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2012]

## Symposium Articles, Comments, and Keynote Response

### JUDICIAL DECISION MAKING IN A WORLD OF NATURAL LAW AND NATURAL RIGHTS

GEORGE C. CHRISTIE\*

WHAT I have come to appreciate most in John Finnis's work is his urging us to return to the more classic as well as intellectually richer notion of natural law espoused by St. Thomas Aquinas that builds on the work of Aristotle and Cicero. By that I mean a natural law that is focused on the achievement of the good and ultimately on the achievement of what, from the social perspective, we have come to call the common good. This focus on the good as the basis of morality and the social organization of human beings, as opposed to an approach focused on natural rights, is refreshing. It helps us see that, while law and morality are not exactly the same, it is nevertheless impossible to separate law completely from morality. From this perspective, all rights, whether called natural or legal, are aimed at enhancing some good. Some of the goods may be said to be intermediate or instrumental goods, that is to say goods that are pursued because they contribute to achieving the more basic and important goods that stand at the apex of our moral universe. As is well known, Finnis sets forth a list of seven basic goods which he contends have been recognized over the ages as fundamental for human flourishing and into which all other goods that we might wish to consider as basic can be subsumed.<sup>1</sup> I am prepared to accept this list as an acceptable attempt to encapsulate, in manageable form, the essence of the moral universe. They are instantiations of what Aquinas called the first principles of the natural law. As such they are each ends in themselves; they cannot serve merely as means to achieving some other basic goods. Looking at the world through this lens alerts us to the fact that, when difficult situations arise in which the achievement of one basic good requires the sacrifice of other basic goods, the conflict can only be resolved by the exercise of what Aquinas called *prudentia* and Aristotle called *phronesis*, that is to say through a process of deliberation by rational human beings possessed of practical wisdom garnered from a lifetime of experience and observation. A major focus of

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\* James B. Duke Professor of Law, Duke University School of Law, Durham, N.C. With some minor changes this Article is a published version of a paper delivered at the John F. Scarpa Conference on Law, Politics, and Culture, A Celebration and Exploration of the Achievements of John M. Finnis, held at the Villanova University School of Law on September 20, 2011.

1. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 59–99 (1980).

this Article is whether this task can be delegated to the courts. If this task cannot easily be performed by the courts, it would strongly suggest that there are limits to the degree that morality can be fully integrated into law.

Resolving conflicts among basic goods can be a very difficult process. That is why people are attracted to the more structured moral universe of natural rights and, to an even greater degree in legal discourse, to a legal universe organized almost exclusively around the concept of legal rights. Rights can serve the purpose of simplifying moral and legal deliberations because in common speech we often do take literally Dworkin's view of "rights as trumps."<sup>2</sup> This is the strength of rights discourse and it is also its weakness. The strength of rights discourse is that it appears to eliminate considerably the discretion of decision makers by greatly narrowing the range of factors that they must take into account. Its weakness is that it not only may undervalue some important human goods but also, by simplifying the decisional process, lessens the moral responsibility of judges by passing that responsibility on to the authors of the legislation and constitutions which the judges must construe and apply. In the legal philosophical debates with which we are concerned, this practical consideration provides an additional impetus for wanting to separate a rigid rights-bound domain of law from a more fluid and nuanced moral domain and to insist on a sharp distinction between law and morality. Likewise, in moral debate, a morality founded largely on natural rights has similar intellectual strengths and weaknesses. It simplifies the moral universe by narrowing the factors that must be considered and eases the moral burden on people making difficult moral choices by transferring moral responsibility for their decisions to some basic moral or religious text and/or to some generally accepted moral or religious authority.

As interesting as the subject we are discussing might be, for a long time in the modern era it would have been considered a matter of serious concern only for academics. That is no longer the case; and it is likely to be a matter of increasing general concern for the foreseeable future. Among the reasons why this is now the case are two important social developments about which many people, including myself, have extensively written. The first has been the increasing acceptance by modern developed societies that the state has a significant responsibility for protecting and even promoting the economic and emotional welfare of its citizens. This sense of increased social responsibility has been conjoined with the rise of the contemporary human rights movement. Political recognition of human rights is not new. Certainly the tradition of seeking recognition for what could be called human rights has a long history in Western civilization that, in the English-speaking world, can be traced back to the Magna Carta issued in 1215, the English Bill of Rights of 1689, and, of course, the American Bill of Rights of 1791 that consists of the first ten

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2. See Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 155–68 (Jeremy Waldron ed., 1984).

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amendments to the United States' Constitution. Most of these rights were narrowly focused and, for the most part, they were concerned with procedural protections for persons involved not only in criminal prosecutions but also in civil litigation. Moreover, they were largely rights protecting the individual against the state, that is leaving him free from state interference such as not to be prosecuted twice for the same offense, or preventing him from employing counsel to assist him in his defense against criminal prosecution, or forbidding the state to take his property without compensation, or restricting his freedom of expression, or interfering with the practice of his religion. Aside from requiring the state to provide a person a fair trial such as by providing him a trial by jury, none of these enumerated "rights" concerned any affirmative obligation of the state to do something for the individual, nor did they purport to be applicable to all political societies.

The gradual recognition of a broader category of universal human rights can be traced back to that most famous of all such documents, the Declaration of the Rights of Man approved by the French National Assembly in August of 1789, whose assertion of the existence of universal human rights was repeated, in December 1948, in the promulgation of the Universal Declaration of Human Rights by the General Assembly of the United Nations. But, although expressed in universal terms, both the Declaration of the Rights of Man and the Universal Declaration of Human Rights, unlike the American Bill of Rights, were merely hortatory with no immediate legal effect in any nation state. This largely hortatory or aspirational character of most enunciations of universal human rights gradually changed as more nations in the post-World War II era, responding to those broadly accepted aspirations, inserted express declarations of legally enforceable human rights into their national constitutions. And now, finally there are several transnational human rights conventions of which the most presently significant, the European Convention for the Protection of Human Rights and Fundamental Freedoms, covers the 47 countries that have thus far ratified it.

Who could complain about the ends which these developments are trying to achieve? The problems, as almost always, lie in the details of implementation. In the area of human rights these problems arise from the interactions of a number of features of modern human rights conventions and the national constitutions attempting to accomplish many of the goals enunciated in international or multi-national human rights conventions. Some of these concern what we might call substantive features. Others we might conveniently label as formal features; but they are as important as the substantive features, and particularly so for lawyers. One such formal feature is the entrusting of the determination of the content of any asserted human right to the judicial decision-making process. Consideration of the implications of entrusting such an important role to the judiciary will be a major part of the remainder of this Article. To set the stage for that discussion, however, we must first discuss some important

substantive features that any such adjudicatory process is likely to confront.

In order to keep the discussion within manageable bounds we shall concentrate on three substantive human rights protected by the European Convention. It should be noted that the Convention does not claim to be creating those rights. It is merely concerned with recognizing them as part of European law and creating the mechanism by which they may be judicially protected. The three rights which will be used to focus our discussion are the “right to respect for private and family life,” guaranteed by Article 8, the right to “freedom of thought, conscience and religion,” including one’s right “to manifest his religion or belief,” guaranteed by Article 9, and the “right to freedom of expression” guaranteed by Article 10. If one were to look only at the caption headings of these articles of the Convention one could readily conclude that he is looking at a more elaborate rendition of something like the Bill of Rights of the United States. But as we all know there is more to this than that. Each of these rights is accompanied in the text by an express declaration that the right in question may be limited by “law,” when “necessary in a democratic society,” for economic, social, moral, and political reasons. To take the right to freedom of religion as an example, the allowable limitations are those necessary “in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

Qualified in this manner, these purported rights seem to be more like what, in legal discourse, are usually called interests or values rather than rights. As such, these purported rights function merely as factors that must be taken into account in the organization and management of the social and political life of a society. Thus, for example, the social purpose of preserving the secular nature of society has been relied upon by the European Court of Human Rights to uphold bans on women wearing head scarves in public universities and in other educational institutions.<sup>3</sup> Indeed in France it is now illegal for a woman to wear a burqa in public<sup>4</sup> and in Switzerland, for the same reason, to build a structure with minarets.<sup>5</sup> Furthermore, in delimiting the scope of the freedom of expression guaranteed by Article 10, the European Court of Human Rights has upheld convictions for denying the Holocaust, even in private correspon-

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3. *See, e.g.*, Sahin v. Turkey, App. No. 44774/98, 44 Eur. Ct. H.R. Rep. 5 (Grand Chamber 2005); Dogru v. France, App. No. 27058/05, Eur. Ct. H.R. (2008).

4. Loi 2010-1192 du 11 octobre 2010 de interdisant la dissimulation du visage dans l’espace public [Law 2010-1192 of October 11, 2010, on the Prohibition of Concealing One’s Face in Public], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2011, p. 18344.

5. CONSTITUTION FÉDÉRALE [FEDERAL CONSTITUTION], Apr. 18, 1999, RO 101, art. 72, para. 3 (Switz.), as amended by referendum in 2011.

dence,<sup>6</sup> without any showing of any advocacy of violence, let alone any evidence that any such advocacy could reasonably be expected to make such violence an imminent possibility. It should also be noted in this regard that all sorts of expression can and on occasion have also been suppressed under Article 15 which permits “derogation” of these and many other articles of the Convention in times of “war or other public emergency threatening the life of the nation . . . to the extent strictly required by the exigencies of the situation.” Fortunately these last types of situations, such as the British attempts to suppress separatist movements in Cypress and Northern Ireland as well as similar efforts in Turkey to deal with Kurdish nationalists, are largely things of the past.<sup>7</sup>

To sum up the discussion thus far, ignoring the extreme national emergency situations to which we have just referred and are now hopefully only of historical interest, we still have a regime in which courts are required to decide whether the suppression of some basic moral value, such as privacy, or religious expression or practice, or simply just expression *simpliciter*, can be restricted in the name of the common good. Because the exercise of all these powers is clearly open to abuse, the Convention requires that measures derogating from Articles 8, 9, and 10 must not only be prescribed by law but also “necessary in a democratic” society to achieve the social purposes for which the curtailment of the protected rights is made; or in the case of Article 15 that the measures taken in emergency situations are “strictly required by the exigencies of the situation.” Because governments are not always disinterested or objective decision makers on these issues, all these derogations from protected human rights are subject to a process of judicial review that eventually leads to the European Court of Human Rights. The assumption behind giving courts the last word on what would seem to be important and often controversial moral and political issues is obviously that there are right answers to these disputes, and that courts are able to reach these correct answers. That this can be said to be possible in a world that is becoming increasingly diverse and in which social morality is undeniably evolving is, to say the least, questionable.

One might say that my concerns are overblown because the Convention itself requires that measures taken in derogation of the human rights with which this paper is concerned must be “necessary,” and also, as the European Court has often declared, “proportionate” to that necessity.<sup>8</sup>

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6. See *Witzsch v. Germany*, App. No. 7485/03, Eur. Ct. H.R. (2005); *Witzsch v. Germany*, App. No. 41448/98, Eur. Ct. H.R. (1999); see also *Garaudy v. France*, App. No. 65831/01, 2003-IX Eur. Ct. H.R. 369.

7. These cases and the issues they present have been discussed in GEORGE C. CHRISTIE, *PHILOSOPHER KINGS? THE ADJUDICATION OF CONFLICTING HUMAN RIGHTS AND SOCIAL VALUES* 39–41 (2011) [hereinafter *PHILOSOPHER KINGS?*].

8. See *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. Ct. H.R. Rep. (Ser. A) at 25 (1978); *Lawless v. Ireland*, App. No. 332/57, 1 Eur. H.R. Rep. 15 (1961). For a scholarly discussion, see Marc-André Eissen, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights*, in *THE EUROPEAN*

On its face that seems to be a good argument. But if the need to preserve the “secular” character of society can justify laws telling a woman what she cannot wear in public, we are in trouble. If a woman can go topless and possibly naked in a public place the justification seems pretty thin. Likewise the prohibition on Holocaust denial, even in private communication, seems hard to justify, if it ever was, sixty-five years after the end of World War II, when there is no actual incitement to the violent overthrow of the existing social order and even less likelihood that any such advocacy would actually result in a half-serious attempt to accomplish that goal. It is particularly odd that such laws should be upheld when many European countries such as the United Kingdom have never criminalized Holocaust denial. A presumption against state derogation of rights is not that much of a shield to an accused individual if it can so easily be overcome.

The really difficult issues, however, arise in disputes between individuals. These are often intellectually more complex and certainly much more frequent. The frequency is considerably enhanced by two developments in the evolving jurisprudence of the European Convention. The first is that on its face the European Convention would support an interpretation that its provisions only concern actions of state actors. And for a time, at least in the United Kingdom,<sup>9</sup> there actually was some uncertainty as to whether and how it would apply in actions involving private persons based on claims that the activities of a private person were interfering with the ability of the plaintiff to enjoy interests recognized as important and protected against the actions of the state. Not surprisingly, that uncertainty did not long prevail. Unlike the United States Bill of Rights, an eighteenth century document designed, as so pithily declared by Justice Douglas, “to take government off the backs of people and keep it off,”<sup>10</sup> the European Convention was almost from the beginning accepted by the European Court of Human Rights as protecting not only the individual against the actions of the state but also as imposing on the state the obligation to facilitate the ability of the individual to enjoy the rights guaranteed by the Convention.<sup>11</sup> Choosing to take this path has created the issue that will concern us for the remainder of this Article and highlights the contrast between a legal world where morality is based on a system of natural rights and one based on a moral universe, such as that favored by Finnis, in which we are concerned with identifying and nurturing the basic goods of human life. What forces us to confront this challenge is that, among the rights with which we are concerned, namely privacy, religion, and ex-

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SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 125 (Ronald Macdonald et al. eds., 1993).

9. See Basil S. Markesinis, *Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany*, 115 L.Q. REV. 47 (1999).

10. *W.E.B. DuBois Clubs of Am. v. Clark*, 389 U.S. 309, 318 (1967) (Douglas, J., dissenting).

11. See, e.g., *A. v. United Kingdom*, Original App. No. 2599/94, 27 Eur. H.R. Rep. 611 (1998).

pression, the rights of privacy and expression frequently come into conflict. This possibility together with the defeasibility of these rights entails that they really are only interests or, to use the terminology that we have adopted in this Article, basic human goods. Given the moral importance of expression and privacy, in order to determine the correct decision, when these two basic goods come in conflict the courts are required to balance, in an ad hoc manner, the competing values and decide which good should triumph in the case before them. Conducting that balancing exercise has been made particularly difficult because, undoubtedly prompted by the tragic death of Princess Diana in 1997, the Parliamentary Assembly of the Council of Europe in 1998 adopted a resolution that declares that the rights of privacy and freedom of expression are of equal value.<sup>12</sup> That position was soon also expressly adopted by the European Court of Human Rights.<sup>13</sup>

These European developments stand in marked contrast to the historical primacy that freedom of expression enjoyed in common law countries. In common law countries, if the expression was true or merely opinion, or even just vitriolic, expression would normally triumph over privacy so long as the expression concerned matters that occurred in public or involved information that was in the public domain. Under this practice, expression might even be considered as a right in the relatively strong sense that might qualify as a trump in the Dworkinian sense. It was not that expression was accepted as a more important moral value, but that the political value of expression was the principal concern of the body politic. Historically, by contrast, expression did not get quite the same primacy in the civil law countries of continental Europe where notions of personal honor often trumped freedom of expression.<sup>14</sup> From the end of the nineteenth century, however, the reach of privacy expanded in the United States and began to challenge on what are clearly moral grounds the primacy of expression to the extent that even the *Restatement (Second) of Torts* declared that, if one disclosed information that “would be highly offensive to a reasonable person, and . . . [was] not of legitimate concern to the public,” one would be liable to that person even if the information was true and lawfully acquired.<sup>15</sup> This development raised obvious constitutional issues that the Supreme Court of the United States was obliged to confront and, over a relatively short period of time, the Supreme Court reinstated in an enhanced form the primacy of freedom of expression on the ground that

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12. EUR. PARL. ASS. RES. 1165, ¶ 11 (1998).

13. *See, e.g.*, Von Hannover v. Germany, App. No. 59320/00, 40 Eur. H.R. Rep. 1, at ¶ 42 (2004). This case was reviewed by a Grand Chamber of the European Court of Human Rights which adopted the reasoning of the earlier decision that was rendered in the Third Section Chamber. Von Hannover v. Germany (No. 2), App. No. 40660/08, 55 Eur. H.R. Rep. 15 (2012) (Grand Chamber).

14. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004).

15. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

this primacy was mandated by the First Amendment of the Constitution of the United States.<sup>16</sup> Whether that enhanced primacy will continue given the ideological splits in the present Court is not an issue that we can profitably discuss on this occasion. What seems clear is that whatever course the Court may take in the future, there is no possibility that privacy and expression will be treated as of *equal* value.

The law of the United Kingdom, however, which had heretofore refused even to recognize a right of privacy, had surprisingly little difficulty in adjusting to the changes mandated by its membership in the Council of Europe and then in the European Union. Building on an expanded notion of confidentiality which did not arise out of any sort of pre-existing confidential or fiduciary relationship, its courts have ruled that someone who happens to learn, however innocently, of embarrassing information about another that is not generally known and would realize that a reasonable person would not want to be generally known is under an obligation not to disclose that information to others.<sup>17</sup> Through this doctrinal shift it was possible, without much difficulty, to begin the process of adjusting the common law of the United Kingdom to the requirements of the European Convention as declared by the European Court of Human Rights. The courts of the United Kingdom have also not had much difficulty in responding to the declarations of the European Court that even public figures and politicians enjoy some rights of privacy even for activities that take place in the public sphere, particularly when some element of family life is involved. For example, the Court of Appeal has held that a newspaper could not publish photographs of the nineteen-month-old son of J.K. Rowling, while the child was being pushed by his father in a buggy as he accompanied his parents to and from a café.<sup>18</sup> There is, however, a New Zealand case practically on all fours in which a unanimous court reached the opposite conclusion.<sup>19</sup>

How do courts decide these difficult cases particularly if, as in Europe, privacy and expression are said to be of equal value? In a recent book<sup>20</sup> I have described at length the process by which the law in Europe has evolved to its current state and have argued that it is not a satisfactory treatment of the matter but should rather serve as a cautionary lesson to those who want to introduce the European perspective into the law of the United States. For present purposes a simplified summary may suffice. Roughly speaking, if expression about lawfully obtained information is challenged as plausibly invading someone's privacy, the challenge will be upheld unless the speaker can persuade the court that the expression in

16. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989).

17. See *Campbell v. MGN Ltd.*, [2004] 2 A.C. 457 (H.L.).

18. *Murray v. Express Newspapers LLC*, [2008] 3 W.L.R. 1360 (C.A.).

19. *Hosking v Runtig*, [2005] 1 NZLR 1 (CA).

20. See generally *PHILOSOPHER KINGS?*, *supra* note 7.

question concerns a matter of legitimate public interest.<sup>21</sup> In the United Kingdom, expression concerning political, scientific, educational, or artistic matters have been mentioned as being types of expression that would more likely be judged to be of legitimate public interest.<sup>22</sup> In a similar vein, the European Court of Human Rights has declared that, for the speaker to escape liability, the challenged expression must be shown to contribute “to a debate of general interest” to society.<sup>23</sup> For both the British courts and the European Court, the fact that the matter is of interest to a significant portion of the public—if it were not, it would probably not be in the interest of the publisher to engage in the expression in question—is in no way determinative. In the view of both the British courts and the European Court, it is for those courts to determine what really is a matter of public interest or concern.

Why speech has to have any purpose escapes me. Why can it not be an end in itself? But that of course is a question that is too big even to begin discussing here. It is important to note the consequences of this approach. Since it is hard, as a practical matter, to conceive of a situation in which a speaker asserts that a private person’s presumptively lawful privacy is restricting his freedom of expression, it is not surprising that all the cases that have thus far come before the courts have involved situations in which it is the speaker who, though the defendant, is faced with the burden of justifying his expression. In dissenting from this view of the governing law, Judge David Thür Björgvinsson of the European Court of Human Rights declared that under the present test it was the expression which must be justified and not the restriction, whereas he was of the opinion that it was the restriction that needed justification.<sup>24</sup> That is a position with which I heartily agree. Regardless of whether one agrees with Judge Björgvinsson, one thing is clear: in a world of conflicting human rights of equal value, as a practical matter one or the other will become the preferred value. In Europe it is privacy which is predominant; in the United States, where there is no pretense that the values are equal, expression is clearly the preferred value. What I want to explore is how the courts could decide such cases while honoring the presupposition that conflicting values are in fact equal and also recognizing that we are really concerned with basic goods in the moral sense and not merely legal or political constructs.

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21. See generally *Campbell*, *supra* note 17. For similar treatment of the conflict between privacy and expression in the European Court of Human Rights, see generally *Von Hannover*, *supra* note 13.

22. See *Campbell*, *supra* note 17 at ¶¶ 148–49 (per Lady Hale).

23. *Von Hannover*, *supra* note 13 at ¶ 76.

24. See *MGN Ltd. v. United Kingdom*, App. No. 39401/04, 2011 Eur. Ct. H.R. 66. This proceeding was brought to the European Court to overturn the decision in the *Campbell* case. In a unanimous decision the Court held that the amount awarded to Ms. Campbell for attorneys’ fees was excessive. In his brief dissent, however, as noted in the text, Judge Björgvinsson disagreed with his colleagues’ upholding of Ms. Campbell’s victory on the merits.

To confine this discussion to manageable dimensions we have been focusing on the judicial struggle to decide a conflict between the two basic human goods, expression and privacy, which are stipulated as being of equal moral value and, in making that decision, the courts are required to determine whether some challenged expression concerns a matter of “legitimate” public concern. Admittedly, both privacy and expression can be evaluated on other scales as well, such as that of comparative political value or formal legal value, but that just complicates the matter because it forces us to confront the apples and oranges problem and somehow attempt to deal with that problem by working out the comparative weight of the competing political and other values involved in the situation under review, and then include them in an equation in which the comparative moral value of expression and privacy in the instant case is also included. One might say that this just amounts to asking decision makers to exercise practical wisdom and of course that is true. But while judges do and must make some resort to practical wisdom in performing their normal tasks, the reason decisions involving basic moral values are referred to judges is because it is felt that they can also somehow discover the truly correct moral solution. It is not of course irrational to believe that there is an objective moral order and therefore a morally correct solution to every moral conflict. The problem is how may human beings arrive at that correct solution.

Declarations that expression or privacy or any other value is a basic good do not get one very far when these goods come in conflict. To meet the challenge there must be something unique about judicial reasoning or something other than a judge’s intuition to which he can refer if his decision is questioned. Courts, including the European Court of Human Rights, often refer to the social morality of their communities, but courts have also been known to refuse to follow the social morality of their communities on the ground that it conflicts with some more basic moral convention. Is this, what a cynic might argue, just imposing on society at large the morality of the social classes from which the judges are drawn under the guise of appealing to some consensus of right-thinking people such as Stendhal’s “happy few”? Dealing with the problem is not made any easier by the fact that social morality can change, sometimes rather rapidly, as the European Court of Human Rights has recognized in cases involving obscenity and blasphemy.<sup>25</sup> It is worth considering that all these difficult questions arise because we are asking the courts to do something that, as a practical matter, is impossible. One should not ignore an observation made by David Hume when he contrasted an artificial virtue like justice to

25. See, e.g., Müller v. Switzerland, App. No. 10737/84, 13 Eur. H.R. Rep. 212 (1988), in which the Court accepted that what was punishable as obscenity in 1960 might not be punishable in 1980. One might compare also Otto Preminger Institut v. Austria, App. No. 13470/87, 19 Eur. H.R. Rep. 34 (1994), with Vereinigung Bildender Künstler v. Austria, App. No. 68354/01, 47 Eur. H.R. Rep. 5 (2007).

the natural virtues. Natural virtues exist in a universe in which the morally right result is dependent on the totality of all the circumstances, that is to say, in a moral world in which situation ethics reigns. An artificial virtue such as justice is, for Hume, marked by bright line rules in which many morally important features are intentionally ignored.<sup>26</sup> A moral gymnast such as Dworkin's Hercules<sup>27</sup> might be able to bridge that gap between morality and law but, for most people, only God would be adequate to the task.

My conclusion is that, if these goods are accepted as being of equal value, it is chimerical to ask judges to decide conflicts between those basic human goods, while avoiding the criticism that they are reaching arbitrary and often inconsistent decisions in the extremely fact-dependent situations in which those conflicts are presented to courts. As judges that have decided such cases have themselves admitted, these are the types of cases in which different judges may reach different conclusions on the same facts.<sup>28</sup> As a practical matter, if any measure of consistency is to be achieved, one or the other of the conflicting basic goods will be given primacy in the sense that, when challenged, one of these values will "bear the burden" of persuading the decision maker that it should prevail. That has happened in the different approaches taken in Europe and in the United States in conflicts between expression and privacy. Religions can handle conflicts between basic human goods by resort to God or to some human being who is accepted as having the insight and authority to make those decisions. As revered as courts, including the United States Supreme Court, might be, they will never be able to achieve that stature. It is not coincidental that, since the European Convention for the Protection of Human Rights and Fundamental Freedoms became incorporated into the domestic law of the United Kingdom, the number of sharply divided decisions in the House of Lords and now in the Supreme Court of the United Kingdom has very markedly increased.<sup>29</sup>

All societies, of course, are faced with the need to make decisions involving choices between basic human goods. These decisions require the talents of statesmen, that is of people who have the practical wisdom to make the best possible decisions taking into account all factors, including

26. DAVID HUME, A TREATISE OF HUMAN NATURE 526–34 (L. A. Selby-Bigge ed., Clarendon Press 1888) (1740).

27. The most prominent reference to such a super-judge is RONALD DWORKIN, LAW'S EMPIRE (1986).

28. In *Campbell*, *supra* 17 at ¶ 188, Lord Carswell, who was part of the majority in a three-to-two decision, conceded that "[w]eighing and balancing these factors is a process which may well lead different people to different conclusions." In that case five of the nine judges who heard the case as it worked its way through the courts actually ruled against Ms. Campbell. A similar recognition that the "casuistic approach" taken in these sorts of cases "may also give rise to differences of opinion" was expressed by Judge Cabral Barreto in his concurring judgment in *Von Hannover*, *supra* note 13.

29. See PHILOSOPHER KINGS?, *supra* note 7, at 18.

the common good, and what is physically and socially possible that in any given situation may have morally relevant significance. In a democratic society these decisions have to be made by actors who are politically accountable for their decisions. Those are the people who are ideally positioned to operate in the Aquinian world that Finnis has reinvigorated. For the courts I am afraid they must operate in a world of rights. If these rights are to be called natural rights and to function as rights in the sense that Wesley Hohfeld described, such rights should be narrowly focused and have real bite. They should not be worded in broad and grandiose terms claiming a universal validity that almost guarantees their being used as shibboleths to give an aura of legitimacy to practical decisions about practical matters. Indeed, there is something to be said for banning the concept of “natural” rights from legal discourse. The inevitable misuse of the concept of natural rights invites the mistaken reaction that law and morality are and should be separate universes. As Finnis reminds us, that conclusion is false. Even though law and morality are different, they are inevitably interconnected. As I hope I have shown, however, there are many theoretical and practical reasons why they can never be the same. Perhaps the most important is that, in order to serve its important function of providing consistency and predictability, law must always display an ineradicable measure of arbitrariness.