

# Washington University Law Review

---

Volume 78 | Issue 1

---

January 2000

## Value Pluralism in Legal Ethics

W. Bradley Wendel

*Washington and Lee University*

Follow this and additional works at: [https://openscholarship.wustl.edu/law\\_lawreview](https://openscholarship.wustl.edu/law_lawreview)



Part of the [Jurisprudence Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

---

### Recommended Citation

W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L. Q. 113 (2000).

Available at: [https://openscholarship.wustl.edu/law\\_lawreview/vol78/iss1/3](https://openscholarship.wustl.edu/law_lawreview/vol78/iss1/3)

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

# VALUE PLURALISM IN LEGAL ETHICS

W. BRADLEY WENDEL \*

|  |     |
|--|-----|
| I. INTRODUCTION .....  | 114 |
| II. PROBLEM CASES.....   | 120 |
| <i>Problem #1—“Hardball” Litigation</i> .....  | 121 |
| <i>Problem #2—Ignore the Bad Facts and They’ll Go Away</i> .....                     | 126 |
| <i>Problem #3—Speaking Calumny to Power</i> .....                                    | 129 |
| III. INCOMPARABLE VALUES .....   | 132 |
| A. <i>The Claim of Incomparability</i> .....   | 141 |
| B. <i>Covering Values</i> .....  | 152 |
| C. <i>Must We Mean What We Say About Incomparability?</i> .....                      | 163 |
| D. <i>Incommensurability of Worldviews, Paradigms, or Forms of Life</i> .....        | 166 |
| IV. COMMUNITY NORMS AND TRADITIONS AS A RESOLUTION OF INCOMPARABILITY PROBLEMS ..... | 173 |
| A. <i>The Role of Social Practices in Ethical Reasoning</i> .....                    | 173 |
| B. <i>Plural Practices</i> .....   | 179 |
| 1. <i>The Rebellious Lawyer</i> .....  | 185 |
| 2. <i>The Establishment Lawyer</i> .....   | 191 |
| V. NARRATIVE UNITY.....  | 198 |
| A. <i>A Limited Role for Personal Values in Legal Ethics</i> .....                   | 198 |
| B. <i>Objections</i> .....   | 203 |
| 1. <i>Integrity Does Not Guarantee Goodness</i> .....                                | 203 |
| 2. <i>Compartmentalization</i> .....   | 205 |
| 3. <i>Antirealism, Romanticism, and Relativism</i> .....                             | 207 |
| VI. CONCLUSION.....  | 211 |

---

\* Assistant Professor of Law, Washington and Lee University. This paper was written in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University. Special thanks to Robert Audi, Ruth Chang, Mark Drumbl, Kent Greenawalt, Stephen Kalish, William Sage, Peter Strauss, Barry Sullivan, and Amelia Uelmen for their comments and perceptive suggestions. I am also grateful to the participants in the interdisciplinary seminar on Moral Theory and its Practical Applications, sponsored by the Center for the Teaching and Study of Applied Ethics, at the University of Nebraska ? Lincoln, and the Columbia Law School workshop for doctoral candidates, where versions of this paper were presented. Finally, thanks are due to the Francis Lewis Law Center at Washington and Lee University for providing generous research support. These acknowledgements, of course, should not be taken to imply agreement with my arguments.

## I. INTRODUCTION

Lawyers serve many masters. They are fiduciaries with respect to their clients, but at the same time are called upon to serve as “officers of the court.” They are charged with advancing their clients’ causes, regardless of whether those aims are consonant with social justice, but they are also duty-bound to avoid inflicting unjustified harm on third parties, a standard which presupposes that lawyers must develop and respect some vision of the public good. Some recent criticism, especially from feminist legal theorists, also calls upon lawyers to recognize the impact of their activity on the network of human relationships that makes meaningful social life possible, to avoid disrupting settled relationships, and to promote the flourishing of interpersonal connections. At the same time, respecting one party’s interest in a dispute or transaction frequently requires devaluing the interests of others, treating non-clients as less than full persons. Because these plural, conflicting obligations derive from the social function of the lawyer, from “legal norms and principles that form fundamental underlying precepts for our polity—background norms that contribute to and result from the moral development of our political community”<sup>1</sup>—legal ethics should be understood functionally, as a question of how to channel lawyers’ behavior in socially desirable ways.<sup>2</sup>

This article is aimed at understanding what happens when these professional duties conflict. Many commentators on legal ethics start with one value—loyalty to one’s client, social justice, fidelity to a set of legal norms, or, most recently, interpersonal considerations such as care, mercy, and connectedness—and seek to establish the primacy of that value in a lawyer’s moral analysis. Arguments of this sort can be quite sophisticated. For example, a frequently encountered contention is that social justice and partiality to one’s client are not incompatible, because justice in the long run requires lawyers who will represent their clients’ interests zealously. Of course, opposing arguments can be constructed—maintaining, for example, that a client is entitled only to a measure of loyalty that is compatible with

---

1. William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1008 (1989).

2. See, e.g., JACK L. SAMMONS, JR., *LAWYER PROFESSIONALISM* (1988); Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context, in LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 180-81 (Robert L. Nelson et al. eds., 1992); William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 568 (1985);. The roots of the functional concept of professional ethics can be found in Durkheim’s hypothesis that occupational groups filled the normative void left by the breakdown of religious authority. See EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIL MORALS* (Cornelia Brookfield trans., 1958).

social justice, and no more.<sup>3</sup> What many of these arguments have in common is evaluative monism: the belief that a single, impersonally justified value can serve as a polestar for any moral agent's deliberation about her ethical responsibilities. Monism requires the analysis of apparently different values in terms of some comparative value, or higher-order conceptual category that permits the ranking of options in relation to one another in an impersonal manner, i.e., without reference to the circumstances of a particular agent.<sup>4</sup> Other seemingly diverse values may then be understood as instantiations of the single relevant value, or the single master value can serve as a criterion for ranking or ordering the lower-order values.

Monism has long been the dominant assumption of legal ethics, and the organized bar's statements on the professional responsibilities of lawyers frequently follow this approach, strenuously resisting the notion that the duties incumbent upon lawyers can actually come into irreconcilable conflict. The preamble to the *Model Rules of Professional Conduct* states:

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.<sup>5</sup>

Courts and commentators also attempt to impose priority rules where they perceive a conflict between professional values. For example, one federal appellate court noted the obvious fact that a lawyer has a fiduciary obligation to her client, but claimed nevertheless that "the lawyer's duties to maintain the confidences of a client and advocate vigorously are trumped ultimately by a duty to guard against the corruption that justice will be dispensed on an act of deceit."<sup>6</sup> In a similar vein, one scholar has extracted one "central" principle from reported cases, disciplinary rules, and stories of the legal profession: "[T]he lawyer's obligation to the client is subordinate to the lawyer's primary obligation to the law."<sup>7</sup> If these statements have a utopian

3. See, e.g., WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* (1998).

4. See ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 117-40 (1993); James Griffin, *Incommensurability: What's the Problem?*, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* 35, 36 (Ruth Chang ed., 1997); J.B. Schneewind, *Moral Knowledge and Moral Principles*, in *REVISIONS: CHANGING PERSPECTIVES IN MORAL PHILOSOPHY* 113 (Stanley Hauerwas & Alasdair MacIntyre eds., 1983).

5. MODEL RULES OF PROFESSIONAL CONDUCT pmbl. cmt.7 (1983) [hereinafter MODEL RULES].

6. *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 458 (4th Cir. 1993). In this case, the court's rhetoric was too neat. There was no actual conflict of professional values because the attorney was simply asserting a spurious obligation of loyalty to avoid punishment for an obvious fraud.

7. Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 *HOFSTRA L. REV.* 311, 317

ring, it is because of their implicit monism; as we will see, one of the principal attractions of ethical monism is the promise of a decision procedure that avoids the tragedy of inevitable wrongdoing.<sup>8</sup>

Monism belongs to the Platonic tradition of philosophy, in which ethics can be viewed as a matter of measurement and calculation, much like the natural sciences, mathematics, or formal logic. “Moral geometry,” as this kind of reasoning has been called, depends on a particular kind of relationship among the values that are at play in practical reasoning.<sup>9</sup> It requires that the values can be compared so that one of the items can be said to be better than, worse than, or equal to the other in terms of whatever comparison is relevant. Moreover, the comparison must be impersonal—that is, carried out with respect to universal rational criteria, not the subjective preferences or beliefs of the deliberating agent. If the discipline of professional ethics is to possess this quasi-scientific character, some means must be devised to make comparisons between obligations generated by the lawyer’s role as an officer of the court, as an agent of the client, and as a person required to make due allowance for the interests of third parties. Of course, disciplinary rules and other legal norms determine a great many practical questions in legal ethics, but there nevertheless remain many cases in which the lawyer is more or less unconstrained by positive law, and must refer to more general moral norms. But even in cases where the rules are silent or underdeterminate, because the interpretation of legal texts is influenced by the background of moral and political principles that justify and undergird their authority, any lawyer concerned with correctly interpreting and applying the governing legal rules must always be attentive to the pull of competing moral values.<sup>10</sup>

My claim in this Article is that the foundational normative values of lawyering are substantively plural and, in many cases, incommensurable. By plural I mean that the ends served by the practice of lawyering are fundamentally diverse, and are therefore valued in different ways.<sup>11</sup> Lawyers promote multiple worthwhile goals, including not only preserving individual liberty, speaking truth to power, showing mercy, and resisting oppression, but also enhancing order and stability in opposition to the “ill-considered passions” of democracy, aligning individual action with the public good, and

---

(1990).

8. See ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* (Henry Hardy ed., 1990).

9. See ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* 25-36 (1988); MARTHA NUSSBAUM, *THE FRAGILITY OF GOODNESS* 30 (1986); see also JOSEPH DUNNE, *BACK TO THE ROUGH GROUND* (1993).

10. See generally RONALD DWORKIN, *LAW’S EMPIRE* (1986).

11. See ANDERSON, *supra* note 4, at 1-16.

shaping disputes for resolution by particular institutions such as courts and agencies. These ends in turn generate a plurality of moral norms, which frequently stand in opposition, and which sometimes cannot be compared or ranked against one another. The incommensurability of moral values is a position that has been considered extensively by philosophers,<sup>12</sup> but it has only recently been explored in connection with legal reasoning<sup>13</sup> and has been examined hardly at all with respect to legal ethics. The claim of incommensurability should not be confused with the familiar argument that in a multicultural, diverse society, the lawyer and client may disagree about justice and the lawyer may face a choice between following her own moral principles or those of her client.<sup>14</sup> Instead, my argument is that the lawyer seeking to act ethically must take account of different value claims that may not be comparable with one another in an impersonally rational, mathematical, or algorithmic manner.

This position does not entail skepticism about the possibility of making ethical choices. Instead, it demands only that the model of ethical decision making for lawyers accommodate the incommensurability of professional values and make appropriate adjustments. Professional ethics need not look like a branch of science or formal logic in order to provide a satisfying account of how lawyers should resolve practical dilemmas. In particular, virtue-centered and rhetorical modes of reasoning have always existed alongside moral geometry and offered an alternative methodology for practical ethics. In a previous paper, I offered two such models of reasoning: (1) the revival of what has been variously termed prudence, professional judgment, practical wisdom, or phronesis, and (2) the tradition of case ethics,

---

12. See generally ANDERSON, *supra* note 4, at 117-29; CHRISTOPHER W. GOWANS, INNOCENCE LOST: AN EXAMINATION OF INESCAPABLE MORAL WRONGDOING (1994); INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON (Ruth Chang ed., 1997); NUSSBAUM, *supra* note 9, at 117-29; JOSEPH RAZ, THE MORALITY OF FREEDOM 322-66 (1986); HENRY S. RICHARDSON, PRACTICAL REASONING ABOUT FINAL ENDS (1994); MICHAEL STOCKER, PLURAL AND CONFLICTING VALUES (1990); David Wiggins, *Weakness of Will, Commensurability, and the Objects of Deliberation and Desire*, in ESSAYS ON ARISTOTLE'S ETHICS 255 (Amelie O. Rorty ed., 1980).

13. See generally Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990); Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994); Symposium, *Law and Incommensurability*, 146 U. PA. L. REV. 1169 (1998); Richard Warner, *Excluding Reasons: Impossible Comparisons and the Law*, 15 OXFORD J. LEGAL STUD. 431 (1995).

14. It is apparent that in many cases the lawyer and the client may have divergent views about the general good. Two legal ethicists even referred to these competing views as potentially incommensurable. See Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 GEO. WASH. L. REV. 984, 985 (1995). Morgan and Tuttle do not, however, consider the effect of incommensurability on the practical deliberation of a *single* moral agent, the lawyer, who must decide between two actions that are supported by incomparable reasons.

or casuistry.<sup>15</sup> These two traditions of practical reasoning solve the problem of incommensurability by appealing to an interpretive community of decision makers who have considered similar issues and resolved the conflict in values. The community's *nomos*—the justificatory narrative that locates, constitutes, and gives meaning to the social institution of lawyering<sup>16</sup>—is itself the criterion for ranking the competing professional values. In this paper I explore the further question of what happens when the community is internally divided over the proper course of action. In that case, no intersubjective, community-based criterion exists for prioritizing conflicting values across competing subcommunities.

A theory of legal ethics must confront the possibility that separate subcommunities of lawyers are guided by fundamentally divergent ideals, and that these incompatible models of the good lawyer result from equally valid rankings of the constituent professional values. In practical terms, this means that historical figures as different as John W. Davis and Clarence Darrow both belong to our pluralistic professional tradition as exemplars of lawyerly virtue, even though they could not be more different from one another. Davis was the archetypal conservative lawyer, struggling steadfastly to maintain the security of private property rights and the stability of established institutions.<sup>17</sup> Darrow, on the other hand, was a radical who believed that government and corporations were thoroughly corrupt, and that a lawyer's highest calling was to struggle against these concatenations of power.<sup>18</sup> One's reaction generally is to admire one or the other of these ideal

---

15. See W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1 (1999); See generally ROBERT AUDI, *MORAL KNOWLEDGE AND ETHICAL CHARACTER* (1997); JONSEN & TOULMIN, *supra* note 9; ANTHONY T. KRONMAN, *THE LOST LAWYER* (1993); ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1984); CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996).

16. See generally Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); see also RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM* 73 (1983); ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988). The analysis in this paper is directed toward understanding the public morality of the legal profession in the United States; lawyers in other countries have their own unique relationships with the state and with professional associations, and have developed different moral justifications for their role in society. Aspects of institutional roles such as the barrister, solicitor split in Britain and some Commonwealth countries can affect the ethical analysis of the legal profession in ways not addressed here. For an excellent comparative study of four professional groups in five countries, see ELLIOTT A. KRAUSE, *DEATH OF THE GUILDS: PROFESSIONS, STATES, AND THE ADVANCE OF CAPITALISM, 1930 TO THE PRESENT* (1996).

17. See generally WILLIAM H. HARBAUGH, *LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* (1973).

18. See GEOFFREY COWAN, *THE PEOPLE V. CLARENCE DARROW: THE BRIBERY TRIAL OF AMERICA'S GREATEST LAWYER* (1995); ANTHONY J. LUKAS, *BIG TROUBLE: A MURDER IN A SMALL WESTERN TOWN SETS OFF A STRUGGLE FOR THE SOUL OF AMERICA* (1998).

lawyers, and to seek to understand the other lawyering paradigm as either fitting within the preferred model of professionalism or as an inauthentic expression of an ideal. Anthony Kronman, for example, argues that the patrician lawyer-statesman, who works alternately in high government positions and on behalf of commercial clients, represents the vital core of the American lawyer's role model and is in danger of being irretrievably lost.<sup>19</sup> Other commentators from various jurisprudential perspectives identify the central tradition of lawyering instead with representation of the outcasts, the powerless, and the dissenters of society.<sup>20</sup> They are suspicious of any form of organized power, including the legal system. Because of this wariness, they engage in a delicate balancing act, seeking to employ access to the judicial process in the service of the powerless while not becoming corrupted by this connection themselves.<sup>21</sup>

Because neither of these ideals can lay claim to being the central moral tradition of the American legal profession, there are cases in which the practices of the lawyer's community do not determine what an agent ought to do. What remains for guidance is the character and personal ethical identity of the agent. People do not approach an ethical dilemma in a vacuum, as some sort of decision making machine; they have a rich history of past commitments, attachments, and allegiances. Fidelity to one's past, a narrative unity maintained over one's lifetime, is itself a resource for making hard choices.<sup>22</sup> This is not a subjectivist position—an agent acting as a lawyer is

19. See KRONMAN, *supra* note 15. For critiques of Kronman that emphasize his one-sided reconstruction of the professional ideal, see SIMON, *supra* note 3, at 23-24; Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV. 1139 (1995) (review essay); David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics*, 108 HARV. L. REV. 458 (1994) (book review).

20. See, e.g., GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* (1981). Milner Ball presents a radical version of Shaffer's argument, relying on the theological vision of William Stringfellow and the legal scholarship of Robert Cover. See MILNER S. BALL, *THE WORD AND THE LAW* (1993); *RADICAL CHRISTIAN AND EXEMPLARY LAWYER: HONORING WILLIAM STRINGFELLOW* (Andrew W. McThenia, Jr. ed., 1995); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986). Ball argues that social institutions—including courts, legislatures, and lawyers—offer only a form of death, and that law is in essence idolatry. See BALL, *supra*, at 75-82, 158-60, 207. In Ball's view, fidelity to one's higher calling demands that a lawyer not engage with worldly institutions. Because one is a "lawyer" only by virtue of worldly institutions, it is hard to see how it is possible to square this eschatological theology with one's professional role.

21. See Max Weber, *Politics as a Vocation*, in FROM MAX WEBER 77, 123 (H.H. Gerth & C. Wright Mills trans. and eds., 1946) ("[H]e who lets himself in for . . . power and force as means, contracts with diabolical powers.").

22. See, e.g., ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPAEDIA, GENEALOGY, AND TRADITION* (1990); Edmund Pincoffs, *Quandary Ethics*, in REVISIONS: CHANGING PERSPECTIVES IN MORAL PHILOSOPHY 92 (Stanley Hauerwas & Alasdair MacIntyre eds., 1983); Joseph Raz, *Incommensurability and Agency*, in INCOMMENSURABILITY,



free only to choose among authentic professional traditions, not to act in any way she believes appropriate. Given the plurality of professional ideals, the agent is liberated from the straitjacket of an incomplete ethical tradition. At the same time, however, the agent is constrained by the commitments she has made over her lifetime in the process of constructing herself as a unique individual. As a result, she may encounter some options that would be morally permissible for other lawyer-agents, but not permissible for her, in light of her personal history and moral character. The character of individual agents and the range of lawyering traditions therefore stand in a dialectical relationship with one another, and no account of legal ethics is complete without considering both.

To illustrate this argument, the following section begins by setting forth some examples of professional dilemmas that an attorney might encounter in ordinary practice. I have tried to avoid dramatic cases, many of which are quite familiar in the legal ethics literature, where some sort of catastrophic injury is threatened or a freakish combination of circumstances creates a tragic choice between harms.<sup>23</sup> Although these cases reveal something about the outer limits of our moral intuitions, they obviously do not occur frequently in the lives of most lawyers. The day-to-day lives of lawyers are nevertheless fraught with ethical issues. While these examples might seem prosaic, they do represent real conflicts between the constituent professional values of lawyering. Subsequent sections of this paper will discuss the incommensurability of the values implicated in these cases, the partial resolution of the dilemmas provided by the traditions of legal practice, and the remainder of cases in which the agent's personal identity serves as the lawyer's moral compass.

## II. PROBLEM CASES

The following examples all posit what appear to be relatively straightforward conflicts between two moral values: the duty of loyalty to one's client and the obligation not to inflict unjustified harm on third parties. After discussing the applicable law, I will suggest some of the complexities that frequently go unmentioned in the neat hypotheticals one sometimes encounters in philosophy or professional ethics discussions.

---

INCOMPARABILITY, AND PRACTICAL REASON 110 (Ruth Chang ed., 1997); Charles Taylor, *Leading a Life*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra*, at 170.

23. Cf. Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985).

*Problem #1—“Hardball” Litigation*

Alice represents a large employer in an age-discrimination action; the plaintiff’s lawyer, Bill, is inexperienced compared to Alice. Bill and Alice receive a routine notice from the court clerk’s office stating that if they do not file within 30 days a request to schedule the case for trial, the case will be stricken from the docket. Bill calls Alice three days before the deadline and requests that she stipulate to an extension of the 30-day period because his mother is ill and he has to fly home to be with her. Alice knows (and apparently Bill does not) that the 30-day time period is jurisdictional—the parties cannot extend the time for filing the notice without seeking court approval. It is clearly in Alice’s client’s interest to agree to the ineffective stipulation because, in Alice’s judgment, Bill’s client has a potentially meritorious claim. The client has instructed Alice to use “any means necessary—or at least any means that won’t get the company in trouble” to defeat the discrimination claim. Should she accept the stipulation?<sup>24</sup>

The professional codes tend to place a strong emphasis on following the client’s instructions. One of the mandatory provisions of the *Model Code* states: “A lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules.”<sup>25</sup> This rule is qualified by an exception which allows the lawyer to “exercise his professional judgment” to decline to assert a position urged by the client.<sup>26</sup> Similarly, the *Model Rules* require a lawyer to abide by the client’s instructions regarding the objectives of the representation, and to consult with the client on tactical matters.<sup>27</sup> Again, the lawyer retains some discretion to refuse to employ a particular means in pursuit of the client’s

---

24. This example is adapted from a problem in STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 84-85 (5th ed. 1998). Professor Gillers offered a similar example from an actual case at the 1998 Hofstra Law School legal ethics conference: A new matrimonial lawyer asks his vastly more experienced opposing counsel whether he will stipulate to a divorce order, with the economic issues to be decided later by the court. Unbeknownst to the new lawyer, the divorce order has the effect of divesting the court of jurisdiction over the marital property; thus, the economic status quo will be preserved, favoring the client of the more experienced lawyer. Gillers asked whether the experienced lawyer should inform the new lawyer of the jurisdictional requirement and, if so, whether he could do so without securing his client’s permission. Stephen Gillers, Address at the Hofstra University School of Law Conference, *Legal Ethics: Access to Justice* (Apr. 6, 1998). Lest anyone think this example is exaggerated, and that no lawyer would be such a jerk, consider *Williams v. General Motors Corp.*, 158 F.R.D. 510 (M.D. Ga. 1993), in which counsel for the defense sought sanctions against a plaintiff’s lawyer who was unexpectedly called away from a deposition to attend to his seriously ill father.

25. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1980) [hereinafter MODEL CODE].

26. MODEL CODE, *supra* note 25, DR 7-101(B)(1).

27. MODEL RULES, *supra* note 5, Rule 1.2(a).

goal.<sup>28</sup> Under the Model Rules and the Model Code, therefore, Alice probably has discretion to exercise professional judgment to refuse the defective stipulation. If the client insists that she play hardball, however, there is no rule of professional discipline that specifically forbids Alice to take advantage of Bill's ignorance. The ABA Committee on Ethics and Professional Responsibility admitted as much when faced with the similar issue of whether a lawyer should be permitted to examine confidential documents disclosed in error.<sup>29</sup> In no way is Alice required, under the organized bar's prevailing norms, to exercise basic courtesy toward the hapless Bill.

There is certainly precedent for the contrary position, at least in the academic community. Consider this quotation from David Hoffman, one (along with George Sharswood) of the canonical early jurists writing on professional responsibility: "I will never plead the Statute of Limitations, when based on the mere efflux of time; for if my client is conscious he owes the debt; and has no other defence than the legal bar, he shall never make me a partner in his knavery."<sup>30</sup>

If Alice believes her client may be liable on the merits, it would be "knavery" according to Hoffman, to agree to the ineffective stipulation. Although scholars continue to quote Hoffman, this argument would probably sound sanctimonious to a practicing litigator.<sup>31</sup> Lawyers do recognize that hardball tactics in litigation are not always appropriate, but they often analyze the question not with reference to the intrinsic moral worth of the act, nor in terms of its consequences to the opposing lawyer, but as a matter of their own reputation in the community. A riveting, albeit fictional, analysis of how a practitioner might reason through the problem is given by a federal judge in Lawrence Joseph's book *Lawyerland*:

---

28. See *id.*, cmt. 1.

29. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-382 (1994); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-368 (1992). See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-387 (1994) (stating that a lawyer has no duty to inform opposing counsel in negotiations that statute of limitations has run on claim). Cf. MODEL CODE, *supra* note 25, EC 7-38. This aspirational provision suggests that a lawyer accede to reasonable requests regarding continuances, but only where the continuance would not prejudice the rights of the client. A few bar association committees have reached the opposite conclusion. In Oregon, for example, a lawyer is required to return an inadvertently disclosed privileged document. See Oregon State Bar Ass'n Bd. of Governors, Formal Op. 1998-150 (1998). The Oregon committee reasoned that reading an accidentally disclosed document would be conduct that "causes . . . harm . . . to the procedural functioning of a judicial proceeding," under DR 1-102(A)(4) of the Oregon Code of Professional Responsibility. *Id.*

30. 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 754 (Baltimore, Joseph Neal, 2d ed. 1836).

31. Cf. *Zabella v. Pakel*, 242 F.2d 452 (7th Cir. 1957).

“The lying.” She sat down. “The deception. It’s not easy to talk about, nor is it easy to explain. . . . It’s one thing to say, ‘That’s not what I said’—which is going on a lot these days, everyone covering, pardon my language, their proverbial asses. But it’s an altogether different thing to say that a document never existed when, in fact, it did, and you, or your client, destroyed it. That I don’t recommend. Double-talk, triple-talk, saying you’re going to do something when you know you’re not going to”—Day shrugged—“what can you do? But . . . [s]aying that something didn’t happen when it did? This is a business in which everyone relies on representations. This is a business in which no one ever forgets, no one ever forgives—a business in which no one ought ever to forget or forgive anyone who goes beyond those extremely tolerable thresholds of deceit into one of those morally . . .” Day stopped. . . . “[H]ere, if you ask me, is the mind-set—a lawyer will get even. It’s how the system—is there a verb retribute? That’s how the system retributes itself. It really does. How do they say it on the street?—‘what you do comes back on you.’ It may take a while, but you make a material misrepresentation of fact to another lawyer, you’d better be prepared to be hit, and I mean hit, and hit hard. The equivalent of being, at the very least, blindsided with a crowbar.”<sup>32</sup>

An unappealing, perhaps even Hobbesian vision of lawyering? Perhaps. But it certainly belies the hypothetical examples, which imply that interactions with opposing counsel are a one-shot affair and that sleazy behavior will go unpunished unless the courts or disciplinary agencies are informed.<sup>33</sup>

---

32. LAWRENCE JOSEPH, *LAWYERLAND* 74-75 (1997). Joseph is a law professor and a published poet who wrote *Lawyerland* to provide a glimpse into the world of lawyers talking among themselves. The identities of the parties are blurred (the character of Judge Day is supposedly based loosely on U.S. District Judge Kimba Wood), and the dialogue is stylized to create the Mamet-like cadences of the lawyers, but Joseph claims the conversations occurred substantially as he recalled them: “*Lawyerland* is truthful rather than factual, but solidly based on facts.” *Id.*, “A Note to the Reader.” I quote this passage in a “truthful rather than factual” way, to illustrate the system of informal reputational control among lawyers.

33. Judge Day’s argument also responds to lawyers who believe that hardball litigation presents a prisoners’ dilemma—if they do not “go nasty” first, the opponent will, with the result that the client of the courteous lawyer will be worse off. See Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618, 1623 & n.13 (1996). Yablon agrees that there are benefits, including reputational enhancement and gaining the trust of the court, to refraining from extreme hardball tactics. See *id.* at 1623-24. Thus, litigation is not a one-shot game, but is iterative in nature. This has been called the “Wally Cleaver Principle,” after the older brother in *Leave It To Beaver*: “You know Beaver, there’s only so much junk you can get away with before you get creamed.” Marianne M. Jennings, *The Model Rules and the Code of Professional Responsibility Have Absolutely Nothing to Do With Ethics: The Wally Cleaver Proposition as an Alternative*, 1996 WIS. L. REV. 1223, 1227 n.19.

One might object that, however compelling Judge Day's words are, her arguments do not pertain to ethics. A widely shared view among lawyers is that acting ethically is importantly different from acting in one's own best interest.<sup>34</sup> In philosophical terms, in order to be ethical, an action must be motivated purely by moral concerns.<sup>35</sup> Here, the word "moral" refers to formal conditions, such as supremacy, concern for others, and universalizability, that characterize a particular kind of judgment.<sup>36</sup> Alternatively, ethics is said to be concerned with the character or disposition of the actor. Merely performing a just act is not justice; the actor must also be a just person.<sup>37</sup> Traditionally, therefore, systems of ethics attempt to place some restraint on self-interest, not to appeal to the actor's prudential motivations. The notable exception is ethical egoism, which advocates

---

For additional discussion of reputational constraints in the practice of law, see *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 643 (1995) (Kennedy, J., dissenting) ("[T]his problem is largely self-policing: potential clients will not hire lawyers who offend them."); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 8.3, at 281 (5th ed. 1998); Warren E. Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11, 12-13 (1966); Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 494-99 (1985).

34. See, e.g., Philip Shuchman, *Relations Between Lawyers*, in ROSCOE POUND, AMERICAN TRIAL LAWYERS FOUNDATION, *ETHICS AND ADVOCACY: FINAL REPORT: ANNUAL OF THE CHIEF JUSTICE EARL WARREN CONFERENCE OF ADVOCACY IN THE UNITED STATES* 73, 97 (1978) ("[u]nless we identify conformity with the [disciplinary rules] with good behavior, we may have taught prudence but not morality."); Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837 (1998). Cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 151(3) (Tentative Draft No. 8, Mar. 21, 1997) (distinguishing between moral and reputational interests).

35. See ROBERT P. GEORGE, *MAKING MEN MORAL* 25 (1993); ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 266 (1980) (actions performed in accordance with moral restraints imposed by law may not have moral worth); IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 3, 10, 19-20, 26 (James W. Ellington trans., 1981); W.D. ROSS, *THE RIGHT AND THE GOOD* 16 (1930) ("As soon as a man does an action *because* he thinks it will promote his own interests thereby, he is acting not from a sense of its rightness but from self-interest."); BERNARD WILLIAMS, *MORALITY* 63-72 (1972). For a discussion of the historical antecedents of the Kantian view, see J.B. SCHNEEWIND, *THE INVENTION OF AUTONOMY* 92, 107-09, 163, 257 (1998). A variation on this claim is *voluntarism*, the thesis that moral values are obligatory or normative only insofar as they are backed by the command of God or a political sovereign. See CHRISTINE M. KORSGAARD, *THE SOURCES OF NORMATIVITY* 21-27 (1996). For one major moral philosopher who took the opposite view, see JOHN STUART MILL, *UTILITARIANISM* 23 (Oskar Piest ed., 1957) (1861) ("[N]o system of ethics requires that the sole motive of all we do shall be a feeling of duty ... motive has nothing to do with the morality of the action.").

36. This definition of moral propositions is from TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 18-21 (4th ed. 1994).

37. See Aristotle, *Nicomachean Ethics*, Book II, Ch. 4, 1105a15-1105b15 (W.D. Ross & J.O. Urmonson trans.), in *A NEW ARISTOTLE READER* (J.L. Ackrill ed., 1987); see also AUDI, *supra* note 15, at 288-91; Tom L. Beauchamp, *Principles and Other Emerging Paradigms in Bioethics*, 69 IND. L.J. 955, 967 (1994) ("Virtue requires properly motivated dispositions and desires when performing actions, and therefore is not reducible to acting in accordance with or for the sake of principles of obligation.").

“prudentialism as the whole story about the moral life.”<sup>38</sup> Most philosophers, for good reason, don’t take ethical egoism seriously as a theory of morality. But the emptiness of ethical egoism does not mean we must ignore psychological egoism, which is the undeniable fact that people find it easier to do what is good for them than acts that require self-sacrifice.<sup>39</sup> If Judge Day’s monologue merely elaborates on lawyers’ motivation for doing the right thing, without claiming that it tells the whole story of the moral life, there is no reason for judging it out of bounds for ethical reasoning.

Suppose someone acts in a way that benefits society, but does it out of purely selfish motives. In Bernard Williams’ example, a man gives money to famine relief to enhance his standing in the Rotary Club or because he feels rotten for eating steak dinners while millions of people starve. No one would be inclined to praise this man in moral terms, but the fact remains that he has done something good. Hunger has been averted because of his act, even though he was only trying to make himself look like a philanthropist in the eyes of his fellows or assuage his own feelings of guilt. As Williams puts it, better that he give the money to famine relief than that he buy another television set.<sup>40</sup> In the same vein, suppose Alice tells Bill that the stipulation would be ineffective, and that he should approach the court for relief. Suppose in addition that she does this because she is afraid that when Bill finds out he has been duped, he will swear revenge on Alice and retaliate at some later time. We may not be inclined to ascribe moral approbation to Alice’s actions or to call her an honest person, but legal practice nevertheless benefits from her honesty. If she had not been candid, a potentially meritorious case would have been dismissed on a procedural ground. Better that Alice advise Bill of his mistake rather than seek to take advantage of it, even if her motivation was not to do the right thing. (Of course, Alice may value her reputation as a Rambo litigator, in which case reputational considerations would actually militate against cooperating with Bill.<sup>41</sup>)

This problem has come full circle. We have concluded that Alice probably should not take advantage of Bill’s ignorance, but only for

---

38. WILLIAM K. FRANKENA, *ETHICS* 18 (1963).

39. See *id.* at 19-20; see also Robert Audi, *Moral Judgment and Reasons for Action*, in *MORAL KNOWLEDGE AND ETHICAL CHARACTER* 217, 217-42 (1997); IRIS MURDOCH, *THE SOVEREIGNTY OF GOOD* 51-54 (1970) (considering the significance of Freud for moral philosophy); Ronald Dworkin, *Darwin’s New Bulldog*, 111 *HARV. L. REV.* 1718, 1725 (1998) (arguing that claims about the truth of moral propositions should not be confused with claims about the difficulties encountered in persuading people to respect moral norms).

40. WILLIAMS, *supra* note 35, at 66.

41. See Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 *S. CAL. L. REV.* 1273, 1321 (1998).

pragmatic reasons. It remains to be established that there is an ethical—that is, non-self-regarding—reason for advising Bill that the stipulation is ineffective. The ethical ground for this judgment depends on Alice’s character, disposition, or integrity, because the foundational normative values of the practice of lawyering do not, by themselves, forbid Alice from accepting the stipulation. These arguments will be developed in the next two sections.

*Problem #2—Ignore the Bad Facts and They’ll Go Away*

Carlos is the outside lawyer for Dead Bugs, the manufacturer of a highly profitable pesticide that a state environmental protection agency seeks to ban. Under the prevailing regulatory scheme, the issue is whether the product is “unreasonably dangerous to human health.” Although he is convinced that the pesticide should be banned under that standard, Carlos has been unable to convince the management of Dead Bugs of this. As proceedings progress, it becomes clear that the inexperienced, overworked, and underprepared agency lawyers will be unsuccessful at persuading the state trial judge that the pesticide is dangerous. Agency attorneys have overlooked some highly damaging data buried in one of the client’s expert’s reports and have failed to point out severe methodological problems in the principal study on which Dead Bugs relies. At several points during the trial, the judge makes statements that reflect serious misunderstandings or assumptions contrary to the facts in the record. Should Carlos draw the judge’s attention to information adverse to his client’s interests?<sup>42</sup>

One might initially object that Carlos does not know that the pesticide is dangerous, as there has been no definitive finding of that fact by the agency, but this response has always struck me as fatuous. Lawyers become intimately acquainted with the facts of cases, and through the process of working with experts to prepare disclosures and reports, often become quite familiar with the scientific and technical aspects of the dispute as well. Monroe Freedman rightly insists that a lawyer who says he can never know whether his client is factually liable is morally irresponsible.<sup>43</sup> To be sure, the

---

42. This example is drawn from DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* 441-42 (2d ed. 1998). Similar problems for discussion may be found in an elaborate hypothetical, *Food for Thought*, in PHILIP B. HEYMANN & LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* 216-34 (1988) and in THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS* problem 18, at 239-40 (6th ed. 1995) (potential tort liability for defective product).

43. See MONROE FREEDMAN, *UNDERSTANDING LAWYERS’ ETHICS* B-1 (1990). See also David Luban, *Contrived Ignorance*, 87 *GEO. L.J.* 957 (1999). As Luban points out, however, the morally

facts are ambiguous in many cases, but in others, the lawyer can claim to be “uncertain” of his client’s liability only in the strong Cartesian sense of not being certain of anything. Or, less philosophically, a lawyer may refuse to learn aspects of his client’s case so that he cannot be charged with knowingly perpetuating a falsehood.<sup>44</sup> In this case, it is not unreasonable to assume that Carlos has sufficient familiarity with documents and expert reports so as to have achieved knowledge that the pesticide is dangerous.

The relevant disciplinary rules do not mandate any one course of action, but merely set out signposts that point in different directions. The Model Code forbids a lawyer to “[c]onceal or knowingly fail to disclose that which he is required by law to reveal,”<sup>45</sup> or to “[p]articipate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.”<sup>46</sup> The lawyer is not actively developing false or misleading evidence, but is instead standing passively by while the other side makes repeated blunders in presenting its case. Thus, there is an ambiguity—is the lawyer subject to sanctions for failing to act to prevent the establishment of a false or misleading factual record? The more recently drafted Model Rules resolve this ambiguity by clarifying the distinction between actively participating in developing false evidence and merely acquiescing in an opposing lawyer’s incompetence: “A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal;[or] offer evidence that the lawyer knows to be false.”<sup>47</sup> Here the emphasis is on the lawyer’s actions; the rule uses the active verbs “make” and “offer.” The only prohibition on passively permitting misleading evidence to be introduced is narrowly circumscribed: “The lawyer shall not . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.”<sup>48</sup> Where there is no fraud, courts and bar associations generally do not impose upon lawyers a duty to correct an adversary’s misrepresentation of facts or the tribunal’s misapprehension of the factual record.<sup>49</sup> If the

---

dubious status of a lawyer’s profession of ignorance does not necessarily mean that the disciplinary rules should be changed to impose liability on lawyers for maintaining an attitude of willful blindness toward their clients’ activities. *See id.* at 976-78.

44. *See* FREEDMAN, *supra* note 43, at 109-11.

45. MODEL CODE, *supra* note 25, DR 7-102(A)(3).

46. *Id.* DR 7-102(A)(6).

47. MODEL RULES, *supra* note 5, Rule 3.3(a).

48. *Id.* Rule 3.3(a)(2); *see also* *United States v. Shaffer Equip. Co.*, 11 F.3d 450 (4th Cir. 1993) (holding that government lawyers violated this rule by failing to disclose a misrepresentation by government expert made in the course of litigation).

49. *See, e.g.*, *Attorney Grievance Comm’n v. Rohrback*, 591 A.2d 488 (Md. 1991); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-397 (1995) (“[A] lawyer has no general duty to advise his adversary of useful facts or promising legal theories”).



nondisclosure does not constitute fraud on the tribunal, the lawyer is forbidden to disclose any information “relating to representation of the client,” including information that Carlos has about the harmfulness of the pesticide.<sup>50</sup> Thus, the Model Rules broadly forbid disclosure, with narrowly circumscribed exceptions—fraud on the tribunal or a prospective criminal act likely to result in death or serious bodily injury.

It is frequently asserted that lawyers are justified by the adversary system in favoring their client’s interests over the interests of third parties or the public good. “[I]n an adversary adjudicatory proceeding, the effect of an attempt to take advantage of an opponent’s incompetence ultimately may be blunted by judicial intervention. Among other factors, the potential for such intervention justifies the attorney’s conduct.”<sup>51</sup> In this problem, however, the lawyer knows there is no potential for judicial intervention; the opposing government lawyer is incapable of mustering the resources to perform the exhaustive pretrial discovery and preparation that the well-funded private lawyers take for granted. It would be at best disingenuous, and at worst extreme bad faith, to justify the introduction of misleading evidence solely on the basis of the opposing party’s potential to rebut it. For this reason, more sophisticated defenders of the adversary system appeal not to the short-run considerations of whether a particular party had an opportunity to develop rebuttal evidence, but to arguments which take a longer view of the incentives that would result from a rule of professional morality that required a lawyer to take steps to correct for institutional imbalances in information and resources. One version of this argument maintains that the parties would have little incentive to develop reliable and accurate information during the pretrial process, because the fear of having to turn over inculpatory evidence would deter a lawyer from digging too deep in her client’s files.<sup>52</sup> A fair trial would therefore be impossible, since the trier of fact would lack access to crucial information and would be forced to make a decision on the basis of partial or inaccurate factual submissions. This argument, too, is misleading, because the discovery system already requires a party to turn over evidence, whether harmful or helpful, to the adversary, subject only to narrow exceptions for attorney work product and privileged matters.<sup>53</sup> Granted, many litigators bend over backwards to avoid this obligation, construing

---

50. See Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1154-57 (1985).

51. John K. Morris, *Power and Responsibility Among Lawyers and Clients: Comments on Ellmann’s Lawyers and Clients*, 34 UCLA L. REV. 781, 797-98 (1987).

52. See SIMON, *supra* note 3, at 64-65.

53. See FED. R. CIV. P. 26.

discovery requests narrowly and tendentiously,<sup>54</sup> raising a welter of often ill-founded privilege objections, burying relevant documents in a “boxcar” of useless paper, and occasionally destroying or withholding discoverable materials. But this pattern of noncompliance with clear legal norms does not permit lawyers to make a straight-faced argument that an obligation to disclose relevant facts to the adversary is a novel or unsound ethical duty.<sup>55</sup>

Nevertheless, most practicing lawyers tend to assume that keeping one’s client’s confidences is their highest moral obligation. “The principle of confidentiality is thought to be so important that the Model Rules, the organized bar’s most recent pronouncement about the matter, barely recognize the propriety of subordinating it to the value of human life.”<sup>56</sup> The Model Rules do permit disclosure in favor of preserving human life, but only if the threat to life is the result of a criminal act by the client that the lawyer believes is likely to result in imminent death or serious bodily harm.<sup>57</sup>

### *Problem #3—Speaking Calumny to Power*

Emma is a well known civil rights lawyer in a major city on the West Coast. She has represented plaintiffs in numerous police-brutality lawsuits, in several cases obtaining verdicts of a million dollars or more. She practices a highly confrontational lawyering style, seeking not only to win cases by any arguably legal means, but also to attract media attention to her clients’ causes.<sup>58</sup> In a recent case, she suffered a momentary setback. The case was assigned to Judge Frank, a notoriously conservative district court judge who, according to courthouse lore, has never seen a civil rights case that didn’t warrant early summary judgment for the defendant. Knowing that Judge Frank is somewhat thin-skinned and has a hot temper, Emma goes on a campaign of public vilification of the judge, hoping to cause him to recuse himself from the case.<sup>59</sup> She openly states that Judge Frank is frequently “drunk on the bench,” and is “ignorant, dishonest, ill-tempered, and a

---

54. See, e.g., *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 858 P.2d 1054 (Wash. 1993).

55. Lawyers are required to disclose some adverse *legal* authority to a tribunal. See MODEL RULES, *supra* note 5, Rule 3.3(a)(3); MODEL CODE, *supr* note 25, DR 7-106(B)(1).

56. Subin, *supra* note 50, at 1159.

57. MODEL RULES, *supra* note 5, Rule 1.6(b)(1).

58. The character of Emma and the facts of this problem are based loosely on *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995). See also *In re Palmisano*, 70 F.3d 483 (7th Cir. 1995); *In re Hinds*, 449 A.2d 483 (N.J. 1982).

59. See *Standing Comm. on Discipline v. Yagman*, 856 F. Supp. 1384, 1387 (C.D. Cal. 1994) (per curiam opinion of three-judge panel) (quoting the lawyer: “Look, there are certain judges I want to be in front of for my Civil Rights cases who are favorable to my view. And I’d like to recuse out the ones who are extremely unfavorable.”).

bully.”<sup>60</sup> These comments are picked up by a reporter for the local lawyers’ newspaper where they are duly reprinted and noticed by the judge. In a fury, the judge recuses himself from Emma’s case, which is reassigned to a liberal judge. Has Emma acted properly?

Lawyers are required by the disciplinary rules to have a good faith basis for factual and legal assertions they make in the course of a judicial proceeding,<sup>61</sup> but these rules do not apply to statements not made directly to the tribunal. Many federal district courts have, by local rules, proscribed conduct that “degrades or impugns the integrity of the court;”<sup>62</sup> that is “unbecoming an officer of the Court;”<sup>63</sup> that is uncivil,<sup>64</sup> or “provoking or insulting.”<sup>65</sup> A few states have passed legislation that attempts to require a certain level of civility from attorneys, including this statute from California: “It is the duty of an attorney to . . . abstain from all offensive personality . . . unless required by the justice of the cause with which he or she is charged.”<sup>66</sup> Many of these rules and statutes are arguably void for vagueness.<sup>67</sup> Even if they are constitutional, they exist in only a minority of jurisdictions. There is no widely applicable professional disciplinary standard or rule of agency, tort, or criminal law that prohibits attorneys from being obnoxious.

Many commentators have argued that courts must rein in uncivil behavior by attorneys in order to protect the liberty of the litigants to obtain “the just, speedy, and inexpensive determination of every action.”<sup>68</sup> An excess of zealous advocacy risks transmuting dispute resolution into litigation-as-total-war, which destroys the effectiveness of the adversary process and renders

60. *Yagman*, 55 F.3d at 1434 & n.4.

61. MODEL RULES, *supra* note 5, Rule 3.1; MODEL CODE, *supra* note 25, DR 7-102(A)(1).

62. See U.S. DIST. CT. R.E.D. CAL., CIV. L.R. 83-180(e); see also MODEL CODE, *supra* note 25, EC 7-36.

63. See U.S. DIST. CT. R.E.D. KY., AND W.D. KY., JOINT L.R. 83.3(c); see also U.S. DIST. CT. R. D.R.I., L.R. 4(e)(3); U.S. DIST. CT. R.E.D. TEX., L.R. AT-2(d)(1)(A); U.S. DIST. CT. R.N.D. TEX., LR 83.8(b)(1).

64. See U.S. DIST. CT. R.M.D. FLA., L.R. 2.04(g).

65. See U.S. DIST. CT. R.D. ALASKA, L.R. 39.5(d); cf. U.S. DIST. CT. R.N.D. OKLA., L.R. 83.2B(14) (admonishing lawyers to “[a]void disparaging personal remarks or acrimony toward opposing counsel”); U.S. DIST. CT. R.W.D. TEX., L.R. AT-5(b)(17) (same).

66. CAL. BUS. & PROF. CODE § 6068(f) (1990).

67. See, e.g., *United States v. Wunsch*, 84 F.3d 1110 (1996) (holding that California statute barring “offensive personality” is void for vagueness); *In re Finkelstein*, 901 F.2d 1560, 1565 (11th Cir. 1990); but see *In re Snyder*, 472 U.S. 634, 644-45 (1985) (stating that term “conduct unbecoming a member of the bar” is not vague in light of the “lore of the profession”); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 666 (1985) (Marshall, J., concurring in part and concurring in the judgment) (stating that attorneys may be disciplined for conduct that “all responsible attorneys would recognize as improper for a member of the profession”); *In re Beaver*, 510 N.W.2d 129 (Wis. 1994).

68. FED. R. CIV. P. 1; see also Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211 (1971) (civility in the conduct of litigation is necessary to protect the rights of individuals).

lawyers powerless to protect their clients' interests through the judicial system. The freedom of lawyers to advocate their clients' causes with vigor must be checked by the recognition that unbounded advocacy destroys the efficacy of the system that seeks to provide fair litigation outcomes.<sup>69</sup> Therefore, litigation sanctions are available to the extent that Emma's assertions about Judge Frank's drunkenness and ignorance were raised in papers filed with the court. Consider, for example, *In re Kelly*,<sup>70</sup> in which the lawyer attempted to secure a judge's recusal in an appeal of a discrimination case brought against Marquette University. The lawyer's theory was that the judge would be biased in favor of the university, and offered as evidence remarks the judge had purportedly made in opposition to abortion.<sup>71</sup> A Seventh Circuit motions panel ordered the lawyer to show cause why he should not be sanctioned under Rule 11; the lawyer responded that sanctions would violate his free speech rights.<sup>72</sup> Judge Posner sensibly avoided the First Amendment thicket, and simply asked whether the lawyer had a reasonable basis for making the statement in his affidavit.<sup>73</sup> Although the court ultimately concluded that sanctions were not warranted, it strongly admonished lawyers to consider the factual basis of allegations in their pleadings.<sup>74</sup>

In this case, however, Emma does not risk Rule 11 sanctions because her comments were not made in a "pleading, written motion, or other paper."<sup>75</sup> The question is, therefore, whether she can be criticized from the standpoint of professional ethics for seeking to secure Judge Frank's recusal by subjecting him to a torrent of abuse.

\* \* \*

The following portions of this paper set out a framework for analyzing problems like these, in which professional norms seem to require taking two "impossible" actions.<sup>76</sup> I hope to establish three propositions. First, foundational professional values, which generate the applicable duties of

---

69. See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 20-21 (1988).

70. 808 F.2d 549 (7th Cir. 1986).

71. See *id.* at 550.

72. See *id.*

73. See *id.* at 551.

74. See *id.* at 552. See also *Maier v. Orr*, 758 F.2d 1578, 1583-84 (Fed. Cir. 1985) (leaving to Rule 11 the task of redressing lawyer's unfounded accusation that judge improperly participated in proceeding from which he should have been recused); *In re Belue*, 766 P.2d 206, 207 (Mont. 1988) (noting that a lawyer in federal district court proceeding was ordered to pay \$5,601.97 under Rule 11 for filing unfounded ethical charges against adversary).

75. FED. R. CIV. P. 11(b).

76. Two duties are "compossible" if it is possible to perform them both. See Hillel Steiner, *The Structure of a Set of Compossible Rights*, 74 J. PHIL. 767 (1977).

legal ethics, are not reducible to a common scale of value, nor are they susceptible of ordinal ranking in all cases, if the values are simply considered in the abstract, apart from any reference to discrete social practices. Second, in many cases the traditions of the legal profession, the practices of the community of lawyers, and the social understanding of lawyers' obligations do provide a resource for ranking these values. Third, in a subset of cases, the traditions and practices of lawyering are themselves plural and incomparable, so that two or more impossible actions are morally justifiable. In these cases, an alternative form of practical reasoning—namely, attention to personal integrity and the narrative unity of one's life history—is the best available method of making ethical decisions.

### III. INCOMPARABLE VALUES

Historically, many philosophers have thought that practical reasoning should strive to eliminate insoluble conflicts between values, so that only one of the choices presented would represent the correct resolution of an ethical problem. Indeed, some have gone so far as to describe as “the central tradition of western political thought” the claim that there is, in principle, only one correct answer to any question of ethics, which can be discovered by the correct procedure and acted upon without violating any other demands that reason makes simultaneously on the agent.<sup>77</sup> This view dates at least from the time of Socrates: “From the time of the *Euthyphro* onwards, a dominant tradition in moral philosophy has agreed on one central point: these cases of conflict display an inconsistency which is an offense to practical logic and ought to be eliminated.”<sup>78</sup> One strand of ancient thought equated practical deliberation with a kind of measurement or algorithm: in any serious ethical conflict, the agent merely had to calculate how much of the Good was presented by each option, and choose the path which resulted in a greater quantity.<sup>79</sup> In the *Protagoras*, for example, Socrates argued for an ethical science of measurement, in which the Good was hedonic pleasure.<sup>80</sup> On this account, ethical deliberation is a species of technical reasoning, akin to finding the eternal truths of astronomy or mathematics.<sup>81</sup>

---

77. See Isaiah Berlin, *The Decline of Utopian Ideas in the West*, in *THE CROOKED TIMBER OF HUMANITY* 20, 24-25 (Henry Hardy, ed., 1990). For a noteworthy exception to this tradition, see ROSS, *supra* note 35.

78. NUSSBAUM, *supra* note 9, at 30.

79. See *id.* at 108-09.

80. See Plato, *Protagoras* (W.K.C. Guthrie trans.), in *THE COLLECTED DIALOGUES* 308, 341-52 (Edith Hamilton & Huntington Cairns eds. 1961).

81. Cf. THOMAS HOBBS, *LEVIATHAN* iv.12 (Edwin Curley ed., 1994).

One modern exemplar of the Platonic tradition of moral geometry<sup>82</sup> is consequentialism, including utilitarianism, which seeks to reduce the multiplicity of human goods to one overarching value—good outcomes, however defined—which can be empirically measured and used as a common metric to evaluate possible actions. For instance, Mill writes: “[P]leasure and freedom from pain are the only things desirable as ends . . . all desirable things (which are as numerous in the utilitarian as in any other scheme) are desirable either for pleasure inherent in themselves or as means to the promotion of pleasure and the prevention of pain.”<sup>83</sup> And Bentham’s pithy comment about the sameness of pleasure in art and games is often quoted to exemplify evaluative monism. “Prejudice apart, the game of push-pin is of equal value with the arts and sciences of music and poetry. If the game of push-pin furnish more pleasure, it is more valuable than either.”<sup>84</sup> In other words, the good for humans, or human interests, are assimilated to the satisfaction of preferences.<sup>85</sup> With the success of Henry Sidgwick’s *Methods of Ethics*, moral philosophy came to be accepted as a theoretical field of inquiry in the academy, its methods blessed by the association with scientific reasoning.<sup>86</sup>

Economics is one modern heir to the tradition of analyzing rational action as a form of calculation, with one value being used as the metric. Individual preferences are assumed to be arbitrarily given and the satisfaction of those preferences is taken as good—as the Good.<sup>87</sup> Preferences are revealed

82. See JONSEN & TOULMIN, *supra* note 9, at 25-36. Nussbaum uses the term “Protagorean science” in the same sense, to refer to Plato’s account of practical reasoning in the *Protagoras* as a kind of science—*episteme* or *techné*. See NUSSBAUM, *supra* note 9, at 89-121, 295.

83. MILL, *supra* note 35, at 10-11.

84. Jeremy Bentham, *The Rationale of Reward*, in 2 THE WORKS OF JEREMY BENTHAM 192, 253 (John Bowring ed., 1843).

85. BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 86 (1985).

86. See JONSEN & TOULMIN, *supra* note 9, at 280-81. Legal reasoning has displayed its own obsession with monism, seeking to find a single foundational principle—a *Grundnorm* in Kelsen’s terms—which justifies the legal order. See Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601 (1993); cf. HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., 1967) (2d ed., 1960). The emphasis on value-neutrality in legal reasoning has been said to be a consequence of the emergence of natural science as the hallmark of rational inquiry and the eclipse of institutions backed by religious authority. See James Boyd White, *Rhetoric and Law: The Arts of Cultural and Communal Life*, in HERACLES’ BOW: *ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 28 (1985).

87. The literature on law and economics is, of course, vast, and the analysis in this paragraph is elementary enough to be found in just about any discussion of the subject. I was guided in these paragraphs by various critical commentaries on the methodological and normative assumptions of law and economics. See generally DAVID P. GAUTIER, *MORALS BY AGREEMENT* ch. 2 (1986) (account of rational choice theory); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 110, 114-50 (1987); KRONMAN, *supra* note 15, at 225-40; Ronald Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563 (1980); Martha C. Nussbaum, *Flawed Foundations:*

through choices: If someone chooses *A* over *B*, she is assumed to have a preference for *A*, and that person's value structure can be revealed by summing all her preferences into a master utility function. It does not matter whether the goods *A* and *B* are similar, like apples and oranges, or fundamentally different, like listening to the New York Philharmonic and monomaniacally counting blades of grass (in Rawls's example<sup>88</sup>); despite the seeming diversity of human ends, they can all be compared in quantitative terms, using the yardstick of wealth or utility, provided that the agent remain consistent across her reported preference ordering. Because observation is thought to be an evaluatively neutral method for determining individual tastes, the preferences of agents can be aggregated and used to determine social policy, which is keyed to the satisfaction of preferences alone. The only acceptable government policy is maximization of wealth or utility, as defined by the satisfaction of revealed preferences—the state may not put its thumb on the scale, so to speak, and encourage the cultivation of a particular set of preferences. Push-pin is truly as good as poetry, on the law and economics analysis, and the state should not be in the business of subsidizing poets if its citizens reveal an overall preference for push-pin. The diversity of human goods is flattened out by economic analysis into one value, wealth or utility, which can be used to guide practical decisions at the individual or government level. One intuitively suspects that Bentham's claim that the values inherent in push-pin are the same as those present in poetry must be incorrect, because we experience the pleasures of art and of mindless diversions differently. To take a trivial example, suppose I must decide whether to spend my day reading philosophy or lying on the beach. Lying on the beach produces sensual pleasure that is not present in the reading of philosophy, but reading produces intellectual satisfaction that is not to be found on the beach.<sup>89</sup> Pleasure is not the end for which we act by reading philosophy, even if we do happen to experience pleasure from the activity.<sup>90</sup>

---

*The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197 (1997); Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977).

88. JOHN RAWLS, *A THEORY OF JUSTICE* 432-33 (1971).

89. See STOCKER, *supra* note 12, at 173.

90. See NUSSBAUM, *supra* note 9, at 295. To be fair to Mill, it should be noted that he appreciated this problem, and strenuously opposed the Benthamite theory that all pleasures have the same nature or quality. See MILL, *supra* note 35, at 11-15. Mill's theory is still compatible with a particular kind of evaluative monism, however, that is practically identical to contemporary economic theory. Mill argues that pleasures should be compared and ranked in terms of tradeoffs (what economists call indifference functions):

Of two pleasures ... that is the more desirable pleasure ... [i]f one of the two is, by those who are competently acquainted with both, placed so far above the other that they prefer it, even though

(This intuition helps explain why the claim of value incommensurability, which will be discussed in the next section, seems so appealing.) Moreover, we have all experienced instances in our own lives where merely having a preference for something was not conclusive of whether we thought we ought to pursue it. We rationally evaluate preferences with reference to some criterion independent of desire or preference, concluding that some of our desires are unhealthy or inconsistent with our life plan; seek out counseling and therapy to attempt to better understand and control our desires; adopt strategies to make some end more desirable (such as rewarding ourselves for exercising or finishing a home-improvement project); bind ourselves in advance so that attractive options are not available in the future (as in the case of Ulysses and the sirens), and so on.<sup>91</sup> These facts of human psychology and behavior strongly suggest that a framework of practical reasoning that takes desires simply as given, and equates the good with satisfying those desires, will seriously fail to account for many of the experiences in our ethical lives.

Utilitarianism promises to make moral reasoning as determinate as the empirical social sciences by summing the pleasures of multiple actors (or the avoidance of their pain, or the satisfaction of their preferences, depending on the variety of utilitarianism employed) into one master quasi-mathematical function and directing that the function be maximized. Utilitarianism has been influential not only because of its promise to make morality determinate, but also because it expresses the importance of impartiality, altruism, and benevolence in moral deliberation. At the same time, however, it suffers from a concomitant inability to explain values like commitment, love, loyalty, and integrity.<sup>92</sup> On a utilitarian account, a person's moral

---

knowing it to be attended with a greater amount of discontent, and *would not resign it for any quantity of the other pleasure* which their nature is capable of.

*Id.* at 12 (emphasis added). The standard of evaluation here is still monistic—it is utility, defined by Mill as “an existence exempt as far as possible from pain, and as rich as possible in enjoyments,” with the proviso that some of these enjoyments may be preferred to others because of their nature. *Id.* at 16. I am grateful to Kent Greenawalt for pointing out the distinction between Mill and Bentham in this regard.

91. See ANDERSON, *supra* note 4, at 132-34; Wiggins, *supra* note 12; JON ELSTER, *ULYSSES AND THE SIRENS* (1979).

92. For a well-known statement of this criticism, see Bernard Williams, *Consequentialism and Integrity*, in *CONSEQUENTIALISM AND ITS CRITICS* 20 (Samuel Scheffler ed., 1988). Elsewhere, Williams acknowledges “indirect” utilitarian arguments that have been advanced for behaviors like truth-telling, concern for one's children, and loyalty to one's friends—these patterns themselves have utilitarian value in that they result in an increase in overall well being. See WILLIAMS, *supra* note 85, at 107. But as he notes, these arguments would violate the transparency condition of rationality by positing reasons for actions that are not the reasons given by agents; if utilitarianism were correct, most people would be laboring in persistent false consciousness. *Id.* at 109.



responsibility is to bring about the greatest possible happiness for humanity, regardless of the effect of this imperative on the agent's own life. If one must drop a life-long project of great personal importance in order to bring about a state of greater aggregate human happiness, utilitarianism commands that one put aside the project and pursue the common good.<sup>93</sup> Utilitarianism can do nothing else, as it recognizes only one value—happiness, evaluated impersonally—which may be weighed against other instances of happiness. Other values, such as commitment and integrity, are treated only as instances of happiness, to be respected only insofar as they contribute to the happiness of the agent and others and subject to override by the potential of doing greater good elsewhere. Utilitarians also must confront the problem of illegitimate desires and pleasures, which requires theorists to develop non-utilitarian standards for evaluating preferences. “Nobody really balances the pleasure of the rapist against the agony of the victim to decide whether to prohibit rape. Neither philosophy nor law can get along without some standard for distinguishing ‘legitimate’ or ‘preferred’ desires from others.”<sup>94</sup> Thus, a persistent challenge for utilitarians, related to the inability of economists to explain the diversity of human ends, has been to explain ethical phenomena like commitment and morally wrongful desires within the framework of a single species of value.

Moral geometry is not limited to consequentialist theories like utilitarianism or welfare economics. Some nonconsequentialist moral systems are founded on the assumption that a limited set of general, universally applicable principles of duty can be discovered, from which practical guidance is derived logically, in deductive fashion.<sup>95</sup> Kant's categorical imperative is the best-known example of a single ethical principle that purports to resolve any practical problem facing an agent.<sup>96</sup> A theory like Kant's is monistic not in the sense of recognizing one kind of good, but because it specifies duties that can all be justified deductively starting with one master principle—for Kant, the categorical imperative.<sup>97</sup> Thus, Kant's

---

93. See Williams, *supra* note 92, at 44-45.

94. Phillip E. Johnson, *Do You Sincerely Want to Be Radical?*, 36 STAN. L. REV. 247, 274 (1984).

95. See Schneewind, *supra* note 4. Schneewind identifies four characteristics of “classical first principles” that have been the object of the quest of modern ethics. For a discussion and critique of this mode of reasoning in political philosophy, see AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 52-63 (1996).

96. See KANT, *supra* note 35, at 30.

97. “Now if all imperatives of duty can be derived from this one imperative as their principle, then there can at least be shown what is understood by the concept of duty and what it means.” *Id.* See also IMMANUEL KANT, *LECTURES ON ETHICS* 11 (Louis Infield trans., 1979) (“[A]s we all need a basis for our moral judgments, a principle by which to judge *with unanimity* what is morally good and what

moral philosophy may be referred to as comparabilist. Because duty is, in principle, unyielding even in the face of overwhelming negative consequences, strict deontological moralities operate in an all-or-nothing fashion. Deliberately taking an innocent human life is not justified, even if the killing would lead to a vast improvement in overall well-being, because not killing is a duty derived from the categorical imperative, while improving social welfare is not.<sup>98</sup> The sanctity of human life is not merely one value that is to be compared and weighed against others, it is *the* value, and respecting it means not trading it off against other values such as the happiness of other persons. Moreover, it is essential to strict deontological theories that duties can never come into conflict. Kant writes:

[B]ecause two mutually opposing rules cannot be necessary at the same time, then, if it is a duty to act according to one of them, it is not only not a duty but contrary to duty to act according to the other. It follows, therefore, that a collision of duties and obligations is inconceivable.<sup>99</sup>

Thus, any conflict of obligations is only an apparent conflict. One alternative must be done, for it is a duty, the other “duty” is spurious. Correlatively, rights are thought to outweigh competing considerations, such as the increase in social utility that could be realized by redistributing property from the wealthy to the poor.<sup>100</sup> “Rights express limits on what can be done to individuals for the sake of the greater benefit to others; they impose limits on the sacrifices that can be demanded from them as a contribution to the general good.”<sup>101</sup> The moral right to bodily integrity means that a small-town sheriff cannot publicly hang a drifter as a horse thief in order to deter horse thievery in his town. To note another well-known example, the legal right to equal protection of the laws and the moral right of human dignity means that the United States government cannot obtain vast goods, such as environmental cleanliness, deficit reduction, and an endless supply of clean energy by exchanging the entire population of African-Americans with a race

---

bad, we apprehend that there must exist a single principle having its source in our will.”) (emphasis added). This latter passage from Kant underscores the theme identified by Berlin above, that philosophy has long insisted on a single correct answer to moral questions.

98. See CHARLES FRIED, *RIGHT AND WRONG* 9-13 (1978); James Griffin, *Are There Incommensurable Values?*, 7 *PHIL. & PUB. AFF.* 39, 56 (1977).

99. IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 25 (John Ladd trans., 1965). See also Schneewind, *supra* note 4, at 116.

100. In Hohfeld’s terminology, duties and claim-rights are correlative. See Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, in *FUNDAMENTAL LEGAL CONCEPTIONS* 23, 91 (1923).

101. Jeremy Waldron, *Rights in Conflict*, in *LIBERAL RIGHTS* 203, 209 (1993).

of space aliens.<sup>102</sup> More controversially, the legally recognized rights to privacy and bodily integrity arguably block the state from requiring a woman to carry a pregnancy to term against her wishes, even though the fetus, as a potential human life, has important interests (but not rights) of its own.<sup>103</sup> A right-holder is entitled to have her protected interest preferred to other interests, even consequentialist considerations of great weight, as in the space traders example. For this reason, some theorists have spoken of rights as “trumps” that prevail even over significant social values or interests that do not belong to the domain of rights.<sup>104</sup> There is no room in such an absolutist deontology for a gradation of evaluations, from best to worst, through intermediate cases of “permissible” or “acceptable.”<sup>105</sup> If rights are trumps, an act is either permitted or blocked by a right—there is no uncertainty arising from the weighing of disparate values. These concepts thus seem to point to a way out of moral dilemmas resulting from value incomparability.

A practical problem with monistic deontological systems arises when one encounters situations that seem to present a conflict of duties or rights. Just as the unpalatable consequences of utilitarianism have spurred theorists to devise a better system, proponents of deontological morality often find themselves scrambling to soften seemingly draconian implications of their theories. Absolute duties and the conception of rights-as-trumps, while capturing our intuition that persons have inherent autonomy and dignity which cannot be violated in pursuit of the common good, do not on their face allow for tradeoffs between one kind of value (a right or a duty) and another (utility) in cases where the gain in utility would be substantial and the right or duty is weak or unimportant.

This is the point of having rights, of course; they block violations of individual dignity in pursuit of the common good. However, at some point our moral intuitions demand that rights be overridden to prevent harm. Although persons generally have a right not to be told falsehoods, we would permit a homeowner to lie to the Gestapo about the presence of Jewish refugees in the house.<sup>106</sup> This problem may be better understood not as a conflict of duties with consequentialist considerations, but as a conflict of

---

102. See Derrick Bell, *The Space Traders*, in *FACES AT THE BOTTOM OF THE WELL* 158 (1992).

103. This is the point of the notorious “famous violinist” example. See Judith Jarvis Thomson, *A Defense of Abortion*, in *THE RIGHTS AND WRONGS OF ABORTION* 3 *passim* (Marshall Cohen et al. eds., 1974). For a sophisticated contemporary argument, see RONALD DWORKIN, *LIFE’S DOMINION* (1993). Dworkin’s argument is directed at the nature of the fetus’s interests.

104. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977) (“Individual rights are political trumps held by individuals.”).

105. See Brian Barry, *And Who is My Neighbor?*, 88 *YALE L.J.* 629, 637 (1979) (book review).

106. See SISSELA BOK, *LYING* 43 (1978).

duties with other duties. The agent has an obligation not to tell lies, but also an obligation to protect innocent persons from harm. Some deontological philosophers argue that duties must be thought to admit of exceptions, or to be outweighed by other, stronger duties.<sup>107</sup> On this account, duties do not operate absolutely, but have prima facie effect: a duty must be done, all things being equal, but if another moral obligation intervenes, the duty may yield.<sup>108</sup>

But, of course, when two or more prima facie duties or rights come into conflict, a theory must specify a method of ranking prima facie values. Instead of a unified deontological system that eliminates conflicting ethical obligations, a scheme of prima facie duties or rights multiplies the potential for uncertainty by positing numerous defeasible values without specifying a ranking procedure.

Some philosophers have proposed a ranking principle, variously known as lexical priority or deontological side-constraints, in which certain principles must be satisfied before moving on to others.<sup>109</sup> According to Robert Nozick, the non-violation of rights is a constraint upon acting so as to maximize the common welfare. In Rawls's political philosophy, individual liberty is lexically prior to considerations of distributive justice: each person has an equal right to "the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."<sup>110</sup> Both Rawls and Nozick seek to capture the Kantian intuition that a political system is unjust if it allows persons to be used as means to the satisfaction of others. As individuals, we are not merely fungible units of social satisfaction. "[N]o moral balancing act can take place among us; there is no moral outweighing of one of our lives by others so as to lead to a greater overall social good."<sup>111</sup> However, Rawls and Nozick famously disagree on the specification of the side-constraints appropriate in a democratic political order, which shows that

---

107. See FRANKENA, *supra* note 38, at 23 (observing that no deontological system has been devised that can make do without exceptions or conflicts between rules); Ruth Barcan Marcus, *Moral Dilemmas and Consistency*, 77 J. PHIL. 121, 124 (1980).

108. See KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 215-20 (1987); ROSS, *supra* note 35, at 19-47 (1930); David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 432-33 (1990).

109. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 28-35 (1974); RAWLS, *supra* note 88, at 40-45. Side constraints find wide application in the law, as in the example of the Delaney Clause, 21 U.S.C. § 348(c)(3)(A) (1994), which places the value of human life (through elimination of carcinogens) lexically prior to the utility realizable from the use of food additives. A decision maker unconstrained by the Clause might face an exceedingly difficult moral problem in ruling on whether to allow the use of food additives (which represent a marginal increase in social utility) where an actuarial probability of death by cancer can be shown to follow from their use.

110. RAWLS, *supra* note 88, at 250, 541-48.

111. NOZICK, *supra* note 109, at 33; see also DWORKIN, *supra* note 104, at 190-91.

the ranking procedure depends for its usefulness on a presupposed theory of the good for society. Specifying an ordering of values in the abstract, detached from a fully developed political philosophy, is another matter altogether. W.D. Ross admitted that “[f]or the estimation of the comparative stringency of these prima facie obligations no general rules can, so far as I can see, be laid down.”<sup>112</sup> He appealed to the intuitions of the agent to sort out the competing values. Despite the seeming vagueness of this decision principle,<sup>113</sup> intuitionism has continued to exert influence on moral philosophy.<sup>114</sup> It is highly implausible, however, that a thoroughgoing intuitionist system with multiple, potentially conflicting prima facie duties can remain monistic in the sense of having a master principle of duty that resolves value conflicts impersonally. Taking a step down the road toward Ross’s scheme of plural obligations is to commit oneself to a non-geometric theory of practical reasoning.

Moral geometry, whether consequentialist or deontological, offers a significant advantage for practical reasoning, which helps explain its wide acceptance in various disciplines. This is the seductive possibility of moral innocence: “the ideal of living one’s life in such a way as to fully, comprehensively, and harmoniously understand and respond to the requirements of morality” and through quasi-scientific measurement, study, and calculation “thereby to entirely exclude all forms of wrongdoing.”<sup>115</sup> If Kant is right, we can never be faced with conflicting obligations if only we think carefully about which obligation can be derived from the categorical

---

112. ROSS, *supra* note 35, at 41. Mill becomes equally fuzzy when addressing the possibility of ethical conflicts, although of course he was working within a different evaluative framework. “There exists no moral system under which there do not arise unequivocal cases of conflicting obligation,” he writes: “[t]hese are the real difficulties, the knotty points both in the theory of ethics and in the conscientious guidance of personal conduct. They are overcome practically, with greater or less success, according to the intellect and virtue of the individual.” MILL, *supra* note 35, at 32-33.

113. Cf. MACINTYRE, *supra* note 15, at 69 (“[O]ne of the things that we ought to have learned from the history of moral philosophy is that the introduction of the word ‘intuition’ by a moral philosopher is always a signal that something has gone badly wrong with an argument.”).

114. For accounts of this influence, or for contemporary exponents, see ANDERSON, *supra* note 4, ch. 5; BOK, *supra* note 106, at 56 n.9; KRONMAN, *supra* note 15, at 66; RAWLS, *supra* note 88, at 34; Alan Donagan, *Consistency in Rationalist Moral Systems*, 81 J. PHIL. 291 (1984); Schneewind, *supra* note 4, at 117.

115. GOWANS, *supra* note 12, at 219. See also MURDOCH, *supra* note 39, at 56-57 (“That a belief in the unity, and also in the hierarchical order, of the moral world has a psychological importance is fairly evident. The notion that ‘it all somehow must make sense,’ or ‘there is a best decision here,’ preserves from despair: the difficulty is how to entertain this consoling notion in a way which is not false.”). Murdoch tends to believe that a moral system will display increasing degrees of unity as it increases in sophistication. Her objection is not to unity as such in moral theory, but to the imposition of a spurious unity, through the overly enthusiastic use of sovereign concepts like freedom, autonomy, or authenticity. See *id.* at 58.

imperative. If law and economics theorists are right, we never do harm by doing good, because overall wealth maximization is always justified, provided that the distribution of resources is optimal, under either the Pareto or Kaldor-Hicks test.<sup>116</sup> Finally, in law, Langdell's model of legal education as scientific investigation offers a source of legitimacy for legal judgments.<sup>117</sup> Like Plato's moral geometry, Langdell's legal geometry promised that deductive logic and belief in unchanging, universally applicable legal concepts could ground a pure system of law.<sup>118</sup> The appeal of monistic accounts of professional responsibility is therefore apparent. If it were possible to demonstrate through logical reasoning that an agent would always do right by ranking her obligations in a certain order, then the only possibility for wrongdoing would be the agent's incapacity or unwillingness to follow this rationally prescribed hierarchy of values.

### A. *The Claim of Incomparability*

Despite the theoretical neatness of moral geometry and the clarity it brings to practical reasoning, it fails to account for other perceived features of our moral life. The central tradition of evaluative monism has been challenged by a considerable body of philosophy which maintains that human values cannot be reduced to a single common unit of value, nor can they be compared with one another in every case. These "incomparabilists"

---

116. See, e.g., Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980); Richard Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEG. STUD. 103 (1979). The close philosophical relative of law-and-economics, utilitarianism, has remained influential in part because of its calculative nature. This approach seems much more precise than other systems of moral philosophy, with their vague-sounding appeals to character and judgment. For utilitarians, "[m]oral thought becomes empirical, and on questions of public policy, a matter of social science." WILLIAMS, *supra* note 35, at 85. Martha Nussbaum argues that nineteenth-century utilitarians were motivated to recognize hedonic pleasure as the sole good for humankind in order to simplify what would otherwise be messy deliberation problems. See NUSSBAUM, *supra* note 9, at 112.

117. See ROBERT STEVENS, LAW SCHOOL 38, 51-64 (1983); Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 930-31 (1996).

118. See generally M.H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEG. HIST. 95 (1986). The claims of legal "science" were criticized as flim-flam by the legal realists. See, e.g., Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). Since there is no observable fact of the matter about whether, say, a labor union is a legal person, courts are free to utter scientific-sounding propositions without ever being forced to back up their claims with empirical evidence. See *id.* at 814. Today, of course, no one believes that law is a science, but the authority of empirical observation is a significant reason for the continuing appeal of positivism as a jurisprudential approach. Classical positivists locate the authority of law in phenomena such as the command of a sovereign, manifested as the words in a judicial opinion or the voting behavior of legislators. The objectivity and authority of law, therefore, can be traced back to observable facts about the world in a quasi-scientific manner.

observe that diverse kinds of ethical claims are *formally* different from one another, and this difference derives from the plurality of observational standpoints that persons may adopt in relating to others, themselves, and to the world:

The capacity to view the world simultaneously from the point of view of one's relations to others, from the point of view of one's life extended through time, from the point of view of everyone at once, and finally from the detached viewpoint often described as the view *sub specie aeternitatis* is one of the marks of humanity. This complex capacity is an obstacle to simplification.<sup>119</sup>

Ethical reasons come in diverse forms because they supervene on circumstances that have ethical significance, but differ in type from one another.<sup>120</sup> For example, consider the category of personal obligations; that is, those duties that are specific to a particular agent. Some arise out of a sense of connectedness and a common history between the obligor and the obligee. These responsibilities may be involuntarily assumed, as in the case of familial duties, or they may be more or less chosen, as in the case of friendships. Other agent-relative obligations include the duty of keeping one's promise and the duty of reparation generated by a previous wrongful act. They may be called duties of loyalty or fidelity. Finally, some philosophers, notably Aristotle, Kant, and Ross, have contended that we owe duties to ourselves, to improve our own lives to make them the best they can be with respect to the standards of human excellence. Personal obligations are different in kind, however, from universal moral proscriptions, such as those generated by rights (the duty of non-maleficence), the diverse merits of persons with respect to the distribution of some good (the duty of justice), and those that rest on the fact that there are people whose lives we could make better (the duty of beneficence). We feel the pull of these impersonal, or non-agent-relative reasons because we are rational creatures, not because some specific action in our past has created them.<sup>121</sup> In these different

---

119. Thomas Nagel, *The Fragmentation of Value*, in MORTAL QUESTIONS 128, 134 (1979). See also Alasdair MacIntyre, *Moral Philosophy: What Next?*, in REVISIONS: CHANGING PERSPECTIVES IN MORAL PHILOSOPHY 1, 5 (Stanley Hauerwas & Alasdair MacIntyre eds., 1983); Max Weber, *Science as a Vocation*, in FROM MAX WEBER 129, 147 (H.H. Gerth & C. Wright Mills eds. and trans., 1946) (“‘Scientific’ pleading is meaningless in principle because the various value spheres of the world stand in irreconcilable conflict with each other.”).

120. Cf. the famous list of prima facie duties in ROSS, *supra* note 35, at 21-24. My presentation in this section is considerably indebted to Ross's formulation. See also Robert Audi, *Intuitionism, Pluralism, and the Foundations of Ethics*, in MORAL KNOWLEDGE AND ETHICAL CHARACTER 32 (1997).

121. See generally KORSGAARD, *supra* note 35.

spheres, the incomparabilists argue, we govern ourselves by moral norms that are appropriate to each mode of social life, which are fundamentally different in the values they express. Values may be said to be incomparable in these pragmatic terms because a monistic theory fails to account for some features of our evaluative practices, such as the use of different kinds of normative standards, depending on the sphere of our life in which they are deployed.<sup>122</sup>

Stated more precisely, the claim of value incomparability is that, of two items, *A* and *B*, it is neither true that one is better than the other nor true that they are of equal value.<sup>123</sup> Incomparable values exhibit a failure of transitivity. *C* may be better than *A* but not better than *B*.<sup>124</sup> Moreover, *A* may become better, on its own terms, without becoming better than *B*. Perhaps some examples will make this definition clearer. Joseph Raz reports that he is indifferent between sitting at home with a glass of scotch, reading a book, and taking a walk in the park.<sup>125</sup> He may prefer sitting at home with a glass of port while reading a book to the first option with the scotch, but nevertheless remain indifferent between staying home drinking something and going for a walk in the park. Beethoven and Wittgenstein were both individuals of exceptional genius, but which was more brilliant? They were brilliant in different ways, and since it is impossible to say that either profession—musician or philosopher—is superior to the other, it cannot be said that either Beethoven or Wittgenstein was superior in general terms.<sup>126</sup> Note that this example also shows the intransitivity of the comparison. If Beethoven had been more brilliant, perhaps by painting pictures (as Schoenberg did), he would have been a “better” Beethoven, but it would nevertheless be incorrect to say he thereby would have become more brilliant than Wittgenstein.

Technically speaking, values that cannot be translated into some standard unit of measurement are said to be incommensurable; those that cannot be ranked ordinally are incomparable.<sup>127</sup> Incommensurability is the thesis that there is no common yardstick, like money or utility, that can be used to make comparisons between diverse values. Incomparability, by contrast, is the stronger claim advanced here by Raz. This is an important distinction to

---

122. See ANDERSON, *supra* note 4, at 119.

123. See RAZ, MORALITY, *supra* note 12, at 322.

124. See *id.* at 324.

125. See *id.* at 328; see also ANDERSON, *supra* note 4, at 132; MACINTYRE, *supra* note 15, at 64.

126. ANDERSON, *supra* note 4, at 55-56.

127. See GOWANS, *supra* note 12, at 52-53; STOCKER, *supra* note 12, at 176-77; Ruth Chang, *Introduction*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 1, 1-2 (Ruth Chang ed., 1997).



observe, because it is easy to fall into the trap of believing that incommensurable values are automatically incomparable when, in fact, it may be possible to compare values that cannot be converted to a numerical scale. If we can form the judgment that *A* is better than *B*, it does not matter whether we can assign the values of 100 utils to *A* and 50 to *B*.<sup>128</sup> The possibility of comparison is borne out by the way people actually reason: some studies reveal broad agreement on subjects' ranking of tort cases with respect to their "outrageousness" or seriousness, while also showing utter lack of agreement by the same subjects on the dollar value to be assigned to the plaintiffs' punitive damages claims.<sup>129</sup>

Gowans introduces a third kind of failure of comparison, inconvertibility: "choices are inconvertible when the better choice still results in a loss, when there is something that the poorer choice would have provided that is not provided by the better choice."<sup>130</sup> It is not clear how Gowans distinguishes inconvertibility from incomparability. In his example, he would feel regret at having to choose either a Kandinsky or a Degas painting for his living room. (If only we all had such choices!) But this regret is a function of the incomparability of Kandinsky and Degas with respect to the value of aesthetic beauty. He says the choice of the Degas would result in the loss of the unique value of something, call it Kandinsky-pleasure, which is not present in the Degas, but that loss can be explained by the incomparability of Degas-pleasure and Kandinsky-pleasure, rather than by the alleged "inconvertibility" of the two kinds of pleasure. In this discussion, I will primarily be concerned with incomparability—the claim that there is no higher-order value in terms of which moral values, and therefore options for action, may be compared impersonally in all cases.

Although some ethicists and economists regard incomparability as something potentially deeply troubling for practical reasoning, it does accurately capture many of the intuitions people have about certain kinds of choices and evaluations. We think it highly inappropriate to offer a friend \$100 in exchange for missing a lunch appointment, even though social etiquette commands that the inconsiderate friend do something to make up for the slight. This is not to say that there isn't an amount so high that she would be bound to accept it. Rather, the point is that it is inappropriate to

---

128. See James Griffin, *Are There Incommensurable Values?*, 7 PHIL. & PUB. AFF. 39, 43 (1977); Wiggins, *supra* note 12, at 259 (aggregating preferences into indifference curves is a nonreductive method of comparing values).

129. Cass R. Sunstein, Address at the Samuel Rubin Lecture, *Rights and Money*, Columbia Law School (Apr. 22, 1998).

130. GOWANS, *supra* note 12, at 148.

trade money for the hurt feelings of a friend. The exchange does violence to the value of friendship by implying that it is something instrumental, something that can be bought or sold like any other commodity. The film *Indecent Proposal*, in which Robert Redford's character offered to pay a million dollars to sleep with a newlywed woman played by Demi Moore, was jarring for the same reason. It is impossible to ask whether marital infidelity is "worth" a million dollars because the two values belong to different normative domains. We have different reasons for caring about money and about the integrity of our marriage; thus, we naturally maintain different evaluative attitudes toward those two goods.<sup>131</sup> The attitude we have toward our spouse would be fundamentally different from love, loyalty, or even jealousy if we expressed it in monetary terms. Similarly, if we were willing to consider selling our pets to laboratories for use in experiments, the attitude we would experience toward our pets would not be recognizable as the emotion of "affection" that we now claim to feel.<sup>132</sup> This is not an irrational decision to forego an opportunity to make money off our pets, but an expression of a particular mode of valuation that is appropriate to the animals we keep as pets. Money should be used to evaluate certain kinds of human activities and not others because there are some evaluative stances that cannot be captured by a market price. The strict segregation of money into a separate normative sphere reflects the intrinsic value we place on goods like love, friendship, and loyalty, and the different ways in which we experience and express the value of these goods.

Along these lines, consider Amartya Sen's critique of the expected utility theory in economics.<sup>133</sup> Sen argues that economic analysis, which assumes pure self-interested behavior on the part of agents, has a hard time accounting for social norms and rules of conduct that exist where economic incentives are absent.<sup>134</sup> The title of his article, *Rational Fools*, reveals his contempt for the attempt by economists to represent the richness and complexity of human goods as a factor in an invariant algorithm that can be applied consistently throughout a person's life:

A person thus described may be "rational" in the limited sense of revealing no inconsistencies in his choice behavior, but if he has no use for these distinctions between quite different concepts, he must be

---

131. See generally ANDERSON, *supra* note 4.

132. See *id.* at 208.

133. See Sen, *supra* note 87.

134. See *id.* at 332.

a bit of a fool. The *purely* economic man is indeed close to being a social moron.<sup>135</sup>

At the very least, a theory about human behavior needs to take into account the difference between egoism and altruism, between prudence and morality. Although defenders of utility maximization may be able to salvage their theory by claiming that people have a preference for others' interests where they are connected by bonds of sympathy, so that someone else's pleasure becomes the agent's pleasure, utility-maximization still cannot account for commitment.<sup>136</sup> Commitment is revealed when someone acts in a way that does not maximize her personal welfare, but rather acts out of loyalty to a group or an abstract principle. This kind of loyalty is difficult to account for using a monistic theory of values, since it is either true that loyalty is utility-maximizing or it is not, and an agent who took monism seriously would choose only the option that maximizes utility in any choice situation.<sup>137</sup>

Another problem with at least some forms of law and economic theory is that it treats human goods as merely a matter of satisfying desires or preferences. The assumption that values are merely things freely chosen for purely subjective reasons is the first step in constructing indifference curves, on which the range of plausible tradeoffs between preferences can be arranged. It does not matter whether either push-pin or poetry is deeply constitutive of human well-being or flourishing—that is, whether either is an authentic human good. Instead, the only relevant question is how much someone is willing to pay or trade off in order to have her preference for either option satisfied.

This conception of human value has been criticized by natural law theorists like Robert George,<sup>138</sup> as well as philosophers from other traditions.<sup>139</sup> George, for his part, argues that a person may have a preference for viewing pornography, but this bare fact does not mean that pornography is a human good.<sup>140</sup> Instead, goods are “intrinsic aspects of the well-being of

---

135. *Id.* at 336 (emphasis in original).

136. *See id.* at 326-27; ANDERSON, *supra* note 4, at 125.

137. This argument is reminiscent of Ross's challenge to G.E. Moore's theory of ideal utility. *See* ROSS, *supra* note 35, at 16-20.

138. *See* GEORGE, *supra* note 35, at 98-102.

139. *See, e.g.*, ANDERSON, *supra* note 4, at 129-40; Robert Audi, *Autonomy, Reason, and Desire*, in *MORAL KNOWLEDGE AND ETHICAL CHARACTER* 195 (1997); MACINTYRE, *supra* note 16; RICHARDSON, *supra* note 12; ROBERTO UNGER, *KNOWLEDGE AND POLITICS* (1975); Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. CAL. L. REV. 995 (1989).

140. *See* GEORGE, *supra* note 35, at 97-100.

human persons; as such they provide ultimate *reasons* for choice and action.”<sup>141</sup> Even if someone does not have a preference for one of these human goods, she is better off if that good is realized, even though no preference of hers has been satisfied; the value remains a human good and a reason for action even though the actor does not fully appreciate it.<sup>142</sup> Knowledge is a good, even for the most determined anti-intellectual, and music and art are goods, even for philistines. Moreover, many activities are pursued for the sake of excellence and their inherent values rather than for pleasure. As Elizabeth Anderson points out: “Environmentalists endure long hours of often boring, poorly compensated work to save remote ecosystems, such as Antarctica, that few people will ever see and enjoy. . . . The baseball pitcher who perfects his curveball takes pleasure in his superior athletic achievement, in a good he recognizes to be distinct from pleasure.”<sup>143</sup> Of course, no mean amount of argument is necessary to establish that any particular value is an intrinsic human good, but this is no less true of the law and economics conception of value as preference-satisfaction. An argument is required there, too, in order to show that goods and values inhere only in the satisfaction of arbitrary and subjective preferences. Liberal philosophers like Rawls, who attempt to construct a theoretical justification for a conception of human good that consists in the satisfaction of wants, beg the crucial question. Rawls’s apparatus of the original position and the veil of ignorance assumes the conclusions it seeks to justify: that persons want only to satisfy their preferences, not to live a genuinely good life, realizing only true human goods.<sup>144</sup>

Incomparable values are frequently opposed in legal reasoning, often with the result that a legal decision seems to devalue a particular conception of human good. For example, a proposed environmental regulation may result in a reduction of the risk of certain human diseases but also lead to increased unemployment or decreased profit for corporate shareholders.<sup>145</sup> Even though the prevention of disease and these economic values are causally linked, people do not view the two sides of the equation as expressing values that can be measured against each other.<sup>146</sup> Refusing to adopt the regulation based on its cost appears to endorse tacitly the infliction of an increased

---

141. *Id.* at 105-06 (emphasis in original).

142. *Cf.* MACINTYRE, *supra* note 16, at 30-31 (noting that classical Greek thought clearly recognized a difference between what seems good to us and what is, unqualifiedly, good for us).

143. ANDERSON, *supra* note 4, at 125-26.

144. *See id.* at 136-39.

145. *See, e.g.*, GUTMANN & THOMPSON, *supra* note 95, at 167-73 (discussing the *Asarco* case); *see also* ANDERSON, *supra* note 4, ch. 9.

146. *See* Sunstein, *supra* note 13, at 834-40.

health risk on third parties so long as there is an offsetting economic benefit. Similarly, if a workplace safety regulation costs  $X$  dollars and saves  $Y$  lives, people are shocked to imagine that the life of a worker is “worth”  $X/Y$  dollars, even though the Kaldor-Hicks efficiency criterion would direct a government decision maker not to issue the safety regulation if its cost exceeds the monetary value of lives saved.<sup>147</sup> The comparison is intuitively unsettling because people do not ordinarily think of lives and dollars as being susceptible to trade-offs, even though they realize that workplace safety has an economic cost. The negligence standard in tort law may be the best known instance of the law’s encounter with, and attempt to handle, incomparable values. The court is directed to perform a deceptively simple mathematical calculation: is the burden of taking a safety precaution less than the gravity of the injury that might result from an accident caused by the untaken precaution, discounted by the probability of its occurrence?<sup>148</sup> Right away the plural values become apparent in this formula. The burden on the defendant is a dollar figure that must be paid by an actor to institute some kind of precautionary measure; for example, stationing a crew member on board a barge under tow, carrying radios on tug boats, or using only double-hulled oil tankers in Prince William Sound. On the other side of the algebraic relation, however, is the gravity of the potential injury, which is not obviously a monetary value, particularly in cases where human life or health is taken by the resulting accident. Of course, our civil damages scheme allows an injured person to recover a monetized remedy for injuries wrongfully inflicted, but this is a contingent feature of our legal system. There is no reason why, in principle, the defendant could not be locked away in jail, subjected to *lex talionis* penalties, or forced to walk around wearing a scarlet letter. If these proposals seem silly, consider that we are all accustomed to thinking of injuries in monetary terms only because this is the way our legal system has chosen to accomplish various social goals like corrective justice and deterrence of dangerous conduct. Most of the time, this somewhat artificial comparison of human suffering and dollars-and-cents is not overly troubling. In other cases, however, it produces outrage.

The problem of incomparable values in tort law was noticed long ago by Judge Learned Hand—ironically also the architect of the B < PL formula—in another negligence case, *Conway v. O’Brien*.<sup>149</sup> That opinion reveals that Hand was sensitive to the difficulties involved in reducing divergent spheres

---

147. See *id.* at 804.

148. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). See also Richard A. Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29 (1972).

149. 111 F.2d 611 (2d Cir. 1940).

of value to a common metric. He cited numerous decisions in which courts understood the issue in negligence cases not as a mathematical calculation, but as a more broadly moral inquiry.<sup>150</sup> Courts ask whether an actor is “heedless,” “utter[ly] forgetful[] of legal obligations,” or in Hand’s summary, “how loudly [the defendant’s] conduct cries for censure,”<sup>151</sup> but they do not purport to decide cases algorithmically. Indeed, Hand went so far as to say that a mathematical approach to tort law would be “essentially self-contradictory” because of the incomparable values involved.<sup>152</sup> Despite the sacrifice of theoretical neatness, Hand was willing to admit that many legal questions are essentially based on practical judgments that cannot be reduced to calculative rationality. In contemporary experience with the tort system, the incomparability of human values like the preservation of life and economic values like profit and efficiency may explain certain phenomena, like the enormous punitive damages judgment in the Ford Pinto case.<sup>153</sup> The jury was appalled that Ford had conducted a cost-benefit analysis to determine whether a redesign of the Pinto was warranted, even though it is precisely this kind of calculation that seems to be required by the *Carroll Towing* formula. But the punitive damages award, like Hand’s *O’Brien* case, shows that the B<PL formula was never meant to be applied literally. It is a rough heuristic, perhaps, but a defendant should be wary of assuming that its moral obligations, which are enforced by juries in tort litigation, are discharged merely by estimating the value of a human life in dollar terms and designing safety features accordingly. Instead, *Grimshaw* and *O’Brien* show that there are moral considerations at play in tort cases that cannot be captured by a monistic scheme of values, and that juries are likely to punish seriously a defendant that seems too willing to conduct its business as though

---

150. See *id.* at 612.

151. *Id.*

152. *Id.* For a contemporary example of the debate over incommensurable values in tort law, consider the problem faced by courts that are required to determine in products liability cases whether the plaintiff’s conduct could be compared with the strict liability of a manufacturer and used to reduce the plaintiff’s damages. See, e.g., *Murray v. Fairbanks Morse*, 610 F.2d 149, 156 (3d Cir. 1979) (noting the qualitative difference between the kinds of fault inherent in a defective product on the one hand, and the plaintiff’s failure to exercise due care on the other). Courts, such as the Third Circuit in *Murray*, have attempted to finesse this problem by claiming to compare the “causative contribution” of both parties, which ostensibly does not raise incommensurability problems. A better solution was adopted by the drafters of one of the new Restatements of torts, who explained that the jury should *assign* shares of responsibility to the parties, rather than purporting to compare quantities that cannot be reduced to a common scale. See RESTATEMENT (THIRD) OF APPOINTMENT OF LIABILITY § 8 cmt. a (Proposed Final Draft Mar. 31, 1998).

153. See *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981). See also DAVID LUBAN, *LAWYERS AND JUSTICE* 206-13 (1988); Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013 (1991).

goods like human life and safety are merely equivalent to a dollar figure.<sup>154</sup> Jurors seem intuitively to believe that there are higher and lower modes of valuation, and that some goods must not be devalued in advance by market actors. This popular understanding of the incomparability of values conflicts with the monism of economics and cost-benefit analysis, even though these monistic paradigms are perhaps a descriptively accurate account of how engineers and economists actually reason through difficult decisions.<sup>155</sup>

In a similar vein, the incomparability of values is the starting point for Margaret Radin's attacks on the imperialism of the marketplace.<sup>156</sup> Radin criticizes the law and economics movement for its relentless monism, for its claim that "[e]verything that is desired or valued is an object that can be possessed, that can be thought of as equivalent to a sum of money."<sup>157</sup> At the risk of oversimplifying a subtle argument, her claim can be described as

---

154. Cf. ANDERSON, *supra* note 4, at 209 (reporting on a study by economists who discovered that citizens asked how much money they would require as compensation for loss of scenic vistas in the Southwest perceive the payment as a bribe, not a fair expression of the value they place on the environment, which cannot be represented in monetary terms).

155. It is one thing to talk about higher and lower modes of valuation in a philosophical analysis, but quite another to advise a manufacturer about what it ought to do when assessing tradeoffs between safety and cost. A vehicle might be built that would offer close to perfect protection to human life in a crash, but this would be a tank, not a subcompact car. As long as we believe there is social utility in small, affordable cars, hard choices will necessarily be made about what structural safety features to forego in design. In the case of the Pinto, for example, placing the fuel tank behind the rear axle created the risk that the tank would be split open in a collision, but an alternative location for the tank would have increased other risks, such as the tank breaking into the passenger compartment in a crash. See Schwartz, *supra* note 150, at 1026-32. Furthermore, subcompact cars generally are less safe in collisions than larger, heavier cars or sport utility vehicles, but subcompacts offer countervailing benefits such as better fuel economy, a cheaper purchase price, and enhanced maneuverability in city traffic. Schwartz suggests that there is a "two cultures problem" at work here: public-policy analysis suggests one way of thinking about values; ordinary citizens (notably in their role as jurors) use another. See *id.* at 1041. The significant question for legal theory is which one of these cultures' understandings ought to form the basis of tort law, as developed through judicial decisions and jury instructions. Should juror outrage, founded on a belief about the incomparability of values, be a permissible basis for an award of punitive damages against a manufacturer that employed cost-benefit analysis, even though tort theory seems to require balancing the cost of safety precautions against the gravity of harm? For reflections on this question, see generally Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015 (1994); William H. Rodgers, Jr., *Negligence Reconsidered: The Role of Rationality in Tort Theory*, 54 S. CAL. L. REV. 1 (1980); Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990); Amelia J. Uelmen, *The Supposed Death of the Consumer Expectation Test: A Study in Culture and Caricature* (19\_\_ ) (unpublished manuscript, on file with author). I am grateful to Adam Scales for sharpening my thinking about these issues in numerous conversations about the basis for jury decisions in negligence cases.

156. See Margaret Jane Radin, *What, if Anything, is Wrong with Baby Selling?*, 26 PAC. L.J. 135 (1995); Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) [hereinafter Radin, *Market-Inalienability*].

157. Radin, *Market-Inalienability*, *supra* note 156, at 1861.

essentially Kantian in its outlines.<sup>158</sup> She argues that bodily integrity is not a fungible object that can be traded for a sum of money, contrary to the rhetoric of law and economics.<sup>159</sup> The marketplace depersonalizes, by its pervasive insistence that anything is permissible (that is, Kaldor-Hicks efficient), as long as someone can be compensated for any loss he or she may experience. People are nothing more than a collection of constituent attributes, which in turn are merely goods to be bought and sold on the market. Taken to extremes, the relentless monism of law and economics justifies brutal results. Radin criticizes Judge Posner for analyzing rape in terms of property rights, since Posner's analysis does not allow for the uniqueness of the rape victim's injury.<sup>160</sup> Rape does not represent merely a loss of *X* units of satisfaction, which can be replaced by fining the rapist an equivalent amount; rather, the crime is one of objectification, which is actually exacerbated by the payment of damages in "compensation" for being an act of depersonalization. Although Radin may not subscribe to this description, this portion of her argument has a great deal in common with the natural law theorists considered previously, who denied that human goods can be represented as simply the satisfaction of preferences. Instead, Radin is claiming that bodily integrity is a fundamental human good which cannot be equated with or traded off against other values.

One of the most frequently cited examples of the imperialism of the marketplace is the *Baby M* case.<sup>161</sup> The parties agreed to an economic exchange: for \$10,000, Mary Beth Whitehead would carry another family's child and surrender it at birth.<sup>162</sup> When she gave birth and wanted to keep the child, a protracted custody battle ensued in which the New Jersey Supreme

---

158. Radin faults Kant for treating persons as interchangeable moral agents shorn of individuating ("heteronomous" in Kantian terms) characteristics. See Radin, *Market-Inalienability*, *supra* note 153, at 1897. Her argument that personal attributes may not be used for the pleasure of others, even if the person is compensated for this invasion, however, is clearly indebted to the persons-as-ends formulation of the categorical imperative. Cf. KANT, *supra* note 35, at 37. Moreover, there is nothing in the Kantian theory of personhood that requires one to think of persons as lacking individuating characteristics.

159. See Radin, *Market-Inalienability*, *supra* note 156, 1880-84; cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1125-27 (1972).

160. See Radin, *Market-Inalienability*, *supra* note 156, at 1884-85. The uniqueness of the victim may be represented in economic terms by maintaining that personal dignity has infinite value. See Regan, *supra* note 139, at 1067. According to Regan, statements like "this friendship is of infinite value" do not suggest that friends and money are incomparable, but that for some people, certain relationships are worth more than any amount of money. *Id.*

161. In re *Baby M*, 537 A.2d 1227 (N.J. 1988). See also GUTMANN & THOMPSON, *supra* note 95, at 231-72 (extensive discussion of the *Baby M* case); ANDERSON, *supra* note 4, ch. 8.

162. See *In re Baby M*, 537 A.2d at 1235.



Court ultimately held that the surrogacy contract was invalid.<sup>163</sup> The court was primarily concerned with the contracting parties' usurpation of the state courts' authority to determine custody based on the best interests of the child.<sup>164</sup> However, there was an undertone of shock at the exchange of money for the custody of a child. "This is the sale of a child, or, at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father," wrote the court.<sup>165</sup> "The sale of a child" carries tremendous emotional impact in that sentence—children are not something that can be bought and sold. "There are, in a civilized society, some things that money cannot buy."<sup>166</sup>

The power of the *Baby M* example derives from the incomparability of values. When the court stated that "[t]here are . . . some things that money cannot buy," it implied that even if money and babies are comparable in some abstract sense, such that there is conceivably some sum that people might agree to trade for a baby, the transaction is nevertheless so abhorrent to human dignity that it cannot be permitted to stand in a civilized society. The court thus appreciated the different ways in which familial relationships and money are valued.

### B. Covering Values

The possibility or impossibility of making comparisons is intelligible only if there is some *covering value* in respect to which the intrinsic merit of two items may be evaluated.<sup>167</sup> People often refer to the impossibility of comparing apples and oranges, or chalk and cheese, without explaining with respect to what value they intend to compare the two items. The claim, "chalk and cheese cannot be compared," is spurious if there is a covering value, say "suitability as a housewarming gift," which makes cheese better than chalk. If, on the other hand, no appropriate covering value exists, the items are said to be noncomparable.

Noncomparability is a formal failure of comparison, formal in the sense that "some condition necessary for both the possibility of comparability and the possibility of incomparability fails to hold."<sup>168</sup> In one of Ruth Chang's

---

163. *See id.* at 1236-40.

164. *See id.* at 1246-48.

165. *Id.* at 1248.

166. *Id.* at 1249.

167. *See* Chang, *supra* note 127, at 5, 27-33. Michael Stocker calls the covering value a "higher-level synthesizing category." *See* STOCKER, *supra* note 12, at 172. In this discussion, I will adopt Chang's term.

168. Chang, *supra* note 127, at 29.

quirky examples, the items in the set {fried eggs, the number 9} are noncomparable with respect to the covering value “aural beauty.”<sup>169</sup> This kind of noncomparability is no threat at all to practical reasoning, for it is merely a failure to specify an appropriate comparability predicate. Practical reason, that is, the kind of problems people actually worry about in their lives, does not demand that we make comparisons between french toast and the city of Chicago for breakfast.<sup>170</sup> Noncomparability is therefore a non-problem that may safely be ignored.

However, some philosophers who wish to deny the incomparability of values have devoted sufficient attention to what I will refer to as the problem of complex or indeterminate covering values. Chang, in contrast, assumes that covering values can be specified with a minimum of controversy. In her examples, it is relatively easy to see why certain predicates belong to the covering value and others do not. For instance, she says that an appointments committee might evaluate new philosophers on the basis of the covering value “suitability as a faculty member,” which includes the components of intelligence, insightfulness, and creativity, but not sartorial elegance.<sup>171</sup> I suppose this case is clear enough, but consider a different case, imagined by Michael Stocker: I must decide whether to spend my day reading philosophy or lying on the beach.<sup>172</sup> Two possible covering values may be employed here: one, “a well-spent day,” or another, “sensual pleasure.” Depending on the covering value chosen, one of the options will seem superior, but there seems to be no way to ascertain which covering value to apply in this choice situation. The determination of which covering value to apply must be made by some kind of meta-covering value. This second-order covering value would be required to determine the proper mix of hedonic pleasure and intellectual stimulation required to achieve the best life for an agent.<sup>173</sup> If an agent were considering a third option, such as volunteering as a literacy tutor in a poor neighborhood, the second-order covering value would also be called upon to allocate the agent’s time between self-regarding activities and altruistic ones. Thus, what started out as a comparative choice between a limited range of options would end with an attempt at resolving some of the

---

169. *See id.* at 28.

170. The example is again Chang’s. *See id.* at 29.

171. *See id.* at 7-8; cf. ANDERSON, *supra* note 4, at 48-49.

172. *See* STOCKER, *supra* note 12, at 172.

173. In Robert Audi’s terms, an ethical theory exhibits second-order normative completeness if it “accounts for the finality of any duty that prevails in a conflict of duties (and for the equal stringency of two conflicting duties if they have equal stringency and one may therefore flip a coin).” AUDI, *supra* note 15, at 280.

knottiest problems in normative ethics.<sup>174</sup> A meta-covering value would end up being defined as something like G.E. Moore's "good"<sup>175</sup>—adequate to account theoretically for practical choices, but unable to guide the decisions actually made by agents. This problem becomes more acute where an agent is deliberating about competing forms of life, where the only potential covering value is some kind of notion of the good for humankind. (Who was more valuable as a contributor to human society, Beethoven or Wittgenstein?)

To illustrate this objection, it may be helpful to consider an extended example of the complexity of covering values and the incomparability of the constituent values. Renowned writer John McPhee set out on a backpacking trip through the Glacier Peak Wilderness in Washington's Cascade range, in the company of Sierra Club founder David Brower and mining geologist Charles Park.<sup>176</sup> The Kennecott Copper Corporation had patented a claim at the foot of Glacier Peak and was permitted to work the copper deposit even in the wilderness area.<sup>177</sup> Brower, Park, and McPhee went to have a look at the spectacular scenery before the mining began.

In every depression is a tarn, and we had passed a particularly beautiful one a little earlier and, from the escarpment, were looking back at it now. It was called Hart Lake and was fed by a stream that, in turn, fell away from a high and deafening cataract. The stream was interrupted by a series of beaver ponds. All around these free-form pools were stands of alder, aspen, Engelmann's spruce; and in the surrounding mountains, just under the summits, were glaciers and fields of snow. Brower, who is an aesthete by trade and likes to point to beautiful things, had nothing to say at that moment. Neither did Park. I was remembering the words of a friend of mine in the National Park Service, who had once said to me, "The Glacier Peak Wilderness is probably the most beautiful piece of country we've got. Mining copper there would be like hitting a pretty girl in the face with a shovel. It would be like strip-mining the Garden of Eden."<sup>178</sup>

---

174. Cf. Charles Taylor, *Justice After Virtue*, in *AFTER MACINTYRE* 16, 27-28 (John Horton & Susan Mendus eds., 1994) (arguing that any ordering of this sort presupposes a theory of the good).

175. See G.E. MOORE, *PRINCIPIA ETHICA passim* (1903); see also ANDERSON, *supra* note 4, at 119-23. Anderson's critique of Moore shows that a non-naturalistic monism is inadequate because it fails to account for the intersubjectivity of reason-giving.

176. See generally John McPhee, *A Mountain*, in *ENCOUNTERS WITH THE ARCHDRUID* 3 (1971).

177. At the time, mining activities were permitted in national wilderness areas. See 16 U.S.C. § 1133(d)(2)-(3) (1994).

178. McPhee, *supra* note 176, at 10.

\* \* \*

Park said, “A hole in the ground will not materially hurt this scenery.”

Brower stood up. “None of the experts on scenic resources will agree with you,” he said. “This is one of the few remaining great wildernesses in the lower forty-eight. Copper is not a transcendent value here.”

“Without copper, we’d be in a pretty sorry situation.”

“If that copper didn’t exist, we’d get by without it.”

“I would prefer the mountain as it is, but the copper is there.”

“If we’re down to where we have to take copper from places this beautiful, we’re down pretty far.”

“Minerals are where you find them. The quantities are finite. It’s criminal to waste minerals when the standard of living of your people depends upon them. A mine cannot move. It is fixed by nature. So it has to take precedence over any other use. If there were a copper deposit in Yellowstone Park, I’d recommend mining it. Proper use of minerals is essential. You have to go get them where they are. Our standard of living is based on this.”<sup>179</sup>

\* \* \*

A pluming waterfall, hundreds of feet high, fell from the east face of Plummer Mountain, and, for lack of a more specific goal, we were homing on it.

“This scenic climax is of international significance,” Brower said.

“That may be, but as long as you’ve got copper here, pressure to mine is going to continue.”

“Well, I’ll give up when copper has to be used as a substitute for gold. The kids will decide then. And I think they’ll decide not to mine it.”

“A mine would remove the mining area from wilderness—anyone in his right mind would admit that,” Park said. “You’re going to have people, equipment, machinery. You’re going to blast. You’re going to have a waste dump. You’re also going to get copper, which

---

179. *Id.* at 21.

contributes to the national wealth and, I think, well-being. And all that can't possibly affect Glacier Peak.”

“The mine will affect anybody in this whole area who looks at Glacier Peak. One of the last great wildernesses in the United States would have been punctured, like a worm penetrating an apple. There would not only be the pit but also the dumps, the settling ponds, the tailings, the mill, machine shops, powerhouses, hundred-ton trucks. Good Lord! The mood would go. Wilderness defenders have to get into abstract terms like mood and so forth, but that is what it is all about. How are the people and equipment going to get in and out of here? A road? A railroad?”

“I think cost would have to enter into that.”

“O.K. I put a price of ten billion dollars on the Glacier Peak Wilderness. Actually, that is facetious. There is no price. The price of beauty has never been evaluated. Look at that mountain! What would it cost to build an equal one?”<sup>180</sup>

The debate between Park and Brower shows not only that values like scenic beauty and inexpensive minerals cannot be compared on their own terms, but that no simple covering value can be specified that makes the comparison possible. The candidates for covering values in this debate, for example, “What is the socially best use for this wilderness area” or “The best mix of development and conservation”—are essentially contestable concepts.<sup>181</sup> There is simply no way to use one of those values as the basis for making comparisons, because the values themselves depend on how the values are ranked with respect to one another.<sup>182</sup> And, there is not much point in specifying the covering value as something like “social good,” because it is impossible to specify this value without begging the critical comparative questions. Is the social good best served by economic development or wilderness preservation? Since Park can only talk about the value of copper as it contributes to the economic life of the country, Brower’s argument is unanswerable in Park’s terms. Thus, the debate seems to become irrational, since Park and Brower are left making claims in separate normative domains

---

180. *Id.* at 39-40.

181. *See generally* W.B. Gallie, *Essentially Contested Concepts*, 56 *PROC. ARISTOTELIAN SOC'Y* 167 (1956).

182. *Cf.* Lewis A. Kornhauser, *No Best Answer?*, 146 *U. PA. L. REV.* 1599, 1617-19 (1998) (stating that incomparability results when an “integration condition” is too weak to specify how values should be ranked).

that do not encompass the other's stated values. Herein lies the threat posed by the incomparability of values to practical reasoning—if Brower is right that it is genuinely impossible to compare the values of a mountain's beauty and the social benefits of minerals, his debate with Park was nothing more than a clash of preferences, as though these two highly educated people had spent several days on a camping trip arguing about whether vanilla or rum raisin ice cream was the “better” flavor.<sup>183</sup>

One response is to characterize the objection as one based on epistemic uncertainty, not incomparability of values. “In real-life ethical confrontations, people entangle their moral claims with factual propositions about human nature and the world. They deliberately open up the former to the latter, sometimes holding themselves prepared to abandon or modify a moral position if the facts turn out to be different.”<sup>184</sup> Our inability to choose among options may result from a lack of complete information.<sup>185</sup> In addition to good faith empirical disagreements, disputes often are made intractable through the presence of ignorance, stupidity, bigotry, pig-headedness, arrogance, or petty bureaucratic squabbling.<sup>186</sup> For example, Ruth Chang discusses one of Joseph Raz's illustrations, in which a musically talented college student is struggling with the choice between pursuing a career as a clarinetist or going to law school to become a solicitor.<sup>187</sup> She doubts that this example shows incomparability of the two careers, although she takes pains to argue that the reason the careers are incomparable does not depend on the limitations of human agents to reason through the dilemma.<sup>188</sup> Others, however, have argued that incomparability in a case such as this one is a function of the possibility of making erroneous judgments, although it is conceptually possible for an omniscient agent to view simultaneously the two

183. See ANDERSON, *supra* note 4, at 92-95 (arguing that tastes, or objects of preferences, belong to a social domain in which idiosyncrasy is tolerated, but intrinsic goods are grounded in communities of valuation that admit of objectivity).

184. Jeremy Waldron, *On the Objectivity of Morals: Thoughts on Gilbert's Democratic Individuality*, 80 CAL. L. REV. 1361, 1374 (1992).

185. See JON ELSTER, SOLOMONIC JUDGEMENTS 9-10 (1989); DAVID LYONS, ETHICS AND THE RULE OF LAW 33 (1984) (“The relevant facts can be much more controversial than the moral judgments.”); Leo Katz, *Incommensurable Choices and the Problem of Moral Ignorance*, 146 U. PA. L. REV. 1465 (1998).

186. See RICHARDSON, *supra* note 12, at 260.

187. See RAZ, *supra* note 12, at 332.

188. See Chang, *supra* note 127, at 23-24; cf. BOK, *supra* note 106, at 77-78 n.\* (1978) (“Moral principles, just like length and weight, represent different dimensions by which we structure experience and *can therefore present conflicts in concrete cases but never in the abstract*. It is for this reason that the search for priority rules among moral principles in the abstract is doomed to fail; one might as well search for such priority rules among pounds, yards, and hours in the abstract.”) (emphasis added).

alternative lives faced by the agent and help the would-be clarinetist or lawyer make the right decision. If it were somehow possible to live life as a clarinetist and then return to the starting point and experience a different life as a lawyer, the perplexed young agent might find reason to favor one career over the other.<sup>189</sup> The best a single human can do, however, is to attempt to view the alternative life choices imaginatively by putting him or herself in the position of both the clarinetist and the lawyer and trying to understand each life from an internal point of view.<sup>190</sup> The choice only seems like one between incomparable alternatives, because an agent with a God's-eye view could decide on the best course of action. From the human standpoint, however, the options really are incomparable, since a God's-eye perspective is not available to us. Even if the conflict is only an apparent one, we have no means of transcending this apparent conflict, so the choice situation as experienced is one between incomparable options.<sup>191</sup> Presumably, critics who accept the epistemic objection would have a similar response to the debate reported by McPhee, that if somehow everything were knowable, we as a society would be able to make the allocative decision between mineral production and scenic views. It is only the multiplicity of variables and unknowns that makes the dispute between Park and Brower seem like one between incomparable values.

The epistemological objection has some bite when applied to the clarinetist versus lawyer example, where the options are richly detailed and the effects of the choice long-lasting, or in Millgram's example of choosing between potential roommates. In the example of the Glacier Peak wilderness, however, it is not difficult to conceptualize the values of pristine wilderness and accessible minerals, but it does seem daunting to construct a covering value that enables a decision maker to resolve contested social issues about how best to balance development and conservation. One might argue that the debate seems intractable only because of our imperfect knowledge: perhaps

---

189. See generally Regan, *supra* note 139; cf. Elijah Millgram, *Incommensurability and Practical Reasoning*, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* 151, 160-61 (Ruth Chang ed., 1997). In Millgram's example, the agent is trying to choose between two prospective roommates: one a slob but an interesting conversationalist, the other a somewhat dull neatnik. See *id.* The agent has no idea how to compare the two roommates for suitability until several months have passed; he has chosen one over the other and realizes that neatness was more important than good conversation—the piled-up dishes in the sink are driving him to distraction, and so on. See *id.*

190. See KRONMAN, *supra* note 15, at 69-72. Kronman, like Raz, accepts the claim that the alternative career paths are incomparable. See *id.* at 69.

191. Cf. KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* 26-27 (1995); Jeremy Waldron, *The Irrelevance of Moral Objectivity*, in *LAW AND DISAGREEMENT* 164 (1999) (arguing that the debate over moral realism is beside the point for human affairs, because even if there are objective values "out there" in the universe, the only thing that exists here on earth are *beliefs* about what those values are, and people continue to disagree about these beliefs).

if all the relevant facts were known, the government official would realize that we have plenty of minerals but not nearly enough wilderness, or vice versa. But suppose it were the case (as I think it is) that as a nation we do not face grave shortages of either building materials or scenic vistas. Then the decision turns on what kind of society we want to inhabit—one more materially prosperous but less enriched with natural beauty, or the reverse. The point of the example is that it seems impossible to specify a covering value that takes into account the full range of moral and prudential considerations at play in the policy dispute and tells us how they should be ranked. Of course, if that political debate has been resolved at a higher level of government, the covering value for the bureaucrat's decision will be readily apparent, but the policy debate itself, in any government institution, can hardly be resolved without a means for comparing the values at stake, which is precisely what makes the covering value indeterminate.

The difficulty of specifying a covering value in ethical reasoning is apparent in cases of tragic conflict, where an agent is faced with two incompatible courses of action, either of which will preserve some important value but destroy another. The conflict is presented by the inability of the agent to do both of two things she ought to do.<sup>192</sup> Some familiar conundrums of moral philosophy show that an agent can be faced with a choice in which he cannot help doing wrong, because each of two incompatible actions is supported by moral reasons that mandate the action, and that are not overridden by other moral requirements.<sup>193</sup> In a classic example imagined by Sartre, a patriotic young Frenchman must choose whether to stay home to care for his ailing mother or join the Resistance.<sup>194</sup> If he cares for his mother, which seems morally obligatory, he must forfeit the opportunity to fight for his country, which also presents itself as something that must be done, for good moral reasons. Both options retain their moral significance, regardless of what the agent chooses to do, and the reasons for doing the unchosen option are not overridden. These tragic choices produce what have been

192. See Bernard Williams, *Ethical Consistency*, in *PROBLEMS OF THE SELF* 166, 171 (1973).

193. See JONSEN & TOULMIN, *supra* note 9, at 95; Philippa Foot, *Moral Realism and Moral Dilemma*, 80 J. PHIL. 379, 380 (1983) ("In situations of moral conflict as thus understood one principle enjoins one action and another another, and it is impossible that the agent should do both."); Walter Sinnott-Armstrong, *Moral Realisms and Moral Dilemmas*, 84 J. PHIL. 263 (1987). Gowans represents this claim, which he calls the "dilemmas thesis," in deontic logic: "There are moral conflicts in which the correct resolution of moral deliberation includes both OA and OB." GOWANS, *supra* note 12, at 49. The dilemmas thesis is contrasted with what Gowans calls the "options thesis," but which is also a corollary of the essential claim of monism, that "for every moral conflict, the correct conclusion of moral deliberation includes exactly one of the following: (1) OA; (2) OB; or (3)  $\sim$ OA &  $\sim$ OB & O(A  $\vee$  B)." *Id.*

194. See Jean-Paul Sartre, *Existentialism*, in *EXISTENTIALISM AND HUMAN EMOTIONS* 24 (1957).



called “moral remainders,” or the lingering sense that the agent has done wrong, even though she chose her action based on good reasons.<sup>195</sup> There remains “a disvalue even within that justified, perhaps obligatory, whole—a disvalue which is still there to be noted and regretted.”<sup>196</sup>

Similarly, politics is the arena for a particularly acute kind of moral dilemma, known as the problem of dirty hands, in which it is asserted that a public official must inevitably participate in wrongdoing.<sup>197</sup> Consider two well-known examples, slightly adapted from Michael Walzer: (1) A virtuous politician who will bring about long-needed social justice in the city can get elected only by entering into a cozy construction deal with a corrupt ward boss, where the politician agrees to steer city construction contracts to the boss’s family; (2) The CIA can learn the location of several bombs planted in elementary schools around the country only by torturing a captured terrorist.<sup>198</sup> Torturing the prisoner or making the corrupt deal may, at the end of the day, be justified. But justification of these choices does not eliminate the sense of wrongfulness we feel about the politicians’ actions. There remains some profound moral sense in which torture is wrong, even if torturing the prisoner was the only way to protect the lives of dozens of innocent persons.

Tragedy and dirty hands are different from the ordinary costs of actions, which are imposed on us by the simple facts of scarcity and mortality. It is important not to overstate this point, because not every choice is tragic. “[N]early every choice and act requires a compromise between values, even moral values. But again, unless one’s life is unfortunate beyond description, not all such compromises are compromising.”<sup>199</sup> On any given occasion, we may have to choose between, say, watching a basketball game and working on a forthcoming article. It would be a serious misdescription of this situation to call it “tragic” merely because we cannot have it both ways. There is no cause to feel ashamed of choosing to work or watch the game, even though either choice necessarily means forgoing another use of one’s time. “[T]he

---

195. See GOWANS, *supra* note 12, at 91: “[T]here are moral conflicts in which, whatever the agent does, he or she will do something which is morally wrong in the sense of transgressing some moral value.” See also ROSS, *supra* note 35, at 28.

196. STOCKER, *supra* note 12, at 13.

197. See DENNIS THOMPSON, *POLITICAL ETHICS AND PUBLIC OFFICE* 4, 11, 18-19, 22, 40, 67, 148 (1987); Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 *PHIL. & PUB. AFF.* 160 (1973); Bernard Williams, *Politics and Moral Character*, in *PUBLIC AND PRIVATE MORALITY* 55 (Stuart Hampshire ed., 1978).

198. Walzer, *supra* note 197, at 165-67.

199. STOCKER, *supra* note 12, at 14; see also ANDERSON, *supra* note 4, at 63 (“[A] choice becomes tragic, as opposed to merely unfortunate or painful, only when it threatens the very coherence of the chooser’s life.”).

strong utilitarian does not think that people go into fits of paralysis whenever they are required to compare goods that cross different domains of their social lives. . . . Over the long haul, when we look at everyday life, the hard question is not why most of these choices are so difficult to make, but why they seem so easy to make.”<sup>200</sup> We do not call these choices “tragic,” because we recognize the possibility of specifying a covering value that readily resolves the conflict. For example, if the covering value is, “what one ought to do in order to gain tenure,” then it is clear that skipping the basketball game to work on the article is mandated by the covering value. If, on the other hand, the covering value is, “what one ought to do to maximize the enjoyment of one’s life because, after all, we only go around once,” then watching the game may be favored. Tragedy, for want of a better word, results from the inability to specify a higher-order value that is capable of guiding decision. Epstein is correct that people do not spend all day locked in irreconcilable value conflicts, because for the vast majority of choices there is a covering value that lends order to individuals’ lives.<sup>201</sup> But this observation does not carry over to all cases, like Sartre’s hypothetical, in which the very specification of the covering value is contested, or where second-order moral reasons are absent or stand in conflict. In such a case, many philosophers have followed Sartre and advocated some form of existentialist reasoning. Raz, for example, maintains that “once reason has failed to adjudicate between a range of options, we normally choose one for no further reason, simply because we want to.”<sup>202</sup>

Here is the rub of my argument: the purpose of the practice of lawyering cannot be captured in a covering value that guides decision in all cases, because any plausible covering value is to some extent indeterminate or internally inconsistent. This is not to say that all ethical choices faced by lawyers result in perplexity, tragedy, or dirty hands. Any conceivable covering value for the practice of lawyering must reflect that a lawyer possesses specialized knowledge, interprets and gives advice on various legal texts, speaks and acts on behalf of another (a person, an entity, the state) in judicial proceedings, is privy to sensitive information about the other’s affairs, and so on. Otherwise, that covering value would not fit descriptively

---

200. Richard A. Epstein, *Are Values Incommensurable, or is Utility the Ruler of the World?*, 1995 UTAH L. REV. 683, 691.

201. Alternatively, there may be a second-order moral norm, such as the principle of reciprocity (the “Golden Rule”), which directs choice in cases where first-order values conflict. See Robert P. George, *Does the “Incommensurability Thesis” Imperil Common Sense Moral Judgments?*, 37 AM. J. JURIS. 185, 189-95 (1992).

202. Joseph Raz, *Incommensurability and Agency*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 110, 125 (Ruth Chang ed., 1997).

with the extant social practice of lawyering.<sup>203</sup> (Of course, alternative legal systems exist that support lawyering practices which would be alien to common-law trained jurists. The covering values that guide choices for those professionals would naturally have different contours. I do not mean to suggest that a different model of lawyering would not be normatively justified in, say, Germany or Japan.)

The practice of lawyering in the present-day United States is justified with respect to social functions that are frequently in conflict.<sup>204</sup> Lawyers are required to maintain order; permit challenges to the existing order; speak on behalf of the political community personified; give a voice to those who may not be heard by the majority; enhance efficiency so that powerful state and private entities can get things done for the benefit of society; challenge abuses of power when the little guys get trampled underfoot; protect private ordering and individual expectations; and align private action with the social good. Lawyers must secure such advantages for their clients as are attainable within the legal system, but also not impede the truth-seeking roles of other actors, such as courts, administrative agencies, and other lawyers. Lawyers are expected to act as partisans, “champions,” “hired guns,” or “friends” to their clients, yet must also avoid inflicting unjustified harm on third parties. Lawyers must counsel their clients on compliance with legal norms, but are also permitted to challenge the boundaries of existing law. Lawyers vindicate the core value of political liberalism—namely, preservation of individual autonomy—while also maintaining a civic republican respect for tradition and the common good. Thus, appealing to the role or social function of lawyers as a covering value for ethical choice situations merely replicates the problem of incomparability.<sup>205</sup> As I will explain in Section IV.B, the traditions of legal practice in the United States embrace this pluralism of professional ideals, permitting us to admire lawyers as profoundly different from one another as Darrow and Davis. If professional ideals were somehow

---

203. Cf. ANDERSON, *supra* note 4, at 92; DWORKIN, *supra* note 10, at 67 (stating that an interpretation of a practice must exhibit a sufficient degree of fit with the standing features of the practice; otherwise, it is something more radical like a proposal for a completely new kind of practice).

204. Cf. JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 320 (1994); MORRIS, *supra* note 51, at 790-92. Raz criticizes Dworkin for assuming that a social practice can have only one purpose, which can then be used as a criterion to identify when an account of that practice is made the best it can be by a process of constructive interpretation. See RAZ, *supra*, at 320. For example, the law of criminal procedure, including the Fourth Amendment exclusionary rule, has as its purpose both the preservation of probative evidence and the deterrence of unjust police practices. An interpretive justification of this body of law would have to refer to diverse purposes as elements in the justificatory argument.

205. Cf. DUNCAN KENNEDY, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1731-32 (1976) (arguing that appealing to the justificatory purpose of rules does not cure indeterminacy in the law, because the reasons behind the rules are themselves at cross purposes).

forced into a single mold, so that only one of these lawyer-archetypes could be found worthy of respect, then much of the richness of legal practice as a moral ideal would be eliminated.

### C. *Must We Mean What We Say About Incomparability?*

Claims about incomparability, setting aside for the moment whether they are true, play a significant role in our thinking about moral values. Perhaps a productive way to approach the debate over monism and pluralism is to ask not whether incomparability is true as a matter of ontology, but whether *belief* in the incomparability of values will have a positive impact on our normative discourse. Frederick Schauer, for example, would ask of the Park-Brower dispute whether Brower's position—that the value of the mountain cannot be compared with the value of copper—is likely to lead to more productive conversation about conservation and natural resource development.<sup>206</sup> It could be the case that incomparability is false, but there nevertheless may be good reasons for people to talk as though some values are incomparable. Eric Posner postulates that people who use the discourse of incomparability are trying to signal to potential cooperative partners that they are reliable, principled people—"good types," as he calls them—who take their moral obligations quite seriously.<sup>207</sup> His example of this kind of communication is rather startling: When Posner tells his wife, "I value you more than anything," he doesn't really believe that his wife cannot be valued in some other terms. Instead, he is signaling to his wife that he is a

---

206. See Frederick Schauer, *Instrumental Commensurability*, 146 U. PA. L. REV. 1215, 1216-17 (1998). Schauer insists that he does not necessarily accept a pragmatic theory of truth generally, only that pragmatic evaluation is a useful way of thinking about incommensurability. See *id.* at 1223-24. For Schauer's earlier statement of this position, see Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785 (1994). For an opposing view, see Jeremy Waldron, *Fake Incommensurability: A Response to Professor Schauer*, 45 HASTINGS L.J. 813 (1994). Waldron argues that Schauer cannot have it both ways—if we have objective knowledge that something is true, then we must act on it; practical knowledge has a "to be done" quality about it. See *id.* at 814. It is, therefore, incoherent to hold a belief that values are comparable, yet act as though they are not, or vice versa. See *id.* A possible response to Waldron's argument can be found in Elizabeth Anderson's pragmatic theory of value, which maintains that any authentic evaluative distinction must play some role in practical reasoning; thus, incomparability is true if and only if we have no need to compare two goods in practice. See ANDERSON, *supra* note 4, at 47-55; Elizabeth Anderson, *Practical Reason and Incommensurable Goods*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 90 (Ruth Chang, ed., 1997). Interestingly, Waldron seems to have moved toward this position in his recent writing. He argues that the truth of the claim of moral realism is irrelevant to political deliberation because finite human agents can have only beliefs about ostensibly "objective" values; there is no way to guarantee that we perceive objective values correctly. See WALDRON, *supra* note 191.

207. See Eric A. Posner, *The Strategic Basis of Principled Behavior: A Critique of the Incommensurability Thesis*, 146 U. PA. L. REV. 1185, 1189-1200 (1998).

trustworthy fellow, a “good type” in his jargon, and will not easily let other things interfere with his relationship with her. The statement about the incomparability of his wife and other values is nothing more than an exaggeration, or a noble lie.

It is tempting to use this argument as an example of the morally impoverished state of law-and-economics discourse,<sup>208</sup> but Posner’s focus on the communicative function of incomparability claims does help explain why some actors may use arguments for the incomparability of values without necessarily committing themselves to an ontological claim about values. For example, applying the analysis of signaling behavior to the debate over the Glacier Peak Wilderness, Brower’s position can be understood as an expression of the strongest possible commitment to wilderness conservation. Perhaps he phrases his arguments in incomparabilist terms to signal to Sierra Club members that he will stand firm and resist any attempt to extract minerals from the public lands. On the other hand, the signal could be directed toward government decision makers, who may wish to consider the strength of the opposition by environmental groups to mining in national wilderness areas. Or, Brower’s words could be aimed at the Kennecott Copper Corporation, as a veiled threat to obstruct the opening of the mine through legal action.

Signaling conventions also help explain why certain choices are not taken to reveal tradeoffs between incomparable values. For example, people sacrifice intimate friendships to move to a different part of the country to make more money.<sup>209</sup> This choice appears to reveal a rational weighing of preferences, and a decision that the additional money is worth more than the friendships left behind. But, as Raz argues, what matters is the symbolic significance imputed by social convention to the action.<sup>210</sup> People do not attach an economic value to spending a month with their loved ones, and would be angry indeed if someone tried to offer them a sum of money to be parted for a month. Nevertheless, people occasionally spend a month away from home as part of their jobs—that is, to earn money. In those instances, in light of the customs surrounding the trip away from home, it is clear that the agent does not affirm an economic trade-off, spouse for money. Thus, someone who relocates to pursue a new job does not symbolically affirm that

---

208. Cf. Brian Leiter, *Incommensurability: Truth or Consequences?*, 146 U. PA. L. REV. 1723, 1727 (1998) (“[T]he empirical inadequacy of rational choice theory strikes me as yesterday’s news”); Nussbaum, *supra* note 87; Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219 (1994).

209. See RAZ, *supra* note 12, at 337-38.

210. *Id.* at 348-49; see also ANDERSON, *supra* note 4, at 59-64.

he can be bought out of his friendships.

The signaling model may explain some apparent instances of incomparable values. Perhaps some attorneys who use the language of incommensurability are indeed trying to signal that they are “good types.” For example, in the famous “buried bodies” case,<sup>211</sup> a criminal defense lawyer learned from his client, who had been charged with an unrelated murder, that the client had killed several young women and hidden their bodies in the wilderness. Based on his client’s directions the lawyer visited the location of the graves, photographed the bodies, and said nothing in public, even though he knew that the parents of the murdered women had been pleading for information about their missing daughters. Revealing the location of the bodies would have assuaged the parents’ despair, without materially worsening the position of the client, who was sure to be convicted of two other murders. The lawyer also realized, however, his obligation to pay due respect to the potentially corrosive effects of lawyers divulging their clients’ secrets. Not revealing the location of the bodies was mandated by the duty of loyalty to the client, while disclosure seemed required by considerations of care for the anguished parents. The lawyer reported having felt this pull of opposing obligations, but he ultimately concluded that the parents’ suffering “was not worth jeopardizing my sworn duty or my oath of office or the Constitution.”<sup>212</sup> Significantly, the lawyer acknowledged publicly that his professional obligation to represent “a bastard” like his client caused pain to the relatives of the murder victims: “I caused them pain . . . . What do you say? Nothing I could say would justify it in their minds. You couldn’t justify it to me.”<sup>213</sup> He seemed to be saying, “I’m not a monster, I’m a conscientious professional. I’m the kind of lawyer you want in your small town, not someone you should run out of town on a rail.” Because the lawyer did live and practice in a small community, this public show of contrition may have been essential to the lawyer’s retaining his livelihood.<sup>214</sup>

---

211. See *People v. Belge*, 372 N.Y.S.2d 798 (N.Y. Co. Ct. 1975), *aff’d mem.*, N.Y.S.2d 711 (N.Y. App. Div. 1975), *order aff’d*, 359 N.E.2d 377 (N.Y. 1976). David Luban analyzes this case in his book *Lawyers and Justice*, and the case forms the core of the debate with one of his critics. See LUBAN, *supra* note 152, at 53-54; Luban, *supra* note 108; David Wasserman, *Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation*, 49 MD. L. REV. 392 (1990).

212. Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 900 (1996) (quoting Frank Armani, one of the lawyer-defendants in the *Belge* case).

213. *Id.* at 903 (quoting Frank Armani).

214. This kind of signalling behavior can also lead an agent to avoid saying something that would suggest the comparability of disparate values, like human life and money. One political scientist imagines a conversation that can never occur, because of the messages it would send about the

The lawyer in the buried bodies case might merely have been trying to salvage his public reputation by frankly admitting that he was pulled in two directions by values that seemed irreconcilable. Posner may be correct that this case does not show us anything about whether the values of loyalty and avoiding harm to third parties are, in fact, incomparable. The signaling explanation does not suffice to account for other cases of ethical conflict in legal practice, however, in which the incomparability of values is a central feature of the agent's choice, not merely a post hoc label attached to the choice by the agent as a justification. In the problem cases in Section II of this Article, there is no communicative explanation for the incomparability of values. Indeed, in the first two problems, no one is communicating anything to another person; they are simply going about their business, trying to decide whether to act or not, but they are not making a public statement about their beliefs or values. The third problem does involve communication, but the lawyer is not asserting the incomparability of values. Her communication, instead, is a defamatory utterance about the judge assigned to her case, which is made for the purpose of angering the judge and causing his recusal. In all of these cases, the moral values are incumbent upon agents as a result of the relationships between the agent and other parties, which are in turn created by the social practice of lawyering. They cannot be explained as simply signaling conventions, where signaling is not a feature of the dilemma.

#### *D. Incommensurability of Worldviews, Paradigms, or Forms of Life*

As a cautionary note, it is possible to overstate the thesis about the incomparability of values as a broad claim of conceptual incommensurability, usually associated with the work of Thomas Kuhn and Paul Feyerabend.<sup>215</sup> Kuhn argues that scientific knowledge proceeds in fits and starts. Competing theoretical frameworks are offered to explain observed data, and scientific revolutions occur when the adherents of one framework convert the scientific community to their new system of explanation. (These

---

speaker: "Mrs. Jones, I share your grief about the plight of your husband, but we simply cannot afford to spend \$30,000 per year to keep him alive when people are dying elsewhere who could be saved for much less." Steven E. Rhoads, *How Much Should We Spend to Save a Life?*, in VALUING LIFE (Steven E. Rhoades ed., 1980). This example also highlights the incomparability of individuals, which is a separate, and very significant, moral consideration.

215. See THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970); PAUL FEYERABEND, *AGAINST METHOD* 255 (rev'd ed., 1988) ("The (cultural) measuring instruments that separate 'reality' from 'appearance' change and must change when we move from one culture to another and from one historical stage to the next.").

frameworks are similar to what Wittgenstein calls “forms of life,” that is, what has to be taken as given in order for rational inquiry and, indeed, human life, to proceed.<sup>216</sup>) A crucial premise in Kuhn’s argument is that these frameworks, or paradigms, as he calls them, are incommensurable; that is, an explanation of observed phenomenon within New Paradigm cannot be translated into terms that are intelligible in Old Paradigm, because New Paradigm employs numerous concepts and categories that simply do not exist in Old Paradigm.

Lavoisier, we said, saw oxygen where Priestly had seen dephlogisticated air and where others had seen nothing at all. . . . And in the absence of some recourse to that hypothetical fixed nature that he “saw differently,” the principle of economy will urge us to say that after discovering oxygen Lavoisier worked in a different world.<sup>217</sup>

Where Kuhn speaks of a “hypothetical fixed nature” that the disputants could appeal to, he refers to a standpoint outside the competing paradigms, from which the claims of Old Paradigm (phlogiston) and New Paradigm (oxygen) could be assessed.<sup>218</sup> The naive realist view, at least as caricatured by Kuhn, is that the-world-as-it-is-in-itself contains either oxygen or phlogiston, so either Lavoisier’s theory or Priestly’s must be the correct description of nature. Kuhn’s radical claim is that there is no theory-independent criterion of truth in science, so one cannot say that Priestly was wrong, only that Lavoisier’s claims have achieved general acceptance in the scientific community. Science does not give us access to the-world-as-it-is-in-itself, so we cannot use the world as a touchstone to prove or disprove theories that posit the existence of oxygen or phlogiston. We cannot ask whether scientific claims are true simpliciter, only whether they are valid under the scientific paradigm currently in vogue.<sup>219</sup>

---

216. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, pt. II, at 226e (G.E.M. Anscombe trans., 3d ed. 1958).

217. KUHN, *supra* note 215, at 118.

218. Cf. MACINTYRE, *supra* note 16, at 166.

When two rival large-scale intellectual traditions confront one another, a central feature of the problem of deciding between their claims is characteristically that there is no neutral way of characterizing either the subject matter about which they give rival accounts or the standards by which their claims are to be evaluated.

*Id.*

219. Some legal theorists invoke Kuhn in support of their critique of law as radically indeterminate. See, e.g., Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990). To the extent Kuhn’s claims fail on their own terms, as I argue below, the radical legal indeterminists do not gain by invoking the supposed crisis in empirical science as a symbol for the instability of legal propositions.



Kuhn's critics argue that broad conceptual incommensurability is literally an unintelligible notion. His arguments about paradigms only make sense if there is some common theoretical framework within which to describe the rival scientific traditions.<sup>220</sup> Kuhn's examples of radical paradigm shifts "are not so extreme but that the changes and the contrasts can be explained and described using the equipment of a single language. . . . Kuhn is brilliant at saying what things were like before the revolution using—what else?—our post-revolutionary idiom."<sup>221</sup> Kuhn is able to talk about the transition from the theoretical construct of phlogiston to the now-accepted explanation of the role of oxygen in combustion while remaining intelligible to his readers. We have the same access to the word "phlogiston" that the believers in phlogiston did, even though we don't believe such a thing exists. Only because our language is rich enough to describe the beliefs of Priestly and Lavoisier and to explain the grounds for the disagreement between the rivals is it possible for us to understand Kuhn's claim that the two theories are incommensurable. Since the very notion of incommensurable paradigms or conceptual schemes depends on the existence of a language in which both paradigms can be represented, the strong argument for the existence of mutually unintelligible conceptual frameworks vitiates itself.

In other words, it is important not to overstate the amount of agreement that is necessary between two frameworks in order for members of these diverse communities to have productive arguments with one another about the truth of competing claims. "As Peirce, Quine and Sellars, and Wittgenstein show us (in very different ways), there is no need to presuppose that there is some ultimate foundation or ultimate standards that must be presupposed to make [scientific debate across rival paradigms] intelligible."<sup>222</sup> We do manage to represent the history of science effectively in our present-day language, and virtually all observers, even radicals like Feyerabend, agree that science made progress through the work of Galileo, Einstein, and the quantum physicists in the early twentieth century. The lasting insight of Kuhn and his followers is that debates between members of rival communities cannot be neatly theorized as deductive logic; instead, we must understand scientific argument, especially at "revolutionary" moments, as involving rhetoric, persuasion, and above all, practical judgment.<sup>223</sup> Although there may not be an externally given, theory-independent set of

---

220. See Donald Davidson, *On the Very Idea of a Conceptual Scheme*, in *INQUIRIES INTO TRUTH AND INTERPRETATION* 182 (1984).

221. *Id.* at 184.

222. BERNSTEIN, *supra* note 16, at 73.

223. *Id.* at 74.

criteria to which scientific disputants can appeal directly, the disagreements described by Kuhn are not wholly irrational.<sup>224</sup> Instead, the rationality of the debates must be redescribed.<sup>225</sup> The distance between conceptual frameworks emphatically does not mean that anything goes, or that there is no such thing as truth and falsity in science.<sup>226</sup> Rather, it merely entails a style of debate that requires imagination, sympathy for arguments based on rival presuppositions, and an openness to the explanatory power of the rival framework. When we approach a rival culture, whether in the natural sciences or in social disciplines like anthropology, we may not be able to translate alien concepts directly into terms with which we are familiar, but it is nevertheless quite possible for us to reach a sufficiently rich understanding of the other culture's practices to compare them with similar practices in our culture.<sup>227</sup> Again, as Clifford Geertz has recognized, this comparison does not proceed through cross-cultural universals, nor does it entail cultural relativism.<sup>228</sup> Instead, members of the rival communities use the claims of the rival community to test the acceptability and plausibility of claims within their own preexisting conceptual framework that they take to be true.<sup>229</sup>

In the realm of ethics, it is important to observe the extent to which members of rival communities (perhaps constituted along geographic lines, or otherwise associated with a particular cultural, religious, or ethnic group) are not making normative claims that purport to hold only for members of that community.<sup>230</sup> A normative framework is the response to a history of grappling with central questions about how people ought to live their lives and structure their families, governments, and social institutions.

[W]hen a person talks about his identity as a Maori, or a Sunni Muslim, or a Jew, or a Scot, he is relating himself not just to a set of dances, costumes, recipes and incantations, but to a distinct set of

224. *Id.* at 92.

225. *Id.* at 92-93.

226. This extreme conclusion could not be true, because, if it were, the scientific enterprise would simply grind to a halt, as opposing camps of scientists with no way to commensurate their claims rationally fell into a game of power politics or pointless squabbling. Cf. John Finnis, *Commensuration and Public Reason*, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* 215, 217 (Ruth Chang ed., 1997) ("If worldviews are incommensurable, we have no reason to accept a scheme of social decision making, a constitution, a Rule of Law. For each person, then, the challenge is simply to become and remain one of those who are in charge.") (emphasis in original).

227. BERNSTEIN, *supra* note 16, at 103.

228. *Id.* at 105-06 (citing CLIFFORD GEERTZ, *INTERPRETATION OF CULTURE* (1973)).

229. *Id.* at 138.

230. This discussion draws from Jeremy Waldron, *Cultural Identity and Civic Responsibility*, in *CITIZENSHIP IN DIVERSE SOCIETIES* (Will Kymlicka & Wayne Norman eds., 1999) [hereinafter Waldron, *Cultural Identity*]. See also Jeremy Waldron, *Particular Values and Critical Morality*, in *LIBERAL RIGHTS* 168 (1993).

practices in which his people . . . have historically addressed and settled upon solutions to the serious problems of human life in society.<sup>231</sup>

As Waldron emphasizes, these practices have developed historically within the context of a particular culture, but no one within that culture thinks they are true, insightful, or useful only for members of the culture and optional for everyone else.<sup>232</sup> The story told about a given norm is not, “Because I am a member of such-and-such a community, I value X.” Instead, it is, “X is a good thing to do.” For example, conservative Christians in the United States do not claim that single-sex marriages are wrong for themselves, but acceptable (or a matter of indifference) for others outside their framework. Rather, they believe quite vehemently that their insistence on the limitation of the institution of marriage to a man and a woman is warranted for people generally. Many secular liberals, on the other hand, believe that extending the institution of marriage to encompass same-sex unions ought to be accomplished, not only within the distinct community of secular liberals, but in society as a whole.<sup>233</sup> Notice two things about the interaction between these communities. First, neither community believes that its claims about right and wrong are valid only for its members. If a religious conservative were asked why marriage ought to be reserved for opposite-sex couples, he or she would presumably respond by telling a story about the importance of different gender roles within a family, or the biological necessity of procreation, or about Adam and Eve.<sup>234</sup> These reasons may not be persuasive to someone else, but they are certainly meant to be a better account of why the form of life lived by the religious conservative is morally preferable to the alternatives.<sup>235</sup> Members of both communities would claim that their understanding of the institution of marriage and its alternatives is true, while the other community’s account is beset with bias, one-sidedness, and partiality.<sup>236</sup> Second, the claims made by these rival communities are not so different that they cannot be understood by others. They begin from dramatically different metaphysical, theological, and empirical presuppositions, to be sure, but they are not mutually

---

231. Waldron, *Cultural Identity*, *supra* note 230.

232. See Alasdair MacIntyre, *Moral Relativism, Truth, and Justification*, in *THE MACINTYRE READER* 202 (Kelvin Knight ed., 1998).

233. This belief is shared by some liberal Christian communities, such as the Riverside Church in New York City, but it is a minority view, even among relatively progressive Protestant denominations.

234. Cf. *Mark* 10:2-9; *Matthew* 19:3-6.

235. See Waldron, *Cultural Identity*, *supra* note 230, at 20-21.

236. See MacIntyre, *supra* note 232, at 208.

incomprehensible.<sup>237</sup> One community's standards may become widely adopted in society, and another's rejected, but this is not for lack of understanding; rather, the claims of both are widely enough understood that they can be compared and ranked. Indeed, contemporary political debates that touch on the values of particular cultures reveal a high level of understanding of the rival claims. I can state the case for both the pro-choice and pro-life positions in the abortion debate, or both sides of the issue of same-sex marriages, even though ultimately I believe one position is better justified than the other.<sup>238</sup>

Alasdair MacIntyre has argued that two people may occupy separate normative spheres—cultures, political orders, or religious traditions—that differ so sharply from one another that mutual understanding of ethical claims is made extremely difficult.<sup>239</sup> However, it is important not to exaggerate the extent to which members of a pluralistic society cannot talk to one another. Perhaps the occupants of rival ethical traditions can, with effort, understand the terminology and concepts used by the others. Jeffrey Stout, criticizing MacIntyre, asks his reader to imagine the case of a modern liberal academic trying to understand and reason with the Corleone family from the *Godfather* movies.<sup>240</sup> The academic hears the word “respect” frequently in Corleone discourse, but has difficulty translating it into her own vocabulary. For her, respect has Kantian overtones: agents are self-governing, autonomous beings, and they should be treated as ends in themselves, not means. But the Corleones clearly don't use respect in this way. For them, it

237. These presuppositions are “basic” in the sense that “no objections others bring to it count against it from [the agent's] perspective, that is, given her set of beliefs, the norms of rational argument she accepts and those beliefs and norms she must accept on pain of unintelligibility.” Andrew Mason, *MacIntyre on Liberalism and Its Critics: Tradition, Incommensurability and Disagreement*, in *AFTER MACINTYRE* 225, 230-31 (John Horton & Susan Mendus eds., 1994)

238. The academic debate over legalizing same-sex marriages shows that both sides are perfectly capable of understanding and representing the claims of rival normative communities, even though the debate shows no signs of ending. *See, e.g.*, Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 *GEO. L.J.* 1871 (1997); William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 *YALE L.J.* 2411 (1997); William N. Eskridge, Jr., *Democracy, Kulturkampf, and the Apartheid of the Closet*, 50 *VAND. L. REV.* 419 (1997); Chai R. Feldblum, *A Progressive Moral Case for Same-Sex Marriage*, 7 *TEMP. POL. & CIV. RTS. L. REV.* 485 (1998); Robert P. George & Gerald V. Bradley, *Marriage and the Liberal Imagination*, 84 *GEO. L.J.* 301 (1995).

239. *See* MACINTYRE, *supra* note 16; MACINTYRE, *supra* note 15. One reviewer faults MacIntyre for slipping between two claims: a weak claim of “historical understanding,” which is merely the thesis that to understand an argument requires an appreciation for the historical context in which it was advanced, and a stronger claim of “essential location,” which holds that an argument depends on its historical setting for its defining features. *See* Julia Annas, *MacIntyre on Traditions*, 18 *PHIL. & PUB. AFF.* 388 (1989).

240. *See* JEFFREY STOUT, *ETHICS AFTER BABEL* (1987).

connotes a complex judgment about social status and the rituals with which status is acknowledged. It would be pointless for the academic to try to understand Corleone practices using the modern Kantian translation of respect. If she wanted to have a dialogue with the Corleones about justice, she would have to immerse herself in Corleone tradition and practice, so that she could make use of the Corleone term, respect.

Stout's point is that imaginative translation is possible, even between conceptual schemes or cultural frameworks that appear at first glance to be mutually unintelligible, and that an immersion in the discourse of another normative scheme can provide sufficient background for translation.<sup>241</sup> The distance between these alternative forms of life is not as great as it seems, at least not for lives lived by real people in the world today.<sup>242</sup> For this reason, lawyers can have conversations about justice even with clients who share vastly different normative presuppositions, as long as both participants are willing to make the effort to see things from the other's point of view. In Joseph Raz's example of such a "detached" normative statement, a Christian could say to his Orthodox Jewish friend, "you shouldn't eat that—it contains pork," although the advice would be received differently from the same advice given by another Jew.<sup>243</sup> It is possible for a non-Jew to give his friend advice on Jewish dietary laws because the two friends can imagine what it would be like to share the same values.<sup>244</sup>

MacIntyre would respond that the attempts to translate from one conceptual scheme to another do not succeed in completely bridging the gaps, because the translated concept—say, "respect"—becomes a mere variant of the concept that exists in the rival framework, not a true rendering of the concept of respect in its home discourse.<sup>245</sup> But this move encounters its own difficulties, because the committed genealogist who insists on the untranslatability of a community's utterances must explain how he can imagine addressing an audience that belongs to a different tradition.

---

241. See also RICHARDSON, *supra* note 12, §§ 39-40.

242. See WILLIAMS, *supra* note 85, at 161-63. Even assuming that some people may hold such extreme views that rational arguments made by moderates cannot reach them, when the extremists participate in the public sphere, they address their arguments to the uncommitted. See RICHARD A. POSNER, *OVERCOMING LAW* 451-52 (1995). Unless a community is so committed to its separate *nomos* that it is willing to withdraw entirely from political life, its members must be prepared to cast their moral claims in terms that outsiders can understand. See also GUTMANN & THOMPSON, *supra* note 94.

243. See JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 175-77 (1975).

244. See also Susan G. Kupfer, *Authentic Legal Practices*, 10 *GEO. J. LEGAL ETHICS* 33, 66 (1996) (noting that the task of ethics is partially that of uncovering common values through a process of dialogue).

245. See MACINTYRE, *supra* note 22, at 43.

The problem then for the genealogist is how to combine the fixity of particular stances, exhibited in the use of standard genres of speech and writing, with the mobility of transition from stance to stance, how to assume the contours of a given mask and then to discard it for another, without ever assenting to the metaphysical fiction of a face that has its own finally true and undiscardable representation, whether by Rembrandt or in a shaving-mirror.<sup>246</sup>

MacIntyre identifies Nietzsche and Foucault as two moral genealogists who have struggled to avoid slipping back into the academic mode, in which the success of the genealogical project can be described in terms that transcend the author's own interpretive community.<sup>247</sup> "[I]t seems to be the case that the intelligibility of genealogy requires beliefs and allegiances of a kind precluded by the genealogical stance."<sup>248</sup> MacIntyre seems to have conceded much of the force of the line of objection advanced by Stout, and to have retreated from his prior insistence that divergent cultural frameworks stand as an impediment to dialogue about ethics.<sup>249</sup> Thus, claims about the incomparability of rival forms of life should not be taken to entail paralysis in public debate, or the impossibility of moving beyond competing conceptions of the ethically responsible life.

#### IV. COMMUNITY NORMS AND TRADITIONS AS A RESOLUTION OF INCOMPARABILITY PROBLEMS

##### A. *The Role of Social Practices in Ethical Reasoning*

Elsewhere, I have developed at length the argument that the norms of a defined community serve as a constraint on members' behavior, so that the community's accepted solution to a given ethical dilemma strongly influences how similarly-situated agents resolve analogous problems.<sup>250</sup> To briefly recapitulate, values are embodied in the practices of social communities and are given shape through application in particular cases. While it may be an interesting exercise for analytic philosophers to attempt to discern the "true" or essential meaning of words like "loyalty," "justice," or "care," the values represented by those signifiers are brought to life in human activity through a process of description and elaboration in which the values

---

246. See *id.* at 47.

247. See *id.* at 49-53.

248. *Id.* at 55.

249. See MacIntyre, *supra* note 232, at 219-20. See also Mason, *supra* note 237.

250. See Wendel, *supra* note 15, at 17-26.

are introduced in a process of explanation and justification for the behavior of moral agents in actual cases.<sup>251</sup> What is taken to be true are traditional understandings, developed through arguments with those inside and outside the tradition, as described by MacIntyre:

A tradition is an argument extended through time in which certain fundamental agreements are defined and redefined in terms of two kinds of conflict: those with critics and enemies external to the tradition who reject all or at least key parts of those fundamental agreements, and those internal, interpretive debates through which the meaning and rationale of the fundamental agreements come to be expressed and by whose progress a tradition is constituted.<sup>252</sup>

This model of practical reasoning emphasizes precedent and the guidance of tradition—*phronesis*—rather than pure abstract reasoning.<sup>253</sup> Because practical reasoning functions within tradition, values that might appear to be incommensurable in an abstract sense may be unproblematically compared if the criteria of comparison are supplied by the traditions of a particular community.<sup>254</sup> The community's practices and traditions provide the covering value for making evaluative comparisons, as discussed in Section III.B. Just as some legal arguments may be logically plausible but would fail to pass the "laugh test" for presentation to a judge, some arguments in legal ethics might be defective not as a matter of formal logic, but because they fail to fit with and account for a community's settled judgments.

There is no point in asking the question "what ought I to do?" except in unusual cases where there is a good reason for doing something out of the ordinary.<sup>255</sup> Most of the time people just muddle through, following a routine, living according to the "structures of normality" that give life its shape.<sup>256</sup> While this description may sound dreary, it is actually the only alternative to an intolerable burden of constantly justifying oneself anew; unless we are living in some kind of hellishly repressive society, we understand "the ways things are" to be mostly morally acceptable and

---

251. See ANDERSON, *supra* note 4, at 97-112; BERNSTEIN, *supra* note 16; STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* (1980).

252. MACINTYRE, *supra* note 16, at 12.

253. See generally BERNSTEIN, *supra* note 16, at 38-40, 57-58.

254. See generally BERNSTEIN, *supra* note 16, at 219 ("Judgment is communal and intersubjective; it always implicitly appeals to and requires testing against the opinions of other judging persons."); SUNSTEIN, *supra* note 15, at 69-74; see also DENNIS PATTERSON, *LAW AND TRUTH* 169-79 (1996); Finnis, *supra* note 226, at 228-32.

255. MACINTYRE, *supra* note 16, at 24, 54.

256. Cf. JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY*, ch. 6 (1995) (describing "the Background").

accordingly pattern our activities around the routine established by our culture. Of course, our understanding of the given order of things also includes an appreciation for some of the inherent problems of the culture.<sup>257</sup> We recognize that “the ways things are” is not always a sufficient justification for a particular social practice. But again, we do not recognize those deficiencies in justification a priori in every case; they have been marked off as problems through the give-and-take of the culture’s self-understanding.

These central cultural norms seldom take the form of rules. Maxims and rough rules of thumb, perhaps, and certainly stories that are meant to illustrate some aspect of the culture’s self-understanding, but not rules in the formalized sense familiar to lawyers.<sup>258</sup> Even where rules exist, the application of those rules requires nuanced judgment that cannot be reduced to a rule-governed decision procedure. The resistance of traditional normative understandings to embodiment in rules is one reason for the disconnect between ethics codes for lawyers and other sources of professional values. Lawyers are, in many cases, more likely to be influenced by professional lore or war stories—precatory tales told by more experienced practitioners—than by reading rules, disciplinary cases, or bar association opinions. What is significant for the purposes of my argument is that these stories and the narrative account of the culture of which they are a part serve to integrate the incomparable values that bear upon the professional role. As MacIntyre shows, the Greeks, who were concerned with understanding how various goods ought to be apportioned among different classes of citizens, appreciated this insight: “How are the goods of honor and those of the external rewards of excellence to be apportioned among different kinds of achievement? How is the desert of the good soldier to be compared to that of the good farmer or the good poet?”<sup>259</sup> The form of community life answered

---

257. See MacIntyre, *Moral Relativism*, *supra* note 232, at 218.

258. Rawls and others refer to these tentative, pretheoretical judgments as *intuitions*. See RAWLS, *supra* note 88, at 20, 48-50; WILLIAMS, *supra* note 85, at 97-99. Cf. AUDI, *supra* note 15, at 292 (noting that moral standards may be more or less explicit, and they may be internalized habits learned through education). Audi would allow much more room for moral theory in the formation of these intuitions, however. (This sense of the word does not imply any metaphysical thesis about the nature of moral values or how they are apprehended by the agent, unlike the claim of early twentieth-century ethical intuitionists.) Searle is getting at something different with his concept of Background, although it plays a similar role. For Searle, the Background is not just a set of raw data awaiting theoretical confirmation or refutation, but is a precondition of any social life. See SEARLE, *supra* note 246, at 127-47. Professional traditions and norms have a status somewhere between intuitions and Searle’s Background: they are more open to questioning and criticism than the Background, but more centrally constitutive of the reality of participants in the social practices we know as lawyering than Rawlsian intuitions could be.

259. MACINTYRE, *supra* note 16, at 33.



that question, not only by providing a rank ordering of human goods in many cases, but also by delineating a space for each good within the patterns of normal life, “so that there would be in some cities at least a time of the year when tragic poetry received its due and a time when comedy did so.”<sup>260</sup> The analogy between Athenian political philosophy and the theory of legal ethics is not as strained as it may seem; for just as there was a form of life in the Greek city-states that distributed rationally incommensurable goods according to a higher-order conception of the good for the city-state, there are contemporary traditions of the legal profession which specify the ranking of incomparable professional values.

Practical reasoning in one’s personal moral life requires an understanding of the final good for humans, “the complete ethical rectitude of a lifetime.”<sup>261</sup> This is obviously a daunting task given the complexity and diversity of human activities. Fortunately, a similar model of practical reasoning for professionals may be constructed with reference to a more limited vision of the good for that particular occupational group. Social practices generate evaluative criteria.<sup>262</sup> We might agree that a good doctor is someone who applies the methods of science to heal and prevent illness. A good accountant is someone who ensures accuracy and honesty in financial recordkeeping. A good architect appreciates the aesthetic and technical aspects of a building project, and so on. Note the chain of reasoning here: the conception of the

---

260. *Id.* at 34.

261. BERNSTEIN, *supra* note 16, at 147; *see also* MACINTYRE, AV, *supra* note 15, at 203 (“[T]here is a *telos* which transcends the limited goods of practices by constituting the good of a whole human life, the good of a human life conceived as a unity.”).

262. The emerging customs regulating use of the Internet provide an apt illustration of how normative standards evolve that are tailored to the ends of particular social practices. Even relatively rule-bound practices like judging can make use of these custom-based criteria, as shown by a recent Canadian court judgment. *See* 1267623 Ontario, Inc. v. Nexx Online, Inc., [1999] 89 A.C.W.S.3d 135 (Ont. Sup. Ct. J.) *available in* 1999 ACWSJ Lexis 16867. In *Ontario, Inc.*, an Internet service provider (ISP) canceled a customer’s account for a violation of “Netiquette,” the unwritten customs of neighborly Internet usage. *See id.* at ¶ 14. The ISP alleged that its customer had breached Netiquette, and therefore its contract, by sending “Spam”—unsolicited bulk commercial e-mail. *See id.* Significantly, the contract between the customer and the ISP obligated the customer to “follow generally accepted ‘Netiquette’” without further defining that term, or without specifically mentioning Spam. *See id.* The Ontario Superior Court nevertheless held that Netiquette had a sufficiently determinate meaning in the community of Internet users, and that the ISP was contractually justified in shutting down its customer’s account for sending Spam. *See id.* at ¶ 26. At the risk of reading too much into this case, I should note that the practice of communication on the Internet has a plurality of ends: (1) freedom of expression for a broad community of users, relatively unencumbered by government regulation or cost, on the one hand, and (2) efficiency of communication, including sharing of relatively limited bandwidth and server capacity. Spam presents a conflict between these two ends, but the consensus of the community of Internet users, embodied in unwritten Netiquette, is that the Spammer’s interest in promoting his or her products online must yield to the interest in maintaining open channels of communication.

good for a professional is derived from the social role that person fills, or the profession's *telos*; the moral evaluation of that person depends in turn on normative standards generated by that end or conception of the good. An accountant who failed to report that her client was cooking the books would be criticized in moral terms because nondisclosure would be inconsistent with the social reason for creating the practice of accountancy in the first place. Similarly, models of medical ethics depend on the social function of physicians, and derive principles of professional conduct from that understanding.<sup>263</sup> What is necessary in beginning to elaborate a theory of professional ethics, therefore, is an understanding of what functions the profession performs in a particular society.<sup>264</sup>

This account at first blush appears to be unduly conservative, since it gives substantial normative weight to precedent and tradition. "Prudence is today an unfashionable virtue; to many, its invocation will seem a mask for reactionary interests and the illiberal privileges of the status quo."<sup>265</sup> But, as Bernstein's illuminating study of Gadamer, MacIntyre, and the American pragmatists shows, there is no such thing as living outside a tradition. Tradition and reason are not opposed, because we can only conceive of ourselves, understand the external world, and make arguments to others from within a tradition.<sup>266</sup> Reasoning and understanding are essentially intersubjective, because they are by their nature linguistic processes.<sup>267</sup> In other words, meaning does not just exist "out there" in the universe, waiting to be discovered; it is created through human engagement with the world, through people trying to relate to, interpret, and exercise some control over their surroundings and one another. "[W]e are essentially beings constituted by and engaged in interpretative understanding."<sup>268</sup> This form of life creates a store of traditional understandings, which Gadamer calls "enabling prejudices."<sup>269</sup> Gadamer (and Bernstein and others) are quick to point out that

263. See, e.g., BEAUCHAMP & CHILDRESS, *supra* note 36.

264. Cf. David Miller, *Virtues, Practices and Justice*, in AFTER MACINTYRE 245, 250-51 (John Horton & Susan Mendus eds., 1994) (stating that a "purposive practice" is one which exists to serve some social end beyond itself, and its standards of excellence should be reviewed in the light of the purpose the practice is meant to serve). Our understanding of a practice may be informed by ideals, even though the practice in reality fails to measure up to the ideals it sets for itself. See ANDERSON, *supra* note 4, at 107. As I have been arguing, however, the evaluation of a practitioner is complicated when the practice professes a plurality of incompatible ideals.

265. Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1571 (1985).

266. See BERNSTEIN, *supra* note 16, at 77.

267. *Id.* at 126-27; see also HANNA FENICHEL PITKIN, WITTGENSTEIN AND JUSTICE 201-03 (1972).

268. BERNSTEIN, *supra* note 16, at 137.

269. See HANS-GEORG GADAMER, TRUTH AND METHOD 249 (Joel Weinsheimer & Donald G.

these prejudices are not immune from rational criticism. Indeed, it is one of the principal tasks of an interpreter to ascertain which prejudices are worthy of retention and which represent mere superstition or false belief. This critical self-interpretation can take many forms. A tradition is constituted in part by its ideals, which provide a resource for internal self-criticism, a method for discovering which beliefs are based on cultural bias, superstition, or self-deceptive motivations; traditions also can be tested for internal coherence and theoretical plausibility (in terms of compatibility with empirical science and formal logic).<sup>270</sup> Traditional practices may lose their social utility, and even fall into crisis, as the conditions that allowed the practice to flourish cease to exist.<sup>271</sup> Previously accepted traditions “may cease to provide a useful map of the practical landscape.”<sup>272</sup> Tradition-bound reasoners may seek out alien traditions that represent different, and often more appealing, ways of thinking about the same problems, and triangulate from these disparate cultural practices in an attempt to identify those beliefs that blind them to the meaning of what they are trying to understand.<sup>273</sup> But despite all these critical strategies, it is impossible for persons to achieve an Archimedean standpoint outside of all traditions.<sup>274</sup> Thus, reasoning from within a tradition is not conservative, nor is it progressive. It simply is.

The common law is an example of how tradition-based reasoning need not be conservative and in fact can undergird revolutions. Tradition provides the intellectual resources for challenging the status quo. Although detailed consideration of the history of the civil rights movement is well beyond the scope of this Article, it is sufficient to note that the legal victories of the NAACP were based in part on changing societal attitudes (possibly including whites recognizing that their own interests would be promoted by granting

---

Marshall trans., 2d rev'd ed. 1990) (1960).

270. See ANDERSON, *supra* note 4, at 106-08.

271. See generally *supra* note 16, at 361-69 (discussing “epistemological crises”). The internal ferment that periodically precipitates crises within traditions shows that a tradition-based account of ethical norms does not presume that communities are big happy families or '60s style communes, in which all participants get along in a perpetual state of peace and harmony. Cf. Don Herzog, *As Many as Six Impossible Things Before Breakfast*, 75 CAL. L. REV. 609, 617-19 (1987).

272. ANDERSON, *supra* note 4, at 109.

273. See BERNSTEIN, *supra* note 16, at 138-39; see also James Boyle, *Anachronism of the Moral Sentiments? Integrity, Postmodernism, and Justice*, 51 STAN. L. REV. 493, 518-21 (1999). According to Boyle, one of the central insights of postmodern philosophy is that competing traditions provide breathing space for moral agents in which to rebel against the stultifying conformity of the dominant worldview. See *id.* at 527.

274. See ANDERSON, *supra* note 4, at 112 (“Although any particular intuition or thick concept can be intelligibly criticized, it makes no sense to criticize the whole lot at once, for the only way we can frame an intelligible criticism is in terms of some intuitions and thick concepts whose authenticity must provisionally be presupposed.”); cf. Davidson, *supra* note 221.

civil rights to blacks<sup>275</sup>), but also on the existence of inchoate antidiscrimination norms in the American legal tradition. Mark Tushnet explains how the early civil rights litigation pursued by the NAACP relied on cases such as *Yick Wo v. Hopkins*,<sup>276</sup> which held an invidiously discriminatory licensing scheme unconstitutional, and even *Plessy v. Ferguson*,<sup>277</sup> which at least stressed formal equality, albeit while simultaneously endorsing segregation.<sup>278</sup> The NAACP lawyers used those precedents as leverage to argue for a broader understanding of the norm of equality, but they certainly did not seek to undermine the rule of law. Quite the contrary—they showed that the regime of law already contained the principle of substantive racial equality in an embryonic form.<sup>279</sup> Tradition enabled change by legitimating it in the minds of observers who recognized elements of the new order in the status quo.<sup>280</sup> At the same time, popular perception that the law was not being administered in a just manner provided leverage for those within the legal tradition to move the law in a new, more inclusive, direction. There is thus an interplay between the internal perspective of practitioners and the external, critical standpoint by which a tradition can be judged.<sup>281</sup>

### B. *Plural Practices*

The problem with the application of this general pattern of justification to legal ethics is that lawyers' social roles are multifaceted and the various aspects of the public function of lawyers are not always harmonious.<sup>282</sup> The

275. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

276. 118 U.S. 356 (1886).

277. 163 U.S. 537 (1896).

278. See MARK V. TUSHNET, *THE NAACP'S STRATEGY AGAINST SEGREGATED EDUCATION, 1920-1950*, at 36 (1987); see generally RICHARD KLUGER, *SIMPLE JUSTICE* (1976).

279. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); cf. ANDERSON, *supra* note 4, at 104.

280. See Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 44 (1998) ("[E]ven . . . paradigm-shifting cases may be seen more accurately in gradualist terms. . . . In general, the great common law opinions such as Cardozo's in *Palsgraf v. Long Island Railroad*, or Hand's in *United States v. Carroll Towing Co.*, are known for their elegant synthesis of existing precedent, rather than for doctrinal innovation.") (internal citations omitted).

281. Cf. Miller, *supra* note 264, at 256 ("It is precisely because we are able to reflect on the ends that politics should serve, and therefore on what it means genuinely to excel in this field, that [critical arguments] are able to get a grip.").

282. Rob Atkinson argues that many lawyers and academics wrongly assume that there is One True Way of lawyering, while there are, in fact, several ethically defensible models for conscientious lawyers to follow. See Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 317 (1995). See also ANDERSON, *supra* note 4, at 7 ("There is a great diversity of worthwhile ideals, not all of which can be combined in a single life.").

*telos* of the practice of lawyering—the covering value for making comparisons among professional values—is internally inconsistent in ways that make ethical decisions indeterminate in some hard cases of value conflict.<sup>283</sup> The organized bar’s statements on professional responsibility sometimes admit as much, although they provide little guidance for resolving these value conflicts: “[t]he duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.”<sup>284</sup> Or, consider the “Professionalism Creed” drafted by the American Inns of Court, an organization dedicated to ethical reform of the legal profession.<sup>285</sup> This set of aspirational principles seeks to provide ethical guidance for lawyers, but it must grapple with the plurality of foundational normative principles of the profession. Inns of Court members pledge simultaneously to: “serve as an officer of the court [and] work to make the legal system more accessible, responsive, and effective,” and “represent the interests of my client with vigor.”<sup>286</sup>

Of course, in many cases it is possible to advocate vigorously on behalf of one’s client while nevertheless promoting the efficiency and responsiveness of the judicial system, and it is certainly a worthy aspiration to attempt to do both, but in many cases, such as the problems set out in Section II, these two goals pull in opposite directions. If Alice allows Bill to make a mistake that would result in dismissal of his client’s case, for example, she would be advancing the interests of her client but denying access to the court system to Bill’s client. Similarly, Carlos’s inaction while the state agency bungles its case is hardly defensible as enhancing the efficiency and responsiveness of courts.

Again, I do not claim that the social role of the lawyer generates a radically indeterminate covering value in every case. An argument that purported to show that a lawyer had a duty to inform law enforcement authorities of confidential communications received from her client relating solely to her client’s past crimes would be rejected immediately on the basis of the traditions and norms of American legal practice, even in the absence of a positive legal duty not to disclose the information. In some cases, there is

---

283. To be more precise, the covering value is *underdeterminate*. See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987).

284. MODEL CODE, *supra* note 25, EC 7-10.

285. See American Inns of Court, *Professional Creed* (visited Mar. 2, 2000) <<http://www.innsforcourt.org/aboutframe.htm>>. The curious prevalence of religious imagery in professional responsibility discourse, like the use of the word “creed” in this document, was noticed and criticized by Atkinson. See Atkinson, *supra* note 282, at 260-70.

286. See *id.*

only one acceptable solution to an ethical problem in light of the law of lawyering and the background moral principles of the profession, although conscientious objection may remain an option. For example, I am fairly confident that no community of practicing lawyers in the United States would criticize Carlos for not salvaging the agency's case against his client, absent some kind of statutory duty to disclose adverse information to regulators. This is so even though the values of loyalty and social justice may, in the abstract, be incomparable. But consider a closer case, such as Problem #3, above. In that case, the lawyer reasonably believes that her client will not receive a fair hearing before Judge Frank, and that a motion to recuse the judge probably will not be successful. She is obligated by the duty of loyalty to her client to use any lawful means to advance her client's cause. At the same time, she is required to respect the procedural system put into place for the resolution of disputes, and not to undermine the rule of law. What should she do?

First, to condemn Emma for using "unlawful" means to secure Judge Frank's recusal would be simplistic, because the word "lawful" itself requires elaboration. Is an action taken by a lawyer in litigation lawful provided that it does not warrant the imposition of judicial sanctions? This legal realist position appears to be endorsed by the *Model Rules*. "[I]n determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change."<sup>287</sup> What law exists in this area is nothing if not ambiguous; indeed, many civility codes have been held unconstitutionally vague.<sup>288</sup> The mandatory portion of the *Model Code*, for its part, prohibits a lawyer from taking any action on behalf of a client "when it is obvious that such action would serve merely to harass or maliciously injure another."<sup>289</sup> In this case, the action is not motivated solely by spite or malice, but is intended as part of a judge-shopping strategy. As Ronald Dworkin continually reminds us, ascertaining the boundaries of the law without reference to the scheme of principles that underlies the regime of rules is a vain enterprise; an interpretation of the law requires the interpreter to make the law the best it can be by unifying its disparate strands into one communal voice that says, "In this society, this is what we, collectively, stand for." The problem here, however, and a problem with Dworkin's argument generally, is that the

---

287. MODEL RULES, *supra* note 5, Rule 3.1 cmt. 1 (emphasis added). The phrasing of this rule has always called to my mind the repeated demand of Linda Loman in *Death of a Salesman*: "Attention must be paid!" In other words, the rule has a precatory nature, not merely a permissive one—lawyers should employ the law as a tool for change and be unwilling to accept that injustice is sanctioned by existing law.

288. See *supra* note 67.

289. MODEL CODE, *supra* note 25, DR 7-102(A)(1).

justificatory principles underpinning the law point in two directions, and the community's stance on the norms of the practice of lawyering is Janus-faced. Dworkin struggles gamely to respond to challenges like this, but the only resolution he achieves is to grant both of two competing principles a place in the justificatory scheme of political values. Speaking in the voice of his superhuman alter ego, Hercules, Dworkin says:

The constraints of fit require me to find a place in any general interpretation of our legal practice for both of the more abstract principles . . . . No general interpretation that denied either one would be plausible; integrity could not be served if either were wholly disavowed. But integrity demands some resolution of their competing impact . . . a choice that our practice has not made but that must flow, as a postinterpretive judgment, from my analysis. Integrity demands this because it demands that I continue the overall story, in which the two principles have a definite place, in the best way, all things considered.<sup>290</sup>

So Hercules picks one value as the winner in the case at hand and continues the story, with the “loser” value continuing to play a role in the overall scheme of principles. The two values live together, in occasional tension, with one occasionally coming to the fore in a particular case.<sup>291</sup>

This is a descriptively accurate account of the practice of judging and, more importantly for the purposes of this paper, of the practice of lawyer self-regulation. There is simply no way to suppress one of two competing values, such as loyalty or avoidance of harm to third parties, without producing a caricature of the social practice. But recognizing this tension entails a certain sacrifice in theoretical elegance. The highest-order covering value that guides ethical choices by lawyers—the *telos* of professional life—turns out to be ambiguous and underdeterminate in some interesting cases. In Problem #1, for example, the practices of the relevant community may vary. In some communities, particularly smaller towns where lawyers encounter one another repeatedly over the course of their careers, allowing a rookie attorney to submit an ineffective stipulated continuance without telling him of his mistake would be universally condemned in the strongest ethical

---

290. DWORKIN, *supra* note 10, at 270.

291. Boyle oversimplifies Dworkin's position somewhat when he says that, in contrast with postmodern legal theories that see opposing normative understandings as providing the motive force of legal creativity, for Dworkin, “conceptual tension is simply a close call with a right answer.” Boyle, *Integrity*, *supra* note 273, at 509 (emphasis omitted). As the above passage from Dworkin/Hercules shows, however, a judicial decision does not suppress the second-place value entirely, but relegates it to a temporarily subordinate position in the justificatory scheme of principles.

terms. In larger cities, especially in certain subcommunities like the personal-injury bar, with its rough-and-tumble ethos, Alice's actions would hardly warrant a raised eyebrow. The bar's response to situations like Problem #2 is somewhat more uniform—every practicing litigator I have talked to about a variation of this problem has adamantly denied that Carlos has any duty to point out flaws in the agency's case. Problem #3, on the other hand, reveals the same kind of variation among subcommunities as the first problem. Lawyers for outsider groups, who represent clients with very little social status or power, are more likely to approve in ethical terms of Emma's conduct than are lawyers who work on behalf of powerful interests.<sup>292</sup>

Surely one of these communities must have the ethical balance right, and the other be mistaken, right? I think the answer is a qualified "no." In some communities the seemingly callous behavior of practitioners may be the result of being excluded from higher-status subcommunities in which "gentlemen's agreements" are enforceable. For example, the plaintiff's personal-injury bar has historically been composed of immigrants and lawyers from other lower-status groups who were not welcomed in large commercial law firms, where more "gentlemanly" practices were alleged to have been the norm.<sup>293</sup> The bar is markedly stratified by social prestige, with lawyers who serve business clients at one end, and lawyers who serve individuals at the other.<sup>294</sup> Interestingly, some of the practice specialties in the lower-status range are rated by survey respondents as having a higher incidence of "sharp practice" or unethical behavior,<sup>295</sup> but this finding is susceptible of two quite different interpretations. Are some lawyers social

---

292. Even lawyers who belong to a tightly circumscribed subcommunity may differ on the correct balance of competing ethical obligations. Tax counselors, for example, differ on whether their role is to minimize the client's tax exposure by any means that is not likely to get the client or the lawyer in trouble, or to align the taxation of the client's proposed transaction with the purposes of the tax laws. See Rostain, *supra* note 41, at 1328-31.

293. See, e.g., MARY ANN GLENDON, *A NATION UNDER LAWYERS* 60-84 (1994). During the first third of this century, the organized bar vigorously resisted admitting non-WASP immigrants, often employing spurious character and fitness evaluations as the basis for exclusion. See RICHARD L. ABEL, *AMERICAN LAWYERS* (1989); Patrick L. Baude, *An Essay on the Regulation of the Legal Profession and the Future of Lawyers' Characters*, 68 *IND. L.J.* 647, 649 (1993); Rhode, *supra* note 33, at 499-502.

294. See, e.g., JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (rev. ed. 1994); KRAUSE, *supra* note 16, at 50-51.

295. See HEINZ & LAUMANN, *supra* note 294, at 69-71; see also Mark C. Suchman, *supra* note 34, at 848 (reporting comment by a large-firm associate that lawyers in smaller firms "are typically quite hardworking, but they do tend to be people who . . . are more uncivil than they ought to be"). The ABA study described by Suchman revealed that lower-status lawyers, such as the plaintiffs' personal-injury bar, were concerned that corporate lawyers at large firms were able to "turn the process into a hypercivilized game of manners, at the expense of more substantive ideals such as truth, justice, and efficiency." *Id.* at 848 n.21; see also *id.* at 865 n.46.



pariahs because they are unethical, or is the “sharp practice” epithet assigned by higher-status lawyers to those without power? It might be argued that personal-injury and criminal defense lawyers are, indeed, less ethical than others and are therefore shunned by their respectable peers. On the other hand, one might question the neutrality of the evaluation. If these lawyers represent individuals against powerful institutions like the government and large business enterprises, and the clients themselves are already derogated in the social hierarchy, then the very act of working in one of these fields will carry a reputation for antisocial, unethical behavior. One clue that the latter interpretation may be the correct one is found in the differential prestige rankings of lawyers on opposite sides of the same cases. In six fields—antitrust, labor, environmental, personal injury, criminal, and consumer law—the lawyers representing challengers to the establishment (unions, injured consumers, criminal defendants, and so on) are ranked lower in prestige than those working on behalf of powerful interests.<sup>296</sup> In short, “the primary determinant of the social structure of the profession is the interests and demands of the lawyers’ clients.”<sup>297</sup> Further support for this claim is provided by studies that show disciplinary actions against lawyers are disproportionately brought against lower-status professionals, such as criminal defense and divorce lawyers.<sup>298</sup> Again, it could be that these lawyers are more frequently guilty of unethical behavior, but the more likely explanation is that large institutional law firms do not often run afoul of the kinds of rules codified by state bar associations, or that the elite lawyers who control bar associations do not tend to investigate their own with much enthusiasm.<sup>299</sup> Rules against solicitation of clients, for example, prohibit passing out business cards at hospital emergency rooms, but not meeting potential clients at the golf course.<sup>300</sup> This suggests that the evaluation of unethical behavior has been subtly skewed toward approving of conduct by lawyers for powerful clients and disapproving of the behavior of lawyers for the powerless, or lawyers who must compete for business using methods that elite lawyers find unsavory.<sup>301</sup>

---

296. See HEINZ & LAUMANN, *supra* note 294, at 85.

297. *Id.* at 151.

298. See, e.g., JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 4-7 (1976); JEROME E. CARLIN, *LAWYERS’ ETHICS: A SURVEY OF THE NEW YORK CITY BAR 176-82* (1966).

299. See ABEL, *supra* note 293, at 147-50; HEINZ & LAUMANN, *supra* note 294, at 159; KRAUSE, *supra* note 16, at 54.

300. See HEINZ & LAUMANN, *supra* note 294, at 159.

301. A similar phenomenon has been observed in the sanctioning behavior of federal courts, which disproportionately impose sanctions on particular classes of litigants, such as plaintiffs in civil rights suits. See, e.g., Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading*

If the bar is stratified into subcommunities that correspond to the interests and social prestige of clients, it seems only reasonable that these subcommunities would evolve different normative understandings of what it means to be an ethical lawyer. In Aristotelian terms, because of the fragmented nature of the professional *telos*, it is only to be expected that these diverse communities would emphasize different aspects of the lawyer's function. Some groups would take as their rallying cry the traditional lawyer's mission to resist oppression and tyranny; others of a Burkean stripe would not see their role as custodians of valuable social traditions that risk damage from ill-considered passions.<sup>302</sup> It is difficult to combine these two functions into one unified vision of professional practice, even in multi-lawyer firms, as revealed by the reluctance of many large law firms to engage in certain kinds of pro bono work for fear of offending their important, establishment clients. "The defining characteristics of the friendless and despised are, after all, that they lack important friends and that many persons find them distasteful, and the difficulty with reformist causes is that they may well be controversial."<sup>303</sup> Thus, even though professional discourse acknowledges that the function of the lawyer is both to promote order and to permit challenges to power, lawyers in their practice tend to take one or the other of those ends as the central guiding principle of their activities, promoting it to the detriment of the other constituent function. The remainder of this section discusses these competing traditions of legal practice critically and argues that neither tradition can claim to be the exclusive function of American lawyers.

### 1. *The Rebellious Lawyer*<sup>304</sup>

Although there is some debate over the extent to which the organized bar is committed to this ideal, there is no question that at least one strain of professional ideology in the United States emphasizes the moral neutrality of the lawyer, who is expected to provide technical competence to a client who sets the political or moral agenda of the representation. The rebellious lawyer emphatically rejects the norm of neutrality. For the rebellious lawyer, it is

---

*Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935 (1990); Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2191-95 (1989); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 493-95 (1989).

302. See generally EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Conor Cruise O'Brien ed., rev. ed. 1969) (1790).

303. HEINZ & LAUMANN, *supra* note 294, at 164.

304. This term is borrowed from Gerald López's study, although my analysis does not agree with López's in all particulars. See López, *supra* note 20.

essential that the representation advance a particular vision of social justice, generally through the representation of clients who share the same vision, but sometimes—and far more controversially—by strategies of persuasion, resistance, or even coercion within a professional relationship in which the lawyer and client disagree about the client’s ends.

Rebelliousness is not necessarily limited to the espousal of politics through one’s work as a lawyer. Many lawyers use the machinery provided by the legal system, such as public law remedies, class-action lawsuits, impact litigation, and the like, to improve the welfare of disempowered individuals. This kind of progressive lawyering “involves working within accepted professional understandings of skilled and zealous client representation.”<sup>305</sup> A rebellious lawyer, on the other hand, may also be committed to transgressing existing legal norms when necessary to vindicate a political agenda.<sup>306</sup> The very legal norms that a lawyer is ordinarily bound to uphold are the root cause of the injustice suffered by the client. Often, rebellious lawyers speak in terms of systematic oppression, patterns of thought, structural injustice, or institutional wrongs. “[I]f justice can be obtained for the not-poor through an adversary system of law, it is because they are involved with the law on a case-by-case basis. But a case-by-case injustice is not what poor people face; they confront a host of unjust institutions, acting for and within an unjust society.”<sup>307</sup> Rebelliousness means recognizing that the legal system itself in many cases legitimizes oppression, and that meaningful social change cannot always be accomplished within the framework of existing legal norms. “As Martin Luther King and many of our moral heroes have taught us, moral values are more important than legal values.”<sup>308</sup> This means that legal rules should be cast aside whenever they interfere with the realization of an important extralegal moral value. This vision of lawyering is profoundly radical—“sufficiently at odds with established political, professional, and career structures to entangle radical cause lawyers in a variety of destabilizing conflicts and contradiction.”<sup>309</sup>

---

305. Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*, in *CAUSE LAWYERING* 3, 7 (Austin Sarat & Stuart Scheingold eds., 1998).

306. See, e.g., ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996) [hereinafter UNGER, *LEGAL ANALYSIS*]; William H. Simon, *Visions of Practice in Legal Thought*, 36 *STAN. L. REV.* 469 (1984); Mark Tushnet, *An Essay on Rights*, 62 *TEX. L. REV.* 1363 (1984); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 563, 592 (1983) (arguing for a theory of law that “would provide constant occasions to disrupt any fixed structure of power and coordination in social life”).

307. Stephen Wexler, *Practicing Law for Poor People*, 79 *YALE L.J.* 1049, 1059 (1970).

308. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 58 (1994).

309. Sarat & Scheingold, *supra* note 305, at 7. Duncan Kennedy made waves in 1981 by

Emma, the lawyer in Problem #3, and Steven Yagman, upon whom she was based, are archetypal rebellious lawyers. The motivation for Emma's behavior is to ensure that her client will obtain a fair hearing before an impartial tribunal, because she is certain that Judge Frank would be biased against her client's claim. Instead of filing a request that Judge Frank recuse himself, however, Emma sought a more effective and reliable method of removing the judge from her case. By heaping public scorn on the judge, Emma angered him sufficiently that he was forced to reassign the case, not because he could not impartially judge Emma's client's case, but because he was biased against Emma personally. Notice that Emma did not take advantage of available legal procedures for securing recusal, such as filing a motion as provided by statute.<sup>310</sup> Thus, her conduct flouted the legal norm that disputes are handled only through prescribed means, such as seeking relief by submitting motions or appealing a judge's ruling. Emma, of course, would respond that those procedures are inherently oppressive to powerless clients, who either cannot afford the lengthy legal maneuvering necessary to secure their rights, or who confront hostility from powerful government officials. Since legal rules and procedures are worthy of respect only to the extent that they lead to just outcomes, she would argue, a lawyer has no obligation to conform to them if injustice would result.

There are several aspects of the rebellious lawyer paradigm that should give us pause. First, the lawyer who justifies her activities by reference to a political agenda must take special care to ensure that she is not projecting her own ideals onto her client. Rebellious lawyering can lose its focus on the client's interests, so that "clients often become stalking horses for law reform efforts."<sup>311</sup> In some "rebellious" contexts, the interests of the lawyer and those of the client may diverge at the outset of the representation, or may begin to drift apart over time, as the clients grow weary of the conflict and

---

publishing a brief article in which he encouraged law students to become saboteurs, insinuating themselves into corporate law firms and subverting them from within. See Duncan Kennedy, *Rebels from Principle: Changing the Corporate Law Firm from Within*, HARV. L. SCH. BULL. Fall 1981, at 36, excerpts reprinted in GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 1023 (2d ed. 1994); see also RHODE, *supra* note 42, at 86-88. You can work for the big, bad law firm and be faithful to your progressive politics, he purred seductively, as long as you practice "sly, collective tactics within the institution where you work, to confront, outflank, sabotage or manipulate the bad guys." As Kennedy's critics were quick to point out, it is not terribly morally demanding of lawyers to salve their consciences by occasionally committing covert acts of rebelliousness while continuing to draw fat paychecks from The Man. "One should not barter one's soul to practice law, and one does not have to. . . . But you can't expect to be a habitual conscientious objector and still plan to be a general." *Id.* at 88 (quoting John G. Kester, *Correspondence*, HARV. L. SCH. BULL., Spring 1982, at 82).

310. See 28 U.S.C. §§ 144, 455 (1994).

311. Margulies, *supra* note 19, at 1160.

seek rapprochement with the opponents in the lawyer's struggle.<sup>312</sup> Bell discusses several cases in which local NAACP lawyers, along with black school board officials and parents, sought federal court approval for compromise desegregation plans that did not achieve anything approaching full integration. National NAACP lawyers were shocked at these compromises and intervened in the litigation to press for greater integration against the wishes of the ostensible clients, the affected parents, who were more concerned with seeking an excellent education for their children than with achieving the more abstract ideal of integration.<sup>313</sup>

Another serious problem with the rebellious lawyer paradigm is that there seems to be no logical stopping point. Rebelliousness, in the sense of freely transgressing legal norms, risks eliminating the distinctiveness of the social role of lawyer, as compared with elected officials, non-lawyer activists, or interested citizens.<sup>314</sup> Consider the response to two recent incidents of egregious abuse of government power: the shooting of Amadou Diallo, an unarmed West African immigrant, by New York City police officers, and the brutal jailhouse sexual assault of Abner Louima, by other NYPD officers. Although outrage at these violations was practically universal, there was an essential difference between the modes of response available to non-lawyer protesters, such as the prominent black political officials and religious leaders who staged daily public arrests at City Hall after the Diallo shooting, and the civil rights lawyers who almost immediately intervened in both cases. The civil rights lawyers and the protesters sought the same reforms—increased hiring of people of color onto the police force, the establishment of a more effective civilian oversight board, racial-sensitivity training for officers, a requirement that police officers live in the communities in which they work, decreased use of random stop-and-frisks to search for weapons, and so on. The lawyers, however, sought to accomplish these reforms by appealing to values intrinsic to, and dependent upon, the legal system. Without a federal statute establishing a cause of action against state officials for violations of Diallo's and Louima's civil rights (and, indeed, a constitution declaring those

---

312. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976). *But cf.* Wexler, *supra* note 307, at 1053 (“Poor people have few individual legal problems in the traditional sense; their problems are the product of poverty, and are common to all poor people.”).

313. For an overview of the disagreement within the civil rights community concerning the value of integration, see Bradley W. Joondeph, *A Second Redemption?*, 56 WASH. & LEE L. REV. 169, 188-89 (1999) (book review); cf. Hugh LaFollette, *The Truth in Ethical Relativism*, \_\_ J. SOCIAL PHIL. 146 (1991) (recounting disagreements within the civil rights community over what tactics—such as violent revolution, passive resistance, education, and persuasion—ought to be employed).

314. See Richard Wasserstrom, *Postscript: Lawyers and Revolution*, 30 U. PITT. L. REV. 125, 128-33 (1968).

rights), or state law tort remedies against the officers, the victims' families would have no opportunity to seek legal redress against the government actors who abused their power. If all of these remedies, which depend on a functioning legal system, were repealed overnight, the protesters could continue to march in front of City Hall, but the lawyers could do nothing but close up shop and join the rest of the demonstrators on the sidewalk. Thus, to the extent that legal strategies are effective in checking government power, civil rights lawyers have an incentive to maintain the institutions of the law over the long term.

To turn the argument around, if rebellious lawyers justify their activity by pointing to the inherent injustice of the legal system, to what extent are they not unacceptably co-opted by their very participation in that system as lawyers?<sup>315</sup> The lawyer's job is to secure the greatest possible advantage for her client within the system of ordered liberty protected by the rule of law.<sup>316</sup> Can a rebellious person have it both ways by working as a lawyer while decrying the systemic oppressiveness of the legal regime? After all, conscientious objectors don't join the army and hope to reform it from within; they are excused from service. Max Weber clearly recognized the inevitable "tragedy" of political institutions in a powerful passage from his essay, *Politics as a Vocation*:

[H]e who lets himself in for politics, that is, for power and force as means, contracts with diabolical powers and for his action it is not true that good can follow only from good and evil only from evil, but that often the opposite is true. Anyone who fails to see this is, indeed, a political infant.<sup>317</sup>

While politicians and lawyers undoubtedly need to feel passionately about the "goodness" of their causes, this passion must be tempered by a "cool sense of proportion" that recognizes the "ethical irrationality of the world," including the need to engage with potentially unjust institutions.<sup>318</sup> In other words, co-optation by imperfect, even corrupt institutions may be the price that a lawyer must pay in order that good ultimately may be done in the world. If one believes adamantly that her soul will be corrupted by complicity in a system of injustice, then she has good ethical grounds for

---

315. See David Luban, *Getting the Word*, 91 MICH. L. REV. 1247, 1262-63 (1993) (reviewing MILNER S. BALL, *THE WORD AND THE LAW* (1993)).

316. See Wasserstrom, *supra* note 314, at 128-33.

317. Max Weber, *Politics as a Vocation*, in FROM MAX WEBER 77, 123 (H.H. Gerth & C. Wright Mills trans. & ed., 1946).

318. *Id.* at 115, 122.

refusing to work as a lawyer; however, she cannot then be surprised at her lack of access to the levers of power that is provided by a license to practice law. Again, Weber puts the choice forcefully:

[F]or the politician the reverse proposition holds, “thou shalt resist evil by force,” or else you are responsible for evil winning out. . . . No ethics in the world can dodge the fact that in numerous instances the attainment of “good” ends is bound to the fact that one must be willing to pay the price of using morally dubious means or at least dangerous ones.<sup>319</sup>

It sounds as though, by quoting this passage from Weber, I am taking back what I have said in the rest of this Article. For if being a lawyer involves a Faustian bargain with the ways of evil, in order that greater good may come, then what ethical restraint exists on any of our hypothetical lawyers? Why should Emma not wantonly slander a judge that will visit injustice upon her client? Why should Alice be at all hesitant to trick Bill into filing an ineffectual document? Why would Carlos even think twice about watching the state agency blunder its way through the trial? These are the questions with which every politician and lawyer in the Machiavellian tradition must grapple. Weber is perfectly clear that working in politics “endangers the salvation of the soul,”<sup>320</sup> but I think the key word here is “endangers.” Politics, and lawyering as a political activity, amounts to tickling the dragon’s tail. One is playing around with the instrumentalities of one’s own corruption, but these same means are necessary in order for any good to come through the rule of law administered by lawyers. The response to the injustice of the legal order can only be, as Weber says, to be clearheaded, virtuous, and resolute: “what is decisive is the trained relentlessness in viewing the realities of life, and the ability to face such realities and measure up to them inwardly.”<sup>321</sup> Since Machiavelli, political philosophers have recognized that, because politics may require doing evil so that good may come, the only guarantee against abuse of this power is the moral character of the politician.<sup>322</sup> Similarly, lawyering is a matter of character, and any lawyer, progressive or not, must be attentive to the danger that her participation in an unjust system may allow her to do good or evil, both in the external world and in her own soul. There is a balance to be

---

319. *Id.* at 119-21.

320. *Id.* at 126 (internal quotation marks omitted).

321. *Id.* at 126-27.

322. See DENNIS THOMPSON, *POLITICAL ETHICS AND PUBLIC OFFICE* (1987); Bernard Williams, *Politics and Moral Character*, in *PUBLIC AND PRIVATE MORALITY* 55 (Stuart Hampshire, ed., 1978).

struck here, and whenever talk turns to balancing, Aristotelian ideas cannot be far behind. The virtue of the lawyer is, ultimately, the only guarantee that the language of power can be used to challenge the exercise of power.

## 2. *The Establishment Lawyer*

Geoffrey Hazard has argued that a different strand of the traditional ideal of legal practice has been lost in recent times. “Legal practice primarily involves the protection of property, specifically business property,” he claims.<sup>323</sup> Hazard draws from Tocqueville’s famous description of lawyers as American aristocrats who preserve order and stability in the face of the “ill-considered passions of democracy.”<sup>324</sup> Stability runs both ways, from lawyers to the state and from the state to lawyers; law as an institution depends on the state for its existence and so has a strong tendency toward conservatism.<sup>325</sup> Establishment lawyers need not work for large corporations or law firms. A public defender may be animated by an abstract commitment to the adversary system of justice and a sincere belief that someone must be the one to do the necessary work on behalf of criminal defendants in order to preserve the rule of law.<sup>326</sup> This is an “establishment” justification for one’s professional life, even though one’s clients are outside the circle of power-holders in society. In a slight variation, a prosecutor may be animated by law-and-order ideals, perhaps as the result of having a relative who was victimized by a criminal act.<sup>327</sup>

323. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1266 (1991). See also KRAUSE, *supra* note 16, at 57 (“Lawyers as a profession help to preserve the present U.S. system of overwhelming capitalist domination over state policy.”). Compare the populist sentiments of Louis Brandeis, who argued that the role of lawyers is to curb “the excesses of capital” or “[t]here will come a revolt of the people against the capitalists.” See Louis D. Brandeis, *The Opportunity in the Law*, Address Before the Harvard Ethical Society (May 4, 1905), *reprinted in* THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 5, 8 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 3d ed. 1994).

324. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 263-70 (George Lawrence trans. & J.P. Mayer ed., 1969).

325. See Sarat & Scheingold, *supra* note 305, at 8.

326. See Randy Bellows, *Notes of a Public Defender*, in *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* 69, 97 (Philip B. Heymann & Lance Liebman eds., 1988) (“I became a public defender because I believe passionately in our system of justice, in the adversary system. Without a lawyer fighting with all of his strength to advocate for his client, without a lawyer as competent and able as the prosecutor, the system simply is not legitimate.”). For a Jewish perspective that argues the defense lawyer’s obligation is to remove evil from society, but only by means that are themselves just, see Michael J. Broyde, *Practicing Criminal Law: A Jewish Law Analysis of Being a Prosecutor or Defense Attorney*, 66 FORD. L. REV. 1141 (1998).

327. The eponymous lawyer in *Notes of a Public Defender* relates several experiences that caused him to question his commitment to representing criminal defendants, including trying a rape and robbery case on the day after a close family friend was robbed and raped. See Bellows, *supra* note 326,



The American Founders shook off many British feudal institutions with the Declaration of Independence, but they were shrewd enough to recognize that something comparable to the English aristocracy would be necessary to guarantee stability in this post-revolutionary society; thus, they adopted state constitutions that contemplated a significant role for the law and the legal profession.<sup>328</sup> Some early American legal theorists attempted to equate lawyers with ministers of order, who were responsible for minimizing factionalism and chaos.<sup>329</sup> But it is probably not necessary to browbeat lawyers into maintaining order, because the law itself is frequently felt as a stabilizing force. “Men who have made a special study of the laws and have derived therefrom habits of order, something of a taste for formalities, and an instinctive love for a regular concatenation of ideas are naturally strongly opposed to the revolutionary spirit.”<sup>330</sup> (This approving observation by Tocqueville has been deconstructed by some critical legal theorists, who have vehemently attacked legal education for its supposed tendencies to inculcate conservative dispositions in students.<sup>331</sup>)

It is inevitable, however, in a system founded on the authority of precedent and on respect for the past, that lawyers will tend toward gradualism and incremental change. The foundational assumption of the common law system is that something ought to be done in a certain way because it has been done that way in the past; in other words, past decisions are necessary to confer legitimacy on present actions.<sup>332</sup> Present actions in a tradition-based framework are not the product of all-things-considered rational deliberation, but are constrained to some degree by what decision makers have done before in relevantly similar cases. Of course, the authority of precedent can be defended on instrumental grounds—for example, because it makes deliberation more efficient by saving decision makers from constantly reinventing the wheel, and makes decisions more uniform and

---

at 78. Bellows recounts another case where he had to seek reassignment—the defendant had allegedly robbed a pregnant woman and threatened to kick her in the stomach if she did not hand over the money; at the time, Bellows’s wife was six months pregnant. *See id.* at 80. If these experiences could shake the ideals of a committed public defender, they could just as readily motivate a lawyer to become a prosecutor.

328. *See* Paul D. Carrington, *A Tale of Two Lawyers*, 91 NW. U. L. REV. 615 (1997).

329. *See id.* at 621, *citing* FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS*, *republished in* 16 CARDOZO L. REV. 1883 (1995).

330. TOCQUEVILLE, *supra* note 324, at 264.

331. *See, e.g.*, Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 38 (David Kairys ed., rev. ed. 1990); Robert V. Stover, *Making It and Breaking It: The Fate of Public Interest Commitment in Law School*, *reprinted in* *LAWYERS: A CRITICAL READER* 75 (Richard L. Abel ed., 1997).

332. *See* Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990).

therefore predictable.<sup>333</sup> Lawyers, however, are taught to respect the past not only pragmatically, but morally, because it deserves to be respected for its own sake as an articulation of an ideal moral vision to which we aspire.<sup>334</sup> The decisions and traditions of the past represent the people's attempt to come to grips with conflicting moral demands and values, and thus to make sense of the complexities of moral life. And because, as I have been arguing, moral values cannot always be compared impersonally, without reference to a particular community of reasoners, the past is a critical resource for making ethical decisions in the present. There is no way to compare incomparable values other than by reference to what has been done in similar cases.<sup>335</sup> By helping to conserve this social self-understanding and pass it along through decisions that look to the past for their justification, lawyers perform an exceedingly valuable public function, which cannot be replaced by a rebellious group that considers itself to be fundamentally agents of radical change.

Establishment lawyering is animated by the rule-of-law ideal so eloquently captured in Robert Bolt's play about Sir Thomas More. More's future son-in-law, Will Roper, argues that legal rules should be cast aside if justice so requires.

ROPER: So now you'd give the Devil benefit of law!

MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

MORE: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—[do] you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.<sup>336</sup>

---

333. See, e.g., Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63 (1989); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

334. Kronman, *supra* note 332, at 1039; Kronman, *supra* note 265, at 1569. But see UNGER, *LEGAL ANALYSIS*, *supra* note 306, at 115 ("To be tolerable within a democracy a common law cannot represent the cumulative discovery and refinement of a natural and stable world of custom by a group of legal wise men.")

335. See generally JONSEN & TOULMIN, *supra* note 9.

336. ROBERT BOLT, *A MAN FOR ALL SEASONS* 65-66 (Vintage Books 1990) (1960). A Westlaw search for this passage in the database of journals and law reviews turned up well over 150 hits,

If we could be sure the devil would not turn on us, there would be some justification for cutting down all the trees. The problem with any model of lawyering that permits lawyers to disregard legal norms is that there is no guarantee that a transgression for the sake of justice will not be used to relax the protection of legal rules in the future for an unjust purpose. Furthermore, by repudiating norms that powerful actors claim to respect, lawyers like Roper seem to invite a powerful backlash and will be unable to cling to the norms they trashed previously when that backlash comes.

Just as the rebellious-lawyer paradigm misses some salient features of legal practice, so does the aristocratic model of the establishment lawyer. One should be cautious not to assume too quickly that legal norms are invariant facts about the world or that preserving the system of laws in its present form is the ethically mandated course of action for lawyers. These are related, but distinct lines of criticism. The first critique is suggested by the legal realist understanding of the law: sometimes the devil is not hiding in the forest, but is the trees themselves. The vivid metaphor in More's response to Roper suggests that laws, and ethical restraints on the behavior of lawyers, are empirical facts "out there" in the physical universe, like rocks and streams and trees, that any competent observer can acknowledge to exist.<sup>337</sup> Laws, like trees, should not be cut down. But what if this metaphor is misleading? What if the devil is not hiding behind trees, but behind smoke and mirrors, or behind illusions of trees the devil has conjured up? Roper would surely be justified in pointing out that what seems like a forest is merely an image, and once the deception is unmasked, we can see the devil exposed for the fraud he is. Some legal realists claimed that the law was nothing more than the product of decisions made by political actors.<sup>338</sup> "[T]he existence of rules of law, as anything outside of the books, is an illusion."<sup>339</sup> More recently, it has become commonplace for left-leaning legal scholars to point out that what seem to be neutral, objective rules are often nothing more than the entrenchment of results favorable to powerful actors.<sup>340</sup> Law and economics scholars point to the theory of interest groups,

---

indicating that Bolt's defense of the rule of law has struck a chord with jurists.

337. See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* (1930); Cohen, *supra* note 118.

338. See, e.g., KARL N. LLEWELLYN, *BRAMBLE BUSH* (1930).

339. Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 698 (1931) (summarizing, and qualifiedly endorsing, this realist position).

340. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982); Mark Kelman, *The Deification of Process*, in *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); Richard Davies Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). Even critics of Critical Legal Studies rehearse this argument, if only to demonstrate

which states that participants in the political process compete for legislation or regulations that favor their own interests over those of others.<sup>341</sup> Applied to More's image, these critiques suggest that we do not know where the trees are until we have managed to identify the devil.

The second critique emphasizes the role of lawyers in speaking truth to power and in resisting concentration of power in the hands of the state or corporations. The result of the emphasis on lawyers as aristocrats or guardians of tradition has been, as Paul Carrington argues, two centuries of relatively stable democratic government. But the price of this stability has been the relentless demand that lawyers understand themselves as public professionals capable of perceiving and acting on the common good.<sup>342</sup> It is just this demand that throws rebellious lawyers into a rage, for their clients have manifestly not benefitted from whatever general good is enjoyed elsewhere in society. If the principal argument of this paper is correct, in many cases there is no uniquely proper priority of moral values that holds necessarily for all moral agents. Thus, there may be two equally permissible options in a dilemma situation—neither choice would represent “unethical” conduct. If, however, a powerful group were able to influence discourse about ethics, it might succeed in labeling permissible behavior as unethical. There is not necessarily anything sinister about the process of achieving social consensus about contested ethical judgments—this is what communities do in cases where values stand in conflict. The danger is not from rhetoric and persuasion as such, but with dominance and the breakdown of discourse.<sup>343</sup> If all interested members of a community are given a voice that is heard and respected, then a community's normative judgments are entitled to respect, but if those in power are permitted to suppress the positions of dissenters by coercion, then a genuine moral consensus does not exist.

The locus of power is, of course, often the government, and the model of establishment lawyering is always in danger of fetishizing the state.<sup>344</sup>

---

that it is not all that original. *See, e.g.*, Johnson, *supra* note 96, at 266-80. Jefferson Powell offers the argument from the intriguingly different standpoint of theology. *See* H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION* (1993).

341. *See, e.g.*, Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31 (1991).

342. Carrington, *supra* note 328, at 633.

343. *See generally* JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (Thomas McCarthy trans., 1984). Ely's constitutional theory is, I think, related to Habermas's project of establishing the legitimacy of norms in discursive rationality. *See generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

344. *See, e.g.*, Thomas L. Shaffer, Book Review, 41 *LOY. L. REV.* 387 (1995) (reviewing KRONMAN, *supra* note 15).

Establishment lawyers locate the source of justice and stability in institutions that have withstood the test of time and have proven their worth as repositories of moral understanding for generations. A thoughtful conservative theory of lawyering would include in the set of relevant institutions such private “mediating associations” as families, churches, neighborhoods, unions, clubs, and civic organizations.<sup>345</sup> These associations have a great deal to teach us about what is morally valuable in social life and, by contrast, the government may have very little to say on the subject of what makes a good person. As I have emphasized previously, however, a theory of lawyering cannot confine itself to sources of normativity that are not accessible to the majority of citizens in society.<sup>346</sup> Political institutions, such as courts and legislatures, and including lawyers, must take responsibility for offering moral truth—claims to the community as a whole, taking due account of the normative claims of the constituent subcommunities. What binds us together as a polity are deeper value commitments shared by members of these mediating institutions, and the task of governing in a pluralistic society is that of discovering a coherent scheme of principles to which everyone can assent, regardless of his or her particular allegiances.<sup>347</sup> Mediating institutions are, to be sure, an essential part of the process by which fundamental normative commitments are elucidated, but a role nevertheless remains for political entities to harmonize conflicting value claims into a coherent scheme of principles. This is an ideal theory of the role of state institutions, but it is by no means equivalent to the view that the role of lawyers and judges is simply to execute the will of the elected branches of government. Rights remain as “trumps” against the will of the majority where the majority’s action is inconsistent with fundamental principles of our political order (again, which can be developed and preserved by mediating institutions). One of the basic roles of lawyers in our society is therefore to safeguard these rights, by resisting state power if necessary.

Finally, the problem noted earlier of the plurality of traditions within the legal profession can be observed, writ large, in society. Asking lawyers to guard and preserve tradition merely moves the inquiry back one level. Which tradition, or whose tradition, ought to be preserved? (This argument is the

---

345. See *id* at 397; see also Thomas L. Shaffer, *Towering Figures, Enigmas, and Responsive Communities in American Legal Ethics*, 51 MAINE L. REV. 229 (1999) (forthcoming); cf. DWORKIN, *supra* note 10, at 196-99; WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989); CHARLES TAYLOR, *SOURCES OF THE SELF* (1989).

346. See Wendel, *supra* note 15.

347. See DWORKIN, *supra* note 10, at 225 (“[I]ntegrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness.”).

mirror image of the concern, noted above, that rebellious lawyers ought to make sure that the position they urge is in fact held by their clients.) Surely divergent principles of political morality may be located in American political history and in contemporary discourse.<sup>348</sup> We are a society that emerged from a revolution, adopted chattel slavery, pushed westward through the conquest of native people, fought a bloody war for preservation of the union, became a colonial power, grew to be an economic and political colossus after fighting two world wars, and gradually embraced the ideals of racial and gender equality starting in the middle this century. Our history reveals strands of socialist agitation and radicalism as well as unfettered capitalism; progressivism and Jacksonian populism; imperialism, isolationism, and internationalism; secularism and religious piety; racism and liberation. In contemporary society, political discourse is a curious amalgam of libertarianism, civic republicanism, New Deal statism, and natural law theory. As Cynthia Fuchs Epstein observes:

Americans believe in equal justice for all, but they do not value funding of the institutional supports to achieve it. They believe in justice for the poor, but not in government support for legal services; they believe that morality is essential, but pragmatic necessities may dictate skirting it; they believe discrimination in employment is not right, but employers should have the right to employ anyone they wish; they believe that all people are created equal but that individuals' abilities vary according to ethnicity, race, and gender. . . . Americans believe women should participate in public life and have full professional careers, but women must take primary responsibility for children, and the state should not provide or subsidize childcare.<sup>349</sup>

These contradictions surface in legal disputes, as in tort law, where each doctrinal development recapitulates old battles between notions of individual responsibility and collective risk-spreading, or in contract law, where "freedom of contract" and protection of powerless parties perennially clash. Each of these strands of our public self-understanding is rooted in genuine political traditions, and cannot easily be ruled out as a valid basis for policy decisions. As it is impossible to pinpoint only one of these historical currents as the authentic expression of what we stand for as a polity, establishment

---

348. See, e.g., KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 67-68 (1988); Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801 (1993); Johnson, *supra* note 340, at 268-70; Glen O. Robinson, *Communities*, 83 VA. L. REV. 269 (1997).

349. Cynthia Fuchs Epstein, *Knowledge for What?*, 49 J. LEGAL EDUC. 41, 41 (1999).

lawyers seem destined to bicker endlessly over the precise contours of the tradition they seek to preserve.

## V. NARRATIVE UNITY

### A. *A Limited Role for Personal Values in Legal Ethics*

In the majority of cases, the choice between incomparable values is governed by professional traditions that favor one value over the others. In other situations, however, the customs and practices of a community of lawyers is underdeterminate with respect to the decision faced by the agent because, as we have seen, the practice of lawyering generates multiple communities with divergent ethical norms.

Where professional traditions permit two or more incompatible solutions to an ethical dilemma, an alternative guiding principle for lawyers making choices between incomparable alternatives is the concept of narrative unity.<sup>350</sup> Personal history is “an enacted dramatic narrative in which the characters are the authors.”<sup>351</sup> In other words, persons constitute themselves by their own actions. Ethical agents are not decision makers that approach each choice anew, bound to decide on a course of action based solely on the facts as they present themselves in that case. Instead, they approach ethical choices as persons who have lived lives shaped in particular ways by past decisions and commitments. Think of a government official who has maintained a commitment to protecting and conserving natural resources over the course of her political career.<sup>352</sup> That official might ultimately become intellectually convinced that permitting mining in pristine wilderness land is, on balance, ethically permissible (but not mandatory) for reasons of social policy. She may personally be unable to order that action, however, because of her lifelong commitment to wilderness preservation. Her reluctance is not due to the impersonal calculus of values, which we have

---

350. See MACINTYRE, *supra* note 15, at 214-25; MACINTYRE, *supra* note 22, at 196-215; CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* (1992). Dworkin seems to accept a similar account of moral decision-making for individuals. See DWORKIN, *supra* note 10, at 166. See also Kupfer, *supra* note 244, at 71 (noting that the value of “authenticity” represents being true to one’s inner core of values, allowing one’s choices to develop these values over time, while simultaneously being constrained by prior decisions); Walter Sinnott-Armstrong, *Moral Realisms and Moral Dilemmas*, 84 J. PHIL. 263, 271-72 (1987) (moral antirealists can explain choices between incomparable alternatives by factoring in the agent’s commitments and way of life as truth conditions for moral judgments).

351. MACINTYRE, *supra* note 22, at 215.

352. Charles Taylor offers a similar example in his thoughtful article on narrative unity. See Charles Taylor, *Leading a Life*, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* 170, 176-77 (Ruth Chang ed., 1997).

assumed comes out as permitting exploitation. Rather, it owes to how the choice between conservation and development interacts with her own value structure; she has decided, at some point in the past, that environmental protection is a cause she will take seriously, even at significant cost. Taking this value seriously means she gives environmental conservation greater weight in her own scheme of values than the value has in the calculus of social harms and benefits. Expressing this commitment, she might even choose to resign her government position rather than approve of mining in the wilderness. This commitment is a criterion for choice, even among incomparable values. "Choosing in harmony with one's past reasonable commitments, and, thus, establishing or maintaining one's personal integrity (in the non-moral as well as the moral sense), constitutes an important reason which often guides our choices between rationally grounded options."<sup>353</sup>

Personal identity and narrative unity often enter professional ethics discussions in connection with one of the most morally problematic occupations in our society: working as a public defender, representing clients who are almost certainly guilty, knowing that if one does one's job well, some extremely dangerous individuals will be permitted back on the streets.<sup>354</sup> A lawyer with Marxist commitments, for example, may have an understanding of the moral worth of her work that arises out of her ideology, which would tend to view defense of accused criminals as part of a class struggle. Alternatively, a lawyer may be motivated by a powerful sense of compassion for the oppressed and may be committed above all else to ministering to the despised of society.<sup>355</sup> Another lawyer may have a more abstract commitment to the adversary system of justice and a sincere belief that she must be the one to do the necessary work on behalf of criminal defendants in order to preserve the rule of law.<sup>356</sup> Finally, lawyers may choose this career for egoistic reasons, such as the achievement of trial skills that will be marketable to private firms. A lawyer who is just biding her time

---

353. George, *supra* note 201, at 189; *see also* ANDERSON, *supra* note 4, at 59-64; Edmund Pincoffs, *Quandary Ethics*, in REVISIONS: CHANGING PERSPECTIVES IN MORAL PHILOSOPHY 92 (Stanley Hauerwas & Alasdair MacIntyre, eds., 1983).

354. *See generally* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993).

355. Thomas Shaffer has offered a theological justification for lawyering that draws heavily from New Testament stories of Jesus among the outcasts. *See* SHAFFER, *supra* note 20, at 71-79 (1981). According to Shaffer, a lawyer's commitment to defending accused criminals may be grounded powerfully by a religious faith that teaches the inherent dignity of human beings; one's clients "are children of God, infinitely valuable, more valuable than any government or all governments." *Id.* at 100.

356. *See* Bellows, *supra* note 326, at 97; *see also* Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 177-78 (1983).



as a public defender, waiting to become an accomplished trial lawyer, will have a very different reaction to defending society's outcasts than a committed Marxist or Christian lawyer. Of course, none of these reasons for working as a public defender may apply to a given individual; perhaps there is no reason why a particular lawyer would want that job, given the kind of person she is. That is all right. It may be morally permissible for a generically described moral agent to do *X*, yet not permissible for me in light of my commitments, personal history, and moral character.<sup>357</sup> Counterintuitive though this may seem, it is an important, and often overlooked dimension of ethical reasoning. The choices we make should not be evaluated impersonally, as though we were automatons or value-computers reasoning in a vacuum, but should be measured against the background of the lives we have chosen to lead.

One's life history is not merely a collection of weights assigned to and balances struck between various goods. It is also a particular scheme in which goods are fitted together to form a coherent whole, to construct a unique individual.<sup>358</sup> The creation of a background narrative is essential to a scheme of normative evaluation: "any set of moral admonitions . . . rests on a culture and a story."<sup>359</sup> Compare Ronald Dworkin's familiar analogy of the law to a chain novel, written by a succession of authors, each of whom must be concerned with creating a coherent whole out of the contributions of predecessors.<sup>360</sup> Depending on what has gone before, an author maybe use the character of Scrooge in *A Christmas Carol* to embody the inherent evil in humankind, or to illustrate how an essentially good person may be corrupted by capitalism. If only a few chapters have been written, the author may take either direction, but if a considerable amount of character development has occurred and some of the key events of the novel have taken place, the author's choices are much more narrowly circumscribed. In either case, the novel must display the virtues of unity and coherence—there would be something deeply wrong with a version of *Romeo and Juliet* that suddenly became a do-it-yourself manual for suicides.<sup>361</sup> Similarly a human agent that

---

357. See Pincoffs, *supra* note 353, at 101.

358. See Babcock, *supra* note 356, at 179; Boyle, *supra* note 273, at 495 n.2; Finnis, *supra* note 226, at 220-22.

359. THOMAS L. SHAFFER & MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* 66 (1991).

360. See DWORKIN, *supra* note 10, at 228-38.

361. I owe this example to James Boyle. See James D.A. Boyle, *Legal Fiction*, 38 *HAST. L.J.* 1013, 1016 (1987) (book review). Of course, as Boyle points out in reviewing *Law's Empire*, Dworkin's analogy only works if the hypothetical author assumes certain conventions about novelistic aesthetics. If the author wishes instead to produce a "postmodern" novel, with many abrupt shifts in viewpoint, unresolved contradictions, and a marked lack of unity, then the previous chapters of the

did not display integrity and unity throughout her lifetime would be thought somewhat eccentric at best, mad at worst.

The ability of persons to rank goods differently, assign different weights to competing values, and form a commitment to one goal to the exclusion of others is what makes us humans as opposed to utility-machines.<sup>362</sup> For Joseph Raz, the essence of being human is the capacity to live a different, but equally valuable form of life from one's fellows. "[A] person cannot normally lead the life both of action and of contemplation . . . nor can one person possess all the virtues of a nun and of a mother."<sup>363</sup> If there are forms of life that exemplify virtues that cannot be realized in other, equally morally worthy forms of life, then the ideal of a single perfect form of life is a chimera. This vision of persons as expressions of plural values suggests a model of professional ethics in which lawyers' decisions are imperfectly constrained by values that they have adopted and made central to their moral identities. Just as neither a nun nor a mother can be criticized for failing to realize the virtues particular to the other, so is it possible that two or more types of lawyers may exist, each of which exemplifies competing but incompatible virtues. Different lawyers may therefore resolve dilemmas of choice between incomparable values differently, depending on their prior commitments. The lawyer's life history provides a resource for working through the problem of weighing values and balancing them against one another. Incomparable values are what give our lives shape, and our lives in turn become a rich resource for helping us make choices between incomparable values.<sup>364</sup>

What this means, however, is that ethical decisions can never become completely theorized and predictable. We are often tempted to think that ethics is analogous to a set of rules of the road, with general prescriptions, exceptions, and priority rules: wait at a red light until it turns green, unless you are making a right, and then only go if there is no approaching traffic on the intersecting road, and then only if you are not driving in New York City,

---

novel would provide comparatively little constraint. Postmodern critics like Boyle probably would be delighted to find *Romeo and Juliet* turn into *Final Exit*, or *Around the World in Eighty Days* into a holiday brochure. But even Boyle might be alarmed to find a postmodern work abruptly abandoning its own aesthetic presuppositions, as if Joyce suddenly began writing like Melville in the middle of *Finnegan's Wake*. It is only the assumption that the novelist is playing around with, or appropriating, someone else's convention that gives postmodern fiction its coherence.

362. Cf. Brian Bix, *Dealing with Incommensurability for Dessert and Desert: Comments on Chapman and Katz*, 146 U. PA. L. REV. 1651, 1652-53 (1998) (the incommensurability of values makes choice—in the sense of judgment or will—possible, because an automaton could choose \$500 over \$100, but only a human could choose a way of life over an incomparable alternative).

363. RAZ, *supra* note 12, at 395.

364. See Pincoffs, *supra* note 353, at 100-03; Taylor, *supra* note 352, at 182-83.

and so on.<sup>365</sup> No matter how complex these systems become, they may always be evaluated impersonally; two different drivers would resolve a rules-of-the-road dilemma the same way, provided that the situation were described with sufficient particularity. Many philosophers believe that the same is true for ethics. They hold that you may describe a conflict—between, say, a promise made to one’s friend and an unexpected opportunity to save a life—and formulate generally applicable rules and meta-rules of ranking that determine the right resolution of the dilemma for all similarly-situated agents. But this description of the problem leaves out the character of the deliberating agent, without which, in many cases, there is insufficient information to solve the problem. Perhaps there are two or more sets of authentic human value commitments, both of which are morally worthy, but which would lead the agent to resolve the dilemma differently. In that case, there would be a plurality of right answers, none of which is impersonally better. It is only by virtue of the agent’s value structure that a ranking procedure may be specified.

Philosophers who invoke plural moral values and personal character often draw an analogy with aesthetics. Why should we think that morality leads to only one rational solution to a problem any more than we think the standard of “beauty” ought always to pick out one artistic work as better than another? This is not to suggest that aesthetic ideals have no content—every competent observer would agree that Schubert is a better composer than elevator-music maestro John Tesh, for example, in terms of musical values like logical structure, harmonic inventiveness, thematic beauty, mastery of the vocabulary of prior artists, and so on. But who is a better composer, Brahms or Thelonious Monk? Here the comparison invokes shared values, but straddles divergent ideals, neither of which may be deemed intrinsically superior to the other. Each ideal emphasizes different virtues as central—for Brahms it is musical logic and the fusion of classical and romantic styles, for Monk it is startling originality and interpretive daring—although neither ideal excludes the other virtues, which remain as complementary elements in each composer’s work. Just as these composers balanced aesthetic values differently, music lovers may be attracted to one or the other, depending on what elements in music move them. Similarly, in the domain of morality, a person may cultivate, for example, an ideal that is highly responsive to human suffering, or one that is as honest as Abraham Lincoln, in which one virtue is judged to be the cardinal organizing principle of the individual’s

---

365. This example, and the deeper point about the false analogy between ethics and rule-based decision making, is from Pincoffs, *supra* note 353, at 98-99.

ethical life.<sup>366</sup> Both ideals are socially acceptable; neither can be ruled out as a pattern for human life on the basis of our shared traditions and understandings. By the same token, neither can be held superior to the other in our ethical tradition. In some cases of ethical conflict, one ideal may demand one course of action, the other ideal, another. As long as both ideals are indeed expressions of strands that we consider valuable and worthy of respect within our ethical tradition, either course of action must be regarded as permissible, and neither agent may be criticized in moral terms. Just as we can cultivate tastes for classicism or romanticism, modernism or post-modernism within the domain of beauty, in the realm of ethics we can approve of diverse ideals that agents may adopt as guides for leading their lives.

## B. *Objections*

The account of professional ethics as narrative unity is open to several criticisms, which show some of the limits of personal character as a criterion of moral choice.

### 1. *Integrity Does Not Guarantee Goodness*

Agents can display a high degree of integrity but nevertheless be monstrously evil. Consider one of the great villains from literature, the renegade of Avignon, whose story is retold by Rameau's nephew in Diderot's dialogue of the same name.<sup>367</sup> This man became intimate friends with a Jew in Avignon, lived in his house, and eventually won his complete confidence. One day, however, the man and his Jewish friend were reported to agents of the Inquisition. Terrified, the Jew asked his friend what should be done. "Be seen going about your business, affect the greatest unconcern, carry on as usual,"<sup>368</sup> the man replied. "This tribunal acts in secret, but slowly. We must take advantage of these delays and sell everything. I will go and charter a ship . . . In it we will deposit your fortune, for that is mainly what they are after, and then you and I will sail away to another clime."<sup>369</sup> As Rameau's nephew is telling the story, his interlocutor anticipates the predictable result—the man steals his friend's possessions and escapes on the ship. But, as Rameau's nephew eagerly announces, the man is far worse than

---

366. See *id.* at 108.

367. See Denis Diderot, *Rameau's Nephew*, in *RAMEAU'S NEPHEW/D'ALEMBERT'S DREAM* 33, 93-96 (L.W. Tancock trans., Penguin Books 1966).

368. *Id.* at 95.

369. *Id.*

that, and “the sublimity of his wickedness” is the result of the totality of his integration of character, for he has none of the scruples of “a respectable citizen.” Because of his supremely unified character, the man commits an act of incomprehensible evil: he turns in his Jewish friend to the Inquisition, who is promptly led to the bonfire. The younger Rameau claims to admire this man precisely because of his peerless integration: “If it is important to be sublime in anything, it is especially so in evil. You spit on a petty thief, but you can’t withhold a sort of respect from a great criminal. . . . What you value in everything is consistency of character.”<sup>370</sup>

The story told by the younger Rameau shows that narrative unity cannot serve as the sole criterion of good character or of good actions. The lawyer may not be in as good a position to determine the right course of action as others who have confronted a similar situation in the past. The merit of tradition-based methods of practical reasoning is respect for the wise decisions of those who have gone before. The narrative unity account, by contrast, does not explicitly constrain the agent’s judgment either to the accumulated wisdom of the past, or to the virtue of the truly wise decision maker. “Agents may be as conscientious as you please, but their opinions will have value only if they are informed and experienced as well.”<sup>371</sup> Thus, a proponent of narrative unity should ideally construct a theory of judgment that integrates an intersubjective component, so that the agent’s deliberation will be influenced by public norms and by the opinions of other ethically conscientious people who have confronted similar dilemmas. This condition may partly be fulfilled by requiring that agents offer as reasons only those principles that are general enough to apply to others who are similarly situated.<sup>372</sup> Although narrative unity focuses on the agent, subjective

---

370. *Id.* at 93. For another example of a writer who has explored the possibility of integration in evil, consider Arthur Miller’s play *Incident at Vichy*, discussed by James Boyle. See Boyle, *supra* note 273, at 512. In the play, a roomful of detainees are trying to convince themselves that whatever the Nazis have in mind for them, it cannot possibly be extermination. After all, they reason, it is wartime and the Nazis would presumably prefer to use captives as forced labor. But one of the prisoners finally sees the situation with clarity—evil is not constrained by ordinary self-interested rationality: “If you despise Jews the most honest thing is to burn them up. And the fact that it costs money, and uses up trucks and personnel—this only guarantees the integrity, the purity, the existence of their feelings.” ARTHUR MILLER, *INCIDENT AT VICHY* 40 (1965). The story is a great *reductio ad absurdum* argument against admiring people for their unity of character alone. See also the description of Charles-Henri Sanson, the executioner of Paris, in ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* 15-42 (1999).

371. JONSEN & TOULMIN, *supra* note 9, at 313.

372. See AUDI, *supra* note 15, at 279-86 (arguing for a “Kantian intuitionism” in which universalizability in the form of the Categorical Imperative operates as a constraint on the prudent agent’s balancing of prima facie obligations); Kupfer, *supra* note 244, at 88-89 (citing several works by Jürgen Habermas, who argues that valid norms must be justified by reasons which could be accepted by all other participants in the ideal speech situation).

principles will be valid justificatory reasons for practical judgments only where they are capable of being accepted by others as a grounds for action, lest ethical decisions be merely solipsistic. In addition to this intersubjective component, universalizability (in the Kantian sense) still plays a role in ethical decision making. A decision must conform to an ideal that we could, in principle, accept as an ideal for others to follow, even though we may not choose to adopt that ideal ourselves. Universalizability may establish a range of acceptable choices while ruling others out as inconsistent with authentically valuable ideals.<sup>373</sup> Put another way, genuine integration is not possible around wicked moral principles.<sup>374</sup>

It is worth emphasizing that narrative unity is intended to function as a criterion for ethical choice only in that limited subset of cases in which the norms and practices of the relevant interpretive community are ambiguous. In such cases, there will probably be a narrow range in which agents may resolve dilemmas differently, but there naturally will be many other possible solutions that are out of bounds for the community.

## 2. *Compartmentalization*

Second, narrative unity may function as a theory of professional ethics only if the actor's professional self and personal self are conceived of as unitary. Not all who have written about public morality have thought that professional actions are governed by the same norms applicable to personal moral decisions. One of the most famous statements of this separation is from Montaigne: "The mayor and Montaigne have always been two people, clearly separated."<sup>375</sup> Complete role-differentiation, as envisioned by Montaigne, requires not only that the agent's public and private actions be clearly segregated, but also that the dispositions and character relevant to each role be similarly separable. Many Americans, for example, are willing to forgive Bill Clinton for his marital infidelities, reasoning that these infractions relate to his private self rather than to an aspect of his character that relates to his performance as President. The public seems able to draw the line envisioned by Montaigne between the President's private and public lives. Moreover, Clinton himself appears to value the bifurcation of his personal and professional selves, accepting praise for being the morally good person who advances his public-policy initiatives while insisting on the

---

373. See Pincoffs, *supra* note 353, at 111.

374. See GEORGE, *supra* note 35, at 79; cf. Mark Tushnet, *Flourishing and the Problem of Evil*, 63 TUL. L. REV. 1631, 1642-43 (1989).

375. Quoted in Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 20 (1951).

irrelevance of his darker, private side.<sup>376</sup>

This separation frequently proves tenuous and unstable. Eventually, in the example of Bill Clinton, the suspicion grows that if he would break his marriage vows and lie to his wife, then he very well also might lie to the public about, say, his motives for attacking terrorist installations overseas. This evaluation is based on the intuition that, unlike the case of Montaigne, “William Jefferson Clinton” and “the President” are not always clearly separated. The dispositions that Clinton cultivates in his private life must inevitably spill over into the character he brings to his performance of public duties. Alternatively, a public figure who adheres to a strict public-private separation becomes an unattractive character in terms of both his personal and official selves. There is something inhuman about a person who “refuses to be seen except in pieces,”<sup>377</sup> and who insists that all his character traits be seen in isolation from one another, as though they were manifestations of a split personality.<sup>378</sup> Finally, even within the realm of public acts, we should not regard radical compartmentalization as normatively desirable. A government official who can easily separate his role as a spouse from the relationship of trust he maintains with the public may be so morally fragmented that he is unable to appreciate the relevance of one government policy to another arena of public activity.

In what remains as one of the best philosophical accounts of professional morality, Gerald Postema argues that the strategy of separating one’s public or occupational self from one’s personal self incurs intolerable social and psychological costs.<sup>379</sup> In the context of lawyering, the process of giving legal advice to clients cannot proceed in a moral vacuum. Advocacy, judging, and indeed, even the most fundamental process of reading and interpreting legal texts, take place in a rich normative context. If a lawyer has created a hermetic separation between her role-self and her personal-self, the

---

376. For a wry observation about Clinton’s 1999 State of the Union address as the apotheosis of this split personality, see Maureen Dowd, *Sex and Balances*, N.Y. TIMES, Jan. 20, 1999, at A31.

377. *Id.*

378. One of the most disturbing aspects of Monica Lewinsky’s interview with Barbara Walters was Lewinsky’s continuing effort to conceive of Clinton as having two personalities: the “person she knew,” who seemed to care about her, and Clinton the “pure politician,” who would cast aside loyal friends and deny his affection for Lewinsky to keep himself out of trouble. See Francis X. Clines & Frank Bruni, *In Interview and Book, Lewinsky Seizes Initiative*, N.Y. TIMES, Mar. 4, 1999, at A22. This split apparently makes Lewinsky feel less like a dupe—she fell in love with the good Clinton and was hurt unexpectedly by the bad Clinton—but it seems an inauthentic description of human nature. One watches this story unfold with a sense of longing to know which personality, good or bad, is the real Bill Clinton. The possibility that both personalities could be the real Clinton is very difficult to accept.

379. See Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 78-81 (1980).

experience of day-to-day private life becomes unavailable as a source of moral understanding. This problem may become manifest in the lawyer's inability to sympathize with the client and see the dispute through the eyes of another. This moral myopia may lead to lack of empathy for non-parties who are affected by ethical judgments. Alternatively, if the lawyer degenerates too far into a Jekyll-and-Hyde role-differentiated personality, she may lose the ability to draw from the principles of public morality that play such an important role in the interpretation of legal texts. Finally, if practical deliberation is not a purely deductive mode of reasoning, then it is incumbent upon a lawyer to develop faculties that enable alternative modes of ethical decision making, such as Aristotelian practical wisdom or casuistical reasoning. These modes, even more than legal interpretation, require the deliberator to draw from a wide range of sources of normative understanding. Thus, it is impossible to retain the ability to make ethical choices if professional and personal roles are conceived as completely separate.

### 3. *Antirealism, Romanticism, and Relativism*

It is sometimes asserted that value incomparability is incompatible with moral realism.<sup>380</sup> Antirealist arguments tend to scare the daylight out of readers, particularly when expressed in stark form, as in this passage by Richard Rorty:

Suppose that Socrates was wrong, that we have not once seen the Truth, and so will not, intuitively, recognize it when we see it again. This means that when the secret police come, when the torturers violate the innocent, there is nothing to be said to them of the form "There is something within you which you are betraying. Though you embody the practices of a totalitarian society which will endure forever, there is something beyond those practices which condemns you."<sup>381</sup>

As others have observed, Rorty can't possibly mean what he says here.<sup>382</sup> He is fond of radical-sounding dicta, which shake things up a bit and help him establish the negative case for pragmatism, but his substantive positions

380. Moral realism is the thesis that "there are mind-independent moral facts in virtue of which each moral judgment is either true or false (and not both)." GOWANS, *supra* note 12, at 141; *see also* AUDI, *supra* note 15, at 287; Walter Sinnott-Armstrong, *Moral Realisms and Moral Dilemmas*, 84 J. PHIL. 263 (1987); Timothy Williamson, *Realism and Anti-Realism*, in OXFORD COMPANION TO PHILOSOPHY 746 (Ted Honderich ed., 1995).

381. RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* xlii (1982) (emphasis omitted).

382. *See* STOUT, *supra* note 240, at 245-65.



are generally much more modest.<sup>383</sup> But whether or not this passage represents Rorty's considered views on moral realism, it does help explain why commentators tend to be quite wary of arguments for the incomparability of values. Indeed, similar concerns are voiced whenever "postmodern" philosophers start talking about deconstructing every possible source of meaning:

[T]he belief in an exclusively linguistic universe leaves humanity more rather than less vulnerable to the forces of political tyranny. There is, in deconstruction, neither a safeguard against nihilistic despair nor an antidote to passive quiescence. Rather than provide a philosophical basis for moral judgment or existential action, deconstruction has the effect of silencing literature and language, leaving us an intellectual void.<sup>384</sup>

If the values at play in human life are incomparable, and liberty and equality may be traded off against one another willy-nilly, what are we to say when the secret police come?

Statements about the incommensurability of belief systems have become part of the rhetorical apparatus of radically skeptical, or "postmodern," critics. "To the . . . universality [of reason], they oppose an irreducible plurality of incommensurable lifeworlds and forms of life, the irremediably 'local' character of all truth, argument, and validity."<sup>385</sup> Skeptics point out that there is no way to describe facts about the world that does not depend on the language and values of particular cultures. The crucial premise in the skeptical argument is the impossibility of reproducing the world-as-it-is-in-itself in language, as though language and knowledge were nothing more than a mirror of reality. Because reality is not represented in language, the object of study for philosophers becomes language—what people say about the world—not the world itself. What people say about the world has, of course, changed over time, and continues to vary among cultures. The moral relativist then seizes on this undeniable fact to argue for the logically remote conclusion that these linguistic frameworks must describe self-contained

---

383. Compare another critic's reaction to an overstatement by Rorty: "I can imagine someone interjecting at this point with some impatience that whatever Rorty may have literally *said* in the passage at hand, it would of course never occur to him, any more than it would to anyone else, to *mean* to suggest [what he said]." MICHAEL MORTON, *THE CRITICAL TURN* 119 (1993) (emphasis in original).

384. DAVID LEHMAN, *SIGNS OF THE TIMES: DECONSTRUCTION AND THE FALL OF PAUL DE MAN* 99 (1991).

385. Thomas McCarthy, *Introduction*, in JURGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* vii, ix (Frederick Lawrence trans., 1987).

islands of normativity, which cannot be compared with each other. Thus, says the relativist, there is no way for a member of one linguistic community to evaluate the norms of a member of different community.

Although the fear of relativism is understandable, the appropriate response is not to search for a means to compare human goods and values on a common scale. As Joseph Raz shows, the existence of incomparable values is fully compatible with moral realism and does not entail moral skepticism or relativism. Raz is quite careful to argue that, although a plurality of alternative ways life are possible for humans, there are numerous possible lives that are of no moral worth whatsoever.<sup>386</sup> Moral pluralism, defended by Raz, is simply the claim that “there are various forms and styles of life which exemplify different virtues and which are incompatible.”<sup>387</sup> It is not a claim that anything goes, or that the secret police do not violate an essential aspect of human life by dragging dissidents away to be tortured. Although Raz argues that there are virtues particular to the life of a nun that cannot be realized within the life of a mother, and vice versa,<sup>388</sup> he does not claim that there are any virtues at all in the life of a drug addict or a neo-Nazi terrorist. The linguistic plurality argument trotted out by some postmodern critics does not, by itself, establish that there are no morally unworthy forms of life.

Other avowedly postmodern thinkers argue that moral pluralism is actually “a cultural and personal resource of enormous value.”<sup>389</sup> By playing off opposing moral traditions against one another, individuals can create space to live freely and to challenge conventional understandings. A similar point can be traced back to the work of a very different philosopher, Isaiah Berlin, who has shown that totalitarianism, not moral relativism, is the greater danger to human societies. The necessity of guarding against authoritarian regimes should lead us to embrace the diversity of human values and experience, rather than to deny the incomparability of values. Liberty and equality cannot be reduced to one another, and this essential incomparability of the two values insures against a state regime that seeks to realize utopian ideals at the expense of individual autonomy.

[T]he belief that some single formula can in principle be found whereby all the diverse ends of men can be harmoniously realized is demonstrably false. If, as I believe, the ends of men are many, and not all of them are in principle compatible with each other, then the

---

386. See RAZ, *supra* note 12, at 133.

387. *Id.* at 395.

388. See *id.*

389. Boyle, *supra* note 274, at 521.

possibility of conflict—and of tragedy—can never wholly be eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition.<sup>390</sup>

A totalitarian regime is thus “a horrifying picture of a frictionless society in which differences between human beings are, as far as possible, eliminated, . . . pressed into a social and political straitjacket which hurts and maims and ends by crushing men in the name of a monistic theory, a dream of a perfect, static order.”<sup>391</sup> The siren song of monism is moral innocence, but, as Berlin argues, the foundation of personal autonomy is pluralism, which ensures that individuals cannot be treated by the state as mere costs of implementing some utopian social vision. For Berlin, treating goods as though they are interchangeable and perfectly commensurable opens the door to totalitarian rulers, who freely subtract from individual liberty in order to add to collective happiness.

If monism were correct, a morally justified action would preclude regret or guilt, because the chosen option would be justified only insofar as it represented more of the Good than the unchosen one. A public official should decide either to allow or not allow mining in the Glacier Peak Wilderness and then go home and sleep well, knowing that good has been maximized. But monism is inconsistent with our experience of making morally troubling decisions. The existence in ordinary language of non-action-guiding moral predicates, like guilt and shame, is often taken to reveal the incomparability of values and to refute monism. Moral emotions, like regret and shame, show that ethical deliberation is not only concerned with determining the right answer to a dilemma, but also with specifying the appropriate attitude to have toward one’s actions.<sup>392</sup> A conscientious official, who truly appreciates the competing values involved, may approve mining near Glacier Peak but remain profoundly troubled by the loss of so much natural beauty. Sartre’s tragic hero will feel regret at not having taken the other path, even though he acted as he did for good reasons. As Berlin shows, attitudes of hesitation in the face of profound ethical choices—shame at having done wrong and regret at the good not done—are healthy dispositions to cultivate in powerful officials. (This insight goes a long way toward

---

390. ISAIAH BERLIN, *TWO CONCEPTS OF LIBERTY* 54 (1958).

391. Isaiah Berlin, *The Decline of Utopian Ideals in the West*, in *THE CROOKED TIMBER OF HUMANITY* 20, 45 (Henry Hardy ed., 1990). Cf. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 113 (1980) (“Only an inhuman fanatic thinks that man is made to flourish in only one way or for only one purpose.”).

392. See STOCKER, *supra* note 12, at 29-35; Postema, *supra* note 379, at 68.

lessening the inevitability of moral tragedy, noticed by Weber, of one who “lets himself in for politics.”<sup>393</sup>) The same is true for lawyers, who may be involved in wrongdoing as an inevitable consequence of their plural commitments. Perhaps the right thing to do in a case is to cross-examine a truthful witness brutally, to shade the truth a bit in a negotiation, or to refuse to disclose a client’s secret that would alleviate suffering if known. But even if those actions are justified, we would prefer that the lawyer feel regret, so that we know she did not make her decision lightly.

## VI. CONCLUSION

It is customary to end this kind of paper with an emphatic summation of the practical consequences of one’s preferred theory of legal ethics, and it is certainly tempting to offer one here—Alice is a sleazeball and legal practice will never return to its former state of grace until we figure out what to do about mean people like her; Carlos must disclose the documents or risk making the legal proceeding an amoral farce; Emma may have been well-intentioned, but she went too far for her client; and so on. It would have been possible to provide such a recapitulation if a different set of problem cases had been chosen, one in which a hard choice really did not exist. The problems presented in this Article, however, are designed to bring into relief the internal contradictions underlying the practice of lawyering in the United States, which I have represented as the tension between rebellious and establishment lawyering, but which could also be conceptualized by other, related paired oppositions: individualistic versus altruistic, conservative versus progressive, liberal versus communitarian, client-centered versus public-spirited, and so on. The contradictions are successfully managed in most cases by intersubjective agreement, which may be embodied in disciplinary rules, principles of professional malpractice, statutes, or administrative regulations, but need not necessarily be captured by positive law. It is worth re-emphasizing that, in many, and perhaps most, situations in which an ethical conflict between values stated at a high level of abstraction may be presented, the traditions of legal practice in a given setting<sup>394</sup> suffice

---

393. See *supra* note 317 and accompanying text.

394. It may make a great deal of difference whether the relevant community is defined geographically, as the set of lawyers who practice in a particular country, state, or city; by subject matter, as in practice-based groups of lawyers such as the admiralty, criminal-defense, or personal-injury bars; or along other lines such as ethnic identity, as in the National Bar Association for black lawyers. There is a balance to be struck here, between overly particularistic definitions of community, which would exclude some interested participants, and communities that are defined so broadly that no set of norms and practices can be ascertained. See *generally* KRAUSE, *supra* note 16, at 54-57; Glen O.

to resolve the conflict definitively, as the community speaks with only one voice. Application of moral values, like the reading of texts, is constrained by interpretive communities. The arguments here are therefore directed at that small but interesting subset of cases in which the community does not speak univocally, but is internally divided.

Should we prefer the theoretical elegance of a monistic foundation for legal ethics? Perhaps some human activities can be rationalized as having one unified end, so that participants in the practice could be judged morally according to whether their actions furthered or hindered the agreed-upon goal. The social practice of lawyering, however, seems almost uniquely unsuited to this kind of simplification, for lawyers are the agents through whom humans construct disputes and dialogue about the basic conflicts inherent in social life. Although I do not wish to make too much of this observation, which has become somewhat clichéd, it nevertheless is the case that social life exhibits a fundamental contradiction, which can be represented as the opposition between liberty and order; individualism and collective good; or partiality and equality. Any scheme of values, therefore, that is to underlie and justify the practice of lawyering, is bound to partake of the same internal incoherence as the principles of social life upon which it is founded. As Isaiah Berlin and others have argued, this insight should be cause for hope, not despair, but it does entail acceptance of a certain level of messiness in moral reasoning. We make sense of this chaos by reasoning together and forming communities that coalesce around a set of shared values, traditions, and commitments, but these communities are always in the process of being challenged and reshaped from within and without. This constant dialectic is what gives rise to competing self-understandings, such as the divergent communities of rebellious and establishment lawyers. Because the energy created by this conflict may ultimately serve as an impetus for controlled, manageable progress (as opposed to revolution on the one hand and ossification on the other), it is a social benefit to have a professional group that is able to justify its activities within society by a plurality of ends. In other words, we need both Darrows and Davises. While no one person can be both, neither option should be ruled out of bounds for ethically conscientious lawyers by reasoning as though one strand of lawyering tradition in the United States is inauthentic. As Berlin and Weber

---

Robinson, *Communities*, 83 VA. L. REV. 269 (1997); Wendel, *supra* note 15. It is an important part of any communitarian ethical argument to delineate the applicable community and defend these boundaries.

how, the price for accommodating both subcommunities is theoretical complexity, the possibility of insoluble conflict, and occasional moral tragedy. The cost of failing to recognize the pluralism of professional values, however, is much greater.