## Contents

1 The Problematic Nature of Discovery and Justification

## Preface

1	Introduction / 1	
	The Realists' Investigation of the Judging or Decision-Making Process	3
	2.1 The Critical Program: The Realists Response to Legal Formalism	3
	2.2 The Constructive Programme: The Realists' Investigation of The Judging Process	5
	2.2.1 Research Aims	5
	2.2.2 Methodology and Result	6
	2.2.3 Puzzling and Brooding	7
	2.2.4 Hunches	7
	2.2.5 Checking/Testing Hunches	8
	2.2.6 Reaching a Decision and Presenting the Decision	8
	2.2.7 Summary and Implications	10
3	Searching For the "Rigid" Distinction Between Discovery and Justification	11
	3.1 Richard Wasserstrom	11
	3.2 Neil MacCormick	15
4	Contradictions Between The Realists' and Positivists' Accounts of	
•	The Decision-Making Process	17
5	Recent Reflections on "Discovery" in the Judicial Decision-Making Process	20
	5.1 The Process of Discovery - Zenon Bankowski	21
	5.2 Decision-Making as Classification - Karl Llewellyn	23
	5.3 Weighing Reasons - Steven Burton	23
	5.4 The Ground of Judgment - Robert Alexy	25
	5.5 Ethical Judgment - Costas Douzinas and Ronnie Warrington	26
6	Methods of Investigating The Discovery Process	29
	6.1 Self Reports	29
	6.2 Idealized Judging	29
	6.3 Imaginary Judges	29
	6.4 Imaginary Cases	30
7	Conclusion	32
I	nvestigating The Analogy Between Science and Law	
1	Introduction	37
2	The Discovery - Justification Analogy	38
3	The Scientific Testing/Legal Justification Analogy	39
	3.1 Scientific Testing/First-Order Legal Justification	40
	3.2 Scientific Testing/Second-Order Legal Justification	42
	3.3 Problems With The Scientific Testing/Second-Order Legal	
	Justification Analogy	46
	3.4 Hypotheses/Rulings are Rivals in Different Ways	
	3.5 Conclusion	51
4	Recent Research by Cognitive Psychologists into "Discovery"	52
	4.1 Understanding and Inference	53

	4.2 Judgment and Decision-Making	54
	4.3 Reasoning	55
	4.4 Problem-Solving	55
	4.5 Creativity	56
	4.6 Introspection	57
	5 Conclusion	58
3	Examining "Discovery" and A Woman's Point of View as Justificatory and Rhetorical Strategies in Madame Justice Wilson's Analysis of The Right to Liberty in Rv. Morgentaler, Smoling and Scott	
	1 Introduction	61
	2 The Morgentaler Case	62
	3 "Discovery" as The Style of Wilson's Analysis of The Right to Liberty	63
	4 "Discovery" as Both a Justificatory and a Rhetorical Strategy	66
	4.1 The Role of "Discovery" in Portraying Wilson in a Favourable Light	67
	4.2 The Role of "Discovery" in Evoking Emotions in The Reader	67
	4.3 The Role of "Discovery" in Presenting a "Logical" Argument	68
	5 Shaping and Controlling The Reader's Questions: Leading The Reader to	
	Ask The Right Questions	69
	6 Shaping and Controlling The Reader's Answers: Leading The Reader to	
	The Right Definition	71
	7 A Woman's Point of View as A Justificatory Strategy	73
	7.1 Women's Decision-Making	74
	7.2 Women's Rights	76
	8 Conclusion	78
4	Investigating "Discovery" in The Arbitration Process	
	1 Introduction	80
	2 The Dispute	80
	3 The Arbitrator's Process of Discovery	81
	3.1 Searching For and Discovering The Overarching Question 3.2 Searching For and Discovering A Method to Answer The	82
	Overarching Question	82
	3.2.1 Searching For & Discovering The Key Question	82
	3.2.2 Testing The Key Question	82
	3.2.3 Searching For A Method to Answer the Key Question	83
	3.2.4 Searching For and Discovering A Method to Test The Answers to	0.4
	The Key Question	84
	3.2.5 Discovering An Answer to The Key Question	86
	3.3 Discovering The Answer to The Overarching Question	86
	4 "Discovery" as A Problem-Solving Process	86
	5 Introspection	89
	6 Conclusion	89
	Appendix A	91
	Appendix B	92
5	Bernard Lonergan on Insight in Theoretical and Practical Reasoning	
	1 Introduction	93
	2 Insight as an Act of Discovery or Invention in Solving Problems and Answering Ouestions	/95

	Contents	vii
	3 Insight in Theoretical and Practical Reasoning	97
	4 Lonergan's Method of Examining Theoretical and Practical Reasoning	101
	5 The Elements of Theoretical and Practical Reasoning	103
	6 Conclusion	106
6	"Discovery" in Theoretical Problem-Solving	
	1 Introduction	107
	2 Theoretical Problem-Solving	109
	3 Elements in The Understanding Phase of Theoretical Problem-Solving	110
	3.1 Sense-experience	111
	3.2 Wondering, Puzzling and Asking What-questions	111
	3.3 Direct Insight - The Act of Discovery in The Understanding Phase	114
	3.4 Formulation	119
	4 Elements in The Testing Phase of Theoretical Problem-Solving	120
	4.1 Is-questions	121
	4.2 Reflective Insight - The Act of Discovery in The Testing Phase	122
	4.3 Judgments of Fact	126
	5 Conclusion	128
7	"Discovery" in Practical Problem-Solving	
	1 Introduction	131
	2 Elements in The Understanding Phase of Practical Problem-Solving	133
	2.1 Wondering and Puzzling about What to do	133
	2.2 Practical Insight - The Act of Discovery in The Understanding Phase	133
	2.3 Proposed Courses of Action	134
	3 Elements in The Testing Phase of Solving Practical Problems	135
	3.1 Is-questions	136
	3.2 Practical Reflective Insight - The Act of Discovery in The Testing Phase	137
	3.3 Judgments of Value	138
	4 Decision/Choice	139
	5 Conclusion	140
8	Legal Reasoning in a New Context	
	1 Introduction	143
	2 Introspection, Question, Insight	143
	2.1 The Process of Introspection	143
	2.2 Questions and Insights	146
	3 Formulation, Expression, Rhetoric, Axiomatics	150
	4 Functional Specialties	159
	4.1 The Past Phase	164
	4.2 The Future Phase	165
	5 Conclusion	167