between the respective guiding ideals of ‘liberty; and ‘my brother’s keeper’ in Samuel V. LaSelva, ‘To Begin the World Anew: Pierre Trudeau’s Dream and George Grant’s Canada’, in Graeme Mitchell, Ian Peach et al (eds), A Living Tree: The Legacy of 1982 in Canada’s Political Evolution (Markham, Ont.: LexisNexis Canada, 2007), pgs 1-30, at 26-30

145 With one partial caveat, Canadian courts today exercise the same distinct type of decision-making process that was developed in England, in a court system consisting of a series of independent courts in each province and territory, and two federal courts, including a final general appellate court, the Supreme Court of Canada. The one partial caveat respects the Province of Quebec, where the provincial substantive law descends not from English common law but from pre-Napoleonic French civil law. I do not go into this distinction in this thesis. Despite differences in such details, if Jung’s theory and my adaptation of it are correct, judicial decision-making in Quebec courts would be essentially the same type of specialized process as judicial decision-making in the common law courts and produce the same characteristic rational viewpoint, and any striking differences in the substantive law that results would be telling reflections of the effects of different social values being brought into the same type of rational decision-making process.

146 The courts include the common law courts of original jurisdiction in the provinces, descendants of the English common law courts, and the various courts referred to and authorized in the Constitutions of 1867 and 1982, including the statutory courts provided for in the 1867 Constitution, such as the Supreme Court of Canada.

147 The Senate cannot originate money bills or veto legislation, and can ultimately only speed or delay their passage; I do not consider the role of the Senate in my thesis. It does not alter the critical psychology perspective I propose on judicial and political decision-making processes, although reforming the Senate may well be a positive step towards improving the democratic nature of the political system.

148 My argument that the executive (including prerogative) discretion of Prime Minister and provincial premiers is as important, and political, as legislative decision-making by governments, is discussed in Chapter 7.


150 Id

151 Respecting finding facts from evidence: In a jury trial, finding facts and coming to a verdict are done by the jurors according to the judges’ directions on the law, a distinction I have noted earlier and do not elaborate, as it does not alter the points I am making. As for the testimony of witnesses, they testify (under oath or affirmation) as to their own personal experience (or, in an extension of the same principle, their personal knowledge of documents or other material, or their personal expertise and opinion) and can be cross-examined on their testimony, which can also be challenged by the testimony of other witness. The requirement of witnesses to present evidence that they stand behind and can be tested on, applies not only to direct personal experience and knowledge, but also to opinion, documentary, and demonstrative evidence. Only if a fact is not contested may it be accepted by agreement or by judicial notice – even an official or routine document (such as a birth certificate or weather report or wedding
photograph) must be identified by a sworn witness if it is contested. Experts, too, are sworn witnesses, whose qualification to give an opinion on a particular topic must be proved, and who can be cross-examined on both their qualification and their opinion, and challenged by the opinions of other expert witnesses. Documentary and demonstrative evidence, too, if contested, must similarly be introduced through witness testimony. ‘Sworn’ now includes an alternative non-religious oath, but the personal promise is the same – to tell the truth – with the aim to reinforce the reliability of testimony through sacred belief or through personal integrity.

152 The quoted phrase comes from dictionary definitions, discussed in Chapter 7.

153 The definition of politicians as people engaged in ‘the art or science of government’ is discussed in Chapter 7.

154 This point is important in the context of addressing the problem of bias, referred to in Part III: To expect greater compassion and mutual support between people, simply by ensuring they become acquainted with each other and live and work together, does not seem to accord with history and human behaviour. As the hostility of civil war attests, feuds between neighbours and even families can be as harsh and intractable as feuds between strangers. While familiarity is often put forward as an antidote to bias, familiarity alone is insufficient, and can also ‘backfire’ and breed contempt. Something more than familiarity is needed to address unwanted bias and prejudice, something akin to shared personal likes and dislikes, affection, fellow-feeling, mutual sympathy.

Respecting temporary and rehabilitative ‘banishment’ from the community, and a proposal by the Samson Cree Nation to turn to ‘an ancient practice to deal with modern day ills: banishment’, see supra, endnote 30.

CHAPTER 2 NOTES


156 I rely particularly on the detailed comparison of American and Canadian constitutional contexts and developments made by Professor Kent Roach (whose dialogue theory I examine in Chapter 3) in The Supreme Court on Trial: Judicial Activism or Democratic Dialogue? (Toronto: Irwin Law, 2001) [herein referred to as SCOT].

157 The American and Canadian nations, established in two different centuries, separated by eighty years, began, in some notable respects, with a different inheritance from the English cultural and social structure. The United States Declaration of Independence was adopted at a Constitutional Congress on July 4, 1776, following which the then-thirteen states adopted the Constitution at a Constitutional Convention in Philadelphia in 1787, which was ratified by special conventions in each state by June 21, 1788, with the new nation coming into existence on March 4, 1789: Miscellaneous Papers of the Continental Congress, 1774-1789, and Records of the Continental and Confederation Congresses and the Constitutional Convention, 1774-1789, Record Group 360; National Archives of the United States. The Constitution has been amended 27 times to date, the first ten amendments (Amendments 3 through 13) passed together in 1791 and collectively known as ‘The Bill.

158 The American constitutional structure is modeled to a large extent on the English parliamentary structure, but with some notable differences; I do not go into these differences, and I do not address French philosophy and practice and other influences on the American governmental structure. Nor do I address the topic of national versus state power, which has been a recurring and strong theme in the conflicts between courts and governments in the United States, as it has been in Canada. The critical psychology analysis I will present in Part Three of the Thesis applies to this topic as to any other topic of conflicting decisions.

159 The amending formula, set out in Article 5, requires large or super-majority votes for amendments to the Constitution: proposals must be either made in Congress by two-thirds of the quorum or made in a convention called by two-thirds of the States, and must be ratified by three-quarters of the State legislatures. To date, 27 amendments have been passed. Many more have been proposed but failed to gain the necessary ratification or have not yet done so, such as the proposed ‘Jackson Amendments’ (several amendments proposed simultaneously by Representative Jesse Jackson in 2005), seeking a wide range of rights, including rights to health care of equal high quality, public education of equal high quality, decent housing, and a clean and safe environment.

160 The first ten amendments passed, which passed together in 1791 when they were ratified by three-quarters of the States, are called collectively ‘The Bill of Rights’.

161 Relevant provisions of the Bill of Rights:
First Amendment: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.’

Fifth Amendment (opening words and ‘due process of law’ provision): ‘No person shall … be deprived of life, liberty or property, without due process of law …’

Ninth Amendment: ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’

Other provisions of the Bill of Rights reflect social context in which they were passed, such as the Second Amendment (‘A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.’) and the Third Amendment (‘No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.’)

162 As Roach points out more particularly (SCOT, supra note 156, supra note 156, pg 15): ‘The framers of the American Constitution did not stipulate clearly whether federal courts such as the Supreme Court should be able to enforce the constitution against the federal and, especially, the state governments.’ And when the ‘Bill of Rights’ amendments were added to the Constitution in 1791, they gave no explicit power to the legislatures to either limit or override the rights as interpreted by the Supreme Court.

163 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)

164 Marbury v. Madison, id., pgs 165-66: ‘By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.’

165 See Roach, SCOT, supra note 156, pg 17: President Jefferson also took the position that ‘the President could act on his own interpretation of the constitution, even if the Court reached a different interpretation.’ President Lincoln later took the same position, see infra, note 181.

166 Marbury v. Madison, supra, pg 177

167 Marbury v. Madison, supra, pg 178; Marshall USCJ reasoned, to summarize in slightly more detail, that in order to be able to apply law, courts have to resolve conflicts between laws and between laws and the Constitution, and to do so they must limit the operation of conflicting laws and must invalidate laws that are ‘repugnant to the constitution’. Marbury v. Madison, supra, pgs 137, 163, 177, 178

168 I do not focus on the issue of federal versus state jurisdiction, as noted above, but I want to note here that Marshall USCJ further justified the Court’s final say on the meaning of laws and the Constitution as necessary for political stability, to avoid endless disputes between federal and state jurisdictions by having one central, final, authoritative source for interpreting the Constitution. For this rationale, see Suzanna Sherry, ‘Politics and Judgment’, Missouri Law Review (2005), Vol. 70, 973-987, at pgs 973-75 [herein referred to as ‘Sherry’].

It is also important to note that Marshall USCJ’s assertion that America must have a ‘government of laws, and not of men’ (supra, pg 163) has been asserted in both the political and judicial contexts, i.e., by Presidents such as Lincoln and Roosevelt, as well as by Chief Justices such as Marshall and Warren. This is not an especially helpful distinction in practice, from the critical psychology perspective that I will introduce: All laws are made by ‘men’, of course, as ‘men’ make both judicial and political decisions about the law, and thus this assertion fails to identify and clarify either of the two decision-making contexts; it does not distinguish what criteria ‘men’ use to make their decisions about the law, and thus what distinct type of rational perspective they bring, either as judges or as politicians, to the law.

169 Little opposition was raised to the Court’s decision: Sherry, id., pgs 973, 974

170 The Supreme Court invalidated 50 national and 400 state laws of this nature between 1889 and 1937 (including various legislative attempts to protect workers by setting minimum wages and maximum hours), as infringements of freedom of contract: see, e.g., Roach, SCOT, supra note 156, pg 19, citing in footnote 10, Gary McDowell Curbing the Courts (Baton Rouge: Louisiana State U. Press, 1988) at pg 3.

171 Lochner v. New York, 198 U.S. 45 (1905), in which the Court was interpreting the ‘liberty’ guarantee in the Fourteenth Amendment, relating to state rather than federal government powers. A New York statute limiting
bakery work hours (to ten hours a day and sixty a week) was challenged by employers. The Court struck down the law, interpreting it as a limit on employers’ freedom of contract and thus on their unfettered ‘liberty’, which was not permissible under the Constitution, not even for social welfare purposes. In response to this and similar decisions, Congress sought unsuccessfully to amend the Constitution to empower it to override the Court’s invalidation of its labour laws.

172 In Adkins v. Children’s Hospital, 261 U.S. 525 (1923), involving federal labour legislation and the ‘liberty’ guarantee in the Fifth Amendment, the Supreme Court came to the same conclusion it had come to in the Lochner case, and struck down a federal minimum wage law on the basis that ‘freedom to contract relating to labour’ was part of the ‘liberty’ protected by the Constitution and could not be restricted by the federal government under its police power in order to protect the public health and general welfare. As Roach explains (SCOT, supra note 156, pg 19), there was not enough support for the ‘radical constitutional change’ of amendments that would allow Congress to overrule the Supreme Court on constitutional decisions; thus: ‘The Court was reading its economic preferences into the constitution and having the last word when doing so.’ The Supreme Court decisions in Lochner and Adkins are oft-cited examples of how the Court effectively halted protective labour policies, when Congress was unsuccessful in its attempts to amend the Constitution to enable its legislation to proceed.


174 Roach aptly describes Roosevelt’s veiled threat as ‘desperate and dangerous’, because it raised the possibility that judicial independence would be undermined by political control of the judiciary (SCOT, supra note 156, pg 21). For King James’s response in replacing Chief Justice Coke in ‘The Explosion of 1616’, thus asserting political control over judicial decision-making, see my overview in Chapter 1.

175 West Coast Hotel v. Parrish, 300 U.S. 379 (1937), the first of a series of Supreme Court judgments, following Roosevelt’s broadcast, which upheld protective labour laws. In West Coast Hotel v. Parrish, a hotel maid sued to recover the shortfall between the wage she was paid and the minimum wage mandated by the Minimum Wages for Women Act, passed by the State of Washington in 1913. The majority of the Court upheld the law, thus expressly overruling the contrary judicial precedent it had established in Adkins v. Childrens’ Hospital, supra note 172.

176 West Coast Hotel v. Parrish, id., per Hughes USCIJ, at 398: judicial notice was taken of these facts.

177 West Coast Hotel v. Parrish, supra note 175, per Hughes USCIJ, at pgs 398-99, where he refers to and quotes from Nebbia v. New York, 291 U.S. 502, at pgs 537-38.

178 Even if the government’s decision might be ‘irrational and unreasonable’, as Baker put it, as discussed in Chapter 1, citing Baker, pgs 170, 183.

179 This shift in the divided Court’s interpretation of protective labour laws was followed, until the 1950’s and the ‘Warren Court’ era, by an interlude of vacillating decisions. See Roach, SCOT, supra note 156, pgs 22-23, characterizing the Court as ‘lurching’ from restraint to activism and back again, deferring to the government in one case, asserting its contrary interpretation in another. Thus, for example, in Minersville v. Gobitis, 310 U.S. 586 (1940), the Court upheld a law requiring the flag to be saluted in schools, reasoning that it was a government policy matter and the Court could not be “the school board for the country”; then, in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), the Court struck down such a law, reasoning (pg 638) that it discriminated against religious minorities and “the very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials.”

180 Dred Scott v. Sanford (1857), 19 Howard 393 (USSC.). Slavery had been banned in certain American territories. The Court’s judgment upheld the right to own slaves as a personal ‘property’ right, and also ruled that a freed slave had no rights of citizenship.

181 Quoting from President A. Lincoln, First Inaugural Address, delivered March 4, 1861, The Avalon Project of Yale Law School’s Lillian Goldman Library website, URL accessed Aug 10, 2011: <http://avalon.law.yale.edu/19th_century/lincoln1.asp>. Roach notes the ‘careful distinction’ Lincoln drew between the authority of the Court to resolve a personal dispute over an issue and the authority of the government to address

182 The 13th Amendment to the United States Constitution (abolishing slavery) was ratified in 1865; the 14th and 15th Amendments (granting citizens ‘equal protection of the laws’ and the right to vote regardless of ‘race, colour, or previous condition of servitude’) in 1870.

183 Brown v. Board of Education, 347 U.S. 483 (1954); ‘the Warren Court era’ refers to two decades from the 1950’s to 1970’s when Earl Warren (a Republican governor appointed by President Eisenhower) was the Chief Justice of the Supreme Court, and presided over a bench which produced a series of progressive civil rights judgments, from mandating racial integration in Brown v. Board of Education, 347 U.S. 483 (1954), to detailing abortion rights in Roe v. Wade, 410 U.S. 113, (1973, delivered shortly after Warren USCS’s retirement).

Early cases, of narrow interpretations limiting the 14th and 15th Amendment right, before the Warren Court era, include The Civil Rights Cases (1883), 109 U.S. 3 (permitting discrimination by private individuals or organizations, as distinct from states); Plessy v. Ferguson (1896), 163 U.S. 537 (holding that equal protection of the laws permitted “separate but equal” segregated facilities for blacks and whites); Berea College v. Kentucky (1908), 211 U.S. 45 (permitting states to prohibit private schools from admitting both black and white students). There were also cases in which the Court ruled the other way, with a more liberal interpretation: e.g. Strauder v. West Virginia, (1880), 100 U.S. 303 (ruling blacks must be permitted on juries).

184 There were both Congressional and state political initiatives (including unsuccessful attempts by Presidents Nixon and Ford) to nullify or curtail the Brown decision, and many schools ignored the Court’s judgment and remained segregated a decade and more after Brown; see the ‘forced busing’ decisions, including Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1954), Cooper v. Aaron, 358 U.S. 1, 18 (1958), and Milliken v. Bradley, 418 U.S. 717 (1974), where the issue was still being addressed more than twenty years later. There was also academic discontent with Brown, and with the Warren Court’s ‘progressive activism’ in general; Roach refers, e.g., to the criticism by American constitutional scholar Alexander Bickel (relating to the Court’s contraceptives decision, discussed below), ‘that the Warren Court was maximizing its law-making power by making sweeping statements that were not necessary to decide the particular dispute before it and were not sufficiently related to its past precedents’: Roach SCOT, supra note 156, pg 26, footnote 42, citing Alexander Bickel, The Supreme Court and the Idea of Progress (New Haven: Yale U Press, 1978).

185 See Roach, SCOT, supra note 156, pg 24, note 31, citing Cooper v. Aaron, 358 U.S. 1 (1958) at 18 (one of the Court’s decisions following up Brown v. Board of Education with orders to actively enforce that decision), respecting the effect of Warren USCS’s assertion that the Court is ‘supreme in the exposition of the law of the Constitution’.

186 The longstanding exclusion of women from the franchise was upheld by early Court judgments, and it was social activism and political change that gained women the right to vote: A proposed ‘Suffrage Amendment’ gained the support of President Woodrow Wilson and passed in the House of Representatives, but was narrowly defeated in the Senate in 1918. A strong women’s suffrage campaign was then mounted in the immediately following national election; many of its supporters were elected to Congress; in 1919, the new Congress passed an amendment giving women the right to vote; it was ratified by two-thirds of the states in 1920, and passed as the 19th Amendment: ‘The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation.’ The 19th Amendment was promptly challenged when the first women registering to vote in Maryland (a state which had not ratified the Amendment). The Court upheld the law as ‘precisely similar’ to the 15th Amendment giving black men the vote in 1870: Leser v. Garnett, 258 U.S. 130 (1922), per Brandeis J, at pg. 135, for the Court. The objection that had been argued by the state was that allowing “so great an addition to the electorate” without state consent would destroy the state’s political autonomy. See also the companion case (with differing facts and arguments) heard and decided at the same time, also by Brandeis J: Fairchild v. Hughes, 258 U.S. 126 (1922). Federal versus state authority is, again, a major theme in this and other conflicts between court and government in the United States, which I do not go into.

187 Griswold v. State of Connecticut, 381 U.S. 479 (1965) (striking down a state law banning medical clinics from providing contraceptives to married couples). The decision was made by a majority of 7-2, but giving varying
reasons for the majority given by Douglas, Goldberg, Harlan, and White, JJ, as well as dissenting reasons given by Black and Stewart JJ. The majority judges gave different explanations in fact and principled logic as the basis of the constitutional protection of the ‘privacy’ right: For some, it was an ‘other’ right expressly preserved by the Ninth Amendment; for White J it came within the concept of ‘liberty’ in the Fourteenth Amendment – he reasoned that the law banning contraceptives deprived married couples of ‘liberty’ without due process of law. They also gave varying descriptions of the factual and conceptual basis for this ‘marriage privacy’ right: *per* Douglas J (on behalf of 5 judges), a right ‘older than the Bill of Rights – older than our political parties’ (pg 486); *per* White J, a basic value implicit in the Bill of Rights; *per* Goldberg J, a right that is ‘vital for the protection of “the traditional family relation” – a right as old and as fundamental as our entire civilization’ (pg 496). It was thus a pre-existing right ‘retained in the penumbra’ of the Constitution under the 9th Amendment (the 9th Amendment protects other unlisted rights ‘retained by the people’, and ‘penumbra’ refers to a semi-shaded area at the edge of a shadow, between darkness and light). The two dissenting judges, Black and Stewart JJ, held that there was no basis for reading any such ‘right to privacy’ into the Constitution.

188 *Roe v. Wade*, 410 U.S. 113 (1973); an old and very limited Texas law, prohibiting abortions except to save a woman’s life, was the law directly challenged in the case, but the Court struck down with it many other more modern and liberal state laws.

189 Rehnquist J, one of the two dissenting judges in *Roe v. Wade*, supra, described the majority’s detailed regulation of abortion as ‘judicial legislation’, and reasoned that, if the law was to be declared unconstitutional, that should only have applied to the specific facts of the particular case and not to the entire field of abortion legislation.

190 These are all issues that are contested today, but were not seriously considered as rights issues and not litigated until recent decades.


192 *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010): In the 5-4 decision, reversing the District Court of Columbia, five sets of reasons were given. The majority struck down legislative limitations on spending on partisan ads and other ‘electioneering communications’ by unions, corporations, and not-for-profit associations (Super-PACs or Political Action Committees), under the Bipartisan Campaign Reform Act of 2002, while upholding the *Act’s* scanty public disclosure requirements. The Court’s decision had the short-term aftermath of skyrocketing election campaign spending by wealthy Super-PACs, and of a proposal by President Obama that the people mobilize a constitutional amendment process to counter the Court’s decision: Obama’s reply, when asked about ‘the corrupting influence of money in politics’ in a question-and-answer session on the Reddit social media site, as quoted by David Jackson, ‘Obama: Overturn Supreme Court campaign cash ruling’, August 30, 2012, *USA Today* website, <http://content.usatoday.com/communities/theoval/post/2012/08/obama-overturn-supreme-court-campaign-cash-ruling1>; Obama’s comments in the interview continued as follows:

‘... We need to start with passing the Disclose Act that is already written and been sponsored in Congress -- to at least force disclosure of who is giving to whom. We should also pass legislation prohibiting the bundling of campaign contributions from lobbyists. Over the longer term, I think we need to seriously consider mobilizing a constitutional amendment process to overturn Citizens United (assuming the Supreme Court doesn’t revisit it). Even if the amendment process falls short, it can shine a spotlight on the super-PAC phenomenon and help apply pressure for change.’

193 Canada’s 1867 Constitution: Originally a statute enacted in 1867 by the British Parliament, as *The British North America Act*, it was patriated to Canada, amended, and re-named in 1982 as the *Constitution Act, 1867*, Schedule A to the *Canada Act 1982* (U.K.), 1982, c. 11 [herein referred to as the ‘1867 Constitution’]. As noted in Chapter 1 and earlier in this chapter, in contrast with the dominant social or collective consciousness in England and the United States in the late 1700s, which informed the American Constitution, the late 1800s saw the introduction in England of legislative initiatives protecting vulnerable groups and promoting government responsibility for general social welfare, influenced by Utilitarian principles (which can be encapsulated as, put simply, the goal of achieving ‘the greatest good for the greatest number of people’), which can be seen reflected to some extent in differences in the Canadian constitution from the American one.
Respecting the different cultural contexts underlying the Canadian and American constitutions, see the comparison between the respective guiding ideals of ‘liberty; and ‘my brother’s keeper’ in Samuel V. LaSelva, ‘To Begin the World Anew: Pierre Trudeau’s Dream and George Grant’s Canada’, in Graeme Mitchell, Ian Peach et al (eds), A Living Tree: The Legacy of 1982 in Canada’s Political Evolution (Markham, Ont.: LexisNexis Canada, 2007), pgs 1-30, at 26-30


Preamble to the 1867 Constitution: ‘Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom’. Also adopted were England’s existing statutory laws and judge-made common laws (in all fields) – except in the province of Quebec, in which the civil law of France (France’s pre-Napoleonic ‘droit civil’) was adopted for matters within provincial jurisdiction; this does not affect my argument in this Thesis and I do not go into it.

Unlike the American system of fixed-date general elections, but like the British system, Canada’s 1867 Constitution provides for federal elections to be called at the discretion of the Prime Minister, within no longer than 5 years. While fixed-date elections have been passed or proposed in some jurisdictions in Canada, an election may still be called earlier if a Prime Minister or premier exercises the discretionary prerogative authority to dissolve Parliament or the provincial assembly.

There were not ten provinces and two territories, but four founding provinces in 1867: Nova Scotia, New Brunswick, Quebec, and Ontario.

1867 Constitution, s. 91 starts out: ‘It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces’, and then lists 29 subjects over which the federal government has exclusive jurisdiction. Judicial scrutiny and enforcement of constitutional law, under this constitutional regime, meant primarily addressing the division of legislative jurisdiction between levels of government.

1867 Constitution, s. 92, lists 16 specific subjects assigned exclusively to provincial legislative jurisdiction.

1867 Constitution, ss. 133 and 93, respectively, guaranteed certain minority English and French language rights in the federal Parliament and in certain provincial legislatures, and guaranteed certain existing minority Roman Catholic and Protestant religious-education rights.

The Canadian Bill of Rights, R.S.C. 1960, c. 44, directed courts to interpret federal laws so as not to infringe certain rights: various provincial human rights codes (e.g., the Ontario Human Rights Code, R.S.O. 1990, c. H.19) also prohibited certain grounds of discrimination. I do not address these statutory rights protections in the thesis.

The 1867 Constitution authorized the federal government to create a ‘General Court of Appeal for Canada’, with final appeals to Britain’s Judicial Committee of the Privy Council (s. 101 of the Constitution Act, 1867), and authorized the provincial governments to create provincial courts (s. 92 (14)). The 1867 Constitution also sets out a small number of rules respecting the composition of such a General Court of Appeal for Canada and qualifications for appointment to it (e.g., eligibility rules requiring certain minimum years of legal practice and requiring at least 3 of the 9 judges come from Quebec). In 1875, pursuant to this constitutional authority, the federal government passed a statute creating the Supreme Court of Canada as a general court of appeal with nation-wide jurisdiction.

The final further appeal to Britain’s Judicial Committee of the Privy Council was abolished, for all appeals, in 1949, by An Act to amend the Supreme Court Act, S.C. 1949, c. 37, s. 3, making the Supreme Court of Canada the country’s final appeal court.

Supreme Court Act, R.S.C. 1985, c. S-26, s. 53, under the sub-heading ‘Special Jurisdiction’, provides for references. There is also a limited jurisdiction respecting private bills referred by the Senate or House of Commons (s. 54). Reference questions are to be answered in an opinion with reasons ‘pronounced in like manner as in the case of a judgment’ (s. 53(4)). The ‘important questions of law or fact’ which can be referred under s. 53 are more
broadly defined than ‘constitutional’ questions; they must concern (a) the interpretation of the Constitution Acts, (b) the constitutionality or interpretation of any federal or provincial legislation, (c) the appellate jurisdiction respecting educational matters, (d) the powers exercised or proposed to be exercised by parliament, provincial legislatures, or federal or provincial governments, or (e) ‘any matter’, whether or not the Court considers it ejusdem generis with those listed, which the government ‘sees fit to submit’ (s. 53(2)) (my emphasis). While the Act makes it ‘the duty of the Court’ to answer reference questions, the Supreme Court ‘has recognized that it possesses a residual discretion not to answer reference questions where it would be inappropriate to do so because, for example, the question lacks sufficient legal content, or where the nature of the question or the information provided does not permit the Court to give a complete or accurate answer’: Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 2004 SCC 79, para 9, citing: e.g., Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525, at p. 545; Reference re Objection by Quebec to a Resolution to Amend the Constitution, [1982] 2 S.C.R. 793, at p. 806; and Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (“Secession Reference”), at para’s 26-30.’ Special references to provincial appeal courts have been legislated by provinces, such as the Courts of Justice Act, R.S.O. 1990, c. C-43, s. 8.

205 The Canadian context (and backdrop to the 1867 Constitution) was not fierce national independence, but a new sense of government responsibility for general social welfare, and an established rule that colonial laws repugnant to applicable imperial statutes were void, as legislated in The Colonial Laws Validity Act 1865, ‘An Act to remove Doubts as to the Validity of Colonial Laws’ (U.K.) 1865 c. 63 (Regnal. 28 & 29 Vict).


207 Edwards v. Canada (Attorney General), [1930] A.C. 123 (P.C.), rev’g [1928] S.C.R. 276. The case arose out of a petition to Parliament to appoint a woman to the Senate. A reluctant Prime Minister Mackenzie King referred the question of women’s eligibility for such appointments to the Supreme Court for its opinion. The Court decided that women were not ‘qualified persons’ referred to in the Constitution as eligible for appointment, because women were excluded from the common law definition of ‘persons’ who could exercise public functions. On final appeal to the Privy Council, however, the British judges interpreted ‘qualified persons’ more broadly, as including women. With that, the Prime Minister decided to grant the petition and appointed a woman to the Senate – not, however, as Roach points out (SCOT, supra note 156, pg 37), one of the eminent suffragettes who advanced the petition, but a person well-connected to the governing party. This historical experience remains instructive and relevant today, to the issue of discretionary political appointments to courts, judicial or quasi-judicial tribunals, and administrative boards. While the Persons case shows the powerful effect of judicial interpretation in stating the law, including the law on a highly contested issue involving human rights, it does not necessarily show that the Court had the final word. It was the Prime Minister who made the decisions to refer the question to the courts, and to follow the court decision; thus, the government arguably made the final decision, and may have been quite happy to have been able to defer the controversial question to the courts, appointing it as the responsible decision-maker, and then making a decision in which it simply ‘followed’ or ‘obeyed’ the court decision.

208 Roach, SCOT, supra note 156, pg 4

209 The Depression caused widespread poverty and distress in Canada, just as in the United States. It led in Canada, as well, to protective labour laws enacted by the national government and struck down by the courts. The Canadian legislation set up a national labour and unemployment insurance scheme, with a preamble citing the commitment of the League of Nations members to ‘the well-being of industrial wage earners’ as a matter ‘of supreme international importance’ and stating that a nation-wide insurance program to protect all unemployed workers was essential for ‘the peace, order and good government of Canada’, thus presenting the government’s argument that this law gave effect to a crucial social policy and was within federal legislative jurisdiction.

211 The judicial decision effectively brought the national unemployment scheme to a halt: In theory, it left provincial governments free to enact and coordinate similar legislation, but in practical reality, apparently, no nation-wide program could be effectively carried out among the provinces.

212 The decisions sparked strong objections not only to judicial interference but also to British interference in government policy in Canada. This led to political action to change the Constitution and to amendments enacted by Britain at Canada’s request, with jurisdiction over ‘unemployment insurance’ given expressly to the federal government, in the Constitution Act, 1940, 3-4 Geo. VI, c. 36 (U.K.); now s. 91 (2A) of the 1867 Constitution.

213 Religious (Roman Catholic) mandatory shop closing case: Henry Birks & Sons (Montreal) Ltd. v. City of Montreal, [1955] S.C.R. 799. Jehovah’s Witness cases: R. v. Boucher, [1951] S.C.R. 265; Saumur v. City of Quebec, [1953] 2 S.C.R. 299 (5-4 decision striking down municipal by-law prohibiting distribution of Jehovah’s Witness literature to the public, as related to ‘speech’ or ‘religion’, both matters of federal jurisdiction), and Roncarelli v. Duplessis, [1959] S.C.R. 121 (revoking a Jehovah’s Witness liquor license). The law’s popular goals (supported by a large majority of the province’s voters) were to protect the spiritual and intellectual life of the province from ‘subversive doctrines’ and ‘aggressive or insulting religious proselytizing activities’ (see Roach SCOT, supra note 156, pg 48), which the Court interpreted as goals falling exclusively within exclusive federal jurisdiction. In practical reality, again, because these goals were not ‘pressing issues on the national stage’, they would never be addressed federally. Thus, the province’s policy goals were thwarted by the Court. Roach (SCOT pg 48) describes the case as demonstrating how a judicial interpretation of legislative power as exclusively federal ‘can be quite intrusive when it frustrates a local majority that cannot command a national majority.’

214 Roach, SCOT, supra note 156, pgs 46, 47, citing cases, including Reference Re: Alberta Statutes, [1938] S.C.R. 100 (holding that criticism of the government was part of an inherent democratic right to free and full political discussion and could not be fettered in provincial legislation regulating the press) and Boucher v. The Queen, [1951] S.C.R. 265 (holding that Jehovah’s Witnesses convicted of provincial offences specifically singling them out, had been denied the right to ‘the protection of impartial laws’ (per Rand J at 292) for their minority religion, and that this right could not be denied in otherwise-valid provincial legislation. Roach points out the significance of these and similar exceptional instances of the Court’s judicial formulation of rights or principles that are so ‘essential to democracy’ that they must be respected by provincial governments, removing them from a provincial government’s power to make laws as it saw fit within its legislative jurisdiction (SCOT, id.): ‘[T]he Supreme Court, long before the Charter, was prepared to pit itself against majority sentiment and strike down laws because they infringed civil liberties that the Court believed were essential to democracy.’ The rights protected in these two cases were not protected in the 1867 Constitution or in the human rights statutes. At the same time, however, the Court decisions in these two cases did not rest solely on formulations of common law principles, or even on interpretation to resolve inconsistencies or uncertainties in the law: they were also shaped by the constitutional division of jurisdiction and they specifically held that provinces could not interfere with these freedom of speech and religion rights. As Roach also points out (SCOT, id.), these rights were protected by the Court from provincial legislative interference, but not necessarily from federal legislative interference. On the other hand, it might be argued that these ‘exceptional’ cases reflect a stronger exercise of judicial law-stating authority by the Supreme Court in Canada than in the United States at the time, since in these cases the Canadian Court went outside the Constitution and articulated legally-protected democratic rights based solely on the Court’s own formulation of judge-made or common law. These cases also illustrate the reputation which the Supreme Court of Canada gained for being biased in favour of federal government power, while the Privy Council gained a reputation for favouring provincial power. But, as the Depression era cases illustrate, such a bias was not invariable or always determinative (see, e.g., Roach SCOT, id., pgs 40-41).

215 Apart from such cases, the norm was ‘the traditional conception of a strictly deferential judicial role’, as Roach and others have stressed and explained in detail: The Supreme Court deferred to government legislative authority, and especially federal government authority, as long as the subject of its legislation came ‘in essence’ within its legislative jurisdiction under the 1867 Constitution. See the discussion of this point in Sharpe, Robert J., K.E. Swinton & Kent Roach, The Charter of Rights and Freedoms, 2nd ed. (Toronto: Irwin Law, 2002), chapter 1. These ‘exceptional’ cases did not stand alone; they were articulated within the narrow context of delineating federal and provincial power under the 1867 Constitution by interpreting ss. 91 and 92. As explained in my text to the endnote
above, these ‘democratic’ rights were protected from interference by the provincial government but not necessarily from interference by any government: the provincial law limiting free speech, for example, was struck down by the Court, not simply for infringing a judge-made democratic right, but for infringing a democratic right which was outside the constitutional jurisdiction of a provincial government.

216 Canada’s 1982 Constitution and Charter, cited supra note 194
217 The short preamble to the Charter declares: ‘Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law’.
218 The 1982 Constitution provides, in s. 52(1), under the sub-heading ‘Primacy of the Constitution’: ‘The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.’ To amend the Constitution requires a ‘super-majority’ of the combined resolutions of Parliament and of two-thirds of the provincial legislatures representing together at least fifty percent of the population of Canada. The resolutions themselves, however, require only simple majorities to pass. The resolutions of Parliament must be passed by both the Senate and the House of Commons. More detailed requirements respecting certain types of amendments to the 1982 Constitution are set out in ss. 52(3) and 38.
219 The Charter, s. 24(1), empowers courts to give whatever remedy ‘the court considers appropriate and just’ to anyone whose Charter rights have been infringed by a government. This reinforces the primacy of the Constitution declared in s. 52 of the 1982 Constitution, id.
220 See s. 32 (1) of the Charter, under the sub-heading ‘Application of Charter’: ‘This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament …; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.’
221 Charter ss. 2 (fundamental freedoms), 3-5 (democratic rights), 6 (mobility rights), 7-14, 24 (legal rights), 15, 28, 32 (equality rights), 16, 17-22 (official languages), 23, 29 minority language education rights), 25 (Aboriginal rights), 26 (other rights and freedoms), 27 (multicultural heritage)
222 The category of ‘economic rights’ was deliberately not included in the Charter that was enacted, according to accounts of the negotiations between the politicians that resulted in the Charter text; see, e.g., Don Butler, ‘Charting the impact of the Charter’, The Ottawa Citizen, April 15, 2007, pg A6 [herein referred to as ‘Butler’s article’], quoting Roach and other constitutional law scholars. The Charter’s categories of protected rights are often described as reflecting the dominant social attitudes in the society (among the politicians) at the time (the late 1990s) about what rights should be protected and, thus, as being more modern than the attitudes about rights at the time of the American Bill of Rights almost two centuries earlier, but not reflecting rights – such as equal or equitable economic security and social benefits and supports – that might well have been included just twenty-five years later.
223 Charter, s. 1
224 Charter, s. 33(1): ‘Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of this Charter.’ This distinctive feature of Canada’s Charter was apparently made in a last-minute compromise in the negotiations involved in drafting the Charter: See Gonthier J, in his dissenting reasons in Sauvé v. Canada, [2002] 3 S.C.R. 519, at para 96, quoting a law text description of the political compromise that led to s. 33: ‘Constitutional writers and commentators point out that s. 33 was a political compromise, meant to bring together provinces opposed to the entrenchment of constitutional rights, with those in favour: P. Macklem et al., Canadian Constitutional Law (2nd ed. 1997), at pp. 597 and 646. Macklem et al. write at p. 597: “Added to the Charter at the last moment, this controversial provision captured the final political compromise among the provinces and federal government that facilitated the adoption of the Charter”.’
225 Ford v. Quebec (A.G.), [1988] 2 S.C.R. 712, a unanimous decision of 9 judges. In practice, Hogg explains (as I discuss in Chapter 3), the power of the government’s s. 33 legislative override is diminished ‘because of the development of a political climate of resistance to its use: Peter W. Hogg & Allison A. Bushell (now Thornton), ‘The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing
After All’), (1997) 35 Osgoode Hall L.J. 75-124 (herein ‘Hogg, Dialogue’, ‘Hogg & Bushell’, and the ‘final word’ dialogue theory), at pg 84. Only in Quebec has the use of s. 33 seemed to be ‘politically acceptable’, and even there, only once in 25 years has it been used to reject a judicial decision, and it was not re-enacted when it expired. Outside Quebec, it has been used only twice to date: in Saskatchewan in 1985 (following the decision in RWDSU v. Saskatchewan, (1985) 39 Sask. R. 193 (C.A.), rev’d [1987] 1 S.C.R. 460) and in Alberta (following the Court’s decision in M. v. H., [1999] 2 S.C.R. 3, in contrast to the compliance with that Court decision by the federal government and such provinces as Ontario). The Alberta government refrained from over-riding a Court decision on a related topic, the protection of equality rights regardless of sexual orientation, in Vriend v. Alberta, [1998] 1 S.C.R. 493, after much public debate, despite the ‘firestorm of criticism’ the Court’s decision provoked in the province (see Butler’s article, supra note 222, and the strong opposition to it by the provincial government and Premier.


227 In striking down the law, and reinstating the trial court decision that had been reversed by the appellate court, the Supreme Court reasoned that it was as an unreasonable limit on freedom of speech under s. 1 of the Charter, because its complete ban on other languages went further than was necessary to achieve the law’s purpose of protecting the French language. The Court also gave some guidance to the government in indicating that a more moderate limit, requiring only that French predominate on signs, would still accomplish the purpose and would be a ‘reasonable’ limit under the Charter.

228 The Quebec government did slightly modify the law, to apply only to outdoor signs. This modification was not suggested by the Court, and might not have been considered a ‘reasonable limit’ by it. In a contemporaneous case, Devine v. Quebec (A.G.), [1988] 2 S.C.R. 790, the Court held that making French mandatory on various business forms violated ‘freedom of expression’ under s. 2 of the Charter, but since other languages could be used in addition, the requirement was upheld as a ‘reasonable limit’ under s. 1 of the Charter. The ‘notwithstanding declaration’ was made by the Quebec government in the form of an omnibus statute that had been passed when the Charter came into force, adding a standard-form notwithstanding declaration to every statute in the province: An Act Respecting the Constitution Act, 1982, S.Q. 1982, c. 21.

229 There were two Sauvé cases in succession, each invalidating a different version of the law, and it is the second case in 2002 that I address here. The first Sauvé case, in 1993, was a unanimous decision of 9 judges, giving extremely brief reasons for striking down the law: Sauvé v. Canada (A.G.), [1993] 2 S.C.R. 438. At the time of the Court’s decision, the long-standing law suspending the right of all prisoners to vote, then in s. 51 (e) of the Canada Elections Act, R.S.C. 1985, c. E-2, had just been amended to limit the suspension to prisoners serving sentences of two years or more, in An Act to Amend the Canada Elections Act, S.C. 1993, c. 19, s. 23(2), with a preamble explaining that the law was designed to provide an appropriate sanction for more serious criminal offences and to reinforce the moral values of Canadian society. The second Sauvé case, in 2002, was a highly divided 5-4 decision of the Court, in Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, striking down that amended law, in s. 4(c) of the Canada, S.C. 2000, c. 9, with lengthy reasons for both the majority and the dissenting judges.

230 ‘The Oakes test’, which I summarize in Chapter 8, is a set of judge-made or common law rules or principles, developed as a ‘basic framework for analysis’ (in the concise phrase used in Roach et al CRF pg 65) by the Supreme Court in its Charter jurisprudence, to guide its interpretation and application of s. 1. It was first set out in the Court’s 1986 decision in R. v. Oakes, [1986] 1 S.C.R. 103, and refined and clarified by the Court in subsequent cases. See, e.g., Gonthier J’s dissenting reasons in the second Sauvé case, supra, at para 79.

231 It can be argued, as I do in Chapter 8, that the government could nonetheless have responded with further legislation, either in the same or revised form, along with evidence to demonstrate that this legislation represented a democratic political decision that was a reasonably well developed and articulated statement of the citizens’ values, and thus re-engaging the Court in an increasingly thorough and refined analysis of the facts and principled logic in its assessment of relevant democratic values and limits under ss. 1 and 3 of the Charter.

232 Reference re Remuneration of Judges of the Provincial Court of P.E.I.; Reference re Independence and Impartiality of Judges of the Provincial Court of P.E.I., [1997] 3 S.C.R. 3, a near-unanimous decision of 6 of the 7
judges, with one judge, La Forest J, dissenting in part. The case concerned more than one such provincial law, as it combined appeals in four cases, all involving provincial court judges and similar legal issues. The law referred to here is the one in issue in the Prince Edward Island appeal, which was part of the provincial budget deficit reduction plan enacted in the Public Sector Pay Reduction Act, S.P.E.I. 1994, c. 51. The law reduced judges’ salaries as part of an overall policy to cut the deficit by reducing all salaries paid out of public funds.

The government promptly complied with this new ‘constitutional obligation’ to establish such Commissions – and then (shrewdly) tied their own compensation as politicians to the compensation set for judges. Thus, concerns about bias are intensified: The members of the Judicial Compensation and Benefits Commissions are appointed by the very parties who stand to gain from generous compensation and benefit decisions (judges and politicians), and the appointees may be lawyers who appear professionally before judges and politicians, and who might become judges or politicians themselves one day. See, for summaries of the detailed rules laid out in the Court’s decision and their application by the Commission: Drouin Commission’s summary, on the Judicial Compensation and Benefits Commission website, URL <http://www.quadcom.gc.ca/pg_JcJc_QC_01-eng.php>, and ‘Mandate of the Judicial Compensation and Benefits Commission’, Government of Canada website, posted April 23, 2012, URL <http://www.quadcom.gc.ca/pg_JcJc_QC_02-eng.php>.

Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625, a majority decision of 7-2: The facts were that Joseph Winko had been found ‘not criminally responsible by reason of mental disorder’ (as it came to be described under s. 672.54 of the amended Criminal Code) for assaults committed in 1982 and precipitated by psychotic (paranoid) auditory hallucinations, and was diagnosed as suffering from ‘residual chronic schizophrenia’. On an annual review many years later, the Review Board was not satisfied that Winko was not a significant threat to the public, and granted a Conditional Discharge with medication and monitoring conditions. Winko challenged the law for violating his legal and equality rights under the Charter, by placing the burden on him to prove he did not pose a threat to public safety, in order to be given an Absolute Discharge, rather than on the Board to find that he did pose a threat to public safety in order to deny an Absolute Discharge. The law, s. 672.54 of the Criminal Code, R.S.C., 1985, c. C-46, provides in relevant parts as follows (all emphasis added):

672.54 Where a court or Review Board makes a disposition … it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society, and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

(a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely; …

See Schneider, R.D., H. Bloom & M. Heerema, Mental Health Courts: Decriminalizing the Mentally Ill (Toronto: Irwin Law, 2007)

R. v. Daviault, [1994] 3 S.C.R. 63, in which the Court reversed the Quebec Court of Appeal and ordered a new trial. The Court’s 6-3 majority decisions was a somewhat ‘divided majority’ because varying reasons were given for the majority result, with 2 concurring judges each giving separate reasons from those given by Cory J on behalf of 4 judges, and dissenting reasons given by 3 judges. The background of the case was that a trial judge had acquitted Daviault, on a reasonable doubt that he could have formed the general intent to commit the crime of sexual assault, based on opinion evidence of a pharmacologist that an extremely intoxicated person was not likely to be aware of his actions. The Quebec Court of Appeal had overturned the acquittal and ordered a conviction, holding that where an accused intended to become intoxicated, the defence of ‘extreme intoxication’ had been removed by ‘The Leary Rule’ (a common law rule established by the Supreme Court in Leary v. The Queen, [1978] 1 S.C.R. 29, a decision predating the Charter). The Supreme Court held that a person charged with sexual assault was entitled to raise the defence of extreme intoxication, and that in eliminating that defence, ‘the Leary Rule’ infringed ss. 7 and 11(d) of Charter rights (the fundamental justice requirement that the Crown establish mens rea for all offences, and the right to be presumed innocent), and was not reasonable and justifiable under s. 1 of the Charter. The Court refined the
older common law rule somewhat, holding that intoxication was a valid defence if it was so extreme that it amounted to automatism or insanity.

Public outcry and aftermath: See Kirk Makin, ‘Law on drunkenness defence struck down – again’, The Globe and Mail website, March 6, 2011, URL <http://www.theglobeandmail.com/news[national/judge-reinstates-controversial-drunkenness-defence-in-sex-assault-case/article578863/>: ‘The controversy over the defence dates back to 1994, when the Supreme Court of Canada ignited a public furor by finding it legitimate in the case of R. v. Daviault. The court set aside Henri Daviault’s conviction for sexually assaulting a 65-year-old woman in a wheelchair. Soon afterward, several men were acquitted of beatings and sexual assault based on the judgment. Enraged editorialists and politicians referred to the defence as a “licence to rape,” while feminists and victim advocates condemned it as a get-out-of-jail-free card for criminals who drank themselves into a stupor. “I think it inflamed the public because these are issues of moral culpability,” University of Ottawa law professor Elizabeth Sheehy recalled of the controversy. "They are decisions that touch ordinary Canadians and which they can grasp."’ In a lengthy preamble to the legislation, the government explained the rationale behind the prohibition by setting out the social concerns that motivated the law (including the association between intoxication and violence against women and children) and recited the Equality Rights and other Charter principles which the government considered justified the law. Per Kirk Makin, id.: ‘A year after the Daviault ruling, Parliament outlawed the defence, explicitly overruling the Supreme Court.’ … “Canadians hold a strong moral view that people who commit violent acts against others while voluntarily drunk should be held criminally responsible for their actions,” justice minister Allan Rock said at the time.’

It is noteworthy that the extensive consultations, studies, and reports, and the Criminal Code amendment, were all accomplished within a year, in 1995, when Parliament enacted legislation specifically prohibiting the defence of ‘self-induced intoxication’ as a defence to general intent crimes, in An Act to Amend the Criminal Code (self-induced intoxication), S.C. 1995, c. 32, s. 1, adding s. 33.1 to the Criminal Code.

The new legislation essentially adopted the dissenting reasons in Daviault. As Hogg points out: ‘In essence, it directly overturns [the Court’s] decision’, since ‘Parliament has basically enacted without modification the very propositions of law that the Supreme Court of Canada rejected’ (Hogg & Bushell, supra, pgs 123, 103-04). The sequence of changes in the law could be described as an older common law rule (creating the intoxication defence), based on judges’ earlier factual and logical analysis respecting volition and insanity in the context of criminal offences, which was refined by the Court in ‘the Leary Rule’ based on a judicial analysis of contemporary social realities and concerns protected by the criminal law, and then altered by legislation.

K. Makin, supra note 237: The ‘extremely unusual legal anomaly’ is that ‘the law remains in force despite being consistently found unconstitutional’, and ‘The upshot is that a law that is consistently found unconstitutional remains in force, waiting for appellate courts to issue binding authority on the matter.’ The majority judges in Daviault had predicted that the defence, with its onerous requirements, would rarely succeed. Legal scholars have also debated the validity of re-enacting rather than over-riding the law; see, e.g., Tsvi Kahana’s argument, in ‘Understanding the Notwithstanding Clause., (2002) 52 U of Toronto L.J. 221-274, that it is preferable to re-enact than over-ride the law, and Kent Roach’s argument that re-enactment lacks the ‘straight forward’, ‘symbolic’ and ‘honest’ quality of using the over-ride, in ‘Editorial: When Should the Section 33 Override Be Used?’, (1999) 42 C.L.Q. 1 at 2, and in ‘Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures’, (2001) 80 Can. Bar. Rev. 481, at 525

R. v. Mills, [1999] 3 S.C.R. 668; the earlier Court decision that was directly reversed by the Criminal Code amendment was R. v. O’Connor, [1995] 4 S.C.R. 411.

R. v. Mills, id.

Mills is a rare but not isolated example of such a legislative response reversing a Court decision. Daviault (just discussed) is of course another such case. See also the Court’s decision in R. v. Seaboyer, [1991] 2 S.C.R. 577, 83 D.L.R. (4th) 193: The Court, in a majority decision, struck down a Criminal Code provision prohibiting cross-examination on a complainant’s prior sexual behaviour in a sexual assault trial, while suggesting that a ‘constitutional exemption’ from such cross-examination might be appropriate in certain cases.
This happened following many cases, in addition to *RJR-Macdonald* and *Morgentaler*, infra, such as in the government’s acceptance of controversial Court decisions in *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 (striking down federal immigration legislation for infringing the Legal Rights of refugees and illegal immigrants), *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (reading into Alberta’s *Individual’s Rights Protection Act* a prohibition against discrimination based on sexual orientation), and *M. v. H.*, [1999] 2 S.C.R. 3 (extending pension benefits to same sex couples), in addition to *Judges’ Remuneration, Winko*, and (eventually) *Ford*, but not *Sauvé*, all discussed and cited supra.


Parliament enacted two years later the extensive *Tobacco Act*, S.C. 1997, c. 13, Part IV of which included ‘new packaging and advertising restrictions’ (Hogg & Bushell, supra, Appendix).

Respecting reluctance to use the notwithstanding clause, *see, e.g.*, Hogg’s description of ‘a political climate of resistance to its use’, noting that to use it takes real confidence in the public will and a willingness to expressly favour majority rule over a human rights pronouncement of a court, and referring to Iacobucci J’s remarks, in *R.W.D.S.U. v. Saskatchewan*, [1971] 1 S.C.R. 460, to the effect that no Deputy Minister of Justice wants to be the first to recommend the use of the notwithstanding clause (Hogg & Bushell, supra, at pg 83, footnotes 25 & 26).

Respecting the high public regard for the Charter in the hands of the Supreme Court, *see, e.g.*, national survey conducted by Environics, commissioned by the Association for Canadian Studies (an umbrella group for university and college Canadian Studies departments), in which 2,000 adult Canadians were interviewed by telephone in January 2002; 82% said the Charter is an important symbol of Canadian identity, and 56% said the Supreme Court should make the final decisions on fundamental rights, compared with 35% who said these decisions should rest with Parliament: as reported in *National Post*, February 4, 2002, pgs A1-A2. Such high public regard in Quebec for the Court decision was perhaps absent in the aftermath of the *Ford* case, following which the Quebec government did override the Court decision: a large majority of Quebeckers strongly supported the provincial law protecting the French language and resisted the interference of the federal government and the Supreme Court.

A governing party may, of course, prefer to let the Court bear the responsibility (and any public hostility) for settling a controversial issue or making an unpopular decision. This can be seen in cases referred to in this chapter, such as in the 1930 ‘Persons case’ (*Edwards v. Canada*, supra) and in the 2004 same-sex marriage reference (*Reference Re Same-Sex Marriage*, [2004] 3 S.C.R. 698, in which the federal government referred a list of questions to the Supreme Court for its opinion as to whether certain provisions of proposed legislation expanding the definition of ‘marriage’ to include same-sex partners would be constitutionally valid, i.e., within the jurisdictional authority of the federal government and not in violation of Charter rights). Politicians themselves have portrayed the notwithstanding clause as repugnant: in the 2006 federal election campaign, ‘then-Prime Minister Paul Martin vowed that the first act of an elected Liberal government would be to strip the federal government of its ability to invoke the notwithstanding clause’: McAdam, R., ‘The Notwithstanding Taboo’, 6 (1) *Federal Governance* (2009), pg 5, on Queen’s University website, URL <http://library.queensu.ca/ojs/index.php/fedgov/article/view/4393>. Government respect for the fundamental principle of the Rule of Law might at least partly explain why, even when there is little public support for Court decisions, governments have not defied or overridden them (e.g., *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, as well as *RJR-MacDonald Tobacco, supra*).

A somewhat-related explanation was given by Roach in the American context (SCOT supra note 156, pgs 29, 32, in his words but citing in footnote 58 Jesse Choper, *Judicial Review and the National Political Process* (Chicago: U of Chicago Press, 1980) at 55), which also applies (if less extremely) to the Canadian context: The failure to respond to conflicting Court decisions with revised legislation may be due to the ‘forces of inertia’ hindering legislative initiatives.

*R. v. Morgentaler*, [1988] 1 S.C.R. 30: a majority of 5 of 7 judges (McIntyre & La Forest JJ dissenting) striking down s. 251 of the Criminal Code, R.S.C. 1970, c. C-34, as breaching s. 7 of the Charter (*Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the
principles of fundamental justice.’). The Court did not preclude some restriction on abortion, suggesting in obiter comments that a narrower law could be valid, without specifying any details of what restrictions on abortion would be justified – unlike the American Supreme Court’s decision in Roe v. Wade, which spelled out the parameters of a valid abortion, and unlike the Court’s decision in Judges’ Remuneration (as already described in this chapter) which spelled out the detailed process required for a valid reduction in judicial salaries.

250 The abortion issue is described as ‘so politically explosive that it eludes democratic consensus’ in Hogg & Bushell, supra, at pg 96, where the legislative history is summarized. Bill C-43, An Act Respecting Abortion, which contained a less restrictive law (making abortion an offence punishable by up to 2 years in prison unless performed by a physician who was of the opinion that the health or life of the mother was in danger), was passed in the House of Commons by a narrow majority (140-131), in a vote in which the Prime Minister imposed ‘party discipline’ on the Cabinet but not on the backbenchers. It was then defeated by a tied vote in the Senate.


252 In Latimer, id., the Court affirmed the appellate court decision which had overturned the trial judge’s lenient sentence.

253 The Court, in upholding the conviction, did not probe very far into the evidence on the arguments that the surgeries were clearly increasing the child’s pain and distress, this pain could not be alleviated, the surgeries were truly experimental, and neither Latimer nor his child could prevent the doctors from proceeding with them. Latimer is one of numerous cases where the Court gave wide scope to governments to decide issues involving public moral values and priorities, such as criminal offences and sanctions. Another example is the criminal offence of assisting suicide, which was upheld by the Court in Rodriguez v. British Columbia (A.G.), [1993] 3 S.C.R. 519, in a majority of 5 of 9 judges (Lamer CJC, L'Heureux-Dubé, Cory, and McLachlin JJ dissenting). Ms. Rodriguez faced a painful death from a fatal disability. Her disability prevented her from ending her life herself when she chose, which itself was not an offence. She wished to have a physician assist her to die when she chose, arguing that to be denied that right was an unjustified limit on her Charter right to liberty and security of the person. The Court disagreed, upholding the law prohibiting assisted suicide. Rodriguez apparently did choose when she died a year later, with a physician’s assistance, despite the Court’s judgment. And another of such decisions is the Mills case (supra, discussed earlier in this chapter) upholding the Criminal Code amendment restricting access to the private records of complainants in sexual assault cases, despite its direct defiance of an earlier Court decision. In the Morgentaler case (supra), the majority, too, accepted the government’s authority to impose some limit on abortion as a matter of its jurisdiction over criminal law.

254 Latimer, supra note 251

255 Newfoundland (Treasury Board) v. N.A.P.E., [2004] 3 S.C.R. 381 (a unanimous decision of seven judges), aff’g lower appellate court’s dismissal of an appeal of the decision of a motions judge quashing an arbitration board order.

More detailed facts: In 1988, the provincial government entered into a Pay Equity Agreement with the province’s public service union, in which it acknowledged the pay inequities to women and agreed to implement pay equalization measures in 1991, starting with equal pay for women hospital workers and payment of arrears owing to them from 1988. In 1991, it passed the Public Sector Restraint Act, S.N. 1991, c. 3 [rep. & sub. 1992, c. P-41.1] (enacted retroactive to March 31, 1991), in which it extinguished the implementation terms of the 1988 Agreement. This law contravened the government’s express equality policy, and undid the 1988 Agreement contract to redress women’s chronic underpayment, not only wiping out arrears owing to them but continuing their unequal pay by delaying for three more years the promised equalization of their wages. A grievance was filed on behalf of the women employees affected by the cut, as a breach of the Pay Equity Agreement. An Arbitration Board ordered the government to comply with the Agreement; on judicial review, a motions judge quashed that decision and dismissed the grievance; the provincial appeal court dismissed the appeal and upheld the motions judge, which the Supreme Court did as well.

256 The law was challenged as infringing the Charter’s s. 15(1) equality right. The Supreme Court agreed that the law infringed this right, and with respect to an ‘important human interest’ in gainful employment, but held that this unequal treatment was ‘reasonable’ and ‘justified’ under the Charter’s s. 1. Applying ‘the Oakes test’: The Court
concluded that the limit on the Charter equality right by paying less to women was ‘justified’ in a democratic society because their lower pay was ‘rationally connected’ to the law’s important purpose of protecting the province’s economy in an exceptional financial crisis, and because it was ‘proportionate’ since the lower pay ‘did more good than harm’.

Binnie J, giving the reasons for the Court in *Newfoundland Treasury Board*, *supra* note 255, described these two factors – the relative size of the pay equity obligation ($24 million) and the seriousness of the fiscal crisis – as ‘the compelling factors’. He stressed the law’s ‘important purpose’ of preserving the province’s fiscal health in an ‘unprecedented’ financial crisis, and that judges must not ignore an economic emergency where ‘an exceptional financial crisis called for an exceptional response’. The nature of the severe and unprecedented fiscal crisis was that the province’s credit rating had been lowered, which increased the cost to the government of borrowing to finance the provincial debt, which made it increasingly expensive. Binnie J also noted two other factors as relevant: there were other severe cost-cutting measures also imposed by the government, and the pay equity measure was to some extent neither permanent, isolated, nor unilateral – the law delayed by 3 years the original timetable for the implementation of pay equity, the cut-backs were part of a range of severe cut-backs, and the government consulted the Union to find alternative measures.

See, e.g., *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, and *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; in *McKinney*, the Court upheld a provincial law requiring university professors to retire from gainful employment at a specific age, rejecting the claim that mandatory retirement at age 65 was unjustified age discrimination. The majority reasoned that mandatory retirement, although it impaired the condition of old people in order to improve the condition of young people, was a justified limit in a democratic society on the equality rights of old people: The discriminatory treatment was a trade-off made by the government in its employment policy, and such a policy required the balancing of multiple competing social and economic factors in order to allocate scarce resources, which, the Court reasoned, was a task governments were in a better position than courts to perform. La Forest J referred to the ‘polycentric’ task of allocating scarce resources, such as positions at university (see discussion in Roach SCOT *supra* note 156, pg 161). See also Roach’s comment (SCOT *supra* note 156, pgs 128 & 118, referring to La Forest J in *Andrews* case, referring to the Court as taking a more deferential and ‘black-and-white’ view in these kinds of cases than others): ‘Much economic and social policy making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions’, and to the Court being, for these reasons, ‘extremely cautious about recognizing economic rights under the Charter’. And see Peter Russell in 1994 (‘Canadian Constraints on Judicialization from Without’ (1994) 15 *International Political Science Rev.* 165, at 168, 169): ‘none of the key economic and social policy interests of government – monetary and fiscal policy, international trade, resource development, social welfare, education, labour relations, environmental protection – have been significantly encroached by judicial enforcement of the Charter.’ But see CRF (pgs 41-42, quoting Dickson CJC in 1986, in *Edwards Books & Art Ltd. v. R.*, [1986] 2 S.C.R. 713): care has to be taken so that the Charter “does not simply become an instrument of better situated individuals to roll back legislation that has as its object the improvement of the condition of less advantaged persons.’

Donald Butler, ‘Charting the impact of the Charter’, *The Ottawa Citizen*, April 15, 2007, pg A6: ‘Several [Supreme Court] rulings had profound -- and often costly -- implications.’ Only relatively small costs resulted from some cases – such as the costs of conducting voting in prisons or providing Judicial Compensation Committees, required by Court decisions in *Sauvé* and *Judges’ Remuneration*, as I have noted. But other judicial decisions have required much more significant costs in financial and other public resources, and have had far-ranging social impacts. This was true before the Charter, and has been more dramatic since the Charter’s introduction of new constitutional rights. Examples include (1) the 1985 *Singh* decision, *supra* (the cost of providing oral hearings and other legal rights for refugees and illegal immigrants, to pursue their claims or respond to deportation orders, mandated by the Court in this decision and implemented by the government in *An Act to Amend the Immigration Act*, 1976, S.C. 1986, c. 13, s. 5, ‘created backlogs and huge new spending in the refugee processing system’, and within two decades had ‘cost the federal government hundreds of millions of dollars’ and created ‘a massive backlog of claimants’: per Butler, *id.*), (2) the 1991 *Stinchcombe* decision, *supra* (requiring prosecutors to disclose all evidence to the defense, which ‘imposed heavy costs and slowed down the justice system appreciably’: Butler, *id.*), (3) the 1999 *Winko* decision, *supra* (the cost of establishing and conducting the new ‘inquisitorial’ process,
mandated by the Court to protect legal and equality rights, and (4) the 2005 Chaoulli decision, Chaoulli v. Quebec (A.G.), supra, [2005] 1 S.C.R. 35 (striking down a law prohibiting private health care schemes within the public health care system, which has had complex and uncertain repercussions in terms of public spending and unequal access to health care). Of course, there are also social and financial benefits that may flow to society from such judicial decisions. And it is important to note that costs and benefits may be allocated by governments and permitted by Courts to fall more heavily on some citizens than others, as in the Treasury Board case, supra, which allocated the cost of deficit-cutting more heavily on the women hospital workers than on the men and on others not called on to accept cuts at all.

260 Treasury Board, supra, per Binnie J at para’s 55-57

Respecting the government’s evidence on issues on which it bore the burden of proof: At the grievance hearing, the government simply produced the budget filed by the Minister of Finance, the public accounts filed with the legislature, and the report of the legislative proceedings in which the Minister of Finance and the President of the Treasury Board explained what they thought the accounts disclosed and required the government to do. There was apparently no cross-examination of government witnesses with respect, for example, to the range of options and alternative measures available to the government and considered by it (including options which did not violate rights protected by the Charter), to the priorities weighed by the government in making its selection, and the rationale for them, and to the democratic will or public support for these specific cuts, which violated the elected government’s social policy as well as the Charter. The record on the appeal was thus minimal and poorly tested, if at all, at the grievance hearing. And no further evidence was requested or provided to augment it on the Supreme Court appeal. See the Court’s reasons in Newfoundland Treasury Board, para’s 55-57. The Court, which did not probingly scrutinize what Charter-compliant steps were available to the government and considered by it, noted some other ‘severe’ steps taken, ‘including’ freezing public sector wage scales, laying off almost 2,000 employees, and eliminating hospital beds and select items of public medical care – neither an exhaustive nor a very full nor an egalitarian list. It appears that at no point in the process, from the arbitration of the grievance to the Supreme Court appeal, was there more than a cursory scrutiny of the government’s justification for selecting this alternative, which denied a Charter right, even ‘temporarily’, and which breached its social policy and contractual obligation.

262 In other words, as I will elaborate in Part Three, the Court did not articulate what the ideal of Justice required – in facts and principled logic – to guide political decision-making in allocating cuts in public spending to reduce the deficit in a financial crisis: Did it require alternative cuts to be investigated, and more weight to be given to cuts that did not violate Charter rights and that might be compensated in other ways when the crisis was over, according to a minimum standard of reasonable care and skill? These kinds of considerations are implicit in ‘the Oakes test’, as I discuss Part Three, in examining the Court’s decision in the Sauvé case: The role and requirements of justice should be made explicit in a judicial decision on a contested topic.

263 The argument respecting the ‘anti-majoritarian’ nature of courts and the ‘rights of the truly unpopular’ is made by Roach, and I discuss it in the context of his dialogue theory in Chapter 3.

264 The idea of a desired ‘rule of law and not of men’ has been invoked, as noted earlier in this chapter and in notes supra, by Chief Justices Marshall and Warren and by Presidents Lincoln and FD Roosevelt.

265 The irrelevance of unpopularity to the validity of the Court decision in Brown v. Board of Education, supra, (which was dramatically and widely opposed and strongly resisted by the public and government alike), is in contrast to the relevance of the widespread and deep-seated conviction in the policy behind the New Deal legislation which the Court held in West Coast Hotel, supra, entitled the government to pass its legislation, whether or not the Court considered it to be practical, reasonable, or rational; see my discussion above in this chapter and notes supra.

266 From President Lincoln’s First Inaugural Address, 1862, supra; one example of the decisive role of popular opinion, in the sagas described in this chapter, is the election campaign behind the Women’s Suffrage Amendment.

267 ‘Political powers’, per Marshall US CJ in Marbury v. Madison, supra; ‘the people’ act as ‘their own rulers’, per President Lincoln in his First Inaugural Address, 1862, supra (explaining his concern that the Court’s decision in Dred Scott not be treated as the policy of the whole nation, in which case: ‘the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal’).
CHAPTER 3 NOTES

267 Quoting select extracts from President A. Lincoln, First Inaugural Address, delivered March 4, 1861, The Avalon Project of Yale Law School’s Lillian Goldman Library website, URL accessed Aug 10, 2011: <http://avalon.law.yale.edu/19th_century/lincoln1.asp>. Roach notes the ‘careful distinction’ Lincoln drew between the authority of the Court to resolve a personal dispute over an issue and the authority of the government to address the ‘larger policy implications’ of the issue: Roach, SCOT, supra note 156, pg 18, citing in footnote 8 the source for the quote: ‘Lincoln as quoted in George Swan, ‘Roe from Lincoln’s Dred Scott Viewpoint’ (1984), 15 Lincoln Law Review 23 at 38, 41-42. Lincoln’s words in full are set out on The Avalon Project of Yale Law School’s Lillian Goldman Library website, supra this endnote.

268 As ‘judicial last words’, I include cases where the Court decided to defer to the government on the basis of a judicial analysis that courts should completely or largely defer to governments on matters within exclusive political authority (such as the early era cases under ss. 91 and 92 of the 1867 Constitution, and the later cases such as Latimer, completely deferring on the prerogative of mercy, and Treasury Board, largely deferring on a budget decision breaching Charter rights). As ‘political last words’, I include cases where governments could have responded but deferred to the Court for political reasons, i.e., where they decided not to respond, or were unable to respond because the democratic will (or popular or strong opinion in the public which the government did not want to oppose) supported the Court decision or did not support the government’s legislation or its potential response (such as Ford (after five years), Morgentaler, and many others).

269 This might be seen, for example, in the fact that it is impossible to know whether the government decisions in such cases as Sauvé, RJR-MacDonald Tobacco, Latimer, and Treasury Board were supported by the majority of the relevant electorate, and furthermore, whether the governments had taken reasonable and appropriately expert steps to develop shared values among the citizens on the issues in the cases. All we know for sure is that the legislation in these cases was passed by governments ruled by the political party that gained the most seats in the House of Commons in the most recent election, and had the support of the majority of the House on the legislation.


271 Roach, SCOT, supra note 156, pg 207

272 As I noted in Chapter 2, citing R. v. Mills, [1999] 3 S.C.R. 668, the Supreme Court of Canada has also referred to the idea of ‘dialogue’ to describe judicial and legislative responses to each other’s decisions.

273 This is my own short-form descriptive term for Hogg’s theory.

274 Peter W. Hogg & Allison A. Bushell (now Thornton), ‘The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)’, (1997) 35 Osgoode Hall L.J. 75-124 (herein ‘Hogg, Dialogue’, ‘Hogg & Bushell’, and the ‘final word’ dialogue theory); Peter W. Hogg & Allison A. Thornton, ‘Reply to “Six Degrees of Dialogue”’, (1999) 37 Osgoode Hall L.J. 529-536 (herein ‘Hogg, Dialogue 1999’). In this article, the same two authors clarified their theory in Hogg, Dialogue, in response to a critical assessment of their study in Christopher P. Manfredi & James B. Kelly, ‘Six Degrees of Dialogue: A Response to Hogg and Bushell’ (1999) 37 Osgoode Hall L.J. 513 (herein ‘Manfredi & Kelly’). See also P.W. Hogg, A.A. Bushell Thornton & W.K. Wright, ‘Charter Dialogue Revisited – or “Much Ado about Metaphors”’ (2007), 45 Osgoode Hall L.J. 1. In Hogg, Dialogue (para 5, fn 12), the authors, citing the literature, noted that the ‘dialogue’ idea had been raised in the American literature, as ‘an interplay between the courts and legislatures or the people’, and in the Canadian context, as a ‘judicial-legislative interplay’, but ‘seems to have been largely left unexplored’.

275 Hogg & Bushnell’s survey of 66 sequels to 65 cases (with 2 sequels to the Ford case): Hogg, Dialogue, pg. 98

276 Hogg, Dialogue, opening abstract and para’s 8, 9, 10, 23, 33, 37, 38, 39, 54; see also para’s 6, 7, 8, 9 for a summary of the argument.

277 Four features of the Charter that facilitate a dialogue with a democratic result: Hogg, Dialogue, Part IIIA, para’s 14-32: (1) the government’s ability to temporarily override some rights by making a Section 33 ‘notwithstanding
declaration’; (2) its ability to justify reasonable limits on rights under Section 1; (3) the qualified rather than absolute nature of Charter rights, and (4) the flexible range of possibilities for satisfying the Section 15 equality right. Respecting re-enactment with a strong preamble: see, e.g., the Daviault and Mills cases, discussed in Chapter 2.

For example, by reducing a limit on a right or extending a benefit to all.

Three rare exceptions where no dialogue is possible: Hogg, Dialogue, para’s 33-39: No government response to the court was possible when a right could not be overridden under s. 33, and the court either interpreted the right as so absolute that no limit was justifiable under Section 1, or interpreted the goal of the legislation limiting the right as unconstitutional. The third exception was when a proposed law was ‘so controversial’ or ‘politically explosive that it eluded democratic consensus’; one example of this is R. v. Morgentaler, [1988] 1 S.C.R. 30, discussed in Chapter 2.

Hogg, Dialogue, para’s 9, 54


An omnibus ‘notwithstanding declaration’ had been passed by the Quebec government, in response to the enactment of the Charter, to shield all provincial laws from its application.

See, e.g., among many examples, the critique by Manfredi & Kelly, supra, note 274.

Hogg, Dialogue 1999, para 1

Hogg & Bushell did not attempt the arduous task of going behind the results, to look for further substantive evidence of the existence of a ‘dialogue’ in, for example, legislative debates or other records that might show what the independent ‘will’ or ‘intention’ or ‘choice’ of the legislature was, and thus why it did not legislate or why it legislated as it did. This touches on one of the key points I make in Part Three, proposing a duty of reasonable care and skill in political decision-making.

Hogg, Dialogue 1999, para’s 6, 10, explaining that the theory ‘depends not at all on having precise figures’ and that ‘many’ legislative replies is enough to establish ‘the empirical part of the thesis.’


In other words, judicial interpretation is decisive in Charter review (as in all other contexts) respecting all rights not subject to the Section 33 override, and thus it may well ‘impugn legislative choices’ without striking them down. This is contrary to the position stated in Hogg, Dialogue 1999 (para 3), that unless courts strike down legislation, their decisions ‘do not, generally speaking, impugn legislative choices, and do not raise concerns about judicial interference in the democratic process.’ Note, however, other references by Hogg, both to examples where the judicial voice is decisive under the Constitution (Hogg, Dialogue, para 6 fn 14, para 22 fn 42; Hogg, Dialogue 1999, para 12) and to the decisive power of judicial interpretation alone (my emphasis): Hogg, Dialogue, pgs 87, 79, 90; Hogg, Dialogue 1999, para 3 (e.g., only the Supreme Court can ‘definitively affirm’ what the Charter means, and governments ‘have to obey’ what the Court says is required by the Charter).

The power of judicial interpretation is either enhanced or reduced by the Charter, depending on which Charter rights and provisions are raised: The judicial ‘final word’ is enhanced in what Hogg calls ‘rare exceptions’ – government responses are restricted where the s. 33 notwithstanding clause is not available, or when the Court interprets rights as absolute or legislative purposes as unconstitutional under the Oakes test. It is also enhanced when the Court does not strike down legislation but interprets it contrary to the government’s intent and desire, and even the plain meaning of the legislative words, as in Winko, supra, discussed in Chapter 2; and of course, a legislative justification under Section 1 is also subject to judicial interpretation. The judicial ‘final word’ is reduced, on the other hand, where the Charter permits governments to override court-protected rights under s. 33.

Hogg’s comment was made in a panel discussion, in the session ‘The Charter or Democracy: Judicial Review or Judicial Usurpation’, at the Osgoode Hall Law School Conference, Les vingt ans de la Chartre / The Charter at Twenty, Toronto, April 13, 2002. Hogg’s comment (according to my notes taken at the session) was: ‘It does not matter on what basis a judicial decision is made, as long as the legislature can respond with the final word.’ (Hogg’s emphasis) – in response to which another panelist, Professor Andrew Petter, objected: ‘Then why not have plumbers make the decisions?’ Petter argued that the ‘darker side’ of a dialogue theory such as Hogg’s is that
(again, according to my notes taken at the session) it ‘fails to ground judicial review in some objective set of values’, and that ‘some normative view has to explain why we’re allowing courts to have this phenomenal power – rather than plumbers.’ This is a fundamental critique, which I take up in this thesis, by offering a normative view based on the critical psychology perspective of Jung’s theory of conscious functions. Petter elaborated his argument in a subsequent article and in Chapter 6 of collected essays of his on the general topic: ‘Rip Van Winkle in Charterland’, 63 Advocate (Vancouver) 337 (2005), and The Politics of the Charter: The Illusive Promise of Constitutional Rights (Toronto: U of T Press, 2010).

291 Hogg, Dialogue, opening Abstract and para’s 1 fn 2, 6 fn 14, 7, 8, 22 fn 42, 23, 40, 54; Hogg, Dialogue 1999, para’s 7, 12, 13

292 Hogg, Dialogue 1999, para’s 12, 13

293 Hogg, Dialogue, para’s 8, 9, 33, 39

294 The terms ‘government’ and ‘legislature’ are used interchangeably by Hogg (Hogg, Dialogue, para’s 8, 13, 17, 20, 31, 40, 45, 46, 48, 49, and Notes 20, 49, and Hogg, Dialogue 1999, para 16 and note 19), and ‘government’ is also used to refer to something other than the legislature, e.g., government ‘benefits’, ‘cheques’, ‘policy-makers’, ‘debates within governments’, government ‘departments’ (Hogg, Dialogue, para’s 19, 48, and Hogg, Dialogue 1999, para 16). ‘Government’ is identified as well with a ruling political party and its leader – ‘the Liberal government of Premier Robert Bourassa’ (Hogg, Dialogue, para’s 17, 19, 32; Hogg, Dialogue 1999, para’s 12, 13).

295 Hogg, Dialogue, para’s 8, 10, 13, 16, 17, 20, 23, 31, 39, 40, 45, 46, 48, 49, 50, and Notes 20, 49; Hogg, Dialogue 1999, para’s 10, 16, and Note 19

296 Hogg, Dialogue, para 54; see also Hogg, Dialogue 1999, para 12

297 Hogg, Dialogue, para’s 7, 8, 14, 18, 19, 23, 54

298 Hogg, Dialogue 1999, para 14, in a qualification that is somewhat unsettling, with its implication that if no important constitutional point is in issue, the Court might not intervene to correct an injustice. Hogg made this comment in the context of explaining that courts don’t ‘want’ to engage in dialogue but want ‘to decide cases’.

299 Hogg, Dialogue, para 54; see also para’s 1 fn 2, 7, 8, and 53

300 Hogg, Dialogue, para’s 42, 47; see also Hogg, Dialogue 1999, para 8


302 Kent Roach, The Supreme Court on Trial: Judicial Activism or Democratic Dialogue (Toronto: Irwin Law, 2001) (herein ‘SCOT’, and ‘democratic dialogue’ theory) (cited earlier, supra note 156)

303 See Roach, SCOT, supra note 156, pg 236


305 Roach has elaborated this argument respecting the rights of ‘the truly unpopular’ in subsequent work, cited infra note 319.

306 Roach, SCOT, supra note 156, pgs 6-7, 8, 14, 33; CRF, pg 38

307 See, e.g., Roach, SCOT, supra note 156, pg. 6, referring to both judicial and political processes: The Charter structures a dialogue that can ‘include’ and ‘combine’ the two voices of court and government, in contrast to the American situation, where no ‘middle ground’ or ‘compromise’ allows courts and governments to ‘co-exist and thrive’.

308 This is an important difference between the dialogue theories of Roach and Hogg: Roach’s attention to the roots of the Charter dialogue in common law constitutionalism, effectively highlights that the dialogue may be facilitated and shaped by the Charter but does not arise from and depend only on the Charter.

309 See, e.g., Roach, SCOT, supra note 156, pgs 250, 285
inds of rights that courts protecting rights and governments limiting them democ

Charles Fox and William Wilberforce) rather than by judicial decisions. My argument distinguishes judicial and political decision making, not on what rights a decision protects, but on how it is made. I do not intend to address the nuances developed in the ongoing academic debates and literature concerning dialogue theory, by such scholars, in addition to Roach and Hogg, as Mark Tushnet, Janet Hiebert, Aileen Kavanagh, Jeremy Waldron, and many others. While doing this might add to and reinforce the perspective I will introduce, and be a worthwhile elaboration of it, it is not necessary for introducing and explaining that perspective.

320 Roach, SCOT, supra note 156, pg 99, and see also pgs 30, 99, 207, 245

321 I do not intend to address the nuances developed in the ongoing academic debates and literature concerning dialogue theory, by such scholars, in addition to Roach and Hogg, as Mark Tushnet, Janet Hiebert, Aileen Kavanagh, Jeremy Waldron, and many others. While doing this might add to and reinforce the perspective I will introduce, and be a worthwhile elaboration of it, it is not necessary for introducing and explaining that perspective.

322 Roach, SCOT, supra note 156, pg 66, see also pgs 8, 12-13, 32, 54, 66-68, 212, 220, 239, 250

323 CRF pg 42, Roach, SCOT, supra note 156. pgs 66, 143, 161, 209

324 Roach, SCOT, supra note 156, pgs 13, 54, 68, 104-05, 148, 212, 229, 236, 239, 245, 247, 264

325 Roach, SCOT, supra note 156, pgs 12, 13, 66-68, 212, 222, 229-230, 247, 286, 293-94, 298

326 Roach, SCOT, supra note 156, pgs 212, 280-81; Roach refers to United States v. Burns, [2001] 1 SCR 283, in which the Court ‘drew a distinction between justice issues that were within its expertise – [such as risk of wrongful conviction and execution of innocent in trial process] – as opposed to more general issues about the morality and wisdom of the death penalty’, which were not (pg 212), and, contrasting the majoritarian concerns of governments, Roach argues that the independent judiciary should have ‘no incentives other than to achieve justice as best it can’ (280-81). See also, re: the ‘special concerns and expertise’ of the courts and ‘Parliament’s special expertise’, Roach, SCOT, supra note 156, pgs 268, 280-82.
327 See, e.g., Roach, SCOT, supra note 156, pgs 6-7, 13, 26 fn 42, 31 fn 61, 57-58, 95, 97, 106, 107, 115-18, 140, 141, 221-22, 229, 236, 239, 245, 248-250, 260, 264-65, 286, 294
328 Roach, SCOT, supra note 156, pgs 13, 246, 247, 248, 260, citing and quoting Bickel
329 Ibid.
330 Roach, SCOT, supra note 156, pg 246, see also on this point, pgs 6-7, 13, 26, 57-58, 111, 221, 222, 236, 239, 247-48, 250, 260, 265, 286
331 Roach, SCOT, supra note 156, pgs 212, 245, 249-250, 57, 264
332 Roach, SCOT, supra note 156, pgs 148, 13, 58 fn 9, 212, 60, 236
333 Roach, SCOT, supra note 156, pgs 57, 245, 249-250, 264; see also pgs 7, 13, 17, 57-58, 111, 236, 245, 249-250, 286
334 Roach argues that the independent judiciary should have ‘no incentives other than to achieve justice as best it can’, without focusing expressly on the question of what criteria are required for judges to do that, apart from being non-majoritarian: Roach, SCOT, supra note 156, pgs 280-81
335 ‘Deliberative’ – defined in the dictionaries as ‘carefully considered, rather than hurried or impulsive’: Hale CJ’s view was discussed in my overview of the historical development in Chapter 1
336 Comparing written judgments to the Hansard record of Parliamentary proceedings, Roach concisely summed it up: ‘who reads Hansard these days?’ (personal correspondence, Oct. 8, 2014)
337 See ‘anti-majoritarian’ term in Roach, SCOT, supra note 156, e.g., pgs 94-94, 101-02, 228, 245, 280-81
338 See Roach, SCOT, supra note 156, pgs 6-7, 13, 26, 57-58, 111, 221, 222, 236, 239, 246-48, 250, 260, 265, 286
340 ‘Government’ decisions include a whole host of decisions that ‘elected representatives’ may make (‘legislative’, ‘executive’, ‘political’, ‘democratic’, ‘administrative’): e.g.: Roach, SCOT, supra note 156, pgs x, 7, 8, 31, 34-35 fn 26, 40, 40-41 fn 46, 57, 67, 68, 236, 264, 294; CRF pgs 31 fn 61, 34-35 fn 26, 40-41
341 Roach, SCOT, supra note 156, pgs 8, 13, 31 fn 61, 57, 68, 212, 222, 236, 245, 247, 249-250, 264, 287, 294; CRF pg 43
342 Ibid.
343 Roach, SCOT, supra note 156, pgs 57, 99, 212-13, 280-81, 10, 220, 280-81
344 Roach, SCOT, supra note 156, pgs 8, 13, 55, 236, 245, 247, 249-250
345 Roach, SCOT, supra note 156, pgs 212, 268, 280-81
346 Roach, SCOT, supra note 156, pgs 8, 13, 54, 55, 57-58, 58 fn 9, 60, 61, 77, 212, 236, 245, 247-48, 286-87; CRF pgs 40-41 fn 46, 42
347 Ibid.
348 Roach, SCOT, supra note 156, pg 60; see also pgs 4, 55, 57, 58, 77
349 Roach, SCOT, supra note 156, pgs 13, 68, 237, 250, 285-86, 293-94
350 Roach, SCOT, supra note 156, pg 99
351 CRF pgs 34-35 fn 26, 42; Roach, SCOT, supra note 156, pgs 57, 99, 218, 237, 267
352 Roach, SCOT, supra note 156, pgs 10, 57, 99, 220
353 Roach, SCOT, supra note 156, pgs 67, 156, 221, 236, 238, 239, 245 or 249-250, 250, 285-86, 293
354 Two ‘dialogic structures’, under Sections 1 and 33: see e.g., Roach, SCOT, supra note 156, pg 236
355 Roach, SCOT, supra note 156, pgs 8, 13, 156, 236, 240, 245, 249-250, 285-86, 286, 293 (for Charter provisions, see my summary in Chapter 2)
Roach, SCOT, supra note 156, pgs 173, 236, 293

Roach, SCOT, supra note 156, pgs x, 13, 156, 245, 249-250, 264, 281-81, 286, 293

And thus their dialogue itself is ‘expanded and refined’: see Roach, SCOT, supra note 156, pgs x, 13, 245, 249-250, 264, 286, 293

Roach, SCOT, supra note 156, pgs 7, 12-13, 176, 178, 192, 236, 245, 249-250, 264-65 (quoted in my text here), 265, 286

Roach, SCOT, supra note 156, pgs 12-13, 264-65

Roach, SCOT, supra note 156, pgs 12-13, 250; Charter Section 33(3)-(5)

Roach, SCOT, supra note 156, pgs 12-13; for Section 33 and the other Charter provisions, see my summary in Chapter 2 and my discussion above in evaluating Hogg’s theory.

Roach, SCOT, supra note 156, 265, 293, 294

Roach, SCOT, supra note 156, pgs 8, 12-14, 54, 57-58, 66-68, 212-13, 218, 236, 240, 247, 250, 264-65, 286, 287, 293, 294

Roach, SCOT, supra note 156, pgs 240 (first part of quoted passage), 294 (second part of quoted passage)


Roach, SCOT, supra note 156, pg 222, see also pgs 212, 220; CRF pg 42


As Roach et al also note: ‘It is said that judicial review strengthens democracy by ensuring the rights and interests of all citizens are protected’: CRF pgs 32, 33, 34-35 fn 26 (quoted passage), 42, 43. Values and principles described variously by Roach as ‘essential’ to a ‘true’ democracy, as ‘enriching’ or ‘enhancing’ or ‘consistent with’ democracy; as ones that ‘have always tempered majority rule’ and our notion of democracy: as historically ‘core values’, and ‘ground rules of democracy’, and as ‘fundamental aspects’ of Canadian society, with its ‘complex and plural commitments’: Roach, SCOT, supra note 156, pgs x, 6-7, 9, 10, 11, 218, 219, 220, 294; CRF pgs 34-35 fn 26, 42, 43.

Roach, SCOT, supra note 156, pgs 219, 66

Roach, SCOT, supra note 156, pgs 250 (quoted), 66, 220

CRF pgs 31 fn 61, 32-34, 35 fn 26, 42, 43; Roach, SCOT, supra note 156, pgs x, 6, 7, 10, 57, 58, 99, 105, 218, 219, 220, 226, 229-230, 237, 240, 250, 267, 294, 295

I have examined elsewhere the qualities of a ‘good society’, and the relationship between justice and democracy in such a society: Connidis, K. Arnet, Variations on Justice in a Good Society: Lorenzetti’s Frescoes in the Siena City Hall, paper delivered at the 3rd Multidisciplinary IAAP Conference, Zurich, July 3, 2008 (referring to Ambrogio Lorenzetti’s famous thirteenth century frescoes of ‘The Good City’ and ‘The Bad City’ in the Palazzo Pubblico, Siena, Italy). There, I argued that in a ‘good society’, ‘Democracy’ does not stand alone but is tempered by ‘Justice’ and other values in addition to ‘Democracy’ itself, and majority wishes may also be attuned to such other values – not as aspects of ‘Democracy’ but as values in their own right. Not even all ‘bedrock values of our democratic tradition’ (Roach, SCOT, supra note 156, pgs 220, 222, CRF pg 42) – however integral to Canada’s constitutional structure and democratic society – are necessarily ‘democratic’ values themselves; ‘democracy’ itself does not strictly require, for example, federalism, the common law, and every minority right and other valued right that is protected under our Constitution or that we would want to protect.
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views of governments, courts, and advocates for women’s and other equality rights reflects the reality:  D...

limited, she argues, because it represents changes in government analyses as resulting from judicial reasoning alone,

127, 135)  It is in this context that McPhedran introduces a ‘trialogue’ metaphor.  The ‘dialogue’ metaphor is t...

such social activist movements ...points out the development of Canadian democracy itself, through ‘their litigation and parliamentary interventions’.  And she central role played by women and other equality seeking groups in the creation of Charter equality rights, and the development of Canadian democracy itself, through ‘their litigation and parliamentary interventions’.  And she points out, very importantly, that the ‘erosion of resources’ by successive governments is undermining the ability of such social activist movements (and I would add, most ordinary citizens) to play this crucial role.  (pgs 102-03, 106, 127, 135) It is in this context that McPhedran introduces a ‘trialogue’ metaphor. The ‘dialogue’ metaphor is too limited, she argues, because it represents changes in government analyses as resulting from judicial reasoning alone, through a ‘mere two-way discussion’ between the Supreme Court and Parliament. Such a dialogue is a ‘His Story’ told by male insiders who see only ‘executive federalism’, she argues (and I agree with her that this has long been so), while a ‘trialogue’ among ‘courts, legislatures, and civil society, particularly among activist organizations’, reflects the reality: Democratic change in drafting the Charter resulted from three-way discussions involving the views of governments, courts, and advocates for women’s and other equality rights – views which these advocacy groups presented in arguments in interventions in court litigation, and in various interactions with parliamentarians. (pgs 126-29) ‘The dialogue model’, McPhedran argues, ‘leaves no room for critical information brought to the judicial process by interveners’ (interveners such as LEAF, NWAC, DAWN, and others). (pgs 130-31).

The approach I introduce, which supports McPhedran’s essential points about the crucial importance of effective voices of women and other marginalized citizens in our democracy, proceeds from a different perspective. I argue, based on the critical psychology approach, that it is important to further reform and refine the existing judicial and political processes, and the interplay between them, which were developed and established through long centuries and hard effort – to improve the way they are being carried out, and how well they serve justice and democracy – rather than to add a further, separate and independent, third party of organized civil activist groups to this structure of dialogue between these two fundamental and powerful institutions of our society. Such a third party of organized groups would remain marginalized in this existing judicial and political structure, outside our democratic society’s actual collective decision-making in courts and governments, or would undermine rather than strengthen them. And such groups would privilege those citizens who have the ability and resources to mount well-organized campaigns to speak effectively for them, outside the ordinary democratic and judicial processes; as McPhedran notes, ‘Constitutional litigation is a strategic choice that few Canadian women can make today ...’ (pg 110). McPhedran can be seen as describing, I argue, a dialogue in which all citizens – including such marginalized majorities as women and unwealthy citizens – are enabled to engage in effective ‘political and legal activity’ (as she describes the ‘litigation and parliamentary interventions’ of women’s groups in the Charter context) and be effective in concrete


375 Roach, SCOT, supra note 156, pgs 220, 239, 285-86, and see also pgs 293-94

376 One of the important ways in which Roach’s theory differs from Hogg’s is in Roach’s development of this view that Charter dialogues have roots in common law constitutionalism; thus, while the dialogues may be facilitated and shaped by the Charter, they are not created by the Charter terms and context and are not limited to them.

377 Respecting the uneasy truce between judicial and political law-stating powers, see my discussions in Chapters 1, 2, and 7 of this thesis.

378 Discussed in Chapter 1, citing Baker, Historical Introduction, pg 84, quoting a passage from the Coronation oath of Edward II (1307-27), Statutes of the Realm, vol. I, pg 168

379 Roach, SCOT, supra note 156, pgs x, 6, 11, 57, 138-39, 147, 221-22, 226, 236-37, 240, 249-250, 294, CRF pgs 32, 37, re: two-party or three-party institutional dialogues (court, legislature, executive), which Roach most often refers to, and occasional references to multi-party dialogues also including ‘society’ and ‘the people’.

Marilou McPhedran, ‘A Truer Dialogue: Constitutional Trialogue’, in Graeme Mitchell, Ian Peach, David E. Smith & John Donaldson Whyte (eds.), A Living Tree: The Legacy of 1982 in Canada’s Political Evolution (Markham, Ont.: LexisNexis Canada, 2007), at pgs 101-136, and see Marilou McPhedran with Anna Maria Tremonti, on ‘Tracking the Charter of Rights’, The Current, CBC Radio, aired April 17, 2012; CBC The Current website, URL <http://www.cbc.ca/thecurrent/episode/2012/04/17/tracking-the-charter-of-rights---part-1-2/>. I want to elaborate briefly on McPhedran’s argument. Her important point is to bring out the indispensable and overlooked achievement of women, in making constitutional and social change, by forming well-organized groups of social activists, and this point stands quite apart from the trialogue model proposal. McPhedran describes the central role played by women and other equality-seeking groups in the creation of Charter equality rights, and the development of Canadian democracy itself, through ‘their litigation and parliamentary interventions’. And she points out, very importantly, that the ‘erosion of resources’ by successive governments is undermining the ability of such social activist movements (and I would add, most ordinary citizens) to play this crucial role. (pgs 102-03, 106, 127, 135) It is in this context that McPhedran introduces a ‘trialogue’ metaphor. The ‘dialogue’ metaphor is too limited, she argues, because it represents changes in government analyses as resulting from judicial reasoning alone, through a ‘mere two-way discussion’ between the Supreme Court and Parliament. Such a dialogue is a ‘His Story’ told by male insiders who see only ‘executive federalism’, she argues (and I agree with her that this has long been so), while a ‘trialogue’ among ‘courts, legislatures, and civil society, particularly among activist organizations’, reflects the reality: Democratic change in drafting the Charter resulted from three-way discussions involving the views of governments, courts, and advocates for women’s and other equality rights – views which these advocacy groups presented in arguments in interventions in court litigation, and in various interactions with parliamentarians. (pgs 126-29) ‘The dialogue model’, McPhedran argues, ‘leaves no room for critical information brought to the judicial process by interveners’ (interveners such as LEAF, NWAC, DAWN, and others). (pgs 130-31).

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reality, both as litigants in court and as voters and politicians in governments, able to ensure their views properly inform judicial and political decisions in any dialogue between courts and governments.

380 Roach, id., particularly pgs 6, 221-22, 147

381 i.e., individual litigants and social activists (including interveners, governments, and all parties to a case) frame the issues, facts, and arguments on the topic, and they bring their personal initiative and interest, time, and resources to the litigation or social activism. But a dialogue may also start with a legislative response to a court decision that first formulates a common law principle which the government does not want to accept, as in the Daviault line of cases (noted in Chapter 2), arising out of a common law defence of intoxication.

382 Roach, SCOT, supra note 156, pg 240: ‘Truly democratic dialogue that occurs under a modern bill of rights is not the professional debate of professors and pundits … it is the democratic debate of citizens whether the power of their elected governments to place limits on the Court’s decisions or even to override them by ordinary legislation should be exercised. …’

383 Executive and legislative decisions should be addressed in a similar way, I argue in Part Three, as political decisions made by democratic governments, whether made by enactment in Parliament or by the Prime Minister’s discretionary exercise of the prerogative or executive power (in consultation with his or her Cabinet of, essentially, leading members of the governing party, or with his or her Office personally selected partisans). Note that executive decisions are often referred to as well as legislative ones, by legal scholars (such as Roach in SCOT) and by Supreme Court judges (such as Dickson C.J. in R. v. Oakes, [1986] 1 S.C.R. 10). I will argue that executive decisions are vitally important in a democratic society, and should invite similar judicial scrutiny – to ensure realistic, concrete, democratic accountability and compliance with an appropriate standard of reasonable care in political practice – as legislative decisions invite. As the historical overview in Chapter 1 showed, much of the development of court and government processes through conflicts between them has had to do with judicial scrutiny of the prerogative, not legislative, decisions of Parliament. Politicians and judges (I argue more generally in Part Three) should be held to standards of ‘reasonable care and skill’ in making their decisions, just as other expert practitioners are in their fields of expertise, since they too make specialized decisions, each requiring a distinct type of expertise, having structures and resources designed to facilitate it, and furthermore having a ‘monopoly’ on their unique decision-making role.

384 It is wiser to develop and refine the existing systems that have developed over centuries of trial and error and collective effort and examination, than to add new parties and new avenues of dialogue and public decision-making: This waters down what has been achieved, requires re-inventing the wheel, and creates in the meantime a Babylon of confusion – with many openings for disproportionate power and privilege, which may be more opaque and confusing and difficult to see, scrutinize, and address, by citizens, courts, media, universities, and so on. I will argue in Part Three that the existing processes may often be carried out in ways that are flawed, and require correction and development (e.g. the rules of evidence can be corrected and refined, the ideal of Justice can be given new content, the electoral and political accountability processes can be improved, etc.), but that the processes and structures themselves are not inherently wrong, despotic, or misguided; in other words, the basic complementary structure is healthy and valuable, not flawed, but it is in need of being constantly examined, developed, and refined to work more effectively. Expanding the dialogue into a multi-party dialogue that includes private group voices may well diffuse and even undermine, rather than sharpen and deepen, the differentiation of judicial and political decisions, and through them, of the collective rational consciousness of the society as a whole.

385 ‘Dialogues’ in the plural: Roach, SCOT, supra note 156, pgs 6, 288, note also pgs 5-6, 8, 54

386 Roach, SCOT, supra note 156, pg 294 (‘the media’), 68 (‘the world’)


388 Roach SCOT, supra note 156, pgs 68, 240, and more generally, 5-7, 8, 12, 14, 33, 54, 57, 58, 66, 67, 68, 236, 237, 240, 265, 294
This will require, as I elaborate in Chapter 7, that governments expertly distinguish and address whatever legitimate emotions and concerns of citizens are being raised – which are often associated with values but easily overshadow and distort them – and thus separate them from their actual underlying values (which requires addressing these associated emotions and concerns effectively); this will enable citizens to then more readily find whatever common ground exists among them (which theories of consciousness such as Jung’s intimate are likely to exist and are more likely to be found this way), and develop these shared values.


See epigraph to Chapter 1, supra note 14, quoting Walter Bagehot’s observation (in his essay, ‘Lord Althorp and the Reform Act of 1832’ (1876), published in Bagehot’s Historical Essays (Anchor, Garden City, N.Y., 1965), pgs. 147-179, at pg. 150) that: ‘The characteristic danger of great nations … is that they may at last fail from not comprehending the great institutions they have created.’

CHAPTER 4 NOTES:


C.G. Jung, ‘Forward to the Argentine Edition’, C.W. 6, pgs x1v-xv; this clarifying passage, quoted more fully: ‘No book that makes an essentially new contribution to knowledge enjoys the privilege of being thoroughly understood. Perhaps it is most difficult of all for new psychological insights to make any headway. … What I have attempted in this book is essentially a critical psychology. … [by providing] general principles and criteria, not too specific in their formulation, which may serve as points de repère in sorting out the empirical material … far too many readers have succumbed to the error of thinking that [this] provides a system of classification and a practical guide to a good judgment of human character. … This regrettable misunderstanding completely ignores the fact that this kind of classification is nothing but a childish parlour game, every bit as futile as the division of mankind into brachycephalics and dolichocephalics [i.e., short heads and long heads]. My typology is rather a critical apparatus serving to sort out and organize the welter of empirical material, but not in any sense to stick labels on people at first sight. It is not a physiognomy and not an anthropological system, but a critical psychology dealing with the organization and delimitation of psychic processes that can be shown to be typical.’

Descriptions Jung gave of his ‘critical psychology’ include: ‘an attempt, grounded on practical experience, to provide an explanatory basis and theoretical framework for the hitherto boundless diversity in the formulation of psychological concepts’, ‘guidelines to reduce the chaotic profusion of individual experiences to any kind of order’, ‘a method of investigation and presentation of the empirical material’ concerning conscious psychological functioning, ‘an aide to a psychological critique of knowledge’, ‘a critical tool for the research worker’, ‘the organization and delimitation of psychic processes which can be shown to be typical’, ‘certain basic principles’, ‘the structure of normal modes of behaviour’, ‘typical forms of reaction’, ‘[the purpose of a typology of this sort] is to

390 As I elaborate in Part Three, Chapters 6 and 7, on any contested topic, judicial decisions can best, and should, establish what is required to attune governments to the concrete requirements of democracy on the topic (by developing their distinct judicial viewpoint of concrete factual and conceptual analysis and a guiding ideal of Justice, and applying that scrutiny of the political decision), just as political decisions can establish what is required to attune courts to the citizens’ actual values and preferences on the topic (by developing their distinct rational viewpoint of felt values shared by the citizens).

391 This will require, as I elaborate in Chapter 7, that governments expertly distinguish and address whatever legitimate emotions and concerns of citizens are being raised – which are often associated with values but easily overshadow and distort them – and thus separate them from their actual underlying values (which requires addressing these associated emotions and concerns effectively); this will enable citizens to then more readily find whatever common ground exists among them (which theories of consciousness such as Jung’s intimate are likely to exist and are more likely to be found this way), and develop these shared values.


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395 Roach makes this point generally in, e.g., ‘Constitutional, Remedial and International Dialogues About Rights: The Canadian Experience’ (2005), supra note 387; I am quoting his summary of this point in a personal communication, October 8, 2014.

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As I noted in the Introduction, at supra note 4, Jung’s theory of conscious functions is easily accessible (due to the simplicity of its basic structure – not unlike the simplicity of the double-helix structure of DNA, the macromolecule that encodes genetic information), and at the same time it is far-reaching in its explanatory power and its complexity of potential (due especially to the examined connection between conscious functions and unconscious contents that is an integral part of his model). This part of Jung’s theory (dealing with the unconscious, its interconnection with conscious functions, and their mutual influences) is not necessary to the approach I introduce, and – although I briefly introduce it – I do not rely on and elaborate on it in this thesis.

Jung’s widely influential first publication on this topic of the different types of conscious functions, *Psychologische Typen* (Zurich: Rascher, 1921), was first published in English translation as *Psychological Types, or The Psychology of Individuation*, trans. R.F.C. Hull (trans.) (Princeton, N.J.: Princeton University Press, 1923)

Numerous ‘personality type’ classification systems have been derived from Jung’s theory of conscious functions (and widely used (and not always well used) in education, employment, relationship counselling, and many other settings). Jung, however, distinguished his theory as a dynamic model of the human psychological structure itself, as a whole and in all individuals, and not a static classification, that is, a system for classifying and ordering human characters or personalities. See discussions in, e.g., Beebe, John E., ‘Psychological Types’, in Renos Papadopoulos, (ed.), *The Handbook of Jungian Psychology: Theory, Practice, Applications* (New York: Routledge, 2006), and Samuels, Andrew, ‘Introduction: Jung and the Post-Jungians’, in Polly Young-Eisendrath and Terence Dawson (eds.), *The Cambridge Companion to Jung* (Cambridge: Cambridge U. Press, 1997), pgs 1-13.

For Jung’s clarification of this point, see, e.g.: C.G. Jung, ‘Forward to the Argentine Edition’, C.W. 6, pgs x1v-xv, supra note 395; ‘Psychological Typology’, in C.W. 6, pgs 554-55, para’s 986-87: ‘It is not the purpose of a psychological typology to classify human beings into categories – this in itself would be pretty pointless.’; C.G. Jung, ‘Introduction to Toni Wolff’s ‘Studies in Jungian Psychology’ (1959)’, and C.W. 10, para 890: ‘As every intelligent person knows, a typology of this sort does not aim in the least at a statistical classification; its purpose is to afford insight into the structure of normal modes of behaviour. There are typical forms of reaction whose existence is quite justified, and which should not be regarded as pathological merely because the analyst belongs to a different type. A typology is therefore designed, first and foremost, as an aid to a psychological critique of knowledge.’

Comment made by Dierdre Bair, an award-winning writer (and not a psychologist), author of *Jung: A Biography* (Boston: Little, Brown, 2003), at the 2nd International Academic Conference of Analytical Psychology and Jungian Studies, at Texas A&M University, College Station, Texas, on July 9, 2005 (my notes).

See Jung’s definitions of his ‘critical psychology’, supra, note 393.

*Extraversion* and *introversion*: In an extraverted orientation, the functions are directed outward, and used to register and interpret external world phenomena. In an introverted orientation, the functions are drawn inward, to register and interpret what is going on in the individual’s private or internal world of physical and psychological phenomena. See, e.g., C.G. Jung, ‘A Psychological Theory of Types’, in C.G. Jung, *Modern Man in Search of a Soul*, supra note 394, at pg. 86.

Our ‘ego’ or ‘I’ is our whole personal identity as we know it to be, but not all that we really are: It does not include the parts of our identity that we do not know – that is unconscious in us, for example, and that does not come to us from the ego or I but from a source outside our consciousness, such as a dream.

Jung, C.W. 13, para 67: ‘merely the center of consciousness’; see also C.W. 6, definitions ‘ego’, para 706, ‘self’, para 789: Jung defined the ‘ego’ or ‘I’ specifically in contrast to the *Self*, which is the term he used for the center of the total psychological structure, both conscious and unconscious. The ego could be envisioned as a satellite of the Self, sent out by the Self into the world of matter and time and space. Another often-used analogy, among many, envisions the ‘I’ as an island of consciousness, on which grow the tools for consciousness, that is floating on a vast, unknown (to the ‘I’) sea of unconsciousness.
Spinoza (and Bergson) to uphold the

Jung, in

Respecting the argument for the superiority of intuition, see that viewpoint attributed to Spin

The Handbook of Jungian Psychology: Theory, Practice, Applications (New York: Routledge, 2006) pg 130, at pg 132: These four terms ‘did not originate with Jung’, Beebe notes, ‘rather, they were culled from the history of psychology, and they carry the ghost of earlier meanings placed on them by many physicians and philosophers’ [pg 132]. Beebe gives two prominent examples of these precursors: the four ‘temperaments’ proposed by Hippocrates, and the ‘powers of mind’ proposed in eighteenth-century faculty psychology. What Jung did that was original and far-reaching, as Beebe explains in his concise summary, was to focus on the ‘possibilities of consciousness’ presented by the differing functions [id at pg 132]. See Jung’s discussion of this in, e.g., C.G. Jung, ‘A Psychological Theory of Types’, in Modern Man in


Jung, C.W. 6, para 770

In another pithy summary, in his essay on typology in Modern Man in Search of a Soul, supra note 394, at pgs 93-94, Jung gave this summary description of the four functions, making a nice comparison between the four functions and the four points of the compass: ‘Sensation establishes what is actually given, thinking enables us to recognize its meaning, feeling tells us its value, and finally intuition points to the possibilities of the whence and whither that lie within the immediate facts. In this way, we orient ourselves with respect to the immediate world as completely as when we locate a place geographically by latitude and longitude. The four functions are somewhat like the four points of the compass …’

See also John Beebe, ‘Psychological Types’, supra note 403, at pg 132, for his concise description of the four functions.

C.G. Jung, ‘A Psychological Theory of Types’, in Modern Man in Search of a Soul, supra note 394, pg 74 at pgs 93-94; see also C.W. 6, para 900. See the full quote, id. at pgs 93-94 (quoted in part in the epigraph to this chapter), where Jung refers as well to the arbitrariness of the four directions designated, in both the compass and the conscious functions contexts (i.e. North-South could just as well have been named Zook-Trook and just as well have been located at the points we call West-East, or Northwest-Southeast, and so on), and nonetheless the meaningfulness and indispensability of making such a designation: ‘Sensation establishes what is actually given, thinking enables us to recognize its meaning, feeling tells us its value, and finally intuition points to the possibilities of the whence and whither that lie within the immediate facts. In this way, we orient ourselves with respect to the immediate world as completely as when we locate a place geographically by latitude and longitude. The four functions are somewhat like the four points of the compass … The four functions are somewhat like the four points of the compass; they are just as arbitrary and just as indispensable. Nothing prevents our shifting the cardinal points as many degrees as we like in one direction or the other, nor are we precluded from giving them different names. It is merely a question of convention and comprehensibility. But one thing I must confess: I would not for anything dispense with this compass on my psychological journeys of discovery. …’

This can be seen in the epigraph to this chapter, a passage quoted more fully in the endnote above.

These various arguments are often debated among ‘Jungian’ scholars and analysts, and the brief description here summarizes the articulation of the various arguments suggested by Beebe in discussion with me on July 15, 2007. Examples of these various arguments are given in John Beebe, ‘Psychological Types’, in Renos Papadopoulos, ed, The Handbook of Jungian Psychology: Theory, Practice, Applications (New York: Routledge, 2006), at pg 130. Respecting the argument for the superiority of intuition, see that viewpoint attributed to Spinoza and explained by Jung, in C.W. 6, para 770: ‘Intuitive knowledge possesses an intrinsic certainty and conviction, which enabled Spinoza (and Bergson) to uphold the scientia intuitive as the highest form of knowledge.’

For an example of hierarchies set up in other theories, explicitly or implicitly, ‘abstract’ over ‘concrete’ perspectives is a hierarchy proposed in both Harvard Professors Lawrence Kohlberg’s and Carol Gilligan’s theorizing about the development of morality in human consciousness: Kohlberg set up a hierarchy not only of ‘thinking’ over ‘valuing’ viewpoints, but also ‘abstract’ over ‘concrete’ viewpoints (essentially on the basis that the former are developed later in life and involve more complex thinking or conceptualization than the latter). His colleague Gilligan, who critiqued and refined the first hierarchy, nonetheless maintained the second one; in her
model of the development of moral decision-making, she does not elevate thinking over personally-felt values, as Kohlberg does, but she does accept the hierarchy of ‘abstract’ (in which she includes generalization) over ‘concrete’: see Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Harvard U. Press, Cambridge, Mass., 1982). Note that in Mnookin’s theory of legal negotiation (an example I discuss in Chapter 5), ‘intuition’ is presented as unreliable, and ‘emotion’ is presented as an impediment to negotiation, what it signals about feeling or valuing, or intuition, largely ignored rather than attended to. And note that Dawkins, in his quarrel with Levin (also an example I discuss in Chapter 5), derides a ‘concrete’ skepticism which does not actually seem to be simply stupid rather than legitimate and useful, and which could spur on the refinement of a concrete or empirical proof that is accessible to intelligent lay-people or non-experts.

411 Respecting the one-sidedness and complementarity of the thinking and feeling/valuing functions on their own, see Jung’s comment, ‘Psychological Types’, C.W. 6, at pg 628: ‘We should not pretend to understand the world only by the intellect; we apprehend it just as much by feeling. Therefore, the judgment of the intellect is, at best, only the half of truth, and must, if it be honest, also come to an understanding of its inadequacy.’

412 Each has its unique brilliance, in the specific viewpoint or perception that it provides, and each has its blindnesses, in the viewpoint or perception of each of the other functions can uniquely provide, since each function is necessarily missing the unique brilliance of the others.

413 The same distinctions can be made respecting each constituent function, of course: For example, sensation perceives a tangible fact of material reality but not its latent potential, while intuition perceives its potential but not its grounding and unfolding in existing material reality. Thinking gives meaning to both kinds of facts by conceptualizing them, but without assessing their personally-felt value, while feeling evaluates them quite apart from any conceptual analysis. These four basic functions can be seen in the various combinations of them, each of which is not only distinct and different but characteristic of its specific constituent functions, as described in the text here respecting empirical and abstract thinking.


415 The terms ‘interplay’ and ‘dialogue’ can both be used – and have both been used – for this concept in Jung’s theory. For clarity’s sake, I will use the term ‘interplay’ in introducing and referring to Jung’s theory (that is, to the interaction between conscious functions and also between conscious functions and unconscious contents and processes), and will use the term ‘dialogue’ when I refer to the specific interplay between judicial and political viewpoints in the decisions of courts and governments.

416 By ‘that point in time’, I refer to any given time in the ever-changing moments and eras in the progression or alteration of rational consciousness.

417 Roach, *SCOT*, supra note 156, pg 246, quoted supra, Chapter 3, at text to note 330

418 Of course, ‘every analogy is lame’, as the adage goes, discussed supra, Introduction, pgs 9-10, note 10.

419 For example, imagine a surgeon who must make an expert decision about conducting a kidney transplant, in which empirical thinking is wanted as the decisive function and personally felt values are not, and whose own primary functions are concrete thinking’s sensation and thinking. Nonetheless, the surgeon can deliberately work to bring her own personally felt values into her consciousness, and then use them to test and be tested by her empirical thinking. The surgeon might find that doing this brings in or highlights something that could distort or bias her empirical decision-making (such as, for example, a personally felt antipathy to old drug addicts and reluctance to conduct expensive surgery on them), which her thinking alone could not see or acknowledge in its processing. Doing this introduces a factor which may be relevant but missing from her empirical thinking (in this example, the potential influence on her decision of her personally felt value or bias), and thus enables her to correct and refine her decision by consciously addressing this factor in her concrete thinking’s factual and conceptual analysis.


421 ‘Abaissement du niveau mental’ (‘lowering of the mental or conscious level’), French psychologist and neurologist Pierre Janet’s term (under whom Jung did a brief practicum) referring to the reduced level of ego consciousness that occurs during sleep and in other highly relaxed states, which permits contents of the unconscious to emerge more easily. See, e.g., entry in Andrew M. Colman, A Dictionary of Psychology (3rd ed., 2008: Oxford U. Press, Oxford).

422 C.G. Jung, Modern Man in Search of a Soul, supra note 394, pg 93.

423 Respecting a ‘shared’ or ‘same outer world’, see the neurologist Candace Pert’s viewpoint, discussed Chapter 5, on the idea that we each live in our own subjective bubble with no shared reality ‘out there’.

424 For some of Jung’s descriptions of the sensation function, see Modern Man in Search of a Soul, supra note 394, pg 93; C.W. 6, para 899, and CW 8, para 288.


426 Jung, C.W. 8, para 288. Note that I have changed the term ‘psychic’ used in the English translation, to ‘psychological’, since ‘psychic’ now has a somewhat different meaning from what Jung intends here.


Sensation tells us that a thing is. Thinking tells us what the thing is, feeling tells us what it is worth to us. Now what else could there be? One would assume one has a complete picture of the world when one knows there is something, what it is, and what it is worth. But there is another category, and that is time. Things have a past and they have a future. They come from somewhere and they go to somewhere, and you cannot see where they come from and you cannot imagine where they go to, but you get what the Americans call a hunch.

428 Jung, C.W. 8, para 292, where he notes the problem of the imprecision and overlapping of these terms: ‘The intuitive process is neither one of sense-perception, nor of thinking, nor yet of feeling, although language shows a regrettable lack of discrimination in this respect. … [people, according to their temperament, speak of it as seeing, as thinking, or as feeling] … But intuition, as I conceive it, is one of the basic functions of the psyche, namely, perception of the possibilities inherent in a situation. It is probably due to insufficient development of language that ‘feeling’, ‘sensation’, and ‘intuition’ are still confused in German, while ‘sentiment’ and ‘sensation’ in French, and ‘feeling’ and ‘sensation’ in English, are absolutely distinct. … Recently, however, intuition has come to be commonly used in English.’

Intuition is ‘a kind of instinctual apprehension’: C.W. 6, para 770; Beebe describes extraverted intuition as a function that is “really an unmediated, instinctive process”: John Beebe, ‘Psychological Types’, id., at pg 137.

429 Jung, C.W. 6, para’s 900, 770; Modern Man in Search of a Soul, supra note 394, at pg 93. See also John Beebe, ‘Psychological Types’, supra note 403, at 132

430 Jung’s Tavistock lectures, 1933, first lecture, C.W. 18, para 24, and quoted in John Beebe, ‘Psychological Types’, supra note 403.

431 Jung, C.W. 6, para 770: ‘[The contents of sensation and intuition] have the character of being ‘given’, in contrast to the ‘derived’ or ‘produced’ character of thinking and feeling contents. … Intuitive knowledge possesses an intrinsic certainty and conviction, which enabled Spinoza (and Bergson) to uphold the scientia intuitive as the highest form of knowledge.’


crete thinking in that context, but intuition is how to hone it where intuitive perception comes from. A simple empirical explanation is that inevitably there will be times when a conscious mind) to have come out of nowhere. It is not an existing fact of material reality, and not a concept that is ours …”

Thus, intuitive insights – and abstract thinking based on them – are not reasonable expectations or borne of experience and common sense – these would be products of empirical thinking, i.e. a conceptual analysis of facts of material and already-experienced reality. They are rather unexpected unknowns, not yet existing or materialized or experienced. In an extraverted orientation, these intuitive possibilities lie hidden in external reality – they are as-yet-unknown potentials, latent or inchoate in our shared outer world. They are registered, all at once and as a whole, through the intuitive perception often called the ‘sixth sense’. Abstract thinking can go as far as ‘visionary’ and ‘mystical’ speculations, which are intuitive perceptions given expression in conceptual form.

Alan Lightman, ‘The World is Too Much With Me’, Second Annual Hart House Lecture (Toronto, March 20, 2002), re-broadcast on CBC Radio Ideas program; from transcript, pg 6: ‘Instead of slowing down the wheel, the increased productivity has only sped it up. Instead of creating breathing spaces in the work week, increased efficiency has caused us to work faster and longer. In this maze of counter-intuitive results, it is hard to tell cause from effect, effect from cause.’

Thus, intuitive insights – and abstract thinking based on them – are not reasonable expectations or borne of experience and common sense – these would be products of empirical thinking, i.e. a conceptual analysis of facts of material and already-experienced reality. They are rather unexpected unknowns, not yet existing or materialized or experienced. In an extraverted orientation, these intuitive possibilities lie hidden in external reality – they are as-yet-unknown potentials, latent or inchoate in our shared outer world. They are registered, all at once and as a whole, through the intuitive perception often called the ‘sixth sense’. Abstract thinking can go as far as ‘visionary’ and ‘mystical’ speculations, which are intuitive perceptions given expression in conceptual form.

Alan Lightman, ‘The World is Too Much With Me’, supra note 437, pg 6: a few sentences later in the same lecture: “‘Everything in our lives has become faster, more hurried, more urgent. I cannot help but recall the first lines of William Wordsworth’s poem, prescient in the way that poets and artists can often divine the future: “The world is too much with us; late and soon, Getting and spending, we lay waste our powers: Little we see in Nature that is ours …”’ Wordsworth’s lines seem prescient because they seem to have ‘divined the future’ when our rational thinking and feeling consciousness has no idea how. Intuition draws its information from the contents of the unconscious – picking up something that has been forgotten or repressed, or never yet known to the individual person – and brings this information into consciousness. This information seems (from the perspective of the conscious mind) to have come out of nowhere. It is not an existing fact of material reality, and not a concept that has been consciously developed or a value that has been consciously felt. If it subsequently proves to be accurate, in application and experience in the material world, it will then seem to have anticipated the future in an uncanny way. This gives intuition its mysterious and prescient quality. A depth psychology explanation for the way intuition seems able to anticipate the future and pick up hidden interconnections, is that time is relative in the unconscious, where intuitive perception comes from. A simple empirical explanation is that inevitably there will be times when a possibility inherent in a situation comes to pass as events unfold. In either case, the practical question respecting intuition is how to hone it – how to refine the capacity for receptivity to intuitive hunches.
This quality of all rational decisions because, by providing a viewpoint on something, they can be used to judge it; ‘the judging intellect with its categories’: C.W. 6, para 608-610; Jung sometimes presents intuition as special or unique, calling it, for example, our ‘noblest gift’: DL Sharp, Personality Types: Jung’s Model of Typology (Toronto: Inner City Books, 1987), at pg 58.

Jung was explicit in positing this connection between intuition and the unconscious, and thus the mysterious or uncanny impression of intuition on a person’s ego or conscious perspectives. This connection to the unconscious allows intuition to pick up what has not yet emerged into conscious material reality. Jung described an intuitive hunch as presenting us with knowledge that already exists in the unconscious, and is picked up from there by an elusive, mysterious process which we call ‘intuition’, but which we cannot trace – or even really explain. Thus, he observed (C.W. 11, para 69):

My psychological experience has shown time and again that certain contents issue from a psyche that is more complete than consciousness. They often contain a superior analysis or knowledge which consciousness has not been able to produce. We have a suitable word for such occurrences – intuition. In uttering this word, most people have an agreeable feeling, as if something had been settled. But they never consider that you do not make an intuition. On the contrary, it always comes to you; you have a hunch; it has come of itself, and you can only catch it if you are clever or quick enough.

In an interview late in his life, Jung highlighted this mysterious source of intuitive insight, describing what we call ‘intuition’ as the same unknown phenomenon that we call ‘instinct’ in biology, ‘the voice of God’ in religion, and ‘conscience’ in ethics: Jung was commenting specifically on the religious perspective, in an interview with the journalist Frederick Sands in 1955: ‘Without knowing it, man is always concerned with God. What some people call instinct or intuition is nothing other than God. God is that voice inside us that tells us what to do and what not to do. In other words, our conscience.’: McGuire, W., Hull, R.F.C. (eds.) (1977) ‘Men, women, and God,’ Jung Speaking: Interviews and Encounters (1977: Princeton University Press, Princeton, N.J.), pg 249

See, e.g., respecting the aptness of distinguishing ‘objective’ and ‘subjective’ perspectives and realities, the work and theorizing on vision and other topics, by Rupert Sheldrake, biologist and scholar of science and philosophy, including in R. Sheldrake, Dogs Who Know When Their Owner is Coming Home, and Other Unexplained Powers of Animals (New York: Random House, 1999, 2nd ed. 2011), and R. Sheldrake, The Sense of Being Stared At, and Other Aspects of the Extended Mind (London: Random House, 2004).
As noted in the quote set out in the preceding section, cited supra note 431, Jung C.W. 6, para 770.

The term concept reflects the distinction made by Jung for the psychological function or process of forming ideas, as the intellectual element in cognition as opposed to the concrete particulars of sense perception: It comes from the Latin for ‘something conceived in the mind, thought’; ‘conception’ is ‘the originating of something (as an idea or plan) in the mind’; ‘conceive’ is ‘to form in the mind (as a concept or idea)’, ‘to think’: Webster’s 3rd New International Dictionary of the English Language, Unabridged (Springfield Mass.: G & C Merriam, 1966).

The term logic, from Greek Logos, (more particularly, logike, fr. fem. of logikos) meaning ‘word, reason, speech, account’; ‘a science that deals with the canons and criteria of validity in thought and demonstration’, and traditionally comprises the principles of definition, classification, correct use of terms, predication, reasoning, and demonstration; ‘a system of formal principles of deduction and inference’: Webster’s 3rd New International Dictionary of the English Language, Unabridged, id. Thus, logic is clearly not a gut hunch or leap of intuitive insight, not a personal desire, not an accepted social norm or tradition if it makes no conceptual sense. Examples of inductive logic (or generalization) can be seen in Hogg’s dialogue theory conclusions as to what is ‘likely’ (discussed in Chapter 3, supra), and in Mnookin’s estimates of ‘likely’ and ‘probable’ benchmarks (discussed in Chapter 5, infra).

Quoted phrases are from NF Cantor, Alexander the Great: Journey to the Edge of the Earth (New York: Harper Collins, 2005, 2007), pgs 11, 17. The classical division of rhetoric between logos, eros, and pathos, most famously developed in Aristotle’s theories, is something I refer to and apply in examining the use of rhetoric in then-Senator Obama’s campaign speech, supra note 560, in Chapter 6, supra. Classical ideas about rhetoric and dialectics can be seen in medieval and modern thought, and in post-modern deconstructionism, and are relevant to the analysis of problems in political decision-making in Canadian and other democracies today. ‘Logical coherence’ is an overall or general term for these conceptual norms; ‘deduction’ is reasoning from cause to effect (Latin ‘a priori’) in comparison to reasoning from past experience or effect to cause (Latin ‘a posteriori’), and to reasoning from specific to general and from general to specific (induction).

The language of conceptual analysis is akin to the language of mathematics: Arithmetic, algebra, and geometry have their own special language or rules for expressing understood meaning.

Jung, C.W. 8, para 290: see also, Jung, C.W. 9i, para’s 66-69ff (‘the judging intellect with its categories’, assigning meanings to life situations, ‘Interpretations make use of certain linguistic matrices’).

For example, law professor Robert Mnookin uses the term ‘think’ this way repeatedly in his lecture and his book, as John Ralston Saul does throughout his essay (both discussed in the examples in Chapter 5).

This ‘irreducible’ essence of the conscious functions he identified was discussed by Jung in an early formulation of his type theory, in which he explains that he distinguishes the four functions ‘because they cannot be related or reduced to one another’, because their principles are ‘absolutely different’ from each other (my emphases): Jung, C.W. 6, para 731: ‘I can give no a priori reason for selecting these four as basic functions, and can only point out that this conception has shaped itself out of many years’ experience. I distinguish these functions from one another because they cannot be related or reduced to one another. The principle of thinking, for instance, is absolutely different from the principle of feeling, and so forth.’

Jung, C.W. 9i, para 67; in para’s 66-69, Jung gives a riveting exposition on ‘meaning’ and the ‘archetype of meaning’.

See Bradd Shore, Culture in Mind: Cognition, Culture and the Problem of Meaning (Oxford: Oxford University Press, 1996), pg 312. What Jung originally identified as ‘archetypes’, can be seen in the concept of ‘foundational image schemas’ used in contemporary cognitive science, which posits the same idea that psychological experience clusters around certain schematic motifs which are foundational, are at the base of mind. Jung deliberately chose a more ‘archetypal’ than intellectual construct for this idea, to try to convey in more than the rational thought or intellectual idea.

Jung, C.W. 9i, para 66

Jung, C.W. 6, para’s 831-32. See also the description by Jungian analyst Donald Kalsched, in a brief note relating Jung’s concept of the concrete thinking function to research in neurology and to the archetypal motif of
463 Jung used both the terms ‘abstract’ and ‘ideological’ to describe this type of thinking: see, e.g., C.W. 6, para’s 510-516; I use the term ‘abstract’ alone, to avoid confusion with symbolic ideals.

464 Jung developed this comparison between the types of thinking evidenced in the works of Plato and Aristotle – among many others – in ‘The Problem of Types in Classical and Medieval Thought’, C.W. 6, para’s 40-57. In this early essay on ‘the problem of different types’, Jung elaborated extensively on the distinctly different types of rational viewpoints seen in fundamental philosophical and religious debates recurring through the course of European history, as examples of the contrast between abstract and concrete thinking.

465 The APA Glossary, id., pgs 34, 35 (herein ‘APA Glossary’). See also Janet W. Lerner, Children with Learning Disabilities: Theories, Diagnosis, Teaching Strategies (Boston: Houghton Mifflin, 2nd ed. 1976), pg 278: ‘The term cognitive skills refers to a collection of mental abilities that enable one to know and be aware. Cognition refers to the manner in which humans acquire, interpret, organize, store, retrieve, and employ knowledge. Neisser (1967) defined cognition as the process by which sensory input is transferred, reduced, elaborated, stored, retrieved, recovered, and used.’ Jung sometimes refers to ‘cognition’ in defining ‘thinking’, as in his description of the four functions, set out in my text in Section 2 of this chapter, in which he refers to ‘thinking’ as a function that ‘facilitates cognition and judgment’ (C.W.6, para 90).

466 The APA Glossary, id., pgs 34, 35; ‘cognitive therapy’ is (pg 35) defined as a treatment method ‘that emphasizes the rearrangement of a person’s maladaptive processes of thinking, perceptions, and attitudes’ (my emphasis).

467 The APA Glossary, supra note 465, pg 120: ‘Perception’ is defined as ‘mental processes by which intellectual, sensory, and emotional data are organized logically or meaningfully’ (my emphasis) – thus, treating perception as a form of cognition, not distinguishing them as different types of psychological processes.

468 ‘Thinking’ and ‘reasoning’ both are included in the APA Glossary definition without making any distinction between them. It may be that the term ‘attitudes’ used in the definition of ‘cognition’ is meant to refer to something akin to what Jung called ‘feelings’ or ‘values’ – but the term ‘attitude’ is also not defined in the APA Glossary.

469 APA Glossary, supra note 465, pgs 39 (‘conscious’: ‘The content of mind or mental functioning of which one is aware’) and 170 (‘unconscious’: ‘That part of the mind or mental functioning of which the content is only rarely subject to awareness. It is a repository for data that have never been conscious (primary repression) or that may have become conscious briefly and later repressed (secondary repression).’). Note that this APA Glossary definition of ‘unconscious’ is a brief statement of Freudian theory.

470 The nature of ‘volition’ is a complex issue which I do not with in this thesis, nor is it necessary for my topic. In the larger context of an individual’s ability to act with integrity on the basis of their own self-awareness – to develop not only consciousness but also conscience – it as just as important to understand ‘volition’ as it is to understand ‘instinct’ in the context of the behaviour of individuals and groups of human beings and other animals. This is a topic I have touched on elsewhere, in examining personal conscience and ethical action: Connidis, K.A., ‘A Dream of Dirty Hands: Moral Conflict and Personal Conscience’ (2004), in David C. Thomasma & David N. Weissstub (eds.), The Variables of Moral Capacity (Dordrecht./Boston/London: Kluwer Academic Publishers, 2004) 95-111.

471 Jung, Modern Man in Search of a Soul, supra note 394, pg 91; C.W. 6, para’s 725, 900; C.W. 8, para 289

472 Jung, C.W. 6, para’s 681, 725

473 This innovative departure from contemporary theorizing also highlights the shortcoming of a concept of ‘cognitive functions’ that does not include ‘valuing’ as a rational function.

474 J. Beebe, ‘Psychological Types’, supra note 403, at pg 133; as Beebe explains there, more fully:

‘Jung held that feeling and thinking are rational functions, and that sensation and intuition are irrational functions. He did not sustain the faculty psychologists’ opposition between reason and passion. Jung understood ‘feeling’ as a rational process, that is, as neither affect (or
what we sometimes call ‘feelings’) nor the result of more unconscious emotion-based processes, even though he admitted our complexes are ‘feeling-toned’. Jung made clear that he took the process of assigning feeling value to be an ego-function that was just as rational in its operation as the process of defining and creating logical links (thinking).

‘Jung also recognized that sensation, even though it is the evidential basis for our empirical reality testing, is as irrational a process as the intuitive one that delivers our ‘hunches’ to us. As a moment’s reflection will demonstrate, we do not rationally choose what we manage to see, hear, smell, taste or grasp with our sense of touch. By linking feeling with thinking as rational functions, and sensation with intuition as irrational functions, Jung broke with the nineteenth-century habit of lumping feeling with intuition as marking a ‘romantic’ temperament and thinking with sensation as the unmistakable signs of a ‘practical’ disposition. Rather, in *Psychological Types*, he convincingly makes the case that consciousness is for all of us the product of both rational and irrational processes of encountering and assessing reality.’


‘Judgment’ is a term Jung used to describe both thinking’s conceptual analysis and feeling’s personally-felt evaluation: see, e.g., in addition to these sources, C.W. 9i, para’s 66-69, and C.W. 6,Para 900.

476 C.G. Jung, ‘A Psychological Theory of Types’, in *Modern Man in Search of a Soul*, supra note 394, at pg 90, 91; Jung continued to use the terms ‘valuing’ and ‘feeling values’ interchangeably with ‘feeling’ throughout the course of his work. Note that this problem of numerous meanings occurs with respect to both the English and German term.

Another important point Jung made was the difficulty of trying to use one psychological function (i.e., thinking in this case, in the attempt to conceptualize the ‘feeling’ function) to grasp or explain another (i.e. feeling) which is distinctly different from it, and ultimately cannot be reduced to its terms: e.g. C.W. 6 para 728:

‘Naturally the above definitions do not give the essence of feeling – they only describe it from the outside. The intellect proves incapable of formulating the real nature of feeling in conceptual terms, since thinking belongs to a category incommensurable with feeling; in fact, no basic psychological function can ever be completely expressed by another. That being so, it is impossible for an intellectual definition to reproduce the specific character of feeling at all adequately. … The very notion of classification is intellectual and therefore incompatible with the nature of feeling. We must therefore be content to indicate the limits of the concept.’

477 As Jung made clear in discussing his ‘compass’, in supra note 394 *Man in Search of a Soul* (continuing the passage quoted earlier), at pgs 93-94: ‘The four functions are somewhat like the four points of the compass; they are just as arbitrary and just as indispensable. Nothing prevents our shifting the cardinal points as many degrees as we like in one direction or the other, nor are we precluded from giving them different names.’

478 See, e.g., Carolyn Fay’s suggestion that this function be called “feeling value”, noted in John Beebe, ‘Psychological Types’, supra note 403, at pg 149, note 2, citing C. Fay, *At the Threshold* (video cassette) (Houston, TX: C.G. Jung Educational Center, 1996).

479 Jung, C.W. 6, para’s 681, 725 (emphasis Jung’s), fuller passage:

‘By the term *affect* I mean a state … characterized by marked physical enervation on the one hand and a peculiar disturbance of the ideational process on the other.4 I use *emotion* as synonymous with affect. I distinguish – in contrast to Bleuler …– *feeling* from affect, in spite of the fact that the dividing line between them is fluid, since every feeling, after attaining a certain strength, releases physical innervations, thus becoming an affect.5 Pronounced affects, i.e. affects accompanied by violent physical innervations, I do not assign to the province of feeling, but to that of the sensation function.’

The distinction between ‘emotion’ and ‘feeling’ was slowly developed and clarified by Jung as he worked out his theory of conscious functioning. His definition of ‘emotion’ is similar to the APA Glossary’s definitions (allowing for the Glossary’s dissimilar use of the term ‘feeling’), but the Glossary’s definitions of ‘emotion’, ‘affect’ and ‘feeling’ are altogether somewhat imprecise and circular, since they include both ‘emotion’ and ‘feeling’ in the
generic term ‘affect’, which is then defined as the ‘subjective experience of emotion accompanying an idea or mental representation’: E.M. Stone (ed.), American Psychiatric Glossary (Washington D.C., American Psychiatric Press, 1988), pgs 61, 5, where ‘emotion’ is defined as ‘a state of arousal determined by a set of subjective feelings, often accompanied by physiologic changes, which impels one toward action; examples are fear, anger, love, hate’, and where ‘affect’ is noted to be ‘often used loosely as a generic term for feeling, emotion, or mood’ (here, ‘feeling’ is not used as it is by Jung), and defined as ‘subjective experience of emotion accompanying an idea or mental representation’.

Jung used both terms ‘enervation’ and ‘innervations’, which refer to the same physiological phenomenon, according to dictionary definitions of ordinary usage and specialized medical usage: ‘Innervations’, a term used in anatomy and physiology, refers to the influence of nerves in the body, and more particularly to the special activity of excitation or stimulation which nerves supply to any part of the nervous system or any organ of the body, and that is necessary for them to maintain their functioning. Thus, put more succinctly and generally, it refers to nervous stimulation or excitement; ‘nervous’, however, is a term that has become so broadly and loosely used that it has probably lost this meaning in common language.

No doubt any relatively self-aware person who has experienced both real and feigned emotions would recognize this difference. As well, fake or feigned emotion can be seen in the same way as fake conscious functions – fake feeling or values, fake thinking, fake sense perception, fake intuition: pretending to do any of these does not alter the nature of the genuine process, and it does not convey the information that the genuine process can. When you are evaluating something according to your own felt preference, or when you are logically analyzing something, you experience really doing it, not playing at it or conjuring it up, and it can produce the real results of those processes.

As quoted by Stephen Hunt, in a newspaper article based on his interview with Mirren: ‘Helen Mirren’s golden age’, The Globe and Mail, July 2, 2004, pg R3. I have slightly condensed his text of Mirren’s words and changed punctuation, to make it clearer, without changing what she said according to his text. Here is the full extract of that part of Hunt’s article, as he quoted her and as he punctuated the quotes:

‘… Mirren is forced to convey the anguish and emotion of her character through a series of scenes …. The film’s climactic moment comes when Mirren, alone in a forest at night, has an epiphany that leads to a reaction shot of crushing grief, a scene consisting of little more than Mirren alone, conjuring up feelings without dialogue, or any action to react to, except her own memory. This is how an actress does it: "That moment at the end … during the previous film [Calendar Girls], my brother had died … and I had to repress my emotions while we were in the Philippines. I was doing this early morning thing with the phone calls while I’m making this light comedy! I couldn't share it with anyone. Then I went straight into The Clearing, and I still hadn't time to sort out all of that pain and then during the film, I had to be very restrained and formal, before we got to that final moment in the woods." Mirren pauses for a moment now. "I was talking to Pieter about how I would do it. I said, 'I don't think I'll cry, maybe there's some kind of vocalization," she explains. "Maybe just a low moan, you know, intellectualizing it. And then we shoot the scene, and I hit the mark, and whoa, this thing just came over me, of complete emotional breakdown. So much so that I wanted to stop the camera. Because it was real. It wasn't acted. It was real. It was actually haunting to me and I didn't want the camera to see it, it was very strange. It was like, no, this is private."’

See, e.g., Jung, C.W. 9ii, para 15; C.W. 6, para’s 725, 68, and C.W. 8, para 642

Jung, C.W. 6 para’s 72, 681, 725, where Jung also cites Wilhelm Wundt, Grundzügeder physiologischen Psychologie. 5th edn., Leipzig, 1902-03, pp 209 ff., and Eugen Bleuler, Affectivitat, Suggestibilität, Paranoia, Halle 1906, p. 6. I elaborate in more detail on this point in Chapter 5, where I give the full quote condensed here, in which Jung also used ‘feeling’ and ‘emotion’ somewhat interchangeably, writing when he was still working out the distinction between ‘emotion’ and ‘feeling’.

Jung does, in this quoted passage, describe feeling as ‘becoming an affect’ if it grows strong enough. I am putting it a bit differently, to express a little more clearly or accurately what I understand is Jung’s theory, as he developed it, than it is expressed in this early writing.
This point, respecting identifying unconscious biases and responding effectively to them, is outside the parameters of my thesis. But I note it here, because it is one of the important practical insights and guiding explanations offered by Jung’s theory in application to judicial and political decision-making, and to any other rational decision-making process.

A striking illustration of the unpredictable results of arousing emotion and the unconscious contents connected with it (which can be done easily and powerfully by music) is portrayed in the 1987 Percy Adlon film, *Bagdad Café*.

**CHAPTER 5 NOTES**

486 Jung, CW 6 ‘Definitions’, para 694, and CW 8, ‘The Transcendent Function’ (1912, partially rewritten 1957), para’s 135, 136; I have changed the English translation’s ‘statesman’ to ‘statesperson’. Full quotes:

The activity of consciousness is *selective*. Selection demands *direction*. But direction requires the exclusion of everything irrelevant. This is bound to make the conscious orientation one-sided. The contents that are excluded and inhibited by the chosen direction sink into the unconscious, where they form a counterweight to the conscious orientation. The strengthening of this counterposition keeps pace with the increase of conscious one-sidedness until finally … the repressed unconscious breaks through in the form of dreams and spontaneous images … As a rule, the unconscious compensation does not run counter to consciousness, but is rather a balancing or supplementing of the conscious orientation. In dreams, for example, the unconscious supplies all those contents that are constellated by the conscious situation but are inhibited by conscious selection, although a knowledge of them would be indispensable for complete adaptation.

The definiteness and directedness of the conscious mind are extremely important acquisitions which humanity has bought at a very heavy sacrifice, and which in turn have rendered humanity the highest service. Without them, science, technology, and civilization would be impossible, for they all presuppose the reliable continuity and directedness of the conscious process. For the statesperson, the doctor, and the engineer as well as for the simplest labourer, these qualities are absolutely indispensable. … But this involves a certain disadvantage: the quality of directedness makes for the inhibition or exclusion of all those psychic elements which appear to be, or really are, incompatible with it, i.e. likely to bias the intended direction to suit their purpose and so lead to an undesired goal.

487 The two types of thinking that Jung called ‘concrete’ (or ‘empirical’) and ‘abstract’ thinking, can also be referred to as two *applications* of thinking (to two different types of perception), which perhaps highlights better that, whether it is ‘concrete’ or ‘abstract’, it is conceptual analysis that makes it ‘thinking’ and the conceptual analysis itself is the same.

488 I discussed the comparison between Jung’s definitions and the APA Glossary definitions for the terms ‘abstract’, ‘concrete’, ‘empirical’, as well as others, in Chapter 4: *see supra*, note 465, and accompanying text.


University of Toronto. His ‘collaborative negotiation’ theory has been widely taught and applied in law and other fields; in the book (pgs x-xii, 7), it is described as having been taught to hundreds of students at Harvard and Columbia law schools in the past five years, and to scores of practicing lawyers in Boston and Geneva, used in workshops and commercial consultations throughout the world, and brought to the War Crimes Tribunal at The Hague between 1998 and 2000. In this thesis, I do not elaborate on the theory itself.

493 Mookin’s method of negotiation requires skills in ‘rational decision-making’ and ‘interpersonal communication’ (including an ‘empathy loop’ technique), as two distinct kinds of skills involved in the ‘critical problem-solving techniques’ which are necessary in order for lawyers to ‘skillfully manage’ the ‘tensions’ inherent in the ‘system of relationships’ involved in a negotiation: see, e.g., Mookin, id., pgs 68, 175-76

494 ‘Options analysis’ is my term, used for ease of reference, as Mookin does not name this specific form or instance of ‘decision analysis’, in which he also includes ‘litigation analysis’ and ‘sensitivity analysis’: see Mookin, supra note 492, pgs 226, 231-39.

495 Mookin, supra note 492, pg 234, see also pgs 226, 231-39

496 Mookin is referring here specifically to his ‘litigation analysis’ (see supra note 494), but the same descriptions would apply to what I have called his ‘options analysis’.

497 Mookin, supra note 492, Preface and pgs 4 (‘We are optimistic realists.’); 7, 8 (the ‘pragmatic goal’ of the collaborative negotiation model is to help lawyers and their clients ‘understand legal negotiation more fully and make their own negotiations more productive and rewarding’).

498 Mookin, supra note 492, pgs 231, 233-39

499 ‘Generalization’ can clearly be seen in the approach in Mookin’s theory, such as in his frequent uses of such terms as ‘likely’, ‘probable’, estimates, percentages, ‘zone’, which are generalizations, predictions or expectations based on concrete or empirical thinking, i.e. logic applied to the facts of sense perception. Mookin expects his theory to work because it has been tested and worked before – not because of intuition, but because of multiple concrete instances of success or aiding in the successful results of negotiation – the repetition and accumulation of such instances in existing, concrete reality. In Jung’s theory, as I have described in Chapter 4, generalization is a conceptualization produced by concrete or empirical – not abstract – thinking. Concrete thinking is conceptual analysis of specific, individual, existing, material facts. The repetition and accumulation of such facts is what provides the basis for generalizing. The more consistent and frequent the perception of the individual occurrences – the premises of the induction or generalization – the more reliable will be the generalization drawn from them. The APA Glossary, unlike Jung’s theory, treats generalization – ‘the ability to generalize’ – as thinking that involves ‘abstractions’ rather than ‘immediate experience’. However, it is the facts of immediate experience, and not abstractions, that Jung’s theory highlights as the key to generalization: Generalization does not rely on intuitive perception, and thus abstract thinking, but on sense perception, and thus on concrete empirical thinking, or the conceptual analysis of material facts.

500 Mookin, supra note 492, pgs 4-8, 37, 41-42, 175-75, 178, 195-96, 200-04, 221, re: values, client’s own interest.


502 Mookin sums up these ‘psychological barriers to successful negotiation’ as ‘a variety of cognitive, social, and emotional forces’, and refers in particular to ‘psychological biases’ or ‘effects’, ‘emotions’, ‘beliefs’, ‘tendencies’, ‘internalized unspoken cultural norms’, and the general catch-all, ‘irrationality’; in a brief Chapter 6, entitled ‘Psychological and Cultural Barriers to Successful Negotiation’: see Mookin, supra note 492, pgs 56-58, 156, 157, 160, 166, 171, 195-96, 229, 273, 299-300. The ‘emotions’ Mookin identifies at various places in the book are ‘anger, fear, envy, regret, guilt, anxiety, resentment, implicit expectations, internalized unspoken cultural rules of an organization: Mookin, supra note 492, pgs 299-300.

503 Mookin, supra note 492, pgs 37, 46, 55-59, 62, 156-57, 166, 171, 196, 199, 201, 207, 229, 233-39, 252, 273, 299-300, describing emotion and other non-rational processes, which can distort rational process and thwart rational self-interest

504 Mookin, id.
Mathematics theories can also be both abstract and empirical, just as legal theories can be: Mathematics is a language that ‘works’ in the world of concrete reality, in accordance with its own terms – akin to the way a compass does: Mathematics accurately identifies and predicts what happens with concrete phenomena in the existing world of material reality; its rules and formulas (for addition, multiplication, measuring the circumference of a circle, etc.) can be applied in practice – to build a bridge or divide profits equally – and produce just the results they predict.

Sylvia Nasar, A Beautiful Mind (New York: Simon & Schuster, 1998) (introduced supra, note 432, and herein cited as ‘Nasar’). Mathematics is a language that ‘works’ in the world of concrete reality, in accordance with its own terms – akin to the way a compass does: Mathematics accurately identifies and predicts what happens with concrete phenomena in the existing world of material reality; its rules and formulas (for addition, multiplication, measuring the circumference of a circle, etc.) can be applied in practice – to build a bridge or divide profits equally – and produce just the results they predict.

Nasar, id., pgs 12, 129, 224

Nasar, supra note 516, pgs 12, 141
feeling is a transfer of value.


Nasar, *supra* note 516, pg. 129 (second quote, citing E.T. Bell, *Men of Mathematics*, and quote cited to Martin Davis, interview 2.9.96, ‘describing the way he thought Nash’s mind worked’); *see also* pg 161 fn 39, pg 162 nis 42 & 47

520 Nasar, *supra* note 516, in her own words, at pg. 162; the three other quotes set out: Nasar, *supra* note 516, pgs 161 fn 39, 162 fn 44 & 47, 349

523 Nasar, *supra* note 516, pg. 12, describing how Nash could intuit unexpected and astonishing solutions, often as if outside the immediate frame of inquiry: ‘Nash’s genius was of that mysterious variety more often associated with music and art than with the oldest of all sciences. It wasn’t merely that his mind worked faster, that his memory was more retentive, or that his power of concentration was greater. The flashes of intuition were non-rational. Like other great mathematical intuitionists – Georg Friedrich Bernhard Reimann, Jules Henri Poincare, Srinivasa Ramanujan – Nash saw the vision first, constructing the laborious proofs long afterward. But even after he’d try to explain some astonishing result, the actual route he had taken remained a mystery to others who tried to follow his reasoning. Donald Newman, a mathematician who knew Nash at MIT in the 1950s, used to say about him that ‘everyone else would climb a peak by looking for a path somewhere in the mountain. Nash would climb another mountain altogether and from that distant peak would shine a searchlight back onto the first peak.’

524 *See, e.g.*, Nasar, *supra* note 516, pgs 141, 1; pgs 161 & fn, 162 & fn, 224

525 Here I depart somewhat from Jung’s categorization, and his description of the objectivity of intuition’s insight; this complex argument is not necessary for my thesis and I do not go into it in the thesis.

526 ‘Seeing is believing’, as the adage goes.

527 Jung, CW 6, para 727 (with a passage quoted earlier in my text: ‘feeling values and judgments are not only reasonable, but are also as discriminating, logical and consistent as thinking.’)

528 Jung, CW 6, para 900, and *see* Daryl Sharp, *C.G. Jung Lexicon: A Primer of Terms and Concepts* (Toronto: Inner City Books, 1991) pg 143 (for the first quoted phrase); C.G. Jung, ‘A Psychological Theory of Types’, in *C.G. Jung, Modern Man in Search of a Soul*, (New York: Harcourt Brace & Co., 1933), pg 91, and see also pgs 93-94 (for the second quoted phrase). Note also Jung’s definition, CW 6, para 729, of ‘active feeling’ as a function, as opposed to passive feeling, and his pithy definition of ‘a feeling type’ of person: ‘The nature of valuation by feeling may be compared with intellectual apperception as an apperception of value. . . Active feeling is a transfer of value from the subject; it is an intentional valuation of the content in accordance with feeling and not in accordance with the intellect. Hence active feeling is a directed function, an act of the will, as for instance loving as opposed to being in love.’, ‘When the subject’s attitude as a whole is oriented by the feeling function, we speak of a feeling type.’

529 It might be argued that the engagement of Nash and his colleagues in solving these puzzles rests on more than their personally felt value in the intellectual stimulation it gives them – such as on rational self-interest from renown in the field, career advancement, making money or a valuable practical contribution to society, etc. – but the description given by one colleague of the ‘emotional’ thrill of working on these puzzles, is a signal that they are desired and valued in and of themselves, for their intellectual stimulation, regardless of other factors: *see, e.g.*, Nasar, *supra* note 516, pg. 224, endnote interview with Stein 12.2.95: Nasar quotes the description of Nash’s intuitive approach given by a fellow mathematician [my emphasis]: ‘Stein [Eli Stein, now prof of mathematics at Princeton U but then an MIT instructor] was intrigued by Nash’s enthusiasm and his constant supply of ideas. He said: “We were like Yankees fans getting together and talking about great games and great players. It was very emotional. Nash knew exactly what he wanted to do. With his great intuition, he saw that certain things ought to be true. He’d come into my office and say, ‘This inequality must be true.’ His arguments were plausible but he didn’t have proofs for the individual lemmas – building blocks for the main proof.”

Pert’s comment: as quoted in Judith Hooper & Dick Teresi, The 3-Pound Universe (New York: Dell, 1986), pg 300; see pgs 287, 300, 302 for context.

For an even simpler example, this ditty of uncertain origin presents a hierarchy of ‘ideas’ and ‘things’ as more valued or worthy topics of discussion than ‘people’: “Great men talk about ideas; mediocre men talk about things; small men talk about people.”

John Ralston Saul, ‘A Wondrous Uncertainty’, Queen’s Quarterly (Vol. 109, No. 1, Spring 2002), pgs 9-32 (hereinafter referred to as ‘Saul’ and ‘Saul’s essay’). This essay is an edited version of an address given by Saul at Queen’s University on 31 January 2002 (see Saul’s essay, id., footnote pg 9), and apparently based on his then recent book, On Equilibrium (Viking, 2001). According to a synopsis at the outset of Saul’s essay, that book ‘represents [Saul’s] latest step in an argument he has now refined for more than a decade’, and one which ‘[Saul] describes as his biggest leap in a new approach to ideas’ since a previous book, Voltaire’s Bastards.

Barack Obama, then-Senator, announcement of his candidacy for President of the United States, delivered on 10 February 2007, in Springfield, Illinois; Obama’s Speeches website, URL <http://obamaspeeches.com/>, accessed 4 Nov 2009 [hereinafter referred to as ‘Obama’s speech’ and ‘Obama’s Springfield speech’]

Any of five major speeches given by Obama during the campaign, and his subsequent 2009 Inaugural Address, would serve as similar and equally good examples:

(1) announcement of his candidacy for President of the United States on 10 February 2007 in Springfield, Illinois;
(2) acceptance of the Democratic Party nomination on 28 August 2008 at Denver, Colorado;
(3) remarks on race relations given on 18 March 2008 in Philadelphia, Illinois;
(4) presidential acceptance speech given on his election victory on 4 November 2008 at Grant Park, Illinois, and
(5) Inaugural Address as President of the United States given on 20 January 2009 at Washington, D.C.

‘Corporatist loyalty’: Saul’s essay, supra note 533, pgs 13, 14, 15, 21, 22, 29

Saul’s essay, supra note 533, quote pg 17; and see pgs 12, 13, 17

Saul’s essay, supra note 533, pgs 9, 10, 11, 13, 16, 17

Mad Cow disease crisis example: Saul’s essay, supra note 533, pgs 11, 13, 17

Saul’s essay, supra note 533, pgs 11, 13, 14, 15, 21, 22, 29

The solution, Saul argues – the way to rescue ourselves from this distorted corporatist loyalty mindset, which stems from our fear of uncertainty – is to ‘deny certainty’ and ‘embrace uncertainty’ in the way we think and make decisions: Saul’s essay, supra note 533, pgs 11-12, 13, 16, 27

These six are defined by Saul as the ‘essential qualities of the human race’, as the ‘human traits’ or ‘tools that we have’ in order to think and make decisions, and tools that are ‘all about denying certainty’: Saul’s essay, supra note 533, pgs 9, 11-12, 13, 14, 15, 16, 17, 21, 22, 25, 27, 29; also note qualifiers: pgs 17, 27; Democracy should be ‘filled with disagreements’: pgs 13, 14, 15, 21, 29

Denying certainty is the way we should use our six essential human qualities: Saul’s essay, supra note 533, pgs 22-23, 24-25, 27, 29, 12, 32

Saul’s essay, supra note 533, pg 16

Saul’s essay, supra note 533, pg 22: Instead, Saul says, to know what a quality is, you have to see it illustrated in its relationship with other qualities. This is an effective approach to take, if done well – but not as Saul does it, with vague general phrases, empty of content, which recur throughout the essay. For example, Saul comes close to defining the six qualities as being ‘all about denying certainty’, which is hard to make sense of conceptually: The need to ‘deny certainty’ is what the six qualities are ‘all about’, he stresses; ‘reason’ is ‘about denying certainty’, and his description of the last of the six qualities this way: ‘So far, these qualities have all been about denying certainty. So it would follow that the sixth and final one we are examining – reason – would also be about denying certainty’: Saul’s essay, supra note 533, pg 27.

Saul’s essay, supra note 533, pg 25

Saul’s essay, supra note 533, pgs 17, 25
Saul’s essay, supra note 533, pgs 17, 25, 26; e.g.: ‘... Everything we do, everything in which we involve ourselves, all progress has imagination at its centre. This is perhaps the tool that strengthens us most against the weakness, the temptation, of certainty. Its very presence, the uncertainty of imagination, tells us we are not driven by self-interest.’ (pg 25)

Saul’s essay, supra note 533, pg 26; Saul argues that we constantly marginalize artists ‘because they use their imaginations as opposed to being hard-nosed and rational’, and thus we reduce imagination to something ‘of the arts’, rather than being ‘a key part of everything in society’ and the centre of ‘everything we do’, he distinguishes intuition from imagination by describing a sculpture as ‘more of an intuitive act’ than an imaginative act, because sculptors ‘reach up into the imagination and pull the sculpture out’; the same applies to writing a book.

Saul’s essay, supra note 533, pg 27: memory ‘is all about the shape and context needed for thinking, for questioning, for acting’, Saul says, and then elaborates in a seemingly free association.

Saul’s essay, supra note 533, pg 27

Saul presents this statement as an explanation or conclusion that follows logically from the premise he gives, though it does not.

Saul’s essay, supra note 533, pgs 25, 27-29, see also pgs 22-23, 24-25; respecting ethics / common sense / intuition versus ‘applied / instrumental / utilitarian reason’, Saul more specifically refers to the medieval dogma of instrumental reason, that its truth is seen from the divine reflection in its application.

Saul’s essay, supra note 533, pgs 26-27 (hockey versus chess); Saul’s essay, supra note 533 pgs 23-24 (heroes)

However, as noted earlier, in his essay Saul does often invoke facts and logic to justify his arguments. The quoted passage giving Saul’s description of his view of fact and fiction in his work, is according to the newspaper report by Mark Medley of Saul’s remarks in an interview with him in September 2012: Mark Medley, ‘John Ralston Saul: Not the man he was then’, National Post website, Toronto, Oct. 19, 2012, <http://arts.nationalpost.com/2012/10/19/john-ralston-saul-not-the-man-he-was-then/>.

Of course, theorizing, in any essay or opinion piece, is a conceptual endeavour – it puts into words and explanations what is perceived. Here, the words are used primarily to state felt values and reinforce and clarify them, rather than to explain them conceptually, despite framing them that way.

Saul’s essay conveys the impression that these values and preferences are subjectively-felt by Saul, that they are not worked out intellectually by him, but his genuine personally felt values and commitments, with no apparent ulterior motivation for presenting them; that is, not as something he may be mouthing or promoting to achieve another purpose, but as felt values that he desires to protect in reality. I will contrast this with the sense conveyed by the values championed in Obama’s campaign speech, the contrasting example I give, following this one.

There are dangers such as this in the simple reversed mindset advocated by Saul, and the one-sided feeling viewpoint he uses to explain and justify it – without testing it with the viewpoint of the thinking function, and with facts and intuitions. Instead of relating complementary opposites, and using them to challenge and correct each other and differentiate the rational outlook, Saul is creating a polarized or one-sided dichotomy – one side is good, the other bad – one of the major problems of corporatist loyalty that he decries in his essay.

Such a society might not be served well by the choices Saul prefers in his reverse ‘intellectual methodology’, but distracted and worn down by them, setting the stage for an equal-but-opposite disaster of self-destructive anarchy. In a ‘good society’ (to use the term used for Lorenzetti’s famous fresco, referred to supra, notes 1, 343), including a modern democracy, it might be just as crucial to develop answers and fellowship, and to try to respond to needs for certainty and predictability and cooperation, and sometimes even efficiency and self-interest. With respect to the undesirability ‘self-interest’, Saul is somewhat more nuanced in his assessment, though without giving a conceptual explanation: Self-interest is acceptable at ‘a tertiary level’ but not as ‘the main driving force of our lives’: Saul’s essay, supra note 533, supra note 533, pg 24.

Any of five major speeches given by Senator Barack Obama during the campaign, including his subsequent 2009 Inaugural Address, would serve as equally good examples: see supra, note 534.

Obama’s Springfield speech, id., para’s 2-3; Obama repeatedly stressed the ‘unity’ of the nation as ‘one people’ and the need for them to come together on a shared journey – e.g. para’s 6, 7, 10, 12, 16, 22, 33, 37, 46

Lincoln references, not only evoking Lincoln but tying him to Obama: Obama’s Springfield speech, supra note 560, para’s 11, 13, 14, 16, 34-36, 38-39, 41-46; e.g.: ‘And that is why, in the shadow of the Old State Capitol, where Lincoln once called on a divided house to stand together, where common hopes and common dreams still, I stand before you today to announce my candidacy for President of the United States.’ (para 11); ‘But the life of a tall, gangly, self-made Springfield lawyer tells us that a different future is possible.’ (para 34).

Obama’s Springfield speech, supra note 560, para 11

Obama’s Springfield speech, supra note 560, para’s 3-12, 21

Obama’s Springfield speech, supra note 560, para’s 20, 22

Obama’s Springfield speech, supra note 560, para’s 14-16, 22-28, see also para’s 29-31

Obama’s Springfield speech, supra note 560, para’s 28, 29; I have slightly changed Obama’s tense, from ‘rebuilding our alliances and exporting those ideals that bring hope and opportunity to millions around the globe’. Obama specifies that ‘combat troops’ must be brought home, and that ‘no amount of American lives can resolve the political disagreement that lies at the heart of someone else’s civil war’.

Obama’s Springfield speech, supra note 560, para’s 32-34, 39-42, 45-46

‘Heart’ is mentioned 6 times (para’s 2, 4, 13, 23, 29 twice) and ‘love’ 3 times (para’s 15, 29, 30), in a short speech of less than 3,000 words.

The specific values championed in Obama’s Springfield speech, include these general ideals and concrete goals:
- Peace: para’s 2, 29
- Hope: para’s 2, 10, 11, 28, 29, 32, 38
- Unity, one people, together, not divided anymore: para’s 2, 16, 28, 32, 33, 37, 46
- Freedom, Liberty: para’s 6, 13, 16, 27, 46
- Opportunity: para’s 27, 28, 43
- Justice, Just, Fair: para’s 9, 13, 43
- Prosperity: see in many references to economy, jobs, etc.
- Equality: para 6 (as well as other references using related words or denoting the same idea)
- ‘transform’ and ‘perfect’ our nation: para’s 22, 42, 45
- complete the task Lincoln began: para’s 16, 45
- ‘better schools’, ‘better jobs, and health care for all’: ‘s 23, 44
- ‘end poverty’: para 25
- ‘strengthen our communities’: para 22
- ‘keep our country safe’: para 28
- ‘reclaiming the meaning of citizenship’: para 32

Obama’s Springfield speech, supra note 560, para 26

Obama’s Springfield speech, supra note 560, para’s 22, 23

Obama’s Springfield speech, supra note 560, para 27; other more concrete causes and values articulated in the speech include: We want to improve our schools by recruiting ‘a new army of teachers’, who get ‘better pay and more support in exchange for more accountability’. (para 23) We want to protect America and ‘confront the terrorists with everything we’ve got’, including improved military and intelligence capabilities, renewed alliances, and exporting our ideals. (para 28-30) Bringing our troops home by March 2008 is our ‘best hope’ that Iraq will find internal peace (para 29).
That meaning or coherence reside in particular personally felt values, quite apart from conceptualization, can be seen in the brief examples of Clemens’s view on vivisection and Pert’s view on the reality of a shared material existence, supra notes 530, 531. Saul presents his essay as a conceptual analysis, but it is not well-developed conceptually and not likely to succeed in achieving his stated purpose; it only makes rational sense as a personally felt evaluation, and as that, it is perfectly coherent: His conceptual analysis could change (and perhaps with a more well-developed conceptual analysis, it would), without changing his felt values message at all (but perhaps better ensuring it could be achieved as proposed). Obama, in contrast, presents bare conceptual statements that do support his values and leadership messages, as far as they go; however, he employs them essentially as a rhetorical technique, and does not engage in or rely upon conceptual analysis itself – again, the conceptual analysis and conclusions could change, without changing his felt values message at all.

This aesthetic aspect of ‘feeling’ is reflected, for example, by the analyst Daryl Sharp’s description of extraverted feeling – the orientation of personal values to the outer or social world – as the basis for the collective expressions of culture that make cultural life in a civilization possible: Daryl Sharp, Personality Types: Jung’s Model of Typology (Toronto: Inner City Books, 1987), pg 50

Obama’s Springfield speech, supra note 560, para’s 3-6: the humble origins and noble motives of an unknown newcomer to Illinois doing lowly Church work in a poor community

Obama’s Springfield speech, supra note 560, para’s 2, 3-12, 14, 21, 29, 46; in the speech, Obama skillfully presents himself as a candidate with outstanding qualifications combined with the integrity and humility and noble motives of a Lincoln

Obama expressly distinguishes himself from ‘Washington’ lawyers and politicians: Obama’s Springfield speech, supra note 560, para’s 2, 4, 12, 18-22

Many passages (e.g., para’s 3, 4, 5, 6, 8, 12, 21, 29, 30) stressed the ‘practical realism’ sensible nature of his plans, and his ability to realize them in practical reality, as well as his reliability – he could be trusted as someone who was experienced in the right ways and not co-opted by experience in ‘Washington’s ways’.

‘Messianic’ passages: Obama’s Springfield speech, supra note 560, para’s 16, 29, 39-42, 44-46, and note also para’s 3, 4, 5, 16, 22, 46, where Obama refers to his initial work with ‘a group of churches’ (para 3) and with ‘pastors and lay-people’ (para 4); ’the true meaning of my Christian faith’ (para 5); ‘beliefs’ and ‘believe’ (used six times in the speech); faith (three times); ‘call’ and ‘calling’ (five times); the ‘journey’ (for many, evoking not only Abraham Lincoln and Martin Luther King, but the Israelites following Moses out of Egypt), and such vast goals as facing ‘the challenges of this millennium’(para 16); undertaking to ‘transform this nation’ (para 22), and ‘usher in a new birth of freedom on this Earth’ (para 46). Obama’s approach has been characterized by David Brooks as a combination of ‘Christian realism’ and ‘liberal internationalism’: David Brooks, ‘Obama’s Christian Realism’, New York Times, 14 Dec 2009, URL (accessed 15 Dec ‘09):<http://www.nytimes.com/2009/12/15/opinion/15brooks.html>

Respecting rhetoric, see supra notes 454, 508-514.

Obama’s Springfield speech, supra note 560, para’s 7, 8, 10, 11, 13, 14, 15, 16, 20, 22, 24-30, 31, 32, 33, 34 ff, 39, 41-42, 45, 46: all examples of powerful metaphors, analogies, poetic descriptions, catchy rhetoric, alliteration, rhyming, emotion, repeating refrains, and so on.

Obama’s Springfield speech, supra note 560, para’s 13, 33-46, goes from ‘you’ – ‘I’ – ‘we’ – ‘us’, including his audience in presenting himself as a leader who is a team-player and fellow-journeyer, not a member of a distanced elite.

This is the emotion raised by personally-felt values – not the values themselves that matter or are cared for as important by personal feeling.

In other words, when addressing the intellect or thinking function, it is better to avoid arousing emotion, telling personal life stories, etc., in order to prevent confusion and unnecessarily disrupting facts and logic, unless doing that specifically furthers that intellectual process (e.g. as an effective illustration directly related to a point of fact or analysis).
all elements are composed of atoms’ which have ‘all the characteristics of that element’;  the atom is the ‘unit’ regarded as ‘the source of nuclear energy’: see, e.g., Macmillan Encyclopedia, supra note 596; quotations from

587 See supra note 454, contrasting Plato’s and Aristotle’s assessments of rhetoric, and Plato’s concern about the potential of effective rhetorical techniques to corrupt and undermine civil society (due to their power and the ability to use them to disguise and promote personal self-interest over the good of society).

588 Obama’s Springfield speech, supra note 560, para 15

589 Obama’s Springfield speech, supra note 560, para’s 6, 18, 22, 24, 27, 28-30, 32, 44, are examples of short statements of conceptual conclusions to elaborate and bolster values message – without conceptual scrutiny: How realistic is the idea that unions will be able to ‘lift up the middle class again’ in our world today? (para 24), or that Obama will bring the combat troops home from Iraq by March 2008? (para’s 28-30), or that voters can fix the political process by following Obama’s admonitions to ‘awaken’ and be ‘active’, to ‘accept responsibility’, ‘set priorities’, ‘push’ ‘politicians’, and be good parents and hard workers. (para’s 6, 18, 22, 32)?

590 The criticism that Obama was raising ‘false hopes’ was made by, inter alia, fellow Democrat Hilary Clinton, the other main contestant for the Democratic nomination: see, e.g., news report, Claudia Parson, ‘After Obama win, Clinton warns of "false hopes”’, Reuters website, January 4, 2008, URL <http://www.reuters.com/article/2008/01/04/us-usa-politics-clinton-idUSN0429124420080104>.

591 Election campaigns differ from legislative debates in Parliament, and in House of Commons and Senate committees, and from prerogative or executive decision-making, by governments, as I discuss in Chapter 7.

592 Obama’s refers the power and the abuse of words or rhetoric, in his Springfield speech, supra note 560, para’s 6, 8, 10, 12, 27, 31, 34-35, speaking about the power of words, the broken campaign promises, and how voters can ensure that his own campaign promises are fulfilled.

593 This is a question I have examined from the psychological perspective of Jung’s theories, in K.A. Connnidis, ‘A Dream of Dirty Hands: Moral Conflict and Personal Conscience’, in D.C. Thomasma & D.M. Weisstaub (eds), The Variables of Moral Capacity (Dordrecht and Boston: Kluwer Academic Press, 2004), pgs 95-111

594 Again, similar moral issues are raised, for example, by Mnookin’s approach to emotion and empathy in his negotiation method (discussed supra), where strong emotion is acknowledged as a powerful tool, and where empathy can be presented as being used to benefit both parties but at the same time be manipulatively used against the other party’s interest.

595 My very brief outline of the course of atomic theorizing today is taken from contemporary news reports and encyclopedia entries, as noted, as well as from illuminating personal discussions with more knowledgeable friends and family, including my brother-in-law, Professor Davit Zargarian, University of Montreal, Quebec.

596 The polymath Democritus, ancient Greek scholar, philosopher, and scientist (c. 470-360 B.C.E.), developed the idea of atomism from Leucippus, and also wrote on biology, cosmology, perception, music, and ethics: The Macmillan Compact Encyclopedia (1994 ed.) (London: Macmillan Publishers Ltd., 1993) (herein cited as Macmillan Encyclopedia). ‘Atomism’: Note that his was not the only ancient formulation of such an idea, which was formulated, for example, in ancient India as well. See: ‘Atomism’ definition, URL accessed March 4, 2007: <http://wordnet.princeton.edu/perl/weblwn?s=atomic%20theory>: ‘atomism’ denotes ‘any theory in which all matter is composed of tiny discrete finite indivisible indestructible particles’, held by the ancient Greek Democritus among others.


598 In 1803, by John Dalton: Macmillan Encyclopedia, supra note 596

599 The ‘atom’ itself was broken down into three smaller particles: ‘Electrons’ were the first particles observed to emerge from atoms, in cathode ray tube experiments in 1897. ‘Protons’ were detected in experiments on nitrogen gas in 1918, and ‘neutrons’ in radiation experiments in 1932: See, e.g., Macmillan Encyclopedia, supra note 596

600 Today, the ‘modern atom’ is defined, e.g., as ‘consisting of a nucleus surrounded by a system of electrons’, and ‘all elements are composed of atoms’ which have ‘all the characteristics of that element’; the atom is the ‘unit’ regarded as ‘the source of nuclear energy’: see, e.g., Macmillan Encyclopedia, supra note 596; quotations from
Princeton University website, URL accessed March 4, 2007: <http://wordnet.princeton.edu/perl/webwn?s=atomic%20theory>, And thus, of course, ‘atoms’ in modern speech are not ‘the ultimate particle’ that the word refers to, but are structures which contain yet-more-ultimate particles or atoms, and which differ in the number and kind of the various subatomic particles they contain.


It then appeared [with Rutherford’s model] that ‘the whole universe was constructed of these three particles’: Macmillan Encyclopedia, supra, note 596

Other hypotheses: Neils Bohr based his theory (the Bohr atom) on Rutherford’s model, but the modern concept of the atom was finally worked out by Schrodinger and others; see, e.g., Macmillan Encyclopedia, supra, note 596.

Various analogies illustrate the minuteness of the atom: A human hair is about 1 million carbon atoms wide, a single drop of water contains about 2 sextillion atoms of oxygen (2 followed by 21 zeros) and twice as many hydrogen atoms; a speck of dust might contain 3x10^12 (3 trillion) atoms.

An example of the sophisticated technology and expertise in particle physics, now used to further develop subatomic theory, is the ‘bubble chamber’ experiment, in which a beam of charged particles was shot into a tank of superheated pressurized hydrogen: Trials of tiny bubbles that temporarily appeared indicated the passage of the particles through the hydrogen, and their interactions and decay, in experimental results and analyses that were quite easy to understand: see description on Cern website, accessed Jan 14, 2010, at URL <http://teachers.web.cern.ch/teachers/archiv/hst2000/teaching/resource/bubble/bubble.htm>

‘Nuclear energy’, produced by nuclear fission or nuclear fusion (the energy released when a heavy atomic nucleus, such as uranium, splits into two or more parts (fission) or when two light nuclei such as hydrogen, combine to form a stable nucleus such as helium (fusion)) creates enormous explosive power, and nuclear weapons (missiles, bombs, shells or land mines that use fission or fusion of nuclear material) yield enormous quantities of heat, light, blast, and radiation; see, e.g., Macmillan Encyclopedia, supra, note 596.

New problems posed with discovery of neutron by Chadwick in 1932: It then appeared that ‘the whole universe was constructed of these three particles. [pg 410] … The outstanding problem was the nature of the force that held neutrons and protons together in the atomic nucleus. The only two fundamental forces known at the time were (1) gravitation and (2) the electromagnetic force; (1) was held to be too weak to account for the stability of the nucleus and (2) had no effect on the electrically-uncharged neutron.’ Macmillan Encyclopedia, supra, note 596, pg 410

Quark theory’s current model of the hadron is based on Murray Gell-Mann’s concept of the quark, introduced in 1963, in which the hadron is divided into 2 classes, ‘baryons’ and ‘mesons’, baryons consisting of 3 quarks and mesons consisting of a quark and anti-quark pair: Macmillan Encyclopedia, supra, note 596.

The word ‘quark’ was taken from a 13-line poem (relating to the cuckolded King Mark in the Tristan legend) in James Joyce’s novel, ‘Finnegans Wake’. The physicist Murray Gell-Mann, who proposed this name for these particles, said in a private letter of June 27/78 to the editor of the Oxford English Dictionary that he had been influenced by Joyce’s words: ‘The allusion to 3 quarks seemed perfect [originally there were only three subatomic quarks]’: Macmillan Encyclopedia, supra, note 596. Joyce’s rhyming word playfully and masterfully conveys connotations of both ‘quack’ and ‘hark’.

Thus, just as with subatomic theory, quark theory has proceeded through the pattern of the articulation of a hypothesis, the verification or falsification of it in observations made in concrete tests with huge machines and sophisticated imaging techniques, and logical conclusions and generalizations drawn from them.

Subatomic theory introduced two additional fundamental forces – adding to the previously-known forces of ‘gravity’ and ‘electro-magnetism’, the forces of ‘strong interactions’ and ‘weak interactions’: Macmillan Encyclopedia, supra, note 596.

Sample, supra note 601: ‘It was named dark matter because it does not reflect or absorb light, making it impossible to observe with telescopes.’
were it not for the extra

stars after The Big Bang.

nt's effusion in

on science (and himself) made in one of Levin's columns:

public hostility towards science and ignorance about it. To

March 2, 2007

Science at Oxford University), broadcast on BBC1 Television, Engl

Dimbleby Lecture, 1996,


621

2004, URL accessed January 26, 2010

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Davies and Sample news reports, supra note 601; Ian Sample, ‘Is the Large Hadron Collider worth its massive

were likely to be a postulate of pure logic or pure thinking, since (as far as I have found from newspaper

reports alone) there is no published claim of either any concrete evidence for it or any intuitive vision of it (though

the latter may well exist); see., e.g., Davies and Sample, id., and Adam Rutherford, ‘What price the secrets of the

universe?’, The Guardian website, December 1, 2009, URL:

<http://www.guardian.co.uk/commentisfree/2009/dec/01/large-hadron-collider-research>

615

Id.

I wrote this in 2007, and revised it in 2010, when physicists seemed even more possibly on the verge of detecting

evidence of dark matter, in the postulated ‘Higgs boson’ (sometimes called ‘the God particle’).

Sample, supra note 613, and Judith Burns, ‘LHC to shut down for a year to address safety concerns’, BBC News, Science, website, March 10, 2010, URL: <http://news.bbc.co.uk/2/hi/science/nature/8556621.stm>, respecting the Large Hadron Colliders (LHCs) created to conduct experiments to recreate the moments after The Big Bang.

The LHC at Cern is described in, e.g., Sample, Davies, supra note 613; Rutherford, supra note 614; Burns, supra note 617, John Gribbin, ‘A very lucky universe’, The Guardian website, October 19, 2009, URL: <http://www.guardian.co.uk/commentisfree/2009/oct/19/cern-higgs-boson-particle>; ‘Putting the fizz into physics’, The Observer profile series website, URL: <http://www.guardian.co.uk/theobserver/series/observer-profile>.

619 ‘The LHC is the biggest and most expensive experiment in history’, ‘an expensive beast’ involving a


<http://www.guardian.co.uk/commentisfree/2009/nov/19/fear-large-hadron-collider>

620 Richard Dawkins, holder of an endowed chair at Oxford, the Charles Simonyi Professor of the Public Understanding of Science (since 1995 when it was created), is a graduate in ethnology and a scholar in the field of evolutionary biology and a popular public commentator on that and related topics, has written several international best-sellers on his evolutionary theory and other related topics, and won numerous awards for his accomplishments in lecturing and writing: see The Richard Dawkins Foundation for Reason and Science website, URL March 3, 2007: <http://richarddawkins.net/foundation,trustees> – URL: <https://richarddawkins.net/richarddawkins/>.

Henry Bernard Levin, a leading opinion-piece columnist for The Times of London from 1971 to 1997, was one of the most celebrated English journalists of his time, as well as being an author and broadcaster. When he died in 2004, his thought and writing were described in a Times obituary as ‘passionate, controversial, courageous, and never dull’, and he was praised for his ‘very powerful mind … and strong views’ and for being ‘one of the most gifted and influential columnists to write for The Times’: ‘Obituary of Bernard Levin’, Times Online, August 9, 2004, URL accessed January 26, 2010: <http://www.timesonline.co.uk/tol/news/uk/article467546>, and


Their quarrel was recounted by Dawkins in ‘Science, Delusion and the Appetite for Wonder’, The Richard Dimbleby Lecture, 1996, delivered by Dawkins (in his role as Charles Simonyi Professor for the Understanding of Science at Oxford University), broadcast on BBC1 Television, England, on November 12, 1996, URL accessed March 2, 2007: <http://www.edge.org/3rd_culture/dawkins/lecture_p1.html>. In the lecture, Dawkins decried the public hostility towards science and ignorance about it. To illustrate the point, he told this anecdote about an attack on science (and himself) made in one of Levin’s columns:

A few weeks ago, Bernard Levin’s effusion in The Times was entitled “God, me and Dr Dawkins” and it had the subtitle: “Scientists don't know and nor do I -- but at least I know I
don't know". It is no mean task to plumb the full depths of what Mr Bernard Levin does not know, but here's an illustration of the gusto with which he boasts of it.

"Despite their access to copious research funds, today's scientists have yet to prove that a quark is worth a bag of beans. The quarks are coming! The quarks are coming! Run for your lives …! Yes, I know I shouldn't jeer at science, noble science, which, after all, gave us mobile telephones, collapsible umbrellas and multi-striped toothpaste, but science really does ask for it … Now I must be serious. Can you eat quarks? Can you spread them on your bed when the cold weather comes?"

It doesn't deserve a reply, but the distinguished Cambridge scientist, Sir Alan Cottrell, wrote a brief Letter to the Editor: "Sir: Mr Bernard Levin asks 'Can you eat quarks?' I estimate that he eats 500,000,000,000,000,000 quarks a day."

622 In other words, the theory can be seen as detached from direct sense perception because the postulated particles cannot be perceived directly by the senses – by the eye – or even by optic microscope or the electron microscope. What the eye could see were results of laboratory experiments, which produced super-natural effects (man-made effects going beyond what occurs naturally on earth), which were recorded by sensors, and which recordings were observed and interpreted by experts in particle physics. If a recording reflected a predicted activity of a postulated particle, it could be interpreted as suggesting or verifying the existence of the particle. The conceptual reasoning behind the quark theory experiments is impressive, and at the same time, the grounding in ordinary direct sense perception was remote. And quark theory also lacked the concrete proofs of successful applications in the practical world of material reality (in military or medical or other uses), which so convincingly verified sub-atomic theory.

623 Quotes here are from Dawkins' lecture, supra note 621:

‘Now, here's an apparent confusion: T H Huxley saw science as "nothing but trained and organized common sense", while Professor Lewis Wolpert insists that it's deeply paradoxical and surprising, an affront to commonsense rather than an extension of it. Every time you drink a glass of water, you are probably imbibing at least one atom that passed through the bladder of Aristotle. A tantalisingly surprising result, but it follows by Huxley-style organized common sense from Wolpert's observation that "there are many more molecules in a glass of water than there are glasses of water in the sea".

‘Let's keep a sense of proportion about this! Yes, there's much that we still don't know. But surely our belief that the earth is round and not flat, and that it orbits the sun, will never be superseded. That alone is enough to confound those, endowed with a little philosophical learning, who deny the very possibility of objective truth: those so-called relativists who see no reason to prefer scientific views over aboriginal myths about the world.

‘Our belief that we share ancestors with chimpanzees, and more distant ancestors with monkeys, will never be superseded although details of timing may change. …’

624 Dawkins' lecture, id.

625 Dawkins' lecture, supra note 621:

‘[U]nlike, say, quantum theory or relativity, [the flow of blood through heart] isn't hard to understand. … Many of our ideas, on the other hand, are still best seen as theories or models whose predictions, so far, have survived the test. Physicists disagree over whether they are condemned forever to dig for deeper mysteries, or whether physics itself will come to an end in a final ‘theory of everything’, a nirvana of knowledge. Meanwhile, there is so much that we don't yet understand, we should loudly proclaim those things that we do, so as to focus attention on problems that we should be working on.’

626 Nobel Laureate Leon Lederman, prominent particle physicist quoted in Leon Lederman and Dick Teresi, The God Particle: If the Universe is the Answer, What is the Question? (Boston: Houghton Mifflin Company, 1993, reprint 2006), pg. 22; fuller quote:

‘It's a hard-won simplicity [...and...] remarkably accurate. But it is also incomplete and, in fact, internally inconsistent ... This boson is so central to the state of physics today, so crucial to our
final understanding of the structure of matter, yet so elusive, that I have given it a nickname: the God Particle. …'

627 Sample, supra note 613


629 Sample, supra note 613

630 The ‘lively debate’ between Cern physicist Professor Cox and UK Science and Defence Minister Lord Drayson: Rutherford, supra note 614. It has sometimes been argued that this is a debate over a false or over-stated dichotomy (for e.g.: ‘the polarity of the question [scientist vs. inventor; pure speculation & exploration vs. practical application] is overstated’, per Rutherford, id.). However, at this point in time, when the two sides being debated and priorities between them are still being developed and differentiated, and when the outcomes have significant practical consequences on public funds and peoples’ lives, the debate seems healthy and called for, and the opposition should not and need not end in polarization.

631 Such as in the Cox and Drayson debate, id., where Cox argued that Drayson champions ‘goal-oriented research’ over what has become known as ‘blue skies’ research, or in other words, "research" as opposed to "making stuff".

632 Davies, Rutherford, Montes, Sample, supra note 619: the thrill of exploration defines what it is to be ‘human’

633 As Rutherford says in his newspaper commentary, supra note 614: ‘I sympathise with the scientists. Retrospective justification is anti-innovative as it restricts young researchers with sparse or non-existent track records, and targeted research restricts the creativity that defines science. Nevertheless, I think the polarity of the question is overstated. Certainly, discovering the gene that makes a snail’s shell twist left rather than right has less obvious applications than the implications for spintronics of more energy-efficient microchips. But both of these are on a spectrum, and most research is somewhere in the middle. The government should realise this, and stop trying to force scientists into becoming inventors.’

634 Rutherford, supra note 614: ‘Critics might wail about how much the LHC costs, but esoteric it ain’t. … There will be some direct technological spin-offs for sure. Other high-energy physics projects formed the basis for the development of positron emission tomography, which revolutionised medical scanning. Should the scientists at Cern ever need to fill in this new retrospective revenue-generating spin-off technologies section on a grant application, they would do well to write: “We invented the internet. Now give us some money.”

635 Sample, Davies, Rutherford, supra note 619

636 Montes, Gribbin, supra notes 618, 619

637 ‘Montes’, supra note 619

638 Brian Cox ‘Five-Minute Interview with Matthew Stadlen’, supra note 628

639 Dawkins’ lecture, supra note 621

640 Dawkins expressed his personally felt preference (Dawkins’ lecture, supra note 621), referring to ‘the view that science is dull and plodding’ because of the tedium of concrete proofs: ‘Yes, we must have Bunsen burners and dissecting needles for those drawn to advanced scientific practice. But perhaps the rest of us could have separate classes in scientific appreciation, the wonder of science, scientific ways of thinking, and the history of scientific ideas, rather than laboratory experience.’

641 Dawkins’ lecture, supra note 621, and see his remark, beginning ‘Many of our ideas, on the other hand’, quoted supra note 625

642 The fuller comment, quoted from in my text, in Dawkins’ lecture, supra note 621, on this point: ‘I wish I could meet Keats or Blake to persuade them that mysteries don’t lose their poetry because they are solved. Quite the contrary. The solution often turns out more beautiful than the puzzle, and anyway the solution uncovers deeper mystery. … The rainbow’s dissection
into light of different wavelengths leads on to Maxwell's equations, and eventually to special relativity.

"Einstein himself was openly ruled by an aesthetic scientific muse: "The most beautiful thing we can experience is the mysterious. It is the source of all true art and science", he said. It's hard to find a modern particle physicist who doesn't own to some such aesthetic motivation.

Typical is John Wheeler, one of the distinguished elder statesmen of American physics today:

"... we will grasp the central idea of it all as so simple, so beautiful, so compelling that we will all say each to the other, 'Oh, how could it have been otherwise! How could we all have been so blind for so long!'"

CHAPTER 6 NOTES


644 Other types of viewpoints (philosophical, political science, economics, sociology, psychology, and other non-judicial viewpoints) can shed light on a judicial decision – but not if they treat it as the same type of decision as theirs: They can illuminate a judicial decision only insofar as they relate their viewpoint to the distinct type of viewpoint that a ‘judicial’ decision-making process is able to and is desired to develop well. These other types of viewpoints can also be the subject of a judicial decision, where the Court similarly must relate its distinct type of viewpoint (in factual conceptual analysis and Justice) to that other’s own distinct type of viewpoint, a point which I discuss when I consider the example of the Sauvé case in Chapter 8.

645 I have addressed this topic elsewhere, as noted in the previous chapter, in the context of developing personal conscience in moral or ethical conflicts, in K.A. Connidis, ‘A Dream of Dirty Hands: Moral Conflict and Personal Conscience’, *supra* note 593.

646 See discussion in Chapter 1, citing Baker, pgs 7, 144, where he notes a reference in the laws of Ine of Wessex, dating from about 690 C.E., to ‘justice (right) being demanded before the shire-man’ (the definition ‘right’ is Baker’s), and where he gives the example of Chief Justice Huse who stated, in refusing the king’s request for an opinion on a case, that the case ‘would come before the King’s Bench judicially [and] then they would do what by right they ought to do.’

647 See discussion in Chapter 1, citing Baker, pg 5, where he also writes: ‘The procedure in contentious matters was calculated to avoid decision-making.’

648 Judges went from adopting and adapting communal practices, to developing their own ‘common law’, and (I argue) becoming experts with a thorough command of the law. Thus, today, as McLachlin CJC described it in an academic journal article, referring to the Charter review context, the first rule ‘to assist judges in avoiding the evils of unprincipled, inappropriately interventionist judging’ is that ‘judges must ensure that their decisions are grounded in a thorough understanding of the Charter’, and, I argue, the same holds with respect to any law a judge applies in a particular case): Hon. Beverley McLachlin, ‘Courts, Legislatures and Executives in the Post-Charter Era’, in Paul Howe and Peter H. Russell (eds), *Judicial Power and Canadian Democracy* (McGill-Queen’s University Press: Montreal & Kingston, 2001), pgs 63-72, at 70.

649 See Chapter 1, citing Baker pgs 144 (‘the professional training of the judiciary’) and 17 (referring to developments as early as the 1200s: ‘The typical justices of the Bench no longer politicians, administrators, and men of public affairs, but professional judges spending most of their time on the administration of the nascent common law.’): In this way, as Baker describes it (pg 144), ‘the professional training of the judiciary [coupled with the notion of a constitutional monarchy] … transformed the personal loyalty which judges owed to the king into a more objective form of loyalty to an impersonal Crown and to the king’s common law.’ See also pgs 133, 134.

650 See Chapter 1: note that Baker, pgs 66, 62, emphasizes the significance of jury trials in the separation of facts from principles of law, and thus the refinement of the common law – and as I argue, the refinement of both the factual and conceptual basis for the principles of common law.

651 The common law judges’ rejection of intuition and divine revelation can be seen, I argue, in the contrast with the decisions of the court of Chancery, in the era of the clashes between them (described *supra*, Chapter 1), in which the
Chancellor asserted his personal conscience to decide cases, provoked in part by the injustices of common law judgments which had become rigidly bound by narrow technical rules. Intuition has more recently been expressly and controversially rejected by Canada’s Supreme Court as a basis for their decisions: see e.g. dicta of McLachlin J. as she then was, in RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, at pg 329, referring to the process of applying the Oakes test in making a judicial decision under Section 1 of the Charter: ‘The process is not one of mere intuition …’ – following which she goes on to refer to the process as involving, rather, inter alia, demonstration by ‘rational inference from evidence or established truths’.

652 The common law judges’ rejection of personally felt values as a basis for their decisions can be seen more in the absence than the express rejection of them: There was no conscious grappling with them and defining and refining them, and no attempt to draw out and articulate the personally felt values and preferences of the litigants – unless this was a fact relevant to the application of the law or the judges’ principled or conceptual analysis. See Baker’s description, pg 172, of the early common law principles as ‘law which was accepted learning within the profession’ of court advocates and judges, the ‘“common erudition” as it is called in the old books’, what judges ‘said as a body was law mainly because it conformed to the reasoning of the little intellectual world of Westminster Hall.’

The problem of unwanted judicial bias, and the common law test of ‘a reasonable apprehension of bias’, raises the question of personally felt values of judges that conflict with citizens’ shared values or with laws made by democratic governments.

653 See Chapter 1, Baker pgs 63, 5, 81-82, 116


Looking back to when he was appointed in 1976, at thirty years old, Reilly J. described himself in his early years on the bench as a judge who was ‘too young to be a judge’ and who ‘thought he was doing good work from his courtroom’ but in reality was ‘arrogant, red-necked, and ignorant’ and ‘just applying the law blindly’; who thought ‘harsh penalties would achieve results, and that judging was ‘just an academic exercise’. His perspective changed after two decades, in which he ‘got fed up with watching all the suffering humanity coming through my courtroom’, and in which it ‘really came home to me’ how alone, isolated, and vulnerable were the women who were victims of violence and the young people who committed suicide. (As he said in the interview: ‘One of the things that really came home to me about that case was how alone and how isolated those women [victims of violent abuse] were. There was no protection for them.’) At 50 years old, Reilly J. reached a turning point, and vowed to provide better justice for the people coming to his courtroom:

’[Going out to the Wesley cemetery] was the turning point in my life. … what struck me was the number of grave markers of people born since 1970 … all these young people committing suicides. It was in that moment that the huge suffering that is happening on Indian Reserves just came down on me. … I saw it as my duty to do something to change that situation.’

Judges become ‘judicial tyrants’, Judge Reilly reflected, through ‘lack of understanding’. He attributed his changed attitude to his having gained greater knowledge and understanding – understanding of human nature in particular:

‘I should have learned a lot more about people and human nature before I started exercising the authority of a judge. … I had lost my ignorance. … It’s made me much more critical of the system and I think as a result maybe made me a better judge, because instead of just applying the law blindly which is what I see myself doing in my pre-1996 career, I see myself applying it now with a much more human approach. And I’m hopeful that maybe I’m doing much more good as a result of my newfound attitude …’

655 Though I will not delve into the complexities of the categories and rules of evidence and procedure, it is worth noting that the importance of sense perception specifically is reflected in the measure of deference given by appellate courts to factual findings of trial judge’s made from live witness testimony.

656 See Chapter 1 discussion, citing Baker, pgs 1, 12, 172

657 The ‘beautiful mysteries’ of our material world: paraphrasing R. Dawkins: see discussion in Chapter 5, citing Dawkins’ lecture, supra notes 621 and 642.
Worldly wisdom is practical knowledge of the material reality of life in the universe, including the psychological facts of human nature and the sociological facts of human relationships, gained from experience in the mundane world that has been intelligently reflected on and grasped consciously. It is not wisdom about a spiritual or heavenly or transcendent world, and it is not the wisdom of a priest or mystic, or a theoretical physicist or philosopher, or a popular leader, military commander, visionary poet, or naïve hermit or child.

658 F.W. Maitland: ‘Law was the point where life and logic met.’: ‘Introduction’, Year Books 1 & 2 Edward II (17 Seldon Society, 1903), p. xxxvii (also noted supra, note 8), referring to the common law lawyers in Medieval England: ‘While as yet there was little science and no popular science, the lawyer mediated between the abstract Latin logic of the schoolmen and the concrete needs and homely talk of gross, unschooled mankind. Law was the point where life and logic met.’ Frederick William Maitland (1859-1906), a pre-eminent English jurist and modern historian of English law, as referred to in J.H. Baker, ‘The Three Languages of the Common Law’, (1998) 43 McGill L.J. 5, at p. 19: ‘Another of Maitland’s observations was that lawyers “mediated between the abstract Latin logic of the schoolmen and the concrete needs and homely talk of gross, unschooled mankind” by devising a whole new range of words to describe logical and argumentative processes …’, and at fn 61, citing the reference above, Baker notes: ‘This prompted his famous remark, “Law was the point where life and logic met.”’). Contrast Maitland’s observation with Sir Edward Coke’s: ‘Reason is the life of the law.’, in Commentary Upon Littleton (1628) 97b; Holmes’s observation (infra, note 659) directly contradicts Coke’s, while Maitland balances the two.

659 O.W. Holmes, Jr.: the American jurist OW Holmes Jr.: ‘The life of the law has not been logic; it has been experience.’, The Common Law (1881) pg 1 (Toronto: U. of Toronto Typographical Society reprint, Paulo J.S. Pereira & Diego M. Beltran (eds), 2011, pg 5) (also noted supra, note 8). Justice Oliver Wendell Holmes, Jr. (1841-1935), a pre-eminent American jurist, Associate Justice of the Supreme Court of the United States (1902-1932) made this remark in an introductory sentence in the oft-quoted opening paragraph of the lectures gathered in this book, which Holmes Jr. began by stressing that other tools besides logic went into the making of the common law, in a very wide list that includes (as realistic, whether or not endorses as desired) society’s ‘felt necessities’, ‘intuitions of public policy’ even ‘unconscious’, and ‘prejudices’ of judges and society alike:

‘The object of this book is to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. …’

660 CG Jung, CW 10, para 831; fuller quote:

If the unconscious were dependent on consciousness, we could, by insight and application of the will, finally get the better of the unconscious, and [If our conscious ego was in charge of the psyche …] the psyche could be completely remodelled to suit our purpose. Only unworlly idealists, rationalists and other fanatics can indulge in such dreams. The psyche is a phenomenon not subject to our will; it is nature, and though nature can, by skill, knowledge and patience, be modified at a few points, it cannot be changed into something artificial without profound injury to our humanity. A human being can be transformed into a sick animal, but not moulded into an intellectual ideal.

A description Jung gave of how to gain such life experience, which clarifies its nature: CG Jung, ‘New Paths in Psychology’, in Two Essays in Analytical Psychology, CW 7, para 409:

‘Anyone who wants to know the human psyche will learn next to nothing from experimental psychology. He would be better advised to put away the scholar’s gown, bid farewell to his study, and wander with human heart through the world. There, in the horrors of prisons, lunatic asylums and hospitals, in drab suburban pubs, in brothels and gambling-hells, in the salons of the elegant, the Stock Exchanges, Socialist meetings, churches, revivalist gatherings and ecstatic sects, through love and hate, through the experience of passion in every form in his
own body, he would reap richer stores of knowledge than textbooks a foot thick could give him, and he will know how to doctor the sick with real knowledge of the human soul.’

661 See Chapter 3 discussion of Roach’s focus on the distinct judicial ‘rights protecting’ role in the Charter dialogue, and in common law tradition (in a traditional judicial concern in the common law to protect ‘fundamental rights’ and ‘disadvantaged minorities and the unpopular’, as well as ‘fairness’ and ‘fair process’).

662 See Chapter 3 discussion of Roach’s view of judicial decisions as decisions based on ‘principle properly crafted and defended’, quoting and citing Bickel and others.

663 See discussion of intuition in Chapter 5, where I contrast the views of Professor Allan Lightman and others, with Jung’s precise definition; as I explain there, intuition, as Jung used the term, is not based on the facts and logic of experience and common sense, and often stands out precisely because it defies them. As for intuition in the judicial context, when McLachlin J. (as she then was) uncontroversially rejected ‘mere intuition’ as a basis for the Court’s judicial analysis, in RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199 at 328-29 (quoted by Wetston J. in his trial decision in Sauvé 2, infra Chapter 8, note, para 15), she clearly did not mean it to refer to common sense experience or rational inference, which she recognized as playing a major role in judicial analysis, as she expressly emphasizes herself in her reasons in Sauvé 2, as discussed infra in Chapter 8.

664 This is explained in Chapter 7, when I distinguish the distinct function of political decisions in ascertaining and refining the personally felt values and preferences of the citizens – a task that courts are not wanted to do in their judicial decisions, cannot do legitimately because they lack the authority for doing it, and could not do well in any event because they lack the professional expertise and resources to do it. What courts can and ought to do, however, uniquely and effectively, as I argue and explain in more detail in the next chapter in the context of the interplay between judicial and political decisions, is scrutinize political decisions to ensure they meet a reasonable standard of skill and care, according to the judicial viewpoint of facts, logic, and justice, in carrying out that political task.

665 As McLachlan CJC phrased it, in Sauvé 2 (2002), supra note 229, at para 10: If an infringement of rights can simply be labelled ‘a matter of social philosophy’, that ‘removes the infringement from our [i.e., the judges’] radar screen, instead of enabling us to zero in on it to decide whether it is demonstrably justified as required by the Charter.’

666 In other words, the perception or viewpoint of a non-decisive or unwanted function can have a positive effect to be nurtured or a negative effect to be avoided in making a judicial decision. It might be based on information that is relevant and can be used to correct and hone the judicial decision’s concrete thinking viewpoint (such as an accurate but overlooked fact or principle that provoked an anxious or angry response) – which is something to recognize, seek, and develop. Or it might be based on information that is irrelevant and can have a negative effect in distorting that viewpoint with errors and biases (such as a personal antipathy to old men) – which is something to recognize so that it can be corrected or guarded against.

667 As I elaborate in Chapter 7, when I describe the potential interplay between judicial and political decisions, society does not benefit if judges do this – i.e., if judges abandon the type of decision-making they uniquely can do well, and substitute other types which they cannot do well in the judicial context – not as well, for example, as politicians, or pastors, or psychotherapists, or philosophers can do in their special contexts. Each of these decision-makers exercises a different type of decision-making process; none of them can make a distinctively judicial decision as well as judges in courts can, any more than judges can do theirs.

668 Pioneering cases seem to be arising more and more frequently in our time, as a review and comparison of the issues brought to our courts in the last three decades alone would no doubt show.

669 When a judicial decision is called for: The absence of relevant facts on an issue will typically result in a decision against the party bearing the burden of proving that issue. For example, in R. v. Spence, [2005] 3 S.C.R. 458, in which an accused claimed the right to challenge jurors for potential racial bias, the Court dismissed the claim on the basis that, in contrast to the proved white anti-black racial bias, there was not a sufficient factual foundation for the Court to take judicial notice of the other particular racial bias alleged. Historically, as Baker notes, pg 17., in the early days of the courts in England, a case might also go without judgment if there was no settled common law on the issue, that is, ‘if the judges could not agree on the law’.
Such evidence of concrete facts may not be available because, for example, the issue does not lend itself to proof by any such evidence, to being measured empirically or concretely – such as the issue of whether suspending prisoners’ votes does in concrete fact further a symbolic policy goal of ‘enhancing the rule of law and civic responsibility’ (as in the Sauvé 2 case, supra note 229, discussed in Chapter 8).

See notes 669, 670 supra, re: finding against a party for want of evidence on an issue the party must prove.

Contrasting ‘signs’ with ‘symbols’: see CG Jung, CW 15, para 105; CW 6, para 816 (a sign is ‘a representation of something known’); CW 5, para 180 (‘a commonly accepted indication of something known’); CW 18, para 482 (‘less than the thing it points to’); CW 8, para 88 (treating a symbol semiotically ‘debases it to a mere sign’); CW 4, para 674 (a symbol should not be treated reductively as a sign or symptom, because ‘the symbol is not merely a sign of something repressed and concealed, but is at the same time an attempt to comprehend and to point the way to the further psychological development of the individual…’).

‘Symbol’ definitions and descriptions by Jung: see, e.g., CW 6, para’s 814 (‘A symbol always presupposes that the chosen expression is the best possible description or formulation of a relatively unknown fact, which is nonetheless known to exist or is postulated as existing.’); 816 (‘So long as a symbol is a living thing, it is an expression for something that cannot be characterized in any other or better way. The symbol is alive only so long as it is pregnant with meaning. But once its meaning has been born out of it, once that expression is found which formulates the thing sought, expected, or divined even better than the hitherto accepted symbol, then the symbol is dead, i.e., it possesses only an historical significance. We may still go on speaking of it as a symbol, on the tacit assumption that we are speaking of it as it was before the better expression was born out of it.’); 817 (‘An expression that stands for a known thing remains a mere sign and is never a symbol. It is, therefore, quite impossible to create a living symbol, i.e., one that is pregnant with meaning, from known associations. For what is thus produced never contains more than was put into it.’); 818 (‘an expression for something unknown’); 819 (‘A symbol really lives only when it is the best and highest expression for something divined but not yet known to the observer.’); (‘Symbols that do not work in this way on the observer are either extinct, i.e., have been superseded by a better formulation, or are products whose symbolic nature depends entirely on the attitude of the observing consciousness. [i.e. a purely individual or personal attitude that sees it rationally rather than symbolically] The attitude that takes a given phenomenon as symbolic may be called, for short, the symbolic attitude. … it is the outcome of a definite view of the world which assigns meaning to events, whether great or small, and attaches to this meaning a greater value than to bare facts.’); 821 (‘a symbol is an ‘unconscious product’, that ‘may actually be full of significance’, [not] ‘morbid’ or ‘a mere symptom’); CW 15, para 105 (‘The true symbol differs essentially from this [i.e. from a sign standing for something known], and should be understood as an intuitive idea that cannot yet be formulated in any other or better way.’); CW 15, para 119 (‘re: works of art which are openly symbolic:’ ‘Their pregnant language cries out to us that they mean more than they say. We can put our finger on the symbol at once, even though we may not be able to unravel its meaning to our entire satisfaction. A symbol remains a perpetual challenge to our thoughts and feelings. …’); CW 6, para 401 (symbols are ‘remote from comprehension’; this enables a symbol to ‘withstand attempts by the critical intellect to break it down’); see also CW 6, para 178, CW 10, para 24, CW 11, para 282, CW 13, para 199, CW 16, para 496.


The Code of Lipit-Ishtar, 19th century (~1878-1860) B.C.E.: In the English translation in Sarah Robbins (ed.), *Law: A Treasury of Art and Literature* (New York: Harkavy Publishing, Beaux Arts Editions, 1990), at pg 19: ‘When Lipit-Ishtar the wise shepherd was called to the princeship of the land in order to establish justice in the land, to banish complaints, to turn back enmity and rebellion by force of arms, and to bring well-being to the Sumerians and Akkadians …’

The Code of Hammurabi, 18th century (~1780) B.C.E.: In the English translation in Sarah Robbins, ed., *Law: A Treasury of Art and Literature*, id., at pgs 20-22: ‘When the lofty king Anu, and Entil, lord of heaven and earth, who determines the destinies of the land, committed the rule of all mankind to Marduk; when they pronounced the lofty name of Babylon and made it great among the quarters of the world and in its midst established for him an everlasting kingdom whose foundations were firm as heaven and earth – at that time, they named me, Hammurabi, the exalted prince, the worshipper of the gods, to cause the righteous to prevail in the land, to destroy the wicked and the evil, to prevent the strong from plundering the weak, to go forth like the sun over the black-headed race, to enlighten the land and further the welfare of the people.’ With respect to the fair or fitting moderation in the atonements listed in Hammurabi’s Code, Robbins points out that it contrasts markedly with the later Athenian Laws of Drakon of the 17th century B.C.E., under which even minor crimes were punished by death; hence the term ‘draconian’ used to refer to a harsh penalty.

‘Atone’ and ‘amend’: note Middle English meaning of ‘atone’. ‘to make or become united or reconciled’, and archaic meaning ‘to agree’. see dictionary definitions cited supra, note 674.

The image of balanced scales is a widespread and long-standing symbol of Justice, in societies shaped by Jewish, Christian, and Muslim beliefs and cultures, as well as in other societies, Hindu and Buddhist mentioned in brief symbol dictionary sources, and statues also found in e.g. Japan, Australian courthouses. See, e.g., symbol dictionary references:

- scales appear ‘from time immemorial’ as ‘one of the principal attributes of Justice (J.C. Cooper (ed.), *Brewer’s Myth and Legend* (London: Cassell, 1992), pg 253);
- scales are an ‘ancient symbol of judgment, especially of the soul after death’ (James Hall, *Hall’s Illustrated Dictionary of Symbols in Eastern and Western Art* (London: John Murray (Publishers), 1994), pgs 81-82);
- ‘This instrument, of Chaldeaan [i.e. Babylonian] origin, is the mystic symbol of justice, that is, the equivalence and equation of guilt and punishment.’; ‘In its most common form, that is, two equal scales balanced symmetrically on either side of a central pivot’: (J.C. Cirlot, trans from Spanish to English by Jack Sage, *A Dictionary of Symbols*, (New York: Philosophical Library Inc., 2nd ed., 1971, 1st ed. 1962, Routledge & Kegan Paul Ltd., London), pg 280)
- Scales are ‘symbolically important … as a general symbol for justice and the just proportion in many cultures, associated with the judicial system, earthly justice, and Justice with her blindfold ….’ (Hans Biedermann, *Dictionary of Symbolism: Cultural Icons & the Meaning Behind Them*)

- in ancient Egypt, depictions date back over 3500 years: the weighing of the deceased’s heart ‘was a popular subject from the beginning of the New Kingdom (c. 1567 B.C.), found almost exclusively in the Book of the Dead’ (James Hall, *Hall’s Illustrated Dictionary of Symbols in Eastern and Western Art*, id., pgs 81-82);
- ‘In Egyptian myth the soul, at death, was weighed against the feather of truth in the Judgment Hall of Osiris. (J.C. Cooper, ed., *Brewer’s Myth and Legend* (London, Cassell, 1992), pg 253) ‘According to the ethical doctrines of retribution held by many religions, there is a court of justice in the afterlife as well, to consider our good and bad deeds from this life – e.g., the ancient Egyptian court of the dead in which the god Osiris, in the presence of Maat, the goddess of Justice, weighs the heart of each person who has died and thus decides that person’s fate in the afterlife.’ (Hans Biedermann, id.);
- Hindu and Buddhist religion or mythology: ‘The Hindu Lord of the Dead, Yama, also judged the dead. He was adopted by Buddhism and presides over the scales in which a person’s good deeds, represented as white pebbles, are weighed against black, his sins.’ (James Hall, *Hall’s Illustrated Dictionary of Symbols in Eastern and Western Art*, id., pgs 81-82);
- ancient and classical Greece: scales are ‘an emblem of Themis, as law, order, and truth. (J.C. Cooper, ed., *Brewer’s Myth and Legend*, id., pg 253); ‘Hermes/Mercury weighs Greek against Trojan on Attic vase painting.’ (James Hall, *Hall’s Illustrated Dictionary of Symbols in Eastern and Western Art*, id., pgs 81-82);
- ‘Scales represent the sign of Libra in the Zodiac’ (J.C. Cooper, ed., *Brewer’s Myth and Legend*, id., pg 253); (James Hall, *Hall’s Illustrated Dictionary of Symbols in Eastern and Western Art*, id., pgs 81-82);
- scales ‘date from the Roman era’, ‘A sword and scales have been the attributes of Justice personified since Roman times.’ (James Hall, Hall’s Dictionary of Subjects & Symbols in Art (London: John Murray Publishers, 1974, rev’d ed 1979), pgs 183-84, 274); ‘In Roman art, Justice personified, one of the cardinal virtues, has sword and scales, which she retains to this day.’ (James Hall, Hall’s Illustrated Dictionary of Symbols in Eastern and Western Art, id., pgs 81-82);
- ‘Christianity has the scales as an emblem of the Archangel Michael.’ (J.C. Cooper, ed., Brewer’s Myth and Legend, id., pg 253); ‘In Christian art, the archangel Michael weighs the souls of the dead before Christ the judge, first seen in French cathedral sculpture from the 12th century. [i: German tomb relief, c. 1237].’ (James Hall, Hall’s Illustrated Dictionary of Symbols in Eastern and Western Art, id., pgs 81-82); ‘Famine, one of the four horsemen of the Apocalypse, has a pair of scales.’ (id.)
- Muslim: ‘According to the Koran, at the Judgment Day everyone will be weighed in the scales of the archangel Gabriel. The good deeds will be put in the scale called ‘Light’ and the evil ones in the scale called ‘Darkness’, after which they have to cross the bridge Al-Sirat, not wider than the edge of a scimitar. …’ (J.C. Cooper, ed., Brewer’s Myth and Legend, id., pg 253)
- Renaissance Europe (France, Germany, Italy): Woman personified as Justice, with scales, as one of the four ‘cardinal virtues’, along with Prudence, Fortitude and Temperance. (James Hall, Hall’s Dictionary of Subjects & Symbols in Art, id., pgs 183-84)
- Note that the blindfold, unlike the balanced scales and sword, is not an ancient and ubiquitous attribute of Justice, but was introduced in Renaissance Europe, and is still often used today (examples in the Old Bailey in London and in courthouses in Canada, noted infra notes 783-86. Its older meaning was a negative one: See, e.g.: in James Hall, Hall’s Illustrated Dictionary of Symbols in Eastern and Western Art, id., at pgs 183-84: scales signify Justice’s impartiality, ‘blindfolding does too, however, it goes back only to the 16th Century. (Elsewhere in Renaissance allegory blind folding implies absence of judgment, as in the case of Cupid, Fortune, Ignorance – indeed in antiquity Justice was known for her clear-sightedness.’ Other symbol dictionary sources gloss over this point, some incorrectly describing the Greek goddess Themis as being portrayed blindfolded in Greek antiquity.

680 See references cited in endnote above, and discussion and endnotes below respecting statues of Justice. In this thesis I am not addressing in depth the nuances and levels of meanings, and the many psychological and cultural considerations raised by the particular personifications (typically in the form of a woman or goddess), images, and metaphors used to symbolically convey the ideal of Justice.


682 ‘Collective’, ‘social’, and ‘relatively fixed’ symbols, as distinguished from purely ‘personal’ and ‘relative’ symbols: See CG Jung, CW 6, para 820-21 (a collective or social symbol resonates with people generally, because it arises from the same ‘widespread’ ‘essential unconscious factor’ and thus ‘touches a corresponding chord in every psyche’); a collective or social symbol embraces both the most well-differentiated and complex understanding attainable by a few in a highly-civilized society and the most primitive and common understanding common to many in it, and in this combination ‘lies the potency of the living, social symbol’; CW 6, para 820 (The living symbol has an essential unconscious factor, and the more widespread this factor is, the more general is the effect of the symbol, for it touches a corresponding chord in every psyche); as Jung explains, quoting more fully from CW 6, para’s 820-21:
Since, for a given epoch, it is the best possible expression for what is still unknown, it must be the product of the most complex and differentiated minds. But in order to have such an effect at all, it must embrace what is common to a large group of men. This can never be what is most differentiated, the highest attainable, for only a very few attain to that or understand it. The common factor must be something that is still so primitive that its ubiquity cannot be doubted. Only when the symbol embraces that and expresses it in its highest possible form is it of general efficacy. Herein lies the potency of the living, social symbol and its redeeming power. [CW6 para 820]

All that I have said about the social symbol applies equally to the individual symbol. … For the individual, they [i.e. ‘individual psychic products whose symbolic character is so obvious that they at once compel a symbolic interpretation’] have the same functional significance that the social symbol has for a larger human group. [CW 6, para 821]

683 For the mundane or temporal or worldly aspect of the symbolic ideal of Justice, e.g., ‘The figure of justice is very commonly seen on public buildings wherever the law is administered.’ (James Hall, Hall’s Dictionary of Subjects & Symbols in Art, supra, note 679, pgs 183-84); ‘Scales are ‘symbolically important … as a general symbol for justice and the just proportion in many cultures, associated with the judicial system, earthly justice, and Justice with her blindfold ….’ (Biedermann, Dictionary of Symbolism, supra note 679).

684 Figures of Justice that are divine and are situated in an after-life judging context, especially with respect to judging the soul after death, such as: Maat, as the Goddess of Justice presiding over the weighing of the deceased’s heart in the Hall of Judgment, in ancient Egyptian culture (a popular subject more than 3,500 years ago); divine Justice is one of the overarching characteristics of the gods of Jewish, Christian, and Muslim beliefs (including archangels Michael and Gabriel with their scales to weigh deeds and souls on Judgment Day), as well as Hindu and Buddhist belief, and there are references to similar Tibetan and ancient Persian belief: see symbol dictionary references, supra note 679. ‘ “Poetic justice”: In dramas and other literary works the reward of the virtuous and the punishment of the guilty, sometimes accomplished accidentally.’: Gertrude Jobes, Dictionary of Mythology, Folklore and Symbols (New York: The Scarecrow Press, 1962), Vol. 2, pg 898

685 Attempts to define the transcendent symbol of Justice: ‘The deepest significance of the balance derives from the zodiacal archetype of Libra, related to immanent justice’, or the idea that all guilt automatically unleashes the very forces that bring self-destruction and punishment.’ (J.E. Cirlot, J. Sage (trans.), A Dictionary of Symbols, supra note 679, pg 280); ‘This instrument [the scales], of Chaldaean origin, is the mystic symbol of justice, that is, the equivalence and equation of guilt and punishment.’; ‘In its most common form, that is, two equal scales balanced symmetrically on either side of a central pivot’: (J.E. Cirlot, id., pg 280); ‘Balanced scales … it has a secondary meaning – subservient to the above – which is, to a certain extent, similar to other symbolic bilateral images, such as the double-bladed axe, the Tree of Life …’: (J.E. Cirlot, id., pg 280); and the idea of the soul or heart or deeds being judged after death, according to a higher Justice in the afterlife: see references supra, note 679.

686 ‘Foundational image schemas’, as discussed in Chapter 4: What Jung originally identified as ‘archetypes’, can be seen in the concept of ‘foundational image schemas’ that are identified in contemporary cognitive science, positing the same idea that psychological experience clusters around certain schematic motifs which are foundational, are at the base mind: See Bradd Shore, Culture in Mind: Cognition, Culture and the Problem of Meaning (Oxford: Oxford University Press, 1996), pg 312.


‘Social injustice’ – in the deliberately unequal treatment of two parties in a conflict resolution – seems likely to alienate them from each other and the process: The party treated less favorably is likely to experience negative emotions (anger, resentment, cynicism, mistrust, hopelessness, withdrawal, and vengefulness), especially if ‘justice’ had been sought and if their unequal treatment was controlled by another party; the favoured party too might well experience negative emotions (such as guilt, discomfort, and withdrawal to maintain a privileged position).
Hannah A. Chapman, D.A. Kim, J.M. Susskind, and A.K. Anderson, ‘In Bad Taste: Evidence for the Oral Origins of Moral Disgust’, *Science* 27 February 2009, Vol. 323, no. 5918, pp. 1222-1226; URL <http://www.sciencemag.org/content/323/5918/1222.full>, report of Chapman interview on Canada A.M. radio, *U of T researchers shed light on morality’s origins*, February 27, 2009, February 27, 2009, CTV.ca news staff, URL: <http://www.ctvnews.ca/u-of-t-researchers-shed-light-on-morality-s-origins-1.374525>, In the study, participants were asked to taste unpleasant liquids, look at photos of disgusting objects such as dirty toilets, and then subjected to unfair treatment in a laboratory game; using an electromyography technique — small electrodes placed on the face to detect the electrical activation that occurs when the *levator labii* facial muscle contracts (which raises the upper lip and wrinkles the nose — movements thought to be characteristic of the facial expression of disgust) — the researchers observed that the same grimace was made in all three experiences. Conclusion, as described in the CTV report, *id.*, quoting Chapman: ‘Activation of the muscle region for the facial expression for disgust — said to be universal’ — is also observed when people ‘experience unfairness’ … Humans’ sophisticated moral sense of fairness may develop from our primitive preference for what did not taste good for us, what was potentially nutritious or poisonous, not safe to eat. …”What we think this research shows is that our moral sense is guided as much by simple emotional responses as it is by complex thought. That’s not to say that thought isn’t important; it’s just that some of these very simple emotions play a role too.”

Dog study 2008, ‘inequity aversion: Rob Stein, ‘Dogs Feel Envy – or at Least Grasp Inequity When It Comes to Treats’, *Washington Post*, December 15, 2008, pg A06, URL: <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/14/AR2008121401911.html>; Chimpanzee and children studies 2012, fair play and sharing equal portions: Victoria Gill, *Sharing: Chimp study reveals origins of human fair play*, BBC Science News, 14 January 2013, URL http://www.bbc.co.uk/news/science-environment-20973753, Study; Darby Proctor (lead researcher), Rebecca A. Williamson, Frans B.M. de Waal, and Sarah F. Brosnan, ‘*Chimpanzees play the ultimatum game*’ (Yerkes National Primate Research Center at Emory University, US, published in Proceedings of the National Academy of Sciences, November 29, 2012, URL: <http://www.pnas.org/content/110/6/2070>), comments by Dr. Proctor, an evolutionary biology interpretation of fairness or sharing: ‘Both chimps and people are hugely cooperative; they engage in cooperative hunting, they share food, they care for each other’s offspring. So it’s likely that this was needed in the evolution of cooperation. It seems to me that the human sense of fairness has been around in primates for at least as long as humans and chimps have been separated.” (Note these caveats: only 3 pairs of chimpanzees tested; there was ‘economic sense’ or a purely rational reason for sharing, since they were likely to get nothing if they did not share equally; what seems more interesting to me is that the other monkey would refuse rather than take a smaller share.) A similar experiment was done by the same team with 20 children between 2 and 7 years old, and the researchers concluded that the children experienced the same ‘inequity aversion’: Both young children and chimpanzees ‘responded like humans do’ — tending to opt for an equal division of the prize.


Re: innate Archetypal and physiological responses as two sides of the same innate phenomenon: These studies showing deleterious emotional, relational, and physical effects of unfair treatment can be seen as supporting Jung’s theory that there are inborn physiological response patterns, which are the counterpart to inborn psychological or archetypal patterns, and which in the case of the justice examples indicates that the sense of fairness is an archetypal phenomenon and not an intellectual construct. In these studies it is possible to see the physiological side of what is inborn in us — the ‘instinctual’ responses that are just as mysterious as archetypal responses and are the physiological counterparts to them.

The biblical story of Solomon’s judgment: Different English versions of the Bible translate this passage differently; the wisdom is described, for example, as ‘understanding to discern judgment’ in the renowned old 1611 *King James Authorized Version*, and as ‘discernment to administer justice’ in the 1985 *New International Version Study Bible*. The story is told in the Christian Old Testament in 1 *Kings* 1-11 (repeated, with minor variations, in 2 *Chronicles* 1-9), with the ‘trial story’ at 1 *Kings* 3:5-28. In the Hebrew Torah, it is told in Melachim 1:3-8-28. Unless otherwise noted, quotations I use are from the 1611 *King James Authorized Version*, as it appears in the ‘Authorized Version School Bible’ (London: Eyre & Spottiswoode, 1973). As an historical figure, Solomon is
known as the king who consolidated the nation of Israel about 3,000 years ago; this apparently legendary story of Solomon took shape through a long oral and literary process in the centuries afterward: Paul Achtemeier (gen. ed.), *Harper’s Bible Dictionary* (San Francisco: Harper & Row, 1985), at pgs. 112, 975-977.

609 1 Kings 3:28: Again, different English versions give different descriptions of the judgment and the people’s awe or what is awesome to the people: It is ‘all Israel’ who are struck with ‘fear’ by Solomon’s ‘wisdom of God to do judgment’, in the 1611 *King James Authorized Version*, and Solomon’s wisdom ‘to administer justice’ in the 1985 *New International Version Study Bible*. A version referring to ‘justice’ rather than ‘judgment’ is given in an English translation of the story in Melachim 1, 3:5-28, URL <http://www.jlaw.com/Commentary/solomon.html>: ‘All of Israel heard the judgment that the King had judged. They had great awe for the King, for they saw that the wisdom of God was within him to do justice.’

610 ‘Awe’ is defined, in Webster’s *3rd New International Dictionary of the English Language, Unabridged* (1966) and *The Concise Oxford Dictionary of Current English* (1964), *supra* notes 442, 452, 514, as ‘an emotion variously combining dread, veneration, and wonder that is inspired by authority or by the sacred or sublime’, as ‘a feeling of reverential respect mixed with fear or wonder’, having the archaic meaning of ’dread, terror’; derived from Middle English (first known used: 13th century), from Old Norse *agl*; akin to Old English *ege* awe, Greek *achos* pain.

611 Just as in the example given earlier of the Supreme Court’s decision in the *Orton* case, Solomon’s judgment did not simply resolve the dispute rationally, but ‘did justice’ in resolving the dispute rationally. It could have been resolved differently (such as by paying the highest price or winning a battle for the child), whether non-rationally (by picking blind-folded or by tossing a coin), or rationally but ineffectively (such as by cutting the child in two, a compromise that might make sense in an insoluble dispute over a material thing such as matrimonial property, but not here), or rationally and effectively but unsatisfactorily – and far from awesomely (such as by reasoning that explained factually and logically why the child must be the other mother’s, notwithstanding the lack of love and dangerous unconcern she displayed for the child).

612 Throughout the Bible story of Solomon, it is his great wisdom of the natural world that is stressed, with a scope that is so far beyond others as to be divine, but repeatedly related to the natural or mundane world.

613 Punishment and forgiveness are not part of this story of Solomon’s judgment, although they both come up later in the full Bible story of Solomon’s life, when he gives a beautiful public prayer dedicating the Temple. In his prayer, Solomon relates Justice to punishing wrong-doers and rewarding right-doers, and he also refers to the need for forgiveness to follow after punishment and remorse.

614 There have been centuries of debate over whether the good mother was the biological mother, including by Rabbinical debates and by students in law school evidence courses. Furthermore, this legendary story of thousands of years ago has come to pass in actual court cases today, in disputes over parental rights to a child between the ‘contracted birth’ or ‘surrogate’ mother and the sperm-donor father and his partner.

615 An intellectually clever concrete thinking resolution of the issue would prompt the kind of admiration and satisfaction that is prompted by the deductions of Sherlock Holmes in a Conan Doyle detective story.

616 A particular conceptual formulation of the symbolic ideal of Justice, in the context of a custody dispute, depends on such standards of principled logic as selfless love and care for the welfare of the child, and thus the best interests of the child and the mothering talents and abilities of a person. The particular concrete application of this ideal of Justice, in that context, is the judicial order requiring that this child be given to this mother.

617 It is sometimes said that practicing lawyers (unlike legal scholars) do not appreciate cases being complicated by legal complexities: consider, however, that lawyers, perhaps often more concerned for the wellbeing of their clients than for the intellectual stimulation of theorizing about law, may therefore very much appreciate and seek any complication and innovation in the law that furthers their client’s wellbeing, and thus they may have a stake or interest in legal theorizing that is no less intense than a scholarly interest.

618 The symbolic meaning and effect of the Moon is a simple example of this: As astronomy and aeronautics have advanced, and concrete thinking and its application reached the point where people walked on the Moon, the Moon has no doubt lost its former powerful symbolic meaning and impact. Respecting ‘living’ and ‘dead’ symbolic images and motifs, see *supra*, note 673, citing C.G. Jung, CW 816, 817, 819, 821
By Justice as ‘a rationally theorized ideal’, I mean that numerous theories have been developed about the ideal of Justice and what it requires, separate to some extent but dependent upon the concrete application of Justice in judicial decisions which give it a particular concrete conceptual shape in worldly reality of the circumstances of each case. Various such theories of Justice are discussed in the next section of this chapter.

Vancouver Law Courts statue: ‘Themis, Goddess of Justice’, by sculptor Jack Harmon, erected 1982 at Vancouver Law Courts building (apparently modeled by the sculptor, not after the Greek Goddess of Justice, Themis, but the Greek goddess of the hunt, Diana: see Judith Resnik & Dennis E. Curtis, Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms (New Haven: Yale University Press, 2011, pg. 445, fn 331). In this statue, Themis is blindfolded (a recent addition to the symbolic figure, which has mixed negative and positive connotations, as noted above in my text), and carries the scales in her left rather than right hand, which reverses the particular collective association with the right and left hands.

New Westminster Law Courts statue: ‘Themis’, by sculptor Elek Imredy, erected 1981 at New Westminster Law Courts building. The sculptor was apparently well aware of the accuracy and significance of his portrayal of the ancient Themis as clear-sighted, as the accompanying plaque notes that the blindfold was not introduced until the Renaissance, explaining that it was ‘a mark of derision, implying an absence of judgment’.

Osgoode Hall statue, Toronto (courthouse for the Ontario Court of Appeal and Divisional Court, and home of the Law Society of Upper Canada): World War Two memorial, by sculptor Cleve Horn, installed in the center of the Rotunda, to represent ‘hope in the future’ as a memorial to the lawyers and law students who lost their lives during World War Two. (It Elsewhere in Osgoode Hall are two reliefs of the Figure of Justice, in the Rotunda, explaining that it was ‘a mark of derision, implying an absence of judgment’.)


See, e.g., the balanced scales image on the Canadian Bar Association website: URL accessed April 14, 2014: <http://www.cba.org/cba/>. It is sometimes said that conceptualizing supersedes symbolizing – that the discriminating precision of rational thinking replaces the vague and elusive hints of symbols, which are mere throwbacks to naïve times. Richard Dawkins, for example, highlights this in The Magic of Reality (London: Bantam Press, 2011), where he contrasts old myths with contemporary conceptual explanations of reality. Jung’s observation was the reverse, or rather, that conceptual and symbolic languages both contribute something essential to rational consciousness, and that the symbolic function is indispensable to transcending rigidly polarized conceptual dichotomies and thus to developing and transforming rational consciousness – and thus, that symbols remain essential in human psychology, and key to processes for developing consciousness, no matter how advanced or civilized human beings and their societies may be. Jung was concerned about the impoverishment of the symbolic attitude in contemporary societies, and the lack of awareness of the role and impact of symbols. When a particular symbolic image has become empty and lost its stimulating effect – as specific symbolic images may well do – that underlying archetypal idea cannot be replaced conceptually, nor can a new one captured conceptually: They can only be renewed in or arise out of a new symbolic expression. In other words, when old symbols die, new ones will arise – unless and until we have solved rationally every riddle of the mystery of existence.

C.G. Jung, CW 6, para 816, and see also supra, note 701

We can never legitimately cut loose from our archetypal foundations unless we are prepared to pay the price of a neurosis, any more than we can rid ourselves of our body and its organs without committing suicide. If we cannot deny the archs or otherwise neutralize them, we are confronted, at every new stage in the differentiation of consciousness to which civilization attains, with the task of finding a new interpretation appropriate to this stage, in order to connect the life of the past that still exists in us with the life of the present, which threatens to slip away from it.


712 The Hon. Justice Richard D. Schneider, Hy Bloom, Mark Heerema, Mental Health Courts: Decriminalizing the Mentally Ill (Toronto: Irwin Law, 2007) provides a comprehensive and critical overview of the ‘therapeutic’ and ‘problem-solving’ approach in Mental Health Courts, covering the literature on ‘therapeutic jurisprudence’ and its practical application in a variety of contexts, including in the Ontario Mental Health Court.

713 See Schneider, Bloom & Heerema, id., at pgs 2, 40-43, 63, respecting the spurs to the development of a ‘therapeutic’ justice approach ‘in ‘problem-solving’ courts

714 See Schneider, Bloom & Heerema, supra note 712, at pgs 1, 39-44, 48, respecting principles of the ‘therapeutic conception of justice’.

715 Schneider, Bloom & Heerema, supra note 712

716 Schneider, Bloom & Heerema, supra note 712, sets out and responds to this and other criticisms of the therapeutic justice model that have been raised, e.g., that a therapy mandate can be an ally and co-extensive, and not simply incompatible, with a justice mandate (pgs 61-63), that participation in mandated therapy need not be coercive but can be voluntary and left to the decision of an accused (pgs 63-64); see also issues and responses at pgs 17-18, 31, 47, 63-63.

These kinds of issues are especially important from the perspective of a critical psychology approach based on Jung’s theory, because of the need to maintain separate and distinct rational functions, in order to promote, and not impede or obfuscate, an ‘interplay of complementary opposites’ among them, with its potential for differentiating the topics involved (such as therapeutic goals and methods, social service needs, legal and human rights, etc.) and avoiding unwanted biases. Similarly, therapists and other professionals on such a multi-disciplinary team have their own distinct information and rational viewpoints to bring to it, not the same as the distinct judicial concerns of the judges, such as, for example, the efficacy of various treatments or the specific social supports called for in a case.

See also, respecting the necessary attention, with such a multi-disciplinary team, to distinguishing legal and medical approaches to ‘mental disorder’ and ‘insanity’, and relating them productively to each other: Hon. Justice Richard D. Schneider, The Lunatic and the Lords ((Toronto: Irwin Law, 2009), in which, in the course of telling the full story of a pivotal ‘insanity’ case, Schneider explains the contrasting definitions and purposes from the criminal law perspective and from the mental health care (psychiatric diagnosis and treatment) perspective.

717 See my discussion in Chapter 1, and citations to Baker, pgs 7, 8, 84.

718 See my discussion in Chapter 1, citing Baker, pgs 83 (citing clause 29 of the Magna Carta of 1215 and subsequent statutes), 101, 104-06, 124, 126-27, and 123-24 (Baker’s comments on the common law development of ‘extraordinary’ common law remedies and the principle of ‘the rule of law’).
Section 24 (1) of the Charter, supra note 194, under the heading ‘Enforcement of guaranteed rights and freedoms’: ‘Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.’

They are a 1917 decision of the Ontario Court of Appeal, in Campbell v. Hedley, [1917] 39 O.L.R. 528 (C.A.), per Lennox J. at para 19 (in a case involving ownership of the carcass of a fox that escaped from its owner’s ranch and was shot by a hunter on a third party’s property, referring to an 1882 American case of an escaped canary bird: ‘I am not at all sure that our Courts would be prepared to adopt either the decision or dicta in that case; although it has much in abstract justice to commend it.’), and a 1998 decision of the Supreme Court of Canada: Ordon Estate v. Grail, [1998] 3 S.C.R. 437, aff’g (1996) 30 O.R. (3d) 643 (C.A.), at para’s 36, 102, 115 (in a case respecting the common law definition of damages in a maritime law context, the Court, referring with approval to the lower appellate court’s reasoning that the effect of the common law would be ‘extremely unfair’ and ‘result in a gross injustice’ in the circumstances, held that it was ‘clear that reform of the rule in Canadian maritime law is necessary’ and that change was ‘required to keep non-statutory maritime law in step with modern understandings of fairness and justice, as well as with “the dynamic and evolving fabric of our society”, ‘in order to achieve justice and to bring the law into harmony with changes in society’).

Applying the judicial decision-making process to give form and content to the symbol of Justice could be seen as one of the ‘attempts by the critical intellect to break it down’ into a rational viewpoint: see Jung’s comment, CW 6, para 401. As I will discuss in the next chapter, the political decision-making process in a democracy, by comparison, cannot give the symbol of Justice a comparably well-refined concrete thinking form and content, but rather is able to give it form and content according to well-refined felt values and priorities of the citizens.

The requirements of ‘retribution’ in contrast to ‘vengeance’, as an appropriate punishment: see, e.g., R. v. M. (C.A.), [1996] 1 S.C.R. 500, per Lamer C.J. at para 80: ‘Retribution in a criminal context, by contrast [to vengeance], represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender’s conduct.’ [Emphasis in original.] Similarly, and more broadly, the symbolic ideal of Justice has been given concrete form in this specific context of criminal punishment, by judicial decisions requiring that punishment for crime must serve a legitimate criminal law purpose, such as deterrence, rehabilitation, retribution, and denunciation: see, e.g., R. v. Smith, [1987] 1 S.C.R. 1045.

CHAPTER 7 NOTES

Orson Welles, interview with Michael Parkinson, 1974, You-tube website (highlights of the 1974 interview, published June 29, 2013, with introduction from 1994): URL: <http://www.youtube.com/watch?v=6dAGcorF1Vo> Parkinson, in his 1994 introduction to the video recording of the 1974 interview, describes Welles as ‘a political animal, a friend of President Roosevelt, a speech writer and commentator’ (at 2:40 minutes), and explains the context of Welles’s remarks: ‘It was the time of Watergate, and I’d been asking him his views on the stature of politicians.’ (at 3:05 minutes). This part of the interview began, just before the part quoted in the epigraph:

Welles: ‘I don’t think politicians are natural crooks.’
Parkinson: ‘Not all of them?’
Welles: ‘No, I don’t think most of them are. I think they are actors. … Actors are actors. And one aspect of it is the political game. But that kind of acting is not lying, as long as …’

Adam Price (creator and writer), Jeppe Gjervig Gram, Tobias Lindholm (writers), Borgen, political drama series aired on Danish public broadcaster DR1 (Sept 2010-May 2013), Season 3, Episode 22, spoken by character Birgitte Nyborg, as a politician and former Prime Minister of Denmark.

My application of Jung’s theory to political decision-making is not the same as some other stimulating and important applications of Jung’s theory in the political realm, such as Lawrence Alschuler’s and Andrew Samuels’s, for example: See Lawrence R. Alschuler, ‘Jung and Politics’, in Polly Young-Eisendrath and Terence Dawson


The derogatory connotations of ‘politics’ are found similarly in the range of dictionaries referred to supra, note 727.

As discussed in Chapter 5, Obama’s campaign speech carried both a ‘shared values’ message and an ‘elect-me’ message: the purpose of the latter message, and the use of *pathos* and *ethos* in the rhetoric designed to support it, can clearly undermine the reliability of the former message.

President Lincoln’s description of legislative policy ‘affecting the whole people’, noted in Chapter 2, citing his First Inaugural Address, delivered March 4, 1861, as quoted on The Avalon Project of Yale Law School’s Lillian Goldman Library website, URL accessed Aug 10, 2011: <http://avalon.law.yale.edu/19th_century/lincoln1.asp>. Roach’s dialogue theory, discussed in Chapter 3, supra, citing SCOT pgs 8, 13, 55, 236, 245, 247, 249-250 (‘sentiments’, ‘the discovery and reflection of majority sentiment’, ‘popular will’, ‘sensitive to what the people want’ (quoting Blakeney), ‘values of the community’, ‘respond confidently and democratically’).

‘Dumbing-down’ is a slang or informal expression describing the deliberate lowering of the intellectual level of something, usually referring to arts and culture or news and education settings; in the Oxford Dictionary definition, the first example given is ‘modern politics’: Meaning of the adjective ‘dumbed-down’ in British and World English: *Oxford Dictionaries* website, URL: www.oxforddictionaries.com/definition/english/dumbed-down:

‘Simplified so as to be intellectually undemanding and accessible to a wide audience: the dumbed-down nature of modern politics.’

C.G. Jung, CW 6, para 727

The rational ‘valuing’ or ‘feeling’ function: see my discussion in Chapters 4 and 5, supra, citing, among others, C.G. Jung, CW6, paras 900, 725, 289. The difficulty of knowing one’s own subjective values arises somewhat similarly in personal life and in the democratic process: In personal life, an individual might well struggle to know what his or her genuine feeling values are, apart from social expectations, emotions, complexes, and other factors that may obscure or distort them. In political life, governments might well struggle to ensure that citizens can ascertain and refine their feeling values on a topic, and that the government accurately articulates them and effectively carries them out, rather than making political decisions that do not reflect well-developed feeling values shared by the citizens, but rather exploit their emotions, and ignore or fail to address their felt values altogether.

The United States Declaration of Independence, 1776, refers to ‘equality’ as well, preceding these three, as among the ‘inalienable rights’ endowed by the Creator on all men. ‘Happiness’ – or what we might call ‘Virtue’ – is also the ultimate good or goal in the English philosopher J.S. Mill’s theorizing.

I note this below in the example of the Krever Commission inquiry, infra, at text to note 749. A personally felt value can conflict with well-honed thinking, which does not produce felt values, though it can articulate them conceptually, and it can be used to help differentiate them.
As discussed in Chapter 1, the Exchequer or Treasury, Chancery, and all the other powerful administrative departments of government, as well as all the courts – the common law courts such as King’s Bench and Common Pleas, the specialty courts such as the Admiralty Court and Star Chamber, and the Chancellor with his court of equity – were originally created through the monarch’s delegation of aspects of the royal prerogative to advisors and administrators of the royal council, who initially exercised it on the monarch’s behalf, eventually becoming experts in their specialized tasks of accounting, tax-collecting, judging, and so on. The prerogative was gradually curtailed, so that, for example, by the end of the 1600’s it could no longer be used to dismiss judges or veto legislation.

As discussed in Chapter 1, during the 1500s, Parliament created the ‘new concept of legislation’, by which a carefully-drafted text on a topic was introduced as a Bill in the House of Commons, debated, revised, and voted on, and passed by a majority vote as an Act of Parliament: supra, Baker pg 179

See discussion and citations to Baker in Chapter 1, including Baker pgs 179, 184, 186, 187, 25, 96-98, 108, 123, 78-80, 80 (trials by judge alone were agreed to so often that ‘by the end of the 1800s only half the civil trials in the High Court were by jury’), and 81 (‘Some judges were bewildered by the dual role imposed on them, and for some years it was possible to speak of a judge ‘misdirecting himself’.’)

The majority need not be members of the political party, which may govern if it has the support of the majority of the members of the House of Commons, regardless of the party to which they belong.

Prerogative decisions were, in fact, as noted here and as was described in Chapter 1, the first types of ‘government’ decisions to be brought under the control of the council of nobles, effectively the first instance in England of ‘self-governing citizens’, 800 years ago.

‘Democracy’: definitions again found in the range of dictionaries referred to supra, note 727, as well as The American Heritage New Dictionary of Cultural Literacy (Houghton Mifflin, 3rd ed., 2005); and the Parliament of Canada website, accessed July 12, 2014, URL: <http://www.parl.gc.ca/About/Parliament/Education/OurCountryOurParliament/html_booklet/democracy-defined-e.html> (‘a political system in which all eligible citizens have a right to participate, either directly or indirectly, in making the decisions that affect them’, a representative democracy in which ‘citizens elect someone to represent them in making decisions at the different levels of government’); ‘A Short Definition of Democracy’, URL: http://www.democracy-building.info/definition-democracy.html; Wilson, N.G. Encyclopedia of ancient Greece (New York: Routledge, 2006)

Etymology of ‘democracy’: from the Classical and Hellenistic Greek (5th cent. BCE) dēmokratia (‘rule by the common people’), from dēmos (‘the people, common people, simple people’) and kratia (‘power, rule’), to denote political systems of the time in Athens and other Greek city-states; used in contrast to arisokratia (‘rule of an elite’) and ochlocratia (oppressive ‘mob rule’); via late Latin (13th cent.) dēmocratia, Middle French (16th cent.) démocratie: Online Etymology Dictionary (Douglas Harper, Historian, 2010), Dictionary.com website, URL: http://dictionary.reference.com/browse/democracy;

See Maddicott, pg 2, discussed and cited supra, Chapter 1

Roach, SCOT, supra note 156, at pg 294; U.S. President A Lincoln, ‘Gettysburg Address’ (speech delivered at the dedication of the Soldiers’ National Cemetery at Gettysburg, Pennsylvania, on November 9, 1863. Lincoln had given a more detailed yet also concise description of ‘the majority principle’ of democracy in his First Inaugural Address on March 4, 1861, quoted in Chapter 2, supra, note 181: ‘A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people.’

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), at pg 178: legislative decisions are subject to the Court’s ultimate authority ‘to say what the law is’, while at pgs 165-66: ‘By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.’ Marshall U.S.C.J. does expressly identify the ‘political’ nature of executive decisions, and the President’s accountability for them ‘only to his country in his political character’, but in doing so he excludes them from the judicial scrutiny afforded to legislative decisions, and thus from any way of ensuring the citizens’ values and voices are heard in them, other than
by election or defeat in a periodic election – a narrow base of accountability that is much too clumsy for such a
‘political accountability’ purpose.

747 See my discussion in the next section of this chapter, of these and other aspects of political decision-making and
and its predictable blind-spots and vulnerabilities.

748 Baker pg 170: Here is Baker’s comment in context (his further comment that the distinction between judicial
and legislative change ‘is one of degree’ seems to contradict what he writes in the rest of the passage, and attributes
to Hale: Baker is drawing an appropriate limit to the particular distinction drawn that he is referring to, but it is not
a point I pursue and clarify in my thesis):

Changes in the law have sometimes come about through barely perceptible
modifications and clarifications from case to case; at other times they have
occurred swiftly and deliberately, through bold judicial decisions or reforming
legislation. But never has the law been exempt from the ceaseless alteration to
which all human creations are subject. Even the distinction between judicial and
legislative change has not always been as fundamental as modern theory
supposes. … The courts do make new law, but they do so within the
framework of common law reasoning, whereas a sovereign legislature may
legislate irrationally or unreasonably.

See also Baker’s comments that legislatures may ‘make bad laws’ and legislate ‘the impossible’, pg 183:
‘Parliament cannot make bad good, nor can it make possible the impossible.
But it can make bad law, and it can prescribe punishment for those who fail to
do the impossible.’

749 The Krever Inquiry into the tainted blood scandal, supra notes 107, 749, resulted in Krever J. finding (an
essentially ‘judicial’ finding and a well-reasoned one) that in later cases blood providers were negligent and should
be legally responsible for compensating patients, while in earlier cases there was no fault and they should not be
liable; the Minister of Justice announced that all people who were harmed by tainted blood transfusions would be
compensated from public funds, regardless of lack of fault or legal responsibility (and the precedent set), in response
to a public outcry against the judicial decision basing liability on the concrete analysis of fault.

750 Hogg also notes that governments may avoid issues that are ‘controversial’, ‘divisive’, or ‘politically explosive’
among their citizens; see my discussion in Chapter 3.

751 See my discussion in Chapter 3, respecting Roach’s discussion of ‘failures’ and ‘malfunctions’ of democracy
that undermine the citizens’ voice, due, e.g., to decisions made with ‘little public debate’, or shaped not by citizens’
values and interests but by the ‘political power’ of corporations that ‘pump millions into the economy’, or
governments ‘beset with paralysis’ and not carrying out their task, citing Roach SCOT pgs 57, 99, 218, 237, 267,
and CRF pgs 34-35 fn 26, 42 ; respecting non-majoritarian aspects of democratic governments, SCOT pgs 10, 57,
99, 220. Note also Roach’s references to ‘broad social questions’ such as mandatory retirement, and to Blakeney’s
comments on that issue, and to the limits of assuming that courts are allies of vulnerable or unpopular groups.

752 Id

753 By ‘modern theories of democracy’, I mean philosophical and political science theories that go back to the
philosophies first developed in Europe in the 17th and 18th centuries (‘the Age of Enlightenment’), defining the
essential elements of modern democracy, and the theories that developed since from that basis respecting ‘modern’
or ‘liberal democracy’ (which I refer to here). This is in contrast to the ‘classical theories’ of Greek and Roman
antiquity, distinguishing between aristocracy (rule of an elite), ochlocracy (rule of the mob), and democracy (rule of
the people, the common or simple people). See, e.g., ‘A Short Definition of Democracy’, URL:
<http://www.democracy-building.info/definition-democracy.html>. See also, respecting etymology and basic
categorizations of ‘democracy’, supra note 743.

754 Roach’s theory: see my discussion in Chapter 3, and references to SCOT, infra note 752

pg. 27, referring to freedoms of expression and the press.
See, e.g., respecting the need for or benefits of a relatively high level of education: IJ Deary, GD Batty & CR Gale, ‘Bright children become enlightened adults’, Psychological Science (2008) 19(1), pgs 1–6, and H. Rindermann, ‘Relevance of education and intelligence for the political development of nations: Democracy, rule of law and political liberty’, Intelligence (2008), 36(4), pgs 306–322


There is also another aspect of judicial review that promotes democratic values. Although a court’s invalidation of legislation usually involves negating the will of the majority, we must remember that the concept of democracy is broader than the notion of majority rule, fundamental as that may be. In this respect, we would do well to heed the words of Dickson C.J. in Oakes, supra, at p. 136:

The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

See my discussion in Chapter 3, citing Roach SCOT pgs x, 6-7, 9, 10, 11, 66, 99, 218, 219, 220, 221, 222, 229, 230, 237, 250, 294; and CRF pgs 32, 33 fn 21, 34-35 fn 26, 42, 43. Roach includes in the ‘bedrock values of [Canada’s] democratic tradition’ other attributes in addition to ones I have listed here, such as federalism, minority rights, and the common law: SCOT pg 222, see also pgs 212, 220; CRF pg 42. Roach’s full phrase: ‘preconditions to individuals making independent, informed, and intelligent decisions’.

Ambrogio Lorenzetti’s famous medieval frescoes in the Siena city hall contrast the ideals of ‘the good city’ and ‘the bad city’ (as the frescoes have been named), depicting in particular the rivalry between Siena and Florence, but more generally and symbolically, the interrelationship among Justice, Judging, and Good Government required for a good life in society: See supra, endnote 1, citing Randolph Starn, Ambrogio Lorenzetti: The Palazzo Pubblico, Siena (New York: George Braziller, 1994), and K. Arnet Connidis, ‘Variations on Justice in a Good Society: Lorenzetti’s Frescoes in the Siena City Hall’, paper delivered at the 3rd Multidisciplinary Academic Conference of the International Association for Analytical Psychology, at Zurich, July 3, 2008, in which I examined this aspect of Lorenzetti’s frescoes.


‘Many forms of Government have been tried and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except for all those other forms that have been tried from time to time; but there is the broad feeling in our country that the people should rule, continuously rule, and that public opinion, expressed by all constitutional means, should shape, guide, and control the actions of Ministers who are their servants and not their masters.’

See, e.g., arguments made by law professor and political journalist Gaetano Mosca in The Ruling Class (New York and London: McGraw-Hill, 1939) (Hannah D. Kahn, trans.). Plato criticized the idea of democracy, in The Republic, in contrast to what he considered the best form of government, an aristocracy of reluctant or unambitious wise men or ‘philosopher-princes’ drafted for the position.

The instability and inefficiency of democratic government are argued in economic theory critiques based on assumptions about voter ‘irrationality’, insufficient knowledge on issues and strong personal biases, and the impacts of the disruption of frequent elections, shifts in governments and policies, and thus lack of continuity in long-term development.
“Tyranny of the majority”, i.e., oppressive popular rule, is a potential problem because ‘the rule of the majority’ gives the majority voters the democratic political power to achieve their own will and interests regardless of and at the expense of minorities, and thus the majority can oppress minority or vulnerable or unpopular groups (hence J.S. Mill’s concern that a majority might pass laws confiscating the property of the wealthy minority).

Similarly, if a powerful minority is able to control a democratic government (such as, e.g., Lord Acton’s concern, below in this endnote), it can tyrannize the rest of society, majority and minority alike, and it has been argued persuasively that the ability of a narrow but capable minority is more likely to successfully assert its interests over the majority; this is reflected in Roach’s observations about the ability to gain political interests through ‘political clout’ and ‘lobbying’.

The risk has been debated for thousands of years (including by Aristotle and Plato in Classical Greece), and this phrase or variations of it widely used, including most famously by John Adams in On Government (1778), A Defence of the Constitutions of Government of the United States of America, Vol. 3 (London: 1787), p. 291; Edmund Burke in Reflections on the Revolution in France (1790); James Madison in Federalist Papers 10 (‘the superior force of an interested and overbearing majority’), 51, A Memorial and Remonstrance Against Religious Assessments (1785) (concerning both tyranny of majority and of minority); Alexis de Tocqueville in Democracy in America (1835); John Stuart Mill in On Liberty (1859) (citing Tocqueville); Lord Acton in The History of Freedom in Antiquity (1877) (‘The one pervading evil of democracy is the tyranny of the majority, or rather that party, not always the majority, that succeeds, by force or fraud, in carrying elections.’); Herbert Marcuse in essay ‘Repressive Tolerance’ (1965) (idea that tolerance of intolerable policies ‘strengthens the tyranny of the majority against which authentic liberals protested’).

Means that have been used to counter the potential tyranny of the majority include constitutional separation of powers, super-majority requirements, and guaranteed minority and individual rights. Means used to protect against the potential tyranny of the powerful minority include equal rights to vote, transparency and accountability rules, and limits on private donations to politicians.

Such tyrannies can arise within Parliament and government, given the absolute executive power, and effectively legislative power too, of the government — and thus the governing Political Party — in a majority government; the absolute ‘power of the House’, partisan or governing Party-controlled Parliamentary Committees and even Senate committees; the expanding PMO (Prime Minister’s Office) as a modern day equivalent of the ancient Witan — not a Cabinet of elected members of Parliament, but a privately-selected inner body of purely personal, partisan supporters, advisers, and administrators, brought into Parliament and paid out of the parliamentary budget.


‘ “To allow the use of House proceedings for any purpose whatsoever would be to license parliamentary tyranny by a governing majority over the minority parties sitting in opposition if not also over outside third parties. … conventional legal reasoning would say there are no legally enforceable limitations on the power of the House to direct the activities of its committees or, by extension, on the powers of committees acting under a House order”, but, Walsh says, the issue raises broader considerations over the “legal propriety” of the order itself. Such powers, he points out, are meant to support the constitutional functions of the House — “namely,” he notes, “legislating, deliberating and holding the government to account”, and he observes that the order instructing the Committee to question Mulcair over his party’s budget would seem to fall well short of that purpose.’

This is an example of the important need, as I will argue, for the Court to establish what standard of reasonable care and skill democratic processes require, even within Parliament and the government itself.

Elections, which are required by democratic theory to be competitive (through competing Parties), and free and fair procedurally and substantially, are nonetheless still election campaigns, and centered in the ‘elect-me’ message I discussed in Chapter 5 in the context of Obama’s nomination campaign speech. Re: electoral irregularities, abuse
and fraud: note the (apparently unauthorized) use of the Conservative Party’s massive data-base as ‘a voter suppression tool’ (as New Democrat M.P. David Christopherson called it) to send misleading robocalls to voters during the 2011 federal election campaign: The Canadian Press, ‘NDP wants PM to testify about use of Tory contacts for robocalls: Conservative CIMS database used to make misleading robocalls in 2011’, CBC News, May 5, 2014, URL: <http://www.cbc.ca/news/politics/ndp-wants-pm-to-testify-about-use-of-tory-contacts-for-robocalls-12632746>. Re: abuse of emotion: PCH’s comment, Roach’s dialogue theory evaluation: ‘Politicians in their demagogic role sometimes whip up and even create the public sentiment they are meant to reflect. Judges don’t have the advantage of the ‘bully pulpit’; their defence lies with the slim investment of the public in an independent judiciary.’

Unidentified writer of opinion piece ‘Kim Campbell was right: Elections are not a time for serious debate’, The Gazette, Sept 12, 2008, URL: http://www.canada.com/story.html?id=f4dbb1c5-1b46-40cb-b426-8febfdaee40. It is an apt commentary; the passage in full:

‘[Former prime minister Kim Campbell] famously declared that an election campaign is no time to be discussing complicated issues. Her observation was met with loud derision at the time, but … that bit of political wisdom has endured. In the current campaign [the 2008 federal election], she is being proven right again, this time by Prime Minister Stephen Harper … It’s not actually that issues can’t be discussed, it’s that debates and advertising in elections aren’t about seeking truth, they are about winning. Harper is verifying Campbell’s thesis by demonstrating how a politician willing to ignore the truth can easily twist a complicated issue to his or her advantage when winning is all that matters.’

The remark attributed to the frank-spoken Kim Campbell, running as a new Prime Minister in the Canadian federal election of 1993, was that (as reported) ‘an election is no time to discuss serious issues’; this was apparently a misleading condensation of her actual comment to the effect that the 47 days of an election campaign was not enough time to discuss the major social policy changes that she considered necessary, but the import is much the same, and as the columnist put it above, a ‘bit of political wisdom’.

Private donations may be made, within various limits, and a major portion reimbursed from public funds (even, under the municipal laws governing Toronto elections, reimbursing donations from donors who do not live in Toronto) – in other words, all taxpayers, no matter what their views and what Party they support, pay the most to the Party that gets the most in private donations. Preferential treatment is given to donors than non-donors, and greater access to democratic decision-makers (e.g., expensive money-raising gala dinners with politicians, the ‘Victory Fund’ and ‘The Laurier Club’ of the Liberal Party, consider the Super-PAC issue in the U.S. and challenges of regulating ‘private campaigning’ to exclude corporate expenses and require transparency. Contrast with judicial process, where private donations to judges would never be countenanced, and yet judicial decisions are not more impactful than political decisions, and not less vulnerable to unwanted bias and conflicting self-interest.

Political Parties have been credited as mediators between citizens and governments: ‘Ideological political parties’ as a necessary ‘mediating broker between individual and government’, in an influential model of voting from a rational utility perspective (which concludes that such a perspective would almost always lead voters not to vote, thus making a perplexity of voter turnout): Anthony Downs, An Economic Theory of Democracy (New York: Harper & Bros., 1957). Note Bob Rae’s comment in law school course (my personal notes), that the party system ensures accountability and continuity in government policy-making and action. The experience of the past ten years in Canadian and Ontario politics does not seem to support that. It seems more realistic and accurate to characterize Political Parties also as self-interested and inadequately-accountable political elites competing for power through votes. An example of both a strength and a weakness of the Party system, in Canada’s political process, can be seen in the recent response to a significant error made in employment figures by Statistics Canada, the federal government department responsible for compiling important statistics for the country: The strength can be seen in the Opposition Party’s alert and critical scrutiny of the error, and the limitation in its swiftly blaming the error on the Governing Party’s policy before knowing the facts involved: See Sarah Petz, ‘Statistics Canada identifies ‘human error’ in July jobs report’, August 13, 2014, CBC News website, URL: http://www.cbc.ca/news/politics/statistics-canada-identifies-human-error-in-july-jobs-report-1.2735342
The mood of choice in expressing different views by voting for a member from a specific party. The suggestion being discussed (and agreed with by all three panelists) is that partisan politics in Canada does not capture or express how Canadians feel on the issue of the hostilities between Israel and the Palestinians that escalated in July 2014: Maher’s comment [from my notes]:

“In Canada our partisan political discourse around this is very, very narrow. I don’t think that it necessarily reflects the way the people in Canada feel. [reference to Toronto businessman Zane Caplansky supporting both Jewish and Palestinian film festivals in town] The mood of the public of Canada is probably better captured by Mr. Caplansky than by what our politicians are saying.”

Stephen Maher, of Postmedia News, panelist on Evan Solomon’s ‘Power & Politics: Harper’s Hard Line on Israel: What Message Does it Send?’, July 25, 2014, CBC (video clip, 7 minutes): The suggestion being discussed (and agreed with by all three panelists) is that partisan politics in Canada does not capture or express how Canadians feel on the issue of the hostilities between Israel and the Palestinians that escalated in July 2014: Maher’s comment [from my notes]:


Canada has many different political parties. People in the same party usually have similar opinions about public issues. In Parliament, members of different parties often have different opinions. This is why there are sometimes disagreements during elections and when Parliament is sitting. Having different parties allows criticism and encourages watchfulness. Canadians have a choice in expressing different views by voting for a member from a specific party during election time. This is called the party system.

A problem with another part of this definition, describing the system of ‘different parties’ whose members ‘often have different opinions’ as a system that ‘allows criticism and encourages watchfulness’, is that it ignores the aspects of the Party system working against that: Unlike the judicial context, in which the views and issues and parties change as facts and topics and interests change, in the political context, Parties strive to be one big umbrella setting broad positions on a whole range of views, and to aim for the middle ground as noted above, a much more clumsy and unreliable way to scrutinize and determine views on any particular issue.

As editorial cartoonist Greg Perry conveyed the dilemma, the quality of political practice can become so poor that elections become dilemmas over whether to ‘vote the bums out or vote the bums in’: Greg Perry, editorial cartoon, Ottawa Citizen (May 2014): ‘Harry is still undecided … he’s not sure if he’s going to vote the bums out or vote the bums in.’

Omnibus’ Bills hundreds of pages long, may cover many topics ranging from new taxes and spending priorities to changes in environmental laws and the judicial process – a far cry from the Bills carefully drafted on discrete topics that Parliaments refined over the centuries since the idea of legislation was introduced – rushed through debate in Parliament by a majority government. See, e.g.: Bill C-4, entitled ‘Economic Action Plan 2013, No. 2’, introduced in the House of Commons by the Conservative government on October 22, 2013, contained – among hundreds of clauses on topics as unrelated to them as was the title of the bill – two provisions, Clauses 471 and 472 relating to the controversial eligibility criteria for appointing judges to the Supreme Court Act: see Reference re Supreme Court Act, ss. 5 and 6, 2014 SCC 21, para 11. The provisions were rushed through the House of Commons and Senate and passed in less than 2 months, on December 12, 2013. See also, e.g., Bill C-13, entitled ‘Protecting Canadians from Online Crime Act’, combines popularly-supported provisions which relate to bullying, fraud, terrorism, and other crimes committed online, with controversial provisions which extend police surveillance powers, raising privacy concerns; Justice Minister McKay swept aside concerns about potential Charter challenges and refused widespread calls to split the Bill in two, maintaining that that ‘would be perverse’ and make the Bill ‘an empty vessel’, ‘a shell of a bill’. Liberal M.P. Scott Simms described the bill as ‘too wide in its scope’: ‘This omnibus bill touches everything from terrorism to telemarketing, cable stealing to hate speech, and is an affront to both democracy and the legislative process.’ B.C.’s privacy watchdog, Elizabeth Denham, described the problem with such an omnibus bill: ‘Any proposed increase to those powers [police surveillance powers under the Criminal Code] must be critically examined and vigorously debated.’: as quoted in Susana Mas, ‘Cyberbullying bill won’t be split in 2, Peter MacKay says’ (May 26, 2014), online: CBC News <http://www.cbc.ca/news/politics/cyberbullying-bill-won-t-be-split-in-2-peter-mackay-says-1.2654659>.

Parliamentary Committee proceedings, ‘kangaroo court’ example: Kady O’Malley, “Tom Mulcair to face MPs over the use of House resources next week: NDP committee members preemptively dismiss House-ordered
appearance as a ‘witch hunt’”, May 6, 2014, CBC News, <http://www.cbc.ca/news/politics/tom-mulcair-to-face-mps-over-use-of-house-resources-next-week-1.2633937>, describing a ‘rancorous’ House Procedural Committee meeting that saw Opposition Party members ‘castigate their committee colleagues for proceeding apace with a process that they preemptively dismissed as a "witch hunt" and a "kangaroo court." ‘Already tense from the moment the gavel dropped, the mood around the committee table turned downright acrimonious after Conservative and Liberal members voted down a proposal to limit Mulcair’s appearance to one hour — a courtesy that, the New Democrats repeatedly pointed out, is regularly accorded to cabinet ministers. Unmoved, the other parties rejected the request, with Conservative MP Scott Reid noting they can put off discussion of extending such privileges to Mulcair until he becomes prime minister.’

772 ‘Parliament is important, and so is hearing from real Canadians’, Liberal Party of Canada Newsletter, May 8, 2014: (Note the newsletter text is presented partially in graphic form, with background sketches and talking balloons, which I have not represented in this quote. I have also anonymized the Party and politician names and slogan and phone number for donations; such newsletters, varying in details, might be sent out by any Party.) See also media commentary on the low attendance of a number of politicians from Parliament: Jessica Hume (QMI Agency), ‘Liberal leader Trudeau shrugs off absences in the House’, December 11, 2013, Sun News website, URL: http://www.sunnewsnetwork.ca/sunnews/politics/archives/2013/12/20131211-151931.html; Stephen Hui, ‘Bill C-279 vote: Which Conservative MPs stood up for transgender rights’, March 21, 2013, Georgia Straight website, URL: http://www.straight.com/blogra/364656/bill-c-279-vote-which-conservative-mps-stood-transgender-rights (‘Liberal leadership frontrunner Justin Trudeau was notably absent’); Scott MacDonald, ‘Trudeau’s absence on vote shows lack of leadership’, Frank Magazine website (undated), URL:http://www.frankmagazine.ca/node/1087; Andy Radia, ‘Leadership candidates among MPs with the worst attendance records’, Canada Politics website, February 19, 2013, URL: https://ca.news.yahoo.com/blogs/canada-politics/best-worst-mp-attendance-records-165047923.html.

773 Respecting appointments to ‘judicial tribunals’ (other than courts), see Ron Ellis, Unjust by Design: Canada’s Administrative Justice System (Vancouver: UBC Press, 2013), discussed supra note 46.


775 Proroguing Parliament to avoid falling on a non-confidence vote, as was done in the unprecedented and controversial 2008 prorogation of Parliament, decided solely as an executive decision made by the request of Prime Minister Harper and the granting of it by Governor General Jean (in a private meeting, with narrow time-limits and conditions, but with no debate and vote in Parliament, no judicial scrutiny, no formal reasons given).

776 See, e.g., R. v. Latimer, [2001] S.C.R. 3, discussed in Chapter 2, supra note 251, where the government simply refused to address the issue of clemency, in a case where a lenient sentence was given by jury, clemency urged by the trial judge and the Supreme Court of Canada, and clemency was not simply refused but not unaddressed.

The government’s non-response in this case highlighted the unfettered and unprincipled nature of executive discretionary power. Note that the Ontario Court of Appeal and the English House of Lords have held that the courts have the power to review the exercise of the prerogative ‘if its subject matter affects the rights or legitimate expectations of an individual’: Black v. Canada (Prime Minister)(2001), 54 O.R.(rd) 215 (C.A.), per Laskin J.A. at para 51, aff’g test set out by JC of HL in Council of Civil Service Unions v. Minister for the Civil Service, [1985], 1 A.C. 374 (H.L.).

Executive power to grant pardons for crimes: Notwithstanding legislation enacted by the federal government, setting out the conditions upon which pardons may be granted by the Parole Board of Canada, the Prime Minister has exercised the ‘royal prerogative’ to grant pardons outside that bureaucratic process: See ‘Can the Governor General Grant a Pardon?’, Parole Board of Canada website, posted December 15m 2010, URL: http://www.canadianpardons.ca/blogs/can-the-governor-general-grant-a-pardon/. The Prime Minister in Cabinet controls membership (appointment, renewal, length of term) on the Parole Board of Canada, through the same prerogative or executive authority. See also ‘Harper Pardons After Bill C10’, August 14, 2012, on the Record Suspension Services Center website, URL: http://www.recordsuspections.org/blog/tag/pardons/:
‘Earlier this month, Prime Minister Stephen Harper granted pardons for several farmers who had been convicted years ago. … [although] new laws implicitly state that pardons are no longer granted with a new record suspension system. Harper used what is called “royal prerogative” to initiate a pardon, which is granted by the Governor General on advice of the public safety minister. … The use of Royal Prerogative is usually a very rare occurrence and demonstrates a great use of power.’


778 The ‘black hole’ of government accountability: quoting Greg Watson (CBC national affairs reporter), infra, note 779.


The current flap over whether [the Opposition Party] used parliamentary funds for partisan activities is actually much ado about not much. But it points to a far greater problem of political parties spending millions of tax dollars with all the transparency and accountability of a black hole … the three main federal parties collectively spent about $50 million in 2012 …. Roughly $46 million of that — or 92 per cent — came from Canadian taxpayers. … The parties’ windfall was even bigger in 2011, an election year, when the grateful taxpayers of the land coughed up a whopping $116 million. … While every penny of that comes from the public purse, the nation’s political parties cling to the quaint 19th-century notion that the spending of all that money is nobody’s business but their own.


Behind every breach of secrecy lies the secrecy itself. In this case, the tangle of rules governing MP expenses [that are] administered behind closed doors by the board of internal economy, comprising MPs who swear not to air each other’s dirty laundry in public. No sense in letting the public know what the other guys are up to, when every party is doing the exact same thing. But the Senate scandal has drastically changed the climate. Mike Duffy’s, Pamela Wallin’s and Mac Harb’s expenses were all perfectly fine – until they weren’t. Once exposed, they didn’t look as good as when they were quietly reimbursed with no one watching.

A similar description of ‘inappropriate conduct’ might apply to any potential conflict of interest reasonably perceived in the case of former Prime Minister Chretien’s business trip to China less than two months after leaving office on December 12, 2003: One of Chretien’s last political functions was entertaining a delegation from China, as Prime Minister, and one of his first private activities was the business trip to China with his son-in-law — so close to his days in office that he was still using his Parliamentary contact information: see, e.g., ‘Tories, Grits spar over Chretien’s China remarks’, Aug 20, 2008, Canwest News website, URL: http://www.canada.com/story_print.html?id=bcc17026-e0b8-4af3-ae6e-f9517610f0a&amp;sponsor


782 The qualities most commonly associated with ‘liberal democracies’ (summarized supra) do not, in principle or practice (as in Canada’s constitutional Charter of Rights, for example), include income equality and equal benefits from society’s basic resources, such as food, shelter, education, health care. These basics are prerequisites for other aspects of culture that may only flower when these are in place. And it is possible that a theocracy or monarchy or oligarchy could provide them, especially for vulnerable minorities, while a democracy does not; consider Che Guevara’s criticism of parties and elections: Che Guevara, ‘Economics Cannot be Separated from Politics’, speech given at a meeting of the Inter-American Economic and Social Council (CIES), at Punta del Este, Uruguay, on August 8, 1961, Marxists Org website (OAS trans), URL: <https://www.marxists.org/archive/guevara/1961/08/08.htm>

‘Democracy cannot consist solely of elections that are nearly always fictitious and managed by rich landowners and professional politicians.’

783 ‘Tri-ologue’ caution: see my discussion in Chapter 3


785 See my discussion in my historical overview in Chapter 1. This is not to say that trial and appellate processes are perfect by any means, or that reforms have not sometimes become over-reforms, or that there are not many more reforms to be made.

Note that in jury trials (e.g. in criminal and defamation cases), the facts are found and the verdict given by the jury, and judge’s role is to direct them on the law, in addition to ensuring the evidence is properly and fully presented, process is followed, etc.; but the basic point remains, and the judge and court have wide authority to oversee and direct the jury, e.g. jury verdict that could not have been reached on the evidence.

Note that in judicial decisions, it is judges’ own personal skill in exercising the decisive functions that is required – their assessment of the evidence, their confidence in the principles and logic argued, etc. In contrast, in the decisions of politicians it is their skill in furthering the exercise of the decisive function in citizens that is required.

786 Some judicial decisions are binding on the whole world (in rem decisions in maritime and family law cases), but this is somewhat different from, for example, the responsibility of all citizens to actively obey general legislation, and to compensate victims of a wide range of wrongs or errors that may be made by governments, politicians, and public servants. Citizen accountability is a reason why Justice would require expert skill from politicians and accountability for their exercise of the political function.


788 Citizens’ feeling values in judicial decisions: i.e., they are not wanted to be decisive in the decision-making process, unless they are relevant as concrete facts in a particular case, i.e. if a court must determine as a fact what a child’s personal felt values and preferences are respecting her or his custody, or what the public consensus or moral
value or preference is respecting a particular issue, which is when the court turns to the government to provide the evidence the court needs to determine this fact.

789 Feeling values can change and develop, just as conceptual analysis can – something that is overlooked or not anticipated in theories which equate or intertwine emotions and feeling values: e.g. Rainer Knopff, ‘Courts Don’t Make Good Compromises’, infra, note 809

790 No conscious viewpoint can ‘internally’ hone itself as well and precisely as it can be honed by a complementary viewpoint, which has the well-developed counterpart to its non-decisive function. In other words, while a viewpoint can hone its decisive function through the repeated use of it, it cannot test the blind-spots of its decisive function precisely because those are the blind-spots, or the less well-developed, functions, of the viewpoint.

791 In other words: Politicians and judges can and should use their own non-decisive functions as spurs to hone their exercise of their decisive function, and thereby hone or refine their decision’s distinct specialized viewpoint (as I have described in my text above). However, inevitably the non-decisive function in each specialized decision is not as well-developed in it as in the other complementary specialized decision in which it is the decisive function, and thus neither can as effectively scrutinize itself with its non-decisive functions. The political process cannot apply a concrete thinking scrutiny to its decisions as effectively as the judicial process can, and vice versa, the judicial process cannot apply a shared feeling values scrutiny to its decisions as effectively as the political process can. This is why their ‘complementary opposite’ quality is significant. The same point applies to the differing guiding ideals of the two specialized decisions, and the distinctly different form in concrete thinking or felt value that each gives to the ideals.

792 This was what occurred in, among many examples, R. v. Latimer, [2001] S.C.R. 3, 193 D.L.R. (4th) 577 (discussed in Chapter 2, supra note 251), in which the Supreme Court upheld the overturning of a judge’s lenient one-year sentence for murder, recommended by a jury, reasoning that it was for the government to decide law and policy on matters of public morality and criminal law (while inviting the government to consider exercising its prerogative of mercy in the case, an invitation to which the government responded with silence). The issue has been raised repeatedly recently, with some judges being reluctant to enforce mandatory minimum sentences they do not find sound or just in concrete logic.

793 One study at least seems to show this is the case, which seems realistic and not surprising: see M.P. Boivin’s comments, CBC News, infra, endnote 795.

794 See M.P. Boivin’s comments, CBC News, infra, note 795


796 Id. As M.P. Françoise Boivin, the Opposition Party’s Justice critic (and a criminal lawyer) summed it up, the government’s legislation exploited public misunderstandings and was ‘catering to preconceived impressions’ and ‘exacerbating them’; the Government Party’s claims, as well as the media’s spin, distorted reality: id. Boivin also described the law as ‘legislation by popular opinion’ on a complex issue, although the legislation may well not have accurately reflected even popular opinion on crime and punishment.

797 See, e.g., John L. Powell, ‘Professional Negligence: The Changing Coastline of Liability’, and such judicial formulations and statements of the standard as, for e.g., J. in Bolam v Friern Hospital Management Committee [1957] 1 W.L.R. 582

798 This might also save political time used in elections and fund-raising, and save the public money. Consider the actual ‘seclusion’ of politicians in early medieval Sienna, in a government building complete with living quarters, for the duration of their months-long term in office, as an attempt to ensure their impartiality by separating them
from current direct management or knowledge about their own worldly affairs. Discussed in my paper on Lorenzetti’s frescoes in the Siena city hall, supra note 759.

799 This proposal (to protect citizens from the unfair impact of laws that disproportionately enrich some and impoverish or disadvantage others), and others, reflect practices already implemented in certain respect, by expert advisers and administrators in Parliament and the civil service who, for example, vet legislation for Charter compliance, for gender and other impacts. I am not addressing such practices here, but rather considering potential element of a reasonable standard of care and skill, as a judicial or common law doctrine that courts would hold politicians and Parties accountable for.

800 Ingenuity, as one-sidedly emphasizing speed and intellectual ‘cleverness’, with its inevitable shallowness, over slowness and depth, see as in, e.g., Thomas Homer-Dixon, The Ingenuity Gap: How Can We Solve the Problems of the Future? (Toronto: Alfred A. Knopf, 2000).

801 Voters may well vote for a candidate they want to hand all decision-making power to, perhaps because they trust his or her knowledge and experience and want to rely on them to make the best decisions on matters that are too complex, or too time-consuming, or even too uninteresting for the voters to attend to. That too is an election campaign response and assessment, and an expression of personally felt values or preferences. And it may well be, on the other side, that a politician cannot in good conscience represent or continue to represent citizens whose values are antithetical to his or her own.

802 J.S. Mill later qualified his more extreme earlier view on this issues, and it is not necessary to go so far as giving more weight to the votes of the more highly educated citizens (as Mill argued early on), to nonetheless recognize the value of all citizens having a realistic opportunity to be educated and well-informed about social issues and the political process.

803 Government’s concomitant role to contribute and to learn in mutual processes of education and information: Consider the references to responsibility for the ‘enlightenment’ and ‘welfare’ of the people, in the ancient Codes of Lipit-Ishtar and Hammurabi, and in the medieval English coronation oaths, among many other examples:

- Code of Lipit Ishtar. supra: ‘When Lipit-Ishtar the wise shepherd was called to the princeship of the land in order to establish justice in the land, to banish complaints, to turn back enmity and rebellion by force of arms, and to bring well-being to the Sumerians and Akkadians …’
- Code of Hammurabi, supra: ‘When the lofty king Anu, and Entil, lord of heaven and earth, … named me, Hammurabi, the exalted prince, the worshipper of the gods, to cause the righteous to prevail in the land, to destroy the wicked and the evil, to prevent the strong from plundering the weak, to go forth like the sun over the black-headed race, to enlighten the land and further the welfare of the people.’

804 R. v. Daviault, [1994] 3 S.C.R. 63, referred to in Chapter 2, following which the government swiftly arranged extensive studies and consultations (all accomplished within a year) on the topic of the common law defence of ‘extreme intoxication’, and in a lengthy preamble it explained the rationale for the Criminal Code amendment reversing the Court decision (essentially adopting the dissenting reasons), by setting out the social concerns that motivated the law (including the association between intoxication and violence against women and children) and reciting the Charter principles which the government considered justified the law. Justice Minister Allan Rock said at the time: ‘Canadians hold a strong moral view that people who commit violent acts against others while voluntarily drunk should be held criminally responsible for their actions,’ as quoted by Kirk Makin, Kirk Makin, ‘Law on drunkenness defence struck down – again’, The Globe and Mail, March 6, 2011, theglobeandmail.com/website: <http://news.maars.net/blog/2011/05/06/law-on-drunkenness-defence-struck-down-%E2%80%93-again/>.

With respect to separating out and addressing fears and other emotions and concerns that may be intertwined with values: While psychological and sociological theory and practice might indicate effective ways to do this, it has yet to be developed; however, on many political issues (such as anger and upset over immigrants, a hypothetical I referred to earlier in this chapter) it may not be very difficult to find both the intertwined fears and the underlying felt values that are widely shared, including with immigrants – consider how commonly feeling secure (financially and otherwise) alleviates other once-seemingly-related fears and concerns, and thus how important it is for governments to respond effectively to such insecurities felt by citizens (e.g. minimum income, education and health care, pensions, etc., as well as sense of justice and being heard in reality).
As described in my historical overview in Chapter 1, some of the significant milestones in the development of the judicial and political processes in the course of English history had to do with the interplay between prerogative or executive decisions and legislative and judicial decisions.

I am referring to the ‘extraordinary’ or ‘prerogative’ common law remedies (habeas corpus, prohibition, mandamus, and certiorari) formulated by common law judges in the sixteenth century to oversee and respond to abuses of government power, discussed in my historical overview in Chapter 1.

Political science views: See, e.g. Peter Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987), at pp 3, 5; Christopher Manfredi, ‘The Day the Dialogue Died: A Comment on *Sauvé v. Canada*’, *Osgoode Hall Law Journal* [Vol. 45, No. 1, 2007], pp 105-123, at pg 123 (the court as a ‘political institution’); Jennifer Smith, ‘Forum on R. v. R.D.S.: A Political Science Perspective’ (1998), 21 *Dalhousie L.J.* 236, at 237 (courts as ‘part of the machinery of government’). Such theories often present the judicial role as distinguished by the dispute-resolution context with its hallmarks of impartiality, fairness to all parties, rules of procedure and evidence, and reasons for judgment, while the political role is distinguished by electoral support and partisan interests. Judges too refer to the Supreme Court, following political science theory, as a ‘branch of government’: see, e.g., *Newfoundland Treasury Board* case, where Binnie J. referred to the legislature and executive as the ‘political branches’ of government, and Iacobucci J. in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para’s 138-39: ‘As I view the matter, the Charter has given rise to a more dynamic interaction among the branches of government. . . . the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives (see Hogg and Bushell, *supra*, at p. 82). By doing this, the legislature responds to the courts; hence the dialogue among the branches. To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other.’


Knopff, ‘Courts Don’t Make Good Compromises’, id, at pp 88, 89, 90. Respecting the judicial role, Knopff does not elaborate ‘the strict standards of judicial rationality’ (pg 90), outside the analysis that judicial decisions were imposing ‘public neutrality’ on controversial moral issues in the Charter review context (that is, that judges ‘often appear to seek the path of moderation’ on such issues, commonly by insisting that ‘the state be neutral among intensely clashing moral views’, as a form of ‘toleration’ understood as the equal approval of alternative lifestyles’) (pg 88). He evaluates ‘the increasing power of courts in Canada’s system of government’ according to a standard inspired by James Madison’s thinking: Their task is to find ways ‘to temper’ ‘political exaggeration or inflation’, to ‘dampen [rather than fan] the flames of rhetorical inflation in public life’ (pg 88) and to support achieving ‘the central purpose of any good system of checks and balances: political moderation and compromise’ (pg 93). ‘Bullies’: Knopff engagingly and effectively uses the example of Charles Tupper, ‘Nova Scotia’s chief father of Confederation’, to explain the best route to successful political compromise, and he describes Tupper (with ample evidence) as ‘a hard-nosed politician’, and, quoting another source, ‘a bully’ (pg 87).

As discussed in Part One; note too. Chief Justice Hale’s distinction in 1660’s as ‘adjudicative’ versus ‘deliberative’.

The task of politicians in Parliament is not to resolve disputes *per se*, but to accomplish all the tasks of governing the society – and these tasks include resolving social disputes, as well as a broad range of ‘governance’ and ‘leadership’ matters, such as collecting public revenue and deciding how it is spent, organizing public safety, health care, education, transportation, and other services, and so on.

813 Hon. Beverley McLachlin, ‘Courts, Legislatures and Executives in the Post-Charter Era’, in Paul Howe and Peter H. Russell, eds., Judicial Power and Canadian Democracy (McGill-Queen’s University Press: Montreal & Kingston, 2001), pgs 63-72, at pgs 71, 72; McLachlin referred repeatedly to the need to ‘respect’ the role of legislatures, their choices, and the difficulty of their tasks; she clarified that ‘appropriate respect’ did not mean ‘slavish deference’, but then related such non-deference to protecting Charter rights (pg 72).

814 Knopff, ‘Courts Don’t Make Good Compromises’, supra note 808, pgs 87-93, at 87, 88, and 90 (if ‘hatred cannot be expunged from human affairs’)

815 See, e.g., Allen Wheelis, How People Change, (New York: HarperCollins, 1975), describing a cognitive psychology approach that focuses on frailties of the ego and can pinpoint the breaking points of human personality under torture, in contrast to a psychoanalytic approach that focuses on the potential capacity of the human personality that can be developed. Perhaps a similar argument might be made with respect to relying on Marshall U.S.C.J.’s view of the practice of politics and the scope of political discretion, from the perspective of two centuries ago, in his reasons in Marbury v. Madison in 1803.

816 There is no getting away from this issue of conflicting potential tyrannies of ‘majority’ vs. ‘influential minority’ powers in a democracy: No matter how the democracy is structured – e.g. Parliamentary, constitutional, representative, deliberative, etc. – it cannot ultimately defy the will of the majority of citizens and remain a democracy. This is one of the limits and dangers of democracy, and why it is not a sufficient description of a good society to call it a Democratic Society, any more than solely a Just Society or a Compassionate Society.

Consider Amy Chua’s analysis in World on Fire (2003 or 2004), respecting ethnic conflict arising from democratization in the context of ‘dominant minorities’, as well as Adams, de Toqueville, and J.S. Mill. As for the tyranny of a small powerful elite, see, e.g., President Lincoln’s description in his First Inaugural Address, 1861 (discussed in Chapter 2, supra note 181), and his somewhat inconclusive response to this issue:

A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or to despotism. … The rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left.

817 President Lincoln, id.


819 Professor Ruth Sullivan (quoted in epigraph to Chapter 3), remarks made in her introduction as Chair of the session: ‘Who’s Talking to Whom? The Alleged Dialogue Between Parliament and the Courts’, October 18, 2000, Annual Conference of the Canadian Institute for the Administration of Justice, Dialogues About Justice: The Public, Legislators, Courts and the Media, Ottawa, Oct 17-19, 2002. Quote, from my notes: “‘Dialogue’ is a powerful idea. We like that metaphor, which has become ingrained in our thinking already. But is ‘dialogue’ an adequate conception of what is actually going on and what we want our governments and courts to do?”

820 Roach, personal communication, Oct 8, 2014

821 Jung’s comment (quoted in part in epigraph to Chapter 5): C.G. Jung, CW 8, ‘The Transcendent Function’ (1912 essay, partially rewritten for first publication in 1957), para’s 135, 136, and C.W. 6, ‘Definitions’, para 694; (I have changed the English translation ‘statesman’ to ‘statesperson’).

Bagehot (quoted in epigraph to Chapter 1), as quoted by Stephen Strauss (science writer for the Toronto Globe & Mail newspaper), ‘The scientist as beaver’, The Globe & Mail, March 1, 2003, pg D9, review of Gerhard Herzberg: An Illustrious Life in Science by Boris Stoicheff: ‘Stoicheff sagely quotes Walter Bagehot’s remark that great nations with long histories of creation may fail “from not comprehending the great institutions they have created.”’ Strauss is referring to a quote, used by Stoicheff, from an 1876 essay by Walter Bagehot: Lord Althorp and the Reform Act of 1832 (1876), published in Bagehot’s Historical Essays (Garden City, N.Y.: Anchor, 1965), pgs. 147-179, at pg. 150: “The characteristic danger of great nations … is that they may at last fail from not comprehending the great institutions they have created.”
CHAPTER 8 NOTES

824  *Sauvé v. Canada (Chief Electoral Officer)* (Chief Electoral Officer), [2002] 3 S.C.R. 519, 2002 SCC 68, reasons of McLachlin C.J.C. for majority of five judges, and by Gonthier J. for the four dissenting judges (referred to herein as ‘Sauvé 2’, as the 2002 decision following the 1993 decision in the first Sauvé case). *Canada Elections Act, R.S.C. 1985, c. E-2, ss. 51(e) [rep. & sub. S.C. 1993, c. 19, s. 23(2)], 51.1 [ad. idem, s. 24]*, as cited in the report of the Sauvé 2 decision, which at the time of the decision had been ‘continued in substantially the same form’ in *Canada Elections Act, S.C. 2000, c. 9, s. 4(c).*

825  The *Canadian Charter of Rights and Freedoms,* Part 1 (sections 1-33) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.),* 1982, c. 11 (herein referred to as the ‘Charter’). The law was also challenged as a violation of their Section 15(1) equality rights as well as their Section 3 right to vote, but the Section 15(1) argument was not considered by McLachlin C.J.C. in her reasons (para 63), and was considered and dismissed by Gonthier J. in his dissenting reasons (para 189) in Sauvé 2 (para 189). See Professor Christopher Manfredi’s summary of the ‘more systematic and sophisticated’ equality rights arguments advanced in Sauvé 2: Christopher Manfredi, ‘The Day the Dialogue Died: A Comment on Sauvé v. Canada’, Osgoode Hall Law Journal [Vol. 45, No. 1, 2007], pgs 105-123 (herein referred to as ‘Manfredi’s Comment’), at pg 108, footnote 15.

826  The only other citizens excluded from the federal franchise are Chief and Assistant Electoral Officers. Other restrictions exist in provincial franchises, including prisoner disenfranchisement, which vary from province to province, as Gonthier surveyed in his dissenting reasons in Sauvé 2. There is also a voting suspension in Section 750 of the *Criminal Code*, which has not yet been addressed by the courts (except in obiter comment), and which I discuss below in this chapter.

827  Re: self-interest of the governing political party: see the examples I give from Kingsley’s *History, infra* note 828, of the Macdonald, Laurier, and Borden governments’ varying legislative changes to the franchise, in my examination of McLachlin C.J.C.’s reasons in Sauvé 2. The description ‘collective hysteria’ is from Kingsley’s *History*, referring to interment and disenfranchisement of certain Germanic Canadians in Borden’s World War I legislation, and similar waves of ethnically and economically-motivated disenfranchisements during the subsequent Depression and World War II.

828  Chief Electoral Officer, *A History of the Vote in Canada* (Ottawa: Minister of Public Works and Government Services, 1997, 2nd ed. 2007), 168 pages, Preface. [archived online on Government of Canada website, accessed November 2, 2013, URL: http://publications.gc.ca/site/eng/321505/publication.html; available in print at Fanshawe campus library: fanshawec.libguides.com/content.php?pid=184397&sid=1678931] (herein referred to as ‘Kingsley’s History’). The Chief Electoral Officer at the time of publication was Jean-Pierre Kingsley, who held the position from 1990-2007. This very small franchise was typical of the time: As noted briefly in my historical overview in Chapter 1, in England as late as the end of the eighteenth century, the franchise was restricted essentially to wealthy men, and only about 3 percent of the population was entitled to vote – ‘roughly 300,000’ of a population of almost 10 million people: Amanda Foreman, *Georgiana, Duchess of Devonshire* (New York: Random House, 1998), ‘A Note on Eighteenth Century Politics’ at pg xvii-viii.

829  Kingsley’s *History, id.*
Prisoner disenfranchisement may not necessarily have been invariable, not in law and perhaps not in practice: Linden J.A., in his careful review of the evolution of the prisoner disenfranchisement law in Canada, in his reasons for the majority of the Federal Court of Appeal in Sauvé 2 (F.C.A.), para 65, refers to it being ‘likely’, rather than

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830 Kingsley’s History, supra note 828
831 Kingsley’s History, supra note 828; see also <http://canadaonline.about.com/cs/elections/a/electionfirsts.htm>
832 ‘Status Indians’ gained the vote in 1920, and Indian veterans in 1924: Kingsley’s History, supra note 828, and see also for dates: <http://canadaonline.about.com/cs/elections/a/electionfirsts.htm>
833 Kingsley’s History, supra note 828
834 Kingsley’s History, supra note 828: Conscientious objectors were essentially minority religious groups, notably Mennonites, Hutterites, and Doukhobors. They had lost the vote in 1917, under Borden’s war-time franchise laws, regained it in 1920, and then lost it again in 1934, to regain it once more in 1955
835 Kingsley’s History, supra note 828: Inuit Canadians had been expressly disenfranchised in 1934, along with First Nations peoples living on reserves; the vote was restored to Inuit Canadians ‘without qualification’ in 1950.
836 Kingsley’s History, supra note 828
837 Kingsley’s History, supra note 828
838 Kingsley’s History, supra note 828
839 Kingsley’s History, supra note 828: note the extent to which the franchise expanded, by about one tenth, due to lowering the voting age by 3 years. British residents lost the vote in 1970, unless they became Canadian citizens.
840 Disenfranchisement – or rather, loss of civil rights and a say in the community, before democracy and the franchise as we know them today – has a much longer history, as the punishment for crime in England, than does imprisonment, as we know it today. (Though disfranchisement itself is perhaps not entirely unrelated to the voice of community members in the ancient local assemblies, or the voice of the members of the king’s council at the first Parlement in 1265.) ‘Outlawry’ and ‘civil death’: Linden J.A., in his reasons for the majority of the Federal Court of Appeal in Sauvé 2 (F.C.A.), at para 63, refers to the centuries-old law that ‘one consequence of being convicted of a felony was the loss of all civil rights’. Note also, as I noted in Chapter 2, the larger context in which England’s local assembly system, of which banishment was a part, can be seen, reflected in the description by the English legal historian F.W. Maitland, quoted by Baker, supra, at pg 5, of that system as ‘thoroughly characteristic of archaic legal systems in general’.
841 Pre-Confederation prisoner disenfranchisements: There were disqualifications, noted in Kingsley’s History, supra note 828, of anyone ‘attained for Felony in any Court of Law’, and of anyone ‘convicted of treason or other serious crimes, unless they had been pardoned for the offence or had completed their sentence’. Anyone ‘attained for Felony in any Court of Law within any of His Majesty's Dominions’ (or ‘convicted of a serious criminal offence or treason’, as put by Kingsley) was disqualified from voting by the Constitution Act, 1791, a disqualification which appears to have continued through the 1840 Act of Union of the Province of Canada and the Constitution Act, 1867. In the brief review of the history of prisoner disenfranchisement by Linden J.A., in his reasons for the majority of the Federal Court of Appeal in Sauvé 2 (F.C.A.) at para 64: ‘The Constitution Act, 1791, which established Upper and Lower Canada, specifically provided for prisoner disenfranchisement. It stated, in part, that ”no Person shall be capable of voting at any Election … in either of the said provinces. … who shall have been attained for Felony in any Court of Law within any of His Majesty's Dominions”. In Kingsley’s History, supra note 828, it is noted in a timeline Table that: In 1791 the Constitutional Act establishing Upper and Lower Canada, ‘sets voting rules’ which disqualify anyone who has been ‘convicted of a serious criminal offence or treason’, and that the franchise ‘remains’ the same in the 1840 Act of Union uniting the two colonies as the Province of Canada; British Columbia, just before joining Confederation in 1871, enacted new franchise conditions which included the disqualification of certain prisoners: ‘the law prohibited from voting anyone convicted of treason or other serious crimes, unless they had been pardoned for the offence or had completed their sentence.’

Prisoner disenfranchisement may not necessarily have been invariable, not in law and perhaps not in practice: Linden J.A., in his careful review of the evolution of the prisoner disenfranchisement law in Canada, in his reasons for the majority of the Federal Court of Appeal in Sauvé 2 (F.C.A.), para 65, refers to it being ‘likely’, rather than
certain, that prisoner disenfranchisement was in force at the time of The Electoral Franchise Act of 1885. And the possibility of exceptions to prisoner disenfranchisement, in theory if not in practice, is raised by a comment in a Parliamentary debate referred to in Kingsley’s History: ‘Prisoners had not been allowed to vote since 1898 – although according to at least one MP, Lucien Cannon, some inmates appear to have found a way around the rules: “I know a case where the prisoners were allowed, under a sheriff’s guard, to go and register their votes and they came back afterwards.”’ [citing Debates April 19, 1920; 1820] ‘The solicitor general of the day appeared not to credit this story, replying that prisoners might be on voters lists, but since they could not get to a ballot box, they would be disenfranchised in any event.’ The exclusion of prisoners from the franchise in British Columbia is described in Kingsley’s History, supra note 828, as having been made law in 1871 when ‘British Columbia introduced further restrictions on the vote’ [my emphasis], thus implying that it was not law before, and Kingsley’s History, supra note 828, describes Laurier’s 1898 election legislation as extending the disqualification of prisoners from three provinces – New Brunswick, Ontario, and Manitoba – to the entire country, thus implying that at that time prisoners had had the right to vote in the other provinces: And Table 2.2 in Kingsley’s History, supra note 828, entitled ‘Categories of Citizens Ineligible to Vote, 1867-1885, itemizes a prisoner voting disqualification in only one province (British Columbia), but does not include it in the itemized lists of four others (Nova Scotia, Quebec, Ontario, and Manitoba). (Note that British Columbia’s prisoner disqualification itemized here was worded differently by Kingsley from the wording he refers to in the 1871 British Columbia law – here, the British Columbia franchise is said to have excluded: ‘Any person previously found guilty of treason, serious crimes or other offences, unless he had been pardoned or served his sentence.’) Slightly related, though obviously a different matter, are instances described in Kingsley’s History of former prisoners who were elected to political office – such as Louis Lactose, imprisoned from 1837-38 for political activism, and elected to the Parliament of the Province of Canada in 1861: ‘Louis Lacoste, a notary public from Boucherville, Quebec, was 40 when Jean-Joseph Girouard did this charcoal sketch. A political activist since 1834, Lacoste had been imprisoned in 1837–1838 for his support of the Patriots, but he later won a seat in Parliament, defeating Alexandre-Édouard Kierzkowski in an 1861 by-election (see page 7). Lacoste held the seat until Confederation, when he was appointed to the Senate.’

842 Prisoner disenfranchisement at Confederation and early post-Confederation: Linden J.A., in his reasons for the majority in Sauvé 2 (F.C.A.), briefly summarizes the continuation of the prisoner disenfranchisement in Canada [para’s 64-66], noting that: at Confederation, ‘the Constitution Act, 1867 preserved the status quo and, in s. 41, authorized Parliament to establish the qualifications for voting’; in 1885 ‘Canada’s first electoral law, The Electoral Franchise Act ... required that voters be “of full age of twenty-one years, and . . . not by any law of the Dominion of Canada, disqualified or prevented from voting.” Thus, the voter disqualification contained in the Constitutional Act, 1791 and preserved by section 41 of the Constitution Act 1867 was likely the law in force at that time.’; in 1898, Parliament passed The Franchise Act, 1898, which – in a ‘blanket prohibition of prisoners’ that was ‘nearly identical to that which was in force at the time of the enactment of the Charter’ – denied the vote in federal elections to “[a]ny person, who, at the time of an election, is a prisoner in a jail or prison undergoing punishment for a criminal offence”.

843 Canada Elections Act, R.S.C. 1985, c. E-2, s. 51 (3)(e) (as cited in the Sauvé 1 case; in 1982, s. 14(4)(e), identical wording). Section 750(2) of the Criminal Code suspends the right to vote of any holder of a public office while serving a sentence of two years or more for conviction of an indictable offence while holding public office ‘until undergoing the punishment imposed or the punishment substituted therefore by competent authority or receives a free pardon from Her Majesty’.

844 Charter, supra note 825, Section 1, under the heading ‘Rights and Freedoms in Canada’, and Section 3, under the heading ‘Democratic rights of citizens’, which came into effect on April 17, 1982:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

845 Note that both Liberal and Conservative governments, often with lengthy periods in power and strong majorities – including Trudeau’s Liberal government, 1980-84, Mulroney’s Conservative government, 1984-1993, and
Chretien’s and Martin’s Liberal governments, 1993-2006 – maintained all these exclusions on the right to vote following the enactment of the Charter, until some of them were struck down by the courts. Respecting the 18-years minimum age requirement: see brief discussion below. Respecting residency, two requirements existed; to be entitled to vote, a citizen had to be resident in Canada, and had to satisfy the residency requirements of the local community or riding whose representative was to be elected: see discussion below.


Note that prisoner disenfranchisement was apparently not commented upon, even in the public information provided by the federal government, respecting the Charter right to vote and the earlier Canada Citizenship Act amendments, and even those in 1993.


‘Little unanimity of reasoning’: As described by Linden J.A. in his reasons for the majority in the Federal Court of Appeal decision in Sauvé 2 (F.C.A. 2000), para 68, there was ‘little unanimity of reasoning’ in the previous judicial decisions in the prisoner disenfranchisement cases. However, the weight of the results in the federal law cases was clearly against the constitutionality of this disenfranchisement: It was upheld in two early cases, by the Manitoba Court of Appeal in Badger and by an Ontario trial judge in Sauvé 1 in 1988, but then struck down by the Ontario Court of Appeal in Sauvé 1 in 1992, by the Federal Court Trial Division in Belczowski in 1991, the Federal Court of Appeal in Belczowski in 1992, and by the Supreme Court of Canada in both cases in 1993.


Belczowski v. Canada, supra note 848, reasons of trial judge at 172-73

Arbour J.A., Sauvé 1: Sauvé v. Canada (Attorney General) (1992), 7 O.R. (3d) 481 (C.A.), reasons for the court by Arbour J.A., allowing appeal and reversing trial judgment. Her obiter comments were quoted with approval by McLachlin C.J.C. in her reasons for the majority in Sauvé 2, para 33 (and Arbour J. was by then also a member of the S.C.C. and one of that majority). In her reasons for the Ontario Court of Appeal decision, Arbour J.A. made the following obiter comments, rejecting the trial judge’s view of history and notion of ‘a decent and responsible citizenry’ as a condition of the franchise (pg. 487):

I would also add that the slow movement toward universal suffrage in Western democracies took an irreversible step forward in Canada in 1982 by the enactment of s. 3 of the Charter. I doubt that anyone could now be deprived of the vote on the basis, not merely symbolic but actually demonstrated, that he or she was not decent or responsible. By the time the Charter was enacted, exclusions from the franchise were so few in this country that it is fair to assume that we had abandoned the notion that the electorate should be restricted to a "decent and responsible citizenry", previously defined by attributes such as ownership of land or gender, in favour of a pluralistic electorate which could well include domestic enemies of the state.

The two lawsuits were heard together as ‘companion cases’.

The Canadian Charter of Rights and Freedoms, Part 1 (sections 1-33) of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (herein referred to as the ‘Charter’). The law was also
challenged as a violation of their Section 15(1) equality rights as well as their Section 3 right to vote, but the Section 15(1) argument was not considered by McLachlin C.J.C. in her reasons (para 63), and was considered and dismissed by Gonthier J. in his dissenting reasons (para 189) in Sauvé 2 (para 189). See Professor Manfredi’s summary of the ‘more systematic and sophisticated’ equality rights arguments advanced in Sauvé 2: Christopher Manfredi, ‘The Day the Dialogue Died: A Comment on Sauvé v. Canada’, Osgoode Hall Law Journal [Vol. 45, No. 1, 2007], pgs 105-123, at pg 108, footnote 15.

This provision of the Canada Elections Act was amended, by An Act to Amend the Canada Elections Act, S.C. 1993, c. 19, s. 23(2), which came into force on May 6, 1993, and the Court’s judgment in Sauvé 1 was pronounced twenty-one days later, on May 27, 1993 (see trial judge’s reasons in Sauvé 2 and Linden J.A.’s reasons in Sauvé 1(F.C.A. 2000), para 29). Thus, the Court’s reasons in Sauvé 1 may have been perfunctory primarily because they related to the then-obsolete blanket provision that disqualified every prisoner from voting. See Gonthier J.’s comments on this point, in his dissenting reasons in Sauvé 2 (2002), para 77: ‘The most recent changes to the scope of the franchise were made by Parliament in 1993 … These modifications included s. 51(e), which disqualified incarcerated persons serving sentences of two years or more. It was already enacted at the time this Court heard the first Sauvé case, [1993] 2 S.C.R. 438 (the “first Sauvé case”), but since it was inapplicable to the case under appeal, the Court did not comment on it.’ And as Gonthier J. notes as well, the amended law also followed the earlier, strongly-worded appeal court decisions striking down the law (para 105): ‘What is also particularly relevant is that s. 51(e) of the Act received Royal Assent on May 6, 1993, well after both the Ontario Court of Appeal and the Federal Court of Appeal handed down its decision in the first Sauvé case (March 25, 1992) and the Federal Court of Appeal handed down its decision in Belczowski (February 17, 1992).’ (para 105)

Amendments in 1993 and 2000: Canada Elections Act, as amended S.C. 1993, c.19: Canada Elections Act, R.S.C. 1985, c. E-2, ss. 51(e) [rep. & sub. 1993, c. 19, s. 23(2)], 51.1 [ad. idem, s. 24], and as it existed at the time of the Supreme Court’s decision in Sauvé 2, in substantially the same form: Canada Elections Act, S.C. 2000, c. 9, s. 4(c). The conditions on the federal right to vote that remained following the successful Charter challenges (see supra notes 846 and 848) included minimum age of 18 years, residency in Canada within the last five years preceding the election, and residency within the local riding; the Chief and Assistant Chief Electoral Officers remained disenfranchised under the 1993 and 2000 amendments; judges and people with mental disabilities were no longer disqualified; prisoner disqualification continued for those serving sentences of two years or more.

Sauvé 1, [1993] 2 S.C.R. 438: a unanimous decision of the full bench of nine judges, with the following brief (121 words in all) reasons given by Iacobucci J. [my emphasis]:

We are all of the view that these appeals should be dismissed.

The Attorney General of Canada has properly conceded that s. 51(e) of the Canada Elections Act, R.S.C., 1985, c. E-2, contravenes s. 3 of the Canadian Charter of Rights and Freedoms but submits that s. 51(e) is saved under s. 1 of the Charter. We do not agree. In our view, s. 51(e) is drawn too broadly and fails to meet the proportionality test, particularly the minimal impairment component of the test, as expressed in the s. 1 jurisprudence of the Court. Accordingly, the first constitutional question is answered in the affirmative and the second constitutional question is answered in the negative.

Consequently, both appeals are dismissed with costs.

The test, named after the case in which it was first formulated by the Court, R. v. Oakes, [1986] 1 S.C.R. 103, has been restated and refined in subsequent decisions. McLachlin C.J.C., in Sauvé 2, para 19, gave this brief descriptive comment as she turned to apply ‘the Oakes test’; ‘Keeping in mind these basic principles of Charter review, I approach the familiar stages of the Oakes test.’

Roach uses a similar brief definition or descriptive phrase for the Oakes Test (84): ‘… the Oakes test provides the basic framework for analysis’. See brief discussion in Roach et al CRF, 74-75, 84, noting ‘variable’ stringency and application of the minimum impairment test in particular (pgs 74-75): ‘As the SCC has made clear [citing pg 84 fn 102 Edmonton Journal v. Alberta (A.G.), [1989] 2 SCR 1326], the context of a particular case is of fundamental importance in the application of section 1 of the Charter.’
The ‘objectives’ analysis: The objective of the law must, the Court said in *Oakes*, be neither ‘trivial’ nor ‘discordant with the principles integral to a free and democratic society’. *See R. v. Oakes*, [1986] 1 S.C.R. 103 at 138, cited by McLachlin C.J.C. in *Sauvé 2*, para 20

The ‘proportionate effects’ inquiry: ‘… the government must show that … the overall benefits of the measure outweigh its negative impact (the proportionate effect test).’: McLachlin, C.J.C. in *Sauvé 2*, para 27.

The burden of proof on the government to establish that the law imposes a limit on the right that is reasonable and justifiable under Section 1: The words quoted are from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, per McLachlin J. as she then was at pg. 329, and per Iacobucci J. at pg. 352 [as quoted by Wetston J. in the trial judgment in *Sauvé 2*, at para’s 15 and 18 respectively] [my numbering of his para’s].

860 Parties to the *Sauvé 2* case: This was a decision in two companion cases which were heard together at trial and by the Federal Court of Appeal and the Supreme Court. One of the two cases was brought by Richard Sauvé against the Attorney General, Chief Electoral Officer, and Solicitor General of Canada. The other of the two cases was brought against the Attorney General of Canada by seven individuals (Aaron Spence, Sheldon McCorrister, Lloyd Knezacek, Clair Woodhouse, Serge Belanger, Emile A. Bear, and Randy Opoonechaw), and two inmate associations (the Stony Mountain Institution of Inmate Welfare Committee, and the Native Brotherhood Organization of Stony Mountain Institution). The Interveners in the cases were two provincial Attorneys General (for Alberta and Manitoba); two national associations for prisoner advocacy and support (the Canadian Association of Elizabeth Fry Societies and the John Howard Society of Canada, as community-based advocates for, respectively, women and girls in the justice system, and people returning to society at the end of their sentences); three law and justice associations (the Canadian Bar Association, the British Columbia Civil Liberties Association, and the Aboriginal Legal Services of Toronto Inc., an agency providing community-controlled and culturally-based law and justice support to the Aboriginal community).

Interveners identified *supra*, note 861

*Sauvé 2* (1996 trial decision), *infra* note 867, per Wetston J., para 11: ‘Two of the individual plaintiffs, Richard Sauvé and Aaron Spence, also provided testimony in the present matter. … An agreed transcript of his [Sauvé’s] evidence from a previous trial involving prisoner voting rights was introduced in this case: See *Sauvé v. Canada (Attorney General)* (1988), 66 O.R. (2d) 234 (H.C.); reversed (1992), 7 O.R. (3d) 481 (C.A.) ([hereinafter] *Sauvé No. 1*); affirmed, [1993] 2 S.C.R. 438.’ Note that the joint trial of the two cases before Wetston J., in Winnipeg, took 13 days, between May and September of 1995, and then a further day in Ottawa at the end of December 1995; from case report of Trial judgment: ‘Trial Division, Wetston J. – Winnipeg, May 24, 25, 26, 29, 30, 31, June 1, 2, 5, 6, August 30, 31 and September 1; Ottawa, December 27, 1995.’


Concession that the law violated the Charter Section 3 right to vote: The case was decided on Section 1 alone, as the violation of Section 3 was conceded by the government at trial and apparently on all appeals. This is stated by McLachlin C.J.C. in the majority reasons: ‘The respondents concede that the voting restriction at issue violates s. 3 of the *Charter*. …’ [para 6], as well as by Gonthier J. in the dissenting reasons [para 66: ‘while [the law] having been conceded to be an infringement of the s. 3 Charter right’]. However, note that it appears from McLachlin C.J.C.’s reasons that the government may have argued on that appeal that the ambit of Section 3 itself should ‘be limited by countervailing collective measures’: McLachlin C.J.C., *Sauvé 2*, *supra* note 824, in para 11, in the context of stating that the right to vote must be given a broad and liberal interpretation: ‘I conclude that s. 3 must be construed as it reads, and its ambit should not be limited by countervailing collective concerns, as the government appears to argue. These concerns are for the government to raise under s. 1 in justifying the limits it has imposed on the right.’ And see Gonthier J.’s concern about this concession, para 78 of his dissenting reasons.
The description of the government’s goals or objectives varied somewhat: McLachlin C.J.C. generally referred to them as ‘promoting civic responsibility and respect for the law and imposing appropriate punishment for crime’: (para’s 19, 21, 22); Gonthier J. referred to the first objective also as to ‘augment civic responsibility and respect for the rule of law’ [para 149], and generally referred to the second objective as ‘enhancing the general purposes of the criminal sanction’ (e.g. para 157). As I discuss below, McLachlin C.J.C. also doubted the sincerity of these objectives as what truly motivated the government (para 21). In Belczowski (F.C.A. 1992), supra note 848, Hugessen J.A. had also doubted the sincerity of the ‘alleged objectives’ put forward by the government, and in much stronger language (pgs.456-57, and quoted by Linden J.A. in Sauvé 2 (F.C.A. 2000), para 77).


Respecting the alternative suggested by Wetston J., in his reasons in Sauvé 2, id., see summary in Manfredi’s Comment, supra note 825, at pg 108: In contrast to the Sauvé No. 1 judgment, the trial court judgment in Sauvé No. 2 recognized that there were important objectives underlying the inmate voting disqualification and that the disqualification had a rational connection to those objectives. … He found, however, that the disqualification was overly broad because of its blanket application to all inmates serving terms of two years or more. In his view, this was simply too blunt an instrument for achieving the federal government’s objectives. Instead, he suggested that the decision to disenfranchise should be left to the discretion of sentencing judges, who could decide on a case-by-case basis whether the individual circumstances of the convicted offender warranted the additional sanction of disenfranchisement. In that way, he argued, the disqualification would affect only those inmates who actually deserved to have their right to vote suspended.

Sauvé 2, Federal Court of Appeal decision, 1999, allowing the government’s appeal and dismissing the cross-appeal from the trial judgment: Sauvé v. Canada (Chief Electoral Officer), [2000] 2 F.C. 117 (F.C.A., 1999), a majority decision of two judges, Isaac C.J. and Linden J.A. (majority reasons given by Linden J.A.), Desjardins J.A. dissenting. As summarized by McLachlin C.J.C. in her reasons in Supreme Court decision in Sauvé 2 (para 4): The majority of the Federal Court of Appeal, per Linden J.A., reversed the trial judge and upheld the denial of voting rights, holding that Parliament’s role in maintaining and enhancing the integrity of the electoral process and in exercising the criminal law power both warranted deference. The denial of the right to vote at issue fell within a reasonable range of alternatives open to Parliament to achieve its objectives and was not overbroad or disproportionate. Desjardins J.A., applying the “stringent formulation of the Oakes test”, emphasized the absence of evidence of benefits flowing from the denial and would have dismissed the appeal.

Linden J.A. also referred, in Sauvé 2 (F.C.A. 1999), id., to the adequacy of the government’s evidence, where concrete proof was not realistically available, and to the appropriate level of judicial deference, as ‘a great deal of deference’ in penal matters, to be shown to the government in the context of this case. He described the law as ‘a gentler, more humane alternative’ to punishment, and took ‘judicial notice’ of the facts that there were growing concerns about the inefficacy of lengthy imprisonment and that ‘courts cannot limit Parliament to a single punitive tool’ (para 144), which complemented his holding (para 144) that not only ‘some deference’ but ‘a great deal of deference’ is owed by the courts to the penal law choices of Parliament (and see on this point of judicial deference in applying the Oakes test, also para 60, 94-95, 111-16)


Sauvé 2, Supreme Court of Canada decision, 2002, allowing the appeal from the Federal Court of Appeal decision: Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519 (introduced earlier at supra note 824), reasons for the majority of five judges by McLachlin C.J.C., and for the four dissenting judges by Gonthier J. Interestingly, the federal government has not (yet, in 2012) amended the Canada Election Act to either reassert its legislative decision with a strong preamble, or to assert a modified legislative provision, or to comply with the Court decision and remove the invalidated provision disenfranchising prisoners serving two years or more (although the Chief Electoral Officer has complied with the Supreme Court’s decision by ensuring all prison inmates have the opportunity to vote): See Table in Kingsley’s History, supra note 828, stating, as of 2004: ‘Parliament did not
amend the Canada Elections Act to remove the voting disqualification for inmates serving over two years. Nevertheless, the Chief Electoral Officer applied the Sauvé (2002) decision during the 2004 and 2006 general elections, giving all inmates the opportunity to vote.’

873 McLachlin C.J.C., Sauvé (2002), id., para’s 22, 61, 23, 18, 28, articulating the importance of ‘concrete’ or ‘empirical’ evidence (McLachlin C.J.C.’s terms) in establishing the government objectives in court: ‘[The government’s vague and symbolic objectives] carry many meanings, yet tell us little about why the limitation on the right is necessary, and what it is expected to achieve in concrete terms.’ (para 22); ‘even if there were merit in the Court of Appeal’s view that the trial judge relied too heavily on the absence of concrete evidence of benefit, it is difficult to avoid the trial judge’s conclusion …’ (para 61). She distinguished ‘other matters’ that do ‘not require empirical proof in a scientific sense’, identifying these as matters of ‘social philosophy’ or ‘matters involving philosophical, political and social considerations’, such as whether suspending votes as a sanction for crime sends an ‘educative message’ that ‘promotes respect for the law’ and has a ‘beneficial moral impact’. For such matters, she stated, ‘it is enough’ for the justification to take the form of ‘rational, reasoned defensibility’, or ‘common sense and inferential reasoning’, to show what is likely ‘either by evidence or in reason and logic’ (para 28) [my emphasis], and reasoning (at para 18):

While deference to the legislature is not appropriate in this case, legislative justification does not require empirical proof in a scientific sense. While some matters can be proved with empirical or mathematical precision, others, involving philosophical, political and social considerations, cannot. In this case, it is enough that the justification be convincing, in the sense that it is sufficient to satisfy the reasonable person looking at all the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has: see RJR-MacDonald, supra, at para. 154, per McLachlin J.; R. v. Butler, [1992] 1 S.C.R. 452, at pp. 502-3, per Sopinka J. What is required is “rational, reasoned defensibility”: RJR-MacDonald, at para. 127. Common sense and inferential reasoning may supplement the evidence: R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 78, per McLachlin C.J.C. However, one must be wary of stereotypes cloaked as common sense, and of substituting deference for the reasoned demonstration required by s. 1.

874 McLachlin C.J.C., Sauvé 2, supra note 872, para’s 21, 26; while she did accept the two goals as valid objectives, she did so only out of ‘prudence’, provisionally and with reservations, so that she could proceed to the second stage of the Oakes test analysis, where she telescoped her conclusion that the inherent problems with the objectives became ‘manifest’ (para 21, para 26):

Section 51(e) denying penitentiary inmates the right to vote was not directed at a specific problem or concern. Prisoners have long voted, here and abroad, in a variety of situations without apparent adverse effects to the political process, the prison population, or society as a whole. In the absence of a specific problem, the government asserts two broad objectives as the reason for this denial of the right to vote: (1) to enhance civic responsibility and respect for the rule of law; and (2) to provide additional punishment, or “enhanc[e] the general purposes of the criminal sanction”. The record leaves in doubt how much these goals actually motivated Parliament; the Parliamentary debates offer more fulmination than illumination. However, on the basis of “some glimmer of light”, the trial judge at p. 878 concluded that they could be advanced as objectives of the denial. I am content to proceed on this basis.

Quite simply, the government has failed to identify particular problems that require denying the right to vote, making it hard to say that the denial is directed at a pressing and substantial purpose. Nevertheless, despite the abstract nature of the government’s objectives and the rather thin basis upon which they rest, prudence suggests that we proceed to the proportionality analysis, rather than dismissing the government’s objectives outright. The proportionality inquiry allows us to determine whether the government’s asserted objectives are in fact capable of justifying its denial of the right to vote. At that stage, as we shall see, the difficulties inherent in the government’s stated objectives become manifest.

875 Re: ‘overbroad’ or not ‘minimally impairing’ the right, the second inquiry under the second stage of the Oakes test: McLachlin C.J.C. (para’s 54-56), having already held that the law was not rationally connected to the
government’s objectives, ‘simply observed’ that ‘the class denied the vote – all those serving sentences of two years or more – is too broad, catching many whose crimes are relatively minor and who cannot be said to have broken their ties to society’ and ‘many people who, on the government’s own theory, should not be caught’ (para 54).

McLachlin C.J.C., para’s 44, 57-59; re: harms to those affected by the law ‘greatly outweighed’ or were disproportional to the beneficial effects of the law: para’s 57-60

McLachlin C.J.C., para 60, re: the disproportionately harmful effect on Aboriginal prisoners – and the doubtful usefulness of the criminal sentence marker to the extent it reflects such factors as poverty and social alienation, rather than culpability.

See, e.g., Gonthier J. at para’s 67, 99, 100, 102-03, 157, 159, 174, 178, 180-83: the law limiting prisoner voting rights as reasonably justified in a democracy, as legitimately signalling symbolic objectives that express values of the society.

The law rationally furthered objectives in ‘reason, logic and common sense’ and in ‘extensive expert evidence’ as well, per Gonthier J. para 157; both ‘symbolic and concrete’ effects, per Gonthier J., para’s 99, 100, 102, 103, 142, 157, 159, 174; note that neither McLachlin CJC nor Gonthier J treat ‘symbol’ in the sense Jung has elaborated in his critical psychology, and also that ‘symbol’ seems to be sometimes treated by Gonthier J. as meaning the same as ‘abstract’, though both terms are also used together, indicating they do not have the same meaning.

Gonthier J. disagreed ‘at a more fundamental level’ with the reasons of McLachlin C.J.C., para 67, and elaborated that more fundamental disagreement at para’s 68, 92, 93, 94, 95, 97, 141, 157

Gonthier J., dissenting reasons: vote is not a special right (para’s 95, 103), signalling effect of ‘symbolic’ objectives, and ‘symbolic’ arguments and evidence, are legitimate (para’s 99, 100, 102, 103, 142, 157, 159, 174, 180-83)

‘Deference’ in the ‘dialogue between Court and government: This point is elaborated in my examination of McLachlin C.J.C.’s majority reasons, below, referring to Gonthier J., dissenting reasons, para’s 68, 101, 104-08, 160-61, 175, 186-88.

The Fair Elections Act was introduced in Parliament and rushed to Committee in 2014; with respect to the tougher mandatory minimum sentencing laws, there have been instances of judges balking at enforcing them.

‘Democracy’ in Canada since 1982: essential principles include inherent dignity of each individual, equality, , inclusivity: McLachlin C.J.C., Sauvé 2, para’s 15, 33, 35, 41, 44. Humanitarian and pluralist principles: McLachlin C.J.C., Sauvé 2, quoted extracts are from para’s 15, 35, 37, 44, 58, 111-13. The concept of democracy as a framework within which ‘citizens can explore and pursue different conceptions of the good’, in the phrase used here by McLachlin C.J.C., apparently comes from a moral philosophy theory of Professor Joseph Raz, a legal and political philosopher, author of The Morality of Freedom (Oxford: Clarendon Press, 1986). Raz’s concept emphasizes the principle of freedom or individual liberty, which could be seen as dominant in the American constitution and society, over the principles of equality and social welfare, which could be seen as dominant in the Canadian constitution and society. See brief comments in Gonthier J.’s dissenting reasons, Sauvé 2, para’s 111-13.

Note that McLachlin C.J.C. referred to these humanitarian principles [respect for the inherent worth and dignity of every person] as ‘a constitutional commitment’ that ‘lies at the heart of our democracy’, and thus on the text of our constitution including the Charter – specifically resting her reasons on this point on dicta of the South African Constitutional Court in its reasons in the cited case [para 35], rather than on the Court’s own reasons, and later in her reasons she reiterated this point and the reference to the South Africa court’s decision [para’s 44 & 58, referring back to the citation in para 35]: a simple and ringing statement about, not democracy in general, but the vote per se.

McLachlin C.J.C., Sauvé 2, para 35: ‘More broadly, denying citizens the right to vote runs counter to our constitutional commitment to the inherent worth and dignity of every individual. As the South African Constitutional Court said in August v. Electoral Commission, 1999 (3) SALR 1, at para. 17, “[t]he vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.” The fact that the disenfranchisement law at issue applies to a discrete group of persons should make us more, not less, wary of its potential to violate the principles of equal rights and equal membership embodied in and protected by the Charter.’
The ‘special importance’ of the right to vote, as ‘the heart’ and ‘cornerstone’ of democracy, ‘fundamental’, ‘essential’ to democracy, the basis of governmental ‘legitimacy’ in our system: McLachlin C.J.C., para’s 1, 9, 11, 13, 14, 15, 27, 31, 32, 33, 60: ‘The framers of the Charter signalled the special importance of this right …’ [11], it ‘lies at the heart of Canadian democracy’ [para 1, twice]; it ‘stands at the heart of our system of constitutional democracy’ [31], it is ‘fundamental to our democracy and the rule of law and cannot be lightly set aside.’ [9], it is among ‘the core democratic rights of Canadians’ and ‘one of the most fundamental rights guaranteed by the Charter’ [13], ‘the right to vote, the cornerstone of democracy, exempt from the incursion permitted on other rights through s. 33 override.’ [14], no judicial deference – which ‘may be appropriate in some cases’ – bec. ‘it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed in the Charter that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system.’ [15], ‘a crucial right’ [23], the centrality of the right to vote to Canadian democracy, the rule of law, and legitimate sentencing [27], ‘the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote’ [31], there is a ‘vital symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it.’ [31], ‘This connection, inherited from social contract theory and enshrined in the Charter, stands at the heart of our system of constitutional democracy.’ [31], the vote is ‘the basis of democratic legitimacy’ [32], this is a ‘truth’ [33], ‘universal enfranchisement has become at this point an essential part of democracy’ [33], ‘the modern precept that all citizens are entitled to vote as members of a self-governing citizenry’ [33], a right of ‘seminal importance’ in the Charter’s ‘constellation of rights’ [36], - ‘the most basic of their constitutional rights’ [37], - a right as basic as the right to vote’ [46], the vote is ‘a voice at the ballot box and, by proxy, in Parliament’ [60], ‘Aboriginal people in prison have unique perspectives and needs. Yet s. 51(e) denies them a voice at the ballot box and, by proxy, in Parliament.’ [60]

McLachlin, C.J.C., id., and para’s 35, 37, 44: ‘More broadly, denying citizens the right to vote runs counter to our constitutional commitment to the inherent worth and dignity of every individual. As the South African Constitutional Court said in August v. Electoral Commission, 1999 (3) SALR 1, at para. 17, “[t]he vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.” (para 35); ‘[In disenfranchising prison inmates] the government is making a decision that some people, whatever their abilities, are not morally worthy to vote — that they do not “deserve” to be considered members of the community and hence may be deprived of the most basic of their constitutional rights. …’ (para 37); ‘Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the Charter: compare August, supra. …’ (para 44).

The ‘special importance’ of the right to vote: McLachlin C.J.C., supra note 886, at para’s 11, 13, 23, 36, 37, 46 ‘Special protections’ of the right to vote: McLachlin C.J.C. supra note 886, and para’s 11, 14, 36: ‘The framers of the Charter signalled the special importance of this right not only by its broad, untrammeled language, but by exempting it from legislative override under s. 33’s notwithstanding clause.’ [11], ‘the right to vote, the cornerstone of democracy, exempt from the incursion permitted on other rights through s. 33 override.’ [14], ‘In recognition of the seminal importance of the right to vote in the constellation of rights, the framers of the Charter accorded it special protections. Unlike other rights, the right of every citizen to vote cannot be suspended under the “notwithstanding clause”.’ [36]

Kingsley’s History, supra note 828, describing the Act as having had ‘a dual purpose: to increase the number of electors favourable to the government in power and decrease the number of electors unfavourable to it’, and quoting a contemporary assessment of Prime Minister Borden’s partisan finesse with this Act: ‘The president of the Canadian Suffrage Association remarked that the act would have been more honest if it had simply disenfranchised everyone who failed to promise to vote for the Conservatives!’

McLachlin C.J.C., para’s 37, 62

McLachlin C.J.C., para 37

As Gonthier J. pointed out (para 118, and see 119), there is a ‘nexus’ between voters and their local community, which seems to be reflected by the local riding residency requirement. He stressed the democratic choice involved in making cut-offs by asking (para 89): ‘How, then can there be a justification for denying the vote to a politically
mature 16 or 17 year-old? … The answer must simply lie in the fact that s. 1 allows Parliament to make such choices as long as they are rational and reasonable limitations which are justified in a free and democratic society.’

894 McLachlin C.J.C., para 41


Note that McLachlin C.J.C. does refer to the testimony of Professor Jackson in this context (para 38), but without any elaborate analysis, and indeed, there was no attempt to examine the conflicting opinion or theoretical evidence in any detailed or rigorous way.

896 The important ‘values and principles’ of democracy: Dickson C.J.C.’s words, relating to the qualities of a modern or liberal democracy, discusses in Chapter 7, where I also quoted descriptions of democracy in the context of Section 1 of the Charter, by Dickson CJC in R. v. Oakes, [1986] 1 S.C.R. 103, para 136, and by Iacobucci J. in Vriend v. Alberta, [1998] 1 SCR 493, para 140; Dickson CJC described ‘the values and principles essential to a free and democratic society’ as including ‘respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.’ (Dickson CJC’s words, quoted by Iacobucci J. in explaining that ‘the concept of democracy is broader than the notion of majority rule, fundamental as that may be.’)

897 McLachlin C.J.C., para’s 13, 21: ‘It is for the courts, unaffected by the shifting winds of public opinion and electoral interests, to safeguard the right to vote guaranteed by s. 3 of the Charter’ [13]; ‘Public debate on an issue does not transform it into a matter of “social philosophy”, shielding it from full judicial scrutiny.’ [13]

898 McLachlin C.J.C., para’s 17, 21, 23, 24, 46, 52; see also 40 and 41: ‘at first you don’t succeed’ [17], a contest of “our symbols are better than your symbols.”’ [23], the objectives advanced by the gov as ‘rhetorical’ and ‘suspect’ [24], ‘the argument, stripped of rhetoric, proposes … I think not.’ [46], ‘When the façade of rhetoric is stripped away, little is left’ [52], ‘The record leaves doubt how much these goals actually motivated Parliament’ [21], ‘debates offer more fulmination than illumination’ [21], ‘… it sends the unacceptable message that democratic values are less important than punitive measures ostensibly designed to promote order.’ [40], ‘The government’s novel political theory that would permit elected representatives to disenfranchise a segment of the population finds no place in a democracy built upon principles of inclusiveness, equality, and citizen participation. …’ [41].

899 McLachlin C.J.C., para 21

900 See Gonthier J., e.g. para’s 164, 165, endorsing the lower court assessments of it as ‘a rigorous evaluation’ in which a Parliamentary Committee ‘spent a great deal of time’ and ‘carefully considered the submissions’ of the Lortie Commission, and both the Committee and Parliament ‘debated this measure vigorously’.

901 History of this legislative amendment process, initiated largely or in part in response to the court challenges and decisions under Section 3 of the Charter:

(1) The Royal Commission on Electoral Reform and Party Financing (‘Lortie Commission’) – appointed 1998:
- ‘The achievement of these ends was assisted by the Royal Commission on Electoral Reform and Party Financing (also known as the Lortie Commission). It was appointed by the federal government in 1989 to review, among other matters, the many anomalies in the electoral process identified by Charter challengers. [per Kingsley’s History, supra note 828]
- ‘[40] In 1993, the CEA was substantially amended by Bill C-114 [An Act to amend the Canada Elections Act, 3rd Sess., 34th Parl., 1993]. However, prior to the enactment of the amended CEA, a Royal Commission on Electoral Reform and Party Financing (the Lortie Commission) was established, in November of 1989, for the purpose of inquiring into the appropriate principles and processes that should govern, inter alia, the election of members of the House of Commons. The Lortie Commission’s Final Report was submitted to Cabinet in November of 1991. The Report was comprehensive and covered numerous topics, including the disqualification of certain groups of voters, among whom were prison inmates.’ [trial judge’s reasons in Sauvé 2 – reviewing, as stated in para 39, the debates and proceedings of the Legislative History that gave rise to the amended s. 51(3) in 1993]
(1-a) Research studies provided to the Royal Commission:
- ‘[41] As is typical of royal commissions, numerous research studies accompanied the Lortie Commission's recommendations. The prisoner disqualification, in particular, was addressed in an article by P. Landreville and L. Lemonde entitled “Voting Rights for Prisoner Inmates” [in Democratic Rights and Electoral Reform in Canada, Volume 10 of the Research Studies], in which the authors recommended that all prisoners be granted the right to vote. The Lortie Commission did not accept that recommendation; rather, it concluded that persons who had been convicted of an offence punishable by a maximum of life imprisonment, and who had been sentenced to a prison term of ten years or more, should be disqualified from voting during the period of incarceration (Recommendation 1.2.7.). Obviously, Parliamentarians had full access to the research studies, as well as the Final Report of the Royal Commission.’ [trial judge’s reasons in Sauvé 2]

(2) Special eight-member Parliamentary Committee – the Hawkes Committee – 1992:
- ‘In 1992, the Commission's recommendations were reviewed by the Hawkes Committee, a special eight-member panel that produced additional recommendations concerning the Canada Elections Act.’ [per Kingsley’s History, supra note 828]
- ‘[42] As part of the consideration of Bill C-114, there was also an intensive review by a Special Committee on Electoral Reform. Considerable discussion of the prisoner voting rights issue also took place during the debates of the House of Commons and the Senate.’ [trial judge’s reasons in Sauvé 2]
- ‘[43] The Minutes of the Proceedings of the Special Committee on Electoral Reform reveal Parliament's concern that the courts should defer to Parliament on the issue of the prisoner disqualification. The Special Committee spent a great deal of time trying to determine whether a two-year limit for the disqualification was appropriate, or whether a cutoff of five years, or seven years, or ten years (as recommended by the Lortie Commission) was more justifiable. Eventually, the Special Committee recommended a two-year cutoff since, in their view, serious offenders may be considered to be those individuals who have been sentenced to a term of two years or more in a correctional institution. Generally, that means a federal penitentiary, but not exclusively.’ [trial judge’s reasons in Sauvé 2]
- ‘[44] It is evident from the Minutes that members of the Special Committee expressed anxiety over the fact that the most serious offenders could be given the right to vote. In this respect, the objective of enhancing punishment through the disenfranchisement of prisoners was clearly considered by the Committee. For instance, during the discussions of the Committee, it was expressed that there must be some limits on the right to vote, and that punishment encompassed the disenfranchisement of all incarcerated offenders: Minutes of Proceedings and Evidence of the Special Committee on Electoral Reform, Issue No. 12, at pages 12:18-12:19.’ [trial judge’s reasons in Sauvé 2]

(3 & 4) Parliamentary & Senate debates – 1993:
- ‘Both reports were reviewed by Parliament, with advice and support from the Chief Electoral Officer. One of the outcomes was the passage of Bill C-78 in 1992 and Bill C-114 in 1993 – which together initiated significant changes in the way electoral law dealt with access to the vote. …’ [per Kingsley’s History, supra note 828]
- ‘[45] The House of Commons Debates reveal the differences of opinion expected when Parliamentarians are dealing with a knotty social policy question. A number of legislators were opposed to any type of disqualification; others were clearly in favour of a disqualification on the basis of the two-year cutoff; others favoured something in between. While the objective of the enhancement of civic responsibility was not expressly addressed in the House of Commons Debates, it was asserted that all Canadians should be made aware of the existence of the inmate voting disqualification, and its imposition as a consequence of a sentence of imprisonment: House of Commons Debates (HOC Debates), Vol. 14, 3rd Sess., 34th Parl., 1993, at pages 18015-18107. These comments imply that the Government intended the prisoner disenfranchisement provision to have an educative effect. Similarly, it was expressed that persons who choose to act against society must suffer the consequences, including the denial of freedom and the loss of privileges which free and responsible citizens enjoy – one of which is the right to vote: HOC Debates, Vol. 14, 3rd Sess., 34th Parl., 1993, at pages 18017-18019. This suggests that one purpose of the impugned provision relates to civic responsibility and respect for the rule of law.’ [trial judge’s reasons in Sauvé 2]
- ‘[46] The Senate Debates also reveal the considerable ambivalence which many Senators exhibited toward the continuation of any prisoner disenfranchisement. In addition, the Senate Debates reflect the difficulty which Senators experienced in attempting to determine the appropriate line to be drawn. As might be expected, the Debates do not illuminate the objectives clearly although, as indicated above, there is some glimmer of light.’ [trial judge’s reasons in Sauvé 2]
- ‘[50] In the context of the considerable amount of study and discussion surrounding prisoner disenfranchisement before Bill C-114 was passed, I find a clear concern by Parliament regarding the characteristics of civic responsibility and respect for the rule of law in Canadian society. Furthermore, there is evidence of an intent to punish individuals who commit serious anti-social acts.’ [trial judge’s reasons in Sauvé 2]
- [51] Specifically, the legislative text, in conjunction with the proceedings of the Special Committee on Electoral Reform, reveal that the provision is clearly directed at imposing the sanction of disenfranchisement as a further punishment for serious crime. Moral education also appears to be a rationale for this additional sanction. The objective of enhancing civic responsibility through the operation of paragraph 51(e) of the CEA is more elusive. Nevertheless, the Debates of the House of Commons do reveal that some consideration was given to the fact that the impugned provision is capable of sending a message to offenders, and to the general public, about the importance, in a democracy, of the right to vote. [trial judge’s reasons in Sauvé 2]
- [102] As I indicated above, the Lortie Commission recommended that disenfranchisement occur where an offender has been convicted of a crime for which he could potentially receive a punishment of life imprisonment, and for which he did receive a sentence of ten years or more in prison. It is clear that Parliament considered this recommendation and rejected it. Parliament also considered a five-year cutoff and a seven-year cutoff, and rejected both. Furthermore, Parliament considered the voting rights of prisoners in other democratic countries. Eventually, Parliament settled on a two-year cutoff for disqualification. According to the defendants, this limitation allows Parliament to ensure that only those who have committed serious crimes are denied the right to vote. [trial judge’s reasons in Sauvé 2]
- [105] The legislative history of paragraph 51(e) of the CEA displays virtually no consideration of a court based process where disqualification is considered as part of sentencing. What the legislative history does reveal, in somewhat vague terms, is an apparent desire to keep the matter out of the courts. In the House of Commons Debates, some reference was made to the issue of whether or not a criminal like Clifford Olsen should be permitted to vote. With disqualification on a case-by-case basis, a clearly indecent and immoral offender like Clifford Olsen could, as a consequence, be disenfranchised by sentence of the court. [trial judge’s reasons in Sauvé 2]

902 The ‘Lortie Commission’, supra note 901
903 See Trial judge’s reasons, Wetston J., Sauvé 2, 1995, supra note 867, para 41 [my numbering], respecting the research study on prisoner voting by P. Landreville and L. Lemonde, Voting Rights for Prison Inmates.
904 Final Report of the Lortie Commission (including on the topic of prisoner voting), submitted to Cabinet in November 1991. ‘Parliamentarians had full access to the research studies, as well as the Final Report of the Royal Commission.’: trial judge, id., para 41
905 Id.
906 The Hawkes Committee: Special Parliamentary Committee on Electoral Reform, on Bill C-114, supra note 901
908 See Trial judge’s reasons, Wetston J., Sauvé 2, 1995, supra note 867, para’s 42-44, describing views expressed in the debates, such as ‘concern that the courts should defer to Parliament on the issue of the prisoner disqualification’; a great deal of time spent trying to determine whether a two-, five-, seven- or ten-year cut-off was ‘more justifiable’; the opinion in their view, serious offenders may be considered to be those sentenced to a term of 2 years or more; anxiety over the fact that the most serious offenders should be given the right to vote, and the view that there must be some limits on the right to vote, and that punishment encompass the disenfranchisement of all incarcerated offenders.
909 Trial judge’s reasons, Wetston J., Sauvé 2, 1995, supra note 867, para’s 42, 45, 46
910 Trial judge’s reasons, Wetston J., Sauvé 2, 1995, supra note 867, id.
911 See my discussion in the historical overview in Chapter 1: the major reforms of the judicial system in the 1800s were legislated following law commission and Parliamentary committee reports. Other group decision-making and facilitation processes exist and are being developed, including psychological and sociological approaches to such process decision-making, local community association focus groups, and wider consultations; note also Andrew
Samuels’ proposal for private personal psychological consultant for politicians and others in positions of public trust and power.


913 Linden J.A. para 116; see also para’s 93, 96-99, 114, 116, 120, 121

914 Gonthier J., para 187, and all his dissenting reasons respecting the ‘legislative history’ and assessments of it: para’s 105, 106, 162, 164, 165, 187


916 Nor should public opinion be treated on the same plane as electoral interests, as it seems to be in McLachlin C.J.C.’s somewhat pejorative reference to ‘the shifting winds of public opinion and electoral interests’ that influence political policy: para’s 13, 21

917 The importance of being discriminating about ideals: See my discussion in Chapter 6 respecting the ideal of Justice and the need to distinguish and interrelate, not fuse, different symbolic ideals, just as with different facts and concepts, referring to such theories as Transformative Justice (in which differing ideals are combined) and Therapeutic Justice or Jurisprudence (in which different ideals are separated but kept in interplay). In his democratic dialogue theory, Roach notes the need to distinguish those values which are ‘preconditions’ to citizens making the ‘independent, informed, and intelligent decisions’ that are required for a thriving democracy, and I argued, in discussing political decision-making in Chapter 7, that not all values in a ‘Good Society’ (in the name given Lorenzetti’s famous fresco portraying this ideal) are uniquely ‘democratic’: Many ideals, felt values, and rights identified as ‘democratic’ in theories of modern or liberal democracy were developed and can exist in theocracies, monarchies, and aristocracies, and that liberal democracies do not necessarily provide or protect all cherished values of citizens (such as an equal or even fair share in society’s resources of food, housing, health care, education, and so on). Various ideals are necessary for A Good Society – not Justice alone, not Democracy alone, not Safety or Liberty or Prosperity alone, though some may be more valued or essential than others in a given society. And specialized decisions, such as those of courts and governments, may well serve certain overarching ideals and not others.

918 How expertly were citizens’ shared felt values on the topic of prisoners’ voting rights, and the ideals or objectives stated by the government, ascertained and developed? What common ground came to light, if any, and how accurately was this articulated and carried out by the law? It may be that expert and effective citizen consultations were conducted. But if so, that was not described in any of the court decisions in the case. In a case such as Sauvé 2, for example, the government could respond with evidence of the steps taken to develop citizens’ shared values on the topic, by the Royal Commission or Parliament or otherwise, and of the adequacy of these steps, and of how their results were reflected in drafting and debating the law enacted. (This was done to some extent, for example, after the Daviault case, although in the Sauvé 2 case, the government might discover that for most citizens this issue is not as high a priority as other issues for the spending of public funds, resources, and political expertise.) And the courts will have reliably learned from the government the facts as to the well-developed shared values of the citizens on a topic. Other considerations will still apply, including Charter rights, and Justice, but they will be applied to more accurate facts concerning the ‘democratic voice’.

919 Sauvé 2, McLachlin C.J.C., para’s 39, 48, 54

920 Gonthier J. on two or more year sentences: para’s 155, 158, 164, 173, (generally 160-174), 183, 184, respecting the statistics on inmate sentences. Note that these statistics are very general and not well focused on the issue of the seriousness of the crimes, e.g. calculating only the average, not the mean, and not detailing the offences at the lower
range. And note that, according to the expert witness introducing this evidence, 75% of these inmates were serving sentences of 5 years or less – so a huge number are caught by the 2-year cut-off who would not be caught by a higher cut-off. See also Linden J.A., FCA, para’s 145, 146.


922 Quoted description is from summary of the judge’s reasons, given in the reasons of Sharpe J.A. on an application for a stay: Frank v. Canada (Attorney General), 2014 ONCA 485 (June 23, 2014 decision of Sharpe J.A. in chambers, rejecting an application for a stay pending appeal of the motions judgment of Penny J., Ont. S.C.J. May 2, 15, 2014): The motions judge struck down the Canada Elections Act provision denying the vote to non-resident Canadians who had been continuously out of the country for five years or more, applying McLachlin C.J.C.’s approach in the Sauvé case: As summarized by the appellate court judge, the motions judge characterized the government’s objectives of ‘fairness to resident voters’ and ‘the integrity of Canada’s electoral system’ as ‘so abstract, broad and symbolic that they barely qualified, if at all, as pressing and substantial’ objectives, and held that the five-year non-residency limit as ‘overly drastic’. It may be that the judge in Frank was adopting the reasoning in the majority in Sauvé, but what were the facts and principled logic on which it did so? Is the residency requirement akin to a minimum age requirement, as a ‘modality’ based on the ability to understand the issues at stake in the local community and to respond to them as a member of that community, or is it more akin to a prisoner disenfranchisement based on moral and punitive criteria? What are the citizens’ shared values respecting the residency requirement, and what are the capacities of these non-residents to vote on the political or election issues affecting their riding? Had the Court in Sauvé scrutinized the political decision at issue there, as I argue, according to a reasonable standard of care and skill in democratic decision-making practice, it could have laid a more effective and substantive ‘judicial’ foundation to guide courts, and governments, in subsequent cases such as Frank.

CONCLUSION NOTES

923 Put another way, if Jung’s theory of the development of rational consciousness is correct, then one could view the institutions of court and government, figuratively, as if they are two individuals, each with a distinct type of expertise and well-developed conscious viewpoint, interacting with each other and challenging and compensating each other; one could equally aptly view them as two different conscious functions interacting in the same way, with the society itself as the individual. I have briefly discussed such metaphorical treatments of this approach in the Introduction, pgs 9-10. The developmental perspective in Jung’s theory is consistent with that of many other psychological theories. By ‘historical perspectives’, I am referring to the comments of historians, cited in Chapter 1, to the effect that the communal system of local folk assemblies in England a thousand years ago is typical of archaic legal systems in general: a similar differentiation process can be seen in the Roman or civil law, which occurred centuries before it occurred in England’s common law system.

924 As I discussed in Chapter 2, both courts and governments have invoked ‘the rule of law’ and ‘not of men’, articulating the distinct criteria of their own decision-making process in stating that law.

925 This was the early and enduring American precedent, set by the United States Supreme Court in Marbury v. Madison 5 U.S. (1 Cranch) 137 (1803), discussed in Chapter 2, where I quoted Marshall U.S.C.J.’s dicta that the President was entitled to make and break executive appointments according to his personal discretion, with no judicial oversight, ‘accountable only to his country in his political character, and to his own conscience’ – in other words, subject not only to personal conscience, but also to political or democratic accountability. The same judicial treatment of a government’s (or Prime Minister in Cabinet’s) prerogative and other executive decisions has prevailed in Canada.

926 As it was put by Kent Roach, personal communication, noted supra, Oct 8, 2014.

927 The traditional judicial hallmarks Roach refers to frequently are ‘facts’ found in ‘evidence’, a rational process that is its ‘own way of reasoning’, and a concern with ‘justice’ or ‘fairness’ as both an inspiring ideal and an applied process: Roach also stresses, as an important dimension of the judicial process, ‘the concrete effects of law on individuals’. See my discussion in Chapter 3, citing, e.g., K. Roach, Constitutional, Remedial and International Dialogues About Rights: The Canadian Experience’ (2005) 40 Texas J. of International Law 537-576, and K.

928 The ‘advantages’ of governments (such as resources enabling them to set up task forces, obtain expert advice, consult with citizens, and so on) and the ‘failures of democracy’ (such as imperfect democratic accountability) noted by Roach, are discussed in detail in Chapter 3.

929 Roach refers to the biases of citizens, when he notes that the dialogue forces citizens to confront their ‘prejudices and fears’, as discussed in Chapter 3.

930 ‘For good or for ill’: Whether compelling archetypal images and other unconscious contents are used for good or for ill, and indeed, whether rational consciousness, too, is used for good or for ill, depends on the important and profound question of personal conscience, tied to self-awareness but seemingly more than that alone, a question I have addressed elsewhere, in a paper and later book chapter entitled ‘A Dream of Dirty Hands: Moral Conflict and Personal Conscience’ (2004), in David C. Thomasma & David N. Weisstub (eds.), The Variables of Moral Capacity (Dordrecht, Boston, London: Kluwer Academic Publishers, 2004), pgs 95-111

931 This is a topic I have addressed in a conference paper, Beneficent Old Age: A ‘Jungian’ Perspective, delivered at the Canadian Conference on Elder Law, Toronto, October 30, 2010. The relevance of age (and more particularly, the kind of experience and wisdom that can come with time) to judges and the quality of judicial decision-making, is brought out by The Hon. Justice John Reilly in his book, part memoir and part roadmap for social change, Bad Medicine: A Judge’s Struggle for Justice in a First Nations Community (Rocky Mountain Books, 2010), discussed in Chapter 6. In an interview with Anna Maria Tremonti on ‘The Current’, CBC Radio, aired Nov 8, 2010, URL: http://www.cbc.ca/thecurrent/books/2010/11/08/nov-0810---pt-1-judge-reilly/, Reilly looked back to when he was appointed in 1976, at thirty years old, and described himself in his early years on the bench as a judge who was ‘too young to be a judge’ and who ‘thought he was doing good work from his courtroom’ but in reality was ‘arrogant, red-necked, and ignorant’ and ‘just applying the law blindly’; who thought ‘harsh penalties would achieve results, and that judging was ‘just an academic exercise’. His perspective changed after two decades, in which he ‘got fed up with watching all the suffering humanity coming through my courtroom’, and in which it ‘really came home to me’ how alone, isolated, and vulnerable were the women who were victims of violence and the young people who committed suicide. As he said in the interview: ‘One of the things that really came home to me about that case was how alone and how isolated those women [victims of violent abuse] were. There was no protection for them.’ At 50 years old, Reilly J. reached a turning point, and vowed to provide better justice for the Stony people:

‘[Going out to the Wesley cemetery in 1996 or 1997] was the turning point in my life. … what struck me was the number of grave markers of people born since 1970 … all these young people committing suicides. It was in that moment that the huge suffering that is happening on Indian Reserves just came down on me. … I saw it as my duty to do something to change that situation.’

Judges become ‘judicial tyrants’, Judge Reilly reflected, through ‘lack of understanding’. He attributed his changed attitude to his having gained greater knowledge and understanding – understanding of human nature in particular:

‘I should have learned a lot more about people and human nature before I started exercising the authority of a judge. … I had lost my ignorance. … It’s made me much more critical of the system and I think as a result maybe made me a better judge, because instead of just applying the law blindly which is what I see myself doing in my pre-1996 career, I see myself applying it now with a much more human approach. And I’m hopeful that maybe I’m doing much more good as a result of my newfound attitude …’