Indiana Law Review

Volume 44 2011 Number 2

ARTICLES

JUDICIAL STRATEGY AND LEGAL REASON

EVELYN KEYES*

ABSTRACT

Contemporary legal philosophers generally reject traditional legal reasoning as mere "conventionalism." They argue that resort must be had to judicial strategies derived from moral and political theory—such as originalism, moral constructivism or perfectionism, minimalism, or pragmatism—to solve "hard cases," particularly in divisive and developing areas of constitutional law. In this paper, I argue that the rejection of traditional legal reasoning is misdirected and destructive. Legal reason, as commonly understood and employed by traditionalist judges, is neither mere conventionalism nor one among many types of judicial strategies—and it is a particularly inadequate one where "hard cases" are concerned. Rather, it is a dynamic form of practical reason or applied moral reason operating within a flexible system of ordered liberties that is the positive law. It can resolve all cases, no matter how complex or novel, and it functions to maintain the purpose, integrity, and functionality of the rule of law over time. All judges should decide cases traditionally—not by the constructive use of non-traditional judicial strategies.

INTRODUCTION

Philosophers and judges generally agree on what legal reason is. Everyone knows that at least in most cases, judges reason deductively from conventionally fixed principles in the positive law[1] as applied to the facts of particular cases to reach judgments that prescribe the rights and obligations of the parties in the case and in similar future cases—and that is traditional "legal reasoning." In the terminology of Ronald Dworkin, it is "conventionalism,"[2] and it is closely linked

* Justice, Texas Court of Appeals, First District. M.A., Ph.D., Rice University; M.A., Ph.D., University of Texas; J.D., University of Houston Law Center; B.A., Tulane University.

1. I define the "positive law" as the complex of officially generated, approved, and enforced constitutional principles, statutes, rules, and precedents upon which American judges generally rely to decide cases.

2. *See* RONALD DWORKIN, LAW'S EMPIRE 114-17 (1986) [hereinafter DWORKIN, LAW'S EMPIRE] (describing traditional jurisprudence as mere "conventionalism" and arguing that it cannot provide any justification for the resolution of issues that have not been settled one way or the other

to legal positivism, or the theory "that a community's law consists only of what its lawmaking officials have declared to be the law."[3] This common knowledge then serves as the springboard for what I will call the "anti-traditionalist" argument. The anti-traditionalist argument states that traditional or "conventional" legal reason operates as common knowledge says it does, and that it works well enough in non-controversial, settled areas of the law, but because it cannot resolve "hard cases" for which the positive law provides no clear answer, judges must go outside the positive law to fill in the gaps.[4] This argument is accepted by legal philosophers as diverse as Dworkin[5] and Richard Posner,[6] and it opens the door to alternative judicial strategies for solving "hard cases" that proponents variously claim reflect logical deductions from the objectively true moral propositions that at the highest level guide sound legal

---

by whatever institutions have conventional authority to decide them).

3. RONALD DWORKIN, JUSTICE IN ROBES 187 (2006) [hereinafter DWORKIN, JUSTICE]. Dworkin defines legal positivism as the thesis "that a community's law consists only of the explicit commands of legislative bodies." *Id.* at 212.

4. DWORKIN, LAW'S EMPIRE, *supra* note 2, at 130-50; *cf.* Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, *in* JUDGES ON JUDGING: VIEWS FROM THE BENCH 76 (David M. O'Brien ed., 2004) (describing traditional legal reasoning). Judge Kozinski explains:

> [T]here are more or less objective principles by which the law operates, principles that dictate the reasoning and often the result in most cases. . . . Now, these principles are not followed by every judge in every case, and even when followed, there is frequently some room for the exercise of personal judgment.
>
> But none of this means principles don't exist or that judges can use them interchangeably or ignore them altogether. Let me give you an example of one principle I think is extremely important: *Language has meaning.* This doesn't mean every word is as precisely defined as every other word, or that words always have a single, immutable meaning. What it does mean is that language used in statutes, regulations, contracts and the Constitution place an objective constraint on our conduct. The precise line may be debatable at times, but at the very least the language used sets an outer boundary that those interpreting and applying the law must respect. When the language is narrowly drawn, the constraints are fairly strict; when it is drawn loosely they're more generous, but in either case they do exist. . . .
>
> Another very important principle is that judges must deal squarely with precedent. . . . Precedent, like language, frequently leaves room for judgment. But there is a difference between judgment and dishonesty, between distinguishing precedent and burying it.

Id. at 78-79.

5. *See generally* DWORKIN, LAW'S EMPIRE, *supra* note 2; Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718 (1998).

6. *See* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY vii-viii, 240-52 (1999) [hereinafter POSNER, PROBLEMATICS]; Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1694 (1998).

judgment,[7] lead to the socially "best" results for the community,[8] or reflect the reconstructed "original intent" of the drafters of the law.[9]

The anti-traditionalist argument has been so successful that Dworkin indicates that "[t]he political influence of legal positivism has sharply declined in the last several decades . . . and it is no longer an important force either in legal practice or in legal education."[10] "Government," he assures us, "has become too complex to suit positivism's austerity."[11] Legislative codes can no longer "purport to supply all the law that a community needs" when "technological change and commercial innovation outdistance the supply of positive law," and thus, the idea has "steadily gained in popularity and in constitutional practice that the moral rights people have against lawmaking institutions have legal force."[12] And, he might also have argued, the alternative strategies to traditional legal reasoning that compete with his moral reading of the Constitution have similarly gained force in legal theory and practice, pushing out traditional jurisprudence as insufficient to serve as a practice guide for sound judicial problem solving and unworthy even of scholarly attention.

But what if the anti-traditionalist portrait of traditional jurisprudence is wrong? What if legal reason as employed by traditionalist judges is not correctly described as mere conventionalism or legal positivism? Suppose that it is better understood as a form of applied moral reason, or practical reason, operating within the constraints of the positive law that is integral to maintaining the fairness, purpose, integrity, and functionality of the rule of law. But if we suppose that we have been missing the boat on understanding legal reason and then turn to actually parsing out how traditional jurisprudence works and what the process of legal reason upon which it relies actually is, what happens to the justification for rejecting traditional legal reasoning in favor of alternative strategies? And, worse, what if adherence to sound legal reasoning is essential to the integrity and functionality of the law, and the alternative strategies now being taught and recommended for the practice of our courts are actually blueprints for judicial advocacy that undermine the systemic integrity of the law that traditional jurisprudence protects? What happens to our legal system when judges become advocates for social justice, for the "best" construction of moral principle, or for the "original" meaning of the text?

In this paper, I argue that legal reason as traditionally employed within our constitutionally constrained hybrid common law and statutory legal system is not just one strategy among many (none with any better claim to legitimacy than the other) for resolving "hard" legal cases. Rather, it is a particular form of practical or moral reason that operates within the constraints of the positive law to keep

---

7. *See* DWORKIN, LAW'S EMPIRE, *supra* note 2, at 226.

8. *See* POSNER, PROBLEMATICS, *supra* note 6, at vii-viii.

9. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 45 (1997).

10. DWORKIN, JUSTICE, *supra* note 3, at 211.

11. *Id.* at 211-12.

12. *Id.* at 212.

equity and law conjoined in the production of judgments that are fair to the parties, further the moral purpose of the law, maintain the integrity and functionality of the law, and ensure justice. To analyze traditional legal reason and justify its use in *every* case is thus the objective of this paper.

II. Judicial Strategy and Legal Reason

The justification for judges employing alternative legal strategies to resolve hard, often constitutional, cases depends entirely upon the validity of the anti-traditionalist argument—the argument that traditional jurisprudence, grounded in the interpretation of rules and principles in the positive law as applied in particular cases and controversies, is not up to the task of solving "hard cases" in developing and divisive areas of law. So how does that argument describe traditional jurisprudence and its shortcomings? Is that description accurate? And what do contemporary legal philosophers propose to put in its place to solve the problems they contend it cannot solve?

Dworkin states that traditional jurisprudence, or "[c]onventionalism[,] requires judges to study law reports . . . to discover what decisions have been made by institutions conventionally recognized to have legislative power" and to interpret legal text accordingly.[13] He then argues that judicial opinions based solely on those "conventional" sources in the positive law are merely "backward-looking factual reports" that cannot resolve the novel and controversial moral issues presented by legal cases.[14] He states,

> Law by convention is never complete, because new issues constantly arise that have not been settled one way or the other by whatever institutions have conventional authority to decide them. So conventionalists add this proviso to their account of legal practice. "Judges must decide such novel cases as best they can, but by hypothesis no party has any right to win flowing from past collective decisions—no party has a *legal* right to win—because the only rights of that character are those established by convention. So the decision a judge must make in hard cases is discretionary in this strong sense: it is left open by the correct understanding of past decisions. A judge must find some other kind of justification beyond law's warrant, beyond any requirement of consistency with decisions made in the past, to support what he then does. (This might lie in abstract justice, or in the general interest, or in some other forward-looking justification.) Of course convention may convert novel decisions into legal rights for the future. . . . In this way the system of rules sanctioned by convention grows steadily in our legal

---

13. *See* Dworkin, Law's Empire, *supra* note 2, at 226. For legal positivist theory, see H.L.A. Hart, The Concept of Law 89-95 (1961); *see also* Dworkin, Law's Empire, *supra* note 2, at 114-17, 430-33 (setting out his conception of conventionalism and of Hart's legal positivism); Adam Liptak, *The Transcendent Lawyer*, 2005 Law Sch. 14, 15-16, *available at* http://issuu.com/nyulaw/docs/2005?mode=9_p.

14. Dworkin, Law's Empire, *supra* note 2, at 225.

practice."[15]

Dworkin advocates an aspirational or *perfectionist* theory of legal reason to resolve the cases he contends conventional jurisprudence cannot solve.[16] He argues that American legal principles, at least at the constitutional level, state universal moral truths and that the duty of judges of integrity is to discern and apply those truths in deciding "hard cases."[17] These moral truths are universal in form and objective—both metaphysically, in that there exist right answers to legal questions, and epistemically, in that there are mechanisms for discovering right answers free of distorting factors.[18] Once these are discovered, objectively true propositions of law may be deduced from them and a just society implemented.[19] Thus, the main inquiry for perfectionist legal philosophers and judges is what conditions must hold so that legal judgments may follow deductively from objectively true propositions of law.[20] Dworkin states, "This is particularly important in political communities like our own in which important political decisions are made by judges who are thought to have a responsibility to decide only as required or licensed by true propositions of law."[21]

Richard Posner, generally Dworkin's antagonist, agrees with Dworkin's characterization of traditional legal reasoning as "conventional" and unable to solve "hard cases."[22] But he opposes it with his own theory of judicial *pragmatism*. This theory holds that the ultimate aim of society in legal

---

15. *Id.* at 115 (citation omitted).

16. *See, e.g.*, DWORKIN, JUSTICE, *supra* note 3, at 2, 5, 187 (describing his own theory as doctrinal and aspirational and setting out the anti-traditionalist argument); DWORKIN, LAW'S EMPIRE, *supra* note 2, at 114-15, 225; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 14, 82-84 (1978) [hereinafter DWORKIN, RIGHTS]; *see also* CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 31-39 (2005) [hereinafter SUNSTEIN, RADICALS] (using the term "perfectionist" for jurisprudential theories like Dworkin's).

17. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2-13 (1996) [hereinafter DWORKIN, FREEDOM'S LAW] (describing the "moral reading" of the Constitution); DWORKIN, LAW'S EMPIRE, *supra* note 2, at 225-28.

18. *See* Brian Leiter, *Introduction*, *in* OBJECTIVITY IN LAW AND MORALS 1, 3 (Brian Leiter ed., 2001) [hereinafter OBJECTIVITY] (discussing objectivity in legal reasoning).

19. Rational idealist perfectionism dedicated to discovering and implementing the objectively true laws of the just society has been the dominant social and political theory in American philosophy for at least the last half century. *See, e.g.*, DWORKIN, FREEDOM'S LAW, *supra* note 17, *passim*. For rational idealist theories of the just society, see generally THOMAS NAGEL, EQUALITY AND PARTIALITY (1991); JOHN RAWLS, A THEORY OF JUSTICE (1971); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

20. *See* DWORKIN, JUSTICE, *supra* note 3, at 5 ("Our main question is about the nature of the doctrinal concept of law. We ask whether moral considerations figure among the truth conditions of propositions of law and, if so, how.").

21. *Id.* at 2.

22. *See* POSNER, PROBLEMATICS, *supra* note 6, at ix-x.

decisionmaking, and of the judges who actualize society's aims, is "to maximize the social utility of law."[23] On this view,

> the judge or other legal decisionmaker thrust into the open area, the area where the conventional sources of guidance run out (such sources as previously decided cases and clear statutory or constitutional texts), can do no better than to rely on notions of policy, common sense, personal and professional values, and intuition and opinion, including informed or crystallized public opinion.[24]

The judge should be informed by "the analytic methods, empirical techniques, and findings of the social sciences (including history)."[25]

Dworkin and Posner are not alone in denying the capacity of traditional legal reasoning within the positive law to resolve "hard cases" and in affirming the legitimacy of alternative judicial strategies. Cass Sunstein argues that there *is* no single valid form of sound legal reasoning; there are only judicial strategies.[26] Unlike the blindfolded image of justice balancing her scales, he claims, "judges have no scale . . . they must operate in the face of a particular kind of social heterogeneity: sharp and often intractable disagreements on matters of basic principle."[27] Thus, Sunstein also advocates taking a constructivist approach to the law to correct the defects of traditional jurisprudence—but only, he argues, where it really matters.

Sunstein agrees with Dworkin and Posner that legal rules are "approaches to law that aspire to make legal judgments in advance of actual cases,"[28] i.e., fixed principles that entail objectively true or false legal judgments. But unlike those theorists, Sunstein does not describe traditional judges as reasoning deductively from fixed conventional rules to the propositions of law entailed by them. Rather, he calls traditional legal reasoning "rulelessness" and "casuistry"—which he defines as "analysis of cases unaccompanied by rules."[29] Traditional jurisprudence, he argues, is properly described as ruleless precisely because its judgments do not derive from theory but are "case-by-case decisions, narrowly tailored to the particulars of individual circumstances."[30] He distinguishes "ruleless" traditional jurisprudence from theory-driven jurisprudence, or "rule-bound justice," which he describes as "an approach to law that specifies a simple and (usually) unitary value, that operates at a high level of abstraction, and that decides cases by bringing the general theory to bear," operating deductively so

---

23. *Id.* at xi.

24. *Id.* at viii.

25. *Id.*

26. CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT, at vii-x, 3-7 (1996) [hereinafter SUNSTEIN, LEGAL REASONING] (declaring the nonexistence of a single theory of legal reasoning).

27. *Id.* at 3.

28. *Id.* at 21 (emphasis omitted).

29. *Id.* at 10.

30. *Id.* at 11.

that "[r]esults in particular cases are viewed as a logical consequence of the general theory."[31]

Sunstein identifies fundamentalists as contemporary theory-driven constitutional strategists or originalists, for whom the "goal is to return to what they see as the essential source of constitutional meaning: the views of those who ratified the document,"[32] and perfectionists, who "believe that the continuing judicial task is to make the . . . [Constitution] as good as it can be by interpreting its broad terms in a way that casts its ideals in the best possible light."[33] Democratic perfectionists, he states, "believe that where the Constitution is ambiguous, judges should interpret it to promote democracy rather than to compromise it," and they insist that the Supreme Court "act most aggressively when the requirements of democracy are themselves at risk," believing "that the Court should protect those groups that are least able to protect themselves in democratic arenas."[34] Rights perfectionists "insist that the Constitution should be read to protect the essentials of human dignity, including a right to make the most fundamental choices free from the constraining arm of the government."[35]

Observing that "[g]eneral theories are a natural ally of codification, which tries to organize and systematize the law, and a natural enemy of the common law, which tends to be quite unruly and to resist explanation according to theory,"[36] Sunstein posits a continuum with theory-driven jurisprudence at one end and "rulelessness," or traditional common-law jurisprudence, at the other. Given the intractability of the theories of jurisprudence he identifies as being at the high end of the continuum and the unruly common-law system in which they are brought to bear at the other, Sunstein proposes that a "well-functioning legal system" might "adopt a special strategy for producing stability and agreement in the midst of social disagreement and pluralism"—namely, "*incompletely theorized agreements*"[37] in which "judges accept a certain approach to free speech, or equality, or religious freedom without necessarily agreeing on the deepest foundations of that approach."[38] Judges can then resolve the dilemma posed by profound disagreements of principle at the high end of the continuum by moving from abstraction to a level of greater particularity, concentrating on

---

31. *Id.* at 14.

32. SUNSTEIN, RADICALS, *supra* note 16, at 26; *see generally* Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457 (2003) (distinguishing four types of judicial decisionmaking: legal, political, strategic, and litigant-driven); Timothy P. Terrell, *Statutory Epistemology: Mapping the Interpretation Debate*, 53 EMORY L.J. 523 (2004) (setting out different theories of judicial interpretation).

33. SUNSTEIN, RADICALS, *supra* note 16, at 32.

34. *Id.* at 38-39.

35. *Id.* at 39.

36. SUNSTEIN, LEGAL REASONING, *supra* note 26, at 16. Of course, part of the objective of this paper is to explain our traditional "quite unruly" common law jurisprudence!

37. *Id.* at 4 (emphasis in original).

38. Cass R. Sunstein, *The Minimalist Constitution*, *in* THE CONSTITUTION IN 2020, at 37, 41 (Jack M. Balkin & Reva B. Siegel eds., 2009).

the lower-level principles on which they agree, "understanding or converging on an ultimate ground for that acceptance,"[39] and being "cautious about undoing the fabric of existing law."[40] He calls his theory *minimalism* in that it is intended to minimize harm done to the legal system when judges resort to theory to decide "hard cases" by confining theory-driven decisionmaking only to the most important cases of principle.[41]

William Eskridge, unlike other contemporary legal philosophers, approaches the subject of sound judging through a comprehensive critical survey of all leading current methodologies of statutory interpretation.[42] His argument is, however, in my view, as much applicable to theories of legal reason and legal strategy in general as it is simply to theories of statutory construction. Rather than arguing as an advocate that judges of integrity derive their judgments from objective moral principles, a conception of social utility, fixed original texts, or conventionally decreed mandates, Eskridge steps back and asks what statutory interpretation—I would say, more broadly, legal interpretation or even legal reason—actually is. He argues that it is an ongoing, "dynamic" process and that "[t]he work of interpretation is to *concretize* the law in each specific case—i.e., it is the work of *application.*"[43] Thus, he seeks a determinate methodology of interpretation that can make legal decisions concrete and predictable within a dynamic social process. However, upon analysis, he concludes that each of the current interpretative legal theories is incapable of accommodating both dynamism and the determinacy required to concretize the application of the law.[44]

Eskridge rejects foundationalist theories of legal interpretation as unable to "yield analytically determinate answers in the hard cases."[45] Originalism is unsatisfactory because "[t]he 'original intent' and 'plain meaning' rhetoric in American statutory interpretation scholarship and decisions treats statutes as static texts and assumes that the meaning of a statute is fixed from the date of enactment."[46] Similarly, classical liberalism "views government as a social contract among autonomous individuals who in the distant hypothetical past gave up some of their freedom to escape the difficulties inherent in the state of nature.

---

39. SUNSTEIN, LEGAL REASONING, *supra* note 26, at 5.

40. SUNSTEIN, RADICALS, *supra* note 16, at 29.

41. *See id.* at 28-29.

42. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 14 (1994).

43. *Id.* at 64 (quoting HANS-GEORG GADAMER, TRUTH AND METHOD 329 (J. Weinsheimer & D. Marshall trans., 2d rev. English ed. 1991)).

44. *See id.* at 133.

45. *Id.*; *see also id.* at 47 (noting limitations of originalism and observing that interpreters are interested in text and the intention of the enacting body, but also in "the facts and equities of the case, precedents interpreting the statute and legislative feedback, and the consequences of accepting one interpretation over another"); *id.* at 14 (arguing that no foundationalist theory of statutory interpretation (purposivism, intentionalism, textualism) "yields determinate results" or "fully constrains statutory interpreters or limits them to the preferences of the enacting coalition").

46. *Id.* at 9.

. . . Hence, laws enacted by prescribed constitutional procedures are legitimated by the consent expressed in this original social contract."[47] But, Eskridge argues,

> [s]uch indeterminacy [as that entailed by a theory that looks back to the eighteenth century to determine the fixed meaning of contemporary legal terms] creates a dilemma for liberal theories of statutory interpretation. If important policy issues cannot be resolved by an interpretive methodology that is determinate and predictable, then unelected judges and agencies will make political decisions that liberalism leaves to the legislature or some other majoritarian institution.[48]

Thus, he rejects classical liberalism as well.

Eskridge applauds the dynamism of the *legal process theory* of interpretation,[49] which interprets statutes (or constitutional principles) by rationally deducing the answer to divisive legal questions from the best constructive social policy. He states:

> Whereas liberal theory posits mutually suspicious humans who form a social contract to escape the state of nature, legal process theory posits humans who recognize their interdependence and cooperate for the advancement of common interests. The state exists to further the interests that the members of a community have in common. Legal process views law as a "purposive activity, a continuous striving to solve the basic problems of social living."
>
> . . . .
>
> Legal process theory invites dynamic statutory interpretation. Viewing statutes in rationalist terms, most legal process thinkers accept dynamic interpretation as normatively essential to the implementation of statutory policy.[50]

However, he ultimately rejects legal process theory too, pointing out:

> The main difficulty with the rationalist tradition as applied by legal process writers is summed up by the question: Whose reason? Rather than identifying right answers in the hard cases, the application of law's reason depends on the interpreter's own policy choices, which are themselves guided by the framework she brings to the issue.[51]

Eskridge himself tentatively offers as a potential model of sound legal interpretation a hermeneutical model of statutory interpretation derived from the method of deconstructing literary texts developed by Hans-Georg Gadamer and

---

47. *Id.* at 111.

48. *Id.* at 133 (internal citation omitted).

49. *Id.* at 11, 141-42; *see generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1994) (setting out the theory).

50. ESKRIDGE, *supra* note 42, at 141-42 (internal citation omitted).

51. *Id.* at 142.

others.[52] This method recognizes the "limits imposed by tradition" and the surrounding and professional culture on the subject matter being considered—here, the law.[53] While Eskridge acknowledges the distinctions between literary and legal interpretation, he argues that the

> lessons of legal hermeneutics—the importance of the interpreter's horizon, the evolving nature of the text's horizon, and the importance of application to new factual circumstances—make possible the construction of a model of statutory interpretation that . . . recasts the traditional textual, historical, and evolutive inquiries as more explicitly interconnected and mutually influencing.[54]

The problem with the hermeneutical method, however, in Eskridge's view, is that it fails to provide concretizing constraints on sound judicial decisionmaking. Thus, to correct hermeneutics' defects, he opts for what he calls a "*critical pragmatism*"[55] that incorporates elements of each of the theories he has analyzed. He takes this "pragmatist approach" to interpretation because of his belief that "the interpreter's fidelity to the rule of law is nothing more . . . than a sympathetic effort to understand a statute in the context of the problem at hand and of ongoing practice."[56] He then grafts onto that approach a "critical" stance that would permit "an ongoing reevaluation of practice, especially dividing practices that marginalize groups of citizens and interest group distributions at the expense of the public interest."[57] Eskridge acknowledges, however, that a critical theory of interpretation assigns to judges precisely the policymaking role that he himself recognizes as a critical flaw in both foundationalist and legal process theories of legal interpretation.[58] As he puts it, "social constructionism undermines democratic theory as a legitimating device."[59] Thus, he acknowledges that ultimately even his own critical pragmatism fails to solve the problem of providing a theory of legal analysis or legal reason that is at once dynamic and concretizing and also compatible with democratic theory.[60]

The one theory of legal reason and analysis that Eskridge does *not* analyze is traditional jurisprudence, presumably because, as Dworkin points out, "it is no longer an important force either in legal practice or in legal education."[61] Thus, he does not acknowledge that there is already present in the jurisprudential theater a methodology that gives *legally* constrained, although not fully

---

52. *Id.* at 61-68, 348 n.33.
53. *Id.* at 65.
54. *Id.* at 63.
55. *Id.* at 193 (emphasis in original).
56. *Id.*
57. *Id.*
58. *See id.*
59. *Id.*
60. *See id.*
61. DWORKIN, JUSTICE, *supra* note 3, at 211.

determinate, answers to legal questions—a methodology that both accommodates the dynamism of the law and society and concretizes the law in particular cases while maintaining the purpose, integrity, and functionality of the law over time. The argument for that overlooked methodology is made below.

II. PRACTICAL REASON[62]

I agree with Eskridge that statutory interpretation—and legal reasoning, or the solving of legal problems—is a dynamic process and that "[t]he work of interpretation is to *concretize* the law in each specific case—i.e., it is the work of *application.*"[63] I further agree that the "lessons of legal hermeneutics—the importance of the interpreter's horizon, the evolving nature of the text's horizon, and the importance of application to new factual circumstances—make possible the construction of a model of statutory interpretation that . . . recasts the traditional textual, historical, and evolutive inquiries as more explicitly interconnected and mutually influencing."[64] The question is: Of what does a satisfactory dynamic and concretizing model of statutory interpretation—or, more generally, a satisfactory model of reasoning to a valid and sound legal judgment, consist?

Most leading contemporary legal scholars agree on this, at least: that the methodology that judges of integrity should follow is theory-driven and rationally realizes the ends proposed by the theory, whether those ends be the judge's reconstruction of the original intentions of the drafters of legislation or of the Constitution, or the instantiation of "true" moral propositions, or the maximization of social utility within the context of a case. But, I shall argue, the effectively organic, empirical nature of legal problem solving resists the rationalist shoe-horning of the law into abstract theoretical boxes. However, this is precisely because traditional legal reasoning accommodates both empiricism and rationality, concretizing abstract legal concepts in particular cases within a dynamic system of empirical laws. Thus, it is not merely one among many strategies for producing valid and sound legal judgments. Rather, it is a particular method of reasoning from abstract legal principles to sound prescriptions for action under empirical conditions that both accommodates the dynamism of the law and society and concretizes the law in particular cases, all while maintaining the purpose, integrity, and functionality of the positive law over time. What, then, is legal reason on the traditional jurisprudential model?

---

62. The argument that follows in this section is essentially a recapitulation of arguments I have made in prior articles. *See* Evelyn Keyes, *The Just Society and the Liberal State: Classical and Contemporary Liberalism and the Problem of Consent*, 9 GEO. J.L. & PUB. POL'Y 1 (2011) [hereinafter Keyes, *The Just Society and the Liberal State*]; Evelyn Keyes, *Two Conceptions of Judicial Integrity: Traditional and Perfectionist Approaches to Issues of Morality and Social Justice*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 233 (2008) [hereinafter Keyes, *Two Conceptions of Judicial Integrity*].

63. ESKRIDGE, *supra* note 42, at 64 (quoting GADAMER, *supra* note 43, at 329).

64. *Id.* at 63.

I take it as given that legal reason has a peculiar subject matter (the law) in which systemically valid conclusions, or judgments, follow rationally from the application of legal principles to the facts of particular cases and prescribe specific actions to be taken. More than one valid rational argument can be made from any abstract legal concept, principle, or rule whose meaning is not concretely fixed, however. Therefore, legal reason requires both a method for interpreting concepts and a means of reconciling conflicting interpretations and determining which is better and should be instantiated. Thus, the process of legal reason is necessarily more than the mere logical deduction of valid legal conclusions or judgments from objectively defined principles such as Dworkin's "true" moral principles of liberty and equality, Posner's principles of social utility, Scalia's original constitutional text, or even fixed "conventional" principles.

Legal reason is, indeed, a rational process, but it is also a practical, interpretive, and evaluative process that takes place within a constraining system of pre-existing laws. By its means, abstract value-laden legal concepts are applied and reconciled, and legal judgments are issued and implemented under empirical circumstances to tell us what we *must* or *should* do. Legal reason is thus not only a rational process, but also a normative process, or a process for implementing standards of value through prescriptions for action.

A. The Categorical Properties of Moral Reason

That legal reason applies value-laden principles and instantiates value-laden rights to reach prescriptive judgments entails that it is a particular type of applied moral reason,[65] or practical reason,[66] as opposed to purely deductive reason.

---

65. This assertion presupposes that there is an integral relationship between morality and law, and part of the purpose of this paper is to justify that presupposition. In that regard, I note that although the concept of legal reason as a type of applied moral reason that is developed in this paper is mine, the inquiry into the relationship between morality and the positive law is not new.

Hart, for example, developed legal positivist theory without defining morality; he avers that there are many different types of relations between law and morality, but "nothing which can be profitably singled out for study as *the* relation between them." HART, *supra* note 13, at 181. Starting, therefore, with rules consisting of "certain basic protections and freedoms" that already contain the concepts of both morality and law, he adopts a conventionalist concept of law as consisting of "all rules which are valid by the formal tests of a system of primary and secondary rules, even though some of them offend against a society's own morality or against what we may hold to be an enlightened or true morality." *Id.* at 201, 205. This concept, he contends, has the virtue of allowing "the invalidity of law to be distinguished from its immorality . . . [enabling] us to see the complexity and variety of these separate issues." *Id.* at 207. Hart acknowledges, however, that the moral contention "that a legal system must treat all human beings within its scope as entitled to certain basic protections and freedoms, is now generally accepted as . . . an ideal of obvious relevance in the criticism of law." *Id.* at 201. He concedes that "[i]t may even be the case that a morality which does not take this view of the right of all men to equal consideration, can be shown by philosophy to be involved in some inner contradiction, dogmatism, or irrationality," in

Therefore, I begin the inquiry into the nature of legal reason with the question, "What is the nature of applied moral reason or practical reason?" For only when we have determined what practical reason is, and how it functions to preserve moral value within an empirical context, can we determine how legal reason, as a type of practical reason, functions to preserve the values in the positive law.[67]

First, I take it as axiomatic that the concept of morality itself has no meaning or extension without the concept of moral value. Likewise, the concept of moral value has no meaning except by reference to life, i.e., life alone has intrinsic moral value or worth. If so, then all human beings, simply by virtue of their humanity, have dignity, or intrinsic worthiness to be treated with respect.[68] Thus, the concept of the intrinsic worth of every person lies at the core of morality. All moral values other than the value of life itself are derivatively values by virtue of their qualities of respecting the worth of every person and sustaining and advancing life and its prospects. Therefore, I define "morality" categorically as the complex of principles, rules, rights, obligations, judgments, and prescriptions that derive from and entail recognition of and respect for the intrinsic value of

---

which case "the enlightened morality which recognizes these rights has special credentials as the true morality, and is not just one among many possible moralities." *Id.* In other words, Hart does not deny the possibility that morality and the positive law may be shown to be more intimately connected than he recognizes.

Dworkin, reacting to Hart, argues that the essential problem with the positive law is its disjunctive "true" propositions of law, which are those derivable from the philosophically best construction of the moral principles incorporated into the United States Constitution. *See supra* text accompanying notes 16-21.

Sunstein, by contrast, takes the position that just as there is no single concept of legal reason, so there is no definition of morality. Rather, "[t]o understand what morality requires, or what the law should be in hard cases, we need to canvass what we—each of us—actually believe; there is no other place to look." SUNSTEIN, LEGAL REASONING, *supra* note 26, at 18.

66. The term "practical reason" as a descriptive term for the type of reason used in applying moral principles to guide behavior is traceable in modern moral and political philosophy to Kant's definition of practical reason in his *Foundation of the Metaphysics of Morals*:

> Everything in nature works according to laws. Only a rational being has the capacity of acting according to the conception of laws, i.e., according to principles. This capacity is will. Since reason is required for the derivation of actions from laws, will is nothing else than practical reason. . . . That is, the will is a faculty of choosing only that which reason, independently of inclination, recognizes as practically necessary, i.e., as good.

IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT? 29 (Lewis White Beck trans., Bobbs-Merrill Co. 1959) (1785).

67. If this argument seems too abstruse, I invite the reader to skip this section and take up the argument in the next section, where the building upon the foundations begins.

68. *See* KANT, *supra* note 66, at 9, 46-49. This conception of core value reflects the Kantian conception of a person "as an end in himself." *Id.* at 47. Kant, however, located intrinsic value in the pure rational will rather than in life itself. *See id.* at 9.

human life[69] and that are directed to the furtherance of those projects which enhance the quality of our lives and contribute to their flourishing—that contribute to the *good* as empirically realized.[70] And I define applied moral reason, or practical reason, as reason directed to making applied, categorically moral, judgments.

It follows from the definition of morality and moral reason that people are "moral" (and societies "just") precisely insofar as they inculcate and adhere to principles, rules, and methods of reasoning and making judgments that recognize and respect the intrinsic dignity and worth of every person and that make and implement moral judgments rationally in accordance with personal or social codes (or systems of principles and rules) that advance the flourishing lives of those affected. But if people and societies are moral only insofar as personal, social, or societal guiding principles, rules, and judgments are intrinsically moral, and if the positive law of a society consists of those general rules the society makes and enforces through its official governmental institutions, then a society is moral and its laws just only if its positive law and its means of making and interpreting the law respect the intrinsic dignity and worth of each member of society and further the flourishing life of the whole society—the *common good.* But how can we rationally get from the concept of morality to the role of applied moral reason, or practical reason, as the guarantor of the morality of empirical moral judgments, and from there to the concept of the positive law as an intrinsically moral social system and to the role of legal reason as the guarantor of social justice within that system? To answer these questions, we must first ask what the concept of morality entails that makes a judgment or prescription moral.

If morality is understood as respect for the intrinsic dignity and worth of every human being, then all human beings have not only intrinsic moral worth but also moral interests, i.e., the intrinsic right to be treated with respect, both

---

69. This view is shared by Dworkin, who has stated that "[w]e almost all accept . . . that human life in all its forms is *sacred*—that it has intrinsic and objective value quite apart from any value it might have to the person whose life it is" and who likewise takes "the abstract right to concern and respect . . . to be fundamental and axiomatic." DWORKIN, RIGHTS, *supra* note 16, at xiv-xv; Ronald Dworkin, *Life is Sacred. That's the Easy Part*, N.Y. TIMES, May 16, 1993, at 36; *see also* DWORKIN, FREEDOM'S LAW, *supra* note 17, at 84.

70. I accept Aristotle's argument that the objective of morality is the achievement of eudaimonia, defined not simply as the equally abstract term "happiness," but as a flourishing life. *See* ARISTOTLE, NICOMACHEAN ETHICS 5 (Terence Irwin trans., 1985) ("[M]ost people virtually agree [about what the good is], since both the many and the cultivated call it happiness [eudaimonia], and suppose that living well and doing well are the same as being happy. But they disagree about what happiness is. . . ." (first alteration in original)); *see also id.* at 19 ("[T]he end is a sort of living well and doing well in action"); *cf.* KANT, *supra* note 66, at 35 (distinguishing morality as categorically a creature of pure reason from the maximization of happiness as an empirical goal and stating, "[A]ll elements which belong to the concept of happiness are empirical, i.e., they must be taken from experience, while for the idea of happiness an absolute whole, a maximum, of well-being is needed in my present and in every future condition.").

substantively and procedurally, regarding matters that affect their lives.[71] Moreover, because there is nothing in the concept of morality itself to distinguish a moral interest in one person from the same interest in another person, the concept of morality logically requires that all equal moral interests be treated equally. In other words, the moral interests of any person affected by a moral choice should be treated as equal to the same interests of every other similarly situated person. Morality, as respect for the intrinsic dignity and worth of every person, also logically requires that all moral agents respect the right of each rational person as a moral agent to determine individually how the dignity and worth of each person affected by his decision would be best respected as if he himself were in any of the positions subject to his own decision and thus were responsible for his own well-being. In other words, morality as respect for the equal individual dignity and worth of every person entails respect not only for the *equality* of all persons in any given position with respect to a moral choice, but also for the autonomy, or *liberty*, of each moral agent to perceive himself and others as potential objects of moral judgments and to act accordingly. To ensure the morality of his prescriptions, therefore, each moral agent must make judgments as if he himself were subject to them and had the same respect for the moral interests, or *rights*, of those persons potentially affected by his prescriptions as he would have for his own if he were in their positions.[72] To put these Kantian concepts in Kantian terms, "[t]his principle of humanity and of every rational creature as an end in itself is the supreme limiting condition on freedom of the [rational moral] actions of each man."[73]

The concept of rational moral decisionmaking thus requires us to recognize that all persons have intrinsic moral worth. Additionally, all persons have moral interests correlated with abstract moral rights and obligations equally inhering in all similarly situated persons that moral agents may rationally recognize and instantiate. These rights and obligations, in turn, correlate with moral principles generally applicable to all similarly situated persons. For example, the moral principle "stealing is wrong"—in its imperative form, "Thou shalt not steal," and in its judgmental and prescriptive form, "Thou hast wrongfully stolen from thy neighbor and therefore must redress the wrong"—correlates with a personal right not to be stolen from, a personal obligation not to steal, and an obligation of the moral agent to enforce this principle equally for himself and others in the same position.

Moreover, because all rational persons are potentially moral agents, or makers of moral judgments, as well as objects of moral decisionmaking, and because all rational persons are equally entitled to respect in both roles, the general law must be such that a moral agent reasoning morally would willingly

---

71. Conversely, treating human beings as lacking intrinsic worth—treating them as mere objects or commodities without moral interests intrinsically worthy of respect—is categorically inconsistent with morality and with law. The insight is, of course, Kant's. *See* KANT, *supra* note 66, at 9, 46-49, 51.

72. *Cf. id.* at 51-52 (describing moral agents as universal legislators in a world of ends).

73. *Id.* at 49.

subject himself to it. Therefore, not only does a moral agent not steal personally, he also cannot morally prescribe that some persons may steal while others similarly situated may not or that some persons may be stolen from while others similarly situated may not be. Moral prescriptions are impartial as to all persons and, therefore, *universalizable*.

These meta-principles of moral decisionmaking are categorical; thus, they apply universally, or in every case of valid moral reasoning. In Kantian terms, they collectively constitute a categorical imperative of rational morality or practical reason.[74] Indeed, we can say that moral judgments and prescriptions made in accordance with the rules of practical reason are procedurally fair precisely because they respect the liberty and equality of all persons both as agents and as objects of moral decisionmaking under impartial, universalizable principles.

However, the formal constraints placed on moral reasoning by universal moral principles of liberty and equality do not tell us how a moral agent can rationally determine whether employing an intrinsically rational and fair decisionmaking process will have good empirical consequences. That is, the categorical requirements of moral reason fail to tell us how to determine what practical judgments among those available would best advance the flourishing life of those affected by them or the good as actually realized. What, then, ensures not only that applied moral judgments are procedurally fair, but also that they are best suited to advance their purpose under actual empirical conditions—or that they are sound?

B. The Practical Application of Moral Reason

Moral judgments, by definition, entail prescriptions for action under empirical conditions. Thus, they necessarily have empirical content, follow from empirical principles applicable under empirical circumstances, and instantiate empirical rights and obligations of persons in particular conceptual and factual positions, affecting real people under real circumstances. Essential to the understanding of practical moral judgment, therefore, is the recognition that the empirical conditions under which applied moral judgments are made impose their own constraints on moral evaluation that complement the formal constraints of moral reason. Thus, applied moral reasoning is necessarily a more complex process than mere rational deduction of valid conclusions from intrinsically moral principles. What, then, are the empirical constraints upon practical reason, or applied moral reason, and how do they impact our moral judgments?

First, despite their abstract universal form, no empirical moral principles are applicable in all circumstances. Rather, empirical moral principles or imperatives—such as the affirmative command to respect one's parents and the

---

74. *Cf. id.* at 38-39 (stating that since the categorical imperative "contains beside the law only the necessity that the maxim should accord with this law, while the law contains no condition to which it is restricted, there is nothing remaining in it except the universality of law as such to which the maxim of the action should conform" (internal citation omitted)).

negative commands not to steal or commit murder—although objective, universal, and categorically moral in form, are hypothetical in application. That is, they are substantive in content, limited in practical scope, and purposive or instrumental in effect.[75] They apply only in certain circumstances, and only those moral principles that have a correlative relation with the interests of persons who will be affected by a particular moral judgment are implicated in the process of moral reasoning.

Second, the interests of persons in different empirical positions are not the same and generate different moral judgments with respect to each position. The killer who sprays a room with bullets is in a different position than the killed, both logically and morally, with respect to that act. Likewise, our moral judgments regarding persons in the same positions, such as that of the killer, differ in varying factual circumstances. Suppose violent terrorists aim assault rifles at undercover security guards who shoot them first. Suppose the reverse. Suppose terrorists shoot children held hostage in a school. Suppose an angry, estranged, or distraught husband kills his wife and children. Suppose the killer and the killed are drug addicts and the cause of the shooting is a deal gone sour. Our moral views about the killers are different in each instance. Empirical moral judgments are shaped by empirical facts, by precepts learned, by background knowledge, and by perceptions of the circumstances. They are shaped by conceptual and factual context.

Third, practical moral judgments are made under imperfect conditions of knowledge as to the material facts and the consequences of the judgment. Thus, the resolution of empirical moral problems is confined to material considerations and foreseeable consequences.

Finally, the moral interests of persons affected by a moral judgment may, and often do, conflict with each other and with other interests, generating an empirical moral nexus that requires a method of dispute resolution in which only one empirical principle or rule, or only one interpretation of a principle or rule, can emerge as the rule of prescription, and only one interest or right may be instantiated by the moral agent at the expense of another. Thus, practical moral judgment requires an interpretive and evaluative process for resolving conflicts, using as its operational tools rules of issue identification, interpretation and construction, and standards of evaluation, as well as deductive logic. These tools of what we may call the moral analytic allow a rational and fair-minded moral agent to define and weigh empirical alternatives and to resolve conflicts among the potential outcomes of his choice by deciding which of two or more interpretations of a concept is most consistent with the facts and the body of relevant moral concepts and which among alternative prescriptions best advances the moral interests of those affected, consistent with fairness and the maintenance of the purpose, integrity, and functionality of the system as a whole, and thus

---

75. The term is again Kant's. *Cf. id.* at 31 (distinguishing hypothetical imperatives, which are limited in scope and directed to some purpose or "good only as a means to something else," from the categorical imperative, which is thought of as good in itself and "hence as necessary in a will which of itself conforms to reason as the principle of this will").

should be implemented.

Practical reason is thus an ongoing and indeterminate process of concretizing moral precepts in moral judgments under empirical conditions through repeated applications of moral principles, rules, and standards; comparing the consequences of different interpretations of principles; and instantiating rights and obligations in different conceptual and factual contexts to achieve a moral purpose within the formal constraints of fairness imposed by the categorical moral imperative. The process of reasoning morally prescribes not only which interpretations are best and which rights are weightiest in particular circumstances and should be implemented, but also which rules and standards are best to secure a functional and moral system. In other words, the interpretive and evaluative process itself prescribes the empirical scope of principles and the relative weight of rights in different types of circumstances and thus determines which moral judgment is not only rational and fair, but best in any given case or controversy.

Over time the process of repeatedly making rational practical moral judgments creates an evolving hierarchy of more or less well-ordered and well-defined principles and rules, with moral principles being abstract, universal concepts; moral rules being subordinate, more particularized subsets of principles; rules of interpretation and construction being operations for determining the boundaries of those sets of factual circumstances that fall within the scope of a legal rule; and standards of evaluation being operations for evaluating outcomes and determining which is best. Within this hierarchy, fundamental rights are those moral interests that dominate and determine the outcome of empirical judgments at the most abstract and comprehensive level in case after case because their instantiation furthers ends rational moral agents subject to the system deem essential to the preservation and furtherance of the flourishing life through a system of ordered moral liberties. These are, therefore, most general in their application and least subject to radical change.

Within an applied moral system, each judgment or prescription is concrete and fixed with respect to those interests directly affected, but it enters into and becomes integral with a non-determinate, dynamic, and open-ended set of heteronomous moral principles and their subordinate rules. These conform to the categorical requirements of morality and are used to make rational moral judgments and prescriptions when logically applied to particular sets of facts under applicable evaluative standards. The judgments the process of moral reasoning produces within such a self-creating, self-correcting system then become part of and help define the system of flexible, open-ended rules and principles that constitute the moral system itself.

In such a system, a moral agent faced with making an empirical moral judgment or prescription takes into account the operative procedural and substantive principles and rules within the system, the facts of the case, and the relative weight of those principles and correlative rights whose instantiation is sought under applicable evaluative standards; he interprets moral concepts and evaluates alternatives for each position impartially as if he himself were to be affected by his judgment, ensuring his responsibility as a moral agent. When the substantive principles followed and the rights instantiated are intrinsically fair

and rationally judged most conducive to the good by the agent, the outcomes the process produces—its judgments and prescriptions—will be themselves intrinsically rational and moral, and therefore just, and they will contribute to the integrity and functionality of the moral code into which they enter. There is no need—and, indeed, no justification—for a moral agent to seek outside the system of applied moral principles the "true" principles that govern the "best" constructive interpretation of morality or the "best" consequences of his decision in terms of social utility.

An empirical moral system is not derived from a simple set of objectively true moral principles or guidelines, regardless of the contentions of rationalist moral philosophy. Rather, an intrinsically moral empirical value system is grounded in abstract rules and principles tested and incrementally adjusted over a long period of time in a variety of empirical situations and ultimately regularized in formal and informal personal, organizational, and societal moral codes. The system is kept fair and its empirical results just precisely insofar as its agents employ practical reason to reach and implement particular, concretizing moral judgments that instantiate moral rights correlated with moral principles and their subordinate rules, while maintaining the moral purpose, functionality, and integrity of the system.[76] But the system does not thereby become determinate and fixed. Rather, the actualization of morality remains a self-creating, bounded but open-ended, indeterminate, and dynamic process of concretizing or instantiating the principles of an ongoing moral system in particular cases under different circumstances through the exercise of moral reason and moral judgment. This process of reasoning morality creates a moral system consisting of moral prescriptions that, abstracted from, constitute moral rules that do justice to those affected by furthering their moral interests fairly to good ends while maintaining the integrity and functionality of the system itself over time.

But even if a moral system is a self-created body of moral principles and rules made in accordance with the formal requirements of practical reason, and if applied or practical moral judgments are integral parts of a dynamic empirical moral system, how can we justify the further claims that traditional legal reason is a form of practical reason and that it functions similarly to maintain the moral purpose, integrity, and functionality of a system of positive laws that is itself intrinsically moral?

III. Legal Reason

The principles that legal reason applies; the standards, rules, and precedents by which it interprets and applies them; the rights, obligations, and penalties a legal judgment instantiates; and the actions it prescribes are all part of a body of positive law self-created and self-perpetuated, like a moral system, through a

---

76. Correspondingly, if an empirical value system—whether personal or social—is not systemically moral, but incorporates principles and rules that conflict with the categorical requirements of morality, the moral integrity of the system can be maintained only by its agents' rejection of the offending principles.

dynamic process actualized and implemented through concrete applications. In this process, legal judgments, like moral judgments, do not merely follow by deductive logic from the application of legal principles, standards, and rules under given circumstances, so that they are *valid.* They also require the interpretation of value-laden concepts and the evaluation of facts and alternatives under legal and evidentiary standards of evaluation and the rational and normative resolution of conflicts so that the judge may rationally reach prescriptions for action, or legal judgments, that are *sound.*

Within the system of laws in which legal reasoning takes place, no legal opinion or judgment stands alone, just as no moral judgment stands alone. Each relies upon past opinions and judgments, utilizes principles, rules, and standards in the law, and contributes to the ongoing, organic, self-creating, self-sustaining, and self-correcting—or autopoietic[77]—system of publicly enforced legal principles, standards, and rights (or system of positive laws) in which it takes its place. And it is adherence to this complex process of legal reasoning within the context of the body of the law which ensures that a legal judgment will be accepted as both valid and sound and as conducive to the flourishing life of society—and therefore as just, by the parties and the public—and that it will contribute to the integrity and functionality of the dynamic and open-ended system of publicly enforceable laws of which it becomes a part. This dense thesis requires explication, however, and that is the objective of this section, which analyzes and justifies the concept of traditional legal reason as a complex type of practical reason employed within the context of the positive law.

It is self-evident that there is an integral relationship between personal and social moral codes. This relationship is grounded in the equal dignity and worth of every person. Further, it is inculcated and self-enforced in accordance with principles of practical reason on the one hand, and it is a social compact of self-made and self-enforced laws in the form of a constitutional representative democracy—founded, like our own, to ensure the safety and happiness of its members and grounded in principles of liberty, equality, and impartiality—on the other hand. Indeed, there is no serious question that American law was consciously erected on a moral base—namely, the original right of a free and equal people to establish for themselves a government of those laws they themselves deem most conducive to their own safety and happiness. The Declaration of Independence justified separation from the British crown and the formation of a new government on the quintessentially moral ground

> that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and

---

77. The term "autopoiesis" is derived from the Greek word for "self-creating." It was coined by biologists Humberto Maturana and Francisco Varela to describe living systems or autonomous, strictly bounded systems that are shaped by their interactions with the environment over time so as to maintain the system and the relations between parts. *See* HUMBERTO R. MATURANA & FRANCISCO J. VARELA, AUTOPOIESIS AND COGNITION: THE REALIZATION OF THE LIVING 78-79 (Robert S. Cohen & Marx W. Wartofsky eds., 1980).

> the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[78]

And the supreme instrument for structuring, protecting, and furthering that ideal was the American Constitution. Drafted by delegates of the people for their own governance and approved by the people through ratification by the states, the Constitution incorporates those intrinsically moral enabling principles, constraints on personal liberty, and exercises of governmental power that were, in the estimation of the Framers and the states that adopted the Constitution, essential to the concept of a just society of laws and grounded in those precepts deemed vital to the preservation and rational furtherance of the common good.[79]

The Constitution expressly proclaims that the government of the United States was ordained and established by the representatives of the people "in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."[80] And in *Marbury v. Madison*, Chief Justice Marshall reaffirmed the "original right" of the

---

78. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

79. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405-06 (1819) ("If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. . . . But this question is not left to mere reason: the people have, in express terms, decided it, by saying, 'this constitution, and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land' . . . ."); *see also* William J. Brennan, Jr., *The Constitution of the United States*, *in* JUDGES ON JUDGING: VIEWS FROM THE BENCH, *supra* note 4, at 188. Justice Brennan argues:

> The Constitution on its face is, in large measure, a structuring text, a blueprint for government. . . . When one reflects on the text's preoccupation with the scope of government as well as its shape, however, one comes to understand that what this text is about is the relationship of the individual and the state. The text marks the metes and bounds of official authority and individual autonomy. When one studies the boundary that the text marks, out, one gets a sense of the vision of the individual embodied in the Constitution.
>
> As augmented by the Bill of Rights and the Civil War Amendments, this text is a sparkling vision of the supremacy of the human dignity of every individual. This vision is reflected in the very choice of democratic self-governance: the supreme value of a democracy is the presumed worth of each individual.

Id.

80. U.S. CONST. pmbl.

people to establish a government subject to those principles they themselves deem most conducive to their own collective happiness, stating, "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected."[81]

As adopted, interpreted over time, and continually ratified by successive generations, the Constitution has remained the central structural document of the positive law, and hence of the social compact compounded of the positive laws. The Constitution not only creates the institutions of government and allocates delegated powers among them; it assures the people's ultimate responsibility for ensuring that the government created by their ongoing delegation of authority to their representatives and ratified by their consent to its laws is morally and politically just.[82]

In addition to the original moral and political right of self-government, which is a formal right referable to the categorical imperative itself, the Constitution sets out fundamental structural principles of ordered liberty—or enabling principles and constraints upon the collective will—regulating the body politic in an orderly, state-enforced, and intrinsically moral manner. And through the Bill of Rights and subsequent amendments, it ensures the fundamental individual rights of the American people against governmental or private infringement.

Substantive individual moral rights enumerated in the Constitution (and hence in the positive law) and held by the people against the State include, inter alia, the rights of individuals to associate freely with others, to practice religion freely, to speak freely, and to possess their persons, homes, and property without fear of arbitrary intrusion.[83] Procedural rights include rights that ensure a fair trial and constrain the levying of punishments.[84]

Most abstractly, the Fifth and Fourteenth Amendments incorporate the two great procedural principles of liberty and equality intrinsic to the process of practical reason itself as constitutional constraints on *all* governmental decisionmaking—whether by the legislature, by judges, or by the executive branch—ensuring fundamental procedural fairness in the making, interpretation,

---

81. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803); *see also McCulloch*, 17 U.S. at 403-05.

82. *See McCulloch*, 17 U.S. at 403-05 (arguing that the Constitution was promulgated by a convention of delegates elected by state legislatures and submitted for ratification to conventions of delegates "chosen in each state by the people thereof," and "[f]rom these conventions, the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established,' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity.' . . . The government of the Union, then . . . is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.").

83. *See* U.S. CONST. amends. I, II, III, IV, V.

84. *See* U.S. CONST. amends. VI, VII, VIII.

and enforcement of the law.[85] Indeed, the categorical requirement of practical reason that every person affected by a moral decision must be treated the same as every other similarly situated person may be taken as the core of the concept of equality embodied in the Equal Protection Clause of the Fourteenth Amendment.[86] And the categorically moral concept of respect for the moral autonomy of each rational person as both maker and object of moral judgments, as well as respect for the intrinsic worth of all persons, may be taken as the essential moral core of the concept of liberty that underlies the Due Process Clause of the Fifth[87] and Fourteenth Amendments.[88]

But adherence to these two great principles of procedural fairness is not the sole determinant of justice. The people must also be afforded the right to determine the moral objectives of a just society under empirical conditions and the moral means of achieving them within the constitutional constraints they have imposed upon themselves. Thus, the Necessary and Proper Clause of Article One of the Constitution grants Congress the power to promulgate laws to implement the powers delegated to it by the people;[89] Article Five ensures the people's right to amend the Constitution;[90] the Ninth and Tenth Amendments secure against intrusion by the State the substantive personal liberties traditionally held by the people but not enumerated in the Constitution;[91] the Tenth Amendment assures to state legislatures the "police power" that protects the public health, safety, welfare, and morals;[92] and the Fourteenth Amendment

---

85. *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (stating that the concepts of equal protection of laws and due process both stem from the American ideal of fairness).

86. The Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . . The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5; *see* Reynolds v. Sims, 377 U.S. 533, 565 (1964) ("And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.").

87. The Fifth Amendment provides, inter alia, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

88. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) ("[T]he liberty safeguarded [by due process] is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people.").

89. U.S. CONST. art. I, § 8, cl. 18.

90. U.S. CONST. art. V.

91. The Ninth Amendment provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

92. The Tenth Amendment "police power" is "[t]he inherent and plenary power of a

expressly reserves to Congress the "power to enforce, by appropriate legislation, the provisions of this article."[93] Thus, the process for guaranteeing just government that is fair to all and dedicated to the common good as the people perceive it is built into the Constitution.

The Constitution grants all legislative powers to the legislative branch, empowering Congress to enact general laws to carry out its mandate.[94] It vests the President and the executive branch with power to execute the laws.[95] And, finally, it grants the courts jurisdiction to preside over particular cases and controversies[96] and implies the principle of judicial review through its delegation of authority to judges. In this manner, it effects the intent of the drafters that judges, acting as intermediaries between the people and Congress, review and interpret the laws.[97]

The Constitution thus structures a government of ordered liberties, or positive laws, composed of intrinsically fair structural and enabling principles and concomitant constraints upon the power of the State and each of its offices. Most importantly, it constrains all legislative, executive, and judicial decisionmakers to adhere to the fundamental principles of liberty, equality, and impartiality intrinsic to practical reason and to those principles of ordered liberty deemed by the drafters to be fundamental to a just society and thus written into the Constitution to ensure fairness and justice for all. The Constitution establishes the parameters of the rule of law.

Within the constitutionally structured system of positive laws adopted by the United States, the roles of legislators, who make general laws on behalf of the people, and of judges, who construe and apply the law in the context of particular cases and controversies, are both vital, but they are separate and distinct. Legislators make fair and impartial laws of general application within the constraints of the Constitution. It thus falls to them—in light of their access to broad sources of support and information, their role in an assembly of representatives of all, and the generalized effect of the laws they make—to make sound social policy and to ensure its intrinsic morality by adhering to the requirements of practical reason embodied in the Constitution in its promulgation and enactment. If the law is then interpreted and applied by fair and impartial

---

sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice. It is a fundamental power . . . subject to due process and other limitations . . . [and can be delegated] to local governments." BLACK'S LAW DICTIONARY 1196 (8th ed. 2004); *see supra* note 91 (for text of the Tenth Amendment).

93. U.S. CONST. amend. XIV, § 5.

94. U.S. CONST. art. I, § 1.

95. U.S. CONST. art. II, § 1.

96. U.S. CONST. art. III, § 2.

97. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803); *see also* THE FEDERALIST No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]he courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts.").

judges using traditional legal reasoning in particular cases and controversies, its intrinsic morality will be preserved, and the laws so produced will be kept moral. For the role of judges in a functioning constitutional democracy is *not* that of policymakers, as some contemporary legal theorists have averred,[98] but that of interpreters and implementers of constitutional, legislative, and common-law principles and rules within the context of particular cases. And traditionalist judges fulfill that role by reasoning from the facts of the case and the applicable law, in accordance with the principles of practical reason as incorporated into the law, to judgments that instantiate the individual rights and obligations of the parties in a way that is consistent with and becomes part of the positive law to guide future cases in materially similar circumstances. Thus, together with its counterpart (a rational and fair legislative process), traditional judicial reasoning preserves and furthers the ends of practical reason within the constitutional framework.

The system of the positive law in which lawmaking and judicial interpretation take place constitutes a hierarchy of constraints upon the unfettered liberty, both of those who are subject to the law and of those who make and interpret the law. Within this hierarchy, constitutional principles trump statutes, which in turn trump case law, with all being ever subject to change through constitutional amendment, statutory enactment, amendment, and revocation, and judicial interpretation.[99] And it is within this system that legal reason operates to apply the law under particular circumstances in case after case, adjusting the boundaries of legal concepts on an incremental basis as statutes do on a generalized basis. Case law gives way to statutory law when the need for a uniform general law arises and a statute is promulgated and enacted, but case law is then invoked anew to concretize the application of the statute in particular cases and controversies.[100] The entire body of the law is thus subject to ongoing refinement and modification by concretizing judicial interpretation, evaluation, and judgment. And the opinions judges draft in particular cases enter into a

---

98. *See, e.g.*, DWORKIN, JUSTICE, *supra* note 3, at 5; *see also supra* note 21 and accompanying text.

99. This system reflects the common-law system inherited from England. *See* SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 144-45 (Charles M. Gray ed., 1971) (1713) (describing the decrees of kings as overriding parliamentary statutes, which in turn override the judgments of courts, while private opinion has no legal force whatsoever); *see also* SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, *in* COKE ON MAGNA CHARTA [A9-10] (Omni Publ'ns 1974) (1797). Moral principles are embedded in all these sources of the common law. *See id.* at A5, 6, 9-10 (setting out constituents of common law).

100. *See* THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 97, at 467 ("A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.").

flexible body of law that grows and changes incrementally with each case, even as it is kept uniform, coherent, reliable and just through the adherence of judges to "strict rules and precedents" and to traditional legal reason in deciding each case.[101]

The positive law within which judicial decisionmaking functions thus constitutes an autonomous and strictly bounded system of official pronouncements authorized by the Constitution. It is a system that governs the official public life of society and that is shaped by interaction with empirical factual and legal circumstances over time so as to maintain itself and the relation of its parts. It is an autopoietic system.[102] And it is, by adhering to rules and principles in the positive law, within the constraints of practical reason as incorporated into the law and the methodology by which it is applied that judges fulfill their constitutional function of preserving and protecting the boundaries of the laws made by the people (rather than substituting their own private and personal judgments for those sanctioned by due process). Indeed, the integrity and functionality of the system depends upon the shared expectation that lawmakers and judges will play by the rules of the game, i.e., that they will follow the rules and precedents produced by the system itself and will not change the rules to fit their own personal conceptions of the "best" construction of morality or to achieve the "best" social consequences. That is why traditional jurisprudence matters. But how does legal reason, its modus operandi, work in particular cases to achieve these ends?

IV. Applied Legal Reason: The Legal Analytic

I have argued that the positive law in America is structured and maintained in accordance with moral principles and that its purpose is to further justice and the common good. I also have argued that each legal judgment contributes to an organic empirical system of positive laws that is at once autonomous and strictly bounded and also dynamic, indeterminate, and open-ended and that the formal process by which traditional legal judgments are made is not only objective and rational in form, but also particularized, case-bound, interpretive, evaluative, and prescriptive in application and, therefore, concretized. And I have argued that the role of judges is to interpret and apply the law in particular cases fairly and rationally in accordance with its intent so as to do justice to the parties under the law and to preserve the rule of law. But I have not yet indicated how traditional legal reason works within the context of a particular case so that the judgment reached may be said to be best to effect justice in that case and to maintain the purpose, integrity, and functionality of the law overall—and, therefore, to be one that should be implemented. I have not yet addressed the *legal analytic*, or model of traditional judicial decisionmaking within the confines of a particular case.

---

101. *Id.* at 471.

102. *See supra* note 77 and accompanying text.

A. Traditional Judicial Methodology[103]

A traditional judicial opinion customarily begins with a brief introduction stating the nature of the case, the stage of the proceedings, and a very brief statement of the legal issues within the positive law that are to be decided; it may also announce the disposition. The introduction is followed by a statement of facts necessary to the disposition, whether procedural or substantive. These sections set the legal and factual scope of the opinion.

The opinion then sets out the standard of review. These standards—such as abuse of discretion; legal or factual sufficiency of the evidence; de novo review of legal issues; or, in a case challenging the constitutionality of a law, the compelling state interest or rational basis test—establish norms for evaluating the trial court's judgment. Is the case ripe for adjudication? Is the defendant state actor immune from suit? Is deference to be paid to the trial judge's decision so long as it is rational? Is there a presumption in the applicable law in favor of one party or the other, or in favor of innocence over guilt, or in favor of a conviction for a lesser offense over a greater offense in case of reasonable doubt? Is the presumption rebuttable? Does affirmance require proof of a factual scenario by a preponderance of the evidence, or is the judgment reversible only if it is contrary to the overwhelming weight of the evidence or if it is supported by no more than a scintilla of evidence? These are all either objective or rational tests that are designed to determine pure questions of law, such as questions of duty or jurisdiction, or semi-subjective evidentiary or balancing tests that instruct the court how to weigh the evidence in the case to determine whether it is sufficient to support the judgment.

The next section of the opinion, the discussion, sets out each legal issue and the substantive or procedural law that governs each and analyzes the case accordingly. The statement of the law provides premises in the form of legal rules, rules of construction, and standards from and by which courts can reason logically from the legal issues posed by a case to an opinion and judgment—whether the issue regards the interpretation of a constitutional principle, statutory provision, contract, or will, or the proof of the elements of a crime, claim, or affirmative defense. The rest of the discussion consists of the application of the law to the facts of the particular case under the applicable rules and standards as stated in statutes, rules, and precedents so that a conclusion (or holding) may be reached that rationally and fairly decrees the parties' rights and obligations in a manner consistent with prior law and a judgment may issue that prescribes the actions to be taken to implement the holding.

This description of judicial decisionmaking—or applied judicial reasoning—seems incontrovertible and uncontroversial. It describes what judges actually do when they are reasoning legally. The devil, however, is in "the application of the law to the facts," or in the interpretation of the governing rules of law and the evaluation of alternatives so that the "best" judgment is made, or

---

103. This section analyzes intermediate appellate opinions, but the analysis is generally applicable to all judicial opinions.

that which is most coherent with the body and purpose of the law and most conducive to the good of the whole, consistent with the principles of fairness and justice. This is where the anti-traditionalist argument comes into play. For if traditional jurisprudence derives the answers to legal questions by mere deduction from backward-looking factual reports, as the anti-traditionalist argument says it does, then, by definition, traditional jurisprudence has no principled methodology for deciding among alternative interpretations of a legal concept, or for deciding among possible alternative outcomes, or for reaching forward-looking conclusions in a changing social landscape. According to the anti-traditionalists, traditional jurisprudence cannot resolve "hard cases." Similarly, if traditional jurisprudence is ruleless, where is the bar to introducing rules, or theory-driven principles, to bring principled structure to what is otherwise mere casuistry? Not surprisingly, therefore, legal philosophers seek to justify alternative strategies to traditional legal reasoning as producing *better* law than traditional legal reasoning within the constraints of the positive law, and even as producing *some* law where they contend the positive law, being fixed and backward-looking, has gaps.

It is here that Dworkin advocates that judges—especially Supreme Court Justices—should implement the objectively true moral principles that underlie the positive law.[104] It is also here that Posner advocates that judges of integrity should apply a "pragmatic" utilitarian analysis[105] and that Scalia argues that judges should implement the "original meaning of the text."[106] And it is here that Sunstein suggests judges may adhere to whatever strategy they choose, so long as they decide most cases on lower- or mid-level principles on which they agree, introducing fundamental principles only in the most important cases, and thus minimizing the harm done to the fabric of the law by divisive judgments derived from theory.[107] Thus, in the next section, I address the process by which traditional judges actually do apply the law to the facts to show that there are no "gaps" in the positive law they apply and no "hard" cases that traditional legal reasoning fails to resolve, justifying resort to alternative strategies of judicial decisionmaking.

B. Traditional Judicial Analysis

The essential difference between a traditional jurist and a theory-driven jurist is that rather than taking an active constructive approach to the law, a traditional judge decides cases on the understanding that the role of a judge is to further the purpose of the laws that the people themselves have made through their representatives and ratified by their consent or that have evolved through the incremental process of case law. This approach requires judges of integrity to interpret and apply the law within existing constraints in the positive law and in

---

104. *See, e.g.*, DWORKIN, FREEDOM'S LAW, *supra* note 17, at 73-74, 343.

105. *See* POSNER, PROBLEMATICS, *supra* note 6, at xi-xii.

106. *See* SCALIA, *supra* note 9, at 45.

107. *See* SUNSTEIN, LEGAL REASONING, *supra* note 26, at 5.

light of the particular circumstances of the case in such a way as to maintain the integrity and functionality of the law and to effect the common good as the people have defined it. So what are the constraints the positive law imposes upon judicial interpretation?

At the most general and abstract level of the positive law in the United States are constitutional and traditionally held fundamental common-law principles deemed essential to the concept of ordered liberty itself. These abstract principles are the great enabling and constraining concepts that shape the contours of the positive law, but their empirical scope is almost entirely undefined in the Constitution itself.[108] Subordinate to these are rules of law that define the limits, or extensions, of factual situations that fall within the scope of general principles. Rules thus define the relationship between broad abstract intellectual concepts and their practical application to the facts in different sets of circumstances.

In all "hard cases," or cases requiring the exercise of judicial discretion, the judge's first task is to determine the scope of unclear or overlapping legal concepts, where "the extension of the word or phrase is all and only those things that satisfy the descriptions speakers associate with the term(s),"[109] in light of the totality of the material circumstances of the particular case or controversy and the relevant principles, rules, and precedents in the positive law. Then the judge's task is to derive the logical conclusions from that interpretation under the appropriate standards and to evaluate alternatives to find the best—or most logical and functional—fit between the law applied, the purpose for which it was intended, and the consequences for the parties and for the law itself.

Contrary to the portrayal of traditional or "conventional" legal reason by rationalist legal theorists as being "mere deduction" from conventionally fixed principles, the extension of legal concepts (or principles and rules of law) is not fixed, and the best judgment cannot be determined solely by deductive reasoning. Nor are judges licensed by the Constitution to interpret legal concepts constructively in accordance with some "justification beyond law's warrant, beyond any requirement of consistency with decisions made in the past," finding justification for their decisions in "abstract justice, or in the general interest, or in some other forward-looking justification."[110] Rather, in traditional legal

---

108. Chief Justice Marshall recognized this essential feature of the American Constitution in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . . Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.").

109. *See* David O. Brink, *Legal Interpretation, Objectivity, and Morality*, *in* OBJECTIVITY, *supra* note 18, at 12, 21. Brink notes that "[t]he claim that general [legal] terms are open textured . . . fits with[in] . . . a semantic tradition that includes [philosophers from] John Locke . . . [to] Rudolph Carnap." *Id.* at 21.

110. DWORKIN, LAW'S EMPIRE, *supra* note 2, at 115.

reasoning, the extension of legal concepts is generally determined by what can broadly be termed associative and dissociative reasoning within the constraints of the positive law. Once this is determined, principles may be reconciled and interests evaluated to determine the best outcome for the parties and the law within the confines of the legal process itself.

In reasoning legally, the traditionalist judge determines what kinds of situations fall within the scope of each concept by looking first to past interpretations in materially similar and dissimilar situations—precedents—and analogizing to the material elements of those cases or distinguishing them on the same basis. The judge uses these tools to draw or reshape the boundaries of each concept so as best to accommodate the material facts of the case, moving outward from the particular to the more general as necessary to accommodate new data and to find the least general rule that will accommodate the facts while maintaining the structural integrity of the law at issue.[111] Often, this process suffices to determine that the case falls squarely within the scope of a particular rule. When it does not, the judge has recourse to judicially and legislatively created tools of construction, including the plain language of the text to be interpreted, the harmonization of all its parts, the intent of the drafters, and, where appropriate, the policy of the state.[112] When the best interpretation of the governing rules is determined, the judge reasons deductively from that interpretation, under appropriate evidentiary or legal standards, to whatever judgment logically follows. The objective of this process is to ensure that the

---

111. *See* CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 24-25 (2004) ("It is the way of doctrine to develop by analogy, moving out from a core of concrete instances by progressive, metaphorical extensions until a new and more abstract statement is achieved."). Lloyd Weinreb has likewise analyzed the role of analogy in legal reason. *See generally* LLOYD L. WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT (2005). On Weinreb's account, when a judge is uncertain about how to legally classify some phenomenon, he reasons by analogy, or employs "abductive" reasoning, which makes a conclusion possible without making it certain, unlike deductive reasoning. *See id.* at 20-24. Weinreb supports his claim that legal reasoning encompasses analogical reasoning as well as deduction with the argument (with which I agree) that "[u]nless one is able to identify an object as a member of a class despite its differences from other members of the class, no deductive inference is possible." *Id.* at 127. Sunstein likewise has argued that analogical reasoning plays a central role in legal reasoning, according it a much less constrained role than Weinreb or Fried. *See* SUNSTEIN, LEGAL REASONING, *supra* note 26, at 62-67.

112. For example, the Texas Government Code instructs that judges construing statutes may consult, inter alia, the: "(1) object sought to be obtained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; [and] (5) consequences of a particular construction." TEX. GOV'T CODE ANN. § 311.023 (West, Westlaw through 2009 Reg. Leg.). It further instructs judges to presume: "(1) compliance with the constitutions of . . . [the] state and United States is intended; (2) the entire statute is intended to be effective; (3) a just and reasonable result is intended; . . . and (5) public interest is favored over any private interest." *Id.* § 311.021. The Code also advises judges that the rules it contains "are not exclusive." *Id.* § 311.003.

judgment made is at once fair to the parties and consistent with fairness. Furthermore, it ensures that the judgment is most conducive to the integrity, functionality, and purpose of the positive law in which it takes its place, and thus most conducive to furthering the common good.

If alternative interpretations of a term, rule, or principle material to the case are rationally justifiable, such that different prospective judgments follow logically from different interpretations, the consequences of those prospective judgments for the parties and the law are assessed by the judge to maintain the best fit with the function and purpose of the law. The judge determines the foreseeable effects that the potential decision may have upon the parties and upon the functionality and vitality of the body of the law by weighing alternatives under applicable constitutional constraints, rules, standards, and relevant legislative policies. The "best" interpretation and application of a legal concept is that which most closely reflects the ordering of the value-laden concepts built into the law as it has been defined, refined, and redefined over time within the law itself to maintain the functionality and integrity of the law and effect its purpose fairly and rationally. The judge need not move beyond the constraints of the law to decide the case in accordance with the dictates of moral theory or social utility as he "best" construes them. Nor does the judge possess any such warrant under the law.

For example, the principle that there must be both offer and acceptance to create a binding contract is a fundamental principle of contract law. By itself, the principle is abstract, universal, and objective, and it sets the contours of contract law—but it is not in itself linked to any particular set or sets of factual circumstances. Rather, what constitutes offer and acceptance in different sets of circumstances and what does not is determined in particular case after particular case, and the law of contract is developed through repeated acts of interpretation of precedents, rules, statutes, logical arguments, and the weighing of alternative outcomes under applicable standards. The repeated interpretation and application of principles of law, such as offer and acceptance, in different sets of legal and factual circumstances establishes and readjusts the boundaries and weights of legal rules vis-a-vis each other. And the same process holds even if what is at issue is not the formation of a contract or the effectuation of a tort, but the construction of a state or federal statute.[113]

The interpretive and evaluative constraints of the positive law upon adjudication apply even at the level of constitutional construction upon which most jurisprudential theory concentrates. For example, in construing the Equal Protection Clause of the Constitution,[114] no court cognizant of its own responsibility to maintain the functionality, integrity, and purpose of the law—and no judge cognizant of his oath to uphold the laws of the United States or of his accountability to the parties and the law—could simply ignore the language of the clause, the precedents constraining its interpretation, or the facts of the case before him. Similarly, no judge of integrity ignores the traditional

---

113. *See* 29 U.S.C. §§ 1001-1461 (2006 & Supp. 2009).

114. U.S. CONST. amend. XIV, § 1.

comparative and deductive tools of legal interpretation, evaluation, and prescription—such as those rules of construction condemning intentionally discriminatory, overbroad, or constitutionally vague statutes, or requiring a rational relationship between the language of the statute and a constitutionally legitimate state interest, or requiring that a statute be "narrowly tailored" to further a "compelling" state interest. No court or judge cognizant of its responsibility acts independently of these constraints.

The repeated exercise of legal reason by judges in particular cases and controversies defines and redefines the boundaries of the liberties the members of a group or society are free to exercise against each other and the constraints of the positive law upon those liberties. And together with the texts of the Constitution, statutes, and precedents, this case-by-case analysis creates a dynamic body of laws that function organically together as an ongoing, self-creating, and self-adjusting social compact—just as the process of making repeated moral judgments in different circumstances within a body of governing moral principles establishes and refines the content of moral precepts and demarcates the limits of their application, generating a coherent and functional moral system over time. Needless to say, however, any legal judgment that depends upon the interpretation of legal concepts or the evaluation of outcomes under empirical standards, rules, and principles in different circumstances over time will be to some degree subjective and indeterminate. Thus, although flexible, it will be subject to correction by successor or higher courts, or to modification or overruling by legislatures, so that the law remains simultaneously bounded by systemic constraints and capable of growth.

Rules of law, like moral rules, are thus *not* fixed and backward-looking, but dynamic, open-ended, and indeterminate. And the opinions and judgments that define and refine them are not "ruleless," as Sunstein contends,[115] or "conventional" and "backward-looking factual reports," as Dworkin contends,[116] simply because the rules are not fixed and determinate. Nor is traditional jurisprudence incapable of resolving "hard cases" because it is not theory-bound. Rather, when the creation of the positive law through the exercise of legal reason in particular cases is understood correctly as an ongoing rational and evaluative empirical process of making concrete legal judgments and incorporating them into the dynamic body of the positive law, it is evident that "hard cases," like moral dilemmas, are simply those cases that present an empirical nexus in which the scope of two or more legal concepts overlap or the scope of one or more legal concepts is unclear under the circumstances of the case, requiring resolution by interpretation and evaluation within the context of the positive law. In short, *all* cases that present genuine material issues of law or fact are "hard cases."

Contrary to contemporary jurisprudential dogma, legal reason as traditionally employed by judges in the Anglo-American constitutional, statutory, and common-law tradition of adjudicating cases and controversies is a complex form of practical reason employed on an ongoing basis within the confines of the

---

115. *See* SUNSTEIN, LEGAL REASONING, *supra* note 26, at 5.

116. *See* DWORKIN, LAW'S EMPIRE, *supra* note 2, at 225.

positive law to which each judgment contributes and which each modifies. When its actual nature is recognized, it is clear that there are no "hard cases" that evade resolution by traditional legal reasoning or require resolution by recourse to constructive sources of "true" or "better" law. There are no "gaps" that judges must actively seek to fill by recourse to theory from outside the positive law. There is therefore no justification for judges to adopt alternative strategies to traditional jurisprudence to resolve "hard cases."

V. ALTERNATIVE JUDICIAL STRATEGIES

No scholar, to my knowledge, has given an argument for when and why the exercise of traditional legal reason ceases to provide a satisfactory methodology for resolving cases so that "strategic" alternatives to traditional jurisprudence are justified, other than the anti-traditionalist argument, which fails. And no contemporary legal philosopher, to my knowledge, has produced an alternative strategy for resolving legal cases that is at once comprehensive, dynamic, and capable of producing concretizing judgments that will maintain the purpose, integrity, and functionality of the rule of law over time, as traditional jurisprudence does. Rather, the results of the application of alternative strategies demonstrate their inherent tendency to undermine the positive law and the social compact it implements.

Sunstein, for example, accepts the rationalist definition of "rules" as fixed and determinate "approaches to law that aspire to make legal judgments in advance of actual cases."[117] He then construes traditional jurisprudence—in which rules are *not* fixed and determinate—as "ruleless."[118] Thus, while he recognizes that "[a]ll rules are defined in terms of classes,"[119] he does not explore this concept as it applies to traditional legal interpretation. More importantly, he posits a continuum between "ruleless" traditional jurisprudence and "rule-bound justice," or theory-driven jurisprudence, which he defines as holding that judges "should avoid open-ended standards or close attention to individual circumstances" and "should attempt instead to give guidance to lower courts, future legislators, and ordinary citizens through clear, abstract rules laid down in advance of actual applications."[120] This continuum then becomes the linchpin of his argument for minimalism, the doctrine that judges whose decisions are driven by disparate and intractable theories can—and, as principled judges, even *should*—converge on lower-level or mid-level principles when they have profound disagreements of principle, but should resort to rule-bound justice to

---

117. SUNSTEIN, LEGAL REASONING, *supra* note 26, at 21 (emphasis omitted).

118. *See id.* at 13 ("Much of what lawyers know is a set of practices, conventions, and outcomes that is hard to reduce to rules, that sometimes operates without being so reduced, and that is often just taken for granted. This background knowledge makes legal interpretation possible, and it sharply constrains legal judgment.").

119. *Id.* at 24.

120. *Id.* at 10 (emphasis omitted).

decide the most important cases.[121]

The problem with Sunstein's theory is that the important cases are decided by principled judges in advance of actual cases and on general, and admittedly divisive, grounds—the exact opposite of the constitutional mandate that judges must decide particular cases or controversies in such a way as to maintain the integrity and functionality of the law.[122] Ultimately, therefore, minimalist legal theory collapses into advocacy of a system of government by judicial decree in which the ideological might of a bare majority of the judges on a court of last resort makes right.

Similarly, Dworkin's perfectionist conception of the law as legitimized by its logical derivation from objectively true moral propositions leads to an entirely different set of legal judgments from those produced by traditional legal reasoning—namely, political judgments as opposed to traditional legal judgments.[123] Unlike traditional jurisprudence, perfectionist jurisprudence does not begin with the concept that the positive law is a dynamic set of indeterminate empirical principles that is intrinsically moral and is kept moral through a fair and rational process of legal reasoning to which each legal judgment contributes. It begins with the axioms that the fundamental principles of democracy are objectively true moral propositions[124] independent of the positive law and that the "best" construction of the extension of constitutional concepts is given directly by moral and political philosophy.[125] Thus, a judge who, in deciding particular cases, construes and implements the principles of liberty and equality in the Constitution in accordance with his own "best" construction of the rational requirements of the abstract principles of liberty and equality participates in constructing the "true" conditions of a just democratic society. What perfectionists present as an objectively true construction of constitutional principles, however, necessarily reduces to a profoundly *subjectivist* view of legal "truth." For the values in the positive law are exchanged for the values the

---

121. Sunstein argues that judges decide most cases on such "lower-level principles," reasoning largely by analogical reasoning, which does not require anything like "horizontal and vertical consistency," but only "[l]ocal consistency," where there is no pre-existing rule and by interpretive practices within the legal community that frequently take the form of "background knowledge," although "no particular approach" is required. *See id.* at 32-33, 52, 65.

122. *See* U. S. CONST. art. III, § 2, cl. 1 (limiting judicial power to cases or controversies).

123. *See* DWORKIN, JUSTICE, *supra* note 3, at 2 and accompanying text (advocating perfectionist jurisprudence and stating that it is "particularly important" that philosophers and judges determine what conditions must hold so that legal judgments may follow deductively from objectively true propositions of law "in political communities like our own in which important political decisions are made by judges who are thought to have a responsibility to decide only as required or licensed by true propositions of law"). I develop the argument that perfectionist jurisprudence leads to different judgments from traditional jurisprudence in another article. *See* Keyes, *Two Conceptions of Judicial Integrity*, *supra* note 62, at 286-90.

124. *See, e.g.*, DWORKIN, FREEDOM'S LAW, *supra* note 17, at 30-32; *see also supra* note 20 and accompanying text.

125. *See* DWORKIN, FREEDOM'S LAW, *supra* note 17, at 34-35.

theory puts forward, and the truth value of legal propositions depends entirely upon the "best" contemporary construction of those principles as understood by judges freed of the constraints present in the positive law. Thus, perfectionism ultimately reduces to the personal and private political notions of fallible—and possibly even malleable—individual judges, as even Dworkin, the leading proponent of rational perfectionism, acknowledges.[126] Accountability is sacrificed to unfettered judicial independence.

Process-oriented judicial decisionmaking in accordance with pragmatist strategies, such as those of Posner or Eskridge, by contrast, need not have consequences for the law as severe as those of perfectionist or other objectivist theories. Taking consequences into account and making morally optimal empirical decisions—those that contribute most to the flourishing life of society—are here seen as integral parts of the process of legal reasoning. But when consequentialism becomes unmoored from the constraints of the positive law and turns to social constructivism based on facts, theories, or principles foreign to the facts of the case and the positive law of the society, it departs from traditional jurisprudence and its virtues. For example, when a court justifies a legal decision by reference to foreign law in a domestic case or by reference to "trends" in "developing" subordinate laws; or when it justifies a criminal sentence on economic grounds or a civil decision on policy grounds, independent precedent, or legislative intent; or when it justifies a legal decision on the basis of judge's assessment of the "social utility" of the judgment, as Posner advocates;[127] or even when it resorts to Eskridge's "critical pragmatism"[128] and permits "an ongoing reevaluation of practice, especially dividing practices that marginalize groups of citizens and interest group distributions at the expense of the public interest" in accordance with the judge's own values, the principles of legal reason have been abandoned and the "pragmatism" that results has all the damaging consequences for the moral, legal, and political social structure as any other theory-driven jurisprudence.[129] Thus, pragmatism, like perfectionism, fails to offer a sound strategic alternative to traditional jurisprudence.

Indeed, of all the theories of jurisprudence on the current scene, the only theory that defines sound legal strategy in a way acceptable to traditional judges is classical liberalism—not quite as Eskridge describes it,[130] but as it truly exists. Classical liberal jurists do not, as Eskridge states, "view[] government as a social contract among autonomous individuals who in the distant hypothetical past gave up some of their freedom to escape the difficulties inherent in the state of nature," legitimizing "laws enacted by prescribed constitutional procedures . . .

---

126. *See id.* at 74. Dworkin argues that the Constitution makes Supreme Court Justices the moral arbiters of society, accountable only to their own independent "best" construction of the truth, even as he acknowledges their fallibility.

127. POSNER, PROBLEMATICS, *supra* note 6, at xi.

128. ESKRIDGE, *supra* note 42, at 193 (emphasis omitted).

129. As noted above, Eskridge himself recognizes this danger. *See supra* notes 58-60 and accompanying text.

130. *See supra* notes 47-48 and accompanying text.

by the consent expressed in the original social contract."[131] Rather, classical liberals—among whom I count myself—view constitutional democratic government as an intrinsically moral dynamic social compact of ordered liberties, or positive laws. The social compact is grounded in a foundational Constitution that incorporates fundamental principles of liberty, equality, and impartiality; separates delegated governmental powers among executive, legislative, and judicial branches; and charges judges with interpreting the law in particular cases and controversies within the constraints of the rule of law. The people consent to the rule of law thus established by their ratification of its prescriptions and their participation in the political process.[132] They do not look back to the eighteenth century to determine the fixed meaning of constitutional terms, as originalists do.[133] Important policy issues are, indeed, properly resolved by "the legislature or some other majoritarian institution" on this theory,[134] as Eskridge states. But legal judgments are constrained by the entire hierarchical body of the positive law as it is defined and redefined over time, by the facts of the particular cases in which the law is applied, and by the principles of practical reason that constrain both legal reason and the positive law. Thus, the jurisprudence by which the social compact is maintained is, like the compact itself, both dynamic and concretizing and intrinsically just. Indeed, an integral part of the judge's role in classical liberal theory is to ensure that policies made by majoritarian legislatures are interpreted and applied in accordance with the rule of law, and not in accordance with the unfettered will of temporary legislative majorities unbound from the constraints of ordered liberty or in accordance with the independent will of judges. Traditional jurisprudence is classical liberal jurisprudence rightly understood.

CONCLUSION

I have argued that contemporary legal philosophers generally misconstrue the nature of traditional jurisprudence. And I have argued that they and their adherents rely on that misapprehension to justify the abandonment of sound judicial decisionmaking that maintains the justice, integrity, and functionality of the rule of law in favor of alternative judicial strategies that actually undermine the strength of the rule of law. The positive law of the United States is not a set of backward-looking factual reports or mere conventions, as Dworkin and others would have it. Nor is it a set of lower-level and mid-level principles at the low end of a continuum between mere "casuistry" and principled, theory-driven jurisprudence, as Sunstein opines. Likewise, traditional legal reasoning is neither

---

131. ESKRIDGE, *supra* note 42, at 111.

132. I develop the concept of contemporary classical liberalism in another article. *See generally* Keyes, *The Just Society and the Liberal State*, *supra* note 62.

133. *See id.*; *see also* SCALIA, *supra* note 9, at 45 ("[T]he originalist at least knows what he is looking for: the original meaning of the text. Often—indeed, I dare say usually—that is easy to discern and simple to apply.").

134. *See* ESKRIDGE, *supra* note 42, at 133.

mere logical deduction from fixed conventional legal principles that cannot supply answers to hard questions nor "rulelessness" that principled judges must move beyond in important cases of constitutional principle. Nor is traditional jurisprudence merely one strategy among many for resolving legal cases. Rather, as traditional jurisprudence recognizes, the positive law in a constitutional republic founded, like our own, on principles of liberty and equality for all under laws made by all and for all constitutes a dynamic social compact grounded in intrinsically moral principles of ordered liberty. And legal reason, as traditionally understood and employed by traditionalist judges, is a form of practical or applied moral reason that operates over time within the constitutional framework of the positive law fairly and rationally, concretizing legal principles in particular judgments that further the beneficent purpose of the law, thereby ensuring justice to the parties and contributing to the maintenance of the rule of law.

By adopting the anti-traditionalist argument and encouraging judges to reach outside the positive law and traditional legal reasoning and to implement constructivist conceptions of "better" law,[135] rationalist legal theorists justify legal decisionmaking that violates the requirements of practical reason, flouts constitutional safeguards, and destabilizes the law. Traditional jurisprudence—or classical liberal jurisprudence—alone accommodates the dynamism of the law and society and concretizes the law in particular cases while maintaining the purpose, integrity and functionality of the rule of law over time. It thus commends itself as the model of choice for ensuring justice through valid and sound legal decisionmaking in all cases and controversies.

---

135. As discussed previously in this paper, I use the term "better" law to mean that which is derived from moral or political theory, or "pragmatically" directed to the maximization of social utility or to the engineering of social ends.