IN FAVOR OF FOXES: PLURALISM AS FACT AND AID TO THE PURSUIT OF JUSTICE

MARTHA MINOW* **& JOSEPH WILLIAM SINGER****

"The simple point which I am concerned to make is that where ultimate values are irreconcilable, clear-cut solutions cannot, in principle, be found. . . . The need to choose, to sacrifice some ultimate values to others, turns out to be a permanent characteristic of the human predicament."

– Isaiah Berlin[1]

INTRODUCTION

How admirable it is to use words to resolve conflicts between people. Using words rather than fists or bombs is valuable not only because it avoids physical destruction but also because it lays the predicate for more peaceable exchange, because it reflects and engenders respect, and because it creates the possibility of persuasion or for mutual agreement to coexist. Ronald Dworkin's extraordinary career displays possible heights that the use of words to address human conflict can reach. In both form and substance, Dworkin's work manifests profound respect for human beings and the dignity of each distinct person. It is with the respect he has both modeled and so ably earned that we offer these comments in rather diametric opposition to his most recent sterling accomplishment. For while Dworkin celebrates the "hedgehog" of unity of truth, we find the messier variety of plural truths more in keeping with lived experience, more attuned to the transparency and inclusiveness of debates over the good and the right, and more likely to reach the variety of human beings that such debates are meant to affect. Here, then, we suggest that values are plural, not unitary, and are better seen that way than sanded and recast to appear singular and unitary. It is not only possible, but also familiar and rewarding, to work through real problems with direct attention to plural values. At stake in these seemingly abstract and methodological differences are not

* Dean and Jeremiah Smith, Jr. Professor of Law, Harvard Law School.

** Bussey Professor of Law, Harvard Law School. Our mutual thanks and affection go to Richard Fallon, Frank Michelman, and Mira Singer.

[1] ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY, at *l*-li (1969).

only aesthetic tastes but also forms of justification and forms of human engagement through which real people can work through real problems.

I. THE PLURALITY OF VALUES

With his familiar elegance, Ronald Dworkin argues that moral values are more than mere expressions of emotional preference; they can be true or false.[2] Eschewing reliance on moral facts, Dworkin then explains that the truth of moral values rests on the arguments that support them.[3] These two claims lead to a third claim: that value is unitary.[4] It is this third claim – about the unitary state of value – that we wish to question.

We, like Dworkin, are interested in values that relate to practical action; how shall we act in our individual lives and in our social and political and economic lives together? So of course we can see the attraction of modes of understanding values that reduce disagreement and the friction of debate in order to ease judgments and actions of practical import. If values are to be helpful in justifying practical choices, those values must lead to a course of action. We cannot debate endlessly; instead we must choose and we must act, and to win the support and aid of others, we should devise and test arguments to justify our actions. To what, then, should the arguments refer to gain respect or motivate support? A sense of "ought" needs more than its own self-declaration. But competing claims about the foundations of morality or about whether there could ever be noncontroversial or reliable foundations for morality show the contemporary futility of ending debate on that ground. Dworkin wisely focuses on the arguments about morality as the wellspring of justification, but if morality is based on nothing but arguments, then arguments alone have limits in justifying a course of action. Justifying practical action through moral argument seems to involve excluding alternative courses of action, and hence the appeal, to Dworkin and others, of arguments that reach a "right answer."

The rightness of the answer would reflect and, in turn, demonstrate how arguments must be consistent with each other. If, on the other hand, values were fundamentally inconsistent, then it would be impossible for arguments to identify a single course of action and to justify it. Reasoning backwards, if morality is based only on arguments and arguments do not tell us what is right and moral, then values cannot be true or false. Inconsistent values confront us with the thought that leads Dworkin to conclude that all our convictions must fit together consistently in a grand web in order to provide a basis for justifying practical choices.

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[2] *See* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (forthcoming 2010) (Apr. 17, 2009 manuscript at 104, on file with the Boston University Law Review) (arguing that moral values are not "projections of an attitude or emotion").

[3] *See id.* (manuscript at 9) ("Value judgments are true . . . in virtue of the substantive case that can be made for them.").

[4] *See id.* (manuscript at 7).

Consistency affords a reassuring method and a potential imprimatur of truth in the very appearance of coherence. Consistency, after all, is a virtue. Thus, it makes perfect sense to worry about whether one has a sufficient justification for a course of action, especially if one is a judge or other state official empowered to use coercion to control the behavior of some for the benefit of others or, on the contrary, to allow individuals to act freely despite resulting harms to others. One would like an argument that speaks to both sides and justifies the result so that anyone could understand why the result is the right one. For Anglo-American lawyers, consistency is especially appealing. It is the very essence of the common law tradition. Judges and lawyers attempt to promote our convictions and to make them fit together. Jurists and professors announce rules of law and show how they justify the results in patterns of case law. John Rawls gave this process the vivid name of "reflective equilibrium"[5] and ever since, lawyers and legal academics have felt comforted that the sometimes messy process of reasoning back and forth between principles and cases is actually a process of well-justified truth-seeking. Ronald Dworkin extends this process both in his analysis of constitutional law cases and in his theorizing about normative argument in general.

Dworkin gives an example of his method by explaining why liberty and equality can be viewed as consistent rather than conflicting principles.[6] He notes that liberty does not mean unrestrained freedom – that definition would allow murder. When we say we value liberty, Dworkin suggests that what we really value is constrained liberty. One of those constraints, he convincingly argues, is the value of equality.[7] It is a fundamental principle in our society that all people are created equal and that they are entitled to be treated with equal concern and respect. If equality is a foundational value, then we cannot legitimately claim the liberty to violate equality norms. Thus liberty and equality are consistent because the value of liberty is inherently limited by the value of equality – at least for someone who takes the equal worth of persons seriously.

So the unitary thesis is attractive because it appears to support the other two theses. That is to say, if values are true or false and are supported only by arguments, then it seems natural to conclude that the truth of what is valuable can be justified by appropriate argument that explains away inconsistencies and generates answers that can be deemed solid, correct, true. But Dworkin, in our view, makes two errors. First, he errs by considering only the benefits of the unitary view. In so doing, he ignores both the costs of consistency and the advantages of justifications based on the recognition of plural values. Second, he assumes that truth is undermined if argument generates, not a consistent web of convictions and principles, but a field of plural and contradictory values that cannot be cleanly reconciled through reasoned argument. Here, he fails to

[5] JOHN RAWLS, A THEORY OF JUSTICE 48 (1971).

[6] *See* DWORKIN, *supra* note 2 (manuscript at 232).

[7] *See id.* (manuscript at 220-37).

recognize the possibility that justification based on the recognition of plural values is not only possible, but better accords with the truth of the human condition.

We will take these two criticisms in turn. First, what might the costs of consistency be? Making all one's convictions consistent with each other and mutually supporting in a giant web of principles requires us to suppress the experience of conflict. Thus, while Dworkin is correct that it is simplistic to assume that liberty and equality *necessarily* conflict,[8] he is wrong to assume that justification is best handled by reconciling the conflict *all the way down*.[9] Some cases can be handled in the manner that Dworkin proposes. Even libertarians are in favor of the rule of law; they are not, after all, anarchists. When libertarians want regulation, they usually call it "protecting property rights" or something similar that makes it seem as if the limitation on liberty is not "really" a limitation on liberty. But even if one accepts both of Dworkin's first two claims (that values can be true and that they are based on argument rather than correspondence with moral facts), it is a mistake to assume that justificatory analysis fails if it cannot make conflict go away. Rather, it may be true of human values in a free and democratic society, such as we aspire to in the United States today, that values pose irreconcilable conflicts that cannot be cleanly disposed of by reasoned argument.

Under Dworkin's view, a judge deciding a case (or a moral theorist justifying a social or political or legal practice) needs to explain why one value outweighs another. This requires *reinterpreting the values* to show how they actually fit together – or to alter them so they fit. But if one does that, one then reduces the experience of tension, allowing analysts to rest easy that they have found the truth and know what to do. Dworkin is right that it is a virtue of normative reasoning to try to make values consistent,[10] but he is wrong that it is a virtue to make conflicting values consistent when in fact no available principle or argument cleanly, definitively, and uncontroversially draws an acceptable line between them. It may actually be true that our values conflict. If that is so, it would violate the first thesis to pretend that values are unitary when in truth they are not. And if one believes that truth is supported only by consistent interpretation of values, one will be motivated to suppress the depth and persistence of value conflict.

Why does it matter if one suppresses the truth of value conflict? It matters, first, because anyone like Dworkin who seeks the truth will move away from understanding rather than toward it. Indeed, it is an act of subverting rather than discovering truth to pretend that values cohere if, in fact, in a particular context we truly have no good way to state exactly why one value trumps another. Suppressing the truth of value conflict matters, second, because

[8] *Id.* (manuscript at 230-33).

[9] *Id.* (manuscript at 107) (claiming that "in one sense all concepts are interpretive" and that the interpretive process is "interpretive all the way down").

[10] *Id.* (manuscript at 114).

people who believe that they have found the answer – often in the face of obvious difficulty or ambiguity – often adopt a shield of confidence and even experience their resolution as obviously right. They have reinterpreted the values to make the problem go away. There is, therefore, nothing left to worry about. They know what is just and how to act. But this can too often amount to overconfidence, insularity, and rigidity. People who are overly confident – and who have convinced themselves that they no longer need to worry about the conflict of values that previously worried them – feel free to act on the basis of their new web of convictions and therefore feel free to impose their will on others.

Dworkin is worried that our values will have no adequate support in argument (and that is, as he argues, the only support they can have) if they are not consistent with each other.[11] That is not an unreasonable worry. But we are worried that those who make all values conflicts appear to be false conflicts will stop thinking, or worse, will stop worrying about what they are doing when acting in ways that affect others. We should feel regret, worry, or tension, as we act in ways that inflict harm on others, even if the harm is putting a murderer in jail. Those are the major costs of consistency that do not disappear if we ignore them; there are real losses in the assertion that value is unitary that also do not dissipate. What is at risk is sheer honesty about competing views and contrasting tugs on our perceptions and hearts. So is openness to change over time. Further in jeopardy may be respect for disagreement and the inclusiveness that such respect engenders.

As others have noted, Dworkin's method has flaws, and the debates ensuing about his work illustrate grounds for belief in the very multiplicity of possible values and methods that Dworkin seems devoted to suppressing.[12] Insisting on value as unitary requires avoiding or suppressing conflicts between potentially compelling values or between points of view that do not clearly cohere. Insisting on unitary value also requires defeating its own alternative, and hence presents the paradox of the singular claiming superiority precisely in the act of doing battle with a rival whose very existence as a worthy opponent threatens the assumption of unitary value.

Pluralism, the recognition of multiple values, does not produce this paradox. Moreover, pluralism embraces the conflicts that emerge between and among competing values:

> Pluralism recognizes that these tragic conflicts are a normal hazard of political life just as they are of moral life in general – that is, they are not triggered solely by exceptional circumstances, "accidents" or "errors," but

[11] *See id.* (manuscript at 9) ("Value judgments are true . . . in virtue of the substantive case that can be made for them. The moral realm is the realm of argument not brute, raw fact . . . [and] it is sensible to expect that when arguments that seem persuasive produce conflict, better arguments exist that do not.").

[12] *See, e.g.*, Avery Plaw, *Why Monist Critiques Feed Value Pluralism: Ronald Dworkin's Critique of Isaiah Berlin*, 30 SOC. THEORY & PRAC. 105, 110-25 (2004).

> can arise naturally out of the diverse but reasonable ways that values are understood and linked together into the basic models that integrally inform our lives.[13]

The honesty of pluralism embraces truth of conflicting values and cultivates a tolerance and engagement with others that alternative approaches are less likely to promote. Indeed, as an understandable but unattractive corollary to Dworkin's general approach, his theory cannot acknowledge that there are many different forms of coherence and warrant for normative claims. Our approach can recognize his but also acknowledge well-recognized competing views: yes, one important way to make our values coherent is to reinterpret them to make the conflict go away (at least in the case we are considering), but another equally well-established way to pursue value coherency is to recognize the existence of conflict and explain the choice of how to act in another way.

Lawyers are well aware of this second approach and, indeed, many features of legal expertise can be understood as techniques for moving toward defensible action once conflict is acknowledged. This is in fact one of the comparative advantages of legal expertise: people with legal training offer methods for moving through conflict through reasoning and analysis rather than brute force or sheer compromise. One method is the use of a balancing test that expresses the values on both sides in evocative terms, explains their legitimacy, and then gives a discursive argument about why one value trumps the other. Another technique uses narrative to generate movement from one point to another or builds persuasive force for so doing. Still another is to unpack points of difference and similarity amid conflicting values by teasing out analogies and disanalogies, and yet another related technique is to tether a current judgment to analogous precedent and to favor continuity with the past, absent good new reasons for change. A further method articulates meta-values that then justify using a presumption for one set of values and placing a burden of proof on those who would seek to overcome them.

Lawyers and philosophers alike use reasons and analyses in many ways to justify drawing distinctions and establishing lines and relationships between conflicting values. Not all of these techniques can be fairly described simply as a reinterpretation of a value or as a conclusion that a particular value, despite initial appearances, is not actually implicated in a particular case. Common law reasoning more often uses the opposite type of argument. Judges and lawyers recognize the presence of conflicting values and then explain why one trumps another. They do so in the context of a specific case by reference to the facts (telling the story, narrative), precedent (analogy, context, situation sense), and balancing interests and/or golden rule or social contract reasoning (arguing that most people would sacrifice one value for another if they did not know on which side of the conflict they would be situated). Justification using these techniques *preserves* the conflict of values, rather than suppressing it, while giving reasons why one value is given precedence over another.

[13] *Id.* at 114.

Preserving competing values in the statement of the problem and even in the statement of a resolution is often preferable to the procedure Dworkin proposes.[14] Explicit acknowledgment of conflicting values makes the nature and scope of disagreement more transparent to invested parties and bystanders. Recognition of plural values can amply accommodate both historical change and changes in social interpretations of the meaning of a given value. Embracing plural values promotes questioning and critical thinking rather than complacency. We can call this method pluralism; we can pursue it in ways that enable more people to participate in the creation and re-creation of desirable shared worlds. Rather than pushing recognition of regret aside or away from view, pluralism allows an experience and expression of regret as one engages in a morally-justified but problematic action. This dynamic actually can assist us, as disputants, judges, and theorists, in preserving our own sense of humanity and humility and in maintaining our ability to empathize with others and what moves them. Pluralism helps us continue to focus on the humanity of others and to see the legitimacy of their claims even when they lose; this is a prescription for greater respect than one produced by an approach that suppresses what is legitimate about the claims of the loser and risks erasing from view what motivates them or helps them explain their own positions to themselves and others.

Moral theorizing fundamentally addresses right and wrong in human relations. Thus, it should not be a surprising test of moral theorizing to assess its effect on those who use it and on those who are affected by its use. Another test is its capacity to generate results that lead to or justify action, and here working with plural values holds further promise.

II. WORKING WITH PLURAL VALUES

How do lawyers and judges actually work with plural values in resolving real and compelling problems? Although the process may seem difficult and messy, and may lack the tone of confidence that accompanies a method touted for producing "the right answer," familiar forms of doctrinal reasoning help lawyers and judges perceive competing values and work to resolutions in concrete cases. Consider the case of *Blamey v. Brown*,[15] a staple of conflict of laws classes. The question in *Blamey* was whether taverns should be liable for deaths or injuries caused by drunk drivers who became intoxicated by imbibing liquor at the tavern – a case complicated by the fact that, although the tavern was located in a state that grants taverns immunity, the harm was experienced in a state that imposes liability on dram shops.[16] The small tavern in *Blamey*

[14] In keeping with our pluralism, we acknowledge the virtues of and room for his method of adjusting apparently conflicting values to redescribe them to cohere.

[15] 270 N.W.2d 884 (Minn. 1978), *finding of personal jurisdiction overruled by* W. Am. Ins. Co. v. Westin, Inc., 337 N.W.2d 676 (Minn. 1983).

[16] *See id.* at 889-90.

was located in Wisconsin a few miles from the border with Minnesota.[17] The drinking age was lower in Wisconsin than Minnesota and the bars were open many hours later in Wisconsin than Minnesota, which "attract[ed] Minnesota minors to Wisconsin."[18] Moreover, Wisconsin immunized taverns from any liability for auto accidents caused by drunk drivers to whom they served liquor.[19] Minnesota, on the other hand, allowed negligence claims against taverns that served liquor to visibly intoxicated persons who then harmed others by driving while intoxicated.[20] At the time *Blamey* was decided, Minnesota courts adopted the view that taverns owe a duty to strangers who may be harmed by drunk drivers they serve and the view that serving liquor to a visibly intoxicated person may be a proximate cause of the harm to the victim.[21] Conversely, Wisconsin placed all moral blame on the drunk driver and relieved taverns of any obligation to look out for the harms they may be causing; similarly, Wisconsin concluded that the drunk driver is legally liable for injuries he causes, not the tavern which merely sold the liquor at the behest of the patron.[22] Which law applies?

The tort law issue is one that has been contentious. Originally, taverns were not liable for such harms on the ground that it was the drunk driver, not the supplier of the liquor, who caused the harm.[23] In the second half of the twentieth century, however, many courts expanded tort liability at the same time that a national movement to combat drunk driving took hold.[24] Simultaneously, notions of causation changed so that it became prevalent to assume that more than one person might be the "cause" of the harm and that acts going farther back in the chain of causation might be candidates for regulation and condemnation with the various contributing tortfeasors sharing liability in proportion to their contributions to causing the harm.[25] Controlling the behavior of bars seemed one way to stem the tide of drunk-driving injuries and deaths, and a fair number of courts were convinced that it should be a jury question whether the tavern was a moral cause of the harm. Other courts just as stubbornly held to the traditional view; moreover, many legislatures sided

[17] *Id.* at 886.

[18] *Id.* at 888.

[19] *Id.* at 889.

[20] *See* Trail v. Christian, 213 N.W.2d 618, 619-26 (Minn. 1973).

[21] *Id.*

[22] *See* Garcia v. Hargrove, 176 N.W.2d 566, 567 (Wis. 1970) ("Human beings, drunk or sober, are responsible for their own torts.").

[23] *See, e.g.*, *id.* at 568.

[24] *See, e.g.*, JOHN C.P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 131-32 (2d ed. 2008). *See generally* Theodore A. Bruce & Patricia R. Bruce, *The Legislative Response to the Drunk Driving Dilemma: An Empirical Analysis of Its Success and Failure*, 33 ST. LOUIS U. L.J. 177 (1988).

[25] *See* GOLDBERG ET AL., *supra* note 24, at 239-58, 389-404.

with the taverns in affirming their traditional immunities.[26] *Blamey* is even harder because it is a case in which two states have reached opposite moral convictions and adopted contradictory laws. Do we apply the law of the place of the conduct or the law of the place of the injury?

According to Dworkin's notion of unitary value, even if we think the dram shop case is hard, there must be a right answer to this kind of case. Otherwise, value cannot have any truth status. Further, if truth status is based on argument, then we must find the set of convictions, arguments, and principles that justifies one resolution rather than another.

Consider first the tort question. The tavern will argue that it is merely engaging in a legitimate business – selling alcoholic beverages to interested customers. It is the patron – not the tavern – who decides to become drunk and then to drive. It is relatively easy for the patron to avoid the drunk-driving incident: she could decide not to drink so much, to take a taxi, or to have a sober companion drive her home. Conversely, the tavern has fewer preventative options. How is the tavern supposed to know whether a patron intends to drive? Should there be interrogations at the door? Should bouncers follow patrons to the parking lot and physically prevent them from getting behind the wheel? For both reasons of personal responsibility and practicality, there are considerable arguments for the immunity position.

On the other hand, allowing a negligence claim does not mean that the tavern is automatically liable. The courts did not adopt a strict liability rule in this instance. Rather, the plaintiff has to show, from admissible evidence, that the tavern continued to sell liquor to someone who was visibly intoxicated and has to convince the jury that this extra amount of liquor is what caused the harm – a daunting task and one that is not easy to pull off. If the plaintiff was able to discover such factual evidence and overcome the burden of proof, and the defendant was unable to convince the judge that there was insufficient evidence for the jury to find the tavern responsible for the harm, then we have a case in which ordinary citizens have concluded that the tavern does bear some moral responsibility for the harm. If that is so, why should the tavern be immune? The negligence rule does not in fact make the tavern vulnerable every time it serves a drink; cases will only go forward if the plaintiff's lawyer is convinced there is a possible claim. Of course, plaintiffs may wrongfully sue to try to force a settlement, but that does not negate the argument that the tavern may in fact bear moral responsibility for which it should have to pay the price.

The conflict of laws context makes the case even harder. The tavern will argue that it is located in Wisconsin and that it has a right to look to Wisconsin law to determine its rights and responsibilities. As a citizen of Wisconsin, the owner participates in the making of Wisconsin law and can work to change it if he disagrees with it. It is unfair to impose on a defendant the law of a foreign jurisdiction to which the defendant has never been, in which he has never

[26] *E.g.*, LA. REV. STAT. ANN. § 9:2800.1 (2009); WIS. STAT. ANN. § 125.035 (West 2009).

conducted any business, and with which he has no ties of any kind. The tavern will be unfairly surprised that Minnesota law can reach over the border and regulate his conduct in Wisconsin. Additionally, the tavern has a right to be protected from regulation by a jurisdiction with which it has no contact. This argument has led courts in recent years to conclude that, because the tavern has no minimum contacts with the place of injury, the courts at the place of injury do not even have personal jurisdiction over the tavern.[27] That means that it is unconstitutional (as a violation of due process) to hale the defendant into the Minnesota courts.[28]

On the other hand, the Minnesota perspective is that the tavern is (conveniently) located just across the border and is knowingly shooting arrows into Minnesota in the form of drunk drivers. If someone stood in Wisconsin and fired a gun across the border, killing someone in Minnesota, that person will have committed a crime in both states. Minnesota has the right to protect its people from guns being fired across the border into Minnesota. This case does not involve an intentional tort, but it does involve an actor negligently firing missiles into Minnesota. When one of those missiles kills a young girl, should Minnesota not have the power to protect itself from the Wisconsin actor and from the lax Wisconsin public policy that immunizes the actor? Is it actually unforeseeable that a business located near the border and that predictably launches harm into the neighboring state might be morally responsible for finding out what that state's law is and complying with it? Ignorance of the law is no moral or legal excuse, and thus actions that predictably affect the place of injury should bring the actor within the legitimate regulatory power of the place of injury.

Torts and conflicts scholars do create reasoning processes that help choose between these competing constructions of the moralities at issue here and that justify one path rather than another. According to Dworkin, those reasoning processes have the goal of choosing a way of making our competing convictions and intuitions consistent with each other.[29] If that is so, then the legal opinion justifying the result will choose one moral construction over another, either finding the tavern not to be morally responsible or the reverse. But justifying the result in such a fashion *negates the fact that it is a hard case*. Thus, an opinion applying Wisconsin law might flatly state that the tavern is

[27] *See, e.g.*, W. Am. Ins. Co. v. Westin, Inc., 337 N.W.2d 676, 681 (Minn. 1983) (holding that the court could not exercise personal jurisdiction over a Wisconsin tavern because the "defendant's only demonstrable contact with the forum state is the plaintiff-insured's 'unilateral activity' in driving to Minnesota").

[28] *See id.* at 680-81.

[29] *See* DWORKIN, *supra* note 2 (manuscript at 165-66) (arguing that when values appear to conflict, "[w]e need an interpretive meshing of our two principles not some compromise between them"); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 114-23 (1977) (discussing the theory of law as a "seamless web" that is "construct[ed] of abstract and concrete principles that provide[] a coherent justification for all common law precedents and . . . constitutional and statutory provisions").

not the cause of the harm and bears no moral responsibility for the death of the Minnesota girl. It might go on to state that actors in Wisconsin have the right to look to local law to determine their rights and responsibilities and that it causes unfair surprise to impose duties based on the law of another state with which the actor has no contacts. An opinion applying Minnesota law might emphasize that drunk driving is a horrible business and that those who contribute to its perpetuation have much to answer for. Taverns are a part of that chain of causation and should bear responsibility for the harm they cause. Nor can the tavern honestly contend that it has the right to act without regard for the law of another state when it knows (after checking patrons' ages and identifications) that it is serving liquor to a Minnesota resident likely to return home that evening and that it therefore is putting people in Minnesota at risk. The tavern has no moral entitlement to hide behind the border looking insolently into Minnesota saying "you can't get me." Those who cannot confine their conduct – or the foreseeable consequences of their conduct – to an immunizing state bear responsibility for complying with the plaintiff-protecting law of the place of injury.

Now perhaps, after careful thought, you come to believe it is an easy case. Maybe one side's argument is so much better than the other's that it is simply a case of legitimate interests versus no legitimate interests. In such a case, it is appropriate to write the opinion in a way that negates the losing argument.[30] In such a case, Dworkin is right to say that a certain result is just and that it is true that the result is right. But if there are legitimate interests on both sides, and if the case really is hard, then it would be *false* (not true) to deny the legitimate interests on the losing side.

A judicial opinion that stated the truth of *that* moral situation would acknowledge that it was a hard case, that there were legitimate interests on both sides and that, on balance, one interpretation was better than another. Such an opinion would not explain that the principles had been massaged so that they fit into a perfect web. It would acknowledge the messiness of the situation, the complexity of the relevant values and the fact that they do not easily sit together but pull us in opposing directions. It would confront, instead of gloss over, the apparent conflict in values and acknowledge that a choice must be made and justified. The opinion might say, for example, that it is true that Minnesota has a legitimate interest in protecting its people from drunk drivers who become intoxicated in Wisconsin, but that it has other ways to do so – for example, by increasing the criminal penalties for drunk driving or funding a public education campaign on television to make drunk driving shameful and socially discouraged. Or the opinion might explain that there is some unfairness in imposing Minnesota law on an out-of-state actor, but that it

[30] For such a case, see *State v. Shack*, 277 A.2d 369, 374 (N.J. 1971), which held that farmers had "no legitimate need" to exclude doctors and lawyers from entering the farmer's property to provide governmentally-funded services to migrant farmworkers in their living quarters on the farmer's land.

is also unfair to leave Minnesota residents vulnerable to conduct just across the border that Minnesota classifies as morally reprehensible and that predictably causes loss of life inside Minnesota borders. The *truth of the matter* may be that this is a case in which unfairness is inevitable; no result will be completely fair. The appropriate result acknowledges the unfairness that will happen no matter how the case is decided. Then, justifications for a given result may emphasize respecting expectations, or allocating responsibility for change to the elected branches. At least such efforts avoid disrespecting what may be a widespread recognition that no "right answer," no avoidance of unfairness from one or another perspective, is possible.

Consider the history of the way courts have approached conflict of laws cases like *Blamey* over time. At first, courts applied rigid rules deduced from conceptions of the legal issue at stake.[31] Because tort law provides remedies for injuries, courts in the United States adopted a "place of the injury" rule.[32] In the twentieth century, this approach was criticized as mechanical and out of touch with policy issues at stake in the case[33]: the interests of the states in having their laws applied and achieving their policy goals and the rights of the parties to the protection of the laws of their own states. Applying the place-of-the-injury rule might not deter the conduct giving rise to the injury in *Blamey*, for example. Why should the law of the place of injury control over the law of the place of conduct?

Interest analysis answers this question by using "false conflict" analysis.[34] This analysis would focus on the "interests" of the states in having their laws applied by reference to the policies those laws were intended to achieve. If the policy of one state was not implicated in the particular case, the court would apply the law of the other "interested" jurisdiction. In *Blamey*, one might argue that the jurisdiction where the injury occurred has a legitimate interest in regulating and imposing liability on Minnesota taverns but no legitimate authority (and hence no interest) in regulating Wisconsin taverns. If that is so, Wisconsin is interested in applying its law and Minnesota is not. Conversely, one might argue that Wisconsin is interested in immunizing its taverns if they can confine their conduct to Wisconsin; if, on the other hand, they cause harm in a neighboring, plaintiff-protecting state, they cannot legitimately claim the protection of Wisconsin's immunizing law. This furthers the tort principle that you take the plaintiff as you find her; a defendant is liable for any grave harm inflicted on a plaintiff even if the defendant's tortious action would normally result in little harm. Wisconsin, on this view, cannot legitimately give its

[31] *See, e.g.*, SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 10-11 (2006).

[32] *See* EUGENE F. SCOLES ET AL., CONFLICTS OF LAW § 17.2 (3d ed. 2000).

[33] *See* SYMEONIDES, *supra* note 31, at 10-13.

[34] *See* SCOLES ET AL., *supra* note 32, § 17.12 (explaining that "false conflict" analysis is used to "show that the occurrence of the injury in a particular state is too fortuitous and irrelevant to warrant serious consideration of that state's law").

businesses the power to cause harm in a neighboring state because Wisconsin's authority does not extend that far.

If one adopts either of these interpretations of the legitimate spheres of state authority, the case can be disposed of as a false conflict. Such a justification explains that only one state is "interested" in applying its law and the natural thing to do is to apply the law of the only state that wants its law applied. But notice what false conflicts analysis does: it erases the interests of the state whose law is not applied and it deems the interests of the losing party to be wholly illegitimate. Even the inventors of false conflicts analysis would never classify a case like *Blamey* as a false conflict; even those hopeful that many conflicts of law could be resolved as false would concede that here both states have ample justification for wanting their laws applied and both parties have legitimate interests in claiming the protection of their respective state's laws. Analogizing to pervasive larger value conflicts in law and politics, this problem pushes judges, lawyers, and scholars to acknowledge that some conflicts are real and unavoidable. How then can one solve a true conflict?

Conflict of laws scholars have been scratching their heads about this question for more than fifty years. One solution has been to choose the "better law."[35] If both states are interested and both parties have legitimate claims to the protections of their own law, the court empowered to hear the case should simply choose the law that seems more just or wise – a choice often, but not always, identified with the law of the court's own territory. This solution is highly controversial because it appears to jettison neutrality and fails to grant equal respect to all states in governing events connected with their territories or people. A second solution has been to give up on interest analysis and reestablish some sort of rules system that is abstracted from the facts of individual cases and neutral with respect to the content of the conflicting laws.[36] Some advocate for a return to the place of the injury rule on the ground that that is the place that suffers the effects of the tortious actions.[37] Others argue for a place of the conduct rule on the ground that it is wrong to regulate persons located in other states.[38] Still others have split the difference, applying the law of the place of injury if it is "foreseeable"[39] – an approach that obviously jettisons some amount of predictability but which furnishes a

[35] *See id.* § 17.21 (explaining that under the "better law" approach, a court should use the law that is superior "in terms of socio-economic jurisprudential standards" (internal quotations and emphasis omitted)).

[36] *See generally* William H. Allen & Erin A. O'Hara, *Second Generation Law and Economics of Conflicts of Laws: Baxter's Comparative Impairment and Beyond*, 51 STAN. L. REV. 1011 (1999).

[37] *See id.* at 1040-48.

[38] *See id.* at 1043-44 (arguing that under a law-and-economics model, states choose their substantive law to address the particular needs of that state and "each law should be applied in that environment for which it is optimal").

[39] *See, e.g.*, James A.R. Nafziger, *Oregon's Project to Codify Conflicts Law Applicable to Torts*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 287, 306-08 (2004).

possible compromise. The problem of course with these approaches is that they attempt to solve the problem by selecting one side's interpretation of the case to privilege. They also fail to give reasons for choosing one result over another, and, indeed, their shared strategy is to decide the case by telling us not to think about the normative considerations relevant to the case. Unfortunately, this requires ignoring how a case like *Blamey* is *truly* a hard case with no easy or clear solution. This approach seems similar to the search Dworkin launches for a method of interpretation that suppresses, rather than acknowledges, real conflicts.

We should instead recognize really hard cases and acknowledge when there is no clear solution. We should see and state the real normative considerations that are implicated in a decision and identify the "moral remainder" that does not disappear even with a warranted decision. The better law approach requires an announcement that the losing state's system is illegitimate. The "comity" approach – which champions due respect for the ability of other states to regulate events centered there – gives no answer where each state has grounds to defer to the other. As in *Blamey*, often problems present legitimate interests (rights) on both sides, not a case of all-right on one side and all-wrong on the other.

Dworkin's approach to moral and legal disputes seems to require that we deny this conclusion and that any conflicts come in this form – and use a kind of "false conflict" analysis to make apparent conflicts disappear. If cases have right answers (because values are true or false) then it must be that one side is in the right and the other in the wrong. Fifty years of theorizing in the field of conflicts of law cases suggests that certain problems are not only hard but irresolvable on a theoretical level. That does not mean that a judge, legislator, or scholar cannot choose a result in a particular case and justify it by reasoned argument. Justifications that recognize conflicts of values are indeed possible. But the resolution will be contextual and will leave unresolved larger conflicting values. In such cases, appeal to the unitary nature of value is not only beside the point, but is actually misleading because plural, competing values remain. State laws should achieve justice and promote well-being (an argument for tavern liability under Minnesota law) and, at the same time, states should regulate events centered in their territories and their sphere of concern (an argument for no tavern liability under Wisconsin law). It is wrong to obscure the fundamental conflict between competing values because it is not true and because it is not responsible.

Reaching a decision does not require denying conflict in the underlying policies or values. Justification does not have to take the form of stalwart denial of the legitimacy of the claims of the loser. Suppose we issue a ruling in favor of the plaintiff in *Blamey*. How might we justify the result without making all the value conflicts go away? One possible avenue is balancing language – an approach that has (since legal realism broke on the U.S. scene) become routine in judicial decisions. For example: on balance, the unfairness of subjecting the tavern to Minnesota law is less than the unfairness of leaving

Minnesota residents vulnerable and unprotected. Businesses have obligations as well as rights and although they ordinarily have the right to look to the law of the place they act to determine the law that governs them, they cannot hide from liability under the law of the place they cause injury if the effects in that jurisdiction are reasonably foreseeable. Application of Minnesota law is undeniably problematic; if Minnesota law applies to this kind of case, the tavern cannot know for sure what law will govern its conduct. Moreover, a state with which the tavern has no formal contact is defining its conduct as immoral while the tavern's home state finds that it has done nothing wrong. That being said, when the choice is between the tavern that (according to the standards of one of the affected jurisdictions) caused an avoidable death, it is not unreasonable to subject the tavern to the more plaintiff-protecting law. Hobbes argued that we establish government in order to protect ourselves from violent death.[40] In a case where life itself is at stake, it may be appropriate to err on the side of caution, of prevention, of responsibility.

Narrative and context are another way we justify results. The case involves a business that sells a potentially dangerous product. It is not unreasonable for a person engaging in such a business to understand that there may be regulations to prevent harm caused by the business. Indeed, Wisconsin has substantial regulations, and since the tavern is located in Wisconsin, it normally should look to Wisconsin law to determine its rights and obligations. But when the business is located near a state that has higher obligations, the owner cannot hide his eyes from the fact that his business is near the border, that teenagers can be immature, and that the difference in the closing time might attract young people in cars to the tavern to escape the more restrictive laws of their home state. The tavern owner cannot be surprised that his business may result in a tragic death in a state that finds his conduct morally culpable and that a court in that state (or even in his own state) might find him subject to the higher regulatory standards of the place of injury. The traditional conflict of laws rule in the United States is the place of the injury; anyone consulting a lawyer should not be surprised that courts routinely apply the plaintiff-protecting law of the place of the injury in cases like this.[41] While the complex rules of conflict of laws are not exactly a subject of household discussion, there are many areas of law such as taxation that have even greater complexity and, nevertheless, our usual assumption is that ignorance of the law is no excuse. Perhaps most important, the parents waiting in Minnesota for their teenage daughter to come home have a right to something more than a shrug from the tavern that contributed to her early death.

These forms of analysis make strong moral claims. At the same time, they preserve the legitimate interests of the losing side and show appropriate

[40] THOMAS HOBBES, LEVIATHAN 116 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651) (observing that people allow government restrictions in "the foresight of their own preservation").

[41] *See* SCOLES ET AL., *supra* note 32, § 17.2.

deference, respect, and understanding for the position championed by the loser. There is something lost as well as gained by making a final ruling in a hard case. Pluralism acknowledges that this is so without making justification impossible; indeed, justification is both more convincing and more expressive of our deepest values when it acknowledges the presence of the plural and conflicting values implicated in the situation.

III. WHAT IS AT STAKE

Why does it matter how we justify resolutions of conflicting values with words? Does it matter whether we use words that emphasize the conflict or words that shave off the clashing edges? Perhaps this is "just" a matter of aesthetics. Perhaps those who like the hedgehog's single truth prefer things neat with principles and convictions all in their rightful place. Perhaps we foxes are simply more comfortable with things remaining messy, overlapping, jumbled, and in tension. One view prefers conflicts to be massaged, dissolved, overcome, and resolved; the other view regards those approaches as suppression and instead likes to keep conflict disclosed, present, and acknowledged. There is no doubt that aesthetics is part of the divergence. The pluralist, of course, tends to emphasize that there are two kinds of people in the world – those who do not think there are two kinds and those who do. More to the point, hedgehogs are distressed by disorder and ambiguity while foxes revel in acknowledgment of life's complexities. Hedgehogs may seek a system to generate order; foxes may be distressed by such systems and claim that they deny the truth of the human condition. Some people like solid colors and others like stripes and patterns; some keep clean desks and others cannot work without stacks and piles.

Yet at work here is something more than a dispute about aesthetics. What is at stake is a conception of what does and should count as a justification for a moral proposition and as a persuasive argument in a society of actual, diverse human beings. Neat, ordered, consistent principles are persuasive only in cases that can reasonably be understood as false conflicts. If, however, after analysis, one understands the conflicting values to be simultaneously implicated in a particular case, then justifications that suppress one of the values by arguing that it is not relevant in a particular case distort our understanding of the moral choice that we confront. False conflict analysis implies that if you think clearly, you will understand that you were mistaken to think that this case involved a clash of values. Careful analysis reveals that the values are actually consistent and that the contradiction or clash between them was illusory rather than real. With the help of the principled approach, the puzzle can be put to rest; the conflict can be dissolved as a misunderstanding of what really are not true clashes of value. With the true unitary nature of value made clear and realized in the given instance, we can rest, breathe, relax, and feel confident.

Yet to those who think values are multiple, messiness is unavoidable, and struggle is part of life, a resolution that denies multiplicity or struggle can seem

frightening, disturbing, or perplexing. While occasionally a conflict of values is superficial and false, it is often simply *true* that values really do clash even after exhaustive attempts to reconcile them. In such cases, resolution through line drawing requires persuasion using narrative, analogy and disanalogy, institutional concerns, and practical resolutions, rather than a more abstract "principled" resolution. Picture yourself as the tavern owner; picture yourself as the parent of the girl on the way to the cemetery. Acknowledge the tension, worry, and concern of the actors on both sides. Tell the story in a way that lets us see the humanity of the plaintiff and the humanity of the defendant. Let us identify with each side, with what is legitimate about each side's claims. Let us not pretend that one side has no legitimate interests if the truth of the matter is that each side does have legitimate interests. This may be true in a particular conflict, like whether to assign liability to a tavern for the drunk-driving injuries of a customer who drives across state lines after drinking. Enduring, competing values do appear more systematically, for example, if the CIA agents and soldiers who relied on government directives face criminal prosecution for behavior that from the perspective of detainees and outsiders stands as unacceptably abusive.[42]

Pluralism presents the possibility that one may be in the wrong. The preservation of the losing opinion confronts the winner with the presence of the loser. Rather than a triumphant presentation of a neat, consistent case, pluralism reminds winners that they may need to rethink, concede, or change. It confronts all of us with the possibility that we are not unitary actors in solitary control of the world, that we could be convinced, that one who disagrees with us may have warrant to remain unconvinced, and that conflict will not go away. This feeling of discomfort at the insistence of the other view is a plus, not a minus. It is, after all, how we learn and how we grow. It is also how we show respect to both sides in the dispute. It is why permitting and publishing dissenting opinions is the well-respected norm in our judiciary – as is the embrace of dissents by majorities in subsequent years, as perceptions and understandings evolve. Preserving losing opinions is, in short, how we accord equal concern and respect to everyone implicated in a case including our descendents who may come to see matters differently than we do.

Preserving the minority view when values really clash is required by the very value of dignity that Dworkin champions. Dworkin admirably wants to argue that the basic value of dignity requires arguments justifying moral choices and that morality is not merely a matter of emotional preference or affectation.[43] To treat persons with dignity requires giving adequate reasons

[42] Although CIA agents do not yet face prosecution for alleged torture, there have been widespread calls for their prosecution. *See* Olivia Ward, *History Will Judge; It's Now Clear that Officials Involved in Alleged Post-9/11 Abuses May Never Be Charged. But There Are Other Kinds of Justice*, TORONTO STAR, Jan. 3, 2010, at IN1, *available at* 2010 WLNR 84825.

[43] DWORKIN, *supra* note 2 (manuscript at 7-16).

for conduct that affects them and if morality is based on arguments, those arguments must be worked out in enough detail to justify one choice over others. But our opposing view argues that the very goal of treating people with humanity and dignity requires that we not erase them, that we not deny their perspective, their interests, their reality, their legitimate values. Ultimately, the plural view is more inclusive, more democratic, more educative, more persuasive, and we believe, more true.