The Constitutionality of Conscience

Gergely Deli

I What will it be about?

I have never understood on what basis a Christian could sue. Even if it is your own constitutionally protected fundamental right, would it not be better for you to gently give up your claim? I understand and feel heroism in Rudolf von Jhering's vocal call to fight for our rights and at the same time for the law,[1] but that alone does not provide me with a satisfactory answer to the above dilemma. Therefore, in this study, I will try to formulate my own answer and analyse constitutional problems with the tools of the nightly examination of conscience. At first glance, this may seem strange, and for some it may be daunting, despite the fact that both the use of the evening for creative work and the study of conscience are an integral part of European culture. In connection with the former, it is enough to think of Aulus Gellius[2] or Dániel Berzsenyi:

> I painted the evening classes of my harvest,
> If I let my maid rest,
> And I can barely hear the noises of joy,
> I start a fire under my ancient walnut tree.
>
> Wrapped in a veil, I lean on my elbow,
> I look at the blinking flames of my wick,
> I dive into the heavenly dream of the imagination,
> And I live the holy hours of a more beautiful spiritual world.[3]

Mention of the examination of conscience test, may bring to mind Seneca[4] and Saint Ignatius of Loyola.[5] As for the rest, since there has been a constitution, there have also been constitutional law issues, and they can also be seen *sine dubio* as scientific problems. Hence, two thorny issues may trouble the attentive reader *(lectori salutem!):* Linking the evening examination of conscience and constitutional issues in an edited volume that classifies itself as academic. This may prove to be a delicate issue, as the author either defends the scholarly nature of his approach or abuses the

1 Rudolf von Jhering, *Der Kampf ums Recht* (Wien: Manz, 1894), 16.
2 Aulus Gellius, *Attic Nights* (London: Joseph Johnson, 1795), v.
3 An excerpt from Dániel Berzsenyi, *Fragment of a Letter to My Girlfriend*.
4 Lucius A Seneca, *On Anger.* Book III, para 36, 1–4.
5 Saint Ignatius of Loyola, *Spiritual Exercises,* 5, 4.

https://doi.org/10.36250/00907_06

goodwill of the editors. However, I can assure everyone with a clear conscience that my intentions are both fair and scientific. The examination of conscience, in fact, amounts to a conceptual analysis carried out in solitude, on one's own. Man tries to subsume certain concrete life stories and actions under certain concepts (in particular, the concepts of sins and virtues), sets up categories, makes distinctions and considers them. That is, he performs thought operations that can meet the strict requirements of scientific methods. Examination of conscience is undoubtedly an extremely personal activity, but its method, the conceptual analysis, may coincide with the scientific one. Our initial, sudden and perhaps hasty aversion to the idea could ultimately be caused by the fact that there really are very few things that are both personal and scientific. However, the right examination of conscience can even be perceived as such, perhaps because, *per naturam,* it strives for a kind of objectivity and universality.

Having set our minds at ease concerning the scientific nature of the subject (constitutional law issues) and the method to be applied (the examination of conscience as a conceptual analysis), let us outline briefly what will not be discussed. Above all, there will be no mention of the trend called religious constitutionalism in the relevant literature.[6] This is a trend that was embraced by the Social Democratic parties, which were gaining strength and a leading role in Europe for decades, in the post-World War II ideological space, which stated that the equal and inalienable human dignity of man was the ultimate basis of fundamental rights. It is a common mistake to attribute this privileged role of human dignity to the experience of facing Nazi atrocities. The idea had already been embodied in papal encyclicals published in the 1920s, long before the far right gained ground,[7] and sought, in essence, to give Catholicism, which was rapidly losing its secular influence, a resurgent ideological background and to provide legal protection to Christians who were largely oppressed or persecuted by the state.[8] It is no coincidence that later, the leftist movements of the 1960s devoted so much energy to re-conceptualising the notion of human dignity, which had previously been largely Catholicised.

On the other hand, there will be no question of the constitution of Jesus either, since He did not have it, or at least we do not know about it. Even so, much of the spiritual ammunition needed for an investigation comes from the Gospels, and there will be no question of scholastic or law of nature constitutionality filling the absence of Jesus' constitutional studies in the Middle Ages. There is already an extensive literature on the latter,[9] from which an interested person may be informed very thoroughly.

[6] See Perry Dane, 'Foreword: On Religious Constitutionalism', *Rutgers Journal of Law and Religion* 16 (2015), 460.

[7] *Divini redemptoris* is to be mentioned primarily.

[8] See Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015).

[9] See, for example, Günther Mensching, 'Moderne Elemente der Staatsauffassung des Thomas von Aquin', in Rolf Schönberger (ed.), *Die Bestimmung des Menschen und die Bedeutung des Staates* (Baden-Baden: Nomos, 2017), 227–248.

The aim of this study is to show that constitutional problems can be examined not only according to the prevailing clichés, using well-established tests and vocabulary or from a (politically or otherwise) correct ideological point of view. Ultimately, the constitutional problems that affect us all can also be measured by weighing virtues and sins. If some people are concerned about this method, let it be their business. It is the duty of science to worry us sometimes. What, then, will it be all about at the end of the day? Instead of a dominant, human dignity-based, individual, consequence-oriented, human rights-based and 'rational' constitutionality, a weak experiment in thought, it will be an 'emotional' constitutionality that is based on human salvation, personal, intention-oriented, and making sins its subject. However, we also expect the latter, the constitutionality of conscience, to be at least potentially capable of performing all the functions of the former, mainstream constitutionality.

II What should the constitutionality of conscience look like?

Attempting to outline a constitutionality directly inspired by the Gospel raises serious difficulties from the very beginning. One is that Jesus stated quite clearly that His kingdom is not of this world.[10] The other is that He sought to decouple His own teaching from secular authorities: 'So give back to Caesar what is Caesar's, and to God what is God's.'[11] Not only did Jesus not have a conception of state theory but He also accepted the state as it was. Jesus did not outline an image of an ideal or practical state but focused on how His followers should relate to the existing state. However, Jesus only had to exacerbate our current predicament, not just His theory of the state but His theory of law. Or, if the concept of legal theory is interpreted broadly, it operated with a kind of negative, self-destructive legal theory: 'If someone slaps you on one cheek, turn to them the other also. If someone takes your coat, do not withhold your shirt from them. Give to everyone who asks you, and if anyone takes what belongs to you, do not demand it back.'[12] Thus, we are not faced with legal protection, but with waiving it. Elsewhere this is stated even more clearly: 'Man, who appointed me a judge or an arbiter between you?'[13] Jesus did not focus on the dispute, or on resolving it, but on the subject of the dispute. How can these expectations, which are incompatible with the common sense of state and law, become a constitutionality of conscience, based on the teachings of Jesus?

From the above two criteria for the state (that it is essentially irrelevant as it is mundane and must be accepted anyway), we can conclude, for existing states, that state-related studies can only be positively assessed, from the point of view of

[10] John 18:36.
[11] Matthew 22:21.
[12] Luke 6:29.
[13] Luke 12:14.

constitutionality of conscience, if they help the citizens achieve salvation, or at least do not divert them from it. There is, in fact, nothing new in this statement, simply the Aristotelian, thought[14] reworded *ad analogiam*. It follows from this expectation that human rights must not be interpreted as the limits of state arbitrariness, in accordance with the liberal approach, but as instruments of salvation. However, we cannot follow the Christian Democratic view, which sees fundamental rights as values that protect or mediate Christianity, the individual Christian or Christian teaching. If the requirements of legal theory are now added to this framework of state theory, it becomes clear that the function of fundamental rights and constitutional protection is radically different from the classical conception. In contrast to the culture of constitutional complaints, we must proceed, on the basis of the constitutionality of conscience, that all legal claims, including the claim of human rights, are basically an act conceived as a sin. A person who vindicates a right for himself is fighting for his right in the Jheringian sense, and through this for the rule of law, but not for his own salvation. Our spiritual constitutionality must move from this sinful basic situation to salvation by the end of the debate. In this view, human rights function as state-protected means of human salvation. Instead of rationality, the degree of outrage will function as a basic yardstick.

III The procedure

In order to move from sinful legalisation to individual salvation, it is worthwhile performing the following procedural steps when analysing a constitutional problem. The procedure is divided into three main parts. The first part examines the complaint, the second the norm (be it a law or a judicial decision), and the third compares the two. In the first main part, when examining the complaint, it must first be established what, through the fundamental right invoked, is the most serious criminal intent in the situation which may have led the petitioner to lodge the complaint. It is then necessary to determine which is the cardinal virtue, the realisation of which can be promoted by the fundamental right invoked in the given situation. The normative power of a complaint is inversely proportional to its ability to offend people.[15] The greater the outrage caused by the criminal intent that appears as a legal claim in the complaint, the weaker the normative force of the complaint. (See Figure 1; a complaint vector drawn as 'C' pointing from slackness to justice. Here it is enough to suggest that its normative power is high, meaning the act was less outrageous.)[16]

[14] Aristotle, *Nicomachean Ethics,* 1095a.

[15] Outrage as an aspect was included in the model from the teaching of Thomas Aquinas. See *Summa Theologiae,* I–II, Q 95, A 2.

[16] The vectors are for illustration only, the ones explained here have no mathematical basis.

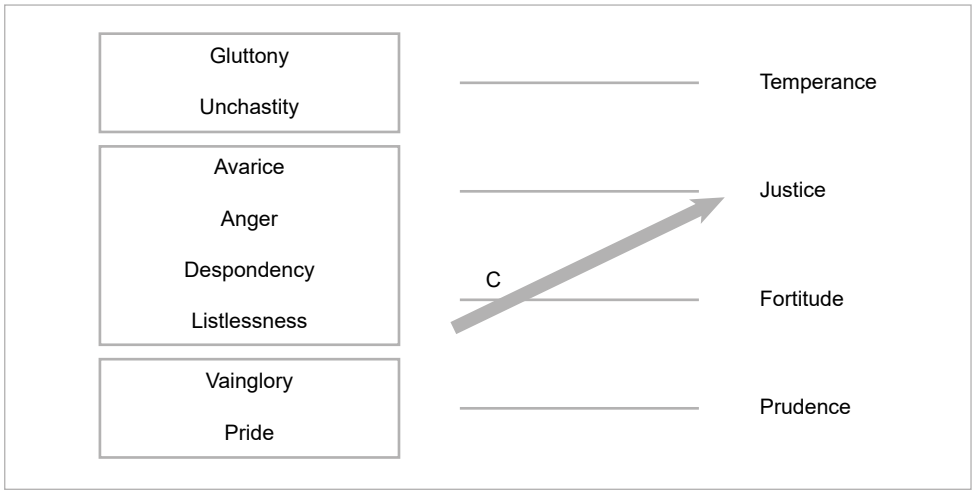

Figure 1 Sins and virtues
Source: Drawn by the Author

In the first phase of the second main part, it is necessary to assess whether the legislation in question intends to move in a good or sinful direction compared to the previous situation, on the basis of the intention of the legislator. In the second step, the most robust reading possible of the norm in question must be constructed in relation to the given facts. The closer the legislative intent thus revealed is to the established ideal reading, the greater the normative force of the challenged norm (legislation or judicial decision). (See Figure 2, in which the norm vector, is drawn as 'N'. The legislative intent is good, hence the length of the vector indicates a large coincidence between intent and an optimal reading.)

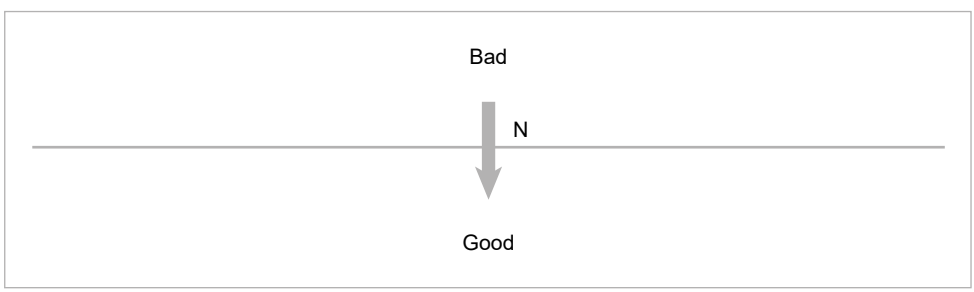

Figure 2 Legislative intent
Source: Drawn by the Author

The third main step is to compare the normative force of the complaint and the norm and, in the light of this, to determine the legal consequence, which may include rejection, establishment of a constitutional requirement or omission, or annulment, in ascending order of the degree of intervention. (See Figure 3, where the addition

of the previous two vectors, 'C' and 'N' gives 'LC' as a legal consequence vector, pointing in the direction of the desired legal consequence.) Having outlined the procedure, it is now worth examining each step of the procedure in more detail.

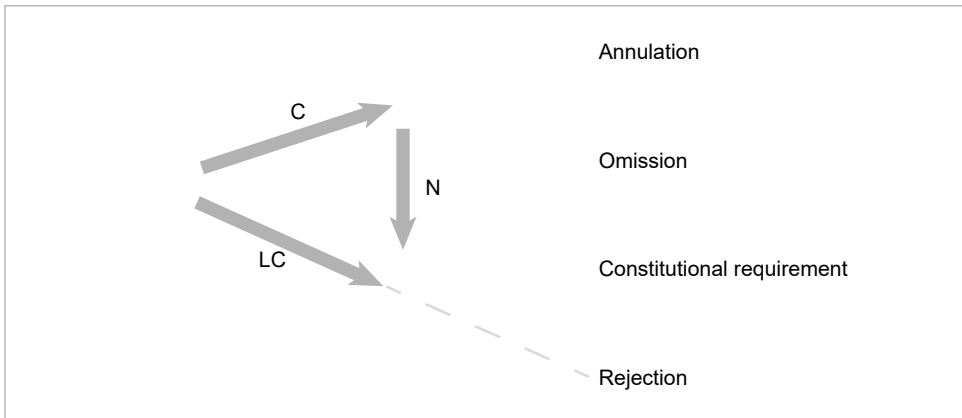

Figure 3 Legal consequences
Source: Drawn by the Author

Based on the basic premise that 'every statement of right is a sin', the sinful intentions embodied in the complaint have to be subsumed under one of the eight 'evil thoughts' identified by the Desert Fathers of third-century Egypt.[17] These eight vices, in ascending order of harm, are gluttony, unchastity, avarice, anger, despondency, listlessness, vainglory and pride.[18] In contrast, the four cardinal virtues that a fundamental right can defend in its pure form are the well-known virtues of temperance, justice, fortitude and prudence.[19] It is worth noting that the eight vices and the four virtues are well matched. The best antidote to gluttony and unchastity (or lust) is temperance; the antidote to material greed and anger is justice; we can respond to despondency and laziness with the virtue of fortitude; and finally, it is worth defending ourselves against vanity and pride with the virtue of prudence. The greater the relative difference between the misdemeanour and virtue in question, the more severe a sanction is justified, for example, the distance between gluttony and justice is small, but great between vainglory and temperance. In the course of the analysis of the complaint, on the one hand, we have to establish the misdemeanour subjectively recognised by the complainant in the specific case, and on the other hand, the abstract virtue lurking behind the fundamental right in the given case.

[17] Johannes Cassianus, *Az egyiptomi szerzetesek tanítása, I* (Pannonhalma–Tihany: Magyar Bencés Kongregáció, 1998), 134.
[18] For the hierarchy, see Evagriosz Pontikosz, *A szerzetes* (Pannonhalma: Pannonhalmi Bencés Főapátság, 2018), 82.
[19] See Catechism of the Catholic Church, 'virtue'.

The normative power of the complaint, as noted above, is inversely proportional to its objectively (that is socially) assessed intended capacity to offend.

In the second main step, the challenged norm is analysed. The legislative intent is assessed binarily (good or bad), as a function of the shift from the current situation, and the normative power of a norm is determined by how it relates to the best moral reading of the norm. The closer the legislative intent and the optimal reading are, the less likely we will be to oppose it, and conversely, the greater the discrepancy between the two, the more severe a sanction will be justified. For example, in an evil piece of legislation (*morally bad law*,[20] or *gesetzliches Unrecht*[21]), such as Government Decree No 1240 ME of 1944 forcing Jews to wear a yellow star, the intention of the legislature is clearly bad, and even the best moral reading of it does not help much, thus the norm is weak. However, if the intention of the legislature is positive and close to the best reading of the norm, a norm has a more secure place in the legal system.

In the third step, the legal consequences are determined. Obviously, the least intrusive sanction is rejection, since in this case the challenged norm remains intact. This is followed in increasing strength by the definition of the constitutional requirement, the establishment of an omission, and finally the strongest sanction, annulment. Comparing the normative force of the complaint and the norm, we can determine the optimal legal consequence. For example, if a complaint constitutes a more serious misdemeanour, but the fundamental right concerned has a lesser degree of virtue, and the outrage caused is great, a complaint will be strong. A norm in the face of such a complaint will only survive if the legislative intent behind it is very positive and approaches its best moral reading. Obviously, this scheme can be used not only in constitutional law cases, but also *mutatis mutandis* in all disputes.

IV Specific examples

As the above procedure may seem quite abstract, it may be useful to illustrate this scheme with examples from four very well-known legal cases. The first case is *Riggs v Palmer*.[22] According to the facts of the case, in his will, an elderly man (Francis B Palmer) appointed his grandson, Elmer E Palmer, to be his heir. By burdening the inheritance with legacies for the benefit of the testator's daughters, Palmer also had to take care of his mother. (A less relevant element in the case is that the will also contained a stipulation that if the inheritance provisions were to come into effect

[20] Ronald Dworkin, 'Seven Critics', *Georgia Law Review* 11 (1977), 1201–1268, 1253. For this, see Genaro R Carrió, 'Professor Dworkin's Views on Legal Positivism', *Indiana Law Journal* 55, no 2 (1979), 223.

[21] Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', *Süddeutsche Juristen-Zeitung* 1, no 5 (1946), 105–108, 107.

[22] *Riggs v Palmer* 115 NY 506, 22 NE 188 (1889).

when the grandchild was still a minor, the mother's maintenance would be borne by the testator's daughters, but only until the boy's mother gets married. The mother actually did get married later.) The testator subsequently expressed his intention to change the content of the will. His grandson learned of this, and to prevent this from happening, he killed his grandfather. Palmer was convicted of murder, which was followed by a civil case in which the plaintiffs were the daughters of the testator; the defendant was the testator's killer and testamentary heir.

The central legal question was whether the person who killed the testator for this purpose could acquire the inheritance. The court annulled the testamentary disposition, so Palmer eventually fell out of the inheritance. According to the majority opinion, the will was declared invalid on the basis of the principle 'no man should profit from his own inequity or take advantage of his own wrong'.[23] In this case, the court, essentially on moral grounds,[24] disregarded a completely clear provision of substantive law and ruled on the basis of a well-known principle of law. According to the positive law, the inheritance must be granted to the person who has been appointed as heir in the will, but the court considered the above principle to be a stronger argument.[25]

Justice John C Gray attached a dissenting opinion to the judgment, in which he was joined by Justice George F Danforth. According to Justice Gray, if the applicable laws are clear and unambiguous, they must be complied with. In the present case, the rule is clear that the inheritance belongs to the person designated in the will. Furthermore, according to Judge Gray, the majority position violates the principle of *non bis in idem,* according to which no one may be punished twice for the same conduct.[26] If this is compared with the principle that no one can invoke their own reprehensible conduct in order to gain an advantage, then not only do the rules and principles compete with each other, but even the principles themselves concur.[27] How can this case be evaluated in our model?

The legal statement was made by the Elmer girls, as they acted as plaintiffs to acquire their father's assets. The main vice that might have driven them was greed (avarice). The ultimate virtue that could have been realised by their acts may be justice, as it would be unfair for their father's killer to inherit. Their actions themselves are not outrageous, as they took action against the profiteering of

[23] For the difficulties of the decision see Benjamin N Cardozo, 'The Nature of the Judicial Process. Lecture I', *Journal of Law: A Periodical Laboratory of Legal Scholarship* 1, no 2 (2011), 329–348, 344.

[24] Stewart F Hancock, 'Meeting the Needs: Fairness, Morality, Creativity and Common Sense', *Albany Law Review* 68, no 1 (2004), 81–104, 87.

[25] For the legal theoretical difficulties underlying the case see Rodger Beehler, 'Legal Positivism, Social Rules, and *Riggs v. Palmer*', *Law and Philosophy* 9, no 3 (1990), 285–293, 286.

[26] For more details see William B Meyer, 'The Background to *Riggs v Palmer*', *American Journal of Legal History* 60, no 1 (2020), 48–75, 59.

[27] For more details see Kevin D Ashley, 'Teaching Law and Digital Age Legal Practice with an AI and Law Seminar', *Chicago-Kent Law Review* 88, no 3 (2013), 783–844, 809.

a person who had committed an extremely scandalous act. That is, the 'complaint' is quite strong and connects or balances a vice and virtue of equal standing. The norm they challenged with their claim is the provision of the will that passed the inheritance to the grandson. This norm, as intended by the legislators (the testator), is fundamentally positive since, in the social environment of the time, it was appreciated and even approved of if one wanted to transfer one's fortune to a male descendant. In this case, however, it is difficult to provide a morally valid justification, since it is morally problematic to defend the transfer of the deceased's property to his own killer. The normative force of the norm is therefore small. The result obtained by comparing the complaint and the force of the norm points in the direction of a serious sanction, annulment, which in the present case naturally does not mean the removal of the norm from the legal system but only its inapplicability and technical invalidity in this case (see Figure 4; the complaint vector is horizontal and long; the norm vector points upwards and is short. These amounts indicate the need for annulment).

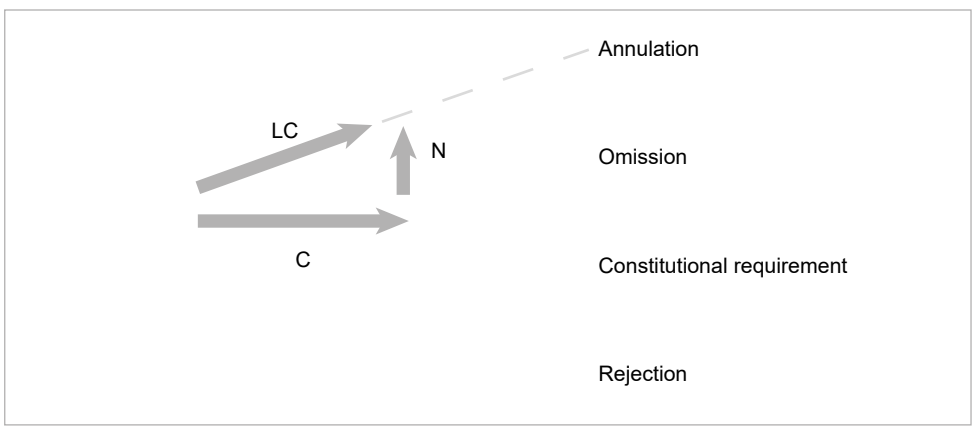

Figure 4 *Riggs v Palmer*
Source: Drawn by the Author

The second case is *People v Collins*.[28] The background to the lawsuit is quite trivial. A lady on her way home from a shopping trip bent down on the way, and someone pushed her to the ground. She did not see who the perpetrator was, nor did she hear his approach. When she looked up, he noticed that her purse was gone, and a blonde woman with a ponytail, wearing dark clothes had run past her. Another eyewitness, who was just watering his lawn at the end of the street, noticed the screaming and that a blonde woman in a dark dress was hurrying into a yellow car driven by a bearded black man and then driving away. The question of law was whether a means of proof based on a mathematical probability calculation is

[28] *People v Collins* 68 Cal2d 319, 438 P2d 33 (1968).

admissible as evidence.[29] It was an expert opinion that sought to determine, from the likelihood of certain elements of the facts (blonde woman, bearded black man, yellow car and so on), whether or not the couple involved in the proceedings could be considered guilty. The court's answer was negative.

The prosecution's argument was essentially that the likelihood of the above criteria occurring together is very small, making it very likely that the couple who have all of these distinguishing features are guilty. In this regard, the court argued in its reasoning that the numerical values used for the probability calculation are not necessarily realistic. There are no reliable statistics on how many yellow cars there are in Los Angeles, how many blonde women there are, and so on. On the other hand, we cannot be sure that these factors are independent of each other,[30] for example, wearing a beard may be overrepresented among blacks. There is also a possible connection between someone having blonde hair and wearing it in ponytail. Moreover, if the individual factors are not independent of each other, the combined probability of their occurrence cannot be determined in the same way as the expert did.[31] On the other hand, the probability calculations might show the chances that, for example, a black man and a white woman can exist as a couple, but does not necessarily point to it, nor does it prove in absolute terms that this couple actually exists. The probability calculation does not provide rock-solid evidence that the act was committed, nor does it provide evidence that the two persons in question, the Collinses, were guilty.[32] On the contrary, it can also be deduced from the model that there are even more such couples in a given Los Angeles region. (A special piquancy of the case is that in 1968, in the court's reasoning, blacks were still called 'negroes', and it is possible that there were one or more jurors within the jury who resented white woman and black man couples.)

How can this case be interpreted according to our model? The legal statement was made by the appellant Afro-American man, Collins. In the worst sense, he gave an example of torpor, as he sought to get rid of a potentially legitimate punishment with his appeal. In so doing he rejected the possibility of repentance in atonement. In the best interpretation of his act, it can realise the virtue of justice, for if he is not guilty, an appeal can help to establish this. An appeal as an act in itself is not outrageous, as everyone has the right to lodge one. Thus, the strength of the complaint is relatively small, and the distance between virtue and vice is also moderate.

[29] See William Twining, 'The New Evidence Scholarship', *Cardozo Law Review* 13, no 2–3 (1991), 295–302, 297.

[30] For more details see Michael Risinger and Jeffrey L Loop, 'Three Card Monte, Monty Hall, Modus Operandi and "Offender Profiling": Some Lessons of Modern Cognitive Science for the Law of Evidence', *Cardozo Law Review* 24, no 1 (2002), 193–286, 272.

[31] Bert Black, 'A Unified Theory of Scientific Evidence', *Fordham Law Review* 56, no 4 (1988), 597–695, 644.

[32] Cindy J O'Hagan, 'When Seeing is not Believing: The Case for Eyewitness Expert Testimony', *Georgetown Law Journal* 81, no 3 (1993), 741–772, 748.

The challenged norm is the judgment of the lower court, backed by the statistical calculation outlined above as the main evidence. The judicial intent is fundamentally positive, as it is aimed at punishing the person he or she considers guilty; moreover, on the basis of an objective, mathematical argument it seems to have a very strong case. However, the best moral reading of the norm shows something completely different. The statistical argument is not simply misleading but also erroneous, so the discrepancy between intention and best reading is significant; the power of the norm is small. On the basis of the above, the result, again, is annulment, that is the appellate court did the right thing in setting aside the judgment of the court of first instance and instructing the forum concerned to proceed with a retrial (see Figure 5; the complaint vector is short, pointing slightly upwards, as is the norm vector, and the end result, the legal consequence vector, thus indicates annulment).

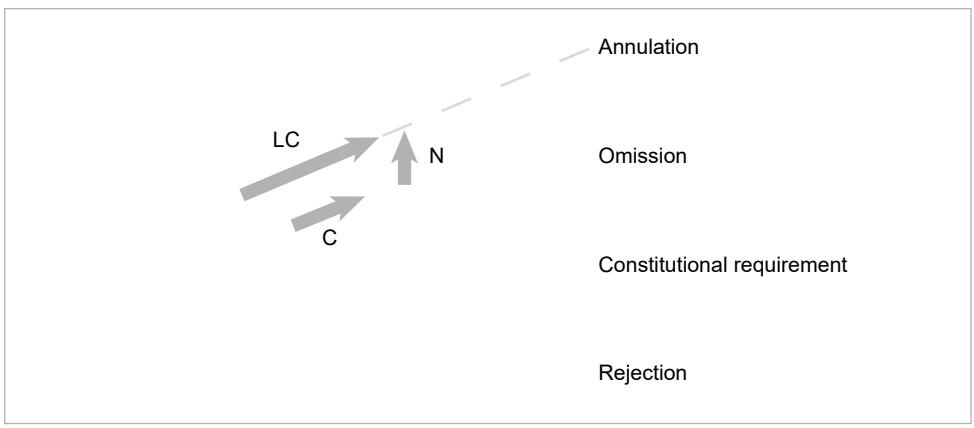

Figure 5 *People v Collins*
Source: Drawn by the Author

The third case is *District of Columbia v Heller*.[33] The District of Columbia enacted a law aimed at curbing the possession of firearms. Under the provisions of the law, citizens were not allowed to keep unregistered handguns in their homes, and further registration of guns was suspended, and the police captain was not allowed to extend existing gun licences. After the law came into force, Dick A Heller's application for a gun licence was turned down. Heller challenged that decision, citing the unconstitutionality of the law. The question of law was whether the law enacted by the District of Columbia was in conflict with the Second Amendment to the Constitution of the United States of America.[34] The affirmative, majority opinion

[33] *District of Columbia and Others v Dick Anthony Heller* 128 SCt 2783 (2008).
[34] Stephen G Giles, 'Mandatory Liability Insurance for Firearm Owners: Design Choices and Second Amendment Limits', *Engage* 14, no 1 (2013), 18–24, 18.

was expressed by Justice Antonin G Scalia. According to the statement of reasons on the judgment, the text of the Second Amendment at issue can be divided into two parts, and there is a causal link between them. In view of this, the text of the provision can be worded as *since* a well-regulated Militia, being (is) necessary to the security of a free State, *therefore,* the right of the people to keep and bear Arms, shall not be infringed. According to the majority opinion, the right to self-defence exists on the basis of *ius naturale,*[35] and concludes that, because of individuals carrying weapons, the army will be more efficient, because less time and financial resources will have to be spent on training soldiers.[36]

The judgment also states that, by using different statistics, both sides are able to argue for their own interpretation of the truth. Proponents of gun-carrying recalled that 85 per cent of cases where a host was able to deter a burglar with a gun end without personal injury. Opponents of gun-carrying, on the other hand, cite data showing that roughly one in five deaths suffered by juveniles in the USA is caused by some form of gun abuse. The response of those in favour of arms to this was that the causal link behind the phenomenon raised was not clear, as it would be possible that if it were forbidden to carry a gun, the ban could be counterproductive, because even more murders would be committed. The ban would only be respected by law-abiding citizens, and criminals would still acquire guns on the black market. The dissenting opinion emphasises that the constitutional amendment does not provide individual citizens with the right to carry arms, but provides protection for federal states against potential repression from the central government.[37] Justice John P Stevens said the ban in the constitutional amendment was, moreover, addressed to Congress and not to the federal states. Justice Stephen Breyer criticises the majority opinion because it does not follow the precedent governing the protection of human life and the right to carry arms, or adequately demonstrate why it deviates from this precedent. How can we evaluate all this according to our model?

The case was brought by Heller, who wanted to keep a handgun in his home. He wore a gun anyway during his work, which is what he also wished to do at home. The main vice he displayed by this is pride: He openly serves in the courthouse carrying a gun; why not do it in his own apartment as well? The main virtue in favour of keeping a gun at home is fortitude. He could thus bravely defend himself and his family against external intruders. Carrying a gun in a basically urban, densely populated neighbourhood is quite outrageous, although it is moderated by

[35] Robert E Shapiro, 'Natural Rights: Requiescant in Pace', *Litigation* 39, no 3 (2013), 55–58, 58; David B Kopel, 'The Natural Right of Self-Defense: Heller's Lesson for the World', *Syracuse Law Review* 59, no 30 (2008), 999–1016, 1013.

[36] Robert J Spitzer, 'Gun Law, Policy, and Politics', *New York State Bar Association Journal* 84, no 6 (2012), 35–42, 37.

[37] Hadley Arkes, 'The Natural Law Challenge', *Harvard Journal of Law & Public Policy* 36, no 3 (2013), 961–975, 965.

the fact that there is plenty of support in the USA for carrying guns at home. The complaint is therefore moderately strong, and since the vice and the virtue have roughly the same weight, this in itself suggests a more moderate sanction. The intention of the legislator in framing the norm was completely positive, as it was aimed at protecting one of the most important values, human life. Its best moral reading coincides with this if it really achieves it. As we have seen, the court did not really come to terms with this question of fact either. In any case, Christian intuition suggests that fewer weapons, not more, bring greater peace, and that a state of 'ceasefire', which is mutually sustained by fear of the other's weapon, is less valuable. The norm is therefore strong rather than weak in this respect. All in all, the recommendation must be a weak sanction, a rejection, or a constitutional requirement, and therefore the opposite result to that of the court hearing the dispute (see Figure 6; the complaint vector is of medium length, slightly upward, while that of the norm is longer, and goes downward, so their amount points to a milder sanction).

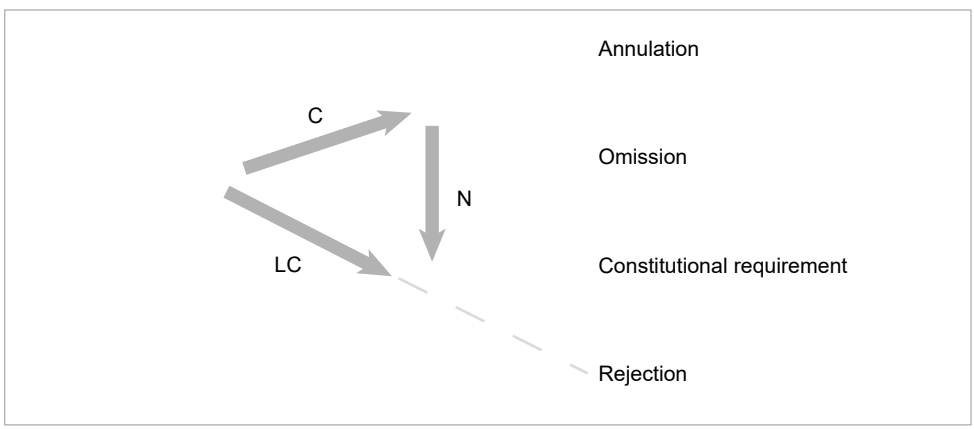

Figure 6 *District of Columbia v Heller*
Source: Drawn by the Author

The fourth and last case is *Tennessee Valley Authority v Hill*.[38] As part of a large-scale project, the US Congress began building a substantial system of dams on the Little Tennessee River. The central element of the facility was a valley dam called Tellico, which, as designed, would have swollen the section of river in front of it. The dam would also have been used as a hydroelectric power plant to supply electricity to hundreds of thousands of residents, and the project would have provided many jobs in a region from which young workers were constantly migrating. Construction was already in full swing when a law protecting endangered species came into force in 1973. Subsequently, a biologist discovered

[38] *Tennessee Valley Authority v Hiram Hill and Others* 437 US 153 (1978).

that a rare type of fish, snail darters, live in the Little Tennessee, and the species was later added to the list of endangered species. Nevertheless, construction did not stop for years: The competent authority voted to approve the necessary budget year after year, despite the fact that it was repeatedly raised during a congressional budget debate that continuing construction may be contrary to the provisions of the Endangered Species Act.[39]

The total cost of the project was more than 110 million dollars, of which about 57 million dollars had already been invested by the start of the lawsuit.[40] The authority in charge of construction therefore did not wish to stop construction. A law student, a law professor and a local lawyer sued the state authority for violating the Endangered Species Act. The case dragged on for years and triggered huge press coverage. The state authority, meanwhile, tried several times to establish snail darters in another river, but failed to prove the success of these efforts. According to biologists, it takes ten to fifteen years to state with certainty whether the translocation of a fish species has been successful or not. In addition, the snail darter is a very delicate freshwater animal species. The annoyance of the state authorities may have been increased by the fact that new perch species were discovered in the area every year, of which there are a total of about 140 registered ones, which differ only slightly. The question of law was whether the term 'action' referred to in Article 7 of the Endangered Species Act includes the completion of a project that has already begun.[41] The Article specifically prohibited acts that endangered the survival of the species listed in the annex to the act.[42] When the Supreme Court ruled, the debate was not about continuing the project, but about completing it. In fact, 80–85 per cent of the project had been completed, with only the closure of the sluices and the construction of some minor structures (for example, a footbridge) remaining. According to the court, the term *'action'* includes all actions, whether or not closing the project is an action.[43] What can be done about this rather spicy case?

The main guilt of the lawmakers is the vain desire for glory. What else can drive a biologist to waste his time on such a Sisyphean activity of little scientific

[39] Harold H Bruff, 'Legislative Formality, Administrative Rationality', *Texas Law Review* 63, no 2 (1984), 207–250, 224.

[40] Some, by contrast, say the value of the perch species is invaluable, see Edwin M Smith, 'The Endangered Species Act and Biological Conservation', *Southern California Law Review* 57 (1984), 361–413, 389.

[41] For the case see Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 23. About this see Steven J Burton, 'Ronald Dworkin and Legal Positivism', *Iowa Law Review* 73 (1987), 109–129, 122.

[42] George C Coggins, 'Protecting the Wildlife Resources of National Parks from External Threats', *Land and Water Law Review* 22, no 1 (1987), 1–28, 9.

[43] Zygmunt JB Plater, 'Statutory Violations and Equitable Discretion', *California Law Review* 70, no 3 (1982), 524–594, 586.

value as identifying distinct species of different perch that are barely separable from each other. And what else can drive a law professor and a law student to prevent a project costing millions of dollars in taxpayer money that could change the standard of living of an entire region? The virtuous reading of their actions is fortitude, as they allied to help an insignificant little species which is unable to defend itself. Their action caused great indignation, and the vices were a little more serious than the strength of virtue. The normative force of the complaint thus suggests the application of weaker sanctions. As far as the norm in question, the Endangered Species Act, is concerned, the underlying legislative intention must be seen as positive. In this particular case, however, the best moral reading may have trouble preventing the introduction of a large-scale project. For this reason, the normative force of the norm is small and points in the direction of milder sanctions. A comparison of the two leads to a rejection of the application, which again has the opposite outcome to that of the Court (see Figure 7; the complaint vector points slightly upwards and is quite long, and the norm vector is down and short, therefore their sum indicates rejection).

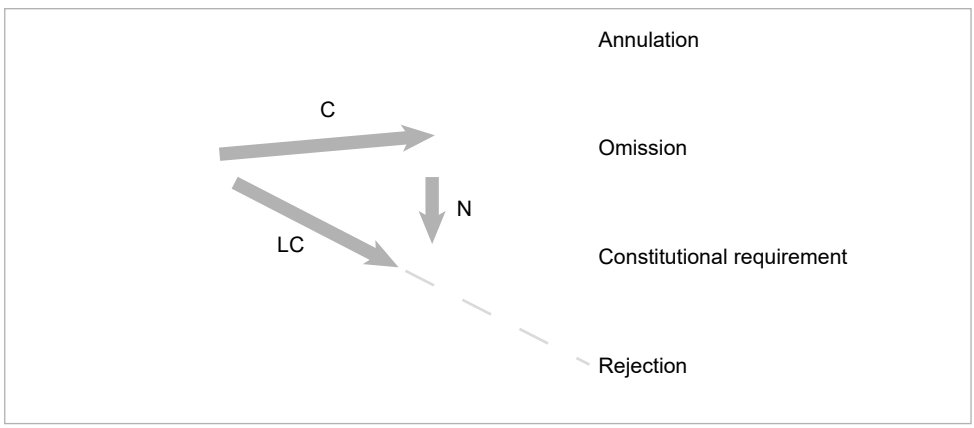

Figure 7 *Tennessee Valley Authority v Hill*
Source: Drawn by the Author

V Summary

The above few examples have shown, hopefully, that conscience-based analysis allows for as deep a study as traditional dogmatics, but it works with other concepts, values and limits. However, constitutionalism of conscience certainly has a serious advantage over classical analysis: It problematises and makes public a much more comprehensible, more important area that affects everyone, namely the world of vices and virtues. When working with the above method, we do not make the assessment to which we are accustomed, and it is not our main expectation that

our reasoning should be consistent and coherent. Rather, we perform a kind of meditation, where, by almost internalising the object in question, we pay attention to our own sinful and virtuous impulses. Moreover, our main expectation is not to allow ourselves to suppress within ourselves the clear voice that is necessary for an honest judgment of a given act.

The reader who has honoured these lines with their attention so far should not be daunted. I have not lost my sanity: I do not think the above scheme can ever displace conventional methods. This is true despite the fact that it relies on much more ancient traditions than legal reasoning. On the other hand, perhaps Christian people, or those who, relying on their own inner sense of justice, are attempting to orient themselves in an increasingly tangled world, may find the above method useful. Conducting 'examinations of conscience' may not only contribute to arriving at a well-founded opinion on the assessment of a socially important debate but may also serve as good practice to judge a case from a yes–yes, no–no perspective. One who becomes adept at this operation will not only be wiser but will be closer to the supreme rule of law, the *honeste vivere,* to fulfil the command to live a decent life.

Bibliography

Arkes, Hadley, 'The Natural Law Challenge'. *Harvard Journal of Law & Public Policy* 36, no 3 (2013), 961–975.

Ashley, Kevin D, 'Teaching Law and Digital Age Legal Practice with an AI and Law Seminar'. *Chicago-Kent Law Review* 88, no 3 (2013), 783–844.

Beehler, Rodger, 'Legal Positivism, Social Rules, and *Riggs v Palmer*'. *Law and Philosophy* 9, no 3 (1990), 285–293. https://doi.org/10.1007/BF01406532

Black, Bert, 'A Unified Theory of Scientific Evidence'. *Fordham Law Review* 56, no 4 (1988), 597–695.

Bruff, Harold H, 'Legislative Formality, Administrative Rationality'. *Texas Law Review* 63, no 2 (1984), 207–250.

Burton, Steven J, 'Ronald Dworkin and Legal Positivism'. *Iowa Law Review* 73 (1987), 109–129.

Cardozo, Benjamin N, 'The Nature of the Judicial Process'. *Journal of Law: A Periodical Laboratory of Legal Scholarship* 1, no 2 (2011), 329–348.

Carrió, Genaro R, 'Professor Dworkin's Views on Legal Positivism'. *Indiana Law Journal* 55, no 2 (1979), 223.

Cassianus, Johannes, *Az egyiptomi szerzetesek tanítása, I.* Pannonhalma–Tihany: Magyar Bencés Kongregáció, 1998.

Catechism of the Catholic Church. www.vatican.va/archive/ENG0015/_INDEX.HTM

Coggins, George C, 'Protecting the Wildlife Resources of National Parks from External Threats'. *Land and Water Law Review* 22, no 1 (1987), 1–28.

Dworkin, Ronald, *Law's Empire*. Cambridge, MA: Harvard University Press, 1986.

Dworkin, Ronald, 'Seven Critics'. *Georgia Law Review* 11 (1977), 1201–1268.

Evagriosz, Pontikosz, *A szerzetes*. Pannonhalma: Pannonhalmi Bencés Főapátság, 2018.

Gellius, Aulus, *Attic Nights*. London: Joseph Johnson, 1795.

Giles, Stephen G, 'Mandatory Liability Insurance for Firearm Owners: Design choices and Second Amendment Limits'. *Engage* 14, no 1 (2013), 18–24.

Hancock, Stewart F, Jr, 'Meeting the Needs: Fairness, Morality, Creativity and Common Sense'. *Albany Law Review* 68, no 1 (2004), 81–104.

Ignatius of Loyola, Saint, *Spiritual Exercises*. https://bit.ly/3dS3II3

Kopel, David B, 'The Natural Right of Self-Defense: Heller's Lesson for the World'. *Syracuse Law Review* 59, no 30 (2008), 999–1016.

Mensching, Günther, 'Moderne Elemente der Staatsauffassung des Thomas von Aquin'. In Rolf Schönberger (ed.), *Die Bestimmung des Menschen und die Bedeutung des Staates*. Baden-Baden: Nomos, 2017. https://doi.org/10.5771/9783845251103-227

Meyer, William B, 'The Background to *Riggs v. Palmer*'. *American Journal of Legal History* 60, no 1 (2020), 48–75. https://doi.org/10.1093/ajlh/njz027

Moyn, Samuel, *Christian Human Rights*. Philadelphia: University of Pennsylvania Press, 2015.

O'Hagan, Cindy J, 'When Seeing is not Believing: The Case for Eyewitness Expert Testimony'. *Georgetown Law Journal* 81, no 3 (1993), 741–772.

Pius XI, Pope, *Divini redemptoris*. https://bit.ly/3s6ISto

Plater, Zygmunt JB, 'Statutory Violations and Equitable Discretion'. *California Law Review* 70, no 3 (1982), 524–594. https://doi.org/10.2307/3480213

Risinger, Michael and Jeffrey L Loop, 'Three Card Monte, Monty Hall, Modus Operandi and "Offender Profiling": Some Lessons of Modern Cognitive Science for the Law of Evidence'. *Cardozo Law Review* 24, no 1 (2002), 193–286.

Seneca, Lucius A, *On Anger*. https://bit.ly/3sct8Fz

Shapiro, Robert E, 'Natural Rights: Requiescant in Pace'. *Litigation* 39, no 3 (2013), 55–58.

Smith, Edwin M, 'The Endangered Species Act and Biological Conservation'. *Southern California Law Review* 57 (1984), 361–413.
Spitzer, Robert J, 'Gun Law, Policy, and Politics'. *New York State Bar Association Journal* 84, no 6 (2012), 35–42.
Twining, William, 'The New Evidence Scholarship'. *Cardozo Law Review* 13, no 2–3 (1991), 295–302.
Von Jhering, Rudolf, *Der Kampf ums Recht*. Wien: Manz, 1894.