THE PLACE OF MORAL JUDGMENT IN CONSTITUTIONAL INTERPRETATION

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> Fact situations do not await us neatly labeled, creased, and folded, nor is their legal classification written on them to be simply read off by the judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand with all the practical consequences involved in this decision.[1]

Today, in the United States, through judicial review, courts settle a wide range of political, moral, social, cultural and economic issues.[2] As we recently learned, the United States Supreme Court can even decide a presidential election.[3] Although the exercise of judicial review is arguably antidemocratic, most constitutional law scholars have come to accept its legitimacy over time.[4] As such, at least in the near future, judges will continue to decide many matters of national importance, including people's right to abortion, physician-assisted suicide, affirmative action, capital punishment, and same sex marriage. When we turn these problems of social morality into questions of constitutional law and expect judges to resolve them, it stands to reason that we must take special care

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1. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, *in* THE PHILOSOPHY OF LAW 23 (Ronald Dworkin ed., 1977).

2. *Cf.* RONALD DWORKIN, A MATTER OF PRINCIPLE 2 (1985) [hereinafter DWORKIN, A MATTER OF PRINCIPLE].

3. Bush v. Gore, 531 U.S. 98 (2000).

4. *See* Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 238 (1988) (arguing that an active role for the judiciary has "dominated modern American constitutional theory and practice"); *see also* MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 11 (1982). A number of conservative judges have sought to restrict the scope of judicial review in the name of democratic self-rule. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); William H. Rehnquist, The Notion of a Living Constitution, *in* Will E. Orgain Lecture (Mar. 12, 1976), 54 TEX. L. REV. 693 (1976); Antonin Scalia, Originalism: The Lesser Evil, *in* William Howard Taft Constitutional Law Lecture (Sept. 16, 1988), 57 CINN. L. REV. 849 (1989). There is a vast literature on whether the exercise of judicial review can be squared with the practice of democracy. Most commentators, albeit for different reasons, have concluded that judicial review can peacefully coexist with our equally important commitment to democratic self-rule. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 3-33 (1991); RONALD DWORKIN, LAW'S EMPIRE (1986) [hereinafter DWORKIN, LAW'S EMPIRE]; JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

in selecting the right people for the job. Unfortunately, theories of law and adjudication do not typically describe the character of a good judge.[5]

Other commentators have doubted our ability to select judges on the basis of their moral expertise.[6] After all, especially in a democracy, the very notion of moral wisdom is bound to be somewhat controversial.[7] As Richard Posner puts it, "[I]t is not obvious that an independent judiciary is in the public interest; the people may be exchanging one set of tyrants for another."[8] Nevertheless, unless we eliminate judicial review altogether, we must try to make the best possible choices in determining what kind of people ought to sit on the bench. This Article contends that making such choices requires an understanding of the cognitive role that moral judgment plays in enabling a judge to render good decisions.[9] Indeed, a judge who cannot exercise such judgment is not a person who is qualified to decide the most important questions of constitutional law.[10]

The rule of law requires appellate judges to assess each case on the merits.[11] An opinion that reads like an ad hoc rationalization for a particular outcome is likely to call into question the integrity of the judge. A legal decision that is reached exclusively for non-legal reasons is also illegitimate inasmuch as dissenters have not been given sufficient reasons to comply with it.[12] From the standpoint of legitimacy, there is an important difference between a judge who uses precedent to rationalize the legal conclusion that she favors on personal grounds and a judge who sincerely tries to find the most plausible legal answer in a particular case. One may believe that there ought to be a constitutional right

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5. *See* Ruth Gavison, *The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability*, 61 S. CAL. L. REV. 1617, 1623 (1988).

6. *See, e.g.*, LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES 73 (1958).

7. *Cf.* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 285 (1983) (arguing that "[a]ll arguments for exclusive rule, all anti-democratic arguments, if they are serious, are arguments from special knowledge").

8. RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 6 (1990).

9. For the idea of "moral judgment," the Author is indebted to Barbara Herman, *The Practice of Moral Judgment*, *in* THE PRACTICE OF MORAL JUDGMENT 73-93 (1993).

10. In what follows, I focus exclusively on questions of constitutional law that involve moral disagreement. Whether moral judgment is required in more technical areas of constitutional law is beyond the scope of this Article.

11. *Cf.* Robert W. Bennett, *Objectivity in Constitutional Law*, U. PA. L. REV. 445, 446-47 (1984) (arguing that "despite their [theoretical] differences, both originalists and nonorginalists insist upon external constraints on judicial choice, and both often express their insistence as a concern that judges be objective").

12. I am assuming, of course, that there is no general moral obligation to obey the law simply because it is the law and that there is a meaningful difference between moral and prudential reasons. On the relationship between the giving of reasons and the legitimate exercise of political power, see BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980). On the conflict between political authority and moral autonomy, see ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM (1970).

to welfare, housing, or health care, for example, but that belief, to have legal force, would have to be based on a reasonable reading of the constitutional text, its linguistic implications, or on the cases that have construed its meaning over time.[13] Legitimate constitutional adjudication is principled when it is based on legal reasons that are independent of the result that the judge might prefer if she were acting in the capacity of citizen or legislator.[14] A judge who allows her policy preferences or moral beliefs alone to dictate the legal result has not rendered a legitimate decision because that decision could not be justified to those who do not share her personal preferences or convictions.[15] Under conditions of reasonable moral pluralism, one of the primary purposes of appealing to the law is that the law, as opposed to other sources of authority, is more likely to legitimate controversial decisions and thus, to encourage compliance.[16]

The ability to remain faithful to the law is the first virtue of judges who are entrusted with the power of judicial review and who are committed to exercising it in a manner that minimizes its antidemocratic tendencies. Honest recognition of the temptation to decide cases on non-legal grounds is the first step toward the kind of self-restraint that we should expect judges to exhibit in a constitutional democracy. A judge who is not honest with herself in this regard is not likely to behave in a principled, professional manner. At the same time, most constitutional adjudication requires moral choice on the part of the judge.[17] In

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13. For an argument in favor of such rights, see Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

14. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15-19 (1959).

15. Public justification requires meeting those with whom we disagree on common ground. JOHN RAWLS, A THEORY OF JUSTICE 580 (1971). For Rawls's most recent views on public justification, see JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 26-29 (Erin Kelly ed., 2001) [hereinafter RAWLS, JUSTICE AS FAIRNESS]. However, such justification need not be addressed to unreasonable persons. On this point, see Erin Kelly & Lionel McPherson, *On Tolerating the Unreasonable*, 9 J. POL. PHIL. 38 (2001).

16. "Conditions of reasonable moral pluralism" refers to intractable disagreement over the nature of the good life for human beings. JOHN RAWLS, POLITICAL LIBERALISM, at xviii (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]. As John Rawls puts it, "A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines." *Id.* For an excellent overview of the range of arguments that support the conclusion that in some instances there are moral reasons to obey the law, see KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 47-203 (1987). Some studies suggest that there is a moderately strong link between compliance with the law and belief in its legitimacy. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 7 (1990).

17. In hard cases, Dworkin believes that a judge cannot apply a legal rule in a straightforward manner—as if a conclusion followed from the premises—to reach the right legal answer. Positivists, such as H.L.A. Hart, also insist that judges have choice in hard cases. Whereas Hart

fact, the vast majority of appellate cases are likely to be hard cases where legal rules or principles alone cannot resolve them.[18] The main premise of this Article is that a commitment to principled adjudication is a necessary but not a sufficient condition of judging well.[19] Appeal to principled adjudication only gets us so far in understanding the operation of good judging because such a theory merely touches upon the moral psychology of a judge who has the right attitude toward her professional responsibilities. Equally important, we must try to understand what should happen in the mind of a judge who conscientiously tries to find the best answer to a difficult legal question.[20]

The application of abstract principles to concrete circumstances is not strictly deductive in the sense that a premise implies a conclusion.[21] As H.L.A. Hart once remarked, "Logic is silent on how to classify particulars—and this is the heart of a judicial decision."[22] In hard cases, the application of a legal rule is bound to turn on the interpretation of the principles and policies that are not explicitly contained in the rule itself.[23] In particular, constitutional interpretation often requires the judge to bridge the gap between highly abstract constitutional language and the actual particulars of the case.[24] At the very least, to decide

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thinks that law runs out and as such, the judge must legislate to fill in the gaps, Dworkin maintains that the judge can still weigh policies and principles (which are part of the law, more broadly defined) in rendering a legal decision. From either standpoint, whether a judge reaches the right decision or a good decision turns on her ability to choose wisely. Despite their deeper theoretical differences over the character of law, then, both Ronald Dworkin and H.L.A. Hart agree that in rendering appropriate decisions, judges must often make moral choices. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 123-130 (1977) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY]; H.L.A. HART, THE CONCEPT OF LAW 12, 204 (2d ed.) (1961).

18. Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717, 1731 (1988).

19. *Cf.* LAWRENCE A. BLUM, MORAL PERCEPTION AND PARTICULARITY 51 (1994) (arguing that intellectual acceptance of and psychological commitment to particular moral principles does not guarantee that the moral agent will be able to recognize particular situations that implicate those principles).

20. For an argument that there are right answers to hard cases, see DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 119-45. For his account of hard cases, see DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 17, at 81-130. Basically, a hard case is hard when "precedents go in both directions and no clear legal rules apply." VINCENT J. SAMAR, JUSTIFYING JUDGMENT: PRACTICING LAW AND PHILOSOPHY, at ix (1998). A hard case also raises highly controversial legal issues that divide reasonable people with legal training. David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105, 105-06 (1988).

21. *See* Hart, *supra* note 1, at 23; *see also* KLAUS GUNTHER, THE SENSE OF APPROPRIATENESS: APPLICATION DISCOURSES IN MORALITY AND LAW, at xiii (1993).

22. *See* Hart, *supra* note 1, at 25.

23. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2-30 (1996); Benjamin Gregg, *Using Rules in an Indeterminate World*, 27 POL. THEORY 357, 358 (1999).

24. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 17, at 136.

whether a punishment is "cruel and unusual," whether a search is "unreasonable," or whether a group of people have been treated "equally" calls for minimal moral judgment. For this reason, the job description of a judge involves more than legal competence.[25] This Article tries to explain what it means for judges to approach hard cases with moral sensitivity and why judges must be able to exercise moral judgment competently in reaching the best possible decision.[26] To exercise moral judgment is to discern the morally relevant facts of the case,[27] to apply abstract language in a morally sensitive way, to appreciate good analogies,[28] and to weigh competing considerations

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25. *See* Gavison, *supra* note 5, at 1653; Schauer, *supra* note 18, at 1717-33.

26. I do not take sides in the debate between Dworkin and others on the question of whether there is a single correct answer in hard cases or how we might know whether such an answer was correct. In fact, even Dworkin concedes that "the inevitable vagueness or open texture of legal language sometimes makes it impossible to say that a particular proposition of law is true or false." DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 128. The point is that some answers to hard questions are more likely to be legally and morally justified than other answers and it is the duty of the judge to narrow the range of plausible answers and select the answer based on the arguments that she finds to be most convincing even when others might reasonably disagree with the decision that she ultimately reaches. In doing so, a judge should always act as if there were a single correct answer to the hard case at hand.

27. *See infra* notes 142-52 and accompanying text.

28. *See generally* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925 (1996); James R. Murray, *The Role of Analogy in Legal Reasoning*, 29 UCLA L. REV. 833 (1982); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993). Drawing an analogy between two or more entities is to indicate one or more respects in which they are similar. The single most important feature of analogical reasoning is the existence of the "analogized" item of some particular characteristic(s) that allows one to infer the presence of that item of some particular other characteristic that may not be initially apparent. Every analogical inference proceeds from the similarity of two or more things in one or more respects to the similarity of those things in some further respect. For instance, a, b, c, and d all have properties X and Y. a, b, and c all have property Z. Therefore, d *probably* has property Z. Analogical arguments, which cannot be deductively valid, can still be more or less cogent depending on the degree to which their conclusions may be affirmed. However, two items compared can be alike or unlike in an infinite number of ways. Thus, there has to be an additional sort of constraint on analogical reasoning: relevance, which is dependent on the discursive context. Analogical argument aims for making the case for the relevant similarity between two items compared.

There are six criteria for appraising the soundness of an analogical argument: (1) the number of entities or instances, (2) the variety of the instances in the premises, (3) the number of respects in which the things involved are said to be analogous, (4) relevance, (5) the number and importance of disanalogies, and (6) the nature of the claim and the modesty of the conclusion affirmed. IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 477-82 (10th ed. 1998). Drawing an analogy between two or more entities is to indicate one or more respects in which they are similar. If we have an earlier case that is sufficiently similar to the case at hand and one set of reasons had outweighed the other set, we can then argue that similar cases should be treated similarly and

appropriately.[29] By understanding its exercise, we can begin to understand the qualities that we ought to look for in candidates for the bench.[30]

This Article is divided into three main sections. Part I spells out the skeptical challenge to the rationality of legal reasoning, answers the charge that legal propositions cannot be true or false, and describes the cognitive process of applying abstract legal rules to concrete cases.[31] Part II examines Aristotle and Kant's thoughts on the operation of judgment in practical reasoning and contends that too much has been made of their purported differences.[32] Part III explains the nature of moral judgment in constitutional adjudication and puts forth a theory of what it means to exercise such judgment well.[33]

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perhaps, weigh the reasons like we did in the past. This does not mean that it is obvious that a past case is sufficiently similar to qualify as an analogy. At the very least, such a move would require argumentation. Indeed, we ought to expect new cases to differ in some respects from previous cases and for the strength of reasons to vary according to context and the extent to which they are stronger or weaker in combination with other reasons.

The impulse toward formalism in legal culture can partially be explained by the fact that all of us believe that fairness or equity requires that we treat like cases alike. The trick is to determine when two cases are sufficiently similar to warrant the same kind of treatment. Judges have a great deal of work to do, then, in figuring out whether two cases are truly analogous. In common law systems, appeal to precedent works as follows: The previous treatment of A in manner B constitutes, only because of its pedigree, a reason for treating A in the same way when it occurs again in a slightly different form. The relevance of an earlier precedent depends on how the facts of the earlier case were characterized. Although no two cases are factually identical down to the last detail—otherwise they would not have been litigated in the first place or would not have reached an appellate court—they may be sufficiently similar in the relevant respects for a judge to decide that the holding and rationale of a previous case is also applicable to the new case.

29. *See generally* CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY 1-21 (1986); Martha C. Nussbaum, *The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality*, *in* ARISTOTLE'S ETHICS: CRITICAL ESSAYS 145 (Nancy Sherman ed., 1999) [hereinafter Nussbaum, *The Discernment of Perception*]; MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS; LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 290-317 (1986) [hereinafter NUSSBAUM, THE FRAGILITY OF GOODNESS]; NANCY SHERMAN, THE FABRIC OF CHARACTER (1989); NANCY SHERMAN, MAKING A NECESSITY OF VIRTUE: ARISTOTLE AND KANT ON VIRTUE (1997) [hereinafter SHERMAN, MAKING A NECESSITY OF VIRTUE].

30. *But see* BLUM, *supra* note 19, at 46-47 (arguing that moral perception and moral judgment is not a unified capacity but rather consists in a "multiplicity of psychic processes and capacities" and that certain persons are better at perceiving certain kinds of particulars than other kinds).

31. *See infra* notes 34-117 and accompanying text.

32. *See infra* notes 118-41 and accompanying text.

33. *See infra* notes 142-86 and accompanying text.

I. THE SKEPTICAL CHALLENGE TO THE RATIONALITY OF CONSTITUTIONAL INTERPRETATION

A. Radical Skepticism

At the outset, anyone who defends any conception of judicial wisdom must address the skeptical challenge to the rationality of legal reasoning. After all, the view that the results of constitutional adjudication can be rationally justified has met stiff opposition from skeptics who believe that we ought to be suspicious of all claims to legal truth.[34] These skeptics insist that for every argument that supports a particular conclusion, there is an equally compelling argument that supports a different conclusion.[35] Roberto Unger writes, "[i]t will always be possible to find, retrospectively, more or less convincing ways to make a set of distinctions, or failures to distinguish, look credible."[36] Richard Delgado insists that "[n]ormative discourse is indeterminate; for every social reformer's plea, an equally plausible argument can be found against it."[37] Duncan Kennedy maintains that interpretations are not better or worse but rather reflect ideological choice.[38] For these skeptics, it makes no sense to be committed to a particular legal position on the basis that one argument, all things considered, is better on the merits than opposing arguments. The very existence of a counterargument means that there is no rational way to adjudicate between competing arguments. As a result, normative commitments cannot be justified on the basis of better or worse reasons.[39]

This kind of skepticism about legal argumentation is part of a more general challenge to the very rationality of practical reasoning in human affairs. Skeptics allege that the interpretive latitude inherent in the exercise of judgment in real situations of choice means that the judgment's results cannot be rationally justified. This objection is premised on the belief that real states of affairs are too complex and interpretive traditions are too indeterminate to constrain

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34. *See, e.g.*, Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 8-9 (1984).

35. *See* Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 716 (1994).

36. ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 8 (1986) [hereinafter UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT].

37. Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 960 (1991).

38. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIECLE 18 (1997).

39. As it stands, this skeptical argument that any argument is as good as any other argument is self-refuting insofar as the skeptic is making an anti-normative normative argument. In addition, that one could put together a poor argument that smoking is good for one's health or that the world is flat, for instance, hardly implies that the reasons, evidence, and inferences made on both sides of the question are equally strong. The mere existence of a bad argument with false premises and faulty inferences does not mean that all arguments are equally sound. In fact, it would be odd if someone could not develop a lousy argument for any particular wrong-headed conclusion.

judgments effectively, thereby making it impossible to draw a meaningful distinction between interpretation and invention. Agents are free to fill in the gaps with idiosyncratic tastes, emotional responses, and partisan politics. At times, it is difficult not to feel the pull of this objection because what counts as a judgment that everyone should accept can be reasonably contested when the case to be decided is morally and factually complicated. It appears that hard cases could fall under an infinite number of possible descriptions when the interpretive community is religiously, morally, and culturally heterogeneous like our own. It is highly improbable that a Catholic, libertarian, conservative, utilitarian, and Marxist will see the same facts of a particular political question as relevant and balance competing considerations in exactly the same way. Even people who employ the same normative language must differentiate plausible applications of their common abstract principles from less plausible applications and they may disagree not only on the criteria for application but also on whether that criteria has been satisfied in a particular case.[40] Those who support animal welfare, for example, are divided over whether vegetarianism is morally required.[41] Even those who characterize themselves as liberals disagree over a fairly large number of political issues.[42]

The less-than-certain character of legal argumentation has led some skeptics to the extreme conclusion that all such argumentation is rhetorical because no argument can be rationally grounded in a deeper moral reality. For them, there is no middle ground between Plato and Nietzsche. If reason cannot provide Cartesian certainty for a truth claim, then it cannot provide any support whatsoever. As Owen Fiss puts it, "[t]he nihilist would argue that . . . [for] the Constitution—there are any number of possible meanings, that interpretation consists of choosing one of those meanings, and that in this selection process the judge will inevitably express his own values."[43]

This kind of skepticism in legal literature has a long pedigree.[44] The concern that legal reasoning could not yield determinate answers to any legal question was central to the Legal Realist Movement, which originated in American law schools in the 1890s, and to its successor, the Critical Legal Studies Movement. The Realists claimed that judges actually resolve legal controversies on the basis of their own moral and political tastes and then choose an appropriate rule to

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40. *Cf.* Ray Nichols, *Maxims, "Practical Wisdom" and the Language of Action: Beyond Grand Theory*, 24 POL. THEORY 687, 687 (1996) (writing that "[m]ost politics lies between pure practice and full-blown theory, in the province of wisdom in practice").

41. This disagreement cannot be explained by adherence to difference principles. See, for example, Tom Regan's account of why utilitarians such as Peter Singer and R.G. Frey disagree about the morality of vegetarianism in TOM REGAN, DEFENDING ANIMAL RIGHTS 14-15 (2001).

42. *See* STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 1-2 (1995).

43. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 741 (1982).

44. Those who advocate legal realism, hermeneutics, feminist legal thought, and critical legal studies typically reject the claim that the law can be objective in the sense of providing politically neutral reasons for legal outcomes. *See* KENT GREENAWALT, LAW AND OBJECTIVITY 7 (1992).

rationalize the result that they have reached.[45] The inherently open texture of legal language makes it impossible to determine whether a particular legal conclusion is true or false.[46] Precedents could be twisted, moreover, to fit the result that the judge wants to reach.[47] The Realists' critique challenged the belief that proponents of formal legal reasoning could claim certainty for their legal conclusions.[48] When Oliver Wendell Holmes proclaimed that "[t]he life of the law has not been logic: it has been experience,"[49] what he meant was that legal reasoning cannot be strictly deductive. His main target was Christopher Columbus Langdell's apparent attempt to turn the law into a coherent collection of clear rules that would logically imply legal conclusions.[50]

The Realists believed that every judicial decision had two distinct characteristics: (1) that in any given case, more than one legal rule would always apply. In a contracts case, for instance, a judge must pay attention to a variety of different considerations: offer and acceptance, consideration, the meeting of the minds, fraud, revocation, remedies, and so forth. Because of these factors, all of which require interpretation, the law itself does not determine the outcome of the case (2) as the holding of a case could not be authoritatively distinguished from its dicta.[51] After all, a judge is always free to decide which rule is

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45. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 17, at 3.

46. *See* DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 128.

47. *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND 38 (Peter Smith ed., 1970) (1930).

48. *See* MARK TEBBIT, PHILOSOPHY OF LAW: AN INTRODUCTION, 22-29 (2000). Today, very few legal theorists or lawyers believe that legal decision making can be reduced to subsuming the facts of a case under a rule and logically deducing the legal consequences. *See* JAAP C. HAGE, REASONING WITH RULES: AN ESSAY ON LEGAL REASONING AND ITS UNDERLYING LOGIC 1 (1997). In this sense, the Legal Realist movement put to rest the notion that legal reasoning could be strictly deductive. Recently, even those who have defended versions of legal formalism do not allege that the law must dictate particular results in all cases. *See, e.g.*, Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 544-48 (1988).

49. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Little Brown & Co. ed., 1938) (1881).

50. *See* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

51. As Andrew Altman explains,

> Even when the judge writing an opinion characterized part of it as "the holding," judges writing subsequent opinions were not bound by the original judge's perception of what was essential for the decision. Subsequent judges were indeed bound by the decision itself, that is, by the finding for or against the plaintiff, and very rarely was the decision in a precedent labeled as mistaken. But this apparently strict obligation to follow precedent was highly misleading, according to the realists. For later judges had tremendous leeway in being able to redefine the holding and the dictum in the precedential cases. This leeway enabled judges, in effect, to rewrite the rules of law on which earlier cases had been decided.

Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 208-09 (1986).

authoritative. As such, right answers to legal questions do not exist.[52]

B. Rebuttal

These concerns are legitimate. At minimum, they ought to make us less certain of the merits of our moral and political judgments and more aware of our own fallibility. After all, historically, we have overlooked a number of egregious moral and political problems such as slavery, the genocide of Native Americans, and the oppression of women. Perhaps, even today, our treatment of animals is morally unacceptable.[53] For these reasons, we should always be hesitant to take for granted that how we have specified moral and political problems in the past is in fact correct.

As Aristotle first pointed out, we have to tolerate a certain amount of imprecision because of the non-codifiability of human judgments.[54] Skeptics try to capitalize on this point by employing an excessively demanding epistemic criterion of absolute certainty to support their claim that such judgments cannot be rationally justified.[55] This objection would have greater force if Americans did not share any of the same political values. Fortunately, norms like freedom, equality, and tolerance—at least at an abstract level—are no longer seriously contested.[56] At present, no one could seriously argue that a society that is truly dedicated to racial equality would tolerate the existence of Jim Crow laws or that a society that truly aspires to gender equality could refuse to educate women. Abstract notions like freedom and equality have a limited range of application in which they cover some kinds of behavior and not other kinds. Nor is language radically indeterminate in the sense that words have an unlimited range of meaning.[57] An English-speaker who refers to a telephone pole as an "artichoke"

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52. More recently, members of the Critical Legal Studies Movement also have tried to show legal outcomes are radically indeterminate. *See generally* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); ROBERTO M. UNGER, KNOWLEDGE AND POLITICS (1975); UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT, *supra* note 36; Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Mark Tushnet and Joseph Singer maintain that legal rules never produce determinate results in real cases. MARK V. TUSHNET, RED WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 191-92 (1988); Singer, *supra* note 34, at 10-11.

53. *See generally* MARY MIDGLEY, ANIMALS AND WHY THEY MATTER (1983); TOM REGAN, THE CASE FOR ANIMAL RIGHTS; PETER SINGER, ANIMAL LIBERATION (1975); STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000).

54. ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS (J.A.K. Thomson trans., 1953, Penguin Books 1986).

55. On objectivity in legal interpretation, see Fiss, *supra* note 43, at 739-773. On objectivity in moral reasoning, see MARY MIDGLEY, CAN'T WE MAKE MORAL JUDGEMENTS? (1991); Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87-139 (1996).

56. ALAN WOLFE, ONE NATION, AFTER ALL (1998).

57. On the constraining effects of legal language, see Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981); Frederick Schauer, *An Essay on Constitutional Language*,

misunderstands the appropriate word for the referent. We may disagree over whether a particular shade of aqua is "blue" but not over whether it is yellow or red. The real issue, then, when a judgment has to be made, is to determine the range of plausible applications in a way that is acceptable to all reasonable people who speak a particular language.

The objectivity of a moral or political judgment does not depend upon finding a universal standpoint that exists outside of language and conceptual schemes. In fact, without making extravagant metaphysical assumptions, it is hard to make sense of the very idea that moral facts can be "out there," floating around like particles in space. To claim that concentration camps are evil is not necessarily to make a claim about the ghostly nature of the physical world. Instead, such a moral proposition is better understood as a truth claim about what we know about human dignity and the resources that people need to live decent lives. In other words, even if there were no moral truths built into the structure of the universe, there still are morally relevant facts about human beings, based on our knowledge of human psychology, biology, and physiology, which any plausible moral theory must take into account. Part of the problem is that the skeptic seems to be insisting on far too stringent an account of what it means to have support for moral or legal judgments. After all, law is interpretative.[58] As Martha Nussbaum writes, "[f]or it is only to one who is attached to the existence of a transcendent ground for evaluation that its collapse seems to entail the collapse of all evaluative argument and inquiry."[59]

The other obvious difficulty with extreme forms of skepticism toward the rationality of moral and legal reasoning is that the skeptic herself is putting forth a sweeping truth claim.[60] As Dworkin has pointed out, the no-right-answer thesis, which is predicated on the assumption that reason cannot arbitrate between two arguments that appear to be equally cogent, must be defended like any other truth claim.[61] The skeptic cannot simply pretend that her skeptical claim about the existence of moral truth is not itself a claim about how the world really is.

Moral principles themselves may not give us an uncontested right answer in hard cases, but they still can help us exclude obviously wrong answers, thereby reducing the range of plausible answers and setting the agenda for further moral, political, and legal deliberation.[62] A claim that no such judgment can be better than its rivals must be defended like any other truth claim about the world. It does not follow from the mere existence of differences of judgment in hard cases that disagreement is inevitable or that all judgments square with the particular

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29 UCLA L. REV. 797, 809-812, 824-831 (1982).

58. *Cf.* James Boyd White, *Judicial Criticism*, 20 GA. L. REV. 835, 842 (1986).

59. Nussbaum, *supra* note 35, at 739-40.

60. As David McNaughton writes, "To believe something is to believe that it is true." DAVID MCNAUGHTON, MORAL VISION: AN INTRODUCTION TO ETHICS 7 (1988).

61. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 280-85.

62. Obviously, more generally, principles cannot make our decisions or do our appraising for us.

facts of the case equally well.[63] The specification of particular moral or political problems is no more immune from rational criticism than is the formulation of moral theories more generally.[64] In understanding the nature of judgment, we must avoid two errors: seeing all cases as hard cases or viewing them as easier than they really are and thus, concluding that practical reasoning can be deductive or mechanistic.[65] In both extremes, the trouble lies in the failure to understand what the exercise of human judgment can reasonably be expected to accomplish.

As citizens deliberate over matters of shared importance, good judgment sets the agenda for the moral conversation of a democratic society, increasing the likelihood that they will not talk past one another despite their deeper disagreement over the nature of the human good. In easier cases, the goal is to reach the best answer according to the facts of the case, their relationship to common political values, and the likely consequences. In more difficult cases, the objective may be less ambitious: to remove some of the interpretive uncertainty surrounding the application of shared political principles in constructing the most appropriate moral response that is possible despite the imperfections of human institutions. The right course of action is supported by the best reasons, all things considered.[66] Citizens need not give sophisticated philosophical explanations of the foundations of their political morality but they must be able to apply its principles competently when they deliberate with their fellow citizens and vote on the most fundamental political questions. Appeal to general principles alone will not get us very far in resolving political controversies fairly. As much as possible, our judgments in real cases must converge as well.[67]

Many of the most important controversies in constitutional law boil down to how particular words of the Constitution (and the cases that have interpreted them over time) are best understood in light of the particular facts of the case and the norms of our political morality. Legal commentators unanimously agree that the death penalty implicates the "cruel and unusual punishment" part of the Eighth Amendment but disagree on the exact circumstances that might trigger a constitutional prohibition on capital punishment. All of them would see

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63. For the famous argument that most hard cases have right answers, see DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 119-45.

64. Onora O'Neill, *How Can We Individuate Moral Problems?*, *in* APPLIED ETHICS AND ETHICAL THEORY 84, 99 (David M. Rosenthal & Fadlou Shehadi eds., 1988).

65. There is voluminous literature in jurisprudence that denies that legal reasoning can be deductive in the sense that legal conclusions can be deduced from legal principles. *See, e.g.*, STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 165-85 (1985); David Lyons, *Justification and Judicial Responsibility*, 72 CAL. L. REV. 178 (1984).

66. *See* James Rachels, *Can Ethics Provide Answers?*, *in* APPLIED ETHICS AND ETHICAL THEORY, *supra* note 64, at 3, 13.

67. This does not mean that principles of justice should not be designed to secure the assent of all reasonable citizens. *See* BRIAN BARRY, POLITICAL ARGUMENT: A REISSUE WITH A NEW INTRODUCTION, at lxxi-lxxii (1990).

crucifixion, drawing and quartering, and stoning as both "cruel" and "unusual." But they are apt to disagree as to whether capital punishment itself is cruel and unusual, whether the Constitution bans imposition of the death penalty for the crime of rape, whether judges (instead of juries) may sentence defendants to death, and whether the mentally retarded or adolescents may be put to death for capital crimes. In fact, much of the argument in hard cases takes place at a lower level of description where the characterization of the particulars is often decisive in determining the result.

Here, high-level theories of constitutional interpretation are not terribly helpful. Nor do the words of the most important constitutional provisions provide much guidance when we need to know what constitutes speech in the first place or how free press concerns ought to be balanced against the equally important right of a defendant to receive a fair trial. Agreement on the mere words of particular constitutional provisions does not ensure that two appropriately motivated judges will reach the same decision. In fact, even judges who adhere to the same grand theory of constitutional interpretation may reach opposite results when they have characterized the facts of the case differently.

All of us would agree that beating a puppy with a stick amounts to "animal cruelty," that executing unarmed civilians constitutes a "massacre," and that mass murder with the intention to wipe out an entire ethnic group counts as "genocide." If it were impossible for a jury to apply the legal concept of a "hostile" work environment in determining whether a series of particular incidents falls under its definition, then no one could ever be held liable for that sort of sexual harassment even in the most egregious of cases.[68] We expect normal adults to behave in reasonable ways in all kinds of settings and those who do not behave appropriately may be subject to social ostracism, criminal prosecution, and civil litigation. Intersubjective agreement on easy cases also contains the rough criteria for making relevant distinctions in progressively more difficult cases. Because the differences that are likely to divide us lie in so-called gray areas, we need a better understanding of why hard cases are hard or whether, indeed, they are as hard as we imagine them to be.

Most, if not all, words have fringe and core applications in that it is impossible to formulate an all-inclusive definition of any word that would cover all possible uses.[69] Fringe applications invite us to argue for inclusion or exclusion. Yet the existence of such applications does not mean that there are no core cases in which an argument on one side is obviously better than opposing arguments are when we share at least some of the same criteria for application. Not all cases are hard in that we are always forced to choose between two equally plausible descriptions. Some human actions are so self-evidently evil that after very little reflection, or none at all, one is able to disapprove of them.[70] The

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68. *See* The Fair Employment and Housing Act, CAL. GOV'T CODE § 12940(a), (j)-(k) (West 1992 & Supp. 2004) (addressing sexual harassment in the workplace).

69. *Cf.* MARY MIDGLEY, WICKEDNESS: A PHILOSOPHICAL ESSAY 45 (1984).

70. Even Michael Walzer, who is skeptical of universal moral claims, acknowledges that certain prohibitions "constitute a kind of minimal and universal moral code." MICHAEL WALZER,

presence of easy cases strongly supports the claim that only moderate indeterminacy exists in the application of moral and legal principles and shifts the burden of persuasion to skeptics who endorse a thesis of radical indeterminacy.

C. Moderate Skepticism

At the same time, even those who have not succumbed to this extreme form of skepticism about the very possibility of rational legal argumentation are far less certain than they used to be about the ability of human reason to ground legal decisions.[71] They fear that legal language, which often appears to be indeterminate, may prevent them from convincing all reasonable members of the legal community that the arguments that justify constitutional decisions are sound.[72] As one commentator notes, "[t]he law, however, is not so clear, consistent, and complete that it constrains judges to reach a single legally required outcome in many cases."[73] The essence of the problem is that the vast majority of applications of legal principles or rules require substantive choice on the part of the judge.[74] This choice is unavoidable, skeptics allege, and its very existence undermines the purported objectivity of legal reasoning. For instance, in a common law system, the relevance of an earlier precedent hinges upon how the judge characterizes the facts of the case and distinguishes the relevant similarities and differences.[75] Because legal argumentation is not formal argumentation, conclusions do not follow deductively from premises.[76] A judge can only apply a legal provision after she has framed the legal issue. This freedom to characterize the facts, as skeptics would have us believe, means that the law does not constrain legal interpretation.

Consider questions of constitutional law. The constitutional text itself produces the major premise of a practical syllogism, such as "cruel and unusual punishments" are prohibited. Whether a mentally retarded defendant can be executed, however, is left to the discretion of the judge. The judge herself must formulate the minor premise, which incorporates the morally relevant particulars and connects them to the case law, before reaching a conclusion. The minor

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INTERPRETATION AND SOCIAL CRITICISM 24 (1987).

71. On this point, see Nussbaum, *supra* note 35, at 716-17.

72. For purposes of simplicity, the Author limits his discussion to instances of constitutional interpretation.

73. STEVEN J. BURTON, JUDGING IN GOOD FAITH 7 (1992).

74. *See* H.L.A. HART, *supra* note 17, at 123. Dworkin denies that judges have "discretion" in the sense that their judgment is unconstrained. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 17, at 31-39. Indeed, this is one of the main points that separate Dworkin from his positivistic critics. When explicit legal rules run out, Dworkin believes that a judge still can fall back on legal principles and policies that are also part of the law. As such, a judge does not have unfettered discretion to choose how to proceed.

75. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 577 (1987).

76. *See* STUART HAMPSHIRE, JUSTICE IS CONFLICT 64 (2000).

premise picks out what is salient in the circumstances and thus, is likely to be very detailed. The problem is that the content of this premise requires the cognitive input of the judge; it is never simply given by the facts themselves. The task of rational justification is considerably more complicated under such conditions because what counts as a good argument, or even what counts as a good reason, may be reasonably contested. Even Ronald Dworkin acknowledges that ties, albeit rare, are possible in hard cases.[77] Moreover, in most controversial cases, no interpretation of the law is likely to fit the facts perfectly.[78] Even under the best of epistemic conditions, then, some of the most important decisions of constitutional law may be open to dispute because they have not been settled to the satisfaction of every reasonable member of the legal community.[79]

D. The False Dichotomy

Other skeptics, such as Stanley Fish, have attacked principles themselves:

> The trouble with principle is, first, that it does not exist, and second, that nowadays many bad things are done in its name. . . . The problem is that any attempt to define one of these abstractions—to give it content—will always and necessarily proceed from the vantage point of some currently unexamined assumptions about the way life is or should be, and it is those assumptions, contestable in fact but at the moment not contested or even acknowledged, that will really be generating the conclusions that are supposedly being generated by the logic of principle.[80]

Although Fish is justified in calling attention to the difficulty of relying upon principles alone to ensure appropriate moral responses, it is peculiar to refer to "a logic of principle." A principle cannot apply itself or single out the morally significant dimensions of the case at hand. Nor can a principle be blamed for being misused or abused to serve morally objectionable ends. Language can be manipulated but that rhetorical possibility should not surprise us. While we should censure the framers of the Constitution for not seeing the evil of slavery and for not recognizing the moral, political, and social implications of the concept of equality, it is a bit odd to blame principles of freedom and equality themselves for injustice rather than the human agents who misapplied such principles over time in self-serving ways.

Nonetheless, Fish asserts that principles are "unoccupied vessel[s] waiting to be filled by whatever gets to [them] first or with the most persuasive force."[81] This assertion is based on his belief that an agent's conceptual contribution in

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77. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 143.

78. *Cf.* Ken Kress, *The Interpretive Turn*, 97 ETHICS 834, 845 (1987).

79. *Cf.* CHARLES R. BEITZ, POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY 8 (1989) ("[T]here is no unambiguous principle of equal power that can plausibly be taken as a basis for resolving the dispute in all of these areas.").

80. STANLEY FISH, THE TROUBLE WITH PRINCIPLE 2-3 (1999).

81. *Id.* at 7.

putting together the pieces of the puzzle, so to speak, vitiates the objectivity of her description of the circumstances of choice. To his credit, Fish correctly points out that we should appreciate the limits of principles in practical reasoning. After all, a principle cannot be so detailed as to preclude the possibility of a disputed application. At the same time, it is a philosophical mistake to believe that we are forced to choose between the abstract and the concrete.[82] One does not have to be a Hegelian to appreciate that abstract principles have social expressions. Indeed, our own political disagreements are often more about the implications of the principles to which we adhere—such as freedom, equality, fairness, and desert—than about the principles themselves. An important part of the practice of democratic politics involves deciding whether our political vocabulary ought to be extended in novel ways. Before the 2000 presidential election, most of us did not appreciate the extent to which outdated punch-card voting machines might disenfranchise voters and thus, infringe upon their fundamental right to vote.

New cases appear and test the meaning of these abstract principles. The act of application, which requires attention to actual details, draws upon additional human faculties that lie outside of these principles.[83] The responsibility of rendering real situations morally intelligible, then, rests upon the shoulders of the human agent. The facts themselves are context-specific and thus, any real situation of choice is bound to be somewhat unique. People react to what they see and conversely, they do not react to what they do not see. For this reason, an agent who is conscientiously devoted to the right principles may not respond appropriately. That does not mean, though, that the principle itself is at fault, as if a principle could be correctly applied without sensitivity to the actual circumstances of application. In fact, moral failure cannot always be traced back to the principles themselves in the sense that the person acted upon the wrong principle. After all, an agent who does not describe a situation of choice in sufficient moral detail may simply fail to put a moral principle into practice despite her most sincere intentions. Indeed, for this reason, even conscientious moral agents can make poor decisions.[84]

The above statement also suggests that Fish believes that it is self-evident that words have an unlimited range of application and therefore, principles can be twisted to rationalize any kind of immoral or evil behavior. The crux of his position would be this: even if we were to achieve consensus on abstract legal norms, this consensus would break down the moment that we began to assess the

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82. *See* MARK TUNICK, PRACTICES AND PRINCIPLES: APPROACHES TO ETHICAL AND LEGAL JUDGMENT 221 (1998).

83. Richard Miller labels this faculty "interpretive perspicuity." Richard B. Miller, CASUISTRY AND MODERN ETHICS: A POETICS OF PRACTICAL REASONING 223 (1996).

84. The Author is not claiming that people never act on the basis of self-interested, sociopathic, or evil reasons. Rather, the point is that moral failure cannot always be reduced to having the wrong motive or having bad character. In fact, moral failure can often be traced to moral negligence or recklessness on the part of the agent who fails to see what a reasonable person should have seen.

particulars of real cases because the actual application of abstract legal notions is not meaningfully constrained. The purported constitutional consensus that we have only consists of a consensus of mere words that cannot help us to resolve real legal controversies. Some of us would frame the issue to be decided in idiosyncratic ways and others would weigh competing considerations differently, leading to a wide range of different legal conclusions, none of which could be said to be more rationally defensible than its rivals. As such, the practice of legal reasoning is susceptible to the skeptical charge that we should not have any epistemic confidence in the conclusions that judges reach because the reasons that they offer as support fall far short of proof. Moreover, we cannot know whether that the agent has followed the rule or principle correctly.[85] After all, principles are too weakened by their necessary abstractness to tell us what to do in particular circumstances.[86]

This objection is the most serious challenge to the rationality of the practice of constitutional interpretation, and legal reasoning more generally, because it is rooted in the theoretical possibility that such reasoning could never live up to its aspirations even under the best of circumstances. For this objection to be decisive, however, its proponents would need to show that legal language is always radically indeterminate, that is, that the malleability of terms such as "free speech," "due process," and "equal protection" renders them meaningless. The norm-governed practice of constitutional argumentation and adjudication shows that this is not the case. The words of the Constitution meaningfully limit the range of legal conclusions that a judge could reasonably reach in a particular case.[87] Indeed, the very existence of easy cases cuts against any skeptical claim that legal language is radically indeterminate.[88]

Even more basically, this view of language is counterintuitive insofar as it is belied by our everyday experience as users of language within a particular linguistic community and by our ability to communicate with one another. The meaning and reference of our terms is given by the nature of the world.[89] The belief that words have no core applications is mistaken because words cover some phenomena but not all phenomena, even when a number of hard cases may lie at the margins. Some legal answers are clearly wrong and some legal arguments are clearly unpersuasive.[90] At the very least, we are entitled to an argument that supports the conclusion that moral or legal language is radically indeterminate. The real trouble, one is tempted to say, is not with principle but

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85. *Cf.* Philip Pettit, *The Reality of Rule-Following*, 99 MIND 1 (1990).

86. *See, e.g.*, Tom L. Beauchamp, *On Eliminating the Distinction Between Applied Ethics and Ethical Theory*, 67 MONIST 514, 519 (1984).

87. *See* Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 809-12, 824-31 (1982).

88. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985); *cf.* Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1 (1990); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989).

89. Brink, *supra* note 20, at 105, 123.

90. *See* GREENAWALT, *supra* note 44, at 6.

with the skeptic's inability to distinguish between good and bad applications of words or principles to real events. That language is not radically indeterminate in all cases ought to make us skeptical of the skepticism of those who allege that there are no straightforward applications.

At the same time, weaker forms of skepticism in legal thought must be taken more seriously. The concern is that the application of a legal rule is severely underdetermined by the facts. H.L.A. Hart traces the indeterminacy of legal rules to two sources: (1) "our relative ignorance of fact" in that we cannot foresee all of the possible applications of a rule when we formulate it and (2) "our relative indeterminacy of aim" where unforeseen empirical features can change the aim of the applicable rule.[91] For these reasons, legal rules have an "open texture."[92] It does not follow, though, that this open texture holds equally for all cases, no more than a text can be read in any old way without reference to the words, authorial intent, and to its context.[93] Some interpretations of a text are much less controversial than others in light of the evidence that has been mustered on their behalf. While for Hart hard cases are left to the discretion of the judges because the law has run out, the right answers to less difficult cases are more or less self-evident in a legal community that shares the same general interpretive norms.

This point is equally true of other phenomena in political life. An election that is rigged, for instance, is not a fair election. That does not preclude the possibility that someone may try to defend an alternative interpretation of an event in the present or a new interpretation of it in the future that may ultimately be accepted. The history of political thought is full of the attempts of political writers to take in new directions the conventional political vocabulary of the time to legitimate particular political actions.[94] In retrospect, new facts or understandings may compel us to reassess our prior judgments. Indeed, we ought to expect disagreement about how a principle applies to the hard case under discussion.[95] Otherwise, the case would not be hard in the first place.

In addition, we should be willing to revisit hard cases and welcome the opportunity to become more familiar with the possible implications of

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91. HART, *supra* note 17, at 125.

92. *Id.* at 121-32.

93. *See* E.D. HIRSCH, VALIDITY IN INTERPRETATION (1967).

94. As Quentin Skinner has written, "The ideologist's aim in this case is to insist, with as much plausibility as he can muster, that, in spite of any contrary appearances, a number of favourable evaluative-descriptive terms can in fact be applied as apt descriptions of his own apparently untoward social actions." Quentin Skinner, *Analysis of Political Thought and Action*, *in* MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS 115 (James Tully ed., 1988). The point of this strategy is to challenge his ideological opponents to reconsider whether they may be making an empirical mistake (and may thus be socially insensitive) in failing to see that the ordinary criteria for applying an existing range of favourable evaluative-descriptive terms may be present in the very actions they have been condemning as illegitimate. *Id.* This point can be extended beyond crude ideological attempts to advance sectarian political agendas.

95. ANNE THOMSON, CRITICAL REASONING IN ETHICS: A PRACTICAL INTRODUCTION 42 (1999).

constitutional language on the assumption that our moral judgment is fallible yet nevertheless may improve over time as we come to understand the specifications of abstract political values such as freedom and equality. The cases in which the conditions of application are unclear should not bother us in the sense that we should doubt the rational justification of every single application. It is simply a philosophical mistake to infer from the existence of hard cases that all cases are equally hard.[96] An unrealistic demand for deductive certainty in legal reasoning can lead to the belief that if we fall short of this epistemic standard, then no result of legal reasoning can be said to be any better than any other result. This demand ignores the fact that non-deductive arguments can be based upon very strong reasons and overwhelming evidence.[97]

We do not need to know beyond a shadow of a doubt that a particular course of action is right before we act.[98] But at the very least, as citizens, we still must give good reasons for our collective decisions, reasons that are both fair and context-sensitive, to legitimate them. There is a premium, then, on identifying all of the possibly relevant reasons in the first place. These reasons are candidates, so to speak, for deciding what to do. This identification step excludes some considerations on the grounds that they are not relevant. That a person has red hair, for example, should not bear on whether she has a right to vote. Whether the person is an ex-felon, by contrast, may have some bearing, even though this fact should not be dispositive. We cannot say that one case should be decided one way, but a similar case should be decided differently, unless there is a relevant difference between them.

Constitutional protection for a Nazi march would appear to deserve the same constitutional protection as that of a KKK speech. In the absence of relevant differences, it cannot be right to treat these cases differently. On the other hand, that Nazism is directly related to the Holocaust might provide the relevant difference.[99] One of the most important judicial tasks involves screening out irrelevant considerations. When irrelevant considerations have been eliminated, what is then left is a number of possible reasons that must be assigned weight in determining the right course of action. The result is that the degree of determinacy that one can expect in a particular case is contingent upon the circumstances of that case.[100] Practical discourses, like that of law, differ from those of the natural sciences and mathematics in that the kind of determinacy that is aspired to is bound to be much weaker.[101]

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96. *Cf.* DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 168.

97. As Catherine Elgin puts it, "[t]o know something it seems is to be epistemically entitled to confidence about it." CATHERINE Z. ELGIN, CONSIDERED JUDGMENT 21 (1996).

98. In political science literature, "bounded rationality" means that our imagination and calculating abilities are limited and fallible. James D. Fearon, *Deliberation as Discussion*, *in* DELIBERATIVE DEMOCRACY 44, 49 (Jon Elster ed., 1998).

99. I owe this example to Sunstein, *supra* note 28, at 745.

100. *Cf.* BURTON, *supra* note 73, at 108-17.

101. Conservative jurists often use a strong determinacy condition as the central premise in their argument for judicial restraint in the name of democratic self-rule. The idea is that to be

Where does that leave us? Does the apparent abstractness of constitutional language render it useless in deciding what to do? The most effective response to this sort of skepticism about the role of principles in guiding behavior is to deny the assumption that principles are abstract in the sense that they cannot take social forms or be contextualized. The implications of abstract constitutional provisions are to be worked out by judges when they confront real cases. The role of the judge is to connect these abstract norms to the legal events that occur in the real world. In a very Hegelian manner, constitutional norms are embodied in the actual practice of constitutional interpretation. Abstract norms are mediated by real circumstances and thus, given substantive content. Indeed, the application itself changes the understanding of the principle.[102] Principles such as freedom, equality, and fairness lose their abstractness once they are subject to supplementary interpretation and normative argumentation over time.

We understand the implications of the free speech clause, for instance, only when we confront new problems that clarify how its language might be extended to cover novel cases. For example, is "tagging" a form of freedom of expression that deserves some degree of constitutional protection? If so, how should this right be balanced against the equally important consideration of protecting public property? Without knowledge of such cases, it is unclear in what sense an interpreter could claim that she understood the meaning of the free speech clause. To understand the words is to understand how they have been applied in the past and might be applied in the future. In short, Fish draws a very sharp distinction between principle and practice that relies on a false dichotomy between the abstract and the concrete.

Nevertheless, hard cases exist. In jurisprudence, a hard case is a case in which there are no clear rules that are applicable and precedents cut both ways.[103] Hard cases are "hard" in the sense that they raise highly controversial legal issues over which lawyers and judges may reasonably disagree.[104] For H.L.A. Hart, such cases exist because legal rules are formulated in general terms and, consequently, have meaning that extends beyond their "core" meaning into the "penumbra," where the law does not determine their meaning.[105] As such, judges cannot decide such cases on legal grounds but must use their discretion. For Ronald Dworkin, when two lawyers or judges are sincerely disagreeing about what the law is on some hard legal question, they are "disagreeing about the best constructive interpretation of the community's legal practice."[106] Hard cases are

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principled, legal reasoning must be as mechanistic as possible. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455 (1986); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

102. James J. Keenan et al., *Contexts of Casuistry: Historical and Contemporary*, *in* THE CONTEXT OF CASUISTRY 221, 226 (James F. Keenan & Thomas A. Shannon eds., 1995).

103. SAMAR, *supra* note 20, at ix.

104. Brink, *supra* note 20, at 105-06.

105. HART, *supra* note 17, at 121-32.

106. DWORKIN, LAW'S EMPIRE, *supra* note 4, at 225.

also hard because the empirical evidence may be conflicting and complex, deliberators may disagree about the weight of the same considerations, words and concepts can be vague, their life experiences may differ, and they may give different priority to different normative considerations.[107] For these reasons, in hard cases, the application of legal rules does not always yield obvious answers that are beyond reproach. Hard cases dramatically increase the likelihood that principled judges will have different sets of equally good reasons for reaching opposite conclusions.[108]

E. The Application of Legal Norms

In such cases, we should not expect a knockdown argument in favor of one legal result that would convince the most skeptical of skeptics. That is an epistemic standard that is simply inappropriate for assessing the truth of legal propositions or the soundness of legal arguments. As a result, in hard cases, it may not be possible to prove to the satisfaction of every reasonable member of the legal community that the application in question is the most rationally justified application compared with all of the other alternatives. Under these circumstances, the words may be broad enough to yield a number of different interpretations, leaving to the judge the task of figuring out which application is most rationally defensible in light of her best understanding of the totality of the circumstances.

This discretion, though, is not arbitrary, as skeptics maintain. The reasons that are supposed to justify the decision still must be the strongest reasons available based on the wording of the applicable constitutional provision(s), authorial intent, accepted norms of legal interpretation, the facts, applicable precedent(s), the probable consequences, and the values of our political morality. To be sure, the law itself does not dictate the answer in the sense that a premise logically implies a conclusion.[109] But one interpretation of the law could be said to support one conclusion, all things considered, better than rival interpretations on the basis of the above criteria. In the vast majority of cases, the law is sufficiently clear to determine an answer for all practical purposes and therefore, to hold people legally responsible for their actions. It is hard to imagine, for instance, that today two judges would disagree on whether a state could be deprived, without its consent, of equal suffrage in the United States Senate or on whether a twenty-year old could be elected as president. In short, a constitutional provision that is abstract is not necessarily empty.

At the same time, the range of application of a legal rule is likely to be

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107. *Cf.* JOHN RAWLS, *The Idea of Public Reason Revisited*, *in* THE LAW OF PEOPLES 177 (1999); RAWLS, JUSTICE AS FAIRNESS, *supra* note 15, at 35-37; RAWLS, POLITICAL LIBERALISM, *supra* note 16, at 54-58.

108. *Cf.* BURTON, *supra* note 65, at 13.

109. On the possibility of semi-deductive legal reasoning, see NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978).

underdetermined at times.[110] As Frederick Schauer points out, terms like "liberty" and "equality" are pervasively indeterminate in the sense that their application to real cases requires supplementary premises.[111] On the edges of the meaning of abstract terms, the application of a rule involves a choice that the words of the rule alone do not determine.[112] In fact, all modern legal systems include norms that are vague in this respect.[113] We know, for instance, that the Fourth Amendment prohibits unreasonable searches and seizures. A judgment about what is "unreasonable," though, is often highly contextual, turning on the particular features of the case at hand.[114] As such, in some cases, we are bound to disagree in good faith about what counts as a "reasonable" search. We may even reasonably disagree about what constitutes a "search" in the first place, that is, about when a person has a "reasonable expectation of privacy."

People who adhere to the same abstract principles may have very different ideas about what those principles require, especially in controversial cases. For instance, most Americans are committed to racial equality in the abstract but they do not have the same beliefs about what sorts of public policies ought to follow from this moral commitment. They disagree over whether affirmative action in higher education furthers such equality and to what extent the race of an applicant should be taken into account in making admissions decisions. In a sense, then, it is not clear exactly what we mean when we claim that as a society, we believe in racial equality beyond a mere consensus on the words.[115] It is not uncommon for the electorate to endorse general moral principles such as freedom and equality yet to be reluctant to put such principles into practice.[116] A majority of Americans believe that gays and lesbians should have "equal rights in terms of job opportunities" yet more than half of those surveyed would deny the right of homosexuals to work as elementary school teachers.[117]

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110. For an argument about the difficulty of applying legal rules in a straightforward manner, see Gregg, *supra* note 23, at 357-78.

111. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 514 (1988).

112. *Id.*

113. *See* Gavison, *supra* note 5, at 1618, 1625.

114. This interpretive problem is not confined to general normative language that invites interpretation. For instance, the Constitution stipulates that the President of the United States must be a "natural born citizen," must be at least thirty-five years old, and must have been "fourteen years a resident within the United States." *See* U.S. CONST. art. I, § 1. While these words seem to be unambiguous, the text does not tell us what it means to be a "natural born citizen" or what kind of actions would qualify for residency. Conceivably, a case could arise where it might be unclear whether a person had met these requirements. What would happen, for instance, if a presidential candidate had been born in an U.S. embassy abroad?

115. On the problem of the application of legal terms, that is, on what he calls "problems of the penumbra," see Hart, *supra* note 1, at 17-37.

116. HERBERT MCCLOSKY & JOHN ZALLER, THE AMERICAN ETHOS: PUBLIC ATTITUDES TOWARD CAPITALISM AND DEMOCRACY 84 (1984).

117. *Id.* at 85.

II. A BRIEF HISTORY OF JUDGMENT

A. Kant and Aristotle

In this section, the Author would like review Kantian and Aristotelian approaches to judgment and make the case that these approaches are more similar than they may initially appear to be. Although neither focuses on moral or political examples, both Kent and Aristotle see judgment as a matter of properly relating universals to particulars. The problem of application cannot simply be treated as a matter of having the right principles because whether an agent can appreciate their possible implications requires more than theoretical understanding. As Kant wrote:

> It is obvious that no matter how complete the theory may be, a middle term is required, providing a link and a transition from one to the other [practice]. For a concept of the understanding, which contains the general rule, must be supplemented by an act of judgment whereby the practitioner distinguishes instances where the rule applies from those where it does not. And since rules cannot in turn be provided on every occasion to direct the judgment in subsuming each instance under a previous rule (for this would involve an infinite regress), theoreticians will be found who can never in all their lives become practical, since they lack judgment.[118]

In this passage, Kant points out that a person can be theoretically knowledgeable but at the same time lack the ability to put that knowledge into practice because she cannot formulate what Kant calls a "middle term," a description of the circumstances that warrant application of the rule. To exercise judgment is to give content to this middle term, that is, to predicate universals of particulars in deciding whether the case at hand falls under the more general principle. In this way, judgment closes the gap between the abstract principle and the concrete facts, safeguarding us against stupidity.[119]

Kant is aware that the subsumption of a particular under a universal in the making of judgments requires a separate cognitive faculty. However, because moral philosophers have paid so much attention to the role of Kant's Categorical Imperative in his moral philosophy, most of the literature on the topic, until recently, has had little to say about the kind of moral judgment that an agent must exercise in making morally permissible choices.[120] On the standard interpretation

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118. Immanuel Kant, On the Common Saying: *"This May be True in Theory, but It Does Not Apply in Practice," in* KANT: POLITICAL WRITINGS 61 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1970) (1793).

119. IMMANUEL KANT, CRITIQUE OF PURE REASON, at A 134, B 173 note a (Norman Kemp Smith trans., 1965) (1787).

120. A number of neo-Kantians have recognized that moral judgment must be more fine-grained than merely following rules. *See, e.g.*, ONORA O'NEILL, CONSTRUCTIONS OF REASON (1989); Herman, *supra* note 9.

of Kantian ethics, the Categorical Imperative is supposed to provide a decision procedure for right action by testing proposed maxims for their moral permissibility. Kantians are concerned with ensuring that such maxims can be generalized and thus, tend to overlook the equally important task of being able to survey carefully the actual context of choice. They are interested in determining whether proposed maxims can be acted upon, focusing their attention on the will of the moral agent and the extent to which her willings are sufficiently constrained.[121]

To complicate matters, it is very hard to pin down exactly what Kant meant by judgment because his most provocative remarks on the subject appear in his non-moral writings:

> A physician, a judge, or a ruler may have at command many excellent pathological, legal, or political rules, even to the degree that he may become a profound teacher of them, and yet, none the less, may easily stumble in their application. For, although admirable in understanding, he may be wanting in natural power of judgment. He may comprehend the universal *in abstracto*, yet not be able to distinguish whether a case *in concreto* comes under it.[122]

For Kant, the ability to apply rules is contingent upon a cognitive faculty that cannot be rule-governed.[123] Judgment is our capacity to apply such rules, to see something as the sort of thing that those rules pick out, subsuming a particular instance under a general rule.[124] Exactly what this process involves, though, is left unspecified. While Kant characterizes judgment as a "natural gift" and claims that deficiency in judgment cannot be remedied, he also states that examples and actual practice can sharpen the faculty.[125]

This passage indicates that outside of ethics, Kant clearly understood the difference between intellectually comprehending an abstract principle and discerning whether the principle covers a particular case. Yet his lack of attention to this topic in his moral writings suggests that he did not fully appreciate the significance of the exercise of judgment in matters of moral choice, perhaps taking for granted that most people could see what they needed to see to act appropriately.[126] For Kant, to have virtue is to be constrained by principles that derive from the rational nature of human beings and to resist turning desires into maxims of action that cannot be universalized. It is more or

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121. *But see* Barbara Herman, *Making Room for Character*, *in* ARISTOTLE, KANT, AND THE STOICS: RETHINKING HAPPINESS AND DUTY 36-60 (Stephen Engstrom & Jennifer Whiting eds., 1998).

122. KANT, *supra* note 119, at 178, A 134, B 173.

123. *See* LARMORE, *supra* note 29, at 3.

124. *Id.* at 4.

125. KANT, *supra* note 119, at 178, A 134, B 173.

126. On the other hand, Kant himself ends *The Metaphysics of Morals* with "casuistical" questions. IMMANUEL KANT, THE METAPHYSICS OF MORALS 182-88 (Mary Gregor trans., 1996) (1797).

less assumed that a sincere moral agent has a sense of what the Categorical Imperative demands of her most of the time. The moral struggle lies in the difficulty of inhibiting actions and impulses that are incompatible with that principle of universalizability and not in the difficulty of specifying what kind of action the principle requires in concrete circumstances.

In the opening passages of *The Nichomachean Ethics*, Aristotle tells us that to choose well is to ask the right questions and to identify the particulars that ought to be considered in the decision-making process.[127] Aristotelian practical reasoning is not deductive in the sense that a conclusion is strictly entailed by the major premise of a practical syllogism.[128] To see a real situation of choice accurately is not to infer conclusions from premises as in formal logic but to appreciate the relationship between the various relevant considerations and to strike a reasonable balance among them. The practically wise person knows when one fact, as a reason for an action, affects the relative strength of other reasons and may override them.

Consider the following example. Aristotle claims that a courageous person locates the mean relative to herself.[129] Such a person is neither too rash nor too meek in light of the available options. A practically wise person who was leading a military expedition, for example, would only attack the enemy at the right time, at the right place, and in the right way if such an attack were likely to succeed or to further another more important tactical or strategic objective. By contrast, a commander who lacks such wisdom is likely to attack when such an attack is not warranted or conversely, not to attack when such an attack would be opportune. To have courage is not to make unnecessary sacrifices. Real courage is a matter of deciding what is the most appropriate response based on the best possible reading of the particular circumstances. A response that might be too rash under certain conditions might be perfectly appropriate in another set of circumstances. The devil is in the details. Choosing as wisely as possible, then, hinges upon an accurate assessment of the relevant facts, that is, understanding why some facts matter more than others, and why some facts, coupled with others, cut for or against a particular course of action. A virtuous person does not just have virtues but also possesses the cognitive ability to grasp the particulars that ought to bear on her decision.[130]

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127. *See* NUSSBAUM, THE FRAGILITY OF GOODNESS, *supra* note 29, at 10.

128. *See* Nussbaum, *The Discernment of Perception*, *supra* note 29, at 145-46.

129. The use of the term "mean" is unfortunate because it connotes a quantitative process whereas Aristotle has qualitative distinctions in mind. *See* J.O. Urmson, *Aristotle's Doctrine of the Mean*, *in* ESSAYS ON ARISTOTLE'S ETHICS 157-70 (Amelie O. Rorty ed., 1980).

130. Obviously, the role of the emotions in the operation of moral perception is a complicated matter. The widespread influence of Platonic and Kantian suspicion of the passions makes it seem as if desire is our enemy. People who cannot control their anger, lust, or jealousy, for example, are bound to act inappropriately. On this account, the self is divided into two selves, one that is rational (and in control) and one that is emotional (and out of control). When the rational, higher self controls the lower self, as Plato would have characterized it, the soul is in harmony. In some cases, this metaphor seems to capture moral failures in which people cannot control their appetites

Aristotle points out that the epistemological confidence that we can muster for our truth claims is relative to their subject matter. There are, of course, different relationships of support between the premises and conclusions in inductive and deductive arguments. He is also making a metaphysical point about the non-codifiable nature of human decisionmaking and the extent to which such judgments can be said to be true:

> Therefore in discussing subjects, and arguing from evidence, conditioned in this way, we must be satisfied with a broad outline of the truth; that is, in arguing about what is for the most part so from premisses which are for the most part true we must be content to draw conclusions that are similarly qualified. The same procedure, then, should be observed in receiving our several types of statement; for it is a mark of the trained mind never to expect more precision in the treatment of any subject than the nature of that subject permits; for demanding logical demonstrations from a teacher of rhetoric is clearly about as reasonable as accepting mere plausibility from a mathematician.[131]

Likewise, the truth of a moral judgment that is a product of practical reasoning depends upon the particular details of the actual context in which the agent chooses. It is a mistake to expect too much precision:

> But we must first agree that any account of conduct must be stated in outline and not in precise detail, just as we said at the beginning that accounts are to be required only in such a form as befits their subject-matter. Now questions of conduct and expedience have as little fixity about them as questions of what is healthful; and if this is true of the general rule, it is still more true that its application to particular problems admits of no precision. For they do not fall under any art or professional tradition, but the agents are compelled at every step to think out for themselves what the circumstances demand, just as happens in the arts of medicine and navigation.[132]

That matters of judgment are not "fixed," however, does not mean that the results of the exercise of such judgment are relativistic or subjective. The agent is committed to arriving at the right decision and not one that is merely pleasing.[133] Obviously, one can make bad judgments in both medicine and navigation that have serious consequences. In fact, we would consider very poor judgment to be

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for food, drink, or sex. It is as if another less disciplined self temporarily took over control of one's mind and body. What this picture overlooks, however, is that the intellect may consult the feelings for information about the true nature of the situation. In fact, a pure intellectual grasp of the moral salience of the facts, without the assistance of the emotions, may be impossible. Unlike Plato and Kant, Aristotle did not sharply distinguish the cognitive and the emotive. *See* SHERMAN, MAKING A NECESSITY OF VIRTUE, *supra* note 29, at 249-53.

131. ARISTOTLE, *supra* note 54, at 1094b 65.

132. *Id.* at 1104 all 93.

133. F.H. LOW-BEER, QUESTIONS OF JUDGMENT: DETERMINING WHAT'S RIGHT 53 (1995).

a product of recklessness or gross negligence. The point is that no two situations are exactly the same and thus, principles or rules must be modified to fit the uniqueness of the circumstances. General rules only hold "for the most part" because changes in circumstances can affect the applicability of the rule or its strength relative to other rules or considerations. The most appropriate response, then, calls for a careful examination of the particulars and an appreciation of when a general rule may or may not be applicable.

Aristotle would reject Kant's "subsumption" model of judgment as being too mechanistic. But he makes a similar point in the *Nichomachean Ethics* about the relationship between prudence (practical wisdom) and the appreciation of concrete context:

> Again, prudence is not concerned with universals only; it must also take cognizance of particulars, because it is concerned with conduct, and conduct has its sphere in particular circumstances. That is why some people who do not possess theoretical knowledge are more effective in action (especially if they are experienced) than others who do possess it.[134]

Aristotelian ethics is famous for being oriented toward choosing wisely in real circumstances and not toward theoretical systematization or modeling for its own sake.[135] A person who cannot read the relevant details of particular situations and be attuned to their significance cannot be wise. For Aristotle, the focus is always on the specifics of the case. As Nancy Sherman remarks, "[W]ise judgment hits the mean not in the sense that it always aims at moderation, but in the sense that it hits the target for *this* case. As such, description and narrative of the case are at the heart of moral judgment."[136]

In addition, Aristotle emphasizes the extent to which wise moral choice is realized in the actual actions of the practically wise person (*phronimos*). The criterion for right choice is based on what such a person would decide to do in real situations. Thus, virtue and practical wisdom are inseparable. For Aristotle, the rendering of good decisions can never be reduced to merely following rules or procedures. Indeed, an important part of the Aristotelian project is to remind us of their limits. Choice in real situations requires much more fine-grained discernment than rules or principles can ever provide.[137]

Even if Aristotle's solution to the problem of practical choice leaves us wanting more explication, his formulation of the problem is highly instructive. Such choice is about searching for partial insights that, in the end, comprise a probable interpretation of the setting of action. Recently, under the name of

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134. ARISTOTLE, *supra* note 54, at 1141b8 213.

135. SHERMAN, MAKING A NECESSITY OF VIRTUE, *supra* note 29, at 267.

136. *Id.* at 244.

137. For contemporary versions of Aristotelian particularism, see JONATHAN DANCY, MORAL REASONS (1993); John McDowell, *Virtue and Reason*, *in* ARISTOTLE'S ETHICS: CRITICAL ESSAYS 121 (Nancy Sherman ed., 1999); DAVID MCNAUGHTON, MORAL VISION: AN INTRODUCTION TO ETHICS (1988); Nussbaum, *The Discernment of Perception*, *supra* note 29, at 145-81.

"casuistry," there have been a number of attempts to rescue judgment from caricature and to rehabilitate it as a means of moral reasoning.[138] Albert R. Jonsen and Stephen Toulmin have argued on behalf of a more flexible, practical attitude toward ethics, in which judgment replaces the attempt to construct rigid rules from which practical conclusions can be deduced.[139] As Richard B. Miller remarks,

> Casuistry seeks to deliver us from those occasions when rules are unclear, when conflicting rules pull us in opposite directions, or when we must ascertain degrees of moral culpability . . . . Casuistry thus teaches that we are not sufficiently equipped when we have merely determined the rules of morality; nor is it enough simply to appeal to the strengths of moral character. Rather, our rules and our character must be put to practical use in our day-to-day lives, and casuists seek to show in concrete terms how we are to put morality into action.[140]

The challenge for anyone writing on judgment, then, is to specify what it means to put morality into action in terms that are not intolerably vague.

Neo-casuists do not put forth formal decision procedures or rigid methodologies and frankly admit that their conclusions in hard cases are subject to challenge both on theoretical and empirical grounds. This is not an admission of failure but rather reflects a realistic sense of what judgment can accomplish in terms of making moral choices easier. At the same time, a theory of judgment or casuistry should help real people to make real moral and political decisions.

Judgment is about determining whether the right issues were identified and

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138. As an ethical form of practical reasoning, casuistry is a kind of moral inquiry that focuses on concrete moral problems, their proper characterization, and their reasonable resolution. Unfortunately, casuistry lost its intellectual respectability hundreds of years ago in the wake of Pascal's *The Provincial Letters*. Not much has changed since this time. The allegation that casuistry is synonymous with chicanery, disingenuous argument, ad hoc reasoning, sophistry, evasion, and the manipulation of moral standards to rationalize unacceptable behavior still is widely believed. People are more likely to associate casuistry with President Clinton's equivocations during the impeachment proceedings, i.e., that the meaning of the word "alone" is vague, than with a bona fide attempt to apply a norm in a context-sensitive manner. Even today, few Roman Catholic theologians practice casuistry. In condemning bad casuistry, however, Pascal painted with too broad a brush, discrediting all casuistry and ignoring the important distinction between an arguable application of a principle to a hard case and its abuse (of which some of the Jesuits in *The Provincial Letters* stand guilty as charged). Pascal himself never confronted the practical problem of how to make complex moral decisions other than by appealing to Scripture. We must move beyond caricatures and take seriously the possibility that even people with the best intentions can make casuistic mistakes by failing to apply principles competently. That the Jesuits abused casuistry—or that it can be manipulated by anyone for that matter—should come as no surprise to us. But that is not a good reason to give up on the very enterprise altogether.

139. ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING (1988).

140. MILLER, *supra* note 83, at 4.

considered, whether these issues were weighed properly and whether the final decision was reasonable in light of the known facts and the probabilities attached to the given alternatives.[141] We can spot lapses in the process when we have identified how a judgment was made and evaluate it according to the above criteria. A comprehensive or refined judgment identifies all of the considerations that should be brought to bear in making a reasonable decision. This is one of the central differences between a good judgment and a poor one. Such a judgment serves as a preliminary report on the issues that must be addressed in more detail, setting the agenda for future deliberation and reflection before a final decision is reached. While our expectations here should be modest after all, we ought to expect some degree of reasonable disagreement in hard cases—the ability to narrow the range of our descriptions of particular cases is an important step toward rational justification.

III. THE NATURE OF GOOD JUDGING

A. Moral Perception

This brings us to the "moral" part of moral judgment. At the outset, it might be easier to explain what moral judgment cannot do. An adequate account of moral judgment cannot explain evil, pathological, or immoral behavior. At the same time, it can illuminate the ways in which even sincere people can go wrong. A compassionate person who genuinely believes in principles of fairness still may be prone to honest, although not necessarily excusable, errors. A genuine commitment to tolerance or fairness will not necessarily lead to behavior that is truly tolerant or fair. After all, it is not difficult to imagine a person who has unimpeachable principles but who nonetheless does a very poor job of assessing the salient features of real situations.[142] If she cannot close the gap between the abstract moral principle and the concrete context in which she must act, she may often behave in ways that appear to be hypocritical even though her mistakes are entirely innocent.

Furthermore, mistakes of judgment do not always result from lacking complete access to empirical information or from being incapable of predicting the probable consequences of possible courses of action. Instead, they can also reflect the failure to see the morally relevant considerations or to balance them sensibly. We have a natural inclination to assume that better rules—i.e., those that are more fine-grained or more comprehensive—will make judgment easier.

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141. JONSEN & TOULMIN, *supra* note 139, at 83.

142. Following Hegel, many critics believe that Kantian ethics are excessively formal and insensitive to social context. A maxim, however, is a subjective principle of action; it should contain "the particulars of person and circumstance as the agent judges are necessary to describe and account for his proposed action." Herman, *supra* note 9, at 75. In formulating a maxim that will be tested for permissibility by the Categorical Imperative (CI), an agent can be attentive to the concrete details of the actual circumstances that she encounters. Otherwise, the CI cannot be an effective practical principle of moral judgment.

Yet as Kant pointed out long ago, a rule cannot contain additional rules for its application in all of the situations in which it is possibly applicable.[143] At some point, rules run out. Indeed, the need for judgment arises in the first place because of doubt about how principles should be interpreted and applied.[144]

Moral perception is the first step in making a moral judgment.[145] The agent must render the situation of choice morally intelligible by incorporating all of the morally salient details and figuring out their possible implications.[146] The notion of salience admits of degrees.[147] A person who is generally morally perceptive is more likely to put together a more comprehensive picture of the circumstances in that none of the important details are overlooked. This does not mean that either a person is or is not morally perceptive even though most likely there will be people at both ends of the spectrum. Although some people are bound to be more perceptive than others inasmuch as they see the world in finer moral detail, some of them will be better in some situations than in others.[148] It is not hard to imagine, for example, a person who acts callously toward her colleagues or students yet at the same time is exceptionally sensitive to the needs of her family and close friends. A person might be very attentive to the racial subtext of a particular social situation yet not appreciate its other moral aspects.

Being perceptive in this way depends on a kind of empathetic understanding that enables the agent to see what she needs to see to react appropriately.[149] A

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143. Kant, *supra* note 118, at 61.

144. MILLER, *supra* note 83, at 18.

145. As Seyla Benhabib writes,

> How does an agent recognize this particular situation as being one that calls for the duty of generosity? Suppose through some circumstances, the details of which are not exactly clear, a friend in the publishing business manages to squander the family fortune and is heavily in debt. We must first determine whether these particular circumstances are ones in which such a duty of generosity has a claim on what we are to do. But how do we determine the claims of the circumstances upon us? Note that this question does not concern the moral duty an agent acknowledges to be generous. It concerns the interpretation of the duty of generosity in this particular case.

Seyla Benhabib, *Judgment and the Moral Foundations of Politics in Arendt's Thought*, 16 POL. THEORY 29, 34 (1988).

146. *Cf.* PATRICIA M. KING & KAREN STROHM KITCHENER, DEVELOPING REFLECTIVE JUDGMENT: UNDERSTANDING AND PROMOTING INTELLECTUAL GROWTH AND CRITICAL THINKING IN ADOLESCENTS AND ADULTS 7-8 (1994).

147. *See* BLUM, *supra* note 19, at 32.

148. As E.D. Hirsch observes, "A lawyer usually interprets the law better than a literary critic not because he applies special canons of statutory construction but because he possesses a wider range of immediately relevant knowledge." HIRSCH, *supra* note 93, at vii.

149. As Thomas Hill remarks,

> I suspect that without compassion one can never really become aware of the morally relevant facts in the situation one faces. The inner needs and feelings of others are virtually always relevant, and without compassion one can perhaps never fully know what these are—or give them their appropriate weight.

person who is morally perceptive should also have enough imagination to see new implications of old principles.[150] When emotions have been cultivated properly, they can sharpen our moral vision by attuning us to morally significant features of real situations that otherwise we might miss.[151] Truly compassionate people see the world in finer moral detail than other people do because they are more emotionally acclimated to subtle signs that indicate deeper meanings. On this view, kindness or compassion is not simply a behavioral predisposition or a raw emotional state. Rather, it is a kind of perceptual attentiveness that attunes one to the considerations that must be reflected upon before a good decision can be made. A compassionate person can recognize the discomfort or distress of others because she can see less obvious indications that others usually miss. The danger of self-absorption is that it blinds us to the needs of other human beings by preventing us from seeing these people as they really are.[152]

If we can avoid representing people to ourselves in ways that are self-serving, then we can begin to see accurately. A morally perceptive person does not let her biases nor her desires keep her from seeing the world from a number of different perspectives that do justice to its complexity. This standpoint requires the agent to avoid seeing everything through the optic of her own ego. This does not mean that the degree of identification that is desirable requires some kind of Platonic seeing without illusion or Buddha-like vision, but rather involves accepting the separate reality of other people and trying to understand them as they understand themselves.

B. The Relevance of Aristotelian Judgment to Principle-Based Ethical Theories

Presumably, for Aristotle, the practically wise person is morally perceptive. She can see patterns or the relevant similarities and differences in other cases, just as a good judge can select the right precedents to justify a legal decision. Such a person is particularly adept at making the subtle distinctions that capture all of the relevant details. A principle or rule of thumb may cover a number, or even a wide range of different cases, predisposing but not making the agent act in a certain way. The practically wise person realizes that such principles only hold for the most part. Indeed, the main task of human choice is to determine

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THOMAS E. HILL, JR., AUTONOMY AND SELF-RESPECT 51 (1991).

150. For example, early on, Justice John Marshall Harlan anticipated that free speech might also include symbolic expression. Garner v. Louisiana, 368 U.S. 157 (1961) (sit-ins at privately-owned, racially segregated, lunch counters).

151. Empirical research on affect and social judgment shows that "emotional feelings influence which facts decision makers will attend to, how much time they will spend poring over them, and how they will interpret and categorize them." NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 77 (2000).

152. For example, for Iris Murdoch, the central moral imperative was "unselfing," that is, "the overcoming of the self-centeredness that prevents us from loving others as separate existences." DAVID J. GORDON, IRIS MURDOCH'S FABLES OF UNSELFING 7 (1995).

when such principles hold and when they do not hold, or how they should be qualified in light of the circumstances. The application of ethical maxims to real circumstances, then, requires the assistance of the faculty of judgment that enables an agent to make an appropriate decision in her particular circumstances. This is an important point because the problem is that the real difficulty of choosing wisely lies in the indefinite nature of the conditions of choice. For this reason, any general principle which might be thought to govern the situation and produce a conclusion deductively cannot identify the exceptions or trade-offs that might lead to a better choice, all things considered.

To convince a Kantian of the centrality of judgment, we only need to point out that the value of Aristotelian sensitivity to context extends to the cognitive process of applying abstract principles of right.[153] The rehabilitation of contextualism in Aristotelian ethics against the formalism in Kantian ethics dissolves the rigid contrast between the two ethical traditions in a way that brings out the strengths of each. As Lawrence Blum points out, principle-based theories of morality require moral perception.[154] A person must be aware not only of the brute facts of a situation but also be able to appreciate their relationship to her deeper moral convictions.[155] Similarly, if a citizen has no preconception of the value of freedom and equality, she will not know what features of the moral terrain of political life should catch her attention to trigger a proper response. One can be aware of the existence of a raw fact yet be unaware of its deeper moral meaning. When exercised competently, the faculty of judgment connects that fact(s) to the relevant moral principle(s) and makes sound moral judgment possible.[156]

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153. For example, Joshua Cohen concedes that "which considerations count as reasons" depends on context. Joshua Cohen, *Democracy and Liberty*, *in* DELIBERATIVE DEMOCRACY 194 (Jon Elster ed., 1998). Among contemporary commentators, Charles Larmore is somewhat unique in that he openly recognizes the importance of moral judgment in applying general rules to particular situations. He points out that higher level principles—such as utilitarianism or Kantian universalizability—can exclude or give insufficient weight to other moral considerations. Larmore's qualified moral particularism takes seriously the need to respond to the particularity of a situation by going beyond the form of general rules. Yet he seems to be too eager to conclude that such judgment resists theoretical understanding and too willing to insist that judgment should play a greater role in personal rather than in political morality. As such, his account of moral judgment overlooks the extent to which such judgment is relevant to the practice of citizenship in a deliberative democracy in which the public deliberation of citizens legitimates collective decisions. *See* LARMORE, *supra* note 29, at ix, 7, 20-21.

154. BLUM, *supra* note 19, at 31.

155. I borrow this distinction from Lawrence Blum, *Moral Perception and Particularity*, 101 ETHICS 701-25 (1991).

156. As Carl Jung puts it,

> Consciousness is something like perception, and just as the latter is subjected to conditions and limits, so is consciousness. For instance, one can be conscious at various stages, in a narrower or wider sphere, more superficially or more deeply. These differences of degree are, however, often differences in character, in that they depend

C. The Limits of Principles

One can be sincerely committed to opposing racism, for instance, yet be a poor judge of what this moral commitment requires in real situations. Consider the following example. Some African-American jurists believe that white judges are much less sensitive than African-Americans are to manifestations of racism in their courtrooms.[157] One possible explanation for this alleged comparative lack of sensitivity is that white judges are less likely to see the racist overtones of behavior on the part of attorneys, witnesses, and other court officers because they are racist. They believe in racial superiority, have internalized racial stereotypes, or are not sufficiently aware of their own racial biases. These explanations, of course, may be true. On the other hand, a person can also be sincerely committed to eradicating racial discrimination yet at the same time miss real instances of racism. Such instances may not register because she lacks the kind of perceptual sensitivity that Aristotle associates with *phronesis*. This failure, while perhaps blameworthy, is not tantamount to being racist in the sense of harboring malice toward particular racial groups. Instead, it exhibits a kind of blindness on the part of the human agent who is situated in particular circumstances but cannot see what she should be able to see. Not acting appropriately, then, is not always a product of having the wrong intentions or motives.[158] An agent who is conscientiously devoted to the right principles may not respond to a real moral problem appropriately because of her failure to appreciate its morally salient features or her refusal to acknowledge the significance of competing concerns.[159]

The moral response that ultimately emerges is a product of a dialectical process in which she has described, redescribed, evaluated, and reevaluated how

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> completely upon the development of the personality—that is to say, upon the nature of the perceiving subject.

Carl Jung, *Foreword*, DAISETCH TEITARO SUZUKI, AN INTRODUCTION TO ZEN BUDDHISM 18 (1964).

157. *See, e.g.*, LINN WASHINGTON, BLACK JUDGES ON JUSTICE: PERSPECTIVES FROM THE BENCH (1994). Although the political ideologies of African-American judges that were interviewed for this book ranged from the right to the far left, nearly all of them commented that the experience of being African-American in America sensitized them to the subtle forms that racism takes in institutional contexts.

158. For Aristotle, a human being that was perceptively challenged would lack virtue and thus, would not have good character. It is not clear, however, whether that person could be said to be responsible for his or her character, that is, not being able to see what a normal person should see.

159. Justice Hugo Black was notorious for reading the free speech clause of the First Amendment literally. By contrast, Justice John Marshall Harlan "viewed balancing not as an escape from judicial responsibility, but as a mandate to perceive every free speech interest in a situation and to scrutinize every justification for a restriction of individual liberty." Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1013-14 (1972).

the applicable abstract principles and facts fit together.[160] Knowledge of what action a moral principle may require in those particular circumstances is as much a part of choosing well and acting appropriately as having the right principles or the right motives. Indeed, it is far from obvious that one can be said to have a particular virtue, such as compassion or generosity, when that person typically cannot figure out the proper response in the real world. Being compassionate toward the wrong people, for example, can be a vice. The attentiveness that underlies moral perception is a moral quality that judges ought to possess when they adjudicate hard cases of constitutional law that divide the electorate.[161] The point is not that either the judge sees the case in the right light or she overlooks all of the relevant features. Rather, the comprehensiveness of her response lies along a continuum and judges can do better or worse jobs at describing real constitutional questions in terms of including all of the relevant considerations.

D. Examples

The failure to appreciate moral salience is the failure to see what a normal person should have seen.[162] Take the following couple of examples. In *Toward Neutral Principles of Constitutional Law*, Herbert Wechsler criticized *Brown v. Board of Education*[163] on the grounds that its justification was not "neutral."[164] Wechsler believed that the legal issue boiled down to two types of associational preferences: the preferences of African-Americans to attend integrated public schools and the preferences of whites to attend segregated public schools.[165] For him, the Court had not advanced a neutral principle to justify the decision to favor the preferences of African-Americans and therefore, the decision itself was constitutionally suspect.[166] This criticism rests on the assumption that the associational preferences of each racial group are somehow comparable, an assumption that neglects the historical context of racial inequality and its social, political, and economic implications. In *Brown*, the Court was not just taking sides in a partisan debate over the wisdom of racial integration in public schools. Rather, the conflicting preferences were not treated as moral equivalents because

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160. *Cf.* Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256, 262 (1979).

161. John McDowell identifies this kind of sensitivity or perception with virtue. McDowell, *supra* note 137, at 122-24.

162. The extent to which an agent is morally responsible for her failure to see what she should have seen is, of course, a difficult question. On the one hand, we do not expect ordinary people to have the practical wisdom of the Aristotelian *phronimos*. On the other hand, in our civil law system of torts, we hold people to the legal standard of negligence (the failure to exercise the due care that a reasonable person should have exercised) and assign civil liability to them when their conduct falls short of this standard.

163. 347 U.S. 483 (1954).

164. Wechsler, *supra* note 14, at 1.

165. *Id.* at 34.

166. *Id.*

what was at stake was equal citizenship in America. It takes little imagination to appreciate the extent to which government-sanctioned segregation of public facilities, the enforcement of racially restrictive covenants, and exclusionary residential zoning may have created a group of second-class citizens. Wechsler's challenge to the legitimacy of *Brown* fails because he could not see what was obvious to many other people: that racially segregated public education has widespread inegalitarian ramifications and thus, a preference for such segregation is simply not on par with a preference for integration.

In *Bowers v. Hardwick*,[167] Michael Hardwick challenged a Georgia statute that prohibited consensual sodomy on the grounds that he had a fundamental constitutional right to engage in such conduct. In a 5-4 decision, the United States Supreme Court upheld the Georgia statute. The majority concluded that, unlike the rights of married people or unmarried heterosexuals to sexual autonomy, the Constitution does not protect such rights for gay persons.[168] In the majority opinion, Justice White characterizes the legal issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."[169] He then immediately distinguishes the case from past privacy cases dealing with family, marriage, and procreation and announces that the Court will not establish a new constitutional right that would protect sodomy between consenting adults.[170] Last, he distinguishes *Bowers* from *Stanley v. Georgia*,[171] which protects the right to possess and read obscene material in the privacy of one's own home, claiming that the latter decision was rooted in the First Amendment.[172]

What is remarkable about this opinion, apart from its appeal to prejudice against homosexuals and its uncritical celebration of religious tradition, is the extremely narrow way in which White frames the legal issue. His description of the case does not come close to capturing all of the relevant considerations. This failure is not simply a matter of defining an alleged constitutional right narrowly or broadly, that is, in terms of a right to a gay or lesbian sex act or a right to sexual intimacy for all adults.[173] Like the dissenting opinion,[174] one could argue

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167. Bowers v. Hardwick, 478 U.S. 186 (1986).

168. Initially, Powell had thought that a twenty-year prison sentence for consensual sodomy was "cruel and unusual punishment" and thus, the case could be decided on Eighth Amendment grounds alone. Later, he changed his vote and sided with the majority to uphold the Georgia statute. After his retirement, he remarked that "I probably made a mistake in that one [*Bowers*]." He also told a reporter that "I do think that it was inconsistent in a general way with *Roe*. When I had the opportunity to reread the opinion a few months later, I thought the dissent had the better of the arguments." JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 520, 530 (1994).

169. *Bowers*, 478 U.S. at 190.

170. *Id.* at 190-91.

171. Stanley v. Georgia, 394 U.S. 557 (1969).

172. *Bowers*, 478 U.S. at 194.

173. From the existence of this problem more generally, Mark Tushnet concludes that these levels of abstraction are easily manipulated and as such, do not adequately constrain judicial

that this case is really about "the right to be left alone" and as such, is consistent with other privacy cases like *Griswold v. Connecticut*,[175] *Eisenstadt v. Baird*,[176] *Carey v. Population Services International*,[177] and *Roe v. Wade*.[178]

The problem is that the majority opinion focuses only on the physical aspect of the conduct in question. By upholding the statute against constitutional challenge, the Court permitted states to criminalize the sexual dimension of non-heterosexual romantic relationships, including those in which the two people love each other. Until recently, this decision allowed a state that was so inclined to prosecute gay people who are not celibate and to imprison them, even those who would marry if that option were available to them.[179] In effect, the decision meant that in states that had prohibited homosexual sodomy, a gay couple had to remain celibate to comply with the law. Yet the majority opinion never explained, or for that matter even addressed, why a homosexual relationship is a potentially less meaningful moral encounter than a heterosexual relationship.

Obviously, one cannot assume without argument that homosexuals are less likely to reach out to each other in a loving relationship than heterosexuals are. Nor did the majority opinion explain why gay and lesbian couples should be treated differently than heterosexual couples and denied certain inheritance rights, the ability to sue for wrongful death, the right to file a joint income tax return, hospital visitation rights, alimony, child support, and the right to make health care decisions for an incapacitated partner. The point is not that these considerations necessarily would have been conclusive. Rather, at the very least, this way of characterizing what was also at stake in *Bowers v. Hardwick*—the right of a loving couple to enjoy sexual intimacy as an expression of their love for each other—should have been addressed by the majority opinion.[180] Even Blackmun's dissent misses this point because he defines the right at stake as one of sexual privacy, whereas the Georgia statute extends far beyond casual sexual encounters.

The purpose of these brief remarks is to make plain that plausible arguments along these lines could have been developed, yet the majority decision conspicuously failed to address them. As Mary Ann Glendon has noticed, the

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discretion. TUSHNET, *supra* note 52, at 135.

174. *Bowers*, 478 U.S. at 199-200 (Blackmun J., dissenting).

175. 381 U.S. 479 (1965).

176. 405 U.S. 438 (1972).

177. 431 U.S. 678 (1977).

178. 410 U.S. 113 (1973).

179. Lawrence v. Texas, 123 S. Ct. 2472 (2003).

180. The Author realizes that not all such homosexual sexual encounters take place within the context as a loving, long-term relationship. Yet the point is that the Georgia statute covered such relationships as well. By ignoring this possibility, the majority was able to turn the issue into a right to a sex act divorced from its possible deeper moral context. Indeed, it is quite a tragedy that the United States Supreme Court could have rendered such a thoughtless decision without more sensitivity to its consequences for those who were involved in long-term monogamous relationships.

decision in *Bowers* lacks "depth and seriousness of the analysis contained in its majority and dissenting opinions" compared with some of the discussions that have taken place abroad.[181] Alternatively, those who make thoughtful decisions are likely to mull over all of the relevant considerations in light of social reality and put together a rich picture of the case at hand. These kinds of decisions can be difficult because one may neglect a relevant fact and thus, not respond appropriately. Or one may simply not be aware of the deeper meaning of the facts.[182] The true nature of such situations may even be hidden from people with the best character—i.e., those who genuinely care about other human beings and seek to treat everyone fairly.

One of the great tragedies in human life is that those with the best of intentions can so easily go wrong. Whether a person will respond appropriately to real moral situations turns on the extent to which she identifies the morally salient features of her situations of choice. The best choice under difficult circumstances will always incorporate the most significant considerations that count for or against a particular course of action because reasons for action are always context-dependent. Such reasons must be particular in character and be assessed relative to the other particulars. As in the two examples above, a decision that leaves out too many of the relevant details will result in moral failure.

E. Weighing Competing Considerations

Facts and reasons exist even when the agent does not recognize their existence.[183] The operation of moral perception and moral judgment, combined with deliberation with others, enables the agent to render a more complete description of the circumstances of choice and yields provisional reasons about what to do. She then must sort through all of the remaining reasons before deciding how to act. Considerable room exists, then, for deliberation and correction of initial impressions because all of the relevant considerations are only potential reasons or candidates for action. From the standpoint of the judge who must make a decision at some point, their significance only becomes apparent when they are somehow connected to the relevant legal authorities. When a particular fact in a given case implicates political equality, for example, then we have a reason, which must be weighed and balanced against other reasons, in deciding upon the most appropriate course of action.[184]

This is the kind of legal reasoning that the practice of constitutional adjudication requires. The central task of the individual appellate judge is to

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181. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 151 (1991).

182. For instance, in *Bowers v. Hardwick*, Justice Powell had great difficulty in acknowledging the existence of homosexuality in America. JEFFRIES, *supra* note 168, at 528.

183. *See* Joseph Raz, *Introduction*, *in* PRACTICAL REASONING 3 (Joseph Raz ed., 1978).

184. In applied ethics, the "stringency" of a moral rule refers to its weight relative to other considerations. Russ Shafer-Landau, *Moral Rules*, 107 ETHICS 584, 585 (1997).

determine the strength of these reasons, all things considered. After all, merely bringing a fact or its significance in terms of the governing legal standards to another judge's attention does not create a conclusive reason for a vote. It merely makes her aware of its existence or possible relevance and makes it possible for that person to take it into account in making a good decision. The facts of a particular case become conclusive reasons for an action only when they bear a clear relationship to the relevant legal norms and defeat other conflicting or competing reasons.

Weighing reasons is a metaphor. The thought is that each set of reasons is placed on a balance scale and those that are heaviest outweigh the reasons that support the opposite conclusion. We should not take this metaphor too literally or assume that this process can be quantitative. After deliberation with the lawyers, their clerks, and their colleagues but before they must vote, a judge finds herself in the position of determining the strength of all of the relevant reasons relative to one another for or against a particular decision. These reasons are only *prima facie* reasons.[185] Another reason may defeat a *prima facie* reason in the sense that it has greater weight or force, in this particular situation, all things considered. For instance, generally, a judge is expected to support a right to free speech or free association. However, in the case of anti-gang injunctions, that same judge might assign a greater value to the protecting the community from gang activity and therefore, support such injunctions. No mathematical value can be assigned to these competing considerations. The weight that each of them should be assigned becomes a matter of offering the best possible reasons and evidence for one position on the issue and then assessing the strength of the counterarguments.

In constitutional adjudication, this means that prima facie reasons can be overridden by stronger reasons. Whether they yield a particular conclusion on how to resolve a particular fundamental question of constitutional law is to be determined through the best efforts of judges at making a rational comparison among the arguments that compete for their allegiance. At the moment of choice, they must make up their own minds in selecting the argument that strikes them as most compelling. In a given case, there is likely to be a continuum of *prima facie* reasons, ranging from the very strong to the very weak. Aristotle's notion of the practical syllogism, where a true minor premise coupled with a true major premise yields a correct practical conclusion, is of little help in hard cases because there are liable to be a number of potentially appropriate minor premises that seem to describe the concrete facts of the case equally well.[186] After all, a

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185. W.D. Ross first introduced the distinction between *prima facie* duties and other kinds of duties in W.D. ROSS, THE RIGHT AND THE GOOD (1930).

186. Legal or moral norms could be thought to serve as the major premise in a practical syllogism. The practical conclusion that this reasoning produces is then exhibited by how the agent acts (assuming no weakness of the will, wickedness, or other behavioral incapacity on her part). Let us assume that a person is committed to an abstract principle of racial equality and conscientiously attempts to avoid racist behavior at all times. The major premise in all of her practical reasoning will be something like "treat all persons equally regardless of race" or "be on

hard case is hard precisely because it can be described plausibly in different ways that imply opposing conclusions. The very notion of a *prima facie* reason is premised on the assumption that in some cases, agents only appear to have certain reasons to act in a particular way and that these reasons can be trumped by other reasons when all of them have been properly considered. The initial reason(s) counts for something but it can be outweighed, upon reflection, by stronger reasons. As such, the strength of a reason in a particular case cannot be determined *a priori*.

F. Resolving Conflicts of Norms

When two legal principles or their underlying values conflict, judges must be able to balance them, as fairly possible, after reviewing all of the relevant considerations. Whereas advocates present their case in an intentionally one-sided manner, a judge must render a legal judgment that does justice to both sides of the case. Her decision must be covered by the applicable legal rules and be consistent with how past cases have interpreted those rules. As such, unlike an advocate, a judge must be able to assume a much broader perspective. The harder the case, however, the more likely the judge will find herself in a situation where she must choose between two sets of reasons, both of which appear to be equally compelling.

How does she rationally resolve such a conflict? A dilemma or conflict of norms exists when at least two norms, which are applied independently, lead to opposite conclusions. This possibility is probably the exception and not the rule yet the existence of hard cases means that we must have a rough outline of an approach that is designed to produce choices that do not demand existential leaps of faith. That one reason has priority over another reason under certain circumstances does not mean that it necessarily would have priority under different circumstances. One is not inconsistent by allowing particular reasons to trump other ones on a more or less ad hoc basis when the contexts differ.

The problem with grand theories of constitutional interpretation, which purport to be internally coherent, is precisely that they try to fit all cases into the same mold and thus, are too insensitive to the concrete details. A judge can only be accused of inconsistency when she votes differently in two cases that are truly alike. Their relevant similarities or dissimilarities cannot be decided by the theory in advance, but rather boil down to a careful assessment of the particulars. Indeed, a large part of public deliberation ought to be devoted to investigating whether cases that seem to be hard and are open to dispute resemble easier cases

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guard against acting on the basis of racial stereotypes." A person who is deeply racist, of course, will not even begin with this major premise. Her moral failing, in other words, is better explained by her not having the right principle in the first place. This principle can be more or less specific but what is important is that it gives some very general guidance about what he or she should be looking for. The principle itself can never be sufficiently detailed to enable her to deduce a practical conclusion from the major premise itself. In fact, it may not be obvious that a particular situation is covered by the general principle at all.

that have yielded defensible answers in the past. As such, it should be possible to draw the conclusion that is supported by the strongest set of reasons even in the midst of reasonable disagreement. If we have strong reasons that lead to a particular conclusion, and only relatively strong reasons that oppose it, then the reasons for outweigh the reasons against.

Alternatively, if there are only reasons against, then those reasons support the opposite conclusion. When a judge confronts two considerations that seem to have equal weight, she also must ask herself what the point of the law is. That is, what is its relationship to the proper functioning of a constitutional democracy? What democratic or liberal values is it designed to serve? In many cases, the answer will be that constitutional provisions stand for the value of equal concern and respect for all citizens. That is not a decision procedure, to be sure, but it should help the conscientious judge to focus her inquiry on the facts and considerations that advance or inhibit political and legal equality.

Those who are ideologically fanatic will not welcome this approach to resolving the most important questions of constitutional law because they will insist that the moral rightness of their views is the only consideration that should matter when collective decisions have to be made. Because their higher-level abstract theories are right and those of others are wrong, they believe that they are justified in not reaching agreement with anyone else. Still, that any single political philosophy could ever do justice to the ethical complexity of political life is extremely improbable. Excessive partisanship is not the right way to think about public justification in politics. Equally importantly, it is not the right way to think about the complexity of real problems of constitutional law and the inherent difficulty of striking the right balance among competing considerations that judges must confront in their institutional role as moral experts in a democracy.

CONCLUSION

As Oliver Wendell Holmes once wrote, "General propositions do not decide concrete cases."[187] In hard cases of constitutional law, where a judge must close the gap between highly abstract constitutional language and the particulars of the case, moral choices are unavoidable. To render a good decision is to discern the morally salient facts, to connect them to the relevant legal norms, to predict probable consequences, and to weigh competing considerations appropriately. The kinds of people that we want to sit on the federal bench when important questions of social morality are at stake are the kinds of people who can exercise moral judgment in this manner. Even more ambitiously, we hope that they will also be able to recognize and evaluate new moral phenomena, thereby sharpening our understanding of the moral ramifications of our constitutional values.

As this Article has tried to establish, much of the hard work in resolving a hard case takes place closer to the ground. There are very few higher-level principles, if any, which are free of exceptions or qualifications when they are

187. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

applied in the real world. Real people, not theories, must move from abstract constitutional provisions to the particulars of the case at hand. Those who adhere to theories of original intent or original understanding severely underestimate the extent to which moral choice is invariably involved in most hard cases of constitutional law.[188] One of the implications of this Article is that all higher-level theories of constitutional interpretation are limited in terms of their abilities to resolve real cases.[189] In making legal decisions, judges must recognize these limitations and be prepared to draw upon non-legal sources.[190]

The point is not that liberal judges are necessarily better than conservative judges at exercising moral judgment. Moderate judges who are not in the thrall of a particular ideology are probably more likely to appreciate the nuances of real cases and to balance competing considerations appropriately. After all, we want people who are fair to sit on the bench. At the same time, a judge who has experienced racism, sexism, and poverty is more likely to be sensitive to such considerations. In other words, to have good moral judgment is also not to be ignorant of the diverse moral aspects of social reality. As such, life experience may be relevant in determining the proper qualifications of a judge. The notorious difficulty of translating theory into practice boils down to the extent to which judges can exercise moral judgment competently in the sense of avoiding egregious errors. That constitutional provisions can be ambiguous or have disputed applications is a fact that we will have to live with. Some cases will always be hard in that they will have complicated facts, present new issues, have uncertain consequences, or contain competing considerations that are difficult, if not impossible, to balance.

The strength of specific reasons is contingent on the concrete context of the hard case to be resolved. At times, context-dependent reasons can be weighed differently and reasonable people may reach different, yet equally legitimate, conclusions. Strictly speaking, such reasons do not "prove" a specific legal conclusion. Rather, they support it in the sense that there can be better or worse reasons even when the criteria for distinguishing better from worse can be challenged. The absence of an Archimedean standpoint that transcends all historical and social settings is not the epistemic disaster that skeptics would have us believe. As Richard Bernstein puts it, "We must avoid the fallacy of thinking that since there are no fixed, determinate rules for distinguishing better from worse interpretations, there is consequently no rational way of making and warranting such practical comparative judgments."[191] Argumentation is still

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188. *See* Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 657, 677 (1990) (book review).

189. *Cf.* Michael D. Bayles, *Moral Theory and Application*, 10 SOC. THEORY & PRACTICE 97, 99 (1984) ("At best, moral theory provides suggestions to be used in analyzing particular problems by indicating past thinking on concrete problems, the meaning of principles, and considerations to be taken into account.").

190. GREENAWALT, *supra* note 44, at 215-16.

191. RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERENEUTICS, AND PRAXIS 91 (1983).

possible provided that there is a minimal consensus on what counts as a reason in support of, or against, a particular conclusion.

To the extent that we share the same legal culture and the same basic constitutional values, we have a common normative language that makes meaningful legal deliberation theoretically possible.[192] We must think very seriously, then, about the role of a "good reasons" approach in justifying legal decisions in hard cases of constitutional law. Furthermore, we must try to understand why some reasons strike us as being stronger in the sense that they are more likely to appeal to the members of our legal community. The force of the better argument is bound to depend on the extent to which lawyers and judges could potentially agree on actual cases.[193] For the purposes of constitutional adjudication, this may mean either that such agreement constitutes legal truth or that such agreement is best evidence of a legal truth that exists independently of our beliefs about it.

Any serious theory of adjudication requires a thorough account of moral judgment that goes beyond appeals to ideology and grand theories of constitutional interpretation. Such appeals obscure the multitude of choices that any judge must make in the course of deciding a hard case. This Article has tried to show that it is possible for a judge to make these choices in a non-arbitrary way and that the conceptual boundary between interpretation and invention is not as troubling as skeptics have insisted. At the same time, no appeal to abstract theories of constitutional interpretation will relieve a judge of the professional responsibility of paying careful attention to particular details. Nor will such appeals relieve us, as members of a democratic society, of finding judges who can exercise moral judgment competently.

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192. Whether our legal institutions foster such deliberation, of course, is an empirical question.

193. GREENAWALT, *supra* note 44, at 6 (arguing that there is rough agreement on the force of legal arguments).