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Law as Integrity: Chief Justice McKusick's Common Law Jurisprudence

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LAW AS INTEGRITY: CHIEF JUSTICE McKUSICK'S COMMON LAW JURISPRUDENCE

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INTRODUCTION

This Article sketches an outline of Chief Justice McKusick's common law jurisprudence.[1] The Article provides a model only, a suggested characterization of the Chief Justice's jurisprudence based upon the Author's reading of a significant number of his court opinions. Since it is intended as an outline only, the Article confines itself to a careful examination of only three of the over seven hundred court decisions authored by Chief Justice McKusick; a more extensive examination will have to be left to another time. Nevertheless, the Author has found those three decisions representative of Chief Justice McKusick's common law method, and particularly helpful in understanding his jurisprudence.

This Article suggests that Chief Justice McKusick practices a common law jurisprudence best described as "Law as Integrity."[2] That jurisprudence, as explained by Professor Ronald Dworkin, in-

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1. This Article distinguishes a common law jurisprudence from a statutory jurisprudence. The former addresses the legal force of prior judicial decisions in areas not explicitly addressed by statute. The latter looks to the legal character of legislative actions. *See* R. DWORKIN, LAW'S EMPIRE 313-55 (1986). Chief Justice McKusick's statutory jurisprudence bears some similarity to his common law methodology, in that he recognizes that legal reasoning concerning one statute may carry precedential weight when interpreting a different statute that addresses similar concerns. *See, e.g.*, Maine Human Rights Comm'n v. City of Auburn, 408 A.2d 1253, 1261 (Me. 1979) (when interpreting Maine Human Rights Act, the court may consider federal case law interpreting analogous federal statutes).

Finally, one could also identify a constitutional jurisprudence, given the special considerations that arise when addressing constitutional questions. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("it is *a constitution* we are expounding").

2. The appellation, "Law as Integrity," was developed by Professor Ronald Dworkin in LAW'S EMPIRE, *supra* note 1. This Article borrows heavily on Professor Dworkin's description of Law as Integrity, and finds that description to best characterize Chief Justice McKusick's common law method. Professor Dworkin has developed his legal philosophy over time, and its essential parts can be seen in a number of his earlier works. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977); R. DWORKIN, A MATTER OF PRINCIPLE 146-77 (1985).

The Author's discussion of Law as Integrity is not intended to be original. Rather, the thesis of this Article is that Professor Dworkin's Law as Integrity jurisprudence provides a helpful model for understanding the Chief Justice's common law methodology.

sists upon the integrity of the law — on developing a coherent body of law over time through individual court decisions. Under Law as Integrity, individual court decisions should draw upon and reflect the judge's best interpretation of the general principles, legal and moral, that characterize the legal tradition. Thus the law that controls a case is more than any particular collection of court decisions—it includes as well the general principles implicit in those decisions. The judge in hard cases is bound to respect not just those prior legal holdings, but also general principles underlying those rulings. Because Law as Integrity requires judges to look for and respect those general principles implicit in the legal tradition, practitioners of this jurisprudence see judicial decisions not simply as controlling precedents when "on point," but also as useful indicators of the meaning of a more complex legal "text," even when not controlling.

In short, Law as Integrity views the law as that seamless web first noted by Frederick Maitland in his review of the history of English law.[3] Individual court decisions are connected by broader strands of explanatory principle, which in turn give coherence to the law. Judicial decisionmaking within that web, therefore, should respect and add to its overall coherence. Consequently, the normative force of particular court decisions arises out of the degree to which those decisions respect the integrity of the law.

This Article begins with an overview of the jurisprudence of Law as Integrity, setting forth its basic components.[4] Following that discussion, the Article turns to three opinions by Chief Justice McKusick as case studies linking his jurisprudence with Law as Integrity.[5] The Article ends with a brief discussion of why Law as Integrity is the appropriate judicial method for judges resolving uncertain questions of law.[6]

The first of the three cases to be examined, *Bell v. Town of Wells*,[7] involved the scope of the public's easement to use intertidal beachfront in the Town of Wells, otherwise held in fee simple by the upland landowner.[8] Despite the great controversy spurred by the *Bell* decision in the pages of this journal and elsewhere,[9] the case

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3. *See* F.W. Maitland, *A Prologue to a History of English Law*, 14 LAW QUARTERLY REVIEW 13 (1898); *see also* 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW, (2d ed. 1899).

4. *See infra* Part I.

5. *See infra* Parts II-IV.

6. *See infra* Part V.

7. 557 A.2d 168 (Me. 1989).

8. *Id.* at 169.

9. *See, e.g.*, Delogu, *Intellectual Indifference — Intellectual Dishonesty: The Colonial Ordinance, The Equal Footing Doctrine, and the Maine Law Court*, 42 MAINE L. REV. 43 (1990); Rieser, *Public Trust, Public Use, and Just Compensation*, 42 MAINE L. REV. 5 (1990). *See also* Beem, *The Majority is in the Minority*, Me. Times,

presents a straightforward example of Chief Justice McKusick's Law as Integrity jurisprudence. As an example of that jurisprudence, it was in fact a relatively easy case.

The second and third cases to be discussed further establish the interpretive character of the Chief Justice's common law method and link it more firmly with Law as Integrity. The second case, *Estate of Worthley*,[10] involved a question of will interpretation, albeit in a difficult context. The third, *In re Gardner*,[11] presented the painful question of when life-sustaining medical treatment could be discontinued. In both those decisions, Chief Justice McKusick had to go beyond particular precedents to more general legal principles that appeared to characterize the case law at issue, and then relied upon his interpretation of those general principles to help resolve the particular questions before him. In *Estate of Worthley*, the background theory relied on by Chief Justice McKusick narrowly characterizes will construction. *In re Gardner*, however, finds the Chief Justice drawing upon broader moral principles that appear for him to be at least partially definitional of the Anglo-American common law tradition.

I. An Outline of Law as Integrity

This Article begins with the premise that a judge's jurisprudence is made clear primarily through his resolution of hard cases.[12] When legal precedents or the wording of a statute clearly spells out the rights and duties of particular parties, a judge's role is easy and his decision is of little relevance to an understanding of his jurisprudence.[13] With a hard case, however, legal rights and duties are not clearly spelled out, either in relevant precedents or in the language

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Apr. 21, 1989, at 7.

10. 535 A.2d 433 (Me. 1988).

11. 534 A.2d 947 (Me. 1987).

12. The Article follows Professor Dworkin's emphasis on "hard cases" as central to the recognition of a judge's jurisprudential method. *See* R. Dworkin, Taking Rights Seriously, *supra* note 2, at 81-130 (1977).

13. The exception to this rule is when social developments bring to light that particular precedents, once clearly established, no longer reflect the more general legal or moral principles upon which the law is based. A case that once would not have appeared difficult now has become so. *See* Brown v. Board of Education, 347 U.S. 483 (1954). Principles of *stare decisis* then come to the fore, and a court must wrestle with when the gravitational force of legal principles implicit in other court decisions and the law generally compel that a prior decision be overruled. The Law Court has set forth standards for determining when a prior decision should be overruled. *See* Comeau v. Maine Coastal Servs., 449 A.2d 362, 371 (Me. 1982) (Carter, J., concurring); Myrick v. James, 444 A.2d 987, 1000 (Me. 1982). Those standards include the erosion of those legal principles that formerly supported the decision. *See* Myrick v. James, 444 A.2d at 1000. *See also* Note, *City of Portland v. DePaolo: Defining the Role of Stare Decisis in State Constitutional Decisionmaking*, 41 Maine L. Rev. 201, 214-15 (1989).

of a statute. Nevertheless, a controversy exists and litigants are before the court demanding an answer. How a particular judge goes about resolving those hard cases and what resources the judge is able to draw upon, give clear indication of that judge's jurisprudence. In keeping with this basic premise, this Article finds in Chief Justice McKusick's resolution of three hard cases the outline of his Law as Integrity jurisprudence.

A. Competing Jurisprudential Methods

Recent history presents us with two strong competing jurisprudential theories about how hard cases are resolved. One school of thought suggests that the law is fully contained within clearly established sources — the Constitution, statutes, and the holdings of prior court decisions — and when those sources of law do not declare a particular right, no right can be said to exist.[14] Judges exceed their authority when they move beyond the declarations of law in those sources to recognize new rights previously not contained in the law.[15] This school of thought has been described in its various forms as legal conventionalism, but has more popularly been identified as a form of judicial restraint.[16] An alternative school of thought holds that the law is simply what judges say it is in particular cases, and that judges in deciding cases should generally attempt to do what they think is best for the community in those circumstances. Professor Dworkin identifies this jurisprudence as legal pragmatism,[17] but it also may characterize legal realism.[18] It appears generally to corre-

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14. Professor Dworkin identifies this school of jurisprudence as "conventionalism." *See* R. DWORKIN, *supra* note 1, at 114-17. *See generally id.* at 114-50 (broadly discussing the jurisprudence of conventionalism).

15. In LAW'S EMPIRE, Professor Dworkin recognizes that in certain strands of conventionalism, a judge may properly move beyond the law and declare new rights. The important point, however, is that the newly recognized right in no sense existed before its judicial recognition. *See* R. DWORKIN, *supra* note 1, at 118-20. Neither party, that is, had a legal right to a decision in his or her favor.

16. *Id.* In *Taking Rights Seriously*, Professor Dworkin appears to be discussing conventionalism when he examines the popular conception of judicial restraint. R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 136-38. Robert Bork has described another version of this jurisprudence in the constitutional context as "originalism." *See* R. BORK, THE TEMPTING OF AMERICA (1990). *See also* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. REV. 1 (1971). Conventionalism need not require judicial restraint, however. *See supra* note 15.

17. *See* R. DWORKIN, *supra* note 1, at 95, 151-75. Professor Dworkin notes that this view of the law in essence assumes there is no such thing as legal rights that compel particular responses by judges when called into play. *Id.* at 152.

18. Professor Dworkin draws this comparison with some justification. *See id.* at 153. Oliver Wendall Holmes, a precursor of the legal realism movement, noted that "[t]he prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by the law." O. W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 173 (1920). For a general discussion of legal realism (or "rule-skepticism"), see H. L. A. HART, THE CONCEPT OF LAW 132-44 (1961). Legal realism is alive and well

spond with what is popularly known as judicial activism.

One of the problems shared by both schools of jurisprudence, however, is that they assume that when litigants come before the court with a hard case involving uncertain rights, neither party has a *legal* claim that the case should be resolved in a certain way. They may each appear to offer legal reasons, and may also employ political or practical arguments in their own behalf, but neither party can be understood as having a legal right to any particular resolution of the matter. For conventionalism generally, the litigant will lose when there are no clearly declared legal rights supporting the litigant's cause. For legal pragmatism, the result will more likely depend on the political perspective of the judge.[19] But in each case, the litigant in a hard case comes into court without a legal right to the result sought.

B. Law as Integrity

Most students and practitioners of the law recognize that legal precedents do not run out in the manner suggested by either the legal realist or conventionalist.[20] Even when legal precedents are not on point, the parties nevertheless carry into court claims of right based upon legal principles that appear to underpin and explain the

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in Maine in its more cynical forms. *See e.g.*, Simmons, *A Window of Vulnerability*, 40 MAINE L. REV. 19 (concluding that the Law Court practices "result-oriented" jurisprudence). *See also* Herlan, *Letter to the Editor* MAINE L. REV., Oct. 1988, at 2 (contesting Mr. Simmon's comments).

Professor Dworkin also links the new Critical Legal Studies movement with legal pragmatism. *See* R. DWORKIN, *supra* note 1, 271-74. Both legal realism and critical legal studies see judicial decisionmaking as essentially political in character. The critical legal theorists often see court decisions as advancing capitalist political ideologies, *see e.g.*, Kairys, *Introduction*, in THE POLITICS OF LAW 1, 4-6 (D. Kairys ed. 1982), whereas some legal realists understand the law as a positive social tool for remaking society, *see* K. LLEWELLYN, JURISPRUDENCE, REALISM IN THEORY AND PRACTICE 42-74 (1962); J. AUSTIN, *Lecture II*, (1832) *reprinted in* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 33 (1954).

19. *See* R. DWORKIN, *supra* note 1, at 148-50.

20. This Article assumes that the force of any particular jurisprudence arises at least in part out of whether it describes with reasonable accuracy what judges and lawyers in fact are doing when they argue about how a particular case should be resolved. To the extent that an ideal theory of jurisprudence fails in a significant sense to account for actual judicial decisionmaking, it should be revised as a poor interpretation of the process it claims to be describing. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 103-105. *See also* R. DWORKIN, *supra* note 1, at 65-68. John Rawls has described a similar process more fully in his account of a general theory of justice. *See* J. RAWLS, A THEORY OF JUSTICE 20-21, 579-81 (1971) (describing the process by which a theory of justice is developed as "reflective equilibrium"). *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 150-55 (discussing the concept of "reflective equilibrium" in Rawls' work); Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHILOSOPHY & PUBLIC AFFAIRS 223, 236 n.19 (1985) (commenting on Dworkin's comments).

relevant case law. Law as Integrity assumes that those principles constrain the judge's decisionmaking, and requires that the judge's decision accord with the best interpretation of those underlying principles. Professor Dworkin explains the process as follows:

> A judge who accepts integrity will think that the law it defines sets out genuine rights litigants have to a decision before him. They are entitled, in principle, to have their acts and affairs judged in accordance with the best view of what the legal standards of the community required or permitted at the time they acted, and integrity demands that these standards be seen as coherent, as the state speaking with a single voice.[21]

In short, when poised for the resolution of a hard case, the common law judge is neither fully free nor fully bound. The judge may proclaim rights that have not been recognized previously, but only when those rights reflect the judge's best interpretation of the guiding principles implicit in the relevant area of law.

Law as Integrity assumes, therefore, that implicit in the law are general principles that explain and justify its character, and that a judge faced with a hard case of uncertain law should draw upon his best interpretation of those general principles, and use them to help resolve the hard case in a manner consistent with the general principles. To explain this interpretive process, Professor Dworkin has compared the law with various social practices,[22] including games such as chess,[23] which can be understood as having a character of their own. When faced with a hard case of rule interpretation within that social practice, the adjudicator is not free to resolve the issue in whatever way he or she pleases, but instead resorts to the best interpretation of what the character of the practice is.[24] The adjudicator then attempts to answer the hard case in a way most consistent with the character of the game as the adjudicator understands it — thereby maintaining the integrity of the social practice. Different people could interpret the character of the practice differently, and in that sense the adjudicator's interpretation is a "contested concept."[25] Yet the participants all agree that there is a character to the practice and that hard cases should be resolved in accordance with that character. Professor Dworkin describes the process as follows:

> The hard case puts, we might say, a question of political theory. It asks what it is fair to suppose the players have done in consenting to [a particular] rule. The concept of a game's character is a con-

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21. R. DWORKIN, *supra* note 1, at 218.

22. *See* R. DWORKIN, *supra* note 1, at 62-65. In TAKING RIGHTS SERIOUSLY, Professor Dworkin drew an analogy between the law and rules of courtesy such as removing one's hat in church. R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 53-58.

23. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 101-105.

24. *See id.* at 103.

25. *Id.* at 101-105.

> ceptual device for framing that question. It is a contested concept that internalizes the general justification of the institution so as to make it available for discriminations within the institution itself. It supposes that a player consents not simply to a set of rules, but to an enterprise that may be said to have a character of its own; so that when the question is put — To what did he consent in consenting to that? — the answer may study the enterprise as a whole and not just the rules.[26]

Professor Dworkin expands on this process by describing three stages in the resolution of a hard case within a social practice. The first is a "preinterpretive stage" of identifying the rules and standards that seem clearly to characterize the practice.[27] Drawing upon his understanding of those rules and standards, the interpreter then constructs a

> general justification for the main elements of the practice identified at the preinterpretive stage. This will consist of an argument why a practice of that general shape is worth pursuing, if it is. The justification need not fit every aspect or feature of the standing practice, but it must fit enough for the interpreter to be able to see himself as interpreting that practice, not inventing a new one.[28]

The interpreter then applies an understanding of the general character of the practice to the hard case, thereby maintaining the character of the practice while resolving the particular dispute.[29]

Law as Integrity is premised on the understanding that law generally, or even a particular area within the law, is a social practice having a character of its own. Given the complexity of the law, its character could be described as "underdetermined" — that is, subject to a variety of reasonable interpretations as to its meaning.[30] But under Law as Integrity a judge accepts that there is a "character to the game," and that a hard case should be resolved by drawing upon the best interpretation of the general principles that justify that practice.[31] To the extent that the judge is successful, the integrity of the law is maintained. Professor Dworkin explains:

> Integrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation. An institution that accepts that ideal will sometimes, for that reason, depart from a narrow line of past decisions in search of fidelity to

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26. *Id.* at 104-105.
27. R. DWORKIN, *supra* note 1, at 65-66.
28. *Id.* at 66.
29. *Id.*
30. *Id.* at 52-53.
31. In TAKING RIGHTS SERIOUSLY, Professor Dworkin creates a fictitious judge, Hercules, and then illustrates the interpretive process by depicting Judge Hercules' resolution of a hard case of law. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 105-30.

> principles conceived as more fundamental to the scheme as a whole.[32]

Under the jurisprudence of Law as Integrity, the common law judge is bound not simply by the particular holdings of earlier courts, but also by that judge's interpretation of the general legal principles that justify those earlier decisions. Thus, although the earlier decisions do not themselves answer the hard case, the judge nevertheless remains bound to resolve that hard case by applying the judge's best interpretation of the principles behind those decisions. Professor Dworkin explains the process as follows:

> [Integrity] insists that the law — the rights and duties that flow from past collective decisions and for that reason license or require coercion — contains not only the narrow explicit content of these decisions but also, more broadly, the scheme of principles necessary to justify them.[33]

C. Law as Integrity and Interpretation

Clearly, the common law judge practicing Law as Integrity applies a methodology that is essentially interpretive in nature.[34] The interpretive essence of this jurisprudence is important for a number of reasons. First and foremost, it explains the manner in which the judge's decisionmaking is constrained by past precedents. Second, it explains the fluid and creative character of the common law method.

On the first point, the judge begins with the understanding that there are in fact general legal principles that best justify the collection of disparate decisions relevant to the hard case presented.[35] The judge's primary obligation in resolving that hard case is to develop the best possible reconstruction of those legal principles and apply them to the case at hand.[36] Once that reconstruction has been com-

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32. R. DWORKIN, *supra* note 1, at 219.

33. *Id.* at 227.

34. *See* R. DWORKIN, *supra* note 1, at 45-86, 410-13; R. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 146-66. The study of interpretation as a guide to social practices (also known as hermeneutics) is fast growing. This Article will not review that body of commentary. For those wishing to pursue that study as it relates to law, see Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories*, 38 KAN. L. REV. 815 (1990); Wroth, *The Constitution and the Common Law: The Original Intent about the Original Intent*, 22 SUFFOLK U.L. REV. 553 (1988); Note, *Dworkin and Subjectivity in Legal Interpretation*, 40 STAN. L. REV. 1517 (1988); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

35. *See supra* notes 20-33 and accompanying text for a discussion of this point. *See infra* Part V and accompanying text for a discussion of why judges and lawyers should assume there are unifying principles implicit in the law, and why they should respect those principles, once discerned.

36. As discussed *supra* at notes 26-33 and accompanying text, the law is most helpfully viewed as an extremely complex social practice the meaning of which is

pleted, the judge is strictly bound to apply those legal principles as he or she understands them. In that sense, the judge is never free to apply a personal moral or philosophical belief as a legislator might be in resolving the hard case.[37] The decisionmaking remains channeled by the body of case law relevant to the issue, and the judge's best interpretation of the principles explaining those cases.

The interpretive character of Law as Integrity also explains its creativity, however.[38] Unlike conventionalism, the judge is free to go beyond the simple holdings of earlier decisions to draw upon his or her best interpretation of the principles implicit in those decisions. To the extent rights and duties at issue are clarified, consistent with the underlying character of the law, the judge has created something that was not clearly there beforehand. The judge has not just added an additional holding to the common law pool, but has also added an interpretive reconstruction of the principles involved. The channeled creativity of Law as Integrity explains well the capacity of the common law to grow and develop over time.[39]

Having provided a general outline of Law as Integrity, this Article now turns to three of Chief Justice McKusick's legal opinions on

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subject to a variety of reasonable interpretations. Thus, both litigants in a hard case may in good faith believe they are legally entitled to win. Nevertheless, Law as Integrity assumes that there is, in theory, one best interpretation of the character of the law, which a judge must pursue when required for the resolution of a particularly hard legal issue. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 279-90; R. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 119-45. One reason for this assumption is practical: the judge must resolve the case, and since the judge sees his or her duty as maintaining the integrity of the law, the judge strives to develop the very best interpretation of the practice at issue. On a more philosophical plane, however, Law as Integrity depicts the political community as a moral actor that must justify its actions in a morally consistent manner. *See infra* notes 140-50 and accompanying text. As Professor Dworkin explains, "We accept integrity as a political ideal because we want to treat our political community as one of principle, and the citizens of a community of principle aim not simply at common principles, as if uniformity were all they wanted, but the best common principles politics can find." R. DWORKIN, *supra* note 1, at 263.

37. Law as Integrity, like any sensible jurisprudence, recognizes that a judge's personal predilections unavoidably shape the way cases are decided. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 123-26. As the judge draws upon more abstract legal and moral theories in an effort to conceptualize the law, the judge becomes more likely to rely on personal political and moral convictions. Yet even at this stage of the argument, the personal convictions of the judge practicing Law as Integrity count only to the extent that the judge in fact believes that they best characterize the law being interpreted. To the extent that those personal convictions fail to do so, they should be disregarded by the judge in resolving the case. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 125-27.

38. *See* R. DWORKIN, *supra* note 1, at 48-49, 220.

39. *In re* Robinson, 88 Me. 17, 23, 33 A. 652, 654 (1895) ("The common law would ill deserve its familiar panegyric as the 'perfection of human reason,' if it did not expand with the progress of society and develop with new ideas of right and justice.").

hard cases of uncertain law. In the first case, *Bell v. Town of Wells*, the Maine Supreme Judicial Court, sitting as the Law Court, had before it a substantial amount of precedent defining the legal issues presented by the case. The case therefore required less abstract conceptualizing than would be necessary for a hard case in less charted waters. It nevertheless depicts clearly the channeled character of Law as Integrity when the legal principles at issue are fairly well established. In *Estate of Worthley* and *In re Gardner*, however, we see the Chief Justice moving into more amorphous areas of the law. In the former, he finds the answer by drawing upon general principles characterizing will construction. In the latter, we see him looking to more abstract background principles generally characteristic of the common law.

II. THE SCOPE OF THE PUBLIC'S RIGHT TO THE BEACHFRONT INTERTIDAL ZONE

The Law Court's decision in *Bell v. Town of Wells* ("*Bell II*")[40] is interesting for a variety of reasons,[41] but this Article examines it as an example of Chief Justice McKusick's Law as Integrity jurisprudence. In particular, Chief Justice McKusick's opinion highlights well the manner in which he isolates the legal precedents relevant to a hard case of uncertain law, articulates the general legal concept he understands to best characterize those precedents, and then relies upon that general interpretive concept to shed light on the proper answer to the particular hard case. The disagreement between Chief Justice McKusick and the dissent in *Bell II* involved primarily the freedom of the court to redefine the relevant text it had before it.

As is fairly well known by now, *Bell II* involved a quiet title action brought by the owners of shoreland property in the Town of Wells, bordering on Moody Beach.[42] The landowners were seeking a declaratory judgment limiting use of the intertidal zone by members of the public to fishing, fowling, and navigation. The various defendants

40. The case first went to the Law Court on appeal of a decision by the superior court dismissing the quiet title action brought by the private landowners. The superior court had concluded that because the state was a "trustee of the public easement in the intertidal zone," it was a necessary party to the action and consequently the action against it was barred by the doctrine of sovereign immunity. *See* Bell v. Town of Wells, 510 A.2d 509, 510-11 (Me. 1986). The Law Court vacated that dismissal, concluding that the state was not a necessary party since the public easement was not in any sense "owned" by the state. *Id.* at 517. Accordingly, the quiet title action could proceed. This Article refers to that decision as *Bell I*, and to the more recent Law Court decision at 557 A.2d 168 as *Bell II*.

41. The Law Court also concluded that the Maine Legislature's Public Trust in Intertidal Land Act, ME. REV. STAT. ANN. tit. 12, §§ 571-573 (Supp. 1990-1991), unconstitutionally deprived the plaintiffs of a property interest without just compensation. *See* Bell v. Town of Wells, 557 A.2d at 176-79. For a discussion of that aspect of the holding, see Rieser, *supra* note 9.

42. Bell v. Town of Wells, 557 A.2d at 169.

and *amici* in the action urged the court to recognize a public easement to use the intertidal area for general recreational purposes, and specifically for bathing, sunbathing, and recreational walking.[43] A majority of the Law Court held for the landowners, and Chief Justice McKusick wrote the majority opinion. Justice Wathen wrote a carefully reasoned dissent, and the two opinions present a sharp contrast in judicial methodologies.[44]

A. The Pieces of the Puzzle Before the Law Court

Whatever one believes should have been the outcome in *Bell II*, there can be little dispute about the relevant factors to be assessed in reaching a decision.[45] There was little difference between Chief Justice McKusick and Justice Wathen on the legal precedents considered important to a decision or on the meaning of those precedents. The real difference lay in how each justice understood his own role in declaring the law in light of those precedents.

The historical backdrop of the case is found, of course, in the Colonial Ordinance of 1641-48, which in essence first granted to private upland owners a personal property interest in the intertidal area.[46] Prior to that time, the intertidal area had been held by the sovereign, both in his personal capacity and in trust for the public.[47] By 1810, at the time the Massachusetts Supreme Judicial Court decided *Storer v. Freeman*,[48] it was well established that the principles set forth in the Colonial Ordinance had become a part of Massachusetts common law:

> [B]ut from that time to the present an usage has prevailed, which now has force as our common law, that the owner of lands bounded

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43. When the case first went up to the Law Court, the court rejected the holding that the State of Maine was a necessary party defendant to the action as "a trustee of the public easement in the intertidal zone at Moody Beach." Bell v. Town of Wells, 510 A.2d at 517. The state nevertheless remained a party to the action. *See* Bell v. Town of Wells, 557 A.2d at 170-71 n.8.

44. Bell v. Town of Wells, 557 A.2d at 180-92 (Wathen, J., dissenting). Justice Wathen was joined in dissent by Justices Roberts and Clifford.

45. Professor Delogu, however, strongly insists that the equal footing doctrine should have altered the outcome of the case. *See* Delogu, *supra* note 9, at 53-64. Even the dissent appeared to reject this proposition, however. *See* Bell v. Town of Wells, 557 A.2d at 181-82.

46. For a full discussion of the history of the Colonial Ordinance, as well as its 1641 and 1648 texts, see Bell v. Town of Wells, 510 A.2d at 511-14. *See also* Bell v. Town of Wells, 557 A.2d at 170-71; Cheung, *Rethinking the History of the Seventeenth-Century Colonial Ordinance: A Reinterpretation of an Ancient Statute*, 42 MAINE L. REV. 115 (1990); Comment, *The Public Trust Doctrine in Maine's Submerged Lands: Public Rights, State Obligation and the Role of the Courts*, 37 MAINE L. REV. 105, 110-11 (1985).

47. *See* Bell v. Town of Wells, 510 A.2d at 511; *see also* Shively v. Bowlby, 152 U.S. 1, 11-13 (1894) (discussing the Crown's original authority over intertidal area).

48. 6 Mass. 435 (1810).

> on the sea or salt water shall hold to low water mark . . . but the rights of others to convenient ways are saved . . . .[49]

Those Massachusetts common law principles in turn became a part of Maine common law when in 1820 the new Maine Constitution declared that "[a]ll laws now in force in this State, and not repugnant to this Constitution, shall remain, and be in force, until altered or repealed by the Legislature . . . ."[50] If there were any doubt regarding whether the Massachusetts common law rule on the intertidal zone had become a part of Maine law at that time, the doubt was resolved in 1831 by the Law Court in *Lapish v. President of the Bangor Bank*,[51] wherein the court reaffirmed the principles set forth in *Storer*, and concluded that "the law on this point has been considered as perfectly at rest."[52]

The *Bell II* decision, however, involved primarily the nature of the public and private property interests in the intertidal zone, rather than whether property interests existed at all. On this issue, too, there was little disagreement on the bench regarding the legal precedents relevant to those competing property interests[53] — the Law Court had addressed the scope of those property interests in approximately a dozen cases between 1831 and 1925,[54] and not at all

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49. *Id.* at 438.

50. Me. Const. art. X, § 3. As described by the Law Court, that constitutional provision was derived from section six of the Massachusetts Act of Separation of 1819. *See* Bell v. Town of Wells, 510 A.2d at 514 n.10.

51. 8 Me. 85 (1831).

52. *Id.* at 93. In light of that decision, Professor Delogu's argument regarding the equal footing doctrine is simply inapplicable to the *Bell* case. *See* Delogu, *supra* note 9, at 53-64. The United States Supreme Court's decision in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484 (1988), made absolutely clear that states newly admitted to the Union were perfectly free to adopt common law principles that differed from those of the original 13 states. Maine exercised its sovereignty in just this manner both through Article X, section 3, of its new constitution and, if there were any doubt, by judicial declaration in 1831 by the *Lapish* court. *See* Bell v. Town of Wells, 557 A.2d at 172.

The vituperative tone of Professor Delogu's article is odd, given the clear legal precedents he was up against. *See* Delogu, *supra* note 9, at 44 (describing the Law Court's decision as "intellectual dishonesty"). The weakness of Professor Delogu's contention is seen in the fact that his central arguments are directed at the 1831 *Lapish* court. *Id.* at 58-59. The *Lapish* court, of course, was not alienating real property when it reached its conclusion. Rather, it was summarizing Maine common law, as formally adopted from Massachusetts through Article X, section 3, of the Maine Constitution.

53. One difference, to be discussed *infra* at note 58, was the dissent's reliance on the 1925 decision in Andrews v. King, 124 Me. 361, 129 A. 298 (1925). *See* Bell v. Town of Wells, 557 A.2d at 187 (Wathen, J., dissenting).

54. The Law Court recognized 15 Maine decisions between 1831 and 1925 as relevant to the issue before it. *See* Andrews v. King, 124 Me. 361, 129 A. 298 (1925); State v. Leavitt, 105 Me. 76, 72 A. 875 (1909); Smart v. Aroostook Lumber Co., 103 Me. 37, 68 A. 527 (1907); Sawyer v. Beal, 97 Me. 356, 54 A. 848 (1903); Marshall v. Walker, 93 Me. 532, 45 A. 497 (1900); McFadden v. Haynes and DeWitt Ice Co., 86 Me. 319, 29

since then until the *Bell* decisions in 1986 and 1989.[55] By the time *Bell II* came before the Law Court, it was clearly established that the upland owner held title to the intertidal zone in fee simple.[56] Conversely, the public right to use that zone was in the nature of an easement.[57] The question before the court was simply the scope of that easement.

Chief Justice McKusick looked to the 155-year span of precedents before the Law Court and concluded that the scope of the easement at issue was unavoidably tied to an interpretation of the terms "fishing, fowling, and navigation." He explained: "We have never, however, decided a question of the scope of the intertidal public easement except by referring to the three specific public uses reserved in the Ordinance."[58] Thus the relevant case law provided Chief Justice McKusick with a text, and he drew from that text the general legal principle that the public has an easement to "fish, fowl, and navigate." The court would interpret liberally what those particular terms mean, Chief Justice McKusick observed, but the scope of the easement is contained therein.[59]

In reaching that conclusion, Chief Justice McKusick found irrelevant the Town's factual contention that the intertidal zone had been used for many other purposes besides fishing, fowling, and navigation.[60] Important for Chief Justice McKusick instead were the court decisions themselves, in addition to the Colonial Ordinance. He

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A. 1068 (1894); Snow v. Mount Desert Island Real Estate Co., 84 Me. 14, 24 A. 429 (1891); King v. Young, 76 Me. 76 (1884); Barrows v. McDermott, 73 Me. 441 (1882); Hill v. Lord, 48 Me. 83 (1861); State v. Wilson, 42 Me. 9 (1856); Moulton v. Libbey, 37 Me. 472 (1854); Deering v. Proprietors of Long Wharf, 25 Me. 51 (1845); Moore v. Griffin, 22 Me. 350 (1843); French v. Camp, 18 Me. 433 (1841); Lapish v. President of the Bangor Bank, 8 Me. 85 (1831).

55. Also of some relevance to the court as a whole was its 1952 decision in State v. Lemar, 147 Me. 405, 87 A.2d 886 (1952), and the opinion by the Maine Supreme Judicial Court in *Opinion of the Justices*, 437 A.2d 597 (Me. 1981). For a brief discussion of the special character of advisory opinions by the Supreme Judicial Court, See Herlan, *Book Review*, 41 MAINE L. REV. 223, 228 & nn.35-37 (1989).

56. The Law Court had earlier reached that conclusion in Bell v. Town of Wells, 510 A.2d at 516; Marshall v. Walker, 93 Me. at 536, 540, 45 A. at 498-499; State v. Wilson, 42 Me. at 28.

57. *See, e.g.*, Bell v. Town of Wells, 510 A.2d at 516-17. *See also* Marshall v. Walker, 93 Me. at 536, 540, 45 A. at 498-499. The United States Supreme Court had also described the right of the upland owner as a fee interest subject to "public rights of navigation and fishery." Shively v. Bowlby, 152 U.S. 1, 18-19 (1894).

58. Bell v. Town of Wells, 557 A.2d at 173. The dissent in *Bell II* relies heavily on Andrews v. King, 124 Me. 361, 129 A. 298 (1925) to establish a contrary conclusion. *See* Bell v. Town of Wells, 557 A.2d at 187-188. That decision, however, fits neatly with Chief Justice McKusick's interpretation that the easement is limited to fishing, fowling, and navigation and related uses. *See* Andrews v. King, 124 Me. at 363-64, 129 A. at 299 (noting right of navigation includes right to pass over flats for purpose of entering on or departing from boat lawfully moored).

59. Bell v. Town of Wells, 557 A.2d at 173.

60. *Id.* at 173-74.

quoted at length from the Law Court's 1900 description of the scope of the public easement for purposes of "navigation and of fishery":

> Others may sail over them, may moor their craft upon them, may allow their vessels to rest upon the soil when bare, *may land and walk upon them*, may ride or skate over them when covered with water bearing ice, may fish in the water over them, may dig shellfish in them, may take sea manure from them, but may not take shells or mussel manure or deposit scrapings of snow upon the ice over them.[61]

For Chief Justice McKusick, the permitted uses were all "activities related to those specified uses" of fishing, fowling, or navigation.[62]

Chief Justice McKusick also found the limited scope of the easement established by a number of decisions denying public use of the intertidal zone. Thus in *McFadden v. Haynes and DeWitt Ice Co.*,[63] the Law Court declared that the rights to the intertidal zone reserved to the public do not include the right to cut ice from that zone or the right to deposit within that zone snow scraped from ice cut below low water.[64] Further, in *State v. Wilson*,[65] the Law Court set aside an indictment for nuisance against an upland owner who erected a wharf in the intertidal zone, thereby allegedly obstructing a public way over those flats.[66] In both cases, the court limited important public uses in light of the upland owner's fee interest in the flats. Both cases make difficult a broader interpretation of the public easement than the right to fish, fowl, and navigate.

In light of these precedents, Chief Justice McKusick could not reasonably interpret the public easement at issue in a broader manner — for example, as an easement to promote commerce.[67] In *Bar-*

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61. *Id.* at 174 (quoting Marshall v. Walker, 93 Me. at 536-37, 45 A. at 498) (emphasis added by *Bell II* court).

62. *Id. See also* Moore v. Griffin, 22 Me. 350, 356 (1843) (in rejecting claimed public right to remove mussel manure from flats, court declared that "[t]he language of the reservation in the [Colonial O]rdinance cannot be extended beyond the obvious meaning of the words fishing and fowling").

63. 86 Me. 319, 29 A. 1068 (1894). *See* Bell v. Town of Wells, 557 A.2d at 173 n.16.

64. McFadden v. Haynes and DeWitt Ice Co., 86 Me. at 325, 29 A. at 1069. Counsel for the defendant in *McFadden* emphasized the commercial importance for the ice cutting industry of depositing snow on the flats. *Id.* at 323-24, 29 A. at 1068. The interpretation of the public easement provided by the dissent in *Bell II* cannot reasonably account for the *McFadden* decision, given the incontestable importance of the Maine commercial ice industry, both for Maine and the world. Justice Wathen nevertheless recognized the importance of *McFadden* to determining the scope of the easement. *See* Bell v. Town of Wells, 557 A.2d at 187-88 (Wathen, J., dissenting).

65. 42 Me. 9 (1856).

66. *Id.* at 27-29. *See also* Deering v. Proprietors of Long Wharf, 25 Me. 51, 65 (1845).

67. Both the dissent and Professor Delogu suggest such an alternative reading of the relevant cases. *See* Bell v. Town of Wells, 557 A.2d at 185 (Wathen, J., dissenting); Delogu, *supra* note 9, at 45-46. They both observe that the origins of the King's original grant of a fee interest to the littoral landholder may have been for the pur-

rows v. McDermott, the court had noted that the right to fish, fowl, and navigate was not limited to those pursuing business or sustenance, but was available as well to those pursuing their personal pleasures.[68] Likewise, case law would not permit interpreting the easement broadly to permit "all significant public uses."[69] Such an ambiguous characterization could not be reconciled, Chief Justice McKusick reasoned, with the clearly declared fee simple property interest of the upland owner.[70]

Having drawn from the case law that the easement at issue was restricted to "fishing, fowling, and navigation and related uses,"[71] Chief Justice McKusick then had no difficulty applying that general principle to the claimed public rights of bathing, sunbathing, and recreational walking. He explained simply that such activities could not reasonably be understood as encompassed within the right to fish, fowl, and navigate.[72]

Further, Chief Justice McKusick emphasized that any interpretation of the easement as extending to bathing, sunbathing, and recreational walking could not be contained on a "principled basis" from becoming "a public easement for general recreation."[73] Chief Justice McKusick continued: "To declare a general recreational easement, the court would be engaging in legislating, and it would do so without the benefit of having had the political processes define the nature and extent of the public need."[74]

B. Justice Wathen's Dissent

Justice Wathen's dissent in *Bell II* presents a sharp contrast to Chief Justice McKusick's Law as Integrity method. Justice Wathen

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pose of promoting commerce. *See, e.g.*, Storer v. Freeman, 6 Mass. 435, 438 (1810).

68. Bell v. Town of Wells, 557 A.2d at 173 (citing Barrows v. McDermott, 73 Me. 441, 449 (1882)).

69. Bell v. Town of Wells, 557 A.2d at 174 (quoting Opinion of the Justices, 365 Mass. 681, 688, 313 N.E.2d 561, 567 (1974)). That broad interpretation of the scope of the easement is implicit in Justice Wathen's dissent, wherein he urged an understanding of the easement depending on "contemporary notions of usage and public acceptance." *Id.* at 188 (Wathen, J., dissenting).

70. *Id.* at 174. Chief Justice McKusick explained: "No decision of either the Maine or the Massachusetts court supports any such open-ended interpretation of the public uses to which privately owned intertidal land may be subjected." *Id. See also* Marshall v. Walker, 93 Me. 532, 536-37, 45 A. 497-498 (1900) (noting landowner's fee interest and right to appropriate intertidal zone to his exclusive use and possession); Barrows v. McDermott, 73 Me. at 449 (rejecting the proposition that the court may change a general principle first declared in the Colonial Ordinance "if satisfied that it does not operate beneficially under present circumstances").

71. Bell v. Town of Wells, 557 A.2d at 174.

72. *Id.* at 173.

73. *Id.* at 176.

74. *Id.* The Chief Justice's concern on this point is seen also in Durepo v. Fishman, 533 A.2d 264, 265-66 (Me. 1987), wherein he insisted that courts should defer to the Legislature's expertise in redrawing social policy.

in large part agreed with the Chief Justice's discussion of the relevant case law and the meaning of those cases.[75] Justice Wathen drew, for example, on the Law Court's 1843 statement that "[t]he language of the reservation in the [Colonial O]rdinance cannot be extended beyond the obvious meaning of the words fishing and fowling."[76] Justice Wathen observed that even in 1894, the court "took a more restrictive view of the public's right to encumber the flat," rejecting an ice cutter's claimed right to throw snow scrapings on the intertidal flats.[77]

Although Justice Wathen read the relevant cases in a way similar to Chief Justice McKusick, he nevertheless reached a different conclusion, relying upon "current notions of usage" to resolve the issue:

> Similarly, in the present controversy we should consider current notions of usage and public acceptance. Although the practice of fishing, fowling and navigation, as classically defined, may have become less important, other recreational uses have developed and received public acceptance within the past sixty years. I am persuaded that this Court and the Superior Court erred in arresting further development in the law by effectively confining public rights to those that had been recognized prior to 1925.[78]

Justice Wathen then found within those contemporary practices a public right to recreational use of the flats at least "broad enough to include such recreational activities as bathing, sunbathing and walking."[79] Justice Wathen looked to the "genius of the common law" to explain his willingness to move beyond the principles otherwise implicit in the relevant case law.[80] He further explained that the common law must "expand with the progress of society and develop [in accordance] with new ideas of right and justice."[81] Yet in the end he failed to set forth an account of the standards that should guide and channel that development.

For Chief Justice McKusick, however, the interpretive character of his jurisprudence establishes the channels through which the common law should grow. In *Bell II*, Maine's common law easily

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75. *Id.* at 185-88 (Wathen, J., dissenting).

76. *Id.* at 187 (quoting Moore v. Griffin, 22 Me. at 356).

77. *Id.* at 187-88 (discussing McFadden v. Haynes and DeWitt Ice Co., 86 Me. 319, 29 A. 1068 (1894)).

78. *Id.* at 188. Unlike Chief Justice McKusick, Justice Wathen found relevant to the issue before the court the legal doctrine of custom, concluding that "plaintiffs' ownership is derived exclusively from customary law." *Id.* at 183-84 & nn.6-8. Justice Wathen failed to make clear, however, in what manner that alternative statement of the easement's origin would change the result in the case. He instead relied upon the character of the common law to explain his interpretation of the easement's scope. *Id.* at 189.

79. *Id.*

80. *Id.*

81. *Id.* (quoting In re Robinson, 88 Me. 17, 23, 33 A. 652, 654 (1895)).

lent itself to the Chief Justice's principled and consistent interpretation of the public easement to use the intertidal zone. Having drawn that interpretation from the relevant case law, Chief Justice McKusick's Law as Integrity jurisprudence would not permit him to decide the case other than as he did. Although strong reasons of public policy or personal philosophy might support a different conclusion, the Chief Justice's interpretation of the relevant law would not.[82] Once he had drawn from those cases his best interpretation of their meaning, he was bound to apply that interpretation to the case before him.[83]

III. ESTATE OF WORTHLEY: A "HARD CASE" OF WILL INTERPRETATION

Given Chief Justice McKusick's common law jurisprudence, the *Bell II* case presented a fairly clear cut issue: the relevant case law was well established, and those cases indicated with fair clarity that the text being interpreted was the public's right to "fish, fowl, and navigate," rather than a broader "right to recreate." In *Estate of Worthley*,[84] however, the Law Court faced a sketchier picture with fewer precedents to guide its inquiry. Not only did the relevant case law, scant as it was, fail to answer the issue faced by the court, but also those decisions presented divergent lines of reasoning, thereby requiring a reconciliation of rationales for a satisfactory answer to the case. Chief Justice McKusick wrote the majority decision,[85] and his opinion reveals well the process by which a judge practicing Law as Integrity may draw upon general principles that appear to explain the specific area of law at issue.

Estate of Worthley involved the issue of whether a general power of appointment that was granted jointly by a will to three named persons would survive the death of one of those persons.[86] The pro-

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82. In Durepo v. Fishman, 533 A.2d 264-265 (Me. 1987), the Chief Justice emphasized that although a common law court has the "power" to create new rights, "the possession of power does not by itself justify its use." The growth of the common law instead must follow carefully the general principles characterizing the law.

83. It must be emphasized that *Bell II* was a hard case — that is, one of first impression for the Court, with no easy answer. As noted *supra* at notes 34-39 and accompanying text, resolution of a hard case requires interpretation of precedents that do not themselves clearly answer the case at hand. Thus judges practicing Law as Integrity act creatively, in that they attempt to construct the most reasonable interpretation of the relevant case law. To the extent they succeed, they have identified legal principles that were not clearly declared earlier. Once they have developed that interpretation, however, they must apply it faithfully.

84. 535 A.2d 433 (Me. 1988).

85. Justice Wathen wrote a dissent, joined by Justice Scolnik. *See id.* at 437.

86. The concept of a "power" is well established in the common law of property, and is not always linked, as it was in *Worthley*, with will construction. For a discussion of powers of appointment under Maine law, *see* Moore v. Emery, 137 Me. 259, 274, 18 A.2d 781, 788 (1941). *See generally* RESTATEMENT (SECOND) OF PROPERTY

vision at issue stated:

> FIFTH: I request that my friends, Harriet Fogg, and Reverend and Mrs. Fred Robie of Sanford, Maine, shall insofar as possible specify the disposition to be made of the remainder of my furniture and furnishings, and I request that my Executor shall carry out the formalities of any such gift, sale or other disposition as they specify.[87]

The personal representative contended that if the provision created a power of appointment, that power rested with the group as a whole and could not survive the death of one of its members.[88] If the court accepted that reasoning, the personal items at issue would pass through the residuary clause of the will.[89]

The Law Court divided on whether the power survived the death of one of its joint holders. Both the majority and dissent pulled only three relevant cases on the survival of jointly held powers.[90] According to the dissent, those three decisions all agreed that whether a power of appointment survives the death of one of its joint holders depends in a critical way on whether the power is "coupled with an interest."[91] As stated in *James v. United States*, the most recent of the three decisions:

> At common law it was also generally recognized that jointly held powers could not be exercised by the survivors following the death or incompetency of one of the holders of the power unless the instrument creating the power provided that the power might be exercised by the survivors or unless the power was coupled with an interest, *i.e.*, the persons holding the power also possessed some proprietary right in the subject matter over which the power was to be exercised.[92]

Both the majority and dissent in *Worthley* agreed that the power at issue was not coupled with an interest.[93] Therefore, if the Law Court were to apply routinely the standard as declared in *James*, the power would fail.

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§§ 11, 12 (1986); 62 AM. JUR. 2D, *Powers of Appointment and Alienation* §§ 1-20 (1990); 1 SUGDEN ON POWERS (1856). The *Restatement* defines a power of appointment as "authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property." RESTATEMENT (SECOND) OF PROPERTY § 11.1.

87. Estate of Worthley, 535 A.2d at 434.

88. *Id.* at 435. The initial issue before the court was whether the will created a trust, specific devise, or a power of appointment. The court unanimously agreed that the will created a power of appointment. *Id.* at 434-35; *id.* at 437 (Wathen, J., dissenting in part).

89. *Id.* at 437.

90. *Id.* at 436 n.3, 437. The three cases relied on by the court on this point were Wilson v. Snow, 228 U.S. 217 (1913); Peter v. Beverly, 35 U.S. (10 Pet.) 532 (1836); James v. United States, 448 F. Supp. 177 (1978).

91. Estate of Worthley, 535 A.2d at 437.

92. James v. United States, 448 F. Supp. at 179.

93. Estate of Worthley, 535 A.2d at 435 n.2; *id.* at 437 (Wathen, J., dissenting).

The case was made more difficult for Chief Justice McKusick, however, because the rule on survival of powers of appointment was set against the general principle imbedded in Maine law and elsewhere that wills should be construed to determine the intent of the testator.[94] As explained by the Law Court in *Moore v. Emery*:

> The guiding principle of a court in construing a will is to determine the intent of the testator, which must be found from the particular language which he has used read in connection with the will taken as a whole and in cases of doubt in the light of the surrounding circumstances. There is no particular magic in isolated phrases. Language which may mean one thing when applied to one state of facts may have to be interpreted differently when applied to another. Precedents are of less importance than elsewhere in the law; and to quite an extent each case must be considered by itself.[95]

This general principle counseled against rigid application of the apparent rule on powers of appointment without first undertaking a careful review of the entire will to determine the testator's intent.

For Chief Justice McKusick, the facts in *Worthley* manifested a clear intent for the power to survive the death of one of its joint holders, thereby accentuating the potential conflict between the general principle on effectuating the intent of the testator and the specific rule on the survival of powers. Regarding the testator's intent, Chief Justice McKusick noted first that she had identified the joint holders of the power as her "friends," thereby indicating that her confidence was with them not as a group only but "because each of them was her friend."[96] Chief Justice McKusick concluded:

> The death of one, therefore, would in no way lessen the confidence Miss Worthley reposed in the judgment of her two surviving friends. The most sensible interpretation of Miss Worthley's intent as set forth in the disputed provision of her will is that if one of her trusted friends should die, she wished the remaining two confidants, as her friends, to exercise their considered judgment about how to dispose of her remaining furnishings.[97]

In a similar vein, the property at issue involved Miss Worthley's intimate possessions, "which probably would carry special meaning for certain of her friends surviving her."[98] It therefore seemed unlikely that she intended such items to pass into the residuary to be "reduce[d] . . . to cash or other liquid assets" simply because of the

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94. *Id.* at 435.

95. Moore v. Emery, 137 Me. at 277-78, 18 A.2d at 790 (and cases cited therein); *see also* ME. REV. STAT. ANN. tit. 18-A, § 2-603 (1980). Chief Justice McKusick in *Worthley* relied on both those authorities. *See* Estate of Worthley, 535 A.2d at 435.

96. Estate of Worthley, 535 A.2d at 436.

97. *Id.*

98. *Id.* at 436-37.

death of one of her three close friends.[99]

Thus Chief Justice McKusick was faced in *Worthley* with a conflict between a guiding principle of will construction and an apparent rule regarding survival of powers of appointment. Maine case law did not directly address the issue, except to note the great importance of discerning the intent of the testator for will interpretation. Furthermore, the three cases addressing the particular question apparently revolved around whether the power to appoint was coupled with an interest. Chief Justice McKusick's answer to the dilemma demonstrates how general legal principles implicit in an area of the law may shape the reading of particular precedents so as to maintain the integrity of the law.

Toward that end, Chief Justice McKusick first observed that the relevant decisions failed to address the issue as clearly as the federal district court in *James* had asserted.[100] In fact, of the two cases relied on in *James*, only in *Wilson v. Snow* could it be said that the coupling of a power with an interest actually overrode the intent of the testator.[101] As did the *James* court, the Supreme Court in *Wilson* based its decision on its own precedent in *Peter v. Beverly*.[102] The *Beverly* decision, however, failed to support the position asserted in *Wilson*.

In *Peter v. Beverly*, the Supreme Court also had concluded that the power was coupled with an interest and survived the death of one of its holders.[103] Chief Justice McKusick correctly observed, however, that the *James* court had misread the *Beverly* case, which was considered a "point of origin" for later decisions on the issue.[104] The *Beverly* Court recited the "general rule" on survival of powers of appointment, but explained that the rule as stated best characterized English case law rather than American.[105] In the American common law tradition, however, the "leading principle" was to determine and carry out the intent of the testator.[106] Chief Justice McKusick in *Worthley* quoted at length the following summary from *Beverly*:

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99. *Id.* Chief Justice McKusick also observed that the disputed article of the will failed to provide for the lapsing of the bequest into the residuary, unlike the other articles in the will. *Id.* at 436.

100. *Id.* at 436 n.3.

101. In *Wilson*, the Supreme Court observed that the will in question appeared to place a special confidence in the joint holder of the power who had predeceased the testator. *See* Wilson v. Snow, 228 U.S. at 222. The Court rejected the plaintiff's argument that this manifestation of intent should override the coupling of the power with an interest in the surviving joint holder. *Id.* at 224.

102. *Id.* at 224 (quoting summary of English common law rule in Peter v. Beverly, 35 U.S. (10 Pet.) 532, 564 (1836).

103. Peter v. Beverly, 35 U.S. (10 Pet.) at 566-67.

104. Estate of Worthley, 535 A.2d at 435-36 n.3.

105. Peter v. Beverly, 35 U.S. (10 Pet.) at 564.

106. *Id.*

> In the American cases, there seems to be less confusion and nicety on this point; and the courts have generally applied to the construction of such powers, *the great and leading principle which applies to the construction of other parts of the will, to ascertain and carry into execution the intention of the testator.* When the power is given to executors, to be executed in their official capacity of executors, and there are no words in the will warranting the conclusion, that the testator intended, for safety or some other object, a joint execution of the power; as the office survives, the power ought also to be construed as surviving. And courts of equity will lend their aid to uphold the power, for the purpose of carrying into execution the intention of the testator, and preventing the consequences that might result from the extinction of the power . . . .[107]

The Supreme Court's reasoning in *Beverly*, therefore, made clear for Chief Justice McKusick that even the common law rule on survival of powers must be read in light of the general principle characterizing will interpretation — discerning the intent of the testator. Seeing the importance of that general principle in both Maine law and the Supreme Court's *Beverly* decision, Chief Justice McKusick then reinterpreted the holdings of *Beverly* and *Wilson* so as to maintain their integrity with the underlying principle. He explained that the coupling of a power with an interest gives a fairly clear indication of the intent of the testator that the power should survive the death of one of its joint holders. The failure to couple a power with an interest, however, means only that one clue to the testator's intent is lost, and the court "must look for other intimations of [the testator's] intent."[108] In Miss Worthley's case, the will included sufficient other "intimations" to support a conclusion that the power of appointment should survive.

Faced with a hard case and few decisions on point, it is nevertheless evident that Chief Justice McKusick did not see himself as free to decide the case in accordance with his own sense of justice. Because the particular issue before him arose out of a body of common law regarding interpretation of wills, his interpretation of the general principles implicit in that body of law necessarily constrained his decisionmaking and informed his reading of the relevant case law. The process of developing a reasoned and consistent interpretation of the relevant case law unavoidably involved redefining (or clarifying) particular decisions in an effort to maintain the integrity of those decisions and their supporting principles.[109] Thus in *Worth-*

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107. Estate of Worthley, 535 A.2d at 435-36 (quoting Peter v. Beverly, 35 U.S. (10 Pet.) at 564).

108. *Id.* at 436 n.3.

109. Professor Dworkin has recognized that any reasonable interpretation of a body of law must also recognize mistaken decisions — not all the cases will fit well with the interpretation, and to the extent that the interpretation reasonably characterizes the law, decisions to the contrary may simply be wrongly decided. *See* R.

ley, a "general rule" on the survival of powers became, in the context of wills, simply an "intimation" of the testator's intent. As with Law as Integrity generally, the normative weight of the *Worthley* decision depends on how well Chief Justice McKusick interpreted the guiding principles in that area of the law, and how effectively he used that interpretation to resolve the case at hand.[110] This interpretive process explains both the creative and constrained character of Chief Justice McKusick's methodology.

IV. In Re Gardner: A Background Moral Theory

As a model of jurisprudence, Law as Integrity recognizes a special connection between legal and moral theory. When resolving particularly hard cases, with sparse guidance from relevant past precedents but important social or political concerns on the line, the common law judge practicing Law as Integrity may properly resort to a background moral or political theory for guidance on the right answer to the case at hand. In a very important way, therefore, Law as Integrity insists that the law itself is more than just legal principles, but is also set against a broader moral backdrop.[111]

The manner in which legal and moral theory come together under Law as Integrity highlights both the interpretive character of this model of jurisprudence, and also its sharp difference from legal realism in its many forms. When particular precedents fail to resolve a new and especially troublesome legal problem, or when social changes bring to light an old problem that has gone unrecognized, the common law judge may draw upon moral theory only in a limited and constrained manner: the judge is not free to apply his own moral perspective to resolve the issue. Rather, he looks to the law itself — precedents, statutes, commentaries, and philosophies of law[112] — to discern the background moral theory that best appears to explain or justify the law's character.[113] Here, too, the method is interpretive in nature. Based upon his or her understanding of the law, the judge seeks to construct a moral theory that appears accurately to explain the general moral principles upon which the law is based.[114] The background theory of the law, as general as it may be, can then be brought to bear on the particular hard case at hand.

Chief Justice McKusick's majority opinion in *In re Gardner* sug-

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Dworkin, Taking Rights Seriously, *supra* note 2, at 118-23.

110. *See supra* note 36.

111. *See, e.g.*, R. Dworkin, Taking Rights Seriously, *supra* note 2, at 110-18.

112. The Law Court has recognized all these sources as important areas to draw upon when considering hard cases of law that may require overturning a past precedent. *See* Myrick v. James, 444 A.2d 987-98 (Me. 1982).

113. *See, e.g.*, R. Dworkin, Law's Empire, *supra* note 1, at 189-90; R. Dworkin, Taking Rights Seriously, *supra* note 2, at 101-05, 125-26.

114. *See* R. Dworkin, Taking Rights Seriously, *supra* note 2, at 125-27.

gests the affinity of his common law jurisprudence with Law as Integrity, even at the outer edges of its interpretive character. This frequently discussed case[115] involved whether the Law Court would respect an incompetent person's wish, declared before he lost competency, that he not be kept alive in a comatose state by life-sustaining medical procedures.[116] The issue had not reached Maine's highest court before that case, and consequently the Law Court had before it no controlling legal precedents. The court split four to three on the issue, with both the majority and the dissent relying on background moral principles to explain their decisions. Chief Justice McKusick's majority opinion clearly depicts his Law as Integrity jurisprudence, and strongly indicates what may be his understanding of the background moral theory that best explains the common law.

In *Gardner*, the superior court had found by clear and convincing evidence that Gardner when competent had declared his desire not to be maintained in a persistent vegetative state by life-sustaining medical procedures.[117] Chief Justice McKusick emphasized at a number of points in his opinion that the issue before the court in no way presented a question of "substituted judgment" — *i.e.*, what a person who had not made his wishes known when competent would have chosen in that situation after losing competency.[118] Even with

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115. The case was first noted in the pages of this journal while it was pending in superior court. *See* Comment, *Maine's Living Will Act and the Termination of Life-Sustaining Medical Procedures*, 39 MAINE L. REV. 83, 106 n.89 (1987). Since then, the case has been discussed in the *Maine Law Review* in Note, *In re Gardiner: Withdrawing Medical Care From Persistently Vegetative Patients*, 41 MAINE L. REV. 447 (1989); Comment, *Withdrawal of Life-Sustaining Treatment: Patients' Rights — Privacy Rights*, 42 MAINE L. REV. 193 (1990).

116. In re Gardner, 534 A.2d 947, 950 (Me. 1987).

117. *Id.* at 949. Once the Law Court understood the superior court to have made a factual finding that Gardner would have wanted life-sustaining procedures discontinued, that finding would stand unless "clearly erroneous." *Id.* at 953 (citing Taylor v. Commissioner of Mental Health and Mental Retardation, 481 A.2d 139, 153 (Me. 1984)). This finding set the parameters on the moral issue at stake in the case — whether the court would respect a clear declaration by a competent individual that he not receive medical care, rather than whether the court would make a decision regarding medical care on behalf of an incompetent individual.

The dissent sharply took issue with the majority on this factual finding, and understood the superior court to have found Gardner's statements to be "casual and of a general nature." *Id.* at 957 (Clifford, J., dissenting).

118. *Id.* at 950, 952 n.4. As discussed *infra* at notes 126-31 and accompanying text, the Chief Justice found the moral value of personal autonomy strongly implicit in the Anglo-American legal tradition. Had Gardner not stated clearly his desire to be free of life-sustaining medical procedures, however, that well-established background theory would have been lost to the court. In its place would have been an ambiguous collection of moral principles implicated in the doctrine of "substituted judgment." *See* Comment, *Maine's Living Will Act and the Termination of Life-Sustaining Medical Procedures*, 39 MAINE L. REV. 83, 103 n.83 (1987) (discussing "substituted judgment"). The court would have to determine what might be in the best interest of the incompetent person, or what a reasonable person would have chosen in such a

the facts narrowed down in this manner, however, the Law Court still had few precedents upon which to draw. The relevant cases available to the court involved the physician's duty to treat a patient only with that patient's informed consent. The two primary Maine decisions on that issue, however, did not involve life-sustaining medical care.

In both *Downer v. Veilleux*[119] and *Woolley v. Henderson*,[120] the Law Court had recognized "the doctrine of informed consent as an actionable species of medical negligence."[121] Under that analysis, however, a court typically asks first, whether the defendant/physician provided the plaintiff/patient prior to a particular treatment with all the information that a reasonable physician would have provided; and second, whether a reasonable person in the patient's situation would have consented to the treatment, knowing that information.[122] Although arguably relevant when an incompetent person has not made his wishes known regarding life-sustaining treatment, the Law Court's negligence analysis was of little help in the *Gardner* scenario — when an incompetent patient had earlier declared while competent that he would not want life-sustaining medical procedures.

In both *Downer* and *Woolley*, the court also recognized a more limited realm of medical malpractice sounding in battery, involving cases where the physician treated the patient "either against the patient's will or substantially at variance with the consent given."[123] That branch of the doctrine of informed consent would suggest respecting Gardner's stated wishes, except for the following factors: Gardner had become incompetent and could not make clear his desires at the current time; furthermore, he would surely have consented to initial medical treatment; and finally, he would die if medical treatment were discontinued.[124] A straightforward reliance on legal principles from the battery analysis would also have to confront the state's well-established legal right to prevent suicide and

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situation. Against these concerns would be the state's interest in protecting from abuse those unable to protect themselves. *See generally id.* at 133-34, 144-47 (discussing moral values that compete against a decision to discontinue life-sustaining medical care).

119. 322 A.2d 82 (1974).

120. 418 A.2d 1123 (1980).

121. *Id.* at 1128 & n.3 (citing Downer v. Veilleux, 322 A.2d at 89-91).

122. Woolley v. Henderson, 418 A.2d at 1131-32. For a discussion of these two issues, see Comment, *supra* note 118, at 126-29.

123. Woolley v. Henderson, 418 A.2d at 1133 (quoting Downer v. Veilleux, 322 A.2d at 89).

124. The dissent in *Gardner* strongly emphasized that Gardner's declarations had been made without any knowledge of the specific medical condition he would later face; and in that sense the consent would fail to meet the standard necessary for a competent person to consent to treatment. *See* In re Gardner, 534 A.2d 947, 957 (Me. 1987).

to intervene to protect the incompetent.[125]

In short, the court had before it in the common law battery analysis only a partial answer to Gardner's plight, and the battery analysis itself could not fully support a decision to terminate life-sustaining medical care. Characteristic of Law as Integrity, Chief Justice McKusick resolved this hard case by going beyond those particular legal decisions to a background moral theory that appeared for him to carry particular explanatory force, not only for this case but perhaps for the common law itself.

Chief Justice McKusick began by noting that "resolution of that narrow question [regarding life-sustaining procedures] must begin with a recognition of the long-standing importance in our Anglo-American legal tradition of personal autonomy and the right of self-determination."[126] Chief Justice McKusick buttressed his point by quoting from John Stuart Mill's important work, *On Liberty*:

> The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[127]

From John Stuart Mill, Chief Justice McKusick moved back into the law, quoting from an 1891 United States Supreme Court decision:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.[128]

Finally, Chief Justice McKusick drew even closer to the issue before him, relying upon Judge Cardozo's statement of the individual patient's right to control medical care:

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages.[129]

None of the quoted passages specifically addressed terminating life-sustaining medical procedures,[130] and yet each was used by Chief

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125. *See*, ME. REV. STAT. ANN. tit. 17-A, §§ 106(6), 201(1)(C), 204 (1983); Adult Protective Services Act, ME. REV. STAT. ANN. tit. 22, §§ 3470-3488 (Supp. 1990).

126. In re Gardner, 534 A.2d at 950.

127. *Id.* (quoting J. S. MILL, ON LIBERTY (reprinted in J. S. MILL, THREE ESSAYS 5, 15) (1975) (first published in 1859)).

128. *Id.* (quoting Union Pacific Ry. v. Botsford, 141 U. S. 250-51 (1891)).

129. *Id.* (quoting Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 129-30, 105 N.E. 92-93 (1914)).

130. Chief Justice McKusick's opinion in *In re Gardner* also cites and quotes extensively from what had become a substantial body of case law in other states sup-

Justice McKusick as indicative of a broader moral background theory upon which the Anglo-American legal tradition at least in part rests.[131]

Having articulated the central importance of personal autonomy to the common law, Chief Justice McKusick then turned to Maine's own common law doctrine of informed consent, noting that "when a competent patient has expressly refused to receive some form of medical care, a doctor would be acting tortiously if he insisted on providing the treatment against his patient's will."[132] He described that principle explicitly in terms of the general background theory of personal autonomy earlier established: "The rationale of this rule lies in the fact that every competent adult has the right to forego treatment, or even cure, if it entails what for him are intolerable consequences or risks, however unwise his sense of values may be to others."[133] Having recognized the right of a competent person to refuse life-sustaining medical care and Gardner's own personal declaration while competent that he not receive such treatment, Chief Justice McKusick saw no persuasive reason for refusing to give legal force to that decision once Gardner lost competency:

> Gardner is in a persistent vegetative state without any hope for

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porting the right of persons to refuse life-sustaining medical procedures. *See* In re Gardner, 534 A.2d at 951-53. Since the *Gardner* decision, courts have continued to affirm that right. *See, e.g., In re* Estate of Longeway, 549 N.E.2d 292 (Ill. 1989); McConnell v. Beverly Enterprises-Conn., Inc., 553 A.2d 596 (Conn. 1989); Conservatorship of Drabick, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (1988). The United States Supreme Court in *Cruzan v. Director, Missouri Dep't. of Health*, 110 S.Ct. 2841 (1990), also recognized that a person has a fourteenth amendment "liberty interest in refusing unwanted medical treatment." *Id.* at 4920. The Court declined, however, to base that interest on the constitutional right of privacy. *Id.* at 2867 n.7. *See also id.* at 2869 (Brennan, J., dissenting) (quoting In re Gardner, 534 A.2d at 953)).

131. A number of this century's most distinguished jurists have shared the view that a judge may appropriately bring to bear on the resolution of a hard case of uncertain law the judge's best interpretation of the legal or moral principles that characterize the law generally. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (Powell, J., for the Court); Poe v. Ullman, 367 U.S. 497, 542-45 (1961) (Harlan, J., dissenting); Rochin v. California, 342 U.S. 165, 170-71 (1952) (Frankfurter, J., for the Court); Adamson v. California, 332 U.S. 46, 63-67 (1947) (Frankfurter, J., concurring); Palko v. Connecticut, 302 U.S. 319, 325-27 (1937) (Cardozo, J., for the Court). All of these cases involved hard cases of constitutional interpretation — the meaning of the phrase "due process of law."

The judge engaging in this interpretive process is not bringing to bear on the question a personal philosophy, but is instead constrained to draw upon the broad moral principles characteristic of the law generally, or in the words of Justice Cardozo, "to be implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. at 325. In that sense, legal precedents do not simply run out, and legal rights may be said to exist even though they have not yet been explicitly recognized by a court. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 81, 104-105.

132. In re Gardner, 534 A.2d at 951 (citing Woolley v. Henderson, 418 A.2d at 1133 & n.11 and Downer v. Veilleux, 322 A.2d at 89).

133. *Id.* (quoting Downer v. Veilleux, 322 A.2d at 91).

> change for the better . . . . Gardner's decision made clear in advance of his injury applies specifically to the circumstances in which he now exists. We see no reason not to respect Gardner's personal decision and allow the discontinuation of life-sustaining treatment.[134]

Chief Justice McKusick saw the right to terminate medical care as particularly important for the person in a persistent vegetative state, and reached that conclusion again based upon general principles of personal autonomy. He explained that when Gardner made his earlier declarations regarding life-sustaining medical treatment, he likely had in mind "the utter helplessness of the permanently comatose person, the wasting of a once strong body, and the submission of the most private bodily functions to the attention of others."[135]

Chief Justice McKusick could not fully resolve this case without addressing various "state interests" generally put forward as relevant to a decision to discontinue life-sustaining care,[136] and in particular the state interests in protecting those unable to protect themselves, and in preventing suicide. In each case, he found the answer in his background theory of personal autonomy. Regarding protection of the incompetent from abuse, he stated that "the greater risk of abuse lies in disregarding such specifically declared personal decisions and in imposing life-sustaining procedures upon the patient contrary to his express will."[137] Chief Justice McKusick likewise rejected any analogy to suicide, since the personal choice at issue was to refuse medical procedures that simply prolonged "the natural dying process set in motion by [Gardner's] physiological inability to chew or swallow."[138]

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134. *Id.* at 954. Although the court did not mention it, additional legal sources justifying this conclusion are found in federal and state laws granting rights to the disabled to interact on terms as nearly equal to the nondisabled as are reasonably possible. *See* Education of the Handicapped Act, Amendments of 1990, Pub. L. 101-476 (101st Congress); Rehabilitation Act, 29 U.S.C.A. §§ 701-796i; Maine Human Rights Act, ME. REV. STAT. ANN. tit. 5, §§ 4551-4602 (1989 & Supp. 1990). Arising out of those statutes is the general principle that an incompetent person ought not to be denied rights otherwise available to competent persons, simply by virtue of the incompetency. This general principle comes into play only when an incompetent person declares his or her wishes before losing competency, and does not suggest an outcome when an incompetent person fails to declare his or her wishes before losing competency.

135. In re Gardner, 534 A.2d at 953.

136. *Id.* at 955. Those state interests are: "(1) the preservation of life; (2) the protection of the interests of innocent third parties; (3) the prevention of suicide; and (4) maintaining the ethical integrity of the medical profession." *See, e.g.*, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 741, 370 N.E.2d 417, 425 (1977).

137. In re Gardner, 534 A.2d at 955.

138. *Id.* at 956. Chief Justice McKusick also rejected any special symbolism in the discontinuation of nutrition and hydration, explaining:

Chief Justice McKusick concluded his analysis by strongly asserting that the Law Court was in no way making a quality-of-life determination. Here too he drew upon the background moral theory that supported his decision throughout:

> Thus Gardner has himself done the balancing of his own values and their bearing on the question of whether to be kept alive in a persistent vegetative state by artificial means. That personal weighing of values is the essence of self-determination. In ruling to respect the personal choice made by Gardner, therefore, we judges do not ourselves engage in an independent assessment of the value of his life. We are only recognizing and effectuating his right of self-determination.[139]

In short, Chief Justice McKusick resolved this hard case by finding implicit in the common law tradition a strong underlying support for personal autonomy. The particular precedents he had before him did not answer the *Gardner* question. Yet those precedents established the clear importance of personal autonomy in the common law tradition. The importance of that general background principle in turn exerted a "gravitational force" upon the case before him,[140] compelling respect for Gardner's clearly expressed wishes. Since it was rooted in background principles implicit in the common law, the *Gardner* decision maintained the law's integrity while at the same time recognizing a right not clearly declared previously. Thus, the Chief Justice carefully channeled his creative development of the law through his Law as Integrity jurisprudence.

V. WHY LAW AS INTEGRITY?

Chief Justice McKusick's common law jurisprudence generally reflects the interpretive method identified by Professor Dworkin as Law as Integrity. When Chief Justice McKusick in *Gardner* looked to the general character of the Anglo-American legal tradition for help in resolving a particularly difficult legal issue, he was also walking a path well traveled by earlier American jurists. Justice Frankfurter of the United States Supreme Court in *Rochin v. California* described that same interpretive process when addressing the meaning of "due process of law":

> The vague contours of the Due Process Clause do not leave judges

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> [A]ny such symbolism lies in the reciprocity of giving and receiving, such as occurs between parent and infant. The symbolism is lost in the artificial introduction of food and fluid into the body of someone in Gardner's unfortunate condition.

Id. at 954-55 (citation omitted). *But see id.* at 958-59 (Clifford, J., dissenting); *see also* Comment, *supra* note 118, at 144-47 and accompanying notes (discussing symbolic importance of nutrition and hydration).

139. In re Gardner, 534 A.2d at 955 (citation omitted).

140. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 115-16.

> at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession.[141]

Justice Harlan likewise maintained that resolution of hard cases of constitutional law should reflect a "respect for the teachings of history, [and a] solid recognition of the basic values that underlie our society."[142]

Aside from its distinguished pedigree, however, why should the Chief Justice (or anyone else, for that matter) follow a Law as Integrity jurisprudence? What is it about that common law method that makes it the appropriate theory for judicial decisionmaking? The answer to this question in large part depends upon an understanding of the nature of the political community which those court decisions in part define.

The most obvious answer — or partial answer — is that judges are not elected legislators, and should not be in the business of declaring new law based simply on their personal predilections. Chief Justice McKusick offered this explanation himself, in his opinion in *Bell v. Town of Wells*.[143] Yet this account does not address why a judge should answer hard cases by reference to general moral or legal principles implicit in the law, rather than simply to what is specifically declared in statutes or prior court decisions. The answer to this question presents more fully the justification for Law as Integrity.

Law as Integrity assumes that we understand our political community[144] to be a shared moral enterprise.[145] That is not to say that

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141. Rochin v. California, 342 U.S. 165, 170-71 (1952) (footnote omitted) (citing B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS). In Ziehm v. Ziehm, 433 A.2d 725 (Me. 1981), Chief Justice McKusick used Justice Frankfurter's *Rochin* standard for assessing due process, concluding that use of particular documents would not "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples." *Id.* at 729 (quoting Rochin v. California, 342 U.S. 165, 169 (1952)). See *supra* note 131 for listing of other United States Supreme Court justices who have used an interpretive method similar to Law as Integrity.

142. Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring). *See also* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). For a discussion of the role of history in the Law as Integrity jurisprudence, see R. DWORKIN, *supra* note 1, at 227-28.

143. 557 A.2d at 168, 176 (Me. 1989). *See also* Durepo v. Fishman, 533 A.2d 264-65 (Me. 1987).

144. It seems apparent that any consistent jurisprudence at some point relies upon an interpretation of the nature of the political community it in part describes. *See, e.g.*, R. DWORKIN, *supra* note 1, at 167-75, 186-90, 411.

145. *See* R. DWORKIN, *supra* note 1, at 170-75, 183-84. This understanding is at

our nation shares a particular moral perspective — clearly it does not. More accurately, we share a belief that our political community is analogous to a moral actor;[146] when the community acts through its political institutions, its actions should be morally justifiable, and in some important sense the community acts wrongly when it cannot morally account for what it does.[147]

Understanding our political community as a moral actor carries with it certain requirements that in large part explain Law as Integrity. First of all, like any moral actor the political community must treat persons similarly who are in like circumstances. There can be no moral justification for rewarding one person for his behavior in certain circumstances and then turning around and punishing another person for the same conduct in the same situation. To the extent actions are morally justified, a moral actor is compelled to respond in a like manner to persons in comparable situations. As has been recognized at least since Aristotle, justice requires treating like persons in a like manner.[148]

In addition, a moral actor must justify his or her morally relevant actions.[149] That is, the actor must explain those actions in terms of the general moral principles relevant to the particular activity at issue. In other words, moral justification involves drawing from a particular activity the central moral principles that appear to explain it. When confronted with situations of like character, the person ought to constrain his or her actions by reference to those same moral principles — or explain in a morally relevant way why this situation is different. Moral actors maintain their integrity to the extent they are consistently able to act in accordance with those general

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least as old as Aristotle. *See* ARISTOTLE, POLITICS, Bk. I. An interpretation of the nature of the political community in no way asserts that our political institutions always act in a manner consistent with this interpretation. Clearly it does not. *See* Berea College v. Commonwealth of Kentucky, 211 U.S. 45 (1908) (upholding state's prosecution of Berea College for refusing to respect state segregation laws). Rather, the interpretation is offered as the best understanding of the structure of our political institutions and the purposes we expect them to advance. Because we understand our community as a shared moral enterprise, we are able to criticize it for its failures to act as it should.

146. Professor Dworkin discusses at length his understanding of the key aspects characterizing a community that is sufficiently "concerned" with its fellow members to believe they warrant equal respect in the application of the law. *See* R. DWORKIN, *supra* note 1, at 195-202, 206-15. The Author will not discuss those components here, but assumes them to be sufficiently met in the United States.

147. The importance of moral justification for actions taken by our political institutions is seen also in the fact that such actions are generally characterized by the use or threat of coercion. *See* R. DWORKIN, *supra* note 1, at 93-94.

148. *See* ARISTOTLE, POLITICS, Bk. III, ch. IX, at 117-21 (1946) (E. Barker ed.); NICOMACHEAN ETHICS, Bk. V, ch. III, §§ 3-4.

149. People frequently act in situations having no moral ramifications. For example, the decision whether to watch the Red Sox or the Cubs carries no moral ramifications for most persons, and is not at issue here.

principles.

It is important to emphasize that moral actors will very likely disagree about the underlying principles that justify the conduct at issue. They may even disagree about how to define what the conduct at issue actually is. The point they agree upon, however, is that morally relevant actions ought to be in accordance with moral principles. The difficulty in identifying the appropriate principle in any particular situation does not lessen the obligation to seek it out.[150] There may be extensive argument among moral actors about the proper conduct in a particular situation. They argue in the same way, however; each one tries to construct the best interpretation of those general principles characterizing the activity, and then each applies that interpretation to the particular situation faced.

Under Law as Integrity, therefore, a judge called upon to resolve a hard case of uncertain law starts from the premise that our political community is a shared moral enterprise. The judge views the law generally as a product of that political community, and as an historical record of the community's formal actions.[151] The judge views the decision to be made on the hard case not as a personal decision, but as a decision on behalf of that political community.[152] Thus the judge is compelled to answer that hard case in accordance with his or her best understanding of the general principles characterizing that area of the law, and if necessary, the law as a whole. To the extent that a judge decides cases in this manner, he or she maintains the integrity of the law by acting in accordance with its general justifying principles.

Thus the judge who practices Law as Integrity brings to decision-making the important assumption that the political community is also a shared moral enterprise — its formal actions must be justified in a manner very much like those of any other, less abstract, moral actor. In great measure, Law as Integrity rests upon this understanding of the political community. Consequently, the moral force of this model of jurisprudence arises out of the persuasiveness of this interpretation of our political community.

CONCLUSION

Chief Justice McKusick provides us with no compendium of his jurisprudence, no formal outline of how a judge should go about his

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150. This general theme runs throughout Professor Dworkin's work. *See, e.g.*, R. DWORKIN, *supra* note 1, at 219; R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 105-25.

151. The Article here is addressing only our formal political institutions, which may legitimately exercise legal coercion. Within the nation there are many other communities — religious, political, personal — for which the law is not a formal record.

152. *See supra* note 37 for a discussion of the role of a judge's personal viewpoints under Law as Integrity.

work. His opinions, characterized by their clarity in words and thought, do not generally pause to explain for the reader the Chief Justice's understanding of his role. Yet that reticence, too, can be understood to reflect a Law as Integrity jurisprudence. Under such a regimen, judicial opinions are not forums for individual judges to set forth and discuss their personal viewpoints. Rather, they represent the arena in which the political community attempts to interpret and apply consistently those legal principles that appear best to characterize its legal system. The judge is charged with that onerous task, not the less burdensome one of philosophical exegesis.

This Article has attempted to isolate in three of the Chief Justice's decisions the core elements of a Law as Integrity jurisprudence. There is an obvious weakness in placing too much weight on only three judicial opinions. Yet those familiar with the Chief Justice's work should find in this interpretation a strong similarity to the legal reasoning and method of many of his opinions. Likewise, those who have been fortunate enough to have worked with Chief Justice McKusick should not be at all surprised to find that a person of his upstanding decency and personal integrity practices in his professional calling a model of jurisprudence carrying those same attributes. The legal community in Maine will greatly miss the Chief Justice's leadership on the Law Court, but it is to be hoped that he will remain intimately involved in shaping the law long after he has left the bench.