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COMMENTS ON GEORGE CHRISTIE'S "JUDICIAL DECISION MAKING
IN A WORLD OF NATURAL LAW AND NATURAL RIGHTS"

Patrick McKinley Brennan*

IT is an honor to comment on this provocative paper by Professor George Christie. I will begin by agreeing with the proposition with which the paper ends: "[law and morality] can never be the same."¹ I am not sure, though, who holds the position Professor Christie rejects. Who holds the position—to re-phrase the thesis—that all requirements of morality can and should be enacted into law? Certainly St. Thomas Aquinas and John Finnis, whose views Professor Christie elides, do not hold that view. Aquinas, for example, is quite decisive in rejecting that view, and he does so on the basis of the very purpose of law itself:

The purpose of human law is to lead men to virtue, not suddenly, but gradually. Wherefore it does not lay upon the multitude of imperfect men the burdens of those who are already virtuous, viz., that they should abstain from all evil. Otherwise these imperfect ones, being unable to bear such precepts, would break out into yet greater evils: thus it is written (Prov.xxx.33): *He that violently bloweth his nose, bringeth out blood.*²

I raise this issue because I worry that Professor Christie's case for limiting the role of courts to the adjudication of "rights" (as Christie defines them) rests, in part, on a straw man.

Coming to the main point, Professor Christie's principal thesis is that the scope of the judicial power should be restricted to adjudication of rights, understood as Wesley Hohfeld understood them³; correlatively, the exercise of the judicial power should not involve decision based on (basic) goods or, as Christie at one point characterizes it, "a more fluid and nuanced moral domain."⁴ Professor Christie defends his thesis of restriction on the ground that judges or courts are *comparatively institutionally incompetent* to get down in the weeds of adjudicating goods.

* John F. Scarpa Chair in Catholic Legal Studies and Professor of Law, Villanova University School of Law. These comments on George Christie's paper are, with only minor changes, what I said at the Scarpa Conference on September 20, 2011. They are, therefore, no more than suggestive, though I have added some citations to places where I or others have argued for the positions suggested here.

1. George C. Christie, *Judicial Decision Making in a World of Natural Law and Natural Rights*, 57 VILL. L. REV. 811, 822 (2012).

2. THOMAS AQUINAS, SUMMA THEOLOGICA I-II 96.2 at 2 (Fathers of the English Dominican Province trans., Benziger Bros. 1948).

3. See Christie, *supra* note 1, at 821–22.

4. *Id.* at 812.

Christie develops this thesis with reference to the European Convention for the Protection of Human Rights and the European Court of Human Rights, but I do not read the words of his paper as limiting his restrictive view of the judicial power to that court alone. I gather he thinks that all courts should be limited to the adjudication of rights as he defines them. But I am not sure what justifies a sweeping skepticism about the ability of all judges and all courts to reach sound decisions about obligations under law.

One clue to the source of Christie's skepticism is his assertion that "[t]he 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."⁵ What Christie finds "obvious" I find unfounded. Ronald Dworkin did at one time defend the "one right answer" thesis, but I cannot say that a Herculean epistemology was the historical justification for the rather broad judicial power of the common law judge. While the cases, especially the older ones, sometimes *talk* in terms that suggest that law is geometry, I agree with Mary Ann Glendon and others that our forebears on the bench—and those legislators who had a hand in assigning our judicial forbears their judicial role—understood that the judgments of practical reason, even from the bench, are often based on probabilities, even if their consequences in the case are final.⁶ When learning grows and the probabilities shift, precedents can be reversed and distinguished based on new—but *not necessarily certain*—learning.⁷

The diachronic process I just described depends for its success, of course, on there being a working tradition. And that, of course, is what is largely missing as a context for the operation of the European Court of Human Rights. It is also increasingly missing in the United States, where, to borrow a phrase from Professor Glendon, tradition bashing is all the rage.⁸ To the extent a culture devalues tradition, the crucible by which practical knowledge makes its bloody entrance and slow but potentially steady increase, it will be prudent to limit the judicial role. But since by hypothesis the culture in question has devalued tradition, it follows that there will be comparatively little reason to hope that there will be truly prudential judgments about the scope of the judicial office. And this, I suspect, is some of what is behind Professor Christie's anxiety, which I share, about what the European Court of Human Rights has been up to. A culture in decline must struggle against a massive undertow, *but*, as I

5. *Id.* at 815.

6. Mary Ann Glendon, *Knowledge Makes a Noisy Entrance: The Struggle for Self-Appropriation in Law*, 10 LONERGAN WORKSHOP 119, 130–33 (1994).

7. I have defended this proposition and the epistemology it depends on in Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. REV. 227, 292–349 (2002).

8. Glendon, *supra* note 6, at 135–41.

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learned from Bernard Lonergan, there is no terrestrial alternative to doing it one step at a time. This is not to make judges philosophers; it is to expect them to be contributors to a dynamic system of practical reason.

This brings me to a final cluster of related issues I would like to address in these brief remarks. Professor Christie maintains that:

[W]hen difficult situations arise in which the achievement of one basic good requires the sacrifice of other basic goods, the conflict can only 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 form a lifetime of experience and observation. . . . 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.⁹

First, I am not sure why the test is what the courts—or anyone else—can do “easily.” Second, again, no one I know of is maintaining that all of morality should be given legal effect. Third, Professor Christie argues for a limitation on the judicial office based on the difficulty of achieving prudence. As Aquinas maintains, however, prudence is required not just of the judge but also of the legislator.¹⁰ It follows that Professor Christie has proved too much. On Christie’s argument from the difficulty of achieving prudence, we could hardly have legislators. We have to work with humans as they are, however, hoping to help them become what they should be. The judicial function does indeed need to be limited, but perhaps virtue rather than Hofeldian rights would be the better limit. It is, in any event, one truer to the fact that law is not a closed system.¹¹

Finally, without denying the difficulty of individuals’ growing in prudence and cultures’ growing in wisdom, I do think Christie, following Finnis on this, has made things in one respect more difficult than they are in

9. See Christie, *supra* note 1, at 811–12.

10. THOMAS AQUINAS, SUMMA THEOLOGICA II-II 50.1 c. (“It belongs to prudence to govern and command, so that wherever in human acts we find a special kind of governance and command, there must be a special kind of prudence. Now it is evident that there is a special and perfect kind of governance in who has to govern not only himself but also the perfect community of a city or kingdom; because a government is more perfect according as it is more universal, extends to more matters, and attains a higher end. Hence prudence in its special and most perfect sense, belongs to a king who is charged with the government of a city or kingdom: for which reason a species of prudence is reckoned to be regnative.”). What Aquinas says of a king applies *mutatis mutandis* to a legislature. On the role of the artful and prudent lawgiver, see Patrick McKinley Brennan, *Law in a Catholic Framework*, in TEACHING THE TRADITION: CATHOLIC THEMES IN ACADEMIC DISCIPLINES 437, 449–51 (John J. Piderit & Melanie M. Morey eds., 2012).

11. H. Jefferson Powell has noted the “anxiety” caused by recognition of law’s “resistance to closure and its correlative amenability to change.” H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 15 (2008).

fact. It is a hallmark of the Finnis-Grisez and, in turn, Christie account of natural law that, from the point of view of practical reason, all basic goods, seven in number, are equally fundamental. There is no naturally knowable hierarchy among them. They are incommensurable.¹² And this leads, in turn, to the particular epistemic difficulty that vexes Professor Christie: judges' acting arbitrarily because they are deciding among "goods [that] are accepted as being of equal value."¹³ The more traditional theory of natural law that Finnis, Grisez, and Christie reject, however, affirms a hierarchy of human goods. The good always is particular, and often difficult to know, but the fallible human grasp of a hierarchy at least provides an in-principle barrier against choosing arbitrarily between freedom of speech and, say, the freedom to give almighty God the worship that is His by right.

In conclusion, I would suggest that the better solution to the problem Professor Christie has wisely identified is a return to the more traditional account of the natural law and its insistence that the work of judges and legislators alike is prudently to give legal effect to the hierarchical natural law and of derivative natural right. And, lest my conclusion seem anodyne, I would add that in a culture better than our own, civil lawmakers' understanding of the natural law and derivative natural right would be enhanced and corrected on the basis of the divine positive law as authoritatively understood by the Church. But that, obviously enough, is virtually the polar opposite of what the European Court of Human Rights was created to do.

12. See RUSSELL HITTINGER, *A CRITIQUE OF THE NEW NATURAL LAW THEORY* 75 (1987) ("[N]o objective hierarchy among the basic goods."); see also Joseph Boyle, *Free Choice, Incomparably Valuable Options, and Incommensurable Categories of Good*, 47 *AM. J. JURIS.* 123 (2002); Germain Grisez, Joseph Boyle & John Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, 32 *AM. J. JURIS.* 99 (1987).

13. See Christie, *supra* note 1, at 821.