NORMATIVE METHODS FOR LAWYERS

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Normative arguments are crucial for the rule of law, and lawyers need to know how to make and defend claims of morality and justice. In recent years, however, cost-benefit and efficiency analysis appear to have taken over most legal scholarship and many law school classroom discussions. Such analysis suggests that the sole goal of the legal system should be to maximize human welfare, which can be best accomplished by deferring to individual preferences, whatever they happen to be, valuing the relative strength of those preferences by reference to market values, and then choosing results for which the social benefits outweigh their social costs. Such analysis is wholly without any normative weight unless it occurs within a framework of institutions, laws, and practices that are consistent with minimum standards for social and economic relationships in a free and democratic society. Normative arguments are designed to define that framework. Such arguments are not merely expressions of personal preference but are evaluative assertions and moral demands we are entitled to make of each other. Moral and political theory provide resources to help lawyers make evaluative assertions about human values that the legal system should respect. At the same time, lawyers possess substantial expertise in analyzing, shaping, and defending normative claims, and the methods they use should be of interest to moral and political theorists. This Article explains four basic tasks of normative argumentation and outlines several ways lawyers accomplish these tasks. Highlighting these methods will help lawyers improve them and develop the skills needed to use them. Articulating and exploring the contours of the methods used by lawyers to make and defend normative arguments will help all participants in the legal system to articulate normative reasons that can justify legal rights and institutions in a manner appropriate to a free and democratic society.

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> Prime numbers are what is left when you have taken all the patterns away. I think prime numbers are like life. They are very logical but you could never work out the rules, even if you spent all your time thinking about them.
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> —Mark Haddon[1]

> [J]ustification of a given end depends not on our ability to identify indubitable first principles that support it but rather on our ability to persuade others to act upon one set of uncertain beliefs rather than another.
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> —Eric MacGilvray[2]

> [T]o be a full human agent, to be a person or a self in the ordinary meaning, is to exist in a space defined by distinctions of worth. A self is a being for whom certain questions of categoric value have arisen, and received at least partial answers. Perhaps these have been given authoritatively by the culture more than they have been elaborated in the deliberation of the person concerned, but they are his in the sense that they are incorporated into his self-understanding, in some degree and fashion. My claim is that this is not just a contingent fact about human agents, but is essential to what we would understand and recognize as full, normal human agency.
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> —Charles Taylor[3]

> Government must treat all subject to its dominion with equal concern: everyone's lives matter, and equally. That is non-negotiable.
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> —Ronald Dworkin[4]

I. REASONING ABOUT JUSTICE: FINISHING THE "BECAUSE CLAUSE"

We live in an age that swings wildly from passionate commitment to studied skepticism. True believers who are certain about right and wrong coexist with cynics who are equally sure that all claims about morality and

1. MARK HADDON, THE CURIOUS INCIDENT OF THE DOG IN THE NIGHT-TIME 12 (Vintage Books 2003).
2. ERIC MACGILVRAY, RECONSTRUCTING PUBLIC REASON 155 (2004).
3. CHARLES TAYLOR, 2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 3 (1985).
4. Ronald Dworkin, *Do Values Conflict? A Hedgehog's Approach*, 43 ARIZ. L. REV. 251, 259 (2001).

justice are "just your opinion." Fierce defenders of the rule of law and human rights contend with hard-nosed realists who view legal reasoning and rights discourse as ideologies whose only purpose is to dress up power relationships to make them seem legitimate, inducing the oppressed to accept their fate and suffer in silence. Rationalists who view justice as based on human reason vie with irrationalists who view justice as a human invention based on essentially nonrational grounds. Deontological theorists who believe moral duties can be derived from a deep understanding of the human condition contend with utilitarians who think the only legitimate way to respect individuals is to maximize satisfaction of human preferences, whatever they happen to be.

The irony is that both believers and cynics see little need to justify their beliefs to others or to engage in acts of persuasion. You either see the light or you don't; morality and justice are either based on reason or on unfettered individual preference.[5] Whether the truth is a set of universal norms or the absence of any pre-given norms at all, there appears to be no means to bridge gaps of understanding or commitment.[6] The truth for both sides is a matter of faith.

Then there are the rest of us—the muddled middle. We have intuitions about what is just, moral, good, and right, and we sometimes feel quite strongly about those intuitions. Indeed, those intuitions seem like much more than personal preferences; certain things seem fundamentally right not just for us but for everyone.[7] We can even give reasons for our views and answer objections from those who promote competing claims.[8] Yet, if we are thoughtful, we are aware of objections that can be made to our own claims. Moreover, not only are such things essentially contested, but upon reflection, we find that our own arguments are often inconsistent. For example, we want freedom of action, but we also want security, and there is no way to achieve security for ourselves and for our families without limiting freedom of action. Where do we draw the line? We want freedom of religion

5. *See* ROBERT FOGELIN, WALKING THE TIGHTROPE OF REASON: THE PRECARIOUS LIFE OF A RATIONAL ANIMAL 1–3 (2003) (arguing that we often appear to be forced to choose between absolutism and nihilism as in the idea that "[e]ither absolute moral standards exist or there is no such thing as morality").

6. *See id.* at 11 ("[T]hose who defend so-called absolutes and those who adopt various forms of absolute relativism *share* a commitment to a rationalist ideal. Those who think that the rationalist ideal can be satisfied swing one way; those who think it cannot, swing the opposite way. Under the sway of the rationalist ideal, no middle ground seems possible, and none is tolerated.").

7. *See* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 92 (1993) ("Mere likings or tastes are distinguished from other attitudes in that they are largely exempt from processes of justification.").

8. *See* FOGELIN, *supra* note 5, at 5 ("Debates concerning radical choices are carried on in a way that insulates them from the ordinary, workaday world.").

but we do not necessarily think this means a church should be able to ring its bells all night if this will keep everyone else from getting sleep. We want to use our property as we see fit but we recognize that we cannot, in general, use our property in ways that harm others, and the question of how to define a harm is a perennial cause of disagreement.

In short, there are hard cases in which values conflict, and lawyers know that nonlawyers often severely underestimate the number of hard cases we are likely to face. We have trouble drawing lines in hard cases, and we have even more trouble defending our moral beliefs to those who have opposite intuitions or commitments. Disagreement seems to be permanent and inevitable—even among persons of good will who actively seek to reach agreement or to discover the truth of the matter. When asked to defend our views, we can come up with reasons, but we know that our arguments can always be met with the question "why?" and we are acutely aware that, at some point, we will have nothing else to say. What is the foundation of assertions of justice, morality, right, and fairness? Why is a claim of justice anything more than a personal opinion? Is it possible to reason about justice?

Philosophers want to know the answers to these questions. Legal theorists are also eager to find out whether judicial pronouncements about the law are anything other than assertions of raw power or partisan advantage. These theorists are not so different from children who repeatedly ask their parents "why?" "Why not do that?" we ask, and the reply is: "Because it's wrong." But then, why? "Because people should not be cruel to others." But why? "Because you would not like it if she did that to you." But what if I knew I would not get caught? "You shouldn't do it anyway." But why? "Because it's wrong to hurt other people." But why? "Because . . . "

We know the feeling of being confronted with the "why?" question and not knowing what to say after "because . . . ," yet feeling we should be able to say something. There is that horrible ellipsis—how do we fill it in? We may find ourselves saying, "that's what I think" or "that's how I feel" or "that's just the way things are"—or even a circular "because it's wrong." Or perhaps we adopt the pragmatic approach and try to turn the tables by asking: "Well, don't you agree?" But these responses feel unsatisfying; there seems to be something else we should be able to say, and it seems to be on the tip of our tongues—if we could only figure out what it was.[9] That is the problem: We have trouble finishing the "because clause"; reasons run out.

9. *See* HENRY S. RICHARDSON, PRACTICAL REASONING ABOUT FINAL ENDS 9 (1997) ("Trying to explain why one pursues what one does take to be worth pursuing for its own sake ties the tongues of the most articulate.").

As a law professor, I have noticed this problem acutely among my students. They quickly learn to make sophisticated arguments about interpreting precedent and statutes, making analogies and distinguishing cases, debating the judicial role (active or restrained), and discerning the advantages and disadvantages of rigid rules versus flexible standards. They also learn to use cost-benefit analysis, measuring the expected consequences of alternative rules of law in monetary values and adding the costs and benefits to determine which rules appear to maximize social welfare. But students are mute when I ask them to make or to defend arguments based on considerations of rights, fairness, justice, morality, or the fundamental values underlying a free and democratic society. They get out the first sentence: "I have a right to use my property as I see fit," or "I have a right to be left alone." But then they go silent. Their silence is partly caused by their inability to determine what vocabulary to use or how to make the argument. But the underlying reason for this uncertainty is their fear that such an argument is merely a matter of opinion that has no objective basis. They know that others can disagree, and they feel unable to defend their arguments.

They do not feel this away about cost-benefit analysis. Efficiency analysis is the contemporary way of interpreting and operationalizing the classical consequentialist normative theory of utilitarianism. It is attractive to students and professors because it takes individual preferences for granted (thereby promoting individual autonomy), counts each person's interests equally (thereby promoting equal concern and respect for human beings), and uses math—the most objective procedure imaginable—to figure out how to maximize human welfare. Cost-benefit analysis thus appears to serve widely shared values (autonomy and equality) and to produce answers to complex questions through a neutral and rational process.

However, most students recognize that there are severe limitations to efficiency analysis. One problem is that most human values cannot be expressed adequately in numerical or monetary terms. Nor do maximizing procedures give us any assurance that individual interests will not be sacrificed for the greater good. For these reasons, among others, students need to able to make arguments that can express and defend claims of rights and justice. There is no alternative but to make arguments that elaborate fundamental human values and that express our considered commitments to judgments about morality and justice. As budding lawyers, this is something law students must understand. Judges partially base decisions on such considerations, and the ability to make sophisticated arguments about justice and morality is a skill all lawyers need.

Law reviews do not offer much help. Legal scholarship today has limitations when it comes to normative argument. Most scholarship either uses economic analysis of law, traditional doctrinal analysis that focuses on precedent and eschews sustained normative argument, critical analysis that reveals inconsistencies in the law or the arguments of others but refuses to make normative claims, or social science analysis that understands law from the outside, developing empirical information about how the world works. There is little work that looks at the law from the inside, asking, for example, how a judge should both decide a case and justify the result to the public. How should the opinion be written? What, exactly, should it say?

The normative work that one finds in the law reviews is often done at such a high level of abstraction that it is unclear how to apply the analysis to particular legal disputes. Or it is so sophisticated, nuanced, and complex that it cannot easily generate the few sentences one can write in a judicial opinion. Although scholars have the luxury of equivocation, the truth is judges decide cases and they need reasons to justify their choices.[10] Normative arguments are of crucial importance to the rule of law; they are the way we show respect to the losing party in a real world dispute. Abstract theoretical work is important, but it will not help judges and lawyers if they cannot figure out how to use it appropriately in real world situations.

It is a big problem if we are tongue-tied when asked to talk about fairness and justice. They are moral demands that can be, and must be, defended.[11] And there are better and worse ways of doing this. Both law professors and students are in need of advice about how to think about the nature of morality, fairness, and justice.[12] More importantly, they need vocabulary for talking about normative matters and a set of resources and methodologies for structuring relevant arguments.

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10. *See id.* at 31 ("In being at least potentially expressible in words, a course of deliberation that is rational is one that can be assessed and explained, justified and criticized—publicly, it goes without saying.").

11. *See* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 4 (1989) (noting that moral intuitions "involve discriminations of right or wrong, better or worse, higher or lower, which are not rendered valid by our own desires, inclinations, or choices, but rather stand independent of these and offer standards by which they can be judged").

12. I do not use the word "nature" to suggest that there is a timeless natural law structure to such arguments. As a pragmatist, I see such arguments as grounded in human culture. The nature of normative argument changes (legitimately) over time and is relative, to some extent, to particular societies. This does not mean that we cannot make judgments about the values of other cultures, because I believe we can, at least about fundamental human rights. On students' need to learn how to talk about justice, see Peter L. Davis, *Why Not a Justice School? On the Role of Justice in Legal Education and the Construction of a Pedagogy of Justice*, 30 HAMLINE L. REV. 513–14 (2007).

One way to move toward this goal is to look to moral and political theories. As I will argue below in Part III.A, this is an incredibly useful step to take. Lawyers have borrowed liberally from economic theory; it is time to extend our reach to moral and political theory in an equally sustained way. These theories provide some structure for thinking about the basic contours of institutions, laws, and practices in a just society—the social, legal, and institutional framework within which economic life goes on and efficiency analysis can be legitimately undertaken. Moreover, emerging schools of thought in both moral and political philosophy have begun to create a middle path based on reviving the notion of practical reason—a conception of reason that is especially congenial to lawyers. It turns out that those of us in the muddled middle may not be so muddled after all; in fact, we may be sophisticated moral reasoners.

For that reason, an alternative, equally fruitful, way to proceed is to look at what lawyers and judges actually do—to discern how they reason about morality and justice. Lawyers have multiple, sophisticated methods for engaging in normative argument and are especially good at negotiating contradiction. We live in a world of hard cases where plural values reign and basic principles are inconsistent or in tension.[13] Lawyers have techniques for dealing with such situations that are useful, illuminating, and productive. Moral and political theorists have much to teach lawyers, but lawyers are experts in applied practical reason, and they have much to teach moral and political theorists.[14] Indeed, legal reasoning is, at base, a highly sophisticated form of moral reasoning.

For some, the very concept of moral reasoning is an oxymoron. Reason is about things that everyone can and should agree upon, but in a democratic society, morality is precisely the thing that we do not agree upon. Just think about religion, abortion, or same-sex marriage. Moreover, the idea of liberty is based on our ability to live our lives as we please; any attempt by govern-

13. *See* ANDERSON, *supra* note 7, at 218 ("Commonsense ethical thinking is deeply pluralistic, contentious, embedded in social practices conceived in 'thick' terms, and expressed through non-consequentialist norms. It lacks the unity, self-evidence, universality, and tidiness many philosophers demand of theoretically respectable claims. But the very features of commonsense ethical thinking thought to constitute philosophical vices are indispensable for self-understanding. We need to think of values as plural to make sense of the variety of ways we have of valuing things. We need to contest their meanings to explore and cultivate our evaluative sensibilities. We need to think of valuations as embedded in social practices to make sense of their meaningfulness to others and their susceptibility to criticism and justification in dialogue with others.").

14. For several very different accounts of the nature of practical reason, see ROBERT AUDI, PRACTICAL REASONING AND ETHICAL DECISION (2006) and TAYLOR, *supra* note 3, at 91–115; Edward C. Lyons, *Reason's Freedom and the Dialectic of Ordered Liberty*, 55 CLEV. ST. L. REV. 157 (2007).

ment officials to tell us that our way of life is wrong is tyrannical. Yet, at the same time, it is obvious that we want to have a government of some kind and that one of the functions of that government is to regulate our conduct so that we do not harm others in the course of exercising our own liberties. Liberty is not anarchy—it is freedom within the bounds of the rule of law. We enlarge our liberty by laws that limit our liberty. I am free to walk the street knowing that you are prohibited from harming me. Yet because we live in an age of diverse viewpoints, we find it hard to agree on the kinds of harms that government should prevent. We therefore look for a method of reasoning that can reconcile conflicting interests and worldviews without privileging one over others. It is an open question whether this is possible.

One path is to seek a neutral, rational decision procedure that both stands above or outside hard substantive disputes and is also sufficiently powerful to adjudicate them definitively. Such a stance may be *substantive* in nature (based on utilitarian or deontological reasoning) or *procedural* in nature (based on notions of democratic governance or separation of powers or the idea of a social contract among "free and equal persons"[15]). One could try to bridge the substance/procedure divide by reference to the idea that our moral claims fit together in a coherent package, thereby mutually supporting each other in a wide circle; alternatively, one could appeal to tradition or our way of life or precedent. Whatever approach one adopts, the idea is to start from noncontroversial or widely accepted premises and then reason deductively or analogically from those agreed-upon premises to find answers to controversial questions.

These strategies are attractive, but critical analysis of such approaches reveals that they fail to solve the problem they were created to address. There is a pervasive fantasy that we can escape the need for normative argument, controversial assumptions, and human judgment by adopting the right decision procedure; but this is an illusion. The unavoidable fact is that no matter how hard we try to define impartial decision procedures, we face persistent disagreement both about basic notions of what is good and right and just and about which procedures are suitably impartial. Our substantive premises wind up being contested and controversial, and we find that we cannot define neutral procedures without resorting to controversial substantive judgments. Even our understanding of the facts is colored by our preconceptions about justice. Where a libertarian sees a voluntary contract between self-governing individuals, a liberal critic sees an oppressive imposition of grossly unfair terms by a powerful employer on a disempowered migrant farmworker.

15. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT § 2, at 5 (Erin Kelly ed., 2001).

The problem recurs when we try to draw implications from the premises we have adopted. We may believe we have described impartial premises or procedures, but then we flounder when we try to derive answers from them. To identify seemingly noncontroversial premises, we have to state them at such a high level of generality that they wind up either empty or too full of implications. We find that they are sufficiently abstract that we can deduce several alternative, competing solutions from them. No consistent set of premises seems to generate a complete set of answers to normative questions; any complete set of premises will necessarily generate internally contradictory guidance. Life is too complicated to embody in a simple theory, and our moral impulses are too various, too situated, too contingent, and too complex to be derived from any single decision procedure.[16]

We face a dilemma: If we make our normative premises sufficiently neutral, then they are too abstract to generate determinate answers. But if we make them sufficiently definite to solve the indeterminacy problem, then we wind up sacrificing impartiality or neutrality. Determinacy and neutrality are in tension. We are thus left with the same conflict we had before: The true believers cannot justify their nonneutral premises in terms that others can accept, and the skeptics conclude that impartial premises and procedures do not exist, or that if they do exist, they are indeterminate. Either way, we are left with the problem that claims of justice and morality cannot be justified in an impartial manner acceptable to persons with different conceptions of the good. After all this, we appear to be no better off than before we tried to identify neutral procedures for normative reasoning. What to do then?

We could give up and join the cynics. From the standpoint of the universe, any view is as good as any other; there are no standards of justice or morality to which we can appeal or that we can discover by observation or introspection. Justice and morality are nothing more than human creations; normative arguments are therefore inevitably defective if they claim an objective basis outside human choice.[17] The only alternative left is a "leap of faith."[18] I'm for poor people and you're for rich people and that's just the way it is. You want environmental protection and I want small government.

16. *See* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY l (1969) ("The simple point which I am concerned to make is that where ultimate values are irreconcilable, clear-cut solutions cannot, in principle, be found. To decide rationally in such situations is to decide in the light of general ideals, the over-all pattern of life pursued by a man or a group or a society."); *id.* at li ("The need to choose, to sacrifice some ultimate values to others, turns out to be a permanent characteristic of the human predicament."); *see also* FOGELIN, *supra* note 5, *passim*.

17. *See* Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).

18. JONATHAN LARSON, *Over the Moon*, *on* RENT (Dreamworks SKG Records 1996).

Are you with me or against me? On this view, persuasion is simply beside the point. Moral argument is not a matter of proof but of recruitment to a cause; it is based, not on reason, but emotional attachment and irrational faith.[19] We simply adopt an existentialist stance, asserting what life means to us and inviting others to sign onto our normative projects. There is no way to defend normative claims other than to describe them vividly, to present them as proposals for action, as invitations to participate in a certain form of social life—an invitation one must accept or reject on essentially irrational (or nonrational) grounds. Alternatively, one may believe that persuasion is possible but that it occurs not through reason but sophistic rhetoric. What we need are smart Madison Avenue advertising executives—not arm chair theorists—to help us convince others about right and wrong.[20]

We could even justify this cynical resolution by comforting ourselves with the idea that we have finally seen the light—there is no moral truth out there for us to latch onto; instead, the moral truth lies in us. Protagoras was right when he tried to convince Socrates that "man is the measure of all things";[21] Nietzsche was right when he characterized conventional morality as an artificial constraint on human freedom.[22] Viewed in this way, the critical impulse is liberating: It allows us to see existing ideologies as elaborate justifications for existing distributions of power, and seeing the impartial or indeterminate nature of all moral systems frees us from their evil grip, allowing us to become what we wish to be. Human preference becomes the key, and the only question is what we want to desire. We will have some form of justice, and morality and its content is in our collective hands—or in the hands of those powerful enough to impose their moral vision on the rest of us.

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19. On the importance of emotion in persuading others, see DREW WESTEN, THE POLITICAL BRAIN *passim* (2007).

20. *See* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 197 (1989) ("[Moral] dilemmas [involving conflicting moral obligations] we shall always have with us, but they are never going to be resolved by appeal to some further, higher set of obligations which a philosophical tribunal might discover and apply."); *see also* RICHARD RORTY, *Pragmatism, Relativism, and Irrationalism*, *in* CONSEQUENCES OF PRAGMATISM 160–75 (1982).

21. PLATO, THEAETETUS 16 (John McDowell trans., Oxford Univ. Press 1973). Robert Fogelin argues that Protagoras's maxim suggests that he adopted a "radical perspectivism." FOGELIN, *supra* note 5, at 73. However, it is possible to interpret the Protagoras view as based on sensitivity to the importance of human judgment in moral matters (as opposed to the more formal view espoused by Plato), much as Fogelin argues in his own work.

22. *See* FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE (Walter Kaufmann trans., Random House 1966) (1886). For a postmodern variant of this, see ZYGMUNT BAUMAN, POSTMODERN ETHICS (1993).

There is a problem with this resolution of the normative question. Lawyers are perhaps more aware of what is problematic about it than anyone else. The problem is that we want those who exercise power over others, such as judges and legislators, to defend public policies that affect the people regulated by those policies. We especially want reasons from judges who are supposed to be acting impartially, treating like cases alike, and according each person equal concern and respect.[23] We do not like the idea of judges who simply say "I'm in charge and this is how it is going to be." But what if we are not in agreement already? What reasons could be good enough? What can be said to the losing party to a lawsuit that is not just a transparent attempt to dupe her into accepting a painful loss? Why accept the result as anything other than the raw exercise of power? The cynic responds that the desire for adequate reasons does not mean that such reasons are available.

In the middle (where I find myself) are those who suggest that the problem lies in a cramped and unsuitable conception of reason.[24] The reasoning methods appropriate to moral argument are not the same as those that are appropriate for solving a math problem. Nor are they the same as those one uses when looking for a cure for cancer. We should not expect algorithmic formulas to solve our problems.[25] Rather, human judgment is required. How do we make these judgments? Traditionalists, both conservative and liberal, suggest we elaborate the implications of our way of life by reference to tradition, original intent, immanent reason, custom, precedent, or evolving principle. Pragmatists, on the other hand, argue that law and morality are human institutions designed to solve human problems. Because these problems are complex, they propose experimenting to discover what works. I am sympathetic to these projects. At the same time, their pretense to transcend normative debate is unconvincing. After all, we will understand our traditions in various ways, judge our customs harshly or kindly, and reveal conflicting immanent principles. Nor can we talk about what works without

23. *See* WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY 4 (2d ed. 2002) (noting the focus of almost all modern political philosophies in the fundamental assumption that "government treat its citizens with equal consideration; each citizen is entitled to equal concern and respect").

24. *See* FOGELIN, *supra* note 5, *passim*; *see also* MARK TIMMONS, MORAL THEORY 267–70 (2002) (arguing for limited moral pluralism); STEPHEN TOULMIN, RETURN TO REASON *passim* (2001) (arguing that a broader conception of reason is both possible and desirable).

25. *See* RICHARDSON, *supra* note 9, at 32 ("[N]ot all rational deliberation from a given starting point need converge on a unique answer about what is to be done as the alternative required by reason."). For a brilliant account of moral reasoning in the face of insolvable dilemmas, see MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY (1986).

some idea of what our problems are, how to understand them, and what it would look like to solve them. Normative argument is inescapable.

How can we make normative arguments in a fragmented and skeptical age? How can we justify legal rules that bind everyone when we have fundamental disagreements about the nature of the good, and our methods of reasoning seem to embody, rather than transcend, those disagreements? If all our decision procedures turn out to be either incomplete or contradictory and if all our normative frameworks rest on controversial and contested values, do we have nothing left but existentialist leaps of faith? Is there a way to frame normative arguments that can give them sufficient persuasive force to support the values we hold dear while retaining a sophisticated understanding of the complexities and perplexities of human life in a diverse society composed of individuals with vastly different conceptions of the good? Descending from the airy realm of political and legal theory to the day-to-day job of lawyering, how can competent lawyers make normative arguments without engaging in sophistry (understood as fallacious arguments intended to deceive)?[26] Is normative argument possible?

Today the dominant answer is no. The main alternatives we find in the law review literature are doctrinal analysis, democratic theory, rights, efficiency, and critical theory. Each of these approaches seeks to avoid or contain normative argument, and each fails. The question is whether there is any alternative. I believe the answer is yes.[27] And I also believe that legal scholars are much in need of an articulated normative alternative to these approaches—especially to the seductive attractions of unsophisticated versions of cost-benefit analysis. Moreover, part of the impetus for this project

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26. I add the caveat in parentheses because the word "sophistry" has come to mean the concept contained in those parentheses. It is not clear, however, that this is what the actual Sophists intended. Some recent scholars have argued that this view of the Sophists comes from Plato's picture of them—or perhaps even Aristophanes' caricature of them, and that the actual Sophists had a sophisticated (not sophistic) view about the nature of truth and rationality that is superior to the Platonic theory of Forms. *See* FRANCIS J. MOOTZ III, RHETORICAL KNOWLEDGE IN LEGAL PRACTICE AND CRITICAL LEGAL THEORY 36–41 (2006). My approach in this Article is compatible with this new, approving view of Sophistry which views rhetoric and practical reason as means to justify law and morality in defensible ways.

27. *See* FOGELIN, *supra* note 5, at 9 (arguing "that inconsistency does not always render a system useless, that consistency is not always the most important goal of inquiry, and that it might be wholly unreasonable to suppose that human beings will ever be able to attain a view of the world that is both suitably rich and completely consistent"); *id.* at 42 ("[I]n practice, it is often quite reasonable to employ systems of rules with no guarantee that they are consistent. . . . Sometimes the best available strategy is to learn to live with inconsistency in, as we might say, a discriminating and civilized manner."); William James, *The Moral Philosopher and the Moral Life*, 1 INT'L J. ETHICS 330 (1891) (affirming the possibility of moral life even though values are based in human claims and human judgment).

is the need to explain to law students how to argue about justice and fairness in a manner that a judge will take seriously. I have long faced the challenge of answering students who want to know how to fill in the "because" clause. When I demand that they explain why the plaintiff's interest in sleeping outweighs the neighbor's interest in holding a raucous, all-night party, they want a clue about how to go about answering this question. They deserve an answer from me.

Part II will explain in more detail why lawyers cannot escape normative argument. I will show how various approaches seek to avoid or set aside sustained normative engagement and why these efforts fail.

Part III will explore what lawyers can learn from and teach to moral and political theorists. Legal methods are not merely watered down versions of more sophisticated theories; rather, lawyers have insights gleaned from the practical activity of lawmaking and legal argument that enrich the methods typically used by moral and political philosophers.

Part IV will describe four general families of methods that as lawyers we employ to frame normative arguments about justice including (1) orientation, (2) evaluative assertion, (3) contextualization, and (4) prioritization. First, we orient ourselves in a moral universe through basic assumptions about human nature, the good society, and social relationships. We also frame the particular issue that confronts us in a way that highlights our underlying moral concerns while using narrative accounts to help us understand the meaning of events, disputes, and situations.

Second, we make evaluative assertions that identify human interests, wants, needs, and preferences that count as human values that deserve respect by others or that count as moral demands we make on one other. We do this in a variety of ways, including arguing about what it means to treat human beings with dignity, elaborating the values we hold dear, and analyzing responsibilities associated with defensible human relationships.

Third, when values conflict, we seek to interpret those values, if possible, to be consistent with each other in particular cases through a process of contextualization, which may involve situational framing, restrained interpretation of values, and social and historical accommodation.

Finally, when value conflicts cannot be avoided, we employ various methods of prioritization to determine which of these values should prevail in particular cases. We do this by adopting a suitably impartial procedure to help us think through the practical problem of what to do when values conflict. Three of the most important procedures include balancing interests, contractualism, and reflective equilibrium.

Part V concludes with thoughts on responsibility, as well as the necessity for and limitations of human judgment on matters of political morality and the rule of law.

II. WHY LAWYERS CANNOT ESCAPE NORMATIVE ARGUMENT

A. How Conventional Approaches Fail to Avoid Normative Engagement

1. The Problem With Doctrine

Beginning law students are often surprised by many aspects of legal education. The first surprise for many students is that they generally learn the law, not by reading a rule book, but by reading appellate opinions. The second surprise is how hard it is to apply the rules they learn to new cases; it turns out that rules do not determine the scope of their own application. The third surprise is how hard it is to apply rules even if their scope is clear. Often the rules themselves are ambiguous; they may contain vague terms or reference ultimate standards, such as good faith or reasonableness, that require judgment to be interpreted and applied. One rule may conflict with another and it may not be obvious where to draw the line between them. In addition, a case may involve facts so different from those in which the rule has been applied in the past that prior law appears to give no guidance in this new situation. The gaps, conflicts, and ambiguities in rules are far broader and deeper than most nonlawyers imagine. A final surprise is how much class time professors spend on seemingly theoretical questions.

Why do we teach law this way? We do so because, as Karl Llewellyn explained, "[w]e have discovered that students who come eager to learn the rules and who do learn them, *and who learn nothing more*, will take away the shell and not the substance. We have discovered that rules alone, mere forms of words, are worthless."[28] Because rules do not determine the scope of their own application, they cannot be understood apart from cases; their meaning is clear only in their application. The ubiquity of gaps, conflicts, and ambiguities in the rules generates the need for argumentation based on policy and principle, as well as the invocation of analogy and situational context, in order to draw lines in hard cases. Students need to understand not only the instances (fact situations) to which the rules apply, but also the principles and policies underlying them; the applicability of a rule often depends on the

28 . KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 2 (10th prtg. 1996) (1930).

context in which it is appropriate, as well as the purposes the rule is intended to serve, and those purposes inevitably include normative considerations. These considerations seem to be necessary ways to address complexity. If this is so, then a judge deciding a common law decision who sought to apply law rather than make it would have nothing to do. She might as well go home. This does not mean that judges make law in a vacuum, or in an unconstrained manner, but instead that rules do not interpret themselves and that interpretation is an inevitably normative enterprise.

Positivists seek to avoid this conclusion. Identifying law with commands of the sovereign, they emphasize the distinction between law and morals, drawing our attention to the fact that there is such a thing as an immoral law and that rules of recognition often point to indicators other than morality or justice to define the rules in force.[29] One might think that this approach allows lawyers to eschew normative argument. Unfortunately (or maybe fortunately), that is not the case. After generating the holding of a case—describing the rule of law for which it stands—the professor often confounds the class by changing one fact and asking if the rule applies to that changed context. Answering that question can be difficult. One changed fact may make it inappropriate to apply a rule that initially seemed to apply to the situation. Extension of the rule to the new case may seem unfair rather than fair, or the values promoted by the rule may clash with competing values.

More fundamentally, although we do separate law and morals, we do not separate them entirely. Legal theorists sometimes ignore this reality. It is a fact about the legal system in the United States that judicial reasoning includes explicit normative considerations. Most opinions include some reasoning based on consideration of rights and social utility; they justify rule choices and interpretation of existing rules based on promoting the general welfare and protecting individual rights. Often, these arguments themselves are based on explicit conceptions of morality, such as self-reliance or altruism. Negligence law, for example, is premised on the notion that individuals have an obligation to act reasonably; moral conceptions are an explicit part of determining what obligations we have toward each other. Many legal rules are indeterminate without reference to considerations of morality and justice. More importantly, we want and expect the law not only to be regular and predictable but also defensible from the standpoint of morality and justice. We expect the law to be fair, or to promote social welfare, or to be consistent with human liberty and dignity. What we need are *reasons* to interpret precedents one way or the

29. *See generally* JOHN AUSTIN, LECTURES ON JURISPRUDENCE (Robert Campbell ed., 4th ed. 1873) (1863); H.L.A. HART, THE CONCEPT OF LAW (1961).

other. Law is justified and shaped, not just by reference to rules, tradition, custom, and precedent, but by reference to normative considerations. Or perhaps a better way to say this is that our legal rules, traditions, customs, institutions, and precedents are partially defined by moral principles, norms, and conceptions of a just society. Normative concerns inevitably shape both social policy and interpretations of precedent. For these reasons, application of doctrine is impossible without normative argument.

2. The Problem With Efficiency

Utilitarian approaches seek to fill the need for normative argument in law in a suitably impartial way. They do this by seeking to maximize social welfare by adopting rules of law that have the best overall consequences for individuals and for society as a whole. This normative approach is both consequentialist and maximizing. Utilitarianism is consequentialist because it judges the justice of legal rules by reference to their consequences. What behavior will follow from these rules? What incentives will they create? What are their costs and benefits? Utilitarianism is also maximizing because it judges fairness and justice by converting all consequences to a common metric, adding up the pluses and minuses for each person, treating each person's interests equally in the calculus, and then seeking to promote the rules that, on balance, generate the maximum amount of utility for all persons in society.

Although utilitarianism is clearly a normative theory—and only one theory among several others—its proponents often feel that it is normatively thin in the sense that it bases normative argument on widely shared and noncontroversial values and proceeds through a form of reasoning that is either self-evident or definitionally rational. If the premises of the theory are uncontroversial and the method of applying that theory to decide specific cases is both determinate and widely accepted, then we can either avoid normative disputes or conclude that we have identified a decision procedure for normative argument that solves the problem of promoting justice in a multicultural world.

Why might one believe that utility (or cost-benefit analysis) is the best answer to the normative problem? Since we care about how law affects people, it arguably makes sense to judge rules based on their consequences. One might believe that a minimum wage promotes human dignity, but if it turns out that imposition of a minimum wage results in firing all the poorest workers, we might well conclude that the law hurts the very people it was intended to protect. It is not much of a protection for human dignity to insist on regulations that harm human dignity; the lawmakers' intent matters less than the effect

on the people they are trying to help. In judging those effects, modern-day utilitarians tend to look to the preferences of individuals to determine whether consequences of rules are good or bad.[30] By deferring to the views of individuals affected by law, we grant people autonomy to choose their own ends based on their own conceptions of the good and we thereby treat individuals with respect and avoid paternalism. By counting each person as one and only one when we aggregate the good and bad effects of alternative laws to determine the laws that have the best consequences overall, we treat each person equally. This method appears to respect the autonomy of individuals by treating them as equal, free, and self-actuating human beings.

Attractive as this approach may seem, utilitarianism faces insuperable difficulties that undermine the claim that this method is a determinate, noncontroversial normative decision procedure. First, and most obviously, it is premised on the twin notions of autonomy and equality—autonomy because it defers to individuals' conceptions of what is in their best interest, and equality because it attempts to count each person's welfare equally. While these are widely shared values, they are hardly noncontroversial. Many people believe, for example, that morality is based on the word of God and that laws that contradict God's law are inherently unjust. The ultimate goal for such persons is not autonomy but some form of virtue, defined as compliance with divine law. Others may believe that what matters most is not autonomy but social justice, and that achieving social justice often requires sacrificing individual freedoms.

Second, even if one believed that autonomy and equality were noncontroversial values, their meaning is contested in ways that utilitarians usually do not recognize. It is not obvious, for example, that the best way to promote autonomy is to satisfy people's preferences, whatever they happen to be.[31] Most moral theorists (and some economists) argue that we should defer, not to actual preferences, but to idealized preferences—those preferences individuals would have if they possessed perfect information and were making choices in a suitable institutional setting, which may or may not correspond with our current institutions.[32] Further, it is possible that preferences would change if circumstances changed. Views about racial equality have changed enormously

30. *See* KYMLICKA, *supra* note 23, at 14–20.

31. *Id.* at 14 (noting the "preference satisfaction" account of utility that assumes that "increasing people's utility means satisfying their preferences, whatever they are"); Jules L. Coleman, *The Grounds of Welfare*, 112 YALE L.J. 1511, 1519 (2003) (arguing that "we cannot infer choice from preference"); *id.* at 1542–43 (distinguishing between a person's desires and his interests, meaning "what is good for him").

32. *See* KYMLICKA, *supra* note 23, at 15–20.

over the last fifty years. Should a utilitarian judge the net social value of the Civil Rights Act of 1964[33] based on the preferences of persons living in 1964 or what persons in 1964 could or should have predicted their preferences would be in the future, or should she focus on the preferences of persons in 2008 after that law has been in effect for some time?[34]

More fundamentally, it is not an uncontroversial idea that we should satisfy all human preferences, no matter what they are, even if they are carefully considered. Some persons may prefer to be cruel and may even persist in this desire after being given perfect information and a suitable decisionmaking setting. To discount such other-regarding preferences, one either must assume that the preferences of those opposed to cruelty would, as an empirical matter, outweigh the preferences of those who desire to be cruel,[35] or one has to count certain preferences as beyond the pale—as themselves failing to be consistent with the injunction of respecting the autonomy of other persons.[36]

In addition, it is not at all obvious that the best way to promote equal treatment of persons is to count their utility equally, aggregate all individual preferences, and follow whatever policy maximizes social utility.[37] Suppose, for example, that social utility is maximized by sacrificing the interests of a minority—say, by enslaving them. This problem is often dealt with by suggesting that the long-run interests of society are improved by treating each person with dignity, but these predictions of remote effects are often unsupported or conveniently shaped to accord with a priori intuitions.[38] More importantly,

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33. 42 U.S.C. §§ 2000a–2000h-6 (2000).

34. *See* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1338 (2001) ("[T]he long-run strategy designed to change preferences may make society as a whole, over time, better off.").

35. This is a version of what Mark Timmons calls the "remote effects" argument. TIMMONS, *supra* note 24, at 137–38.

36. Will Kymlicka argues that utilitarianism is premised on the equality of persons and it therefore cannot consistently value the preferences of individuals who desire to treat others in a manner that does not demonstrate equal concern and respect. *See* KYMLICKA, *supra* note 23, at 26–32, 37–45. For a similar argument, see TIMMONS, *supra* note 24, at 144–47.

37. *See* KYMLICKA, *supra* note 23, at 87 ("The utilitarian idea of giving equal weight to each person's preferences has some initial plausibility as a way of showing equal concern for people's welfare. But, on inspection, utilitarianism often violates our sense of what it is to treat people as equals, especially in its lack of a theory of fair shares."); RICHARDSON, *supra* note 9, at 155 ("arguing for a conception of rational deliberation of ends that resists the lure of maximization").

38. *See* ANDERSON, *supra* note 7, at 68–69 (criticizing the failure of consequentialists to make qualitative distinctions among values and their tendency to avoid embarrassing conclusions suggested by their theory through convenient but dishonest devices like "rule consequentialism, slippery slopes, remote effects, and so forth"); *see also id.* at 89 ("These considerations [of remote effects, slippery slopes, and strategies of indirection, such as rule consequentialism] may generate the intuitively endorsed results, but they fail to explain our confidence in and insistence upon them. Why should

we need not only a way to reach a normatively attractive end but a reason (or set of reasons) to justify the path we have chosen. To argue that slavery is wrong because the preferences of those opposed to it outweigh the preferences of those who favor it is to give an irrelevant reason for abolishing slavery;[39] indeed, it is a reason that is offensive and causes harm by suggesting that the dignity of some can be subordinated to the power of others if the balance of preferences so dictates. Because utilitarianism is based on treating persons equally, we would better promote this goal by tempering the maximization method with a principle of tolerable fair distribution of the costs and benefits of promoting social welfare. When we do this, normative complexity and normative argument are inevitable.

Third, even if we accept the idea of deferring to preferences and using a social-maximizing procedure, we still need to operationalize this approach by assigning numerical values to consequences so that we can perform the aggregating and maximizing functions. How do we do this? We do not have an easy metric by which to measure utility. Some utilitarians, like Jeremy Bentham, focus solely on happiness and unhappiness or pains and pleasures; others, like John Stuart Mill, differentiate among kinds of pleasures, rating some as of more value to human welfare or of higher quality than others.[40] Whatever metric we choose, we then need to assign values to consequences so that we can aggregate and maximize. But we have no natural method for doing this; it is not as if pleasures and pains come in neat packages of "utils" that have an inherent numerical value. For this reason, law and economics scholars have settled on market measures (dollar amounts) to assign values. But dollar amounts are hardly uncontroversial. We must choose between offer and asking prices (the amount one would be willing to pay for something given one's existing wealth versus the amount one would be willing to accept to give up something to another). We must choose whether to assume the existing distribution of wealth or to adopt some hypothetical (and perhaps more equal) distribution of wealth. After all, market values are determined not solely by willingness to pay but by willingness and ability to pay. Thus, in a well-known example, it is clear that one would probably decrease social utility by denying medicine to a poor person who cannot afford it rather than giving it to a rich person who can outbid the poor one but does not need the medicine.[41] Economists are well aware of the decreasing marginal utility of money, but most law and

we be so confident that remote effects and indirect strategies pan out the way consequentialists need in these cases, when we are so uncertain about consequences and strategies in other cases?").

39. On irrelevant reasons, see RICHARDSON, *supra* note 9, at 61–62.

40. TIMMONS, *supra* note 24, at 103–21.

41. RONALD DWORKIN, A MATTER OF PRINCIPLE 253 (1985).

economics scholars are insufficiently attentive to the ways in which this reality undermines the very measures they use to calculate the effects of alternative legal rules on human welfare.

Finally, it is not at all apparent either that all values can be reduced to quantitative measures or that the most rational way to make normative judgments about social issues is to aggregate individual preferences and then engage in a maximizing exercise.[42] Most human values cannot be expressed adequately in numerical (especially dollar) amounts. Nor is our ultimate goal always to maximize particular values; often our goal is to interpret those values in a suitable way so they support a just framework for social life.

Take the example of same sex marriage. According to current preferences, it is apparent that same sex marriage is very controversial in the United States. It is probably the case that more people oppose rather than favor same sex marriage, as it is banned by statutes in forty states. Moreover, views on both sides are intense. But it is not at all clear that the right way to analyze the question whether the state should recognize same sex marriages is to defer to the preferences of individuals, or even to attempt to predict what individuals would want one hundred years from now if circumstances and values were to change. How do we value the interest in refusing to recognize same sex marriages? Is there a market measure for this?[43] Do we use intensity of preference? More fundamentally, why is maximizing happiness or satisfying preferences the right way to solve a problem like this, much less the best way? Isn't part of the problem that some people have strong views about how other people should live, and that this is true whether we allow or prohibit same sex marriage? What do we do with these other-regarding preferences?[44]

In the real world, and especially in our legal system, we do not simply defer to individual preferences no matter what they happen to be. Even if we adopt utilitarianism as a normative method, we do not count all preferences; some preferences are simply intolerable and do not enter into the calculus

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42. *See* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING *passim* (2004); RICHARDSON, *supra* note 9, at 131 (explaining the difficulty of converting qualitatively distinct values into quantitatively comparable measures); Elizabeth Anderson, *Pragmatism, Science, and Moral Inquiry*, *in* IN FACE OF THE FACTS: MORAL INQUIRY IN AMERICAN SCHOLARSHIP 10, 11 (Richard Wightman Fox & Robert B. Westbrook eds., 1998); Joseph William Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103, 116–19 (2002).

43. *See* ANDERSON, *supra* note 7, at 210 (arguing that the theory of consumer sovereignty "fails to capture the ways people value goods outside of market contexts, which in principle cannot be measured by a cash value. It also fails to be responsive to the ways citizens think their values should be reflected in public policy").

44. On the special problems posed by other-regarding preferences, see TIMMONS, *supra* note 24, at 144–47.

of conscientious judges and legislators. If utility is premised on both autonomy and equality, then perhaps we do not count the interests of racists in determining whether a law prohibiting intentional discrimination in housing is good.[45] Perhaps we judge certain preferences as denying the rights of others, and thus exclude them from the utilitarian calculus. For this reason, various scholars have proposed morally constrained utilitarianism, which uses normative argument to weed out certain preferences before the utilitarian calculus begins.[46]

Nor, in the real world, do we make all decisions by numerical, aggregative, and maximizing formulae.[47] Although we often find ourselves looking at the costs and benefits of alternative courses of action, we do not uniformly act as if the only rational way to perform a cost-benefit analysis is to assign numerical values to specific costs and benefits and then add them up to see how the calculus comes out.[48] Instead, we often consider the pluses and minuses of different courses of action and then make a considered judgment based on a holistic consideration of all relevant information. Mathematics is a far from noncontroversial way to engage in normative analysis. Indeed, when

45. *See id.* at 144–45.

46. *See id.*; *see also* GERALD F. GAUS, VALUE AND JUSTIFICATION: THE FOUNDATIONS OF LIBERAL THEORY § 20, at 329–36 (1990) (discussing "constrained teleology"); AMARTYA SEN, DEVELOPMENT AS FREEDOM 77 (1999) ("To insist that there should be only one homogeneous magnitude that we value is to reduce drastically the range of our evaluative reasoning. It is not, for example, to the credit of classical utilitarianism that it values only pleasure, without taking any direct interest in freedom, rights, creativity or actual living conditions."); AMARTYA SEN, RATIONALITY AND FREEDOM 39 (2002) ("Reason has its use not only in the pursuit of a given set of objectives and values, but also in scrutinizing the objectives and values themselves. Maximizing behavior can sometimes be patently stupid and lacking in reasoned assessment, depending on what is being maximized."); Robert C. Hockett, *Minding the Gaps: Fairness, Welfare, and the Constitutive Structure of Distributive Assessment* (Cornell Legal Studies Research Paper No. 06-039, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933129; Eyal Zamir & Barak Medina, Incorporating Moral Constraints into Economic Analysis (Sep. 1, 2006) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931988. For a similar approach from the opposite direction, that is, a deontological, rights-based approach that is combined with utilitarian considerations, see T.M. Scanlon, *Rights, Goals, and Fairness*, *in* THEORIES OF RIGHTS 137 (Jeremy Waldron ed., 1984).

47. *See* ANDERSON, *supra* note 7, at 35 (contrasting consequentialist, aggregative, and maximizing norms with expressive and distributive norms); Gillian K. Hadfield, *Feminism, Fairness, and Welfare: An Invitation to Feminist Law and Economics*, 1 ANN. REV. L. & SOC. SCI. 285, 301 (2005) ("[T]here are values that human beings receive from nontradeable goods such as the right to be free of harassment, the entitlement to dignity and equality in social processes, or the care that is embedded in particular nonmarket relationships such as the family.").

48. For a critique of such methods, see ACKERMAN & HEINZERLING, *supra* note 42; David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335 (2006); Kent Greenfield & John E. Nilsson, *Gradgrind's Education: Using Dickens and Aristotle to Understand (and Replace?) the Business Judgment Rule*, 63 BROOK. L. REV. 799 (1997); *see also* ANDERSON, *supra* note 7, at 200 ("Cost-benefit analysis is properly committed to the view that people should be able to decide for themselves the values of different risks and to express their values in their choices. But it is mistaken in thinking that people can adequately and autonomously express all their valuations through market relations.").

a question involves interpretation of human values, mathematics is ordinarily an irrational way to think about the matter. And if this is so, then arguments will ensue, not only about the numerical values of different costs and benefits, but also about the maximizing procedure itself. If we are shaping the legal and institutional framework of a suitable and defensible way of life, we need to make judgments about the contours of that way of life; maximizing a single value is not necessarily the right way to do this; certainly, it is not the only way.[49] Normative arguments are therefore inescapable in this form of reasoning.

Cost-benefit analysis, especially its efficiency form, cannot avoid the criticism that it rests on controversial premises and that derivation of specific legal rules from those premises cannot be accomplished in a mechanical or nondiscretionary manner. Normative choices cannot be avoided in the economic analysis of law. The question then is whether there is any viable alternative to the methodology of economics to engage in normative analysis.

3. The Problem With Rights

One obvious alternative to efficiency as a normative framework is the elaboration of human rights and liberties. Arguments based on rights and duties (deontological approaches) are, in one sense, based on normative considerations. By definition, they rest on values, or assertions about good and bad, right and wrong, justice and injustice, freedom and oppression, and autonomy and servitude. They distinguish legitimate from illegitimate interests, and they judge preferences rather than merely defer to them.[50] Similarly, arguments that start from the idea of liberty need to define the scope and meaning of liberty. Freedom of action is limited by the duty not to harm others, and some normative framework is needed to define what constitutes a legally cognizable harm.[51]

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49. *See* ANDERSON, *supra* note 7, at 38 ("[C]onsequentialists recognize only one frame for justifying actions, whereas expressivists recognize different frames for different contexts. . . . Because states of affairs have only a context-dependent extrinsic value, it doesn't make sense to globally maximize the value of states of affairs. This is as incoherent as trying to globally maximize the instrumental value of tools, apart from the contexts which give them any usefulness.").

50. *See* RICHARDSON, *supra* note 9, at 204 (explaining the importance of criticizing desires rather than merely satisfying them); CHARLES TAYLOR, 1 HUMAN AGENCY AND LANGUAGE: PHILOSOPHICAL PAPERS 66 (1985) ("It is because this [process of normative evaluation] involves ranking motivations that I speak of it as strong evaluation. It means that we are not taking our *de facto* desires as the ultimate justification, but are going beyond that to their worth. We are evaluating not just objects in the light of our desires, but also the desires themselves.").

51. Joseph William Singer, *How Property Norms Construct the Externalities of Ownership*, *in* PROPERTY AND COMMUNITY (Gregory S. Alexander & Eduardo Peñalver eds., Oxford Univ. Press) (forthcoming 2009).

At the same time, most rights theorists seek to avoid or to contain normative argument by trying to step above it in some way through decision procedures intended to develop determinate answers to controversial questions by reference to noncontroversial premises or foundational nonmoral facts. Some scholars do this by creating presumptions against regulation (as in libertarian approaches to rights) and others do this by explicit reference to idealized preferences filtered through a suitable decisionmaking setting like a hypothetical bargain, constitutional convention, or social contract.

As a practical matter, these efforts are unlikely to be successful. One need only observe the division of the country between Republicans and Democrats, religious groups and secularists, as well as the division among academics on moral, legal, and political theory, to conclude that it is unlikely to be the case that we have identified a noncontroversial, determinate method for adjudicating normative disagreement. Rights arguments wind up being either indeterminate or controversial, no matter what form one adopts—separation of the right and the good (classical liberalism), derivation from foundational human interests (foundationalism) or the requirements of reason (Kantianism), elaboration of a suitable setting for creating a social contract (contractualism) or mutual entailment of principles in a coherent whole (coherentism), or reflective equilibrium between intuitions about particular cases and governing principles. Again and again, we face the problem of the tension between determinacy and neutrality. Principles and decision procedures that are sufficiently robust to actually decide specific cases turn out to be controversial, while noncontroversial premises are too abstract to generate determinate answers to hard cases.

It is also unlikely that we can identify theoretically satisfying decision procedures that will avoid the need to make normative arguments or to engage in persuasion. Traditional liberal political theory seeks to avoid normative controversy by identifying a decision procedure that can develop principles of right that can shape and ground the basic political and legal institutions of a free and democratic society in a manner that allows individuals to pursue what John Rawls called their own "comprehensive philosophical moral doctrines."[52] Rawls developed the idea of public reason to capture this goal of separating the right and the good.[53] The idea of public reason is an attractive one. Governments have historically oppressed individuals by coercively and

52. RAWLS, *supra* note 15, § 5.2, at 14.

53. JOHN RAWLS, POLITICAL LIBERALISM 212–54 (1996); *see also* RAWLS, *supra* note 15, § 3, at 8 (discussing "a public conception of justice"). For a refreshing approach to the idea of public reason, see Eduardo M. Peñalver, *Is Public Reason Counterproductive?*, 110 W. VA. L. REV. 515 (2007).

violently imposing a particular religion on them. We value individual liberties that encompass both freedom of conscience and the ability to choose our own ends, to live our own life on our own terms, and to form associations with others of our choosing. We hope to create basic social and governmental institutions that we can accept despite our differing conceptions of the good.

Attractive as the idea of separating the right and the good may be, it faces pervasive and probably insurmountable problems not only in practice, but in theory as well. Michael Sandel argues that conceptions of the right cannot be completely divorced from conceptions of the good, if indeed they can be separated at all.[54] Sandel sometimes goes so far as to argue that our normative arguments must be based squarely on elaborating a conception of the good that could be supported by everyone and that principles of right are simply unavailable if they are not based on a moral conception of the good.[55] Whether or not this latter point is correct, it does seem to be true that we cannot completely separate the right from the good. Attempts to do so inevitably privilege some conceptions of the good over others and rest on values that have their source and justification in basic moral commitments that emerge from individual conceptions of the good.

Lawyers are more aware of this truth than anyone else. They know, as a matter of fact, that the legal system rests on arguments that directly involve conceptions of the good. Case analysis, opinion writing, and legal argument all involve and require lawyers to make, defend, and criticize arguments based on rights, morality, and social utility in common law adjudication. It is true that during the Lochner era, many judges and law professors entertained the fantasy that the entire legal system could be reduced to a few basic principles and that the specific rules of the common law could be deduced from those widely accepted premises.[56] But the legal realists destroyed our confidence in our ability to use deductive logic to play out the necessary logical implications

54. *See* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (2d ed. 1998). On the difficulty (or impossibility) of distinguishing the right and the good, consider *Lawrence v. Texas*, 539 U.S. 558 (2003), which held that the Constitution does not permit the criminalization of private, consensual sexual conduct among adults. No resolution of this case could have been made that did not significantly burden someone's conception of the good, either by interfering with the ability to engage in intimate personal contact or by promoting conduct incompatible with the traditional family or good morals. Of course, justifications can be constructed that focus on constitutional rights, such as the right to privacy, or democratic powers, such as the power to pass legislation promoting the public welfare, but application of those principles of "right" in a case like this has obvious differential effects on particular comprehensive moral systems—effects that are impossible for a decisionmaker to ignore.

55. MICHAEL J. SANDEL, PUBLIC PHILOSOPHY: ESSAYS ON MORALITY IN POLITICS 147–48 (2005).

56. *See* Duncan Kennedy, The Rise and Fall of Classical Legal Thought *passim* (1975) (unpublished manuscript), *available at* http://duncankennedy.net/bibliography/alpha.html.

of concepts such as freedom of contract, negligence, and property. Instead, judges balance competing interests and justify the balances with arguments that are partly, if not wholly, based on notions of the good and not just the right. For example, the question whether an owner should be able to take advantage of the adverse possession doctrine when he knowingly and in bad faith placed his fence two feet onto his neighbor's property is an issue that cannot be resolved without reference to controversial moral considerations. The concept of private property is compatible with various answers to this question. For this reason, lawyers are acutely aware that Rawls was wrong to think that one could just look at basic institutions in setting principles of right. The common law governs many social interactions that go beyond what Rawls thought of as basic institutions, and implicates moral conflict involving competing conceptions of the good. The details of the legal rules governing social life cannot be defined by deduction or mechanical derivation from the nature of basic institutions or concepts or rules. Our common law system defines those legal rules partly by reference to moral considerations, and it is not clear that our legal system could operate at all if it put these controversial moral arguments off the table.

This does not mean that analysis of rights, liberties, and duties should not be part of the answer to the normative problem. Nor does it mean that we should not be concerned with trying to find approaches to justifying legal rules that could be accepted by people who adhere to very different and reasonable comprehensive moral theories. It does mean that we need to be realistic about our ability to reason about the nature of rights in a manner that avoids, settles, or sets aside debates about morality and justice. We need other methods to elaborate reasons that can justify rule choices and institutional settings for a free and democratic society characterized by widespread disagreement about morality. We are unlikely to find a rigid decision procedure that will be decisive in answering questions about what the law should be; we are also unlikely to develop methods of analysis that eschew all moral considerations. Both our procedures for answering normative questions and the reasons we give to justify the rules we enforce are likely to involve controversial premises and a reasoning process that is far from a mechanical one. We need a form of normative argument that recognizes the complexity and plurality of our values and that allows for forms of moral reasoning and justification that are based on argument, persuasion, and rhetoric—not just logic.[57]

57. *See* TIMMONS, *supra* note 24, at 267–70.

4. The Problem With Democracy

Democratic theory defines appropriate institutions and social decision-making procedures to ensure that decisions can be defended as chosen by the people or by their legitimately chosen representatives through democratic processes.[58] On the judicial front, most theories of this type counsel a subordinate role for judges, suggesting they leave most controversial questions of social policy to the legislature. Or these theories suggest following the rules—applying the law, rather than making it. And when the law is unclear, there is a preference for deregulation, understood to mean increasing the range of freedom of action, even if this free action allows some harm to others.[59] However, other approaches defend judicial activism, partly on the ground that the law develops in a dialogue between legislatures and courts and partly that each institutional setting reveals normative truths in a way that is unavailable in the other setting.[60] For example, legislation is often directed to solving particular social problems but the wording of statutes may fail to deal adequately with particular situations that are not the exemplary cases for which the legislature framed the statute. Courts confront the facts of particular cases, responding to particular conflicts, and may understand the normative limitations of general legislative principles in ways that were not obvious to legislators acting in a planning capacity.[61] Thus, a court may be understandably reluctant to apply a statute providing that a joint tenant succeeds to the ownership interest of his co-owner when she dies if the reason she died is because her co-owner murdered her.[62] The legislature may not have been thinking about murder of one owner by another when they drafted the general law and might be happy for the court to conclude that the statute was never intended to apply in such a case.[63] At the same time, other theorists may believe that the court should apply the statute mechanically and leave it to the legislature to create an exception for murder. The choice between such approaches means that democratic theory can provide guidance for judges only when coupled with a normative framework about the nature, shape, and contours of democracy and the proper relations among different branches of government.

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58. *See* IAN SHAPIRO, DEMOCRATIC JUSTICE *passim* (1999).

59. David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 567–73 (1988).

60. *See* Joseph William Singer, *Catcher in the Rye Jurisprudence*, 35 RUTGERS L. REV. 275 *passim* (1983); Joseph William Singer, *Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 HARV. L. & POL'Y REV. 139 *passim* (2008).

61. *See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 608–09 (1988).

62. *See Wills and Trusts: Murder of Intetstate—Spouse—Constructive Trust*, 25 MASS. LAWYERS WEEKLY 1210 (Feb. 10, 1997) (reporting on *Lee v. Snell*, Mass. Prob. Ct.,No. 95E-0019-GC1).

63. *See* JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY § 8.2, at 361–62 (2d ed. 2005).

More to the point, when adjudicating an issue of common law, deference to the legislature is hardly a full answer given the judge's power and responsibility to interpret precedent and enforce common law rights. The common law simply does not work mechanically. The process of distinguishing cases means that state judges applying common law cannot consistently refuse to find legal rights merely because the legislature has not previously created them. The question is always why the common law precedents should be interpreted the way the defendant wishes rather than as the plaintiff wishes. It is not possible to reserve all policy questions for the legislature on the pretense that the courts can interpret the common law in a neutral, value-free way.

5. The Problem With Critique

Finally, normative argument is inescapable even for deconstructionists, critical theorists, and postmodernists who might seek to avoid it entirely. It is easy for the armchair theorist to say that normative argument is inescapably circular, indeterminate, and ungrounded, or to argue that complete justice is impossible. We can sit in our offices and seek to explain and tear apart arguments made by law makers without attempting to say what we would have done in their place. But it is not so easy for judges and legislators to refuse to engage in normative argument. A judge who decides a case by flipping a coin or without carefully considering competing considerations would be justly criticized as acting in an oppressive manner. We demand that judges think carefully about their exercises of power. More importantly, we demand that judges give reasons to explain how they have exercised their power. Understanding that all reasons can be criticized does not remove the normative and political demand that such reasons be given. Even if airtight reasons cannot be given, we still want power holders, and especially judges, to give them.

The fact that there are no killer arguments that definitively resolve normative conflicts does not mean that all arguments are therefore ideological window dressing. The arguments we give for and against different rules of law are based on considerations we in fact care about. Our inability to prove that we are right does not remove the need for justification. Nor does our desire to rest our normative claims on secure foundations protect us from the need to justify our actions and our laws even when it turns out that such foundations do not exist.[64] The inability to generate a noncontroversial, determinate

64. On the possibility of justifying normative choices without incontrovertible foundations, see MARK TIMMONS, MORALITY WITHOUT FOUNDATIONS: A DEFENSE OF ETHICAL CONTEXTUALISM 147 (1999) and Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229.

decision procedure for normative conflicts does not obviate the need to engage in normative reasoning or argument. We need methods other than an axiomatic decision procedure to fill in the "because clause." And perhaps most surprisingly, it turns out that lawyers do have a special skill set and specialized knowledge that can aid both moral and political philosophers in doing exactly this.

B. Living in Moral Space

1. The Limitations of Analytical Methods

The legal realists demonstrated the limitations of traditional doctrinal analysis. They showed that general principles could not generate detailed rules in a nondiscretionary fashion. Nor could the concepts contained in those principles or in the resulting rules be specified without engaging in judgments of both policy and principle. Some realists reacted to these demonstrations by rejecting the utility of legal doctrine altogether. They suggested that rules and doctrinal categories give us no help or guidance—indeed, such rules have negative utility because they hide the real policy considerations underlying the rules. Similarly, some moral theorists today advocate a form of particularism that asserts that moral rules have no real role in moral reasoning. Rather, particular facts and contexts must be considered to determine the right thing to do in any situation.[65]

Law and economics scholars have similarly turned their attention away from legal doctrine and moral principles, instead using cost-benefit analysis, among other approaches, to identify rules that maximize social welfare. Several professors at Harvard Law School have responded to the legal realist critique of doctrine by developing a course called Analytical Methods for Lawyers.[66] In the place of legal doctrine, the text suggests solving legal problems by using basic business and economic concepts and methods of analysis.

As I have explained, useful as they may be for certain kinds of questions, there are built-in limitations to these analytical methods. At best, they are incomplete as decision procedures for choosing appropriate courses of action. At worst, they are misleading and distorted. They presume that all relevant

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65. *See* Robert Audi, *Generality and Moral Judgment*, *in* CONTEMPORARY DEBATES IN MORAL THEORY 285, 285–304 (James Dreier ed., 2006); Mark Norris Lance & Margaret Olivia Little, *Defending Moral Particularism*, *in* CONTEMPORARY DEBATES IN MORAL THEORY 305, 305–21 (James Dreier ed., 2006); TIMMONS, *supra* note 24, at 245–66.

66. HOWELL E. JACKSON, LOUIS KAPLOW, STEVEN M. SHAVELL, W. KIP VISCUSI & DAVID COPE, ANALYTICAL METHODS FOR LAWYERS (2003).

values can be reduced to measurable—such as monetary—values. Yet this is clearly not true. Even if the analysis recognizes that not all values can be reduced to dollar values, any values that cannot be so expressed are generally omitted from the analysis. Nonetheless, the result of the analysis is usually enthroned as the welfare-maximizing result despite its incompleteness. Moreover, the assumption appears to be that justice-based goals, such as distributive fairness, must be achieved by sacrificing social welfare. I have argued, in contrast, that economic analysis cannot itself be applied analytically without making controversial assumptions about fundamental values.[67] With different baseline assumptions, the analysis would come out very differently. And one cannot define a legitimate baseline without considering normative questions involving things like distributive justice. Further, because many important values cannot be reduced to numbers, an adequate normative method would include methods of reasoning and justification that are outside the scope of the methods described in Analytical Methods for Lawyers.

Law makers also need to articulate acceptable reasons for a rule choice that explain to a losing party why the result is just. Cost-benefit analysis suffers from the limitations of all utilitarian reasoning; it fails to respect the separateness of persons because it assumes that the gains of some can fully offset the losses of others. A judge cannot explain a decision this way. From an external perspective, it may seem sensible to say, "We considered your claim but concluded that the social costs of ruling in your favor outweigh the social benefits." The problem is that the losing party will hear this argument to mean: "We decided to sacrifice your interests for the good of the community." This is not an adequate argument. It does not treat individuals with equal concern and respect. We need ways of reasoning and methods of justification that go beyond these methods. These economically-oriented analytical approaches for lawyers need to be supplemented by normative methods.

2. Moral Reasoning: "As Much Clarity as the Subject Matter Allows"

I have argued that we have many reasons to avoid normative argument.[68] Normative disagreement seems fundamental and permanent, and we have no apparent noncontroversial methods for choosing among competing moral views. But I have also argued that normative argument is unavoidable in the legal system of a free and democratic society. Nor should we want to avoid it. Judges need presentable and persuasive ways to argue about justice, fairness,

67. *See supra* text accompanying notes 31–49.
68. *See supra* Part II.A.

and morality. Lawyers need the ability to do this as well—not only to give persuasive arguments to judges, but also to interpret existing law.

Contrary to the assumptions underlying much current efficiency analysis, not all preferences can or should be indulged and not all preferences can be given equal weight. And when we reject a preference, we should be able to explain why. When we raise some interests to the level of fundamental values, we should be able to provide justification. The language of justice grows out of the human impulse to give reasons for our claims, to justify the demands we make on others.[69] We want to say—without irony—that "torture is wrong" and "people deserve to be treated with dignity"—and we would like to be able to say why. We especially want to give good reasons for imposing laws on those who may disagree with the values underlying the laws. Is there really anything wrong with this impulse?

I would say no. As Charles Taylor explains, "[i]t is a form of self-delusion to think which we do not speak from a moral orientation that we take to be right. This is a condition of being a functioning self, not a metaphysical view we can put on or off."[70] We need to be able to talk more cogently about our moral values, but in order to do so, we may need to give up the artificial constraints on moral reasoning that we have unconsciously imposed on ourselves.[71] If it is not possible to identify neutral, determinate decision procedures for reasoning about values, then perhaps our idea of what reason entails in the realm of normative argument was misplaced. Perhaps reason can coexist with controversy and manage disagreement without abolishing it.[72] Perhaps normative argument is not an enclosed deductive, self-evident

69. CHRISTINE M. KORSGAARD, *The Authority of Reflection*, *in* THE SOURCES OF NORMATIVITY 90, 113–15 (Onora O'Neill ed., 1996); T.M. SCANLON, WHAT WE OWE TO EACH OTHER 4 (1998); *see also* RAWLS, *supra* note 15, § 9.2, at 27 (noting that public justifications are "addressed to others who disagree with us" and "appeal[ ] to beliefs, grounds, and political values it is reasonable for others also to acknowledge"); *id.* § 9.2, at 27–28 ("For justice as fairness to succeed, it must be acceptable, not only to our own considered convictions, but also to those of others . . . .").

70. TAYLOR, *supra* note 11, at 99; *see also* SUSAN NEIMAN, MORAL CLARITY: A GUIDE FOR GROWN-UP IDEALISTS 4 (2008) ("We have moral needs . . . . They include the need to see our own lives as stories with meaning—meanings we impose on the world, a crucial source of human dignity—without which we hold our lives to be worthless. Most basically and surprisingly, we need to see the world in moral terms. These needs are grounded in a structure of reason.").

71. *See* LLOYD L. WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT 92 (2005) ("A decision is not a proof; it does not afford certainty, and reasonable persons may disagree. But in law, as in human affairs generally, a proof is not to be had."); Martha C. Nussbaum, *Valuing Values: A Case for Reasoned Commitment*, 6 YALE J.L. & HUMAN. 197, 202 (1994) (noting that "getting rid of transcendent standards does not mean getting rid of good reasons").

72. *See* FOGELIN, *supra* note 5, at 59–60 ("Reflecting on certain features of a situation can trigger our deontological instincts; reflecting on other features can trigger our consequentialist instincts. Sometimes—perhaps even usually—these instincts support each other. Sometimes, however, they conflict. These, I think, are simply facts about our moral life. The thought that there must be

system, but a form of practical reason or a means of living in the world, rather than a theoretical construct.[73]

If so, how do we reason about normative matters? Charles Taylor suggests we can gain traction by "articulating" what he called our "strong evaluations"[74] and our "moral frameworks."[75] "[S]trong evaluation . . . involve[s] . . . a standard, independent of my own tastes and desires, which I ought to acknowledge."[76] Articulating such strong evaluations helps us better understand our deep, and possibly unconscious, beliefs and assumptions. It also allows us to see their complexity and to criticize and improve them. The complexity that emerges in this process gives us reason to reject the idea that normative reasoning either appeals to self-evident truths or is based on mechanical, logic-driven decision procedures.

Long ago Aristotle argued that we cannot expect exactitude in the realm of moral reasoning; the nature of the subject prevents it. He began his *Nichomachean Ethics* by noting that "[o]ur discussion will be adequate if it has

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some unifying source for our moral instincts—one that shows their underlying coherence—strikes me as wholly unlikely on its face."); ERIC MACGILVRAY, RECONSTRUCTING PUBLIC REASON 155 (2004) (arguing that we should not assume that public reason requires moving from uncontroversial—and possibly empty—premises to controversial—and substantively charged—conclusions).

73. *See* TOULMIN, *supra* note 24, *passim* (arguing to recreate a sense of the reasonable rather than attempting to define what is rational). As Charles Taylor argues:

> If you want to discriminate more finely what it is about human beings that makes them worthy of respect, you have to call to mind what it is to feel the claim of human suffering, or what is repugnant about injustice, or the awe you feel at the fact of human life. No argument can take someone from a neutral stance towards the world, either adopted from the demands of "science" or fallen into as a consequence of pathology, to insight into moral ontology. But it doesn't follow from this that moral ontology is a pure fiction, as naturalists often assume. Rather we should treat our deepest moral instincts, our ineradicable sense that human life is to be respected, as our mode of access to the world in which ontological claims are discernible and can be rationally argued about and sifted.

TAYLOR, *supra* note 11, at 8; *accord*, KYMLICKA, *supra* note 23, at 44 ("The question is which form of equal treatment best captures that deeper ideal of treating people as equals. That is not a question of logic. It is a moral question, whose answer depends on complex issues about the nature of human beings and their interests and relationships. In deciding which particular form of equal treatment best captures the idea of treating people as equals, we do not want a logician, who is versed in the art of logical deductions. We want someone who has an understanding of what it is about humans that deserves respect and concern, and of what kinds of activities best manifest that respect and concern.").

74. *See* TAYLOR, *supra* note 11, at 4 ("[S]trong evaluation . . . involve[s] discriminations of right or wrong, better or worse, higher or lower, which are not rendered valid by our own desires, inclinations, or choices, but rather stand independent of these and offer standards by which they can be judged.").

75. *See id.* at 16–17 (discussing the importance of "articulating" and thus "making sense" of the "'background picture' lying behind our moral and spiritual intuitions"); *id.* at 3–52 (discussing generally the role and importance of moral frameworks).

76. *Id.* at 4; *see also* TAYLOR, *supra* note 50, at 3 (defining a "strong evaluation" as "a background of distinctions between things which are recognized as of categoric or unconditioned or higher importance or worth, and things which lack this or are of lesser value").

as much clarity as the subject-matter allows . . . ."[77] Perhaps we need to give up, or at least relax, the expectation that normative argument should derive the answers to hard questions from uncontroversial premises, or the expectation that neutral procedures can be wholly divorced from substance, or the expectation that we need decision procedures that generate answers in a mechanical or deductive fashion.[78] Perhaps what we need are structures of normative reasoning that recognize the inevitability both of controversial normative premises and procedures and of the need for contextualized human judgment to apply those normative methods to concrete cases.[79]

Yet giving up the idea of an orderly, self-proving moral system raises the possibility of self-delusion and false legitimation. What we seek are legitimate justifications of normative choices; what we fear are seductive arguments that legitimate oppression. We are aware that we can talk ourselves into doing horrible things. How do we engage in justification and avoid oppressive legitimation? If competing moral claims seem relevant in a particular case, and we do not have a noncontroversial method to solve the battle of competing norms, then we have no choice but to rely on contextualized, carefully considered human judgment. We work within a tradition, developing both high-level and low-level norms of interpretation, argumentation, justification, and defense. But retreat to notions of craft or expertise, or pronouncements by experts that certain arguments are not sound, inevitably appear to the losing side to be mere assertions of power—words designed to silence the loser rather than to provide legitimate reasons. It is easy to slip into a self-justifying stance, convincing ourselves we are right when we are actually wrong.

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77. ARISTOTLE, ETHICS 5 (John Warrington trans. & ed., J.M. Dent & Sons Limited 1963).

78. As Isaiah Berlin argued in a 1957 radio address:

> The arts of life—not least of politics—as well as some among the human studies turn out to possess their own special methods and techniques, their own criteria of success and failure . . . Bad judgment here consists not in failing to apply the methods of natural science, but, on the contrary, in over-applying them . . . To be rational in any sphere, to apply good judgement in it, is to apply those methods which have turned out to work best in it . . . [To demand anything else] is mere irrationalism.

Political Judgment (BBC Third Programme radio broadcast June 19, 1957), *quoted in* TOULMIN, *supra* note 24, at viii.

79. *See* FOGELIN, *supra* note 5, at 61–62 ("It is essential to see that an irreconcilable moral conflict can exist without bringing all morality down around it. . . . Thinking otherwise is almost certainly the result of placing ultrarationalist demands on moral systems: They are either dilemma-free or wholly arbitrary. A leading aim of this work is to break the spell of thinking of that kind."); KYMLICKA, *supra* note 23, at 44–45 ("What we have in political argument is not a single premise and then competing deductions, but rather a single concept and then competing conceptions or interpretations of it. Each theory of justice is not *deduced from* the ideal of equality, but rather *aspires to* it, and each theory can be judged by how well it succeeds in that aspiration."); CHARLES TAYLOR, *supra* note 11, at 7 (arguing that modernity has inherited "a deeply wrong model of practical reasoning, one based on an illegitimate extrapolation from reasoning in natural science").

This worry is real but the remedy it suggests is misconceived. We should worry about self-delusion and the unfair treatment of others. But the remedy for this worry is not to go back to the failed strategy of seeking to identify noncontroversial premises. Nor is the remedy to cease pursuing justice. Neither of these extreme responses solves our problem. The real remedy is to continue to worry. We do this by acknowledging the need for argument, and the need to give reasons to the losing side. We cannot avoid the problem of talking ourselves into injustice by giving up on justice. The absence of clear, noncontroversial decision procedures does not make normative argument pointless or self-deluding.[80]

Reason in the realm of values must attend to the fact that human beings are "self-interpreting creatures" and that we are as much the source as the object of our normative claims.[81] The skeptics are right that normative argument requires controversial claims to get off the ground and that any set of reasons is likely to be both incomplete and inconsistent. Yet they are wrong to conclude that this makes such arguments meaningless or inherently obfuscatory.[82] Normative arguments do more than express what we value. The reasons we give to support moral claims are not just reports of preferences or tastes. Rather, they are both "felt obligations" and demands we feel entitled to make of each other.[83] As moral demands, they possess a different status and character than mere preferences. Moreover, reasons can have weight even lacking a completely coherent framework that determines their relative strength and applicability. The lack of a mechanical decision procedure does not require us to give up the idea of reason altogether. It does require us to frame our arguments in ways that respect the differences between people with regard to conceptions of the good and are attentive to the ways in which we are shaping our arguments as much as being shaped by them. We may not have access to Reason with a capital "R" (what Stephen Toulmin calls "rationality"), but we have the capacity to give reasons to justify our claims on each

80. *See* RAWLS, *supra* note 15, at 30 ("Many of our most serious conflicts are conflicts within ourselves. Those who suppose their judgments are always consistent are unreflective or dogmatic; not uncommonly they are ideologues and zealots."); TIMMONS, *supra* note 24, at 96–97, 267–70 (arguing for "limited moral pluralism").

81. *See generally* KEITH TOPPER, THE DISORDER OF POLITICAL INQUIRY (2005).

82. *See* KYMLICKA, *supra* note 23, at 45 ("To demand that [political argument] achieve logical proof simply misunderstands the nature of the exercise.").

83. On felt obligations, Charles Taylor explains:

> For I do not just feel desire to help this man. Indeed, I might feel no such desire in the usual sense of the term. But I feel called upon to help him. And I feel called upon *qua* rational being, or moral being, or creature made by God in his image, in other words capable of responding to this like God, that is, out of agape.

TAYLOR, *supra* note 50, at 58.

other (what Toulmin calls "reasonableness")[84]—and we have, or should have, the capacity to be moved by reasons given by others.

Lawyers must know how to do this. Normative argument is not just something that philosophers think about in the privacy of their offices. Lawyers make normative arguments every day. These arguments are especially important in the context of common law development. It is part of our legal system to give reasons in support of proposed rules of law when the rules in force are uncertain. When we argue about what the law is, we inevitably allude to what it should be. Whether one is a supporter of natural law or positivism, it is a feature of our legal system to justify legal rights by appeal to normative considerations.

Moreover, one can do better or worse at this project. The fact that one can often write a brief on both sides of a legal question does not mean that all briefs are equally good. As Francis Mootz notes:

> Many first-year law students are troubled by what they perceive to be the wide freedom of judges to decide cases on personal whim and then later to supply adequate legal justification for their decision, but it is no surprise to find that these same students have difficulty formulating a coherent argumentative essay for the final exam. It is easy enough to believe that the law is "just rhetoric" when reading a case, but the tremendous challenge of confronting a specific legal dispute and arguing persuasively on behalf of a client quickly demonstrates to students that a rhetorical exchange can be extremely demanding because it is so decentering. Rhetorical engagement demands an intersubjective relationship if it is to be successful in a close case; crude manipulative tricks simply don't work.[85]

Lawyers have tools to engage in normative argument that structure the process of giving reasons for the demands of justice. They cannot do their jobs without them. Some of them track arguments from other fields, while some are more specific to law. Traditional methods of doctrinal analysis embody both general principles and specific applications. Lawyers use general norms, such as fairness and efficiency, but also look to patterns, exemplary cases, and general rules to help them consider the justifiability of alternative resolutions to a case.

It turns out that lawyers have something important to teach moral philosophers, economists, and political theorists. We are the authors of our

84. *See* TOULMIN, *supra* note 24, at 15 (contrasting the "reasonable" and the "rational").
85. MOOTZ, *supra* note 26, at 132–33.

claims but we are also their subjects;[86] justice and deconstruction can coexist if we recognize that normative argument need not be definitive to make it valuable. The fact that we choose how to live together does not mean that we cannot choose wisely or defend our proposed terms of cooperation in ways that others could accept. One might call this approach critical normativity.[87] Justice is a human achievement, not a found object. It requires humility in a world of disagreement about conceptions of the good. But the likely continuation of fundamental disagreement does not obviate the need to make considered judgments and to give reasons to defend our social and legal arrangements. The Talmud teaches that "it is not your duty to complete the work but neither are you free to desist from it."[88] If T.H. White is right that "[t]here is something important in humanity,"[89] then we must attend to the human impulse to treat each person with equal concern and respect, which requires us to give legitimate reasons for the laws that structure our lives.

III. LAW AS APPLIED MORAL AND POLITICAL THEORY

A. What Lawyers Can Learn From Moral and Political Theory

There is a tendency for legal scholars to believe that lawyers have no specialized knowledge. Legal reasoning is thought to be empty unless filled with some external theory. There is no longer faith in legal reasoning as a way to resolve legal issues. Other theories fill in the gaps. If law involves conflicting arguments, there is no choice but to go outside law to find a firm foundation for rational choice or just adjudication.

There are two fundamental flaws with this view. First, it turns out that other theories similarly look outside themselves to answer the seemingly unanswerable questions. Economists for example, assume that the legal system assigns property rights—a necessary institutional fact required for markets to properly function. They look to lawyers to answer questions that provide the basis for their arguments. So lawyers cannot simply use economic analysis if that analysis needs lawyers to define the baselines from which the

86. *See* Anderson, *supra* note 42, at 23 ("The subject matter of humanistic and social scientific inquiry is ourselves. This fact has inescapable practical implications. As Charles Taylor has emphasized, it is part of our nature as self-interpreting, deliberative beings that we must act on our understandings of who we are.").

87. *See* RICHARDSON, *supra* note 9, at 305 (explaining his "theory of critically relative rationality").

88. Pirkei Avot (Sayings of the Fathers) 2:21 (Joseph William Singer trans.).

89. T. H. WHITE, THE BOOK OF MERLYN: THE UNPUBLISHED CONCLUSION TO *THE ONCE AND FUTURE KING* 42 (1977).

economic analysis should begin. Perhaps we could turn to moral and political theory to give us the baseline needed by the economists.

That brings us to the second flaw in the view that social theory can guide lawyers. Moral and political theory tends to operate at a relatively high level of abstraction. Political theorists consider the basic structure of society and moral theorists consider the kinds of reasons appropriate to interpersonal relations. Lawyers, on the other hand, spend more of their time in the world of applied moral theory. They hammer out the details of concrete social interactions in the context of specific problems. The moral and political theorists seem to assume either that their analyses can be applied in a straightforward manner to concrete cases or that the details of legal rules are technical matters unrelated to fundamental normative dilemmas. But lawyers know better. The normative controversies theorists deal with at the level of high principle go *all the way down*; they recur at the application stage—they never go away.

That being said, lawyers do have a great deal to learn from economists, moral theorists, and political philosophers. Among other things, economists teach us (1) to look at the consequences of adopting one rule of law over another; (2) to consider the incentives that alternative rules create for behavior; (3) to compare the costs and benefits of alternative courses of action; and (4) to think systematically about the interplay of forces in social and economic life, the remote and interconnected effects of different rules and institutions, and the ways in which particular changes effect remote and unexpected changes elsewhere. Law professors and judges generally recognize the benefits of economic theory in choosing and justifying legal rules. What they do not sufficiently appreciate are the benefits of using the insights of moral and political theory to address the issues that economists set aside.

Moral and political theorists have valuable lessons for lawyers. Moral theorists, for example, teach us (1) the importance of giving legitimate and relevant reasons to justify our actions; (2) the idea that individual persons are of intrinsic and immeasurable importance, are imbued with dignity, and are entitled to equal concern and respect; (3) that we judge preferences rather than merely deferring to them; and (4) that we cannot legitimately claim to support a particular rule governing individual conduct if we cannot consistently support that principle in similar situations in the future to similarly situated persons (including ourselves). Political theorists teach us (1) that we should attempt to give reasons for laws and governing structures acceptable to everyone regardless of their particular views of the good; (2) that we cannot identify such reasons without making assumptions about human nature,

relationships, and foundational norms such as autonomy, dignity, security, and equality; and (3) that the persistence of dispute and debate about political and legal questions does not relieve us of the responsibility to specify what these fundamental values mean in a free and democratic society that tries to treat each person with equal concern and respect.

Thus, while economic analysis works from a given baseline—usually the status quo—and then asks whether changing that baseline improves things overall, moral and political theorists focus on defining an acceptable baseline. Rather than taking the status quo for granted, they seek to understand the basic framework of a free and democratic society within which cost-benefit analysis can proceed. They also develop ways to talk about values that cannot be reduced to dollar amounts or cannot be sufficiently respected by attempts to maximize them. These theorists therefore work on the questions that preoccupy lawyers: What are the basic entitlements that individuals should have before they begin interacting with each other? What are the minimum standards for contractual relationships within a free and democratic society that accords each person equal concern and respect? Not only the questions, but also the methods of reasoning used by moral and political theorists are congenial to the work in which lawyers and judges engage. For this reason, moral and political theory provide enormously useful resources for lawyers that cannot be replicated by reducing all rule choices to economic terms.

B. What Lawyers Can Teach Moral and Political Theorists

1. Law Is Complex

Lawyers possess specialized knowledge that is of immense value to economic, moral, and political theory. What do lawyers know? For one thing, many moral and political theorists underestimate the difficulty of defining the legal structures associated with market and social relations in a free and democratic society.[90] Nonlawyers may imagine that only a few basic normative

90. I do not mean to argue that all moral and political theorists misunderstand the complexity of moral choices and legal structures supporting a free and democratic society. Indeed, a number of important theorists have articulated and defended the idea that values are complicated, contextually contingent, plural in nature, and conflicting in application, and that the only reasonable way to handle such complexity is through a form of practical reason rather than a tight deductive or logical system of concepts. This Article builds on their work. Examples include ANDERSON, *supra* note 7; FOGELIN, *supra* note 5; RICHARDSON, *supra* note 9; TAYLOR, *supra* note 11; TIMMONS, *supra* note 24; MARGARET URBAN WALKER, MORAL UNDERSTANDINGS (1998); Anderson, *supra* note 42; Margaret Urban Walker, *Moral Understandings: Alternative "Epistemology" for a Feminist Ethics*, HYPATIA, Summer 1989, at 15. My point is not that no philosophers have recognized the complexity of moral life, but that because lawyers are charged with constructing rules and principles to guide

choices need to be made (such as deciding to have and to protect private property, to enforce promises, to prevent both intentional harms and negligent conduct, and to support the institution of marriage) and that once those choices are made, application of those norms to particular conduct follows naturally and even mechanically. Nonlawyers generally think that the law should be clear and simple. Lawyers are unpopular partly because nonlawyers believe that lawyers intentionally complicate simple problems.[91]

Lawyers know, on the other hand, that defining the rules governing social interaction and market relationships is a very complicated business.[92] Lawyers are acutely aware that they cannot identify a small number of clear principles and apply them in a straightforward manner to particular cases. Although this was arguably the aim during the era of classical legal thought at the beginning of the twentieth century, it is now understood that that effort was a colossal failure.[93] Simple concepts like property or the free market cannot be defined in a few sentences. As the foreign minister of Czechoslovakia, Jiri Dienstbier, commented in 1990, "[i]t was easier to make a revolution than to write 600 to 800 laws to create a market economy."[94] If anything, he understated the case.

Lawyers are expert at one aspect of analytical philosophy: ferreting out ambiguities in fundamental concepts and principles. To clarify those ambiguities, they divide legal issues into many constituent parts. Rather than merely asking whether the defendant wronged the plaintiff, the question divides into a number of elements, such as duty, breach, causation, and damage. Each of these elements is further distinguished by the kind of duty, breach, causation, and damage. For example, there are different types of duties leading to different torts, such as fraud and assault. The duties imposed by the tort of fraud are themselves defined by a number of distinct elements, namely (a) a representation (b) that was false when made (c) intended to induce reliance by the plaintiff, (d) which did in fact induce reliance (e) where the reliance was reasonable and (f) caused the plaintiff harm. There are difficulties in determining the meaning of each element of the claim. Further, defenses have their own difficulties of interpretation and application. We refine the meaning of these analytical elements by reference to other concepts, social

numerous real world situations, they have rich experience in applied moral and political theory that tends to cause them to accept the idea that complexity is inevitable and that abstract theories are unlikely to dissolve complexity.

91. Even a few scholars are seduced by such impossible dreams of simplicity. *See, e.g.*, RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995).

92. *See* RICHARDSON, *supra* note 9, at xi ("discerning the true complexity of value").

93. *See* Kennedy, *supra* note 56, at 9.

94. William Echikson, *Euphoria Dies Down in Czechoslovakia*, WALL ST. J., Sept. 18, 1990, at A26.

contexts, underlying norms, narratives, and social policies. We make finer and finer distinctions until the rule books are thousands of pages long.

Lawyers do this not because they are perverse and get secret thrills in making simple things complicated. Nor is the reason to turn themselves into an expert guild where they are the only ones able to interpret this morass and thereby ensure job security. Law is complicated because qualitative distinctions matter, and they matter at this level of detail. The process of applying rules and doctrines to particular cases reveals the normative complexity involved in determining the meaning of moral principles and public policies. Lawyers are confronted with, and highly attuned to, the number and the complexity of choices that must be made to put abstract concepts and ideals into practice.

The field of ethics tends to distinguish metaethics from applied ethics. Metaethics concerns the foundational basis and meaning of moral statements or evaluative assertions.[95] General ethical discussions tend to identify general moral principles, while applied ethics works out moral principles in the context of concrete problem cases.[96] The assumption seems to be that one works from foundations to principles to the application of principles. The work of application appears technical, as if clear understanding of the principles will tell us how to decide concrete cases. The division of labor seems akin to that between the physicist who studies the laws of gravity, the architect who designs the building, and the contractor who builds the house according to the plans created by the architect. Applied ethics appears to be a technical enterprise rather than a subject for the big thinkers.

However, lawyers know better. They are aware of the difficulty of working out the meaning of moral principles in concrete cases. The process of applying law to concrete cases heightens awareness of the complexity of values and the difficulty of determining their scope and weight in particular cases. Society is characterized by disagreements about moral values. Even when we agree on fundamental values, we find that they are multiple and conflicting. They push us different ways when we try to apply them to concrete cases. We want efficiency and equality, freedom of action and security, stability and change, majority rule and constitutional rights, as well as freedom of religion and freedom from the establishment of religion. We cannot make grand choices between private property and communism, for example, and assume that these choices come with an institutional structure. We choose to

95. *See* Jason Brennan, *Beyond the Bottom Line: The Theoretical Aims of Moral Theorizing*, 28 OXFORD J. LEGAL STUD. 277, 294 (2008).

96. *See id.* at 291–94.

have private property—and then what? Then we wind up with a twenty-volume treatise attempting to define the contours of the property system.

Drawing appropriate lines between competing values is complicated, and because the rules in force attempt to protect and vindicate conflicting values, they reflect careful calibration and sophisticated line drawing. High-level theorists hope they can invent a metatheory that will reconcile competing normative considerations. Sometimes these theorists even convince themselves that they have succeeded in that task. However, when we apply these metatheories to concrete cases, we find ourselves dissatisfied. We are not persuaded that rights should always be sacrificed on the altar of efficiency; nor are we persuaded that abstractly and formalistically defined rights should be protected though the heavens fall.[97] Moreover, the application process shows us the utility of looking at the same moral dilemma from multiple perspectives. We like using several approaches; we find them useful, illuminating, attractive, and helpful.

Law is complicated not only because our values are complicated, and not only because the application process reveals the limitations of simplistic metatheories, but because our values legitimately and understandably evolve over time. Lawyers understand the need to accommodate rules to existing social values and conditions. We cannot continue to apply rules in 2009 that may have worked well in 1792 if those rules cannot be defended as consistent with current values and circumstances. Arguments for interpreting law in light of the original intent of the founders are generally limited to constitutional claims and instances of statutory interpretation. And even then, room must be made for evaluation of meaning. After all, many of the Founding Fathers owned slaves. Although adherence to precedent and deference to the legislature to overturn precedent are widely accepted arguments when state courts interpret common law, it is not commonly thought that the law should develop by reference to conditions or values that existed 200 years ago. Moreover, the common law has changed drastically since the beginning of the nation. Conduct that would not have been thought harmful to land in the past is now understood to cause harmful pollution that can be regulated by the common law of nuisance or environmental law. Exclusionary conduct that would have been perfectly legal in 1858 is now prohibited by public accommodation laws. Current public policies in favor of abolishing racial

97. *See* NEIMAN, *supra* note 70, at 205 ("Why suppose that rules that don't get you absolute certainty get you nothing worth having at all?"); RICHARDSON, *supra* note 9, at 70–71 (discussing "logically nonabsolute norms"); *id.* at 77–79 (explaining the importance of specification).

discrimination in the marketplace may affect interpretation of common law rules regarding control of property.[98]

In short, the impetus to refine legal rules by making numerous analytical distinctions and by multiplying the number and complexity of rules is not a smokescreen designed to protect a monopolistic guild. Rather, it is a consequence of lawyers' intimate knowledge of the normative complexities involved in making real our most treasured values. Most fundamentally, it results from a commitment to treat human beings with equal concern and respect. It is a commitment to the idea that like cases should be treated alike, which requires practical reason, moral judgment, and fine distinctions. The complexity of law expresses our commitment to our most basic values, as we see that particular cases cause us to revise those values or delimit their scope when they conflict with other values, thereby necessitating distinctions, multilayered doctrines, and calibration of rules to appropriate situations. This raises the important issue of context in applying norms to cases.

2. Context Matters

A second insight lawyers can teach philosophers is the importance of context in determining both the scope and content of legal rules.[99] For example, consider the idea that ownership of land includes the right to exclude nonowners from the property. The right to exclude seems a natural implication of the idea of ownership if it is understood to mean exclusive control of valuable objects in the world. Ownership rights, so understood, protect core values of autonomy, privacy, and security, and promote the general welfare. But does the right to exclude mean that restaurants are entitled to exclude customers because of their race? Does it mean that employers are entitled to exclude the city health inspector? Does the right to exclude mean that a citizen of New Orleans was trespassing if she sought to save her life by entering a neighbor's house during Hurricane Katrina? Are landlords entitled to prevent tenants from having overnight guests? Can homeowners near airports prevent planes from flying too low over their properties? Lawyers are experts in thinking up questions like this; they do it because they study cases in which existing rules seem to have unfortunate consequences and the mechanical application of a seemingly applicable rule will seem

98. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 *passim* (1996).

99. Steven Toulmin and Elizabeth Anderson have both noted the importance of context for understanding the meaning of human events. *See* TOULMIN, *supra* note 24, at 21; Anderson, *supra* note 42, at 17–22.

harsh, unfair, or socially destructive. Lawyers are experts in finding the limits of principles by examining the cases to which they apply.

Lawyers also know that a slight factual change can dramatically alter intuitions about the right result in a given situation. Tenants have a duty to pay rent, but suppose the landlord fails to repair a broken furnace and thus fails to provide heat and hot water to the tenant's apartment as required by both the housing code and the terms of the lease agreement. Does the duty to pay rent persist? Towns have the power to pass zoning laws segregating incompatible uses such as industry and housing, but suppose a town passes a law segregating homeowners by race? Employers cannot refuse to hire someone because of their sex, but can they refuse to hire someone because of their sexual orientation?

The law makes distinctions based on the context in which the rules are applied. And because context matters, rules do not determine the scope of their own application.[100] Lawyers are more experienced than nonlawyers with the practice of studying the detailed and varying contexts in which law applies, and are acutely aware that competing values may require exceptions to, or narrowing of, basic rules. Moreover, changes in facts, social context, environment, other laws, and relationships among parties, all may be involved in limiting the application of a rule. Karl Llewellyn was correct when he argued that a case has almost no meaning by itself.[101] We cannot tell whether the rule in a case is broad or narrow without viewing it in relation to prior rules and subsequent cases.

Further, lawyers are trained in the art of distinguishing cases. It cannot be done mechanically or arbitrarily. Only some distinctions make sense and will be persuasive to a conscientious decisionmaker.[102] This is another reason why the law is complicated; it cannot be reduced to a complete system of formal rules without distortion or sacrifice of core values. Lawyers are not only attentive to appropriate contexts for application of basic norms, but also understand that defining those contexts is an activity that cannot be performed

100. *See* NEIMAN, *supra* note 70, at 11 ("No law applies itself, ever."); TOULMIN, *supra* note 24, at 27 ("The general concepts in which we articulate our ideas and beliefs have formal implications, and it is the task of theoretical analysis to sort out and elucidate them. But, by itself, such a theoretical analysis does not tell us in what situations—how, where, or when—everyday life and practice exemplify those ideas.").

101. LLEWELLYN, *supra* note 28, at 48.

102. *See* ANDERSON, *supra* note 7, at 30 ("No adequate interpretation of a way of valuing something can reduce its motivational component to a desire or preference that some states of affairs occur. They must be brought about in the right ways, by the right agents, in the right context .... Whether desiring, aiming at, or achieving a given state of affairs adequately expresses the right attitudes toward people and things depends on the context that determines its expressive meaning.").

mechanically or deductively. Rather, it is an activity requiring considered judgments about the right result in particular cases and attempts to justify those results by reference to underlying principles. This form of reasoning may seem irrational to those who identify reason with logical, mechanical, or deductive forms of analysis. But these are not the only analytical methods available to us, as explained in the coming sections.

3. Narrative Matters

Lawyers are better aware than most[103] that we understand both social context and social values partly by narrative techniques. In deciding how to handle a particular case, lawyers begin by telling the story. Every judicial opinion starts with a recitation of the facts—essentially a narrative. Lawyers are trained to describe the relevant facts in a manner that unites the facts and the law so as to highlight the facts that matter, what social roles the parties are occupying, the nature of their relationships, and the history of the dispute. How one tells the story may affect how one understands the relative importance of competing considerations, facts, and values, as well as the morality, justice, fairness, and ultimate justifiability of alternative courses of action. Lawyers understand that the construction of narrative is part of the way we reason morally. Narrative is part of the way we understand and judge relationships, actions, causes, and effects; it is a large part of the way we assign responsibility.[104]

If this is true, then it cannot be true that we can apply the law simply by identifying principles, deducing specific rules, and applying those rules in a manner that is relatively mechanical. There is no decision procedure for creating an appropriate narrative.

Consider the infamous *Kelo*[105] decision, in which the U.S. Supreme Court found no constitutional bar to a city's taking of property in a proposed development area by eminent domain and transferring parcels to private developers who would remake the neighborhood. The city's goal was to create jobs, increase the value of the land (and hence property taxes needed to pay for schools, fire, and police protection), and promote economic development in

103. *See* TOULMIN, *supra* note 24, at 123 ("In place of abstract universal concepts, practical disciplines focus on particular episodes. Convincing narratives have a kind of weight that mathematical formulas do not.").

104. *Id.* at 124 ("Despite all the subtlety and depth they display in abstract general terms, the conclusions of a book like John Rawls's *Theory of Justice* provide no effective criteria for settling real-life disputes in actual cases."); Dennis M. Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937 *passim* (1990) (explaining the centrality of narrative to legal reasoning).

105. Kelo v. City of New London, 545 U.S. 469 (2005).

a depressed municipality.[106] Critics attacked the decision by arguing that it made every person's property vulnerable to being taken at any time.[107] More importantly, the critics emphasized that this power would be used to displace lower income families and replace them with either richer families or big businesses. It would allow urban renewal, whose effect if not purpose was to displace African Americans and replace them with white people.[108]

The defenders of the decision had a very different narrative. They told a story about a depressed municipality suffering from economic stagnation, a declining job base, decreasing property values with resulting reductions in property taxes, leading to inadequate funding for public services that in turn led to poor public schools and the flight of the middle class. Each of these conditions fed the others leading to a downward spiral that was hard to stop. Because property taxes pay for most city services, the municipality had few options to improve the situation. The state had the power to help but it was indifferent to the suffering occurring in less wealthy communities like New London. The story was one of a powerful but indifferent state and a relatively powerless municipality. To respond to the indifference of state authorities, the city had no choice but to use the one power it had—the power to shape land use to revitalize the local community by bringing in new business and new jobs, thereby increasing property values and taxes to improve the increasingly inadequate public services. Redevelopment of the city would revitalize the economy, create jobs, and improve public services. Adequate compensation of the displaced owners would enable them to buy comparable replacement housing in the city, perhaps even in the same neighborhood. Displacement of owners who did not want to move was indeed a bad thing, but the city's options were limited. By refusing to sell her land or to allow it to be taken by eminent domain, Suzette Kelo was vetoing the only plan likely to alleviate the suffering of others in the city. Limiting the city's eminent domain power would condemn everyone in the city to deteriorating conditions, limited prospects, and stifled opportunities.[109]

Competing narratives are one of the main ways lawyers debate the nature of the problem that has to be solved. They are also techniques for clarifying the norms underlying social relationships and the contours of institutions. Determining the appropriate story is one of the ways we come to

106. *Id.* at 483.
107. *Id.* at 494 (O'Connor, J., dissenting).
108. *Id.* at 522 (Thomas, J., dissenting).
109. *See, e.g.*, David Barron, *Eminent Domain Is Dead! (Long Live Eminent Domain)*, BOSTON GLOBE, Apr. 16, 2006, at D1.

understand the meaning of the dispute, as well as the appropriateness of applying particular rules to particular social contexts.[110]

4. Practical Reason Can Handle Incommensurable Values

Lawyers recognize that we have plural, incommensurable values and that we generally hold to a form of practical reason to decide hard cases in a pragmatic manner. The stance most of us take toward normative argument rests on several observations. First, we are aware that we have multiple values and that these values often conflict with one other.[111] Second, with experience applying norms of fairness and welfare to human conflicts, most of us find it entirely unlikely that anyone will construct a metatheory that reduces all human values to a single metric or master value, such as autonomy, pleasure, or happiness. Practicing lawyers are acutely aware that we cannot, without distortion, flatten all distinctions of worth or quality by representing all normative considerations as instantiations of a single supreme value.[112] And it is an even greater distortion of our values to try to quantify everything of value. Third, for the most part, lawyers are not attracted by the fantasy that we can use abstractions to dissolve complexity.[113] Norms such as liberty are too abstract to decide hard cases. Finally, it is unlikely that anyone will identify rigid priority rules to adjudicate among plural values; it is not true that one value will always supersede another when they clash. There are too many cases in which a situational change necessitates us to distinguish the case and create an exception to the presumptively applicable rule. At the same time, despite the complexity of our moral lives, most lawyers stand with those philosophers who argue that it is possible to make considered, reasoned judgments in the face of plural values. They hold to a form of practical reason or rough-and-tumble pragmatism.

110. *See* TOULMIN, *supra* note 24, at 133 ("[I]ndividual cases in all their particularity cannot be simply 'deduced from' universal and general principles of a theoretical kind: at best, theories can be required to 'make sense of' the ways in which we succeed in dealing with particular cases. Theory (so to speak) is not a foundation on which we can safely construct Practice; rather, it is a way of bringing our external commitments into line with our experience as practitioners.").

111. On incommensurable values, see RICHARDSON, *supra* note 9, at 89–118.

112. On "limited moral pluralism," see TIMMONS, *supra* note 24, 189–208. On the nature of plural goods, see TAYLOR, *supra* note 14, at 230–47.

113. *Cf.* FOGELIN, *supra* note 5, at 66 ("[C]ontradiction and other forms of incoherence can . . . arise because we, as human beings, lead complex, multisided lives carrying commitments that cannot be resolved into a coherent unity without severe loss.").

To think clearly about the normative implications of rule choices, we make qualitative distinctions among different kinds of human interests.[114] To do this, we must characterize the interests at stake in social disputes.[115] Consider the question of whether landlords should have a duty to mitigate damages when tenants breach lease agreements. Assume a law student living in Cambridge, Massachusetts signed a lease lasting from September 1, 2008 to August 31, 2009. In January 2009, the student gets a job offer at a law firm in New York City. The lease prohibits subletting. The tenant asks the landlord for permission to sublet the apartment over the summer or the right to get out of the lease obligations. She wants to move to New York and hopes not to pay two rents during the summer months. The landlord refuses, the student takes the job in New York and stops paying rent on the Cambridge apartment, and the landlord waits until the end of the summer to sue the tenant for back rent, even though the landlord could have mitigated damages by allowing her to sublet the Cambridge apartment for the summer or by himself finding a replacement tenant for those months. Must the tenant pay the summer rent for the Cambridge apartment to the landlord? If the landlord has a duty to mitigate damages, then the answer is no; the landlord could have avoided the damages entirely and so should recover nothing. If the landlord has no duty to mitigate damages, then the answer is yes.

One way to address this question is by reference to efficiency concerns, using the notion of efficient breach. This analysis assumes that the value of the lease can be reduced to economic terms and that the only question is one of price. The landlord bargained for a certain monthly rent. The tenant promised to pay this rent in exchange for the right to live in the apartment for one year. If the landlord's only interest is in the economic value of the lease, then the duty to mitigate damages arguably protects that interest fully, while allowing the tenant to maximize her welfare by moving and promoting the interest of a potential summer subletter desiring access to the apartment for the summer. The result is Pareto optimal; the landlord is made economically whole while everyone else is better off as well (including the tenant, the subtenant, the new employer, and the new landlord in New York).

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114. *See* ANDERSON, *supra* note 7, at 66–73 (discussing the difference between qualitative and quantitative methods of evaluation); *id.* at 72 ("I claim that it makes sense to value different goods in different ways and that we have little idea of what human life could be if it did not engage in social practices that supported different ways of valuing things."); *see also* Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 459 (2000) (developing a pragmatic approach to conceptual distinctions).

115. *See* ANDERSON, *supra* note 7, at 70–71 (arguing that "[t]wo goods are incomparable in intrinsic worth if they are not candidates for the same mode of valuation," and that "[a] practice is degrading when it expresses a lower valuation of something than it merits").

Not so fast. The economic argument could be turned around. The landlord bargained for the right to monthly rent payments from this tenant for a year. The landlord may have an interest in getting the money from this particular tenant, not from others to whom the tenant might transfer her obligations or that the landlord could find to replace her. Why might the landlord be interested in locking in this tenant to the contract? First, the landlord may not want the hassle of looking for a new tenant. Second, the landlord may believe he has found a creditworthy tenant and wants to take advantage of her ability to pay rather than facing the vulnerability of dealing with a third party whose credit or track record is not so clear. If we characterize the landlord's interest in this way, we may say that the landlord has a property right in the tenant's promise. The landlord owns the right to get a monthly payment from this tenant—an obligation the tenant voluntarily accepted in a freely-negotiated agreement by signing a one-year lease that prohibited subletting. The tenant is not free to move without the consent of the landlord unless she is able to pay double rent for the summer months.

But this raises a crucial question. Is the landlord's interest in getting the money from this particular tenant a legitimate one? On an antipaternalist theory, we should defer to the landlord's preferences, whatever they are. But a competing theory would describe the landlord's preference differently, and do so in a manner that implies a moral judgment. Assume that most tenants cannot afford to pay double rent and that the landlord knows this; if that is the case, the landlord is seeking to control the tenant's behavior by coercing the tenant to stay in Cambridge over the summer and turn down the job in New York. The landlord seeks to tie the tenant to the land. If we characterize the landlord's interest in this way, it appears illegitimate; the landlord is seeking to act like a feudal lord, asserting too much power over his tenant and treating her like a vassal rather than a person entitled to control her own life—control that requires mobility rights and the freedom to change jobs.

This example shows several things. First, normative considerations enter into our conceptualization of the interests at stake in legal disputes. We may characterize those interests in different ways. Second, it is not possible to reduce all values to equivalent units without distortion of those normative concerns. Lawyers understand that there are plural values and that it is a distortion of those values to characterize them as embodying a single value like utility, happiness, or even respect. Third, we can and do make judgments about the legitimacy of individual interests. Another way to say this is that we judge preferences and determine some of them to be out of bounds. How then do

we compare competing values if they are incommensurable in the sense that they cannot, without distortion, be reduced to a common metric?

Many philosophers seek theories that dissolve incommensurabilities by appealing to higher-order norms or metatheories that provide rational priorities among competing values. Lawyers, judges, and law makers, on the other hand, are rarely beguiled by monistic theories. They make utilitarian arguments; they talk about rights, justice, fairness; they are concerned to define the appropriate institutional role for judges in a free and democratic society; they tell the story; they resort to process to solve substantive problems. Moreover, they are skeptical about the ability of rigid priority rules to determine just outcomes in specific cases. In short, they use multiple normative strategies, and are unashamed if unable to find killer arguments that put all normative controversies to bed.

Lawyers are realistic. They do not expect debate to end or normative argument to be resolved. They know it is possible to compare values in the context of particular cases, to consider thoughtfully the appropriate balance between competing values, and to reach a considered judgment without applying a formulaic or algorithmic decision procedure.[116] The case must be decided and endless debate is not possible. Lawyers and judges do not have the luxury of ideological purity. The inability of philosophers to come to agreement after thousands of years of normative argument means that lawyers cannot simply pick one normative approach over others and fail to listen to other types of arguments. They must use all tools at their disposal.[117]

Legal judgments are essentially based on practical reason.[118] As in other uses of practical reason, the process of coming to a conclusion about the right thing to do requires judgment. Conclusions are not derived mechanically from a logical decision procedure. Multiple factors are considered. No theory that purports to choose applicable principles by deductive reasoning or

116. *See* RICHARDSON, *supra* note 9, at 271–308.

117. The notion that moral reasoning is based on plural basic values and that many moral choices are not determined by those basic values is recognized by some moral theorists. *See* TIMMONS, *supra* note 24, at 267–70.

118. For a description and defense of practical reason, see Anderson, *supra* note 42, at 14–22. Practical reason requires what Mark Johnson usefully calls "moral imagination." *See* MARK JOHNSON, MORAL IMAGINATION: IMPLICATIONS OF COGNITIVE SCIENCE FOR ETHICS (1993). He argues, for example, that "[w]e must be able to project beyond clear cases that are morally unproblematic to those that are either nonprototypical or completely novel in our experience. There are no rules to tell us how to perform this crucial task, yet it is the essence of our moral deliberation." *Id.* at 3–4; *see also* STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND xiii (2001) ("What enables effective action is not transcendental truth but pragmatic knowledge—that is, the smaller human truths that best explain how we think and act within the complex social webs that we inhabit (and that inhabit us).").

application of a mechanical decision procedure will ever be adequate for helping judges adjudicate disputes or do their job of making, interpreting, and enforcing law. Indeed, lawyers know that judgment based on multiple factors and various suitably impartial but nonmechanical decision procedures is the only rational way to make decisions in the face of multiple values.[119]

5. Justification Constrains Judgment: The Art of Talking to the Loser

Lawyers are aware that the process of justifying decisions publicly can constrain choice even if our reasoning processes require the exercise of considered judgment rather than the application of an algorithmic decision procedure. Judicial opinions therefore play a crucial role both in helping judges think through the normative issues at stake in particular cases and in limiting judicial discretion. Cases arise not only when lawyers seek to enforce their clients' rights under existing law, but also when lawyers alert judges to gaps, conflicts, and ambiguities in the law. In justifying one interpretation of the law over another, judges must both acknowledge the ambiguity that gave rise to the need for a judicial decision and explain its resolution in a manner that attempts to show how the decision is consistent with existing rules and promotes justice. This may require existing rules to be reinterpreted or changed if justice so demands. The end goal of this process is to explain to relevant audiences the reasons that justify the judge's resolution. From the standpoint of normative support, the main audience for the decision is the losing party. If the moral impulse is based on the need to give reasons that others can accept, then the core function of the justificatory judicial opinion is to explain to the loser why the law favors the interests of the other party over her own. The obligation to give such reasons has significant constraining effects on the decision itself.

Judges both defer to existing rules and shape them. In general, we want judges to enforce laws passed by the legislature and, when enforcing common law rules, to treat like cases alike while showing equal concern and respect for all persons. But judges have power to decide the cases before them; what, short of impeachment, constrains their exercise of power? The usual answer is that judges should follow the rule of law rather than make it. But lawyers know that this answer is woefully inadequate. Ambiguous statutes require interpretation. Constitutional rights render some statutory provisions void. Common law evolves with changing social values and conditions, and the process of applying the rules in force involves human judgment. Considered

119. RICHARDSON, *supra* note 9, at 292–307.

alone, we cannot know what a precedent means. It must be situated in context and given its appropriate scope, meaning, and force by reference to utility, rights, social policy, or other normative considerations. Judges must determine the scope of existing rules by deciding when and how to distinguish cases, create exceptions, or apply competing rules or principles.

Although rules do have significant constraining power, judges are well versed in how to escape the clutches of those rules. For that reason, the greatest constraining force on judges is not the abstract injunction to follow the law. Instead, the biggest check on the use of judicial power is the duty to give public reasons for decisions, justifying choices by writing judicial opinions.[120]

Lawyers are also acutely aware that judicial judgments do not take place arbitrarily or in an unconstrained manner. Numerous constraining factors limit the actions that judges feel are appropriate in particular cases, including role considerations, conceptions of democracy and fundamental rights, the social and historical context in which disputes arise, and the numerous normative arguments that influence how judges rule in particular cases. Judges have the peculiar experience of being responsible for making important choices in a manner that is not mechanically determined by superior authority or existing principles, while feeling hemmed in by various constraining factors that limit their discretion.[121] Judges exercise judgment, not on a blank playing field, but in a field of hedging forces.

I have taught a seminar on the Supreme Court for about fifteen years at Harvard Law School and Boston University School of Law. The students discuss cases being decided in the current term of the Supreme Court, read briefs, and vote on what they would do if they were on the Supreme Court. After the initial discussion and vote, one student is assigned to write a

120. *Cf.* RAWLS, *supra* note 15, at 27 (noting that public justifications are "addressed to others who disagree with us" and "appeal[ ] to beliefs, grounds, and political values it is reasonable for others also to acknowledge"); *id.* at 27–28 ("For justice as fairness to succeed, it must be acceptable, not only to our own considered convictions, but also to those of others . . . ."); *see also* CHARLES LARMORE, THE MORALS OF MODERNITY 8, 12 (1996) (locating moral justification in the human practice of "reflection upon reasons for belief and action" and arguing that "[i]n modern ethics, the expectation of disagreement [on the nature of the good life] has turned attention toward a core morality on which reasonable people . . . can nonetheless agree"); *id.* at 96 ("Moral knowledge is . . . best understood as one species of the reflective knowledge of reasons rather than as a kind of perceptual knowledge."); RAWLS, *supra* note 15, at 17 (arguing that the "principles of justice the parties [in the original position] would agree to . . . would specify the terms of cooperation that we regard—here and now—as fair and *supported by the best reasons*") (emphasis added); *see generally* KORSGAARD, *supra* note 69, at 113–15; SCANLON, *supra* note 69, at 4. On the ways in which reasongiving constrains judgment, see Nussbaum, *supra* note 71, at 209.

121. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997); KARL N. LLEWELLYN, THE COMMON LAW TRADITION 19–61 (1960) (describing "steadying factors" that constrain judicial discretion).

proposed majority opinion. Every time I have taught this course, at least one student changes her mind about how to vote once she starts trying to write the opinion. It is sometimes the case that she finds she cannot rule the way she wanted without overruling too many cases, and her conception of the judicial role makes this problematic. More common is the problem of answering counterarguments. I insist that the opinion writer explain the strongest arguments on the other side and answer them. When the student cannot come up with a good answer to a counterargument, she often reverses the outcome and tries to approach the exercise from the other side. This reversal often happens more than once. There have been years in which six of the twelve students reversed themselves after trying and failing to write the opinion the way they initially voted.

It is the giving of reasons to all affected parties that may be the strongest discipline on judicial decisions. Reasons must be given to lower court judges to explain what they are expected to do in similar cases in the future. Reasons must be given to the general public, to the legal profession, and to the press. But most important, respect for human dignity requires that reasons be given to the losing side—reasons the judge believes the loser could or should accept. And those reasons turn out to be based overwhelmingly on normative considerations. Sometimes the judge explains that the losing party's interests are illegitimate, at least in the context of the case at hand. At other times, the judge acknowledges the legitimacy of those interests but explains why, in this kind of case, the other side's interests should prevail over those of the losing party. This kind of argument is normatively charged. Lawyers and law students therefore need to know the available frameworks and vocabulary for engaging in normative argument—especially normative argument about considerations of fairness, justice, morality, and the basic values of liberty and equality underlying the contours of a free and democratic society that treats each person with equal concern and respect.

IV. NORMATIVE METHODS

What are the normative methods used by lawyers? There are four stages to normative argument, involving somewhat different tasks: (1) orientation (adopting basic assumptions about human nature, society, and the good; framing the question presented; and telling the story); (2) evaluative assertion (identifying legitimate human interests, needs, and wants that count as human values or moral demands); (3) contextualization (interpreting conflicting values in a manner that renders them consistent by identifying the

situations to which the values appropriately attach); and (4) prioritization (resolving conflicts among values by suitably impartial decision procedures).

The purpose here is not to give a full account of each of these methods, nor is it to consider the complexities in using each of them. I hope merely to bring to consciousness the fact that we have such methods, what their contours are, why they count as a form of practical reason, and some examples that show how they work. All these approaches should be familiar to any student who has attended law school. However, the earlier part of this Article attempted to articulate why these normative methods are necessary. The prevailing approaches suggest that normative argument about fairness and justice is either pointless or obfuscatory. On the contrary, normative methods are necessary for adjudicating cases fairly and wisely. While moral arguments can be used to justify oppressive interferences with individual liberties, it is also true that the refusal to judge preferences and interests can lead to oppression if satisfying those preferences enables some to exercise illegitimate power over others. Oppression is as much a danger either way. Morality and justice-based arguments are therefore both unavoidable and necessary to shape the contours of the legal framework of a free and democratic society. We have various resources for thinking through and justifying rule choices based on their fairness, morality, and justice. Bringing these methods to light can help both law professors and law students develop better ways of analyzing and justifying the values underlying the rule of law.

A. Orientation

1. Background Understandings

The first step in normative argument is to orient ourselves in a moral universe. Most of this orientation occurs unconsciously and is reflected in assumptions of which we may not even be aware. In debate about the right way to deal with a dispute, we often find competing orientations, including different assumptions about human nature, the good society, social relationships, the right way to think about justice, and the right way to view the facts. Charles Taylor has called these fundamental assumptions "social imaginaries"[122] or "background pictures" that inform and frame our conceptions of social life and human relationships.[123] Importantly for law, background understandings shape our conceptions of the legal framework of a free and democratic

122. CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES 23 (2004).
123. TAYLOR, *supra* note 11, at 3–4, 8.

society.[124] Taylor has also argued that it may sometimes help to "articulate" our "background assumptions" so that we can be more reflective about their validity or defensibility.[125] Similarly, Henry Richardson argues that "[w]hen people differ radically over what they take to be axiomatic, it is likely that they also arrived at these beliefs through strikingly different tacit exemplars."[126] He further explains: "Tacit exemplars resist rational deliberation because it is difficult to become fully aware of them. Their influence in giving life to the terms we use and the views we hold is so pervasive that it is very difficult to bring them all to consciousness, let alone to obtain a critical perspective on them."[127]

Consider the well-known case of *State v. Shack*.[128] A nonprofit field worker and a lawyer enter a farm to provide government-funded medical and legal services to migrant farmworkers living and working there.[129] The farm owner refuses to let them see the workers in the privacy of their barracks.[130] Instead, the farmer offers to have the meetings conducted in his offices while he watches and listens.[131] The service providers refuse to agree to these conditions and the farmer orders them to leave his land.[132] They refuse and are arrested for criminal trespass.[133] Suppose they then move to dismiss the charges on the ground that they had a right to enter the land to provide government-funded services to the farmworkers who wanted to receive such services. How should the decisionmaker think about the case?

The farmer would argue that the case can be resolved by asking a simple question: Who owns the land? The farmer will argue that he does and that owners have the right to exclude nonowners. The defendants' refusal to leave after he asked them to do so violates his property rights. Nor did the farmer waive his right to exclude in his employment contracts with his workers; he did not give the workers a right to meet with outsiders on his land. The farmer's perspective, as presented, rests on a set of background assumptions about the nature of property and contract, as well as conceptions of individual

124. *See* Singer, *supra* note 60, *passim*.

125. TAYLOR, *supra* note 11, at 8–11; *see id.* at 34 (arguing that "articulation" involves "try[ing] to increase our understanding of what is implicit in our moral and evaluative languages"); *id.* at 41 (discussing the need to "explore the background pictures which underlies our moral intuitions"); *see also* Charles Taylor, *Leading a Life*, *in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 170, 170 (Ruth Chang ed., 1997).

126. *See* RICHARDSON, *supra* note 9, at 271.

127. *See id.* at 292.

128. 277 A.2d 369 (N.J. 1971).

129. *Id.* at 370.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

rights and liberties and what it means to live in a free and democratic society. We might call this framework a libertarian social vision.

The libertarian imaginary rests on powerful and perhaps even unconscious assumptions about the nature of both property rights and state power. It assumes, for example, that land can and should be owned by individuals; that each parcel of land has a single identifiable "owner"; that owners have absolute power to control their land, including the right to exclude others; that ownership rights protect individual interests in autonomy, privacy, and security and thus cannot be limited by law except in extraordinary circumstances; that entry can be conditioned on terms chosen by the land owner. The libertarian framework also assumes that existing property rights have a just origin so that the exclusionary claims of existing owners are legitimate. Or it assumes that any unjust origins are so far in the past as to be irrelevant from a moral point of view as applied to current ownership claims.[134] This set of assumptions is easily understood by members of our culture in the United States and is associated with a particular conception of property that views the owner as the sovereign of a castle with absolute power inside clear boundaries.[135]

Recognizing that the farmer's argument is based on a particular set of assumptions about social relationships and the meaning of property and liberty allows us to question those assumptions and subject them to critical analysis. For example, while it is true that owners generally have the right to exclude nonowners from their land, this is only generally true. This, and all the other assumptions captured by the libertarian framework are either overstated or wrong. Owners do not have absolute rights; rather, property rights are limited in order to protect the personal and property rights of others. Property owners are not free to place any conditions they like on those who enter their land. Neither are business owners subject to the same rules as are the owners of other kinds of property, such as homes. The farmer could not, for example, refuse to hire a worker because of his race even though one can choose his friends based on race.

In addition, the farmer is too quick to assume that ownership rights are all on his side. Tenants have the right to receive visitors in their homes, and landlords are not entitled to prevent their tenants from doing so. This right is so well accepted that few precedents establish it. It is assumed that the transfer of possessory rights gives the tenant the ability to create a home, and

134. *See* Joseph William Singer, *Nine-Tenths of the Law: Title, Possession, and Sacred Obligations*, 38 CONN. L. REV. 605 *passim* (2006).

135. Joseph William Singer, *The Ownership Society: Regulatory Takings and Just Obligations*, 30 HARV. ENVTL. L. REV. 309 *passim* (2006).

that it is a necessary part of that right to receive family, friends, and neighbors as guests in one's home. It is a contested question whether farmworkers in barracks have the status of tenants. If they do, then by inviting the workers to live on his land, the farmer has waived the right to exclude the defendants if the workers want to receive them in the barracks. In other words, it is the farmworkers—not the farmer—who own the right to receive these visitors. By interfering with this right, it is the farmer who is interfering with the property rights of the workers, not the defendants who are interfering with the property rights of the farmer.

Even if the workers do not have the status of tenants, the libertarian conception wrongly assumes that property rights are never limited to protect the legitimate interests of nonowners. The doctrine of necessity, for example, allows individuals to enter the property of another to save a human life. Thus, no trespasses occurred when New Orleans residents took refuge in their neighbors' homes during Hurricane Katrina to escape from flood waters. Federal and state legislation provides assistance to migrant farmworkers because of their vulnerable status and their isolation from the broader community. By claiming a right to exclude, the farmer seeks to exercise his property entitlements so as to deprive his workers of the ability to get benefits to which they are legally entitled. Rather than exercising his own property rights, the farmer is arguably abusing his rights to prevent others from taking advantage of what they are entitled to claim—in other words, of what they own. Indeed, the New Jersey Supreme Court ruled that migrant farmworkers housed in barracks have the same rights to receive visitors as do tenants in apartments—regardless of what the contract says.[136] The farmer may be the owner of the land, but by entering a contract allowing his workers to live on his land, he parted with some of his ownership rights, and, according to the Court, it is the workers, not the farmer, who have the right to receive or turn away guests in their living quarters.[137]

2. Framing the Question

A second way lawyers orient themselves and decisionmakers is by framing the question presented.[138] The farmer asks: Who owns the land? The doctor and the lawyer will want to frame the issue rather differently. They will reverse

136. *Shack*, 277 A.2d at 374–75.

137. *Id.*

138. *See* RICHARDSON, *supra* note 9, at 4 ("There is no uniquely canonical way to phrase a practical question."). For an excellent example of how framing matters, see Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987).

the valence and put the onus on the farmer to justify his actions. Instead of asking who owns the land, the defendants might ask, for example, "don't people have the right to receive visitors in their homes?" Just as the farmer's question suggests its own answer, this question also suggests its own answer, but this time in favor of the defendants. Alternatively, the defendants might ask whether the farmer is entitled to stop the government from providing services to needy people. Imagine, for example, how a judge would react if the farmer prevented an ambulance from entering his property to reach an injured worker who needed to be taken to the hospital. Could his right to exclude prevent the entry of the ambulance? Of course not.

Various methods can be used to reverse the burden of persuasion—to put the onus on the other side to justify the ways in which their actions impinge upon the legitimate interests of the other side. The libertarian framework assumes, for example, that oppression comes when government officials restrict liberty or interfere with property rights. Conversely, if a person is exercising his rights, he cannot, by definition, be oppressing someone else. This worldview assumes that the ownership of property and the exercise of property rights are self-regarding acts.[139] Others have no legitimate interest in telling you what to do on your own land. If this is true, exclusion of nonowners from one's own land does not harm others because the owner is entitled to exclude nonowners. The farmer is doing nothing more than exercising his rights. Since nonowners have no legitimate claim to trespass on land they do not own, trespassers are engaged in harmful, other-regarding conduct. The farmer will suggest that he is causing no harm to anyone, while the defendants are invading his castle.

The defendants will frame the question differently. They will take advantage of the legal realist conception that rights protect legitimate interests. This means that the scope of a legal right is determined by the interests it is designed to protect, and those interests, in turn, are defined to exclude illegitimate interests in harming or controlling others or otherwise denying equal liberties to others. The case therefore presents normative questions about the legitimacy and relative strength of the parties' interests in this particular context. This framework makes it obvious that the exercise of a property right is not necessarily a self-regarding act; rather, such an exercise may harm the legitimate interests of others. An owner who uses his property in a way that creates air pollution is exercising his property rights but doing so in a way that creates externalities. An exercise of a property right is not necessarily a self-regarding act. If this is true, then it is not just government

139. *See* Singer, *supra* note 51.

officials who can act in an oppressive manner by exercising illegitimate power over others; private property owners may themselves engage in oppressive behavior. Reversing the polarity, the defendants might ask: Does an employer have the "right to isolate" his workers and deprive them of "associations customary among our citizens?"[140]

This way of framing the question reminds us that a free society is not one devoid of the rule of law. We are not perfectly free to do whatever we want. In our political and legal system, some contractual demands are out of line because they fail to treat others with equal concern and respect.[141] By preventing his workers from receiving visitors, the farmer is not associating with them on mutually advantageous terms, but is seeking undue control over their lives. He is acting like a master or a feudal lord and treating them like servants or vassals. Because we live in a free and democratic society, autonomy is protected by allowing actors to determine the terms of their agreements with others, but only so long as they do not violate minimum standards that define what Jedediah Purdy calls legitimate "terms of recruitment" for market relations.[142]

3. Narrative

A third way lawyers engage in orientation is through narrative. As discussed, every case starts with the facts, and the way in which the narrative is constructed is a powerful tool in helping us figure out the moral of the story.[143] Lawyers present alternative versions of the facts. They teach students to create a core theory of the dispute, and constructing a narrative is a crucial part

140. *See Shack*, 277 A.2d at 374.

141. Singer, *supra* note 60, *passim*.

142. Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 DUKE L.J. 1047, 1094 (2007); *see also* ANDERSON, *supra* note 7, at 165 ("[L]ibertarians [] argue that any constraints on people's freedom to alienate their property in themselves are paternalistic violations of liberty. . . . But in democratically prohibiting the market alienation of certain goods embodied in the person, people exercise collective autonomy over the background conditions of their interaction.") (citing John Hospers, *The Libertarian Manifesto*, *in* MORALITY IN PRACTICE 23, 27 (James Sterba ed., 3d ed. 1991) & ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 331 (1974); Elizabeth S. Anderson, *What is the Point of Equality?*, 109 ETHICS 287, 289 (1999); Singer, *supra* note 60.

143. *See also* WESTEN, *supra* note 19; *accord*, JOHNSON, *supra* note 118, at 11 ("[N]arrative is a fundamental mode of understanding, by means of which we make sense of all forms of human action."). Trial lawyers are intensely aware of the ways in which both jurors and judges understand cases by constructing the story. *See* ERIC OLIVER, FACTS CAN'T SPEAK FOR THEMSELVES: REVEAL THE STORIES THAT GIVE FACTS THEIR MEANING 6 (2005) ("It is not the facts, but the stories the decision makers build from and around those facts that create the personal meanings that lead to judgments for and against those listener created stories.").

of this task. Coming to see the case one way or the other is part of how lawyers, judges, and jurors come to decide what the case means. Narrative techniques are not merely matters of strategy or rhetoric. Rather, they are part of the way we reason about moral questions. They help us come to see what matters. Construction of appropriate narratives is a necessary supplement to the more abstract methods of moral and political philosophy. Indeed, some philosophers, especially Margaret Urban Walker, have argued that narrative analysis, combined with consideration of responsibilities implicit in particular social roles and relationships, is the best way to reach moral understanding of the situation.[144]

The farmer is likely to start the story by noting that he owns his farm and started a business by recruiting employees. He was entitled to start a business and run it as he wished. The workers were not forced to work for him and they voluntarily agreed to his terms. Moreover, their freedom to refuse to work for him meant that he had to shape the terms of the contract in a manner that attended to their legitimate interests. The story is a freely negotiated contract between A and B. If the law comes in with its heavy hand and rewrites the contract, it is only acting paternalistically by interfering in a voluntary and mutually beneficial arrangement.

The doctor, lawyer, and the Supreme Court of New Jersey told the story differently. Here is part of what the Court said:

> Here we are concerned with a highly disadvantaged segment of our society. We are told that every year farmworkers and their families numbering more than one million leave their home areas to fill the seasonal demand for farm labor in the United States . . . . The migrant farmworkers come to New Jersey in substantial numbers . . . .
>
> The migrant farmworkers are a community within but apart from the local scene. They are rootless and isolated. Although the need for their labors is evident, they are unorganized and without economic or political power. It is their plight alone that summoned government to their aid.[145]

Rather than a mutually beneficial arrangement, the court describes a group that is disempowered and disadvantaged but serves crucial social and economic functions in the market economy. Indeed, others are wholly dependent on the services that migrant farmworkers provide. Yet it is not clear that we recognize our dependence on them or what we owe them. Barbara Ehrenreich argues that we should feel

> shame at our *own* dependency, in this case, on the underpaid labor of others. When someone works for less pay than she can live on—when,

144. WALKER, *supra* note 90, *passim*.
145. State v. Shack, 277 A.2d 369, 372 (N.J. 1971).

> for example, she goes hungry so that you can eat more cheaply and conveniently—then she has made a great sacrifice for you, she has made you a gift of some part of her abilities, her health, and her life. The "working poor," as they are approvingly termed, are in fact the major philanthropists of our society. They neglect their own children so that the children of others will be cared for; they live in substandard housing so that other homes will be shiny and perfect; they endure privation so that inflation will be low and stock prices high. To be a member of the working poor is to be an anonymous donor, a nameless benefactor, to everyone else.[146]

Rather than asking to left alone on his land, the farmer is asking for the right to isolate the workers, to deprive them of government services intended for their benefit, and to deny their "opportunity to live with dignity."[147] Quoting from a government report, the court notes that "'no trespass' signs represent the last dying remnants of paternalistic behavior."[148] By denying the workers access to government services, the Court suggests that the farmer was acting like a feudal lord or plantation owner, treating the workers like servants when all they ask is to be treated with equal concern and respect. This is a story of a heartless employer who denies his employees basic services that he himself enjoys, subjecting them to harsh conditions and social isolation.

B. Evaluative Assertion

1. Humanity and Dignity

Whether we are presented with alternative orientations or a question of what to do within an agreed orientation, we then face the task of justifying one orientation or outcome over another. Normative argument both within and between orientations depends on what Mark Timmons calls evaluative assertions—statements about the right way to act that contain built-in moral judgments.[149] Timmons argues that moral claims are assertions in the sense that they can be right or wrong, true or false. Moral realists argue that such

146. BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 221 (2001).

147. Shack, 277 A.2d at 374.

148. *Id.* at 373.

149. TIMMONS, *supra* note 64, at 6; *see also* Anderson, *supra* note 42, at 21–22 ("[T]he question of what is good and right is largely answered by articulating the field of thick evaluative concepts in terms of which we ought to describe, discriminate, and experience ourselves and the world."); NEIMAN, *supra* note 70, at 19 ("Truth tells us how the world is; morality tells us how it ought to be."); *id.* at 147 ("The claim of equality flies in the face of painful and urgent realities. It does make sense as a demand.").

claims are based on moral facts that can be discovered by the use of introspection, reason, or observation. Moral irrealists, like Timmons, argue that truth or falsity of moral claims does not rest on correspondence with moral facts in the world, but are evaluative judgments designed to guide conduct. Value judgments are not descriptions of some ultimate reality. Rather, they are claims we make on each other. Our inability to rest those claims on incontrovertible foundations outside human will does not deprive them of their value for human life; if we accept them, they can be used as contextually basic foundations for normative argument.[150] Thus Timmons argues that "[t]he content of 'Apartheid is wrong' is apartheid is wrong."[151] The assertion that conduct is wrong is based, not on divine will or natural law but on a human judgment about defensible human conduct and the appropriate contours of social relationships.

How does normative argument begin? It arguably begins when we feel a need to justify ourselves to others, which usually occurs when we engage in action that affects others. According to one legend, morality began when God asked Cain: "What have you done?" המ תישא (meh asitah)[152] The call to justify oneself may come from outside or inside. The Cain story rested on the idea that one has an obligation to defend oneself to God—a pretty heavy duty. The secular version of the story is that one must be attentive to other human beings simply because they are human.[153]

This felt obligation comes from a fundamental assumption that human beings are entitled to be treated with dignity and respect. This normative impulse is different from the teleological argument offered by Hobbes, who suggested that it is in our self-interest to create a government that limits our freedom of action, enabling us to obtain security and avoid the violent death that may come from anarchy.[154] The normative impulse I am describing is

150. *See* TIMMONS, *supra* note 64, *passim*; *see also* RICHARDSON, *supra* note 9, at 203 ("Any end that stands firm on reflection can be accepted as a ground of justification."); Terry Horgan & Mark Timmons, *Morality Without Moral Facts*, *in* CONTEMPORARY DEBATES IN MORAL THEORY 220, 220–38 (James Dreier ed., 2006).

151. TIMMONS, *supra* note 64, at 147.

152. Genesis (Bereishit) 4:10.

153. *See* JOHN FINNIS, FUNDAMENTALS OF ETHICS 21–22 (1983) ("What one can and should say about human nature, as the result of one's ethical inquiries, is not mere rhetorical addition; it finds a place in the sober and factual account of what it is to be a human being."); *id.* at 62–63 ("But what is *in my interests* is certainly not sufficiently to be determined by asking what I *happen* to *take an interest in* (desire, aim for . . .). The decisive question always is what it is *intelligent* to take an interest in. There are no 'interests' (desires . . .) that are immune from that question."); KYMLICKA, *supra* note 23, at 43 (noting that "human beings matter and matter equally").

154. THOMAS HOBBES, LEVIATHAN 227 (C.B. MacPherson ed., Penguin Books 1976) (1651) (noting that government is instituted "to defend them from . . . the injuries of one another, and thereby to secure them in such sort, as that by their owne industrie, and by the fruites of the Earth,

based not on self-interest, but on the sense that people are unique and irreplaceable, and as Kant put it, are entitled to be treated as "ends in themselves" and not "merely" as means to satisfaction of the desires of others.[155] This normative impulse comes from a felt obligation to treat others with equal concern and respect.

The Kantian idea that people are ends-in-themselves entitled to dignity is a secular equivalent of the religious understanding that human beings are created in the image of God and therefore deserve to be treated with dignity.[156] The liberal corollary to this view is that each person is of equal importance and entitled to equal concern and respect. This insight leads to some version of the golden rule, perhaps the central moral principle governing the acceptability of public reasons; the equal moral worth of persons means that one cannot claim something for oneself while denying it to others. It also means that one cannot demand something of others unless one can give reasons that we think they should be able to accept. This in turn is the source of something like Kant's categorical imperative, that an action cannot be justified unless it can be described by a principle that could be accepted as a universal law.

If other people are entitled to be treated as human beings—in other words, humanely—we should feel an obligation to explain ourselves to others when we make demands of them. It is more controversial to claim that we must account to others when we fail to help them. One area of debate is the extent to which obligations of care are as fundamental to humanity as are obligations of respect or autonomy.[157] For now, however, the focus is on a central impulse, which is an obligation to give reasons to others for actions or inactions. Those reasons, in turn, express values. They announce what is important and express what really matters in human relationships.

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they may nourish themselves and live contentedly . . ."); *see also id.* at 254 ("[P]reservation of life being the end, for which one man becomes subject to another . . . ."); *id.* at 188 ("The Passions that encline men to Peace, are Feare of Death; Desire of such things as are necessary to commodious living; and a Hope by their Industry to obtain them.").

155. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 41 (Mary Gregor ed. & trans., Cambridge Univ. Press 1997) (1785). For a discussion of Kant's philosophy, see generally KORSGAARD, *supra* note 69, 90–130; SCANLON, *supra* note 69, at 4.

156. Joseph William Singer, *After the Flood: Equality and Humanity in Property Regimes*, 52 LOY. L. REV. 243, 307–13 (2006).

157. *See* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004); CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1993); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION (2d ed. 2003).

But what is the foundation of those values? Philosophers may debate whether these core values have a foundation—in God (Saint Augustine, Thomas Aquinas), in human rationality (Kant), in communicative action (Habermas), in nature (Hobbes, Locke)—or not (Protagoras, Nietzsche, Sartre, Dewey, and Wittgenstein all argue in various ways that human values originate in human assertion). Although these philosophical debates are of some use to lawyers, they can also be partially set aside. Whether or not we can say that human values have a firm foundation in something other than human will, we can start with a premise that seems fundamental to our current sense of ourselves: human beings matter.

Certainly lawyers start from this premise. They take for granted that human beings are important and entitled to respect. As someone once said, we hold these truths to be self-evident. Moreover, our current and evolving social norms view every person as entitled to equal concern and respect. This fundamental assumption seems obvious today but has not always been universally accepted or respected. One need only think about our history of conquest of Indian nations, the slave system, and the historic oppression of women, to understand that it is not a small matter to contend that all human beings are created equal.

We can call this the argument from humanity. It both rests on the fundamental worth and importance of each person and the idea that people are entitled to be treated with humanity. Whether it is a universal principle or simply a fundamental assumption of our society is less important than the fact that, at least for us, it is a fundamental assumption. As Charles Taylor explains, we tend to want to give "an account" to explain why we have the intuition that human beings are entitled to "life and integrity."

> The account seems to articulate the intuition. It tells us, for instance, that human beings are creatures of God and made in his image, or that they are immortal souls, or that they are all emanations of divine fire, or that they are all rational agents and thus have a dignity which transcends any other being, or some other such characterization; and that *therefore* we owe them respect.[158]

Whether or not we can agree on a reason for respecting the humanity of individuals, it is a fundamental assumption of our social and legal culture that individuals have an innate dignity that must be respected by others. This belief obviously does not solve normative questions or make them go away. But it does furnish a foundational orientation to thinking about normative questions. It also rules out many things; the argument from humanity works

158. TAYLOR, *supra* note 11, at 5.

partly by excluding laws that fail to treat persons as human beings.[159] Indeed, it may well be that this argument excludes a great deal. As Alan Dershowitz and Barrington Moore, Jr. both have argued, there is more agreement about what wrongs we should avoid than on what rights we should protect.[160] Wrongs can be identified partly by asking what we cannot do to others given their status as human beings, which, in turn, has substantial constraining effects on what legal rules we can publicly defend.

It does not, however, make the normative question go away. Rather, it may encapsulate the core issue raised by normative dilemmas. For example, in *State v. Shack*,[161] the Supreme Court of New Jersey found that the entry of the doctor and lawyer onto the farm did not constitute a trespass. The court argued that the workers were entitled to "associations customary among our citizens" and that the farmer had no "right to isolate" the workers by refusing to allow them to receive visitors in their homes.[162] This argument is premised on the notion that the workers have a right to "live with dignity."[163] They cannot be made to occupy a subordinate status. "Indeed," the court explained, "the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity."[164]

The farmer could answer this normative claim by arguing that he did not force the workers to work for him. They chose to do so and it would deny the farmer his dignity if the court tried to control the terms on which he chooses to employ others on his property. It would also treat the workers as incompetent children to deny them the freedom to contract with the farmers on terms chosen by them. Protecting the owner's control of his land and the freedom of the parties to contract on mutually beneficial terms is the way to treat each person with equal concern and respect, while governmental regulation of property and contract fails to treat individuals as self-governing persons.

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159. *Id.* at 4 ("Perhaps the most urgent and powerful cluster of demands that we recognize as moral concern the respect for the life, integrity, and well-being, even flourishing, of others. These are the ones we infringe when we kill or maim others, steal their property, strike fear into them and rob them of peace, or even refrain from helping them when they are in distress. Virtually everyone feels these demands, and they have been and are acknowledged in all human societies.").

160. ALAN DERSHOWITZ, RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS 7 (2004); BARRINGTON MOORE, JR., REFLECTIONS ON THE CAUSES OF HUMAN MISERY AND UPON CERTAIN PROPOSALS TO ELIMINATE THEM 1–13 (1970).

161. 277 A.2d 369 (N.J. 1971).

162. *Id.* at 374.

163. *Id.*

164. *Id.* at 372. On the role of needs in moral theory, see Soran Reader & Gillian Brock, *Needs, Moral Demands and Moral Theory*, 16 UTILITAS 251, 252–57 (2004) (explaining the concept of a "morally important need").

Both sets of arguments depend on the fundamental assumption that human beings have a special status, entitled to be treated with dignity. The debate is over the meaning of dignity—not whether human beings are entitled to be treated with dignity. Human dignity is a foundational assumption upon which all normative argument rests. And reminding ourselves about this fundamental premise may persuade us that one resolution of a case is more just than another.

2. Asserting Values: Ought Statements

If human dignity is at the core of normative argument, how do lawyers operationalize that core value in hard cases? They do so by asking what respect for humanity requires. They evaluate and express what we ought to do.[165] Respect for human beings entails making claims on individuals about proper rules of conduct in their relationships with others. Derived from the fundamental assumption of humanity, these claims amount to moral demands. As Charles Taylor explains, "[t]he whole way in which we think, reason, argue, and question ourselves about morality supposes that our moral reactions have these two sides: that they are not only 'gut' feelings but also implicit acknowledgments of claims concerning their objects."[166] Value statements begin by identifying human interests, wants, needs, and preferences, and then characterizing what is valuable about them. Not all preferences are qualitatively equal. Some are mere tastes while others rise to the level of human values. Values are assertions about right and wrong. They embody judgments about the legitimacy of human interests and support or undermine claims that people make on each other.[167]

Particular evaluative assertions are specifications, in some sense, of the fundamental argument from humanity.[168] Many of them will be uncontroversial, although their application in particular cases may well be contentious. These assertions generally are claims at a lower level of specificity that either take the form of statements of rights—ways in which we are entitled to be treated by others or ways in which we are entitled to act—or statements of obligations—duties we have to others to respect them as human beings. Some

165. *Cf.* FINNIS, *supra* note 153, at 60 (explaining the naturalness of using ought statements to express a sense of obligation or of right conduct).

166. TAYLOR, *supra* note 11, at 7.

167. FINNIS, *supra* note 153, at 35–36 (arguing that practical reasoning rests, not on satisfying wants, whatever they happen to be, but on "*identifying the desirable*" or the use of intelligence to determine what we should want).

168. On specification of general norms and concepts, see RICHARDSON, *supra* note 9, at 69–82.

of these judgments can be powerful either because reflection on our deepest values generates specific inferences or because they rule certain things out.

The farmer will argue first that he has a right to control access to his land. In addition, he will argue that he should be free to enter into contracts with his workers on whatever terms he likes as long as they agree. Individual liberty entails the freedom to enter cooperative relationships with others on terms that are mutually beneficial to the parties. The employment contract does not give the workers the right to receive visitors in the barracks, and if they wanted such a right they should have bargained for it. As Alan Schwartz has argued, individuals have the right to "do[ ] the best they can for themselves, given their circumstances."[169] It is a fundamental assault on human dignity to impose the terms of associations with others by regulating contracts, thereby depriving individuals of the power to make their own choices. If the farmer has too much power in the bargaining process because of his relative wealth, this can be remedied by a tax-and-transfer program that increases the workers' bargaining power, leaving the parties' arrangement to a free contract system that best respects individual autonomy and enlarges individual choice.

Ruling that the farmer could not exclude the defendants from his land, the Supreme Court of New Jersey rested its opinion on a different set of evaluative assertions. Chief Justice Joseph Weintraub wrote in the Court's opinion:

> [W]e find it unthinkable that the farmer-employer can assert a right to isolate the worker in any respect significant for the worker's well-being. The farmer, of course, is entitled to pursue his farming activities without interference . . . . So, too, the migrant worker must be allowed to receive visitors there of his own choice . . . and members of the press may not be denied reasonable access to workers who do not object to seeing them . . . .
>
> [T]he employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens. These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties.[170]

These paragraphs contain a remarkable set of evaluative assertions, including (a) that it is "unthinkable" that the farmer could "assert a right to isolate the worker," although (b) he is "entitled to pursue his farming activities without interference." Nor may the employer (c) "deny the worker his privacy or interfere with his opportunity to live with dignity" or (d) "to enjoy associa-

169. Alan Schwartz, *Justice and the Law of Contracts: A Case for the Traditional Approach*, 9 HARV. J.L. & PUB. POL'Y 107, 114–15 (1986).

170. State v. Shack, 277 A.2d 369, 374–75 (N.J. 1971).

tions customary among our citizens." The workers (e) "must be allowed to receive visitors." These assertions both express and assert values. They make claims that can be defended because they describe interests that are entitled to respect by all persons and therefore constitute appropriate demands on others.

Evaluative assertions often contain words like "should" or "ought." This is because moral claims are demands we feel entitled to make of others, and those demands shape allowable conduct. Lawyers need not be ashamed to make arguments that include the word "ought"—as in, tenants ought to be able to receive visitors in their homes. But why do tenants have the right to receive visitors? Why not leave this issue to free contract? Why should the law interfere with the marketplace? It is important to remember that these questions frame the issue from a libertarian orientation. We could as easily flip the orientation and frame the question in a manner that highlights the values that support a ruling for the defendants, that is, what gives the farmer the right to isolate his workers and deprive them of needed services?

This skeptical stance toward values is what leads law and economics theorists to the idea of deferring to individual preferences, whatever they happen to be, and then using economic analysis to figure out the consequences of alternative rules of law in order to identify the rules that maximize satisfaction of individual preferences. As I explained earlier, the fundamental problem with this normative framework is that it wrongly assumes that all preferences should be satisfied and that all preferences are of equal status.[171] The libertarian assumes that preferences have a prima facie claim to be satisfied. However, reflection reveals that a free and democratic society is defined by minimum standards for market and social relationships.[172] Some

171. *See supra* Part II.A.2.

172. *See* Singer, *supra* note 60, *passim*. As Elizabeth Anderson argues:

> [D]emocratic institutions are needed to enable people to express certain *kinds* of valuations that can be expressed only in non-market social relations. Some of the concerns people have as citizens cannot in principle be expressed in their roles as consumers, but must be expressed through their political relations with other citizens. Consumers act individually, taking the background social relations of their interactions for granted and generally assuming an instrumental attitude toward these relations. In their roles as consumers, they have little power over the social relations and norms governing their interactions, and hence little scope for expressing intrinsic concerns about their relations in market interactions. Citizens act collectively, taking their social relations as an immediate, intrinsic object of concern. Because these relations are constituted by shared legal, ethical, and social norms, people can reform them only through collective action. People care about the meanings embodied in the social relations in which risks are imposed and controlled, not just about the raw magnitudes and financial benefits of these risks. They also care about the character of their social life . . . . Since people rationally express different valuations in different social contexts, cost-benefit analysis deprives them of

preferences are out of bounds; some contractual arrangements are indefensible; and some uses of property are incompatible with the legal framework of a free and democratic society. The assertion of a preference is not a self-regarding act when it involves creating arrangements that affect the legitimate interests of others, especially when those arrangements deny liberty and dignity to others.

But how do we ground the values we identify and assert? One ground is the golden rule: Would you want to be in a position where you could not receive visitors? The argument from consistency suggests that valuing this requires respecting it for others as well. The pragmatic argument suggests that we take for granted the things that no one seriously questions. If we agree that unnecessary cruelty is a bad thing or that children should not be punished for the sins of their parents, or that people are entitled to form attachments with others, we can begin to build moral and legal principles that can serve as the basis for helping us think through harder questions. Evaluative assertions can provide an answer to the "because clause" by appealing to the things we in fact already believe.[173] In Charles Taylor's words, they articulate or bring to consciousness both our background understandings and our strong evaluations.[174]

Of course, evaluative assertions do not necessarily decide cases, especially hard cases that involve legitimate interests on both sides. For example, in *State v. Shack*, it can be argued that there are plausible autonomy claims for both parties. At the same time, a decisionmaker may be able to choose the appropriate characterization of the interests asserted by the parties. Is the farmer, for example, asking for the freedom to manage his own business and enter mutually advantageous contracts or, on the contrary, is he asking for a right to isolate his workers and deny them associations customary among our citizens? The decisionmaker must come to a conclusion about the plausibility of alternative characterizations of the interests asserted in the particular case and assess the legitimacy of the asserted interests as human values appropriate to the situation.

> opportunities to express distinctively non-economic concerns in taking consumer preferences as normative for democratic politics.

ANDERSON, *supra* note 7, at 211–12; *see also* RAWLS, *supra* note 15, at 44 ("A free market system must be set within a framework of political and legal institutions that adjust the long-run trend of economic forces so as to prevent excessive concentrations of property and wealth, especially those likely to lead to political domination.").

173. *See* RICHARDSON, *supra* note 9, at 300 (noting that the "holistic dialect . . . builds from something that [we] do, in fact, accept").

174. TAYLOR, *supra* note 11, at 4 (finding that a "strong evaluation . . . involve[s] discriminations of right or wrong, better or worse, higher or lower, which [is] not rendered valid by our own desires, inclinations, or choices, but rather stand[s] independent of these and offer standards by which they can be judged").

3. Responsibilities in Human Relationships

While normative argument starts with the recognition of or belief in human dignity and then moves to more specific evaluative assertions associated with that fundamental value, the elaboration of the meaning of these values for legal relations gets its normative shape from conceptualizing the responsibilities arising out of human relationships. Dignity and value claims are often used to assert rights, but those rights only translate into legitimate claims against others if we can conclude not only that the right holder has an interest that is prima facie worth protecting through legal control of the behavior of others, but also that those others are under no conflicting obligations. To come to this conclusion, we have to understand and shape the relationship between the parties. The nature of the relationship will help determine whether one of the parties has a responsibility to act or refrain from acting in a certain manner in regard to the right holder. In the case of Hohfeldian rights, the question is whether the other party is under a duty to act or not act, while Hohfeldian privileges or liberties impose a vulnerability on the other party to suffer the effects of the exercise of those privileges.[175] In either case, the legitimacy of the claimed legal entitlement cannot be persuasively asserted unless an argument can be made that the victim of the right has a responsibility to respect the claim of the right holder to freedom of action (privilege or liberty) or security (Hohfeldian right). This relational perspective is most prominently associated with feminist moral and legal theory and is usefully elaborated by philosopher Margaret Urban Walker and political and legal theorist Jennifer Nedelsky.[176]

In *State v. Shack*, the farmer argued that the relationship between the parties involved a free contract containing mutually beneficial arrangements that was entered into under circumstances free of coercion or fraud. The employer-employee relationship is a freely negotiated one and the employees have agreed to enter the employer's land. The relationship thus has a dual character as a contractual relationship and a property relationship. The contractual relationship is the freely negotiated employment/housing agree-

175. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 26, 30–33 (1914); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 986–87.

176. WALKER, *supra* note 90; Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, 30 REPRESENTATIONS 162 (1990); Jennifer Nedelsky, *Reconceiving Rights as Relationships*, 1 REV. CONST. STUDIES/REVUE D'ÉTUDES CONSTITUTIONELLES 1 (1993); *see also* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); JOSEPH WILLIAM SINGER, ENTITLEMENT (2000); ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988).

ment and the property relationship is the legitimate claim the owner has to control of his land. The farmer's relationship with the defendants is one of owner to nonowner, and because the owner has not opened his property to the general public, the defendants cannot claim a legitimate entitlement to enter onto his property.

The defendants would argue that the relationship between the parties is of an entirely different character. The employer has created a relationship between himself and his employees that goes beyond an employment contract. It also involves housing arrangements, and whether or not the employees have leasehold interests, they are living apart from the employer and can exercise rights to receive visitors without intruding on the employer's privacy or his ability to run his business profitably. The defendants also have claims on the farmer that require him to let them onto his land. As the court states, the employer has no right to isolate the workers or deny them "associations customary among our citizens" when the property use in question is distinguishable from the guest in the back bedroom. In effect, the property use is legitimately understood as more public than private.[177] The owner has a responsibility in the relationship to act in a manner consistent with the dignity of the workers and this necessitates relinquishing the right to exclude individuals who are providing needed services to his employees in a manner that does not interfere with his legitimate business interests.[178]

C. Contextualization

When values conflict in a particular case, we try to avoid or solve the conflict by reinterpreting the values so that they fit with each other in a manner that does not result in outright contradiction. This may result in a reinterpretation of the interests asserted by the parties and may lead to the conclusion that one of the asserted values is not actually implicated in the situation. Alternatively, it may result in the view that the conflicting values are both operative but that one value should be subordinated to the other in the context of the case. Three contextualization methods used by lawyers are (a) situation sense, (b) restrained interpretation of values, and (c) social and historical accommodation.

177. *Cf.* KYMLICKA, *supra* note 23, at 103–27 (noting how initial property allocations can give owners power over nonowners).

178. *See id.* at 90 (arguing that it is important to "ensure that the advantaged do not have the power to define relationships of dominance and servility in the workplace").

1. Situation Sense: Distinguishing Cases and Making Analogies

The first way lawyers contextualize is by focusing on the social setting within which the issue is being addressed. The social context matters because we find claims legitimate in one area of social life to be illegitimate when made in a different context. For example, while legally free to choose your friends on the basis of race, choosing customers by race while operating a restaurant is not legal. Thus, the lawyer argues that we are not talking about freedom of contract generally, but a specific contract term in a specific social setting. We are not talking about property rights generally, but a specific property claim in a specific social relationship. Contextual elaboration of the normative meaning of principles is closely associated with the lawyerly technique of distinguishing cases. It also involves what Karl Llewellyn called situation sense—a Gestalt judgment about how to understand the morally relevant features of a situation.[179]

State v. Shack posed a conflict between the right to control land and the right to receive visitors in the home. Doctrinally, it required a judgment about whether this case fit within a legitimate exception to the owner's ordinary right to exclude nonowners from the property. Could the presumption in favor of the owner be overcome? Alternatively, it involved a conflict of property rights. If the farm workers were similarly situated to tenants, then they were able to receive visitors in their homes or to deny access to others. If the workers owned something like a leasehold, then they had the right to exclude or admit and it is the farmer who must overcome that presumption.

To answer this value conflict, the Supreme Court of New Jersey started with three assumptions: first, that owners have the right to exclude nonowners, but that there are exceptions to this principle; second, that tenants have a right to receive visitors in their homes; and third, that visitors do not themselves have the power to enter property without the consent of the property owner and, once admitted, do not have the power to invite others inside—while tenants have the right to receive visitors, dinner guests do not have the right to bring others to the dinner table without consent. Nor do overnight guests in one's home have the right to invite anyone they please into the house. One legitimately has much greater control over the guests in one's home than over tenants renting a separate apartment.

179. LLEWELLYN, *supra* note 121, at 121–57; *see also* Todd D. Rakoff, *Implied Terms: Of "Default Rules" and "Situation-Sense," in* GOOD FAITH AND FAULT IN CONTRACT LAW 191 *passim* (Jack Beatson & Daniel Friedmann eds., 1995).

The migrant farmworkers were housed in barracks and one of the issues was whether this social context was closer to that of the overnight guest (with no right to receive visitors) or to the tenant living in an apartment (with a right to receive visitors). Answering this question requires the use of analogy. This involves identifying factual similarities and differences and generating reasons to treat those facts as relevant from a moral and legal point of view.[180] In turn, this requires consideration of whether the interests asserted by the parties are legitimate in this social context. The Court found that the farmer had legitimate interests in managing his business and excluding meddlesome outsiders, but that he did not have a legitimate interest in isolating his workers. The workers therefore had legitimate interests in receiving visitors and government benefits while the employer had no legitimate interest in excluding the doctor and lawyer from his land. What appeared to be a conflict of values was actually a false conflict.

The farmer, of course, asserted that his interests were legitimate in this context.

2. Restrained Interpretation of Values

Situation sense is explicitly or implicitly tied to interpretation of the conflicting values at stake in the case. Lawyers reevaluate the legitimacy of the asserted interests or the cognizability of the claimed harms in the particular context at issue. This is an example of the more general method of restrained interpretation.[181] When each party asserts the right to have or to exercise

180. There is a rich debate about the normative status and appropriate use of analogy. *See* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996); LLOYD L. WEINREB, LEGAL REASON (2005).

181. This concept comes from conflict of laws. Brainerd Currie, the inventor of "interest analysis," argues that conflicts of law between two different states could be resolved by determining whether both states had a legitimate interest in applying their law to the case at hand. If they did, he suggests taking a second look at the state interests to determine the possibility of engaging in a restrained interpretation of state interests to conclude that one of the states has no real interest in applying its law to the parties, transaction, or occurrence, either because the parties' relationship is centered in another state or because the state has an affirmative interest in comity by allowing another state to regulate the events or relationships in the case. Brainerd Currie, *The Disinterested Third State*, 28 L. & CONTEMP. PROBS. 754, 757 (1963); *see also* WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 249–51 (3d ed. 2002); ANDERSON, *supra* note 7, at 62–63 ("The application of intuitive principles requires an interpretation of their underlying expressive point in light of the relations the agent has to the people for whose sake she acts. If different principles appear to generate conflicting recommendations, the task for a rational agent is not to weight and aggregate their consequences, but to seek more refined interpretations of their demands so that all of them can be satisfied. This is the traditional task of casuistry, reasoning by analogy, and the other commonsense modes of practical reasoning familiar to ordinary life." (citation omitted)); RICHARDSON, *supra* note 7, at 127 ("The alternative . . . is to find some way to restrict the scope of

a property right, each owner experiences the exercise of the rights of the other as an imposition of an externality. However, if we engage in restrained interpretation of the rights associated with ownership, we may convince ourselves that the bundle of rights associated with ownership never included the particular entitlement in question. If one never owned the right to begin with, then a rule limiting the right will not be experienced as the imposition of an externality. In that case, one person is exercising her property rights and the other (the alleged victim of the externality) has no legitimate claim. If we see the case this way, we may convince ourselves that exercise of the entitlement can be legitimately viewed as self-regarding in nature.

For example, the farmer may concede that tenants have the right to receive visitors in their homes but argue that they also have the right to waive that entitlement in exchange for employment or lower rent from the employer. Alternatively, the farmer may argue that the value of free association is not appropriate for employees at work, because businesses cannot operate if employees are free to invite others onto the premises. Although the workers are housed in barracks, their work/home boundary is less clear than the typical living situation, and their rights of free association are accordingly limited in this context. More on point, however, the farmer would argue that the defendants have no right of access to private property against the will of the owner. In this case, the workers are distinguishable from tenants, and the owner who has the right to exclude or to admit is the farmer, not his employees. The farmer therefore has legitimate interests in controlling access to his land, and defendants are making claims that illegitimately interfere with his liberty and property rights.

Conversely, the workers will argue that when they are not working, they are similarly situated to tenants with their attendant rights of free association. Moreover, while the farmer has an acknowledged right to run his business, that right can be fully protected without denying the workers the right to receive visitors. As the Court explained, the owner has "no legitimate need for a right" to prevent his employees from receiving visitors in their living quarters or enjoying "associations customary among our citizens."[182] Either way, the normative technique is to narrow the scope of application of the value in question so that it does not conflict with the legitimate interests asserted by the other side.

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application of these [conflicting] principles so that they are kept out of each other's way . . . ."); *id.* at 170 (arguing that specifying the meaning of a norm requires careful attention to its appropriate range of application, resulting in modification of the original norm so that it coheres with other norms).

182. State v. Shack, 277 A.2d 369, 374 (N.J. 1971).

3. Social and Historical Accommodation

A third form of contextualization is to fit the case into current social practice, historical tradition, and emerging values and principles. The development of the common law represents a series of compromises between fit and justice.[183] The rules must be made to fit with each other in a coherent way if possible, and must be made to fit both our considered judgments and our settled social values and current social conditions. At the same time, normative claims may give us reason to criticize existing practices or to conclude that certain rules of law are inconsistent with other rules of law, emerging or settled notions of justice, or competing values that are appropriately relevant in this context.

The farmer may argue that we have moved from a customary regime based on status and tradition to a dynamic market economy that rests on free contract and individual autonomy. Promoting the free market will both promote social wealth and individual freedom while keeping the state away from unjust interferences with autonomy and self-government. Opportunities abound for individuals and the operation of the free market will discipline employers who are harsh in their treatment of workers.

The defendants argued instead that we have moved from historical customs of feudalism and plantation slavery, as well as unequal status of persons, to a free and democratic society that treats each person with equal concern and respect. This means that there are certain minimum standards for market relationships that must be respected in order to comply with the appropriate legal framework for a free and democratic society. Isolating workers from visitors and insisting upon observing discussions between the workers and their lawyers is inconsistent with the form of social life we have developed that is based on human dignity and equality. The farmer's claimed interests are not legitimate, at least in the context of this case.

D. Prioritization

If we cannot reconcile conflicting values in a particular case by careful designation of the scope of the values through contextualizing techniques, we must then seek some kind of impartial procedure or standpoint from which we can evaluate which of the conflicting normative claims should be vindicated, given their relevance in the context of the case. In a free and

183. RONALD DWORKIN, LAW'S EMPIRE 239 (1986) ("The judge's decision—his postinterpretive conclusions—must be drawn from an interpretation that both fits and justifies what has gone before, so far as that is possible.").

democratic society, we begin with the assumption that individuals, in general, are entitled to choose their own path, their own sense of the good life, and their own values. But of course, individuals do not live alone. Autonomy must be conceptualized in a manner that is consistent with coexistence with others. This means that limits on freedom of action are essential for responsible human relationships. Further, because legitimate government is based on treating each person with dignity, public policy and law must be justified by reasons that could or should be accepted by every person subject to those laws. The three most important normative methods used by lawyers to analyze persistent conflicting legitimate interests are (1) the balancing of interests, (2) contractualism, and (3) reflective equilibrium.

1. Balancing Interests

One primary prioritization method is the legal realist technique of balancing interests. This method is as useful to discussions of fairness and justice as it is to economic analysis. But normative argument based on notions of fairness and justice starts from the assumption that not all preferences are entitled to respect by the legal system, that not all interests can be weighted equally or counted as relevant in determinations of what the law should be, and that there are qualitative differences among interests that make it impossible to reduce them to a common metric without distortion.[184] These normative balancing discussions identify human interests, determine when they are legitimate, and then seek to assess their relative strength or relevance in particular social and legal contexts. Normative analysis that focuses on concerns of fairness, justice, and morality generally eschews converting interests to a common metric. Comparisons of interests can be made even if the values on both sides are incommensurable—not reducible to a common currency. When we do this, we may talk about the strength or weight of the interests in context; we may also talk about which interest should give way or which party is obligated to defer to the interests of the other given the interests and values identified. We may say that certain interests are not

184. *See* ANDERSON, *supra* note 7 (describing the importance of different ways of valuing different human interests); KYMLICKA, *supra* note 23, at 144 ("[W]hen we think about the value of different liberties in relation to people's interests, we see that some liberties are more important than others, and indeed some liberties are without value entirely . . . ."); April Flakne, *Through Thick and Thin: Validity and Reflective Judgment*, 20 HYPATIA 115, 115–16 (2005) ("[A]ny attempt to apply an ethical term with an intuitive content within an existing vocabulary to a new or different context *itself* involves an act of judgment."); *see also* Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433, 498 (2008) ("[O]ne does not have to monetize pros and cons to weigh them.").

appropriate or relevant in a particular context when the competing interests are of a certain character or kind. We may talk in terms of the needs of the parties, or again consider whether the needs are legitimate given the impact their assertion will have on others with competing needs.

For example, while the farm owner in *State v. Shack* may have privacy interests, it is not clear that those interests should be recognized as strong or even relevant when the question is whether he is entitled to deny those same interests to workers housed on his land. Similarly, the farmer may have associational interests in choosing whom to allow onto his land, but it is not clear that those interests are relevant when he has opened his property to others and their own associational interests are at stake.

The New Jersey Supreme Court found it unthinkable that the farmer could "assert a right to isolate" the workers or "deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens."[185] This language assesses the farmer's interests and characterizes them in a manner that denies their relevance, legitimacy, or strength in this social context. In a sense, this is an argument that the owner's interests do not count at all in the balance. The workers have strong interests in receiving visitors and government services, while the farmer has "no legitimate need" to deny them these rights.[186] This makes the balance one that is assessed, not by market measures or strength of preference, but by appropriateness to the situation. Alternatively, the court could have found the farmer's interests in freedom of contract and control of his business and property to be legitimate but overridden by the interests of the workers.

The farmer could counter these arguments by suggesting that alternative means exist to protect the workers' legitimate interests and that the court was wrong to assume that his assertion of control over his land in any way prevented the workers from obtaining legal and medical services. Or he could argue that the workers voluntarily waived these rights by entering their contract with him and that the right to earn a living by obtaining a job outweighs any interests regulating the terms of the employment contract. Part of this argument may also rely on consequentialist concerns that suggest that regulation of the agreement may wind up hurting the very people it was intended to protect by decreasing their wages or limiting job opportunities. These adverse consequences of regulation could overwhelm any benefits sought by imposing minimum standards on the contractual relationship, thereby reversing the balance of interests.

185. *Shack*, 277 A.2d at 374.
186. *Id.*

2. Contractualism: Golden Rule or Role Reversibility

How do we choose between two competing accounts of how to balance conflicting interests in a case? If both seem plausible and equally convincing, we may turn to another prioritization method that rests on the idea of the social contract, which is a derivation of the golden rule. We begin with the observation that treating others with dignity requires us to try to see the world from their point of view as well as our own. Christine Korsgaard and T. M. Scanlon have both argued that morality requires that we justify our actions by reasons others can accept or cannot reasonably reject.[187] Rawls extends this insight to liberal political theory by assuming that we live in a society with persistent diversity on the meaning of the good life. If we respect each person's dignity, we must consider what choices reasonable persons would make about the basic structure of society if they could not be sure that they would be the ones in charge of the government.[188] What rules of the game would we favor if we did not know in advance what role we would play in society? What things do we hope to take for granted? What moral norms governing social interaction could be accepted by others and defended by those of us who want to impose them?[189] The method of reversing roles, of defending an outcome to the losing side, of recognizing the costs as well as the benefits of any rule, is a staple of normative argument used by lawyers.

The farmer may ask whether you would like it if the government told you to open your property to strangers. The opposing side asks what the contract would have said if the contracting parties did not know on which side of the bargaining table they would be sitting. This Rawlsian question suggests that the farmer himself would not want to be deprived of the right to receive visitors as well as needed legal services and medical care if he were in the position of his workers. John Rawls suggested we consider what rules would be adopted by persons who did not know which social roles they would be occupying. These rules could be justified to anyone, including those who appear to be the losers in the situation. Robert Nozick and Charles Fried suggest maximizing the scope of individual freedom, interpreted in a libertarian manner; Jedediah Purdy and my own work suggest a very different conception of what freedom entails.[190]

187. KORSGAARD, *supra* note 69; SCANLON, *supra* note 69.

188. RAWLS, *supra* note 15.

189. *See* Samuel Freeman, *Moral Contractarianism as a Foundation for Interpersonal Morality*, *in* CONTEMPORARY DEBATES IN MORAL THEORY 57–76 (James Dreier ed., 2006).

190. Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237 (2005); Singer, *supra* note 156; Singer, *supra* note 60.

Fundamentally, the object of a judicial opinion is to recite reasons for the result that could justify the result to the losing party. The idea is that anyone who thought about the matter clearly, with appropriate information and motivation, could accept this outcome as the most just way to resolve an intractable conflict involving competing values.

3. Reflective Equilibrium: Coherence

The most quintessentially lawyerly prioritization method is a version of Rawls' method of reflective equilibrium.[191] In some ways, this is the most prototypically legal way to analyze normative questions. We reason from general principles down to specific cases, but use the system of precedent to establish fixed points that are at least temporarily if not permanently closed to revision. In moral theory, we similarly start with strong intuitions about how certain moral quandaries should be resolved and we relate those fixed cases to our general principles. When we consider a hard case, we reason back and forth between the cases and the principles with the goal of developing a coherent story of how they all fit together.[192] This cannot be done by applying an algorithm or a disembodied decision procedure. Nor does it result in anything like an equilibrium. Indeed, lawyers were experts at deconstruction before deconstruction was invented. Lawyers know how to challenge claims, to unsettle certainties, and to find the incoherencies lurking behind coherent stories. Yet at some point, the judge writing the opinion or the lawyer writing the brief or making the oral argument is satisfied that she has created a story that fuses available normative and legal resources in the best possible manner, given the context within which she is acting. When multiple normative arguments are relevant, competing and contested institutional roles are present, and values are conflicting but powerful, we simply have to do the best we can.

Reflective equilibrium does not operate wholly deductively or inductively, and it does not follow a decision procedure. Nor does it resolve all value conflicts by an algorithmic metatheory. Analysis can begin from the top down by applying principles to particular cases. Or it can begin from the bottom up by characterizing the legal rules as applied in the past. The common law system of precedent allows lawyers to tentatively identify a few fixed points. A case is difficult when it arguably fits within multiple categories.

191. RAWLS, *supra* note 15, at 29–32; *see also* RICHARDSON, *supra* note 9, at 178 (discussing Rawls's method of reflective equilibrium).

192. *See* KYMLICKA, *supra* note 23, at 67 (describing reflective equilibrium as "work[ing] from both ends").

A combination of analogy and policy arguments helps divide the cases that are appropriately governed by one rule or another. We use factual similarities among cases but combine those factual discussions with attention to principle and policy that can legitimately distinguish the cases in which a rule applies and in which it does not apply. The result may not be a set of principles that can be applied deductively because attention to social context, historical settlement of issues, as well as considerations of judicial role, all matter enormously.

This method of reflective equilibrium also illustrates all the elements of working within a tradition[193] and undertaking a craft that involves expertise.[194] It is shaped by practical reason rather than deductive logic and requires the exercise of considered judgment.[195]

In *State v. Shack*, the court determined that it was not important to decide whether the migrant farmworkers were or were not tenants. Either way, their situation was close enough to that of tenants that the same values that lead us to protect the right of tenants to receive visitors should apply to the farmworkers. This resolution protected the farmer's legitimate interests while simultaneously protecting the workers' legitimate interests and fit the situation into established normative patterns and moral relationships.

In the end, the case was decided in favor of the workers, because the court found the defendants' story to be more compelling. It better matched the court's judgment about the appropriate balance of interests by identifying the farmer's asserted interests as illegitimate in the situation at hand and the workers' interests as both legitimate and consistent with the contours of a private property regime in a free and democratic society.

V. RESPONSIBILITY AND HUMAN JUDGMENT

> [I]t seems clear to me that many of the systems of rules we follow are in fact inconsistent, and beyond this, it seems inevitable that, in some cases at least, we have no course other than to learn how to live with this inconsistency.
>
> —Robert Fogelin[196]

193. ALASDAIR MACINTYRE, THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPAEDIA, GENEALOGY, AND TRADITION *passim* (1990).

194. LLEWELLYN, *supra* note 121, at 213–35; *see also* Brett G. Scharffs, *Law as Craft*, 54 VAND. L. REV. 2245 *passim* (2001).

195. *See* RICHARDSON, *supra* note 9, at 4, *passim* (discussing the nature of "practical deliberation").

196. FOGELIN, *supra* note 5, at 45.

> Some contradictions are manifestly better to live with than others . . . .
> —Elizabeth Anderson[197]

> The notion of responding to a responsibility confronts us with a paradox. It clearly involves an element of choice and a complete absence of choice. Responding to a responsibility to which one is called upon to respond is not the act of a subject. But neither is it simply a matter of being "subject to" a responsibility. To be responsible is a mode of existence that cannot be reduced to either the passive or the active voice.
> —Johan Van der Walt[198]

At the end of the day, normative arguments come from us and we cannot expect a human invention to save us from ourselves. "Where could I go," Saint Augustine lamented, "yet leave myself behind?"[199] But it is also true that if anyone is going to save us, it is going to be ourselves. We create our normative world but we also live by it. We are free in one sense to live as we please, and at the same time, our need to live with others requires us to give reasons for the claims we make on them. We seek to satisfy our desires but we also subject those desires to critical thought, both learning and teaching ourselves about the desires we should suppress or fail to satisfy in order to live with others in a free and democratic society. We distinguish between base and higher desires; we limit our initial instincts by creating a moral space, a normative world. We recognize conflicts among our own values and seek to articulate them in the context of creating and imposing law. We also criticize our own normative constructions and listen to critiques posed by others that we had not considered; this is not a process that can come to a definitive end. As Charles Taylor explains, "[b]ecause our language gives expression to qualitative distinctions, by which we can have a sense of higher goals, and hence have an emotional experience with strong evaluation, we open an issue which can never be definitively closed."[200] At the same time, despite our disagreements with one other, the internal conflicts among

197. ANDERSON, *supra* note 7, at 136.

198. Johan Willem Gous Van der Walt, The Twilight of Legal Subjectivity: Towards a Deconstructive Republican Theory of Law 431 (July 1995) (unpublished Doctor of Laws thesis, Rand Afrikaans University) (on file with Langdell Library, Harvard Law School).

199. ST. AUGUSTINE, CONFESSIONS 78 (R. Pine-Coffin trans., 1961); *see* Leff, *supra* note 64, at 1249 ("All I can say is this: it looks as if we are all we have.").

200. TAYLOR, *supra* note 50, at 74–75.

competing values we cherish, and our lack of a definitive decision procedure, "there is a lot we can still say to each other."[201]

We are the creators of our society and our legal system, but we are also eternally in the position of Cain, hearing the question, "What have you done?" and feeling compelled to have an answer acceptable to those to whom we are accountable. Some may believe this is God, but in the political and legal realm our audience is other people, as well as ourselves. In the end, we are the ones to whom we must account. We hope that our reasons for moral and legal choices are good ones that promote justice. Yet we must always be aware of the danger of legitimation. It is pathetically easy to exercise illegitimate power over others while justifying it to ourselves as the height of virtue. It is also easy to forget to see the case from someone else's point of view, and even easier to think we know their point of view.

We must therefore develop justificatory strategies that keep competing claims in mind, that prompt us to investigate how people actually experience moral claims and human relationships, and remember to remain open to the possibility that we may find out we were wrong. We must seek reasons that could be persuasive to people who have very different comprehensive conceptions of the good, yet we must also be aware that this sort of impartiality cannot be completely divorced from controversial judgments, and that some forms of the good will be suppressed no matter how neutral we try to be.[202] Indeed, if our goal is to create a free and democratic society, we must acknowledge certain fundamental normative commitments—things we used to call "inalienable rights" or "government of the people, by the people, and for the people."[203]

We are inhabitants of some form of what has been called the "postmodern condition."[204] But this experience is not as new as one might suppose. One of the most famous Jewish jokes of all time involves two disputants who approach a rabbi to ask him to resolve their conflict. The first disputant gives his arguments, and the rabbi is convinced. "You're right," the rabbi says. The

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201. *Id.* at 121; *see also* Flakne, *supra* note 184, at 116 ("My goal is to show that the application of thick ethical concepts is best understood as a process of reflective rather than deductive judgment; that this reflective process means that thick ethical concepts facilitate rather than halt ethical understanding and transformation; and that such reflective processes, though interpretive, produce their own kind of validity without recourse to thin, purportedly neutral, universal or context-independent ethical terms.").

202. *See* RICHARDSON, *supra* note 9, at 298 (arguing that "the mere multiplicity of incommensurable conceptions does not mean that Dionysian revelry is all that one is left with: A more objective approach, extending to collective rationality if not indeed to objective truth, is possible").

203. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

204. JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION (Geoff Bennington & Brian Massumi trans., University of Minn. Press 1984). For an argument that postmodern insights are not incompatible with ethics, see BAUMAN, *supra* note 22.

second disputant speaks, makes opposite arguments, and is equally convincing. "You're right, too." the rabbi says. The rabbi's wife, having heard all this, says to the rabbi, "You said he was right and now you say this one is right. But they contradict each other; they can't both be right." The rabbi responds, "You know, you're right too!"

What is the moral of the joke? Does the rabbi have the answer or not? We tend to assume the law gives an answer, the rabbi is the expert in the law, and since the law comes from God, we should be able to find an answer either from the Torah itself or from the rabbi. But the rabbi seems stumped; he sees the arguments on both sides and has no way to choose between them. This either means he's not a very good rabbi or it means that we were wrong to expect the rabbi to know better than the rest of us how to come up with a just answer for a hard case. Maybe there are no experts better than ourselves.

But another, more provocative reading of the joke is that the wife is wrong that both cannot be right. Perhaps the human condition requires us often to confront the simultaneous truth of two seemingly contradictory insights.[205] We are often faced with hard cases that have no easy resolution. When this happens, we may have strongly supported normative arguments on both sides. We may not know where to draw the line between incommensurable goods or how to divide social life into appropriate spheres for the exercise of different, competing entitlements. There is no easy answer. That is why the rabbi tells both men that they are right. This is not a mistake; the rabbi is not a bad rabbi, but a learned one who recognizes that the truth of the matter—the truth of our normative world—is that both are right even though they contradict each other. We have competing values and we are unsure how to draw the line.

But in another sense, the rabbi's wife *must* be right: When the case calls for a resolution, we must act. The law is not a theoretical system but a practical enterprise requiring an answer. A law review author can refuse to give a clear answer in a hard case. But a judge cannot. A choice must be made and reasons must be given—even though we know and accept the reasons on the other side and even though those reasons are ones we cannot repudiate. The Talmud deals with this problem by religiously (pun intended) preserving minority opinions and by sometimes not even stating which opinion prevailed in the rabbinic courts.

Normative methods provide a foundation for law, not because they provide answers to hard cases, but because they help structure appropriate

205. On this point, see generally MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY (1986).

conversation by law makers about what really matters. They force law makers to speak to law takers. Charles Taylor explains:

> All structures need to be limited, if not suspended. Yet we can't do without structure altogether. We need to tack back and forth between codes and their limitation, seeking the better society, without ever falling into the illusion that we might leap out of this tension of opposites into pure anti-structure, which could reign alone, a purified non-code, forever.[206]

Normative methods structure human judgment, but they also are constructed by fallible human beings who have a partial perspective on the world. Our best practices combine plural considerations and multiple methods; in particular, they combine impartial procedures with fundamental values, narrative elaboration, and situational contextualization. Normative arguments express evaluative judgments about why certain values outweigh other values in particular contexts. The goal is to show respect for all persons affected by the dispute. Although there may not be a unique, mechanically derivable right answer, the decisionmaker is still obligated to come up with her best formulation of the right answer[207] that treats the loser with equal concern and respect.[208]

This seems very humanistic rather than logical, artistic rather than deductive, and pragmatic rather than systematic. But, we should not lament the absence of a mechanical decision procedure for justice. Such a procedure was never available to us in the first place, and if it were, we would not be the

206. CHARLES TAYLOR, A SECULAR AGE 54 (2007).

207. *See* TAYLOR, *supra* note 14, at 53 (explaining that reasoning may be "unformalizable" but nonetheless productive of "insight"); TIMMONS, *supra* note 24, at 96–97 ("[I]n cases of conflict we simply must appeal to the details of the case at hand and use good moral judgment to decide which rule, in that particular case, should be followed . . . . The key idea here is that in cases of conflict, there is no supreme moral principle or superrule that determines what we are to do; rather, in such cases, moral judgment must take over.").

208. *See* RAWLS, *supra* note 15, at 31 ("The most reasonable political conception for us is the one that best fits all our considered convictions on reflection and organizes them into a coherent view. At any given time, we cannot do better than that."); RICHARDSON, *supra* note 9, at 189 ("Since [my view] puts forward no further standards by which the agent is to determine what is acceptable upon reflection, there is necessarily a nondiscursive layer to this view. Practical justification will not turn out to be discursive 'all the way down.' Since the justificational view is holistic and bidirectional, however, it is always open to the agent to keep pursuing the question why, if doing so proves fruitful. The existence of this ineliminable element of intuition in the account of justification does not imply that it traces justification back to self-certifying intuitions. . . . Instead, the rational support . . . that derives from providing an improvement in mutual support among the norms found acceptable upon reflection may always be viewed as rebuttable by further considerations."); TAYLOR, *supra* note 50, at 62 ("Now our direct, intuitive experience of import is through feeling. And thus feeling is our mode of access to this entire domain of subject-referring imports, of what matters to us *qua* subjects, or of what it is to be human. We may come to feel the force of some imports through having explained to us their relations to others, but these we must experience directly, through feeling. The chain of explanations must be anchored somewhere in our intuitive grasp of what is at stake.").

human beings we are or seek to be.[209] The construction of a just world is a human task.[210] It is not a task that can be completed, but it is also not a task that can be avoided. And it helps to remind ourselves that we have some notion of how to do this.

Normative method is meaningless without some substantive vision—both of human beings and the just society. At base, the fundamental premise of all normative method is humanity.[211] Human dignity is where we start, and defensible human relationships are our goal. What kind of society best embodies our most fundamental values—the ones we can defend to each other despite our differences about the nature of both justice and the good? Although our respective goals can be phrased in different ways, a good candidate is the creation of a free and democratic society that treats each person with equal concern and respect. At least, I have so argued.[212] Through all the negotiations, procedures, briefs, arguments, trials, rulings, decisions, appeals, and scholarship, it behooves us to keep this goal in mind.

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209. *See* FINNIS, *supra* note 153, at 67 ("Better and worse practical judgments can be argumentatively distinguished, though not always ordered; in that sense, at least, practical judgments can have objectivity, and there can be practical wisdom and unwisdom."); *id.* at 91 ("The making of basic commitments is not arbitrary, directionless or indiscriminate. It is mere technocratic illusion to suppose that a choice not guided by cost-benefit computations must be arbitrary. On the contrary, the adoption of basic commitments is to be guided by all the requirements of practical reasonableness.").

210. *See* RICHARDSON, *supra* note 9, at 182 ("All arguments must come to an end somewhere, Wittgenstein remarked. One way to put my present point, however, is that on the model I propose there is never any one particular place at which deliberative argument—or discursive practical reasoning—must come to an end. It is the sovereign deliberator who declares closure, as it were, not some ultimate principle."); *see also* David Cole, Letter to the Editor, *"How to Skip the Constitution": An Exchange*, N.Y. REV. OF BOOKS, Jan. 11, 2007, at 63 ("It is true that text, precedent, tradition, and reason do not determine results in some mechanistic way. That is why we ask judges, not machines, to decide constitutional cases. But these sources are nonetheless critically important constraints on and guides to constitutional decision-making. They are what identify those principles that have been deemed fundamental—and therefore constitutional—over our collective history. That there are differences over principle in no way excludes the need for reasoned argument about them."). *See* NEIMAN, *supra* note 70, at 424 ("We are finite and fallible and struggling, and we are nonetheless the source of moral reasoning."); *id.* ("Negotiating small differences is part of being grownup; no one can tell you in advance where to put your foot down.").

211. *See* FINNIS, *supra* note 153, at 127 ("[W]e are left with no reasonable alternative to the principle of unconditional respect for persons."); TAYLOR, *supra* note 50, at 60 (discussing the "reflexive sense of what matters to us as subjects, as being distinctively human . . . [or] a sense of what it is to be human"); Singer, *supra* note 156, at 338–43.

212. Singer, *supra* note 60.