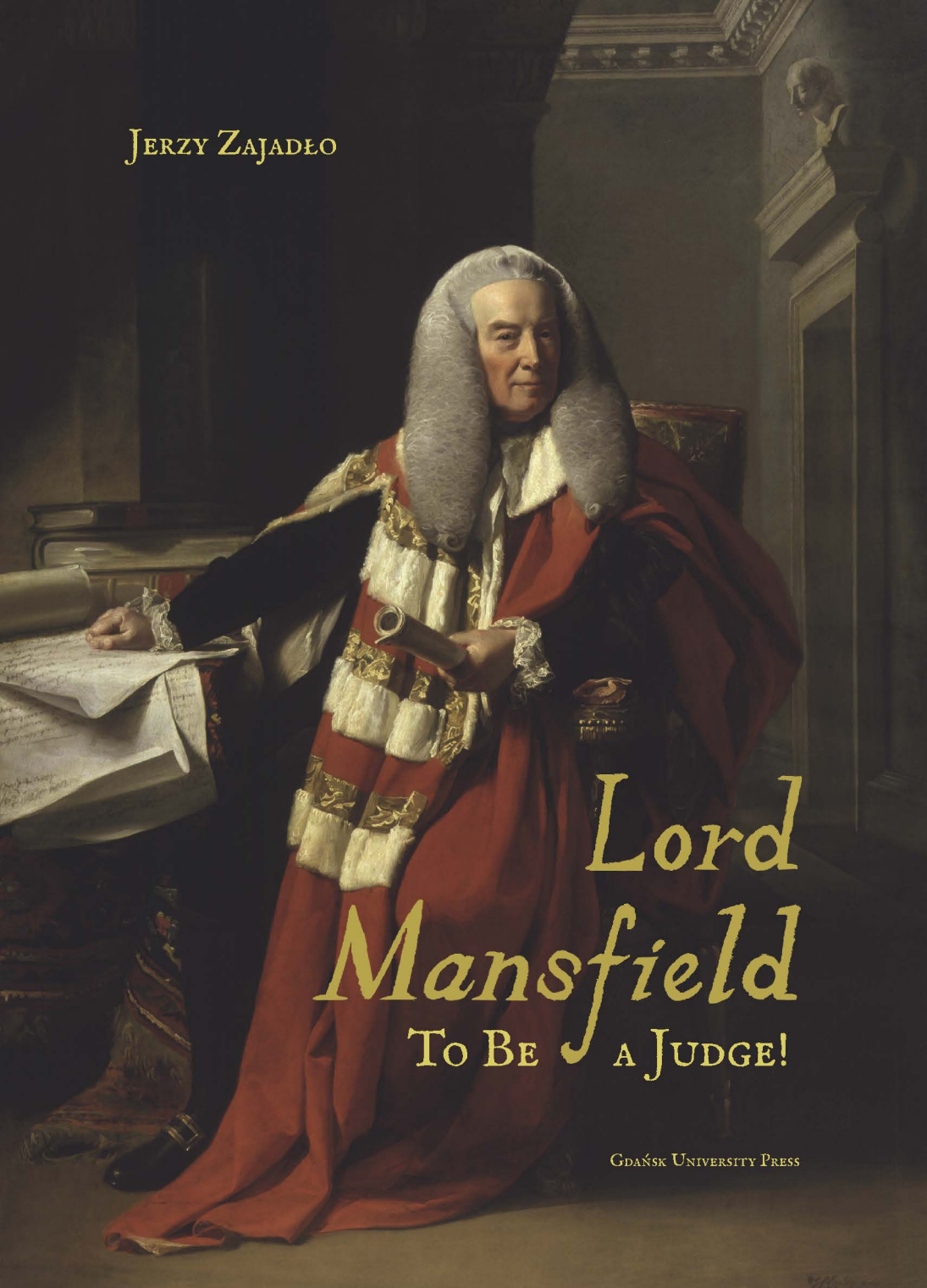

Jerzy Zajadło

Lord Mansfield

To Be a Judge!

Gdańsk University Press

Lord Mansfield

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For Stanisław Zabłocki
formerly Justice of the Supreme Court of the Republic of Poland

Lord Mansfield was a surprising man; ninety-nine times out of a hundred he was right in his opinions and decisions. And when he was wrong, ninety-nine men out of a hundred could not discover it.

Edward Thurlow
Lord Chancellor from 1778 to 1783

Jerzy Zajadło

Lord Mansfield
To Be a Judge!

Translated by
David Malcolm and Jerzy Zajadło

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Professor Ewa Łętowska

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Table of contents

INTRODUCTION

History and paradigms

Three hundred years ago, in the spring of 1718, a certain thirteen-year-old boy made a solitary journey on horseback from Scotland to London. This exceptionally dangerous escapade on the roads and trackless wastes of Britain took him almost two months, but he reached his destination in one piece. He made the journey in order to attend what was at that time the most prestigious school in England, Westminster School, and he was never to return to his family home in Scone Palace in Scotland. He never again saw his loving parents, who had sent him on this long journey so full of dangers. His name was William Murray, and he is the protagonist of this book.

In the history of jurisprudence, he is widely known under another name – as the 1st Earl of Mansfield, and in abbreviated form as Lord Mansfield. Here I will present his biography, a piece of history that is important not just for England and Scotland, but also for Europe, and, perhaps, for the whole world. However, it is not going to be a complete and extravagantly detailed biography, although the personality of its hero and his activities in various roles (lawyer, official, politician, judge, intellectual, aristocrat, royal advisor, and, finally, husband and head of his family) certainly deserve that. The focus will rather be on Lord Mansfield's achievements in case-law. Thus, sometimes, we will deviate from the conventions of classic biography and from the chronology of events, looking into the future or retreating into the past, in order to present his most interesting and sometimes, indeed, his timeless and groundbreaking judgments.

The table of contents of this study clearly demonstrates that the sequence here does not accord with the successive dates on which judgments were delivered, but on the surface appears arbitrary. However, this type of narrative is determined by a hypothesis that what happened previously in Lord Mansfield's life (his origins, his upbringing and education, his reading, his intellectual environment, his friendships, personal models, political choices, fortunate and unfortunate circumstances, etc.), at certain moments, influenced his judgments. At the same time, this book is directed at a broad circle of readers interested in the humanities in a widely accepted sense (biography against the background of history), but, nonetheless, above all at jurists (judicial decisions and their results).

By character, mentality, conviction, and vocation, William Murray was a judge *par excellence*. In the years 1756–1788 he held the position of Chief Justice of the Court of King's Bench, and it is from this period that the judgments come that are discussed in this book. It was proposed to him several times that he accept the highest government office of Lord Chancellor, but on each occasion he declined to do so. He knew perfectly well that one holds only briefly the position of that high office of state, an office entangled in current politics, while as a judge of the Court of King's Bench, he might remain independent and practically impossible to remove from his position.

He was, in any case, entangled in politics as a Member of Parliament, something that may surprise us today, but something that in the England of Mansfield's day was absolutely normal. Here, however, we encounter an important feature of Lord Mansfield's biog-

raphy. As a Scot coming from a rebellious Jacobite family, he was always under suspicion of a lack of loyalty towards the Hanoverian dynasty, but, despite that, he held the highest state offices and was a trusted advisor to King George III. For in politics he was most astute – exceptionally cautious, moderate, skillfully trimming his course in a world of enemies and friends, at times, indeed, opportunistic and conformist, he is accused by many of careerism and nepotism. However, as a matter of principle this was not carried over to how he fulfilled the function of a chief justice. In his robes and his wig, at the judge's bench, he was a genuine titan – brave, creative, sometimes very firm in his views, but at others surprisingly capable of showing empathy and tolerance in searching for an equitable and just verdict.

In legal literature and in the case-law of common law culture, Lord Mansfield's judgments have been cited exceptionally frequently. Perhaps, there would be nothing out of the ordinary in this, if not for the fact that they were made more than 200 years previously, and yet are currently cited. For example, it turns out that the U.S. Supreme Court, from its foundation to the present day, has cited Lord Mansfield's judgments more than 330 times, and has done so in relation to very varied areas of law and legal institutions – from commercial law through contracts, torts, unjust enrichment, inheritance, defamation, parental authority, press freedom, to criminal and constitutional law. If we add the virtually innumerable judicial decisions of lower American courts and of Australian, British, Indian, Israeli, Canadian, New Zealand, and South African courts, we must acknowledge that we are dealing here with a *sui generis* phenomenon.

Legal historians may, of course, protest against this almost idealized image of the judge. During his own lifetime, Mansfield's judicial activism (as we would call it today) and his adoption of the role of a legislator brought him not only supporters but also decided opponents. The best-known of the latter wrote to the press under the pseudonym of Junius.[1] It is true that Junius's criticism applied, above all, to Lord Mansfield's conservative position in the matter of press freedom and of the prosecution of publishers of material critical of the government (so-called seditious libel), but in one of his letters Junius also expressed disapproval of Mansfield's philosophy of judgment in general terms. Murray was also the recipient of harsh words from his long-term political rival William Pitt the Elder.

But, generally, recognition predominated, and sometimes even admiration that in his own day created a legendary atmosphere around the person of the judge. Indeed, with time that legend has become a firm one. Poems have been written in his praise and his name has even been given to a ship, but a desire for truth and accuracy compels us to add that Mansfield was often the negative subject of satirical drawings in political pamphlets. At the end of the nineteenth century, James Croake (in reality, James Paterson) quoted the following opinion of Edward Thurlow (Lord Chancellor from 1778 to 1783): "Lord Mansfield was a surprising man; ninety-nine times out of a hundred he was right in his opinions and

[1] We still do not know to this day who hid behind this pseudonym, but most probably it was Sir Philip Francis, a British politician of Irish extraction, although it is impossible to be sure of this.

decisions. And when he was wrong, ninety-nine men out of a hundred could not discover it."[2] This view is certainly exaggerated. Just like everyone else, Murray as a judge certainly made mistakes and passed faulty judgments, contemporary jurists did not always agree with him, and his precedence-setting judgments were overturned by other judges and by the House of Lords, especially after his resignation from the position of Chief Justice in 1788. However, it is also a fact that in the many years of his career as a judge, his judgments relatively rarely met with a differing opinion on the part of his judicial colleagues. In several cases, this may have been the result of the authority ascribed to him, but most frequently it was a result of his enormous knowledge and convincing argumentation.

Modern biographers generally avoid this type of "hagiographic" grandiloquence and concentrate, above all, on what in William Murray's judicial decisions has remained relevant till today. Norman S. Poser, author of the most extensive and detailed study of Mansfield, considers that his greatness as a judge is based on two grounds: "First, the long-term influence of his decisions, which was a result of his insistence on adapting the law to the changing conditions and on basing his decisions on fundamental principles; second, the morality he brought to the law."[3]

Contrary to appearances, my book is not a study in the history of English law, but is concerned rather with legal-theoretical and

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[2] J. Croake, *Curiosities of Law and Lawyers*, Sampson Low, London 1882, p. 35; quoted in: W. Swain, *The Law of Contract 1670–1870*, Cambridge University Press, Cambridge 2015, p. 76.

[3] N.S. Poser, *Lord Mansfield: Justice in the Age of Reason*, McGill – Queen's University Press, Montreal – Kingston – London 2013, p. 218.

legal-philosophical paradigms. Historians of the law must, thus, forgive me that several issues have been dealt with on the level of general conclusions, without exploring – where this was unnecessary – factual details and, indeed, the historical sources of English law in any depth. In the philosophy of law, there are examples of texts that involve the creation of certain model visions of an ideal judge on the basis of theoretical assumptions. One can point to the figure of the judge Hercules in Ronald Dworkin's integral philosophy of law. We are not dealing with this situation here: Lord Mansfield is no fictional figure, but a living breathing judge, whose actual verdicts created his more or less true and deserved legend. To use the language of Immanuel Kant, we are not operating here in the sphere of theoretical reason (*how things are*), or even practical reason (*how things should be*), but we are rather entering the sphere of the power of judgment and of an evaluative aesthetics (*are things the way they should be?*). Here, it is no coincidence that Dworkin, when he draws his judge Hercules, is inspired in large measure by the judgments of Lord Mansfield, especially by his understanding of precedents as the confirmation of the existence of legal principle. It was similar in Mansfield's own day; William Blackstone considered him, in fact, to offer a certain model pattern of the judge within the common-law system.

In the cases discussed in this book, there is surely interesting material not just for the representatives of particular legal dogmatics (civil, criminal, or constitutional jurists), but also for legal theoreticians and philosophers. It is true that Mansfield did not use this concept, but everything indicates that his philosophy of law perfectly accords with what Dworkin, two centuries later, defined as

integrity. As a judge, Murray had no easy task; he operated in a system that strictly separated common law and equity from each other (including, in terms of the competence of individual courts), and, at the same time, demonstrated a programmatic distance in relation to the achievements of Roman law. In relation to this, modern commentators on Mansfield's judgments stress that it is, in fact, here that his greatest achievement lies. He attempted to combine these three traditions in one whole – common law, equity, and Roman law. In terms of the last of these, Mansfield's own Scottish origins are of importance, inasmuch as Scottish law, as opposed to English law, was principally based on Roman law.

In addition, Mansfield was inclined to favour an incorporation of extra-legal norms, particularly moral norms, into the legal system, and he was also motivated by a feeling of justice and common sense. Junius, whom we have mentioned above, condemned this above all: first, because he was going beyond his competence, and was introducing elements of equity (reserved for the Court of Chancery) into the common-law based judgments of the Court of King's Bench; and, second, because by referring to a feeling of justice, he was, in fact, passing judgment on the basis of subjective and arbitrary ethical convictions. Let us, however, add that for Mansfield here it was not a matter of calling on his own moral convictions, but rather on certain extra-legal norms that functioned in society, norms that today we would call public morality.

This is best seen in the example of commercial law. Mansfield was able to modify it substantially, enriching common law by existing usages and customs (*lex mercatoria*) that functioned among

merchants and traders.[4] In judicial practice, this manifested itself, for example, in calling in such cases jurors drawn from representatives of a concrete professional group (a special jury), because this group best knew the needs and possibilities of national and international commerce. From today's perspective, we could say that Mansfield had a holistic and systemic approach to law (like Dworkin's idea of integrity), and in his application of it, he used a specifically understood systemic interpretation. Within the conditions of common law, based on narrowly and casuistically understood precedents, this was an important modification of the very philosophy of passing judgment.

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[4] In modern Polish legal literature (M. Dróżdż, *Zawarcie umowy w drodze oferty na podstawie Konwencji Narodów Zjednoczonych o umowach międzynarodowych sprzedaży towarów*, Wydawnictwo C.H. Beck, Warszawa 2016, pp. 6 ff.), the central features of *lex mercatoria* are described as follows: "First, it is evident that *lex mercatoria* constitutes a collection of principles and customs belonging to international commercial law, one that does not include norms of domestic legislation. A second definition proposed in legal doctrine describes *lex mercatoria* as a legal system the norms of which take into consideration business customs established in the practice of international trade. A third definition identifies the 'law of merchants' with a set of legal norms of a universal nature, deriving from commercial practices and customs. According to some commentators, the 'law of merchants' constitutes a body of commercial customs developed in the course of international trade, which are given the name 'autonomous commercial law.' However, most frequently in doctrine, the definition used is that suggested by B. Goldman, who pointed out that it was a collection of rules and customs relating to international commerce. Goldman also stressed that this law is independent of any regulations established in domestic legal systems."

Of course, this position required a radical change of approach to the law of precedent. Operating principally on the basis of common law, Mansfield did not underestimate the importance of precedent, and stood firmly within its theoretical principles.[5] Despite this, he instituted a fundamental modification in this field: I pass judgment in the same or similar way to how another court judged previously in a similar case, not because that court so decided, but because its judgment resulted from a regulation in force and because the judgment only confirmed that regulation, and thus I, in the name of the certainty of the law, ought, as long as the regulation is in force, to do the same or something similar. Here one can see the common-sense approach taken by Mansfield: the regulation binds me but that does not mean that I cannot overturn it, especially if it has lost its relevance to current circumstances, does not lead to a just resolution, and to follow it simply goes against common sense. Thus, in one of his judgments (*Jones v. Randall*, 1774), Mansfield noted with sarcasm and irony that "the law would be the strange science if we must go to the time of Richard I to find the case, and see what is the law." At this point, we touch upon a fundamental modern issue – judicial activism or passivity? – which contrary to appearances and perhaps somewhat paradoxically is related to Lord Mansfield too.[6]

Once more let us remove ourselves for a moment from history and the fact that this dilemma takes on a quite different dimension

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[5] Mansfield's understanding of the essence of precedent along these lines is emphasized by many modern theoreticians and philosophers of law.

[6] J. Oldham, "Judicial Activism in Eighteenth-Century English Common Law in the Time of the Founders," *Green Bag* 2005, vol. 8, no. 2, pp. 269–280.

on the basis of common law from the one it has on the basis of the European continental culture of statutory law, and let us consider the problem in a more universal manner. In a culture of statutory law, the dilemma involves a judge's encroaching on the competences of the legislator, while in a common-law culture it is a matter of an excessive breaking of precedents and the creation of new regulations. However, the mechanism is the same: suddenly a judge exceeds his/her natural sphere of applying or interpreting the law and enters (excessively or at all?) the sphere of legislation. So Lord Mansfield would have perfectly understood the question: judicial activism or passivity? His answer would certainly have been unambiguous, although qualified by further questions: activism, for sure, but why, to what end, and what does it mean? In relation to this, James Oldham suggests a thorough analysis of Mansfield's judgments from the point of view of different forms of activism, such as: 1) drawing on international law and foreign law; 2) applying the principles of equity; 3) creating new law; 4) overturning precedents; 5) broadening the interpretation of legislation; 6) narrowing the interpretation of legislation; and 7) drawing on regulations no longer in force.[7]

The Polish scholar who undertakes research into the figure of Mansfield has his/her task made easier, inasmuch as several more or less exhaustive biographies of the man and analyses of his judgements have been written.[8] Also he/she has access to collections

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[7] Ibid., p. 271. Lord Mansfield demonstrated all these forms of judicial activism except the last.

[8] Alongside the study by N.S. Poser, there are several others. The first was published just a few years after Mansfield's death (J. Holliday, *The Life of William Late Earl of Mansfield*, [n.p.], London 1797), and somewhat later he

of verdicts from that time. The modern relevance of Mansfield's legacy derives exclusively from his judgments, because Mansfield, although he had considerable influence on the final shape of individual editions of his contemporary William Blackstone's *Commentaries of the Laws of England*, was not himself a legal scholar and never wrote a scholarly legal treatise. At the same time, however, he made quite detailed notes on the cases he presided over and on the judgments that he prepared. It is true that part of them burned along with his unique collection of books in 1780 during the Gordon Riots, but the majority has survived. They were discovered relatively recently, in 1967, in the family home of Scone Palace in Scotland, and published by James Oldham as the *Mansfield*

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was the subject of extensive chapters in the history of English Chief Justices (J. Lord Campbell, *The Lives of the Chief Justices of England: From the Conquest Till the Death of Lord Mansfield*, vol. 2, London 1849, pp. 302–584) and of outstanding English judges (W.N. Welsby, *Lives of Eminent English Judges of the Seventeenth and Eighteenth Centuries*, S. Sweet, London 1846, pp. 368–448). There are also several more modern studies: C.H.S. Fifoot, *Lord Mansfield*, Scientia Verlag, Aalen 1977 (a reprint of the 1st edition published by Clarendon Press, Oxford 1936); E. Heward, *Lord Mansfield: A Biography of William Murray, 1st Earl of Mansfield, Lord Chief Justice for 32 Years*, Barry Rose (Publishers) Ltd., Chichester – London 1979; J. Oldham, *English Common Law in the Age of Mansfield*, University of North Carolina Press, Chapel Hill – London 2004; E.B. Lowrie, *Lord Chief Justice Mansfield: Dark Horse of the American Revolution*, Archway Publishing, Bloomington 2016. Besides these, a long chapter of nearly one hundred pages can be found in the monumental, twelve-volume history of English law by William Holdsworth, *A History of English Law*, vol. 12, Methuen & Co. Ltd., London 1938, pp. 464–583.

Manuscripts in two large volumes.[9] A reading of them makes it possible for modern scholars to enter deeply into the particular world of the philosophy of judgment of an exceptional jurist, and although it is a world of the history of common law, a history closed off in time and space, it is simultaneously a world full of relevant and enticing universals.

In the context of the modern Polish discussion concerning the role of judges and courts, these are fascinating materials. In the case of Lord Mansfield, we are dealing with a fiercely criticized judicial activism, which is nonetheless a rational and well-founded. In its substance, it does not involve the replacement of the legislator (who, *nota bene*, in Mansfield's day was fairly passive), but at its roots there is rather a culture of constant improvement and perfection of the law in the process of its application and interpretation.[10] It can, of course, be said that Mansfield is not a well-chosen example, inasmuch as I am describing a judge operating within a completely different legal culture, the Anglo-Saxon common-law system, and that more than 200 years ago. But such a complaint can be easily disposed of: in the theory and philosophy of law, it is methodologically customary to seek out paradigms that go beyond historical and cultural contexts. So it is not exclusively a matter of presenting a profile of a great judge and his achievements; it is rather a matter of understanding why he was great in a universal sense

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[9] J. Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century*, vol. 1–2, University of North Carolina Press, Chapel Hill – London 1992.

[10] J.J. Spigelman, "Lord Mansfield and the Culture of Improvement," *Quadrant*, October 2008, pp. 53–55.

Jerzy Zajadło's achievement is that by giving an impassioned account of Lord Mansfield's life and career he enhances the Polish reader's knowledge of courts and their functioning: of what a judge – as a skilled jurist - must grapple with in passing judgment; of his/her confrontation with social and political expectations. (Let us not be afraid to acknowledge that such confrontations happen, but they have to be faced in accord with a professional ethos and with the tools of the legal trade.) And in this matter the example of Mansfield – as an advisor to the King who was also able as a judge to maintain an appropriate distance and objectivity – may prove particularly instructive. The author manages successfully to capture the distinctive philosophy of judgment demonstrated by Mansfield. That philosophy is expressed in an approach to law that is inclusive and one that cares for the social roots that give it legitimacy. In this way, the author and his subject demonstrate a congruence of cognitive principles. Zajadło's presentation of Lord Mansfield as a jurist takes place via a discussion of his judgments, and these judgments are the book's real protagonists. Rarely have doubtful and controversial issues or the dilemmas of judgment been presented in such a readable form.

Professor Ewa Łętowska

Wydawnictwo
Uniwersytetu Gdańskiego

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