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Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law

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RE-IMAGINING JUSTICE

For Molly,
Benjamin and
Nicholas

Re-Imagining Justice

Progressive Interpretations of Formal Equality,
Rights, and the Rule of Law

ROBIN L. WEST

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ASHGATE

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Contents

<i>Table of Cases</i>	<i>vii</i>
<i>Series Preface</i>	<i>ix</i>
<i>Acknowledgements</i>	<i>xi</i>
1 Introduction	1
2 Rethinking the Rule of Law	13
3 Revitalizing Rights	71
4 On Formal Equality	107
5 Conclusion: The Progressive Idea of Law	165
<i>Select Bibliography</i>	<i>177</i>
<i>Index</i>	<i>189</i>

Table of Cases

- Allegheny College v. Nat'l Chautauqua County Bank of Jamestown*, 246 N.Y. 369 (1927)
- Bowers v. DeVito*, 686 F.2d 616 (7th Cir.1982)
- Bowers v. Hardwick*, 478 U.S. 186 (1986)
- Bradwell v. Illinois*, 83 U.S.130 (1873)
- Brown v. Board of Education*, 347 U.S. 483 (1954)
- Bush v. Gore*, 531 U.S. 98 (2000)
- City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)
- City of St. Petersburg v. Alsup*, 238 F.2d 830 (5th Cir.1956)
- Craig v. Boren*, 429 U.S. 190 (1976)
- Dep't of Conservation & Dev., Div. of Parks, of Va. v. Tate*, 231 F.2d 615 (4th Cir.1956)
- Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1957)
- Hawkins v. McGee*, 146 A. 641 (N.H.1929)
- Hoffman v. Red Owl Stores*, 26 Wisc 2d 683 (1965)
- Holiday v. United States*, 683 A.2d 61 (D.C.1996)
- Holmes v. City of Atlanta*, 350 U.S. 879 (1955)
- Johnson v. Calvert*, 851 P.2d 776 (Cal.1993)
- Lochner v. New York*, 198 U.S. 45 (1905)
- Matter of Baby M.*, 537 A.2d 1227 (N.J.1988)
- Maynor & City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955)
- Meyer v. Nebraska*, 262 U.S. 390 (1923)
- Michael H. v. Gerald D.*, 491 U.S. 110 (1989)
- Morrison v. Davis*, 252 F.2d 102 (5th Cir.1958)
- Murrell v. School Dist. No. 1*, 186 F.3d 1238 (10th Cir.1999)
- New Orleans City Park Improvement Ass'n. v. Detiege*, 358 U.S. 54 (1958)
- Oona by Kate S. v. McCaffrey*, 143 F.3d 473 (9th Cir.1998)
- Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925)
- Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)
- Plessey v. Ferguson*, 163 U.S. 537 (1896)
- Prince v. Massachusetts*, 321 U.S. 158 (1943)
- Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)
- Roe v. Wade*, 410 U.S. 113 (1973)
- Rostker v. Goldberg*, 453 U.S. 57 (1981)
- R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998)
- Skinner v. Oklahoma*, 316 U.S. 535 (1942)
- State v. Russell*, 477 N.W.2d 886 (Minn.1991)

- Surrogate Planning Ass'n. v. Commonwealth ex. Rel. Armstrong*, 704 S.W.2d 209 (Ky. 1986)
- United States v. Burroughs*, 897 F. Supp.205 (E.D. Pa. 1995)
- United States v. Emerson*, 46 F. Supp.2d 598 (N.D. Tex.1999)
- United States v. Emerson*, 270 F.3d 203 (5th Cir.2001)
- United States v. Morrison*, 529 U.S. 598 (2000)
- United States v. Virginia Military Academy*, 518 U.S. 515 (1996)
- Vance v. Spencer Country Pub. Sch Dist.*, 231 F.3d 253 (6th Cir. 2000)
- Whitehead v. Stern*, 537 A.2d 1227 (N.J. 1988)

Series Preface

The objective of the Applied Legal Philosophy series is to publish work which adopts a theoretical approach to the study of particular areas or aspects of law or deals with general theories of law in a way which focuses on issues of practical moral and political concern in specific legal contexts.

In recent years there has been an encouraging tendency for legal philosophers to utilize detailed knowledge of the substance and practicalities of law and a noteworthy development in the theoretical sophistication of much legal research. The series seeks to encourage these trends and to make available studies in law which are both genuinely philosophical in approach and at the same time based on appropriate legal knowledge and directed towards issues in the criticism and reform of actual laws and legal systems.

The series will include studies of all the main areas of law, presented in a manner which relates to the concerns of specialist legal academics and practitioners. Each book makes an original contribution to an area of legal study while being comprehensible to those engaged in a wide variety of disciplines. Their legal content is principally Anglo-American, but a wide-ranging comparative approach is encouraged and authors are drawn from a variety of jurisdictions.

Tom D. Campbell
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The Introduction to this book, with minor revisions, was published as 'Re-Imagining Justice' in volume 14 of the *Yale Journal of Law and Feminism*. A revised version of some parts of Chapter One is included as a contribution to *Protecting Human Rights*, Campbell, Goldsworthy and Stone (eds), Oxford Press, entitled 'Rights, the Rule of Law, and American Constitutionalism'. A part of Chapter Two appears in volume 69 of *Fordham Law Review* as 'Rights, Capabilities and the Good Society', and a part of Chapter Two appears as the 'Introduction' to *Rights, The International Library of Essays in Law and Legal Theory*, Robin West (ed.), Tom Campbell, general editor, Ashgate Publishing.

Chapter 1

Introduction

What do we mean by *legal* justice; the justice we hope law promotes? What is the justice that lawyers and judges, peculiarly, are professionally committed to pursue, the virtue around which, arguably, the legal profession and the individuals within it have defined their public lives? Many of this country's best prepared, motivated, and idealistic students go to law school because they are interested in working for justice – in the same way, for example, that other motivated, smart students go to medical school because they are interested in helping people become or stay healthy. Law schools seemingly applaud this motivation, and reinforce the connection between doing law as a profession, and doing justice, at the points of entry and exit: law schools engrave over their entrances that 'Law is the means, justice the end,' or words to that effect, and virtually all commencement addresses in some way exhort the graduating classes to labor for justice, and not just for remuneration. The profession itself of course underscores the connection between the practice of law and the pursuit of justice as well, not just in speechifying rhetoric, but also in Codes of Ethics and Professional Responsibility, where lawyers are quite explicitly admonished to work for justice as well as for their clients' narrow interests.

What, though, is the content of the 'legal justice' to which we urge our students to dedicate themselves? What does 'legal justice' – as distinct from 'distributive justice' or 'social justice,' or 'retributive justice' – demand, of the American legal professional? On the evidence of the limited amount of legal scholarship on the topic,¹ and, perhaps more tellingly, a good deal of legal rhetoric – graduation day speeches, 'Law Day' speeches, Fourth of July celebrations, law school catalogue copy and the like – the American ideal of 'legal justice' seemingly consists of at least three distinct, although interrelated, commitments, each of which is in some way central to a lawyer's professional-moral identity. First, 'legal justice' requires of lawyers a commitment to – and therefore an understanding of – the 'Rule of Law,' or, as it is often put, a 'government of laws rather than men.' 'In America,' Tom Paine famously if ambiguously declared, 'the Law is King,' and lawyers have embraced the sentiment: the case may be different with other sorts of justice, but *legal* justice, lawyers might say – often do say – is only possible within a pre-commitment to the Rule of Law. Second, at least in the United States, it is widely agreed among most lawyers that 'legal justice' requires adherence to some recognizable regime of individual rights. Rights, to borrow from the legal philosopher Ronald Dworkin's formulation, are the means by which justice is secured in law; they are the metaphorical bridge from the moral ought, demanded by justice, to the legal imperative, demanded by law.² It may not always or everywhere be so – other societies, for example, may organize their institutional commitment to justice around a scheme of duties, or around a faith-based identity – but here, and now, in this

culture, we achieve justice, if we achieve it, through recognizing and then enforcing our rights. Third, and perhaps most obviously, most lawyers agree that ‘legal justice’ requires a commitment to what is variously called ‘horizontal equity,’ ‘legal equality,’ or ‘formal equality’: legal justice, for many lawyers, just *is* the moral mandate, binding courts and judges, to ‘treat like cases alike.’ To do ‘legal justice’ means, in essence, to decide cases according to rules, and to decide cases according to rules, in turn, requires that likes be treated alike, and that unlikes be re-thought until their similarity with some pre-existing pattern is identified.³ The virtue of legal justice, minimally, requires a judicial commitment to this moral mandate. There may be other moral commitments embedded in the ideal of legal justice as well. But these three commitments – to the Rule of Law, to a regime of Rights, and to Formal Equality – seem to be sufficiently recurrent in professional incantations of the ideal of justice, that it makes sense to regard them as parts, whether or not the whole, of the ideal of legal justice that informs the professional identity of lawyers.

This wide rhetorical consensus, however, on the general contours of legal justice by no means implies any unanimity regarding its more particular requirements. Each of these ideals – the Rule of Law, Rights, and Formal Equality – is itself a contested concept, in need of interpretation. The ‘Rule of Law,’ for example, can obviously mean many different things to many different lawyers – as a cursory examination of the presidential politics of just the last decade clearly shows: President Clinton’s legally trained backers, during the impeachment scandal, expressed their dismay that the independent prosecutor, the impeachment prosecutors, and the lawyers bringing the Paula Jones case all overstepped the ‘Rule of Law’ in their politically driven persecution of the president, while Clinton’s legally trained prosecutors complained as bitterly that it was Clinton himself, in his disingenuous responses to the questions posed him in legitimate civil lawsuits, that so contemptuously disregarded the ideals of the Rule of Law. Likewise, a profession-wide commitment to the centrality or necessity of Rights to Justice, hardly produces a professional consensus on what sort of society we ought to have, or what ought to be the role of law in it: the idea of ‘rights’ conveys nothing about what rights should be regarded as central (property rights? personal rights? welfare rights?), which should be regarded as peripheral, and which if any should be disavowed entirely. And, the commitment to Formal Equality – the bare-bones notion that cases should be decided according to rule or that ‘like cases should be decided alike’ – says nothing about how likenesses and dissimilarities are to be discerned, and therefore how the analogical reasoning at the heart of this only seemingly simple mandate should proceed. Somehow, judges must decide what is like what, and cases, no less than objects, do not come with pre-existing labels indicating exactly which of their attributes are or should be regarded as salient in that comparative process. Lawyers who agree that like cases should be decided alike – that ‘legal justice,’ in short, requires ‘formal equality’ – will not on that basis alone reach any sort of consensus on how judges or lawyers should formulate the major premises that will allow such inductive reasoning to produce determinate results.

The descriptive claim of this book is that over the last 30 years or so, from the array of possible interpretive possibilities, one particular conception of the meaning of these three ideals – the Rule of Law, Rights, and Formal Equality – has achieved a

remarkable degree of dominance in American law schools, both in scholarship, and, more strikingly, in the often unstated major assumptions of our pedagogy. Those reigning interpretations, in turn, have come to constitute the dominant understanding of the virtue of legal justice to which the legal profession is committed. For that reason, throughout this book, I will call this conception of these three ideals, the ‘dominant interpretation,’ or the ‘reigning interpretation,’ of ‘legal justice.’ That dominant interpretation – consisting of one among several possible interpretations of the meaning of the Rule of Law, of the content of our rights, and of the idea of formal equality – has both an internal logic, or coherence, and an external vision. It ‘hangs together’ as a set of ideas, and rests comfortably within a larger political vision regarding the role of the state in community life. It also has considerable power, particularly in law schools, all the more so for so rarely being explicitly defended as such. The first project in this book is simply to delineate the outlines of this now dominant interpretation of legal justice.

My critical thesis, which I will summarize below, but which is developed in more detail in each of the three chapters that follows, is that this dominant interpretation of legal justice – which consists, again, of more particular conceptions of the Rule of Law, the nature of and content of our Rights, and the meaning of formal equality – is not a very good interpretation of that virtue. Our increasingly conventional conception of Legal Justice, which structures so much of what we teach and a good deal of what we write, is just not a very good one. More specifically, though, and surely more contentiously, I will argue that that dominant conception is flawed in a way that has a consistently conservative and libertarian tilt. As such, the concept of legal justice that predominates, at the turn of the century, in American law schools, despite the often proclaimed ‘liberalism’ of those faculties, nevertheless stands as a real impediment to progressive law reform. Progressive, egalitarian legal theorists, in particular, ought to be more attentive to both the reality and the shortcomings of the dominant conception of legal justice that structures so much of our contemporary, turn-of-the-century legal consciousness.

Just as central, however, as the work of criticism, is the work of reconstruction: we need to take up the task of crafting alternative interpretations of these three ideals, and the conception of legal justice they jointly constitute. For various reasons, which I will explore in each chapter below, the progressive, liberal, and left wing of the legal professoriate – particularly that part of it now referred to as the ‘critical legal studies movement’ – has badly neglected that work of reconstruction. Rather than rethink or reconstruct the concepts that constitute our dominant conception of legal justice, critical thinkers have instead inferred from their various critiques that the ideals themselves are incoherent. This inference, I will urge, is unwarranted. That a particular interpretation of the Rule of Law, or of Formal Equality, or of Rights, might be incoherent, or regressive, or infantilizing, does not imply that the ideal itself is incoherent or worse. It implies, rather, the need to articulate a stronger conception. But the work of reconstruction, unlike the work of deconstruction, has been neglected, and that neglect has proven consequential: in the absence of viable alternatives, the dominant conception, with its regressive political tilt, becomes the only game in town, and wins by default the struggle for definition of an entire

profession's ideals. The reconstructive aim of this book is to sketch the contours of a different, and more progressive interpretation of these three legalistic ideals.

The three chapters that follow this introduction first spell out the conventional understanding of each of the ideals that jointly constitute our understanding of justice, the critical attack that has been directed against them during the last three decades, criticizes both the dominant conception and the critique, and then attempts to reconstruct each in a way that bolsters, rather than frustrates, attempts to use and understand law as a vehicle for achieving a more egalitarian and more just social world. The remainder of this introduction introduces the conventional account, preliminarily explores some of the reasons for its conservative tilt, and suggests the direction a reconstructed account might take.

The Dominant Interpretation

Let me take up, in the order laid out above, the three central components of the dominant conception. First, the Rule of Law. What does it mean to live in a society governed by the Rule of Law? Why do those who live in one, seemingly take such pride in it? According to the dominant interpretation, the point, or purpose, of the 'Rule of Law,' is to shield, or protect, both the individual and the community from the brunt of overly personal, tyrannical, whimsical, or brutal, or 'naked' politics. It is the 'Rule of Law,' on this vision, which distinguishes legality from tyranny; that distinguishes the orderly and benign control of the social behavior of free men by rules from the whimsical (or worse) command over individuals by unchecked and unduly personal authority. Legalism – the very idea of law – shields us, in effect, from the excesses of unadorned political power. Law is power's antidote. Law is the antithesis of politics; law constrains, counters, and cabins politics. What we *ask* of law, on this accounting, what we turn to it to do, is to protect us from the ambitions of an over-weaning, zealous, at best unduly paternalistic, and at worst sadistic and perhaps mad, but always freedom-sapping, state. We organize authority in lawful forms so as to emasculate particular power holders or seekers; we establish law to frustrate the will to power. By so doing, not at all coincidentally, we free individuals to act, and to act in ways that are unpolluted by power. The underlying psychic parable of this understanding of law's essential appeal is Freudian: brothers unite to overthrow the powerful and personal father, and then establish in his place totemic rather than personal authority.⁴ The fictional literature spawned, in this century, by the appeal of this vision – law as that which vanquishes power, and power, simply, as that which kills – is immense and known to all of us from young adulthood. Think, perhaps foremost, of the lawlessness of the political dictatorship of Oceania in George Orwell's dystopic anti-communist classic *1984*.⁵

The prominence of this understanding of law's essence – that law, and the Rule of Law, simply *is* that which protects individual freedom from political overreach – unites and perhaps partly explains a good deal of contemporary constitutional law: it provides the unstated major premise of particular interpretations of quite general constitutional phrases. It is a view of law as the antithesis of power, for example, that

has driven the modern Court to interpret the Fourteenth Amendment's guarantee of 'equal protection of the law' as severely constraining the political power of states from taking even modest affirmative steps toward eradicating the effects of racism, rather than as virtually requiring it to do so. A state acting in such an overtly political way, the Court has reasoned, is a far greater danger to individual freedom than the private racial stratification that a state so acting might thereby seek to ameliorate.⁶ If the 'Rule of Law,' and hence 'Constitutional Law,' exists so as to limit, or mute, or muzzle politics, then surely the point of the Fourteenth Amendment is to limit, mute, and muzzle political voice. Similarly, and more specifically, it is this view of the Rule of Law, and its relation to public and private power, that underlies the view, now shared among a majority of the Supreme Court, right wing political and legal think tanks, and the editorial page of the *Washington Post*, that the remedial portions of the 1994 Congressional 'Violence Against Women Act (VAWA),' which sought to give a private cause of action to victims of gendered assault, is unconstitutional.⁷ That Act, on this view, is itself a greater threat to freedom than is the actual, demonstrated unchecked violence against women that the law sought to remedy. Thus, VAWA is precisely the sort of target at which the Constitution is aimed, and the Act is accordingly unconstitutional. It is this reading of the Rule of Law, to take two final examples, that, at the turn of the last century, regarded the threat to freedom posed by minimum wage laws as a greater danger to individual freedom than the threat posed to individual survival by sub-minimum wages and hence regarded those laws as unconstitutional, and at the turn of this century regards the greatest threat to free speech as emanating from innocuous campus and university speech codes, rather than from cross burnings, gay-bashing, or the vandalizing of menorahs on those same campuses, or for that matter the control of information by a handful of media elites, or the control of elections by economic elites. It is, in short, this understanding of law's essence that drives so many – including the current Supreme Court – to regard the idea of law itself, and hence the Constitution and the rights that law guarantees, as inexorably *limiting* rather than enabling, guiding, justifying or requiring congressional political action. It is this view of the point of the Rule of Law that posits a Constitution ever sensitive to the threat to freedom posed by an overzealous state, and ever willfully blind to the threat to freedom, security, and community posed first by private fratricide, intimidation or subordination, and then by a quiet state and muzzled politics, that blithely acquiesces – or indeed gives aid – to private spheres of humiliation and fear. It is this view of the Rule of Law that makes this understanding of the constitution seem natural, inevitable, and desirable, not just to the political right, but to a generation now of 'apolitical' law students and lawyers as well.

It is also this view of the Rule of Law that constitutes at this point in our history a serious threat to progressive, egalitarian, and identity-based politics. The 'politics' contemplated and paranoically feared by Rule of Law zealotry is demonized, precisely because it is regarded, on this account, as thoroughly meaningless – inevitably and essentially so. Politics is Dionysian, undisciplined, furious, and vengeful – in short, female; and law, by contrast, is Apollonian, orderly, rule-like, rational, merciful, and male. The Rule of Law embodies the latter so as to constrain the former. A Rule of Law that fears politics, and that crafts a Constitution so as to

disable politics, does so, because of the latter's essential, irredeemable irrationality: politics, on this view, and the will to power to which politics gives voice, springs inexorably from a poisoned well of emboldened malignancy – think of the Furies, in Aeschylus's *Oresteia*, and remember their fate, once Apollo and Athena step in and impose the Rule of Law.⁸ Power, hence politics, just is the utterly meaningless thirst to dominate. This impassioned, irrational, political urge, perhaps, cannot be vanquished, but its expression and force can be, and it is the role of *Law* – general, abstract, appollonian, pure and apolitical – to do so. Rule of Law idolatry threatens the development of progressive politics, because it poses politics itself as the threat with which law must reckon.

Second: on Rights. Central to our now dominant understanding of the virtue of legal justice is a particular conception of rights, or rather, a particular conception of the aspects of human nature protected, through rights, against unwise state encroachment. On this view, what we do and should protect, through rights, is the individual's heroic *will*: it is the individual's freedom to assert his will in whatever ways that he individually or idiosyncratically desires, unimpeded by noxious community and communitarian constraints, that is protected by rights. Thus, what is protected is my right to think, act, contract, express myself, own property, maintain privacy, amass wealth, and enjoy my possessions against malign, meddling, or irrational state infringement. The individual is protected, constitutionally, against such infringements of his rights, and he is so protected because of a particular understanding of *who we are*: we are individuals whose essential being is best realized through unencumbered and countercommunitarian acts of individualistic will. It is, then, that individual – that heroically willful individual – who is protected through a regime of rights.

This conception of rights, as left-wing rights critics have pointed out, is clearly hostile to efforts to address, through politics, private sphere subordination, whether that subordination occurs along race, gender or class lines.⁹ It is this conception of rights, after all, that was expressed in the majority decision in *Dred Scott*,¹⁰ protecting the rights of the slave owner to his human property, no less than in *Lochner*,¹¹ protecting the rights of freely willing employees to bind themselves to long hours and low wages, and likewise, albeit less consequentially, in a growing number of articles of the last 10 years, bemoaning the constitutional threat to the first amendment posed by the protection of women against the hostile atmosphere created by verbal sexual harassment on the job.¹² More subtly however, although just as important, this particular view of rights is hostile to efforts to use rights to protect aspects of our being that do not fit the heroically willful mold. Thus, the problem posed to progressive politics by the now dominant libertarian understanding of rights, and the individual protected through them, is not just the occasional head-to-head conflict between individual rights so understood, and the political needs of subordinated groups. The further damage is the neglect of other aspects of our natures that might be in need of rights.

To take an example: the dominant conception of rights stands as a serious obstacle to the nascent feminist efforts, now underway by a number of feminist legal theorists, such as Martha Fineman,¹³ some journalists, such as Deborah Stone,¹⁴ some moral

philosophers including Eva Kittay,¹⁵ and some liberal theorists, such as Linda MacClain,¹⁶ to construct meaningful and enforceable ‘rights of care,’ by which I mean rights that might aim to protect female or male caregivers against the vulnerabilities they sustain, when engaged in caregiving labor, in the private sphere. Rights of care, as envisioned by these thinkers, if we had them or if they were recognized, might, like all rights, work as either a sword or a shield. They might constitute a legal bulwark that would protect caregivers against unwise state action, such as the Personal Responsibility and Work Opportunity Reconciliation Act.¹⁷ Equally important, such rights might be understood to entitle caregivers to state support, such as through a more ambitious Family and Medical Leave Act.¹⁸ Obviously, we do not presently have such rights, and even imagining such rights will no doubt prove to be arduous labor. One reason (among others) for the difficulty, is squarely ideological: the ‘rights of care’ that are needed by caregivers, are not needed for the reasons familiar to the dominant conception – to protect individualistic, heroic, independent acts of will. Rather, they are needed to protect vulnerabilities brought on by our relationality, our mutual dependency, and our interdependency. And they are desirable, in turn, not because of the liberation of industry, genius, invention, or artistry facilitated by the unencumbered individual heroic will, but rather, by the nurtured, healthful, maturation and care of dependents that such labor ensures. But these hypothesized rights, needless to say, ill fit our liberal understandings. We have rights, on the dominant view, when we do, to be free of obligation, of duty, and of dependency, and we have those rights because we are, essentially, independent creatures whose essence is best expressed not through relational acts of care that nurture and protect vulnerable others, but rather, through robust acts of independence, defiance, and individualistic trailblazing – acts that defy, not cement, our essential connections with others.

Third, our dominant understanding of legal justice is constituted by a particular understanding of the moral mandate, felt at some level by all actors in the judicial system, of formal equality: the imperative that presses upon judges to ‘treat likes alike,’ or to follow precedent, or to comply with *stare decisis*. What is behind this mandate? The dominant conception has embraced two of the salient possibilities: first, we might insist on legal justice – on treating like cases alike – because we view such a mandate as an important bridge to the past: as a way of maintaining faith with ancestral wisdom, as a way of preserving traditions, as a way of forging a commonality between who we are as a community and who we have been as a community.¹⁹ Second, we might insist on formal equality – on treating like cases alike – because such consistency and predictability is essential to the end of maximizing human liberty: by knowing with some certainty how and when the legal leviathan will impose itself upon me I can more freely order my own affairs, and the insistence that judges decide according to rule, or that they ‘treat likes alike,’ furthers that certainty.²⁰ Thus, legal justice, as we presently understand it, serves the ends of traditionalism, or social conservatism, and libertarianism, or economic conservatism, quite nicely. But this conventional understanding of formal, or horizontal equality, as serving either (or both) the ends of social or economic conservatism, is also an obstacle to specifically progressive visions of politics, and of political reform. To

combat subordination in the private sphere, there must be a breach, not relentless continuity, with our bonds to the past, at which time subordination was entrenched, and entrenched in the very traditions that formal equality so vigorously promotes. And to either combat subordination or protect the work of care-giving, we must from time to time interfere with rather than relentlessly honor the liberty that comes from our certainty regarding the legal leviathan. A conception of formal equality that seeks to further either traditional patterns of social life or libertarian understandings of human wellbeing will not be well suited to the ends or means of progressive political visions. There will emerge, then, if these conceptions go unchallenged, a quite deep antithesis between the conservative idea of law, as reflected in understandings of formal justice, and the very idea of progressive political reform.

These ideas – ideas centering on the meaning of the Rule of Law, the content and purpose of our rights, and the moral mandate of formal equality – constitute the dominant conception of the virtue of legal justice. They or something like them dominate law day speeches and commencement addresses. But they are more than ornamental. They also undergird large chunks of constitutional argument – the Constitution is our highest Law, and if the point of Law is to constrain and tame politics, and if politics is what sovereigns produce, then the point of the Constitution is to forbid certain outcomes by the political branches. The Constitution exists so as to frustrate rather than facilitate political solutions to social problems. They are also, all three of them, full of contradictions, enough contradictions to absorb the attention and energies of several generations of deconstructionists. At the same time, however, they should not be undersold. They are, first, ideas. They are not simply preferences, stakes, or political parries. They have been a long time in the making; they have a lineage. They have an internal coherence, contradictions notwithstanding. They also, importantly, resonate with our mythological national history. They speak to the fears we have, rightly or wrongly, of over-bearing paternalism, of communism, of imperialism, of states-run-amok, of children or madmen or fundamentalist zealots or sadists at the helm of the ship-of-state. They also echo our dreams, and hopes, ill-placed or not, of unfettered liberty, of freedom being, happily, just another word for nothing left to lose, of ‘breaking away,’ to borrow from Lina Wertmuller, of our imagined essence being a function of the mark we each heroically and quite individually leave on our world. To summarize: this ideological tripod – an interpretation of the Rule of Law, an understanding of Rights, and an explanation of the moral mandate of formal equality – constitutes a widely shared understanding of Legal Justice, which is both facially apolitical – these are ideas about law, after all, not about politics – but which also render natural, or neutral, legal conclusions that are inimical to progressive politics.

What to do about it? There are three options. One is to demonstrate the politics behind the claim of political neutrality. This has been the *idée fixe* of the critical legal studies movement now for over 30 years, and to make a long story short, not much has come of it. The second possibility is to point out the arguably central contradictions behind each leg of the tripod. A good bit of critical and left legal scholarship has gone into this project: the understanding of the Rule of Law recited above rests on a glaring and illogical leap of faith from the fact of a written word to

the ghostlike dream of a government of laws rather than persons; the idea of a right as essentially a negative protection against state intervention into the private is belied by the existence of the criminal law itself, which positively protects us – although some more than others – against private maldistributions of physical power; and the mandate to ‘treat likes alike’ is so thoroughly riddled with exceptions, given the need to accommodate history and difference both, that it is problematized by virtually *all* serious doctrinal as well as theoretical legal scholarship of almost all stripes. There is, though, a third possible critical response, and that is to re-imagine.

We need, I think, a progressive jurisprudence – a jurisprudence that embraces rather than resists, and then reinterprets, our liberal commitment to the ‘rule of law,’ the content of our individual rights, and the dream of formal equality. More inclusive interpretations – more generous re-imaginings – could then undergird, and in a principled way, particular constitutional arguments. Rather than relentlessly buck, deconstruct, or vilify the seeming ‘naturalness’ of legal arguments based on moral premises, we ought to be providing such premises, and natural and general arguments of our own. But first we need to re-imagine.

Let me suggest some possible contrasts, starting with the Rule of Law. Contrast the understanding of the Rule of Law suggested above – in which the point of law is to frustrate, mute, muffle, politics – with a second and quite different understanding of both law’s promise, and the evil at which it is directed. On this alternative conception, the point or essence of law is to *construct*, rather than frustrate, the realm of politics. It is to nurture rather than stifle a public sphere within which our political natures find expression. The horror of lawlessness, on this view, finds dystopic expression not in the totalitarian imaginings of Orwell, but rather, in the equally parabolic young-adult masterpiece *Lord of the Flies*:²¹ in Golding’s dystopic vision, recall, it is the *absence* of a political state – not an all-too-powerful one – that gives rise to the domination of some, and the subordination of others, through fratricidal, and infantile violence. The fear we counter with the hope of law, on this view, is not our fear of an overly powerful state, but rather, our fear of an impotent, absent, emasculated, or neglectful state, and the tribal, fraternal, or inter-familial warfare to which the absence of political authority would give rise. Put positively, the utopian alternative to fratricide, which we attempt to construct, through law, is not so much the unleashing of free individual choice unfettered by an oppressive state, but the necessary conditions of cooperative community life. Law, and the point of the Rule of Law, on this view, is not to frustrate politics, but to enable it. And politics, on this view, is not the dictatorial or totalitarian Orwellian nightmare, or the lethal war of all against all, but rather the antithesis of both; it is the means by which communities and individuals create meaning.

If that is the point of law, then it is also in some way the point of the Fourteenth Amendment’s Equal Protection Clause which guarantees not equality, but ‘equal protection of the law,’ and if that’s right, then the Rule of Law so understood points unequivocally toward the constitutionality, indeed the constitutional necessity, of the Violence Against Women Act, as well as the Brady bill, as well as other forms of gun-control legislation. If the point of law is to police against private violence, as Thomas Hobbes urged some time ago,²² then the Constitution, and surely the Fourteenth

Amendment's Equal Protection Clause, must exist in part to ensure that this protection against violence is granted equally. If that is right, then the constitutionality of VAWA, I think, follows inexorably. And – it is right. It is the basic point of law, and hence of the Rule of Law, to police against private violence – Hobbes had that exactly right. And it is most assuredly the point of the Fourteenth Amendment's Equal Protection Clause, to ensure that protection is granted equally.

Likewise, rather than abandoning rights – throwing the baby out with the bathwater – we need to rethink, jurisprudentially, the understanding of who we are and what we are that underlies the dominant understandings of rights. We are not only beings whose essence is realized through heroic acts of independent will. We are also parents and grandparents and children of parents and grandparents whose essence is realized through acts of care which protect those dependent upon us, and give meanings to our lives by virtue of so doing. Those caring acts that emanate from us and that are bestowed upon us are not only necessary for our individual and collective survival; they are the soil in which our moral and most human selves are rooted. They are also, developmentally, essential conditions for the flowering of the individualist spirit so celebrated by both liberal and libertarian jurists, and so fitfully protected by liberal rights. Perhaps we do, as liberal philosophers and jurists of the last 300 years have urged, need rights to protect our individuality – to protect our freedoms of thought, of speech, religion, property and contract. No less vitally, however, we need rights that we currently lack: we need rights that protect our ability and will to care for the weak among us, and to nurture them to health, and to care for the young, and bring them to responsible maturity, and to comfort and care for the elderly and ease the burdens of age. We need such rights of care not only, and not even primarily, to protect those activities against an overweening state. We need those rights to valorize and honor this fundamental aspect of our being. We need such rights so as to goad to action – not inaction – community and state support for those essential and essentially interdependent spheres of social life.

Finally, we need to re-imagine the point of the mandate of formal equality. The 'moral point' of the mandate to treat likes alike, much authority to the contrary notwithstanding, may be, at heart, neither to protect tradition or liberty. The point of treating likes alike may rather be rooted in a universalist and humanistic inclination to define the human community broadly – to envision a community that includes all, and includes all because of a recognition of shared humanity. This Kantian and cosmopolitan vision of the mandate of formal equality as well, of course, has difficulties, both conceptual and moral, but it is nevertheless one that would not be at heart hostile to progressive aspirations. It would strive for and stress inclusiveness and respect for difference both. It would seek a large rather than constrained community; its impulse is toward a global as well as local acknowledgment of duty and responsibility. If accepted, it would align law, the idea of law, and the idea of legal equality, not with the traditions of the past or the economic liberty of individual and corporations, but rather, with the hopes for a community of world citizens. It would align law, legal justice, lawyers, and lawyering, professionally, with a recognition of universal human rights, grounded in a shared humanity, shared vulnerabilities, and ultimately a shared fate. It would align the idea of law and the ideals of law with the

global politics of the greatest moment, and that is the struggle to secure basic rights for oppressed persons both here and abroad who lack them, because they are regarded as both different from and less than some shared human essence.²³

So, to summarize, in my view, our unexamined but dominant conception of the virtue of legal justice has at its core a set of ideas: particular interpretive understandings of the point of the Rule of Law, the nature of Rights, and the meaning of Formal Equality. They are not very good ideas. They are full of contradictions and they are ungenerous in the extreme. But we ignore them at our peril. Ideas do matter, to repeat a cliché, and bad ideas will win out, if there is no counter. There presently is not much of one. We need and do not have a progressive jurisprudence – a conception of the point of the Rule of Law, of Rights, and of the meaning of Formal Equality – that is respectful of the needs, ambitions, aspirations and, yes, the natures of heretofore not terribly well respected women, men, children and animals. We do not have such a conception, and we do not have it, in part, because progressive legal scholars have grown distrustful of the project: distrustful of the hostility to politics embedded in the Rule of Law; of the punishing and conservative hidden implications in the noble sounding idea of Rights, of the not so well-hidden dangers in a backward looking and backward regarding understanding of legal or Formal Equality. But we have lived without a conception of legal justice for long enough now to see the damage that skepticism has wrought. We need to not only deconstruct so as to expose the hidden politics of dominant conceptions of justice; we need to construct or re-imagine, with care, alternatives.

Notes

- 1 Perhaps notoriously, there is not a lot written on the topic of legal justice, in American legal scholarship. For a recent, and welcome, general introduction, and a good summary of the literature, see Luban (2001).
- 2 Dworkin (1977, 184–205).
- 3 See Kronman (1990); Scalia (1989).
- 4 Freud (1950).
- 5 Orwell (1949).
- 6 See, for example, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490–92 (1989) (in a plurality opinion, Justice O'Connor argued that the city's affirmative action plan for minority-owned construction businesses failed constitutional strict scrutiny because the plan itself was not sufficiently narrowly tailored).
- 7 *United States v. Morrison*, 529 U.S. 598 (2000). See 'Editorial: States' Business,' *Washington Post*, 16 May 2000, A20. But see Peter M. Shane, 'In Whose Best Interest? Not the States', *Washington Post*, 21 May 2000, B5.
- 8 Aeschylus (1953, 146).
- 9 See, for example, Becker (1992); Horwitz (1988); Tushnet (1984).
- 10 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).
- 11 *Lochner v. New York*, 198 U.S. 45 (1905).
- 12 See, for example, Browne (1997); Gerard (1993); Volokh (1992). See generally, Strossen (1995).
- 13 Fineman (1995).

- 14 Stone, 'Why We Need a Care Movement,' *The Nation*, 13 March 2000, 13.
- 15 Kittay (1999).
- 16 McClain (2001).
- 17 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7 U.S.C., 8 U.S.C., 21 U.S.C., 25 U.S.C., and 42 U.S.C.).
- 18 Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 2 U.S.C., 5 U.S.C., and 29 U.S.C.).
- 19 Kronman (1990).
- 20 *Ibid.*, 1037-9.
- 21 Golding (1959).
- 22 Hobbes (1996).
- 23 I argue this at greater length in West (2000).

Chapter 2

Rethinking the Rule of Law

What is the ‘Rule of Law’? What does it mean to live in a society that abides by the Rule of Law? What does it require, and of whom? American legal scholars and jurists of the last half-century have debated – and answered – these questions by focusing almost entirely on the work of appellate courts and judges: the ‘Rule of Law,’ according to virtually all contemporary legal philosophers who have taken up the question, imposes, primarily, a duty of fidelity to the existing rules of law, and of consistency regarding their application, upon the judges that are called on to discover and apply them.¹ In a society that abides by the ‘Rule of Law,’ judges must find, interpret if necessary, and then apply – rather than create – the ‘law,’ in cases that come before them. When judges fail to do so, they violate the ‘Rule of Law.’

The Rule of Law, thus understood, is primarily concerned with ensuring that judges follow rather than create law, and thereby avoid becoming unduly ‘political.’ The judge must decide cases, in (then) Law Professor Robert Bork’s influential formulation of this basic idea, ‘according to the rule of law rather than the whims of politics and personal preference.’² In a similar vein, according to Law Professor and Supreme Court Justice Antonin Scalia, ‘the Rule of Law requires a law of rules’: judges must decide cases in accordance with pre-existing rules, and they must do so, furthermore, by articulating rules themselves that will facilitate the same law-abidance among judges and courts in the future.³ This consensus on the core meaning of the Rule of Law is by no means limited to conservative jurists and scholars: Ronald Dworkin and Owen Fiss, to name just two prominent liberal legal scholars, have also both built their jurisprudence around the central conviction that judges, in a society that abides by the Rule of Law, are bound by existing law, and must use that law to decide cases correctly under the ‘rules laid down.’⁴ Of course, these legal theorists disagree, and mightily, over the meaning and content of *law*, and hence the reach of the Rule of Law, at the margins. But nevertheless there is striking consensus on the core. The Rule of Law, according to our now conventional academic conception of that American ideal, mandates judicial fidelity to existing rules of law.

This court-focused interpretation – or family of interpretations – of the ‘Rule of Law’ has not only dominated the law schools for the last half century, it has also had considerable influence outside of the legal scholarship in which it was borne. It is, for example, precisely this legal-academic understanding of the Rule of Law that Supreme Court nominees now ritualistically invoke when they declare their allegiance to the given, written, or historic Constitution, as opposed to some fanciful bill of their own reckoning: the sworn fidelity to the written Constitution, each candidate for the Court makes clear, is merely the logical implication of his or her greater duty to obey, rather than create, law.⁵ It is also this meaning of the Rule of Law that is typically invoked by professional, academic criticism of the Supreme Court,

whenever that Court decides a case which, in the eyes of the critic, is so out of accord with prior case law, as to be truly threatening to our nation's legalistic aspirations and self identity. Both *Roe v. Wade*,⁶ and *Brown v. Board of Education*,⁷ to take just two examples, were roundly described at the time of those decisions by their critics as not just wrong, but *so* wrong as to be a violation of the Rule of Law – and in both cases, because the court had so drastically departed from prior decisions interpreting the relevant portions of the Constitution.⁸ More recently, it is this same meaning of the 'Rule of Law' as a 'Rule of Judicial Fidelity to Law,' that was invoked in February of 2001, in a 'Letter of Protest' signed by 700 law professors, and published by the *New York Times*,⁹ decrying the Supreme Court's actions in *Bush v. Gore*,¹⁰ in which the five most conservative of the Republican-appointed Justices effectively decided the 2000 Presidential election by ordering an end to the counting of contested votes in Florida. Echoing the rhetoric, if not the politics, of an earlier generation of Court critics, the 'Law Professors' Letter' urged that the Court's action was not only wrong as a matter of law, but such a severe departure from pre-existing law, as to be itself a deep violation of the 'Rule of Law' – an ideal, according to the letter, in the service of which law professors have dedicated their professional lives.¹¹

The Law Professors' Letter's claim notwithstanding, however, this understanding of the Rule of Law, although certainly widely shared by legal scholars, has not by any stretch of the imagination *united* the legal academy around the common ideal, or professional goal, of judicial fidelity to law. Rather, the influential legal-philosophical, academic claim that the Rule of Law requires, primarily, judicial fidelity to pre-existing law, has attracted a broad-based, three-decades long critical attack, also within the law schools and within legal scholarship, on the Rule of Law itself. In early, seminal writings in the late 1970s and early 1980s, some of which effectively ushered the Critical Legal Studies movement into legal scholarship, Professors Roberto Unger and Morton Horwitz of Harvard Law School, and Professor Mark Tushnet of Georgetown Law Center, argued that the Rule of Law, understood as a Rule of Judicial Fidelity to Law, imposes obligations of consistency on judges that are in fact impossible to meet, and that the distinction between law and politics which it is accordingly intended to police, is incoherent.¹² The belief in the Rule of Law, in the face of this incoherence, furthermore, according to Unger, Horwitz, Tushnet, and eventually many others as well,¹³ instills an unappealing hostility, in the legal profession, to politics, and to democratic processes. The Rule of Law, these critical legal scholars eventually claimed, does indeed embrace a broadly shared commitment to an ideal of judicial fidelity, but as such, it is incoherent and undesirable both. The sooner we rid ourselves of the specious illusion that judges can decide cases in a neutral, apolitical fashion, simply by applying rather than creating pre-existing rules, the better and the more mature our political and legal deliberations will become. The Rule of Law requires judicial fidelity, but because it does, we ought to junk it.¹⁴

This skeptical claim regarding the impossibility of judicial fidelity to pre-existing law, and hence the incoherence of the Rule of Law that requires it, obviously renders nonsensical the sort of testimonial of judicial fidelity now routinely offered by Supreme Court nominees during the course of confirmation hearings. It also,

however, by the same token, renders nonsensical the sort of professional criticism of the Court described above. It can hardly be complained that a particular Supreme Court opinion is such a bad interpretation of pre-existing law that it violates the 'Rule of Law,' if judicial fidelity to law is in principle an impossible ideal. Likewise, then, the criticism of the Court's conduct in the 2000 presidential election contained in the 'Law Professors' Letter' – that their actions were so out of accord with existing law as to be a violation of the Rule of Law, and hence a betrayal of lawyerly ideals – is unavailing, if the indeterminacy claim and the logic on which it rests is taken seriously. And, apparently for just this reason, at least one prominent critical legal scholar (or, CLS fellow traveler) – Professor Frank Michelman of Harvard Law School – in spite of his misgivings regarding *Bush v. Gore*, decided against signing the Law Professors' letter described above, which had, again, decried the Court's decisive intervention as a breach of the 'Rule of Law.' The Court's intervention, Michelman has now explained in a recent article¹⁵ spelling out the reasoning behind his decision to abstain, may have been an unattractive decision with unfortunate consequences, but it can hardly be faulted for its lack of fidelity to pre-existing law. True, it departed from and misstated the law. But, Michelman goes on to suggest, many important judicial decisions, including *Brown v. Board of Education*¹⁶ and *Roe v. Wade*,¹⁷ depart from pre-existing law.¹⁸ If the Court's actions violated the 'Rule of Law,' so understood – or, to use his language, violated the spirit of 'a project in which 'Rule of Law' signifies a government of laws and not of men, and . . . which must stand or fall with public faith in a constitutional judiciary who act strictly as servants of a law external to themselves and unamenable to their personal political and ideological dispositions' – they did so in a way that was shared by these decisions as well as others. Objections might properly be lodged against the politics and consequences of their intervention. The complaint that it violates a Rule of Law, though, much less a Rule of Law to which law professors (of all people) have dedicated their professional lives, Michelman declared, is vacuous.¹⁹ Accordingly, Michelman declined to sign the letter declaring it to be such.

Although this debate between Rule of Law advocates and critics, and, correlatively, between Frank Michelman and the authors of the Law Professors' Letter, is the subject of the first half of this chapter, I do not intend to *resolve* the debate over indeterminacy here – in principle, in fact, it very likely can't be resolved.²⁰ Nor do I intend to add to the now substantial literature criticizing or defending *Bush v. Gore*.²¹ Rather, I want to focus on what seems to be the shared, and I think faulty, but now firmly entrenched premise that underlies this entire 'Rule of Law debate.' Both Rule of Law theorists and Rule of Law critics, at least in the American legal academy, seemingly agree that judicial fidelity to law is the primary – perhaps the *only* – value embedded in our very public, very American, commitment to the 'Rule of Law' that could possibly be of relevance to – or at least of interest to – the legal profession, and the legal academy that serves it. Whatever the 'Rule of Law' may mean to (or require of) Presidents, Congress, special prosecutors, the military, the media, or the public, as far as law professors, legal scholars, and legal philosophers are concerned the Rule of Law seemingly has only one core requirement: judges must faithfully find and apply, rather than create, law.²² Thus,

academic critics conclude from their skeptical attack on the possibility of judicial fidelity, that the Rule of Law which seemingly requires it (as well as the liberal theory which requires the Rule of Law) is incoherent, and advocates conclude from the critics' skeptical claim regarding the impossibility of judicial fidelity, that the critics for that reason intend to undermine the Rule of Law.²³ Advocates and critics alike, in other words, concur on the general meaning of the Rule of Law. Where they disagree is over its possibility.

That shared premise, I will argue, is wrong. In fact, in one sense it is obviously wrong: there are clearly a host of legalistic values, and legalistic sentiments, embedded in American devotion to the Rule of Law, as evidenced in repeated invocations of that ideal in public ceremony, and in public criticism of public officials. Some of those should be of at least passing interest to legal philosophers and practitioners both. Thus, and to name just a few, the 'Rule of Law,' when invoked in speeches and op-ed pages, sometimes refers to America's shared commitment to democracy, sometimes to a general respect for legal authority, sometimes to the value of law and order over chaos and private vengeance, sometimes to the virtue of limiting the power of various state actors, but particularly the power of prosecutors, special prosecutors, and police, sometimes to the benefits of a 'limited' or 'minimal' state, sometimes to the importance of subjecting state actors to the same rules as non-state actors, and, last but not least, sometimes to very general constitutional guarantees of equal treatment under the law, and some measure of individual liberty from it. Indeed, during the last decade of presidential politics and scandals, the air waves and editorial pages have been replete with criticism of presidential, prosecutorial, and congressional misbehavior, all of it quite explicitly premised on our shared devotion to the 'Rule of Law.'²⁴ And, until the moment of the Court's intervention into the 2000 presidential election, little to none of that criticism – aimed, variously, at the dishonest misbehavior of the President, the overzealous inquisitorial excesses of the Special Prosecutor, the bald political ambition of the democratically tone-deaf Congressional House Prosecutors, and even the overreaching, intrusive purriance of the authors of our law of sexual harassment – even touched on the propriety or impropriety of 'judicial fidelity to law.'²⁵

Some of those legalistic, but non-court-centered, values – so loudly proclaimed in popular invocations of the Rule of Law, but so curiously muted in law schools – have been lost to legal scholarship, I will argue, by virtue of the blinding light of the contemporary, liberal interpretation of the Rule of Law, the indeterminacy critique that came in its wake, and finally in the 'Rule of Law' debate – still ongoing – that both jointly engendered. Their absence, I think, is our loss. Legal scholars, law professors, and legal professionals more generally should attend to, debate, reflect on, and perhaps embrace a wider understanding of the Rule of Law, and the legalistic values and virtues it might reflect, that go well beyond the possibility or impossibility of judicial fidelity to pre-existing law. If it is true, as the 'Law Professors' Letter' proclaims, that law professors and by implication all legal professionals, have dedicated their professional lives to the 'Rule of Law,' then it would certainly behoove us to at least investigate as *broad* an understanding as possible of the various legalistic values and virtues which that ideal might embrace. We need to think about what the Rule of Law

means, and requires, outside the context of courts, judges, and the determinacy or indeterminacy of law, and then we need to think about what those values might imply with respect to the professional roles and aspirations of American lawyers.

The first two sections of this chapter summarize the now dominant legal-theoretic understanding of the Rule of Law briefly summarized above, and the critique of it put forward by critical legal scholars, and then explores the costs of the debate's shared premise: that the Rule of Law requires, foremost, judicial fidelity to pre-existing law. In the two sections that follow, I then explore two particular 'legalistic values' that I believe are also implicit in the American commitment to the Rule of Law, but which have been overshadowed or muted in recent legal scholarship by our now half-century long obsession with judicial fidelity, the determinacy of law that would facilitate it, or the indeterminacy that would frustrate it. First, I will argue, at least since Hobbes explored the idea in *The Leviathan*,²⁶ it has been central to theoretical liberalism that 'law,' – understood positivistically as the product of deliberative state action – is a better means of ordering society than private vengeance, private violence, private 'ordering,' or private negotiation. The 'Rule of Law' implied by this Hobbesian view, affirms the value of 'public will' over 'private will,' as one Hobbes scholar has helpfully phrased the point.²⁷ As such, the value of 'public will' over 'private will' suggests a liberal – albeit Hobbesian – understanding of law's value, and hence a liberal interpretation of the Rule of Law, that has been badly overshadowed by the last half century's near-obsessive focus on judicial fidelity. In the third section, I try to spell out the contours, the strengths, and the weaknesses of a Hobbesian account of the Rule of Law, and try to highlight how that Hobbesian account contrasts with our contemporary one.

Yet another value, I will argue, embedded in at least American understandings of the Rule of Law, but overshadowed by our endless and increasingly fruitless debates over legal determinacy, is, simply, the value of representative democracy. In his revolutionary pamphlet *Common Sense*,²⁸ Thomas Paine – our advocate for revolution – famously declared that 'in America, the Law is King.' We have been repeating that the Law is King, side by side with our invocation of the 'Rule of Law,' in Fourth of July, Law Day, and graduation day ceremonies that symbolize our national devotion to Law, ever since. It is clear, though, or so I will argue, that the 'Law' that Paine meant to elevate when he declared the law to be king, was not 'common law,' or even 'constitutional law,' and certainly not a 'higher law' or 'natural law' of principle, that would restrain and cabin, through the objective, neutral work of judges, the operation of political sovereigns. Rather, by the 'law' that would be King, Paine meant the law produced by representative, democratic, thoroughly political legislatures, working so as to improve the wellbeing of the community. This commonsensical, Paineian understanding of the Law that would be King, I will argue in the penultimate section of this piece, has likewise been lost to our academic, Rule of Law discussions. Revitalizing a Paineian understanding of the Rule of Law that centers democratic lawmaking, rather than either judicial or judicial restraint, might go some way toward making somewhat more plausible the hope embedded in the Law Professors' Letter, that the Rule of Law is an ideal worthy of a legal professional's or legal scholar's lifelong dedication. In the last section, I will take up

the implications of a broader, ecumenical understanding of the Rule of Law ‘outside the courts,’ so to speak, for the lawyer’s and the law scholar’s professional identity.

The Legal-Academic Rule of Law Debate

The ‘Rule of Law,’ according to the vast majority of contemporary legal scholars, is one ideal (among others) of liberal government, which insists on a strict separation between the methods, aspirations, operations, and values of law, on the one hand, and those of *politics*, on the other.²⁹ ‘Law,’ according to this legal-academic consensus, must consist of public, known, substantive rules, laid down at some point in the past, intended to and capable of governing people’s behavior, as well as more general, and procedural, but equally time-honored legal principles establishing the notions of precedent, equity, due process, and justice, that are themselves intended to, and capable of, governing the behavior of the judges charged with the task of determining and applying the law.³⁰ The content of the rules must be (at least for the most part) fully ‘determined’ prior to their application in the cases in which they are applied – otherwise, they would be *ex post facto*, and a violation of norms of justice as well as run afoul of constitutional rights of due process. Their meaning, then, cannot be in a state of perpetual flux.³¹ Judges must apply the ‘rules laid down’; they cannot make up or modify the rules in mid-stream. The quasi-legal and quasi-moral principles of precedent, due process, equity and legal justice which more generally exist alongside them, must also be in some sense timeless – although since the content of these moral-legal principles is almost by definition less clear, the formulation of these principles can be altered by courts charged with the task of administering them, but only very slowly, and only toward the end of making them better fit the ideal – and hence more congruent with what most reasonable people would expect their content to be. ‘Law,’ then, in this way, subjects current and future events to the rational order of settled, pre-existing rules. Judges are charged with the task of administering and interpreting – not creating – those pre-existing rules.

‘Politics,’ by contrast – the means by which we form, re-form, and re-create the laws under which we live – is almost everything law is not. Most notably, of course, politics is the means by which new law is created, rather than the means by which old law is discovered, ‘applied,’ or ‘interpreted.’ That difference in turn implies further differences between legal and political culture. Politics, unlike law, is the vehicle for abrupt changes in social organization, rather than the vehicle for stability, continuity with the past, or gradual evolution. The political realm is spontaneous, rather than stable, relatively unprincipled, and responsive to the changing interests of various sectors of the public, rather than responsive to the community’s need for continuity with the past, or to the individual’s absolute right to be charged only with obedience to laws that do not change from day to day. Politics upends settled convention and looks to the future, while law is the realm within which we maintain continuity with the past. Politics, as Yale Law Professor Paul Kahn has recently written in his book on the culture of law, often, in fact, acts with suspicion or outright hostility toward the very patterns of past behavior and belief which law reveres.³² Law returns the favor,

distrustful of the dynamic, interested, impassioned realm of politics, and constraining it when it has over-reached.

The primary purpose of the *Rule of Law*, according to this understanding, is to maintain the gulf between law and politics, and to underscore the impermeability of the boundaries that define each of them – but *particularly* the impermeability of the boundaries that define *law*. What the Rule of Law requires, above all else, is that the work of adjudicating law not be, or become, ‘political.’ In practice, this implies that there must be a profound difference between the law-finding and law-applying *legal* work done by judges – adjudication – on the one hand, and the law making *political* work done by legislators – legislation – on the other, as well as differences between the dispositions, behaviors, and ethical values of judges and legislators. Legislators virtually by definition act and think of themselves as political agents of change. They must be responsive to interest and pressure rather than principle. They are not just allowed to be, but are expected to be, impassioned, sympathetic, aligned with the particular interests of the constituents they represent, and open to as well as expert in all forms of persuasion. Judges, by contrast, are the agents through whom law is identified, defined, refined, interpreted, and applied. As such, they must be dispassionate, principled, and disinterested, non-aligned, and above all apolitical. Rather than sympathize with or identify with the needs or interests of those who come before them, they must remain detached, and operate with the tools of rationality, deductive logic, reason, and principle. By virtue of the ‘Rule of Law,’ then, judges understand themselves, and should strive to be, apolitical oracles of continuity with the past, rather than committed agents of change. And, a measure of the success of the Rule of Law, is the extent to which judges behave in a way consistent with that judicial ideal.

Where did this judge and court-focused understanding of the Rule of Law – which, again, is considerably narrower, and far more court-centered than popular meanings – originate? Although it is possible to date at least some aspects of our modern, judicial conception of the Rule of Law to Aristotle,³³ and to a decidedly more ambivalent Plato,³⁴ for the most part, contemporary Rule of Law theorists, as well as Rule of Law critics, identify the roots of this Fullerian understanding of the Rule of Law with the influence of classical, political liberalism,³⁵ and particularly with the strand of liberal theory that has its genesis in the writings of John Locke³⁶ and its most recent articulation in John Rawls’s masterful work, *A Theory of Justice*.³⁷ Liberalism, as developed by Lockean–Rawlsian liberal political theorists, (and, again, according to both the Rule of Law theorists and their critics), seemingly demands a Rule of Law in turn defined by judicial fidelity to pre-existing law, and for at least two reasons. First, classical, political liberalism is constitutively committed to as wide a sphere as possible of individual liberty, and the Rule-of-Law-as-a-Rule-of-Judicial-Fidelity-to-Law can easily be shown to be necessary to preserve that sphere. People can only plan their affairs on the basis of known rules, and they cannot plan much of anything if they face unknown, changing, unpredictable ones. Known rules thus increase the sphere of individual liberty, while unknown or unpredictable rules, or ‘ad hoc’ decision-making, shrinks it. Unless judges decide cases by applying known, pre-existing rules, and do so in an even-handed and consistent fashion, individual liberty is severely compromised.³⁸

But second, and somewhat less obviously, Lockean political liberalism requires a state whose power is limited, and limited not just by God's will or some vague Rousseauian notion of the public good, but rather, limited by actual, concrete, extant, pre-existing, *law*. Unlike authoritarian states, liberal states under the Rule of Law can only act in ways that are explicitly, and legally, prescribed.³⁹ It is now and has always been central to liberal theory that if a state acts beyond its legal authority, that *ultra vires* act is, for that reason, *itself* not law. But this obviously presents a severe practical problem, if not an insolvable paradox: somehow, those legal prescriptions – the restrictions, imposed by law, on the reach and power of the political state – must be themselves enforced. Locke himself did not have much of a solution to this problem: the state must be limited, and it is the state, through the legislature, which has the power to limit it. Operating within the assumptions of legislative supremacy, and then furthering those assumptions by better justifying and limiting the grounds of appropriate state action, Lockean liberalism well defines the objective of a limited state – but then leaves the fox guarding the chicken house.

The American institution of judicial review, and particularly of judicial review of the constitutionality of legislative and executive action, at least according to American legal theorists, suggests a seemingly better answer: courts, and the judges that run them, should be the repositories of the 'law' that must be invoked, so as to limit the power of states. Judges, acting independently of 'the state,' can thereby make real the otherwise illusory promise of a state whose power is limited by law. But this creates another dilemma: judges, after all, must *act*, and sometimes quite aggressively, if 'the law' and the 'Rule of Law' are to be effective constraints on unwarranted state action. Further, whether they are acting so as to constrain individual citizens, or acting so as to constrain state actors, those actions must, at some level of review, be final, if there is to be any end to legal deliberation. And, judges are *themselves* individuals, employed by the state, and hence are themselves 'state actors.' As such, they are as vulnerable to the entire panoply of passions, biases, commitments, whims, interests, and particularized, idiosyncratic perceptions as are those whose power they must ostensibly control. They are, then, impassioned, whimsical, interested, biased, encultured, emotional individuals who are both employed by the state and who hold state power, and as such, they are *exactly* the individuals, and the sort of individuals, whose power, according to liberalism, must itself be limited by law. Yet, the law by which their power must be limited, can only 'come to life' if they act – and they can only act if accorded the power to do so, and if they are willing to use it. But they then become part of the problem, rather than part of the solution. More precisely, by solving the problem, they become the problem.

How to escape from this theoretical – and practical – dilemma? Basically, according to at least American liberal Rule of Law theorists, through the self-imposition, by judges on judges, of the demand of fidelity to law, and consistency and neutrality in its application. All judicial decisions – but particularly those decisions cabining the power of other state actors – must be 'rule-bound,' and in two senses. First, judges may not decide cases whimsically, or arbitrarily, or according to rules they are unwilling to apply in the future: judges must decide cases by articulating rules of general applicability. They must decide cases, methodologically, 'by rule.'

Second, cases must be decided substantively, as far as possible, 'by rule,' meaning, by reference to rules of law that pre-exist the particular decision, rather than by reference to any other source. The outcome of cases must be determined, that is, by *the law*, and not by *the judge*, or by the judge's idiosyncratic, momentary, desires, values, whims, interests, or prejudices.⁴⁰ In Justice Scalia's helpful phrasing of this basic idea, for judging, the 'Rule of Law' requires, fundamentally, a 'law of rules.'⁴¹ The judge must indeed interpret and apply law that often cabins and constrains the power of the state, and it is inescapably true that when doing so the judge is himself exercising power. That power, though, is itself minimized, or checked, so long as it is constrained by pre-existing rules, and is expressed not as whimsical commands, but in rules that, in the future, can be understood, criticized, and applied by others.

To summarize: liberalism requires that the discretion of state actors be limited, and limited *by law*. Judges must enforce these limits, but judges are also themselves state actors whose discretion must be cabined. Thus, judges limit their own discretion through a willed submission to existing rules. Judicial fidelity to determined rules is, therefore, as required by liberalism's constitutive commitment to a limited state, as by its ethical commitment to individual liberty.

In his liberal classic, *A Theory of Justice*, John Rawls alludes to both of these liberal ends, when describing why a Rule of Law, defined more or less as a requirement that judges 'decide like cases alike,' is in fact essential to a liberal state:

The rule of law . . . implies the precept that similar cases be treated similarly. Men could not regulate their actions by means of rules if this precept were not followed. To be sure, this notion does not take us very far. For we must suppose that the criteria of similarity are given by the legal rules themselves and the principles used to interpret them. Nevertheless, the precept that like decisions be given in like cases significantly limits the discretion of judges and others in authority. The precept forces them to justify the distinctions that they make between persons by reference to the relevant legal rules and principles. In any particular case, if the rules are at all complicated and call for interpretation, it may be easy to justify an arbitrary decision. But as the number of cases increases, plausible justifications for biased judgments become more difficult to construct. The requirement of consistency holds of course for the interpretation of all rules and for justifications at all levels . . .

Now the connection of the Rule of Law with liberty is clear enough. Liberty, as I have said, is a complex of rights and duties defined by institutions. The various liberties specify things that we may choose to do, if we wish, and in regard to which, when the nature of the liberty makes it appropriate, others have a duty not to interfere. But if the precept of no crime without a law is violated, say by statutes being vague and imprecise, what we are at liberty to do is likewise vague and imprecise. The boundaries of our liberty are uncertain. And to the extent that this is so, liberty is restricted by a reasonable fear of its exercise. The same sort of consequences follow if similar cases are not treated similarly, if the judicial process lacks its essential integrity, if the law does not recognize impossibility of performance as a defense, and so on. The principle of legality has a firm foundation, then, in the agreement of rational persons to establish for themselves the greatest equal liberty. To be confident in the possession and exercise of these freedoms, the citizens of a well-ordered society will normally want the rule of law maintained.⁴²

Thus, the Rule of Law, according to Rawls, is necessary to both the preservation of individual liberty, and the reining in of unwarranted discretionary state action. It is particularly necessary to rein in the unwarranted, discretionary actions of the very judges who are charged with the duty of limiting, through law, the unwarranted, discretionary actions of others. In practical terms, what the Rule of Law in a liberal state requires, according to Rawls, is that judges limit their own discretion, and the way they should do so, basically, is by deciding cases according to rule, or, as it is often put, by deciding 'like cases alike.'

As is commonly known and as much debated in jurisprudence, as well as virtually all first year law school classes, the solution Rawls (and many others following his logic) offers to this 'fox guarding the chicken house' sort of problem – that judges must constrain the discretion of state actors by, in part, constraining their own discretion, and they must do that by subordinating themselves to the sovereignty of rules – is imperfect at best. Judges are occasionally – perhaps often – faced with cases in which the pre-existing law is unclear, and in which it is undesirable, difficult, or even impossible to craft a decision in the form of a rule. A judge required to resolve cases by rule, and in accordance with pre-existing rules, will have a hard time doing so if there are no pre-existing rules that seem applicable, or if the pre-existing rules that do exist, are vague or appear to conflict. Various legal scholars as well as various legal schools of thought differ, and profoundly, over what judges should do or how they should reason when there are no readily ascertainable pre-existing rules that govern a situation, or, put differently, when the pre-existing law for a case is unclear. For some scholars, notably Ronald Dworkin, the Rule of Law requires judges in such cases to decide issues in accordance with *rights* – variously dubbed moral, legal, political, or constitutional – themselves determined by prior, foundational, inter-generational political decisions.⁴³ For others, such a judge should defer to principles not fully distilled into rules but nevertheless in some fashion traceable to the text of the Constitution or the four corners of the common law.⁴⁴ For still others, judges facing such cases should fill the interstices by reference to fundamental moral truths themselves gleaned either from moral philosophy, or, perhaps more pragmatically, from a generous and fair reading of our country's legal and intellectual history.⁴⁵ Again, while they differ on the particulars, the shared ground here is considerable: the Rule of Law demands of judges principled, reasoned, decision-making, on the basis of known, public rules and principles. It's a fair summary of late twentieth-century American jurisprudence, I think, to say that Rule of Law scholarship has focused near exclusively on this Rule of Judicial Reason. The Rule of Law, under the guidance of our Rule of Law theorists, has become a Rule of Fidelity and Reason imposed upon judges.

Now, the *critique* of this liberal, Rawlsian, and (loosely) Lockean understanding of the Rule of Law, mounted initially in the 1970s and 1980s by prominent members of the Critical Legal Studies Movement, has had two major thrusts, one descriptive, and one normative. First, and most importantly, in a sizeable body of critical literature, Rule of Law critics have argued that this interpretation of the Rule of Law imposes obligations of fidelity to law that are simply impossible to fulfill.⁴⁶ A judge cannot possibly decide cases in the manner required by the Rule of Law, according to the critics, because of the inescapable indeterminacy of those pre-existing rules which

judges are bound to apply: the rules that pre-exist decisions are just not sufficiently determinate to point the way toward a correct outcome. First, as even most liberal legal theorists would agree, almost all rules have vague contours, or ‘penumbras,’ within which their application is radically uncertain. Exceptional circumstances which would render the literal application of a rule non-sensical or cruel, furthermore, are often unimaginable until the exceptional occurs: not departing from the rule, in these events, would be irrational literalism, not obviously in service to any defensible ideal, liberal or otherwise. But this much is relatively non-controversial, and doesn’t depart drastically from the understanding of liberal legalists. More fundamentally, and far more controversially, the critics argued that even the *core* meaning of a legal rule is not something that can be ascertained apart from a thick social context of pre-commitments, shared understandings, and communal values that are not themselves embodied or referenced in any particular legal rule.⁴⁷ Those pre-commitments, shared understandings, or communal values, are not necessarily ‘known’ or appreciated by the parties in a particular action, and they are not even, quite conceivably, known to the judge who sometimes unconsciously applies them. But apply them he must – cases could not be resolved, otherwise. Furthermore, any particular judge, at any time, wittingly or unwittingly, may depart from expected script, and put this thick social context of background assumptions into question, and when he or she does so, the utter indeterminacy of even the most banal or seemingly straightforward rule is quickly revealed. Thus, it is, if anything, the background context – unstated, sometimes unconscious, often indefensible, and consisting of a set of assumptions which a given judge may, or may not, embrace – that determine legal outcomes, if anything does. The legal rules themselves determine, precisely, nothing. A judge cannot, then, be faithful to law by ‘following the rules laid down.’ The ‘rules laid down’ give him no guidance. Nor can it possibly be the case that cases are decided in accordance with pre-existing, known rules. There are indeed known ‘rules’ that pre-exist decisions. But those rules do not determine judicial outcomes; the shared social, linguistic, and cultural contexts that give those rules meaning, do.

If this is right – and it is an empirical question whether or not it is right – then it is simply not true that the legal questions that are posed by cases have legally pre-determined outcomes awaiting their accurate discernment by courts, and if that is right, then the Rule of Law imposes upon the judge an obligation that is incompatible with the reality of law and hence impossible to fulfill. The judge is obligated by the Rule of Law to decide cases in accordance with pre-existing rules, but finds it impossible to do so, given the indeterminacy of the rules he faces. What judges actually *do*, given this inescapable fact of legal indeterminacy, is better described as some admixture of will and reason, of passion and disinterest, of discrimination and discernment, and of judgment and deduction, than as the application, through reason alone, of substantive rules of law. The judge’s invocation, then, of the Rule of Law, and of the legal inevitability of outcomes decided under it when deciding cases, is either confused or disingenuous. The judge is either not sufficiently self aware or introspective to even know the true grounds of his own decisions, or, worse, is fully aware, but seeks to mask those true grounds through the incantation of ritualistic Rule of Law rhetoric.

Because of legal indeterminacy, the critics go on to argue, the understanding of the 'Rule of Law' as policing a distinction between 'law' – meaning a body of determinate, ascertainable, known rules, neutrally applied by judges – and 'politics' – meaning the process by which law is made, unmade, and remade in the legislative branch – is incoherent.⁴⁸ It posits a distinction between the objective, pre-existing, and determinate 'law' to be applied by judges, on one hand, and the subjective, ever-becoming, indeterminate 'politics' of legislatures on the other, that is just non-existent.⁴⁹ There is no 'Rule of Law' that can carve out a pristine judicial space for the law to operate, which can then protect us against our deeply political selves. 'Law' is 'politics' in another voice, just as the judges charged with doing the work of law and protecting the Rule of Law, are no less political than the legislators they are duty bound to constrain. Law, no less than politics, is enacted, interpreted, fought over, and applied by fully embodied 'men' who are as impassioned, political, biased and whimsical as the characters inhabiting the political branch that the Rule of Law is meant to contain. The 'government of law,' then, is no less man-made and man-enforced, than is a government of men – a government of law *is* a government of men, and to imagine a difference between the two is an exercise in delusional thinking. There is no 'rule,' acting as a metaphorical 'wall' separating the 'law' from 'politics,' or 'law' from 'men.' The sooner we acknowledge that reality – the reality of the transparent vacuity of the Rule of Law – the sooner our politics will mature.

In the meantime, though, critics have argued, the habitual invocation of this incoherent Rule of Law, with its impossible-to-meet duty of judicial fidelity, bespeaks not just a futile insistence that law and politics be kept separate, but also a cultural hostility to politics that is, at root, simply anti-democratic. The actual, practical requirement of the Rule of Law – that judges decide cases by reference to pre-existing 'law' – may be impossible to meet, or even incoherent, but the mentality evidenced as well as produced by Rule of Law rhetoric pits the domain of 'law' against the domain of the 'state,' just as it pits legal reasoning against political decision-making.⁵⁰ The Rule of Law, after all, commands courts to engage in work that appears to both contrast with, and then limit, the political work of other, and more representative, state actors. When they do so, according to the Rule of Law, they are engaged in the reasoned, principled, application of law. Legislatures, by contrast, even perfectly representative legislatures, are engaged only in the work of irrational politics – answerable not to reason, but (in the best of circumstances) to their constituents' 'interests.' They indulge their passions in politics, producing new 'legislation' – which must in turn be constrained and even possibly struck down by the truer, higher, and prior 'law' that permits or sanctions it. The Rule of Law, in this duality, is obviously the good, and reasonable parent, pitted against the passionate, interested, biased, political, and quite frightening one – reminiscent of Aeschylus's depiction in *The Oresteia*⁵¹ of the cool, reasonable, articulate, prototypically lawyerly Apollo, and eventually the judicious Athena herself, creating and then defending the Rule of Law, against the wretched, vengeful, emotional, impassioned, female Furies (to say nothing of the murderous Clytemnestra), who, once successfully contained and driven underground, have their power displaced, their fury somewhat abated, their emotions productively channeled – but their heads nevertheless still full of snakes.

The commitment to the Rule of Law thus has the effect, according to the critics, not only of unduly elevating the work of courts, *but also* of unduly deprecating the work of legislators. ‘Legislated’ law created by irrational and interested legislators is at best law’s stepchild, rather than being itself true law. Law, after all, is that which is reasoned, principled, time-honored, handed down from ages past, and applied by Courts, against both itself and others. Politics, as well as the legislation which is its product, is that which is selfish, ‘interested,’ irrational, unruly, and, perhaps worst of all, fleeting. It reflects the interests, biases, and transient constellations of power of any particular moment, not the wisdom of the ages. Law, when functioning well, controls politics, just as reason, maturity, and a healthy regard for one’s long-term interest, when functioning well, controls the passions, the child within, and the needs of short-sighted people for instant gratification. Courts quite properly, then, constrain legislators, and they do so in the name of the Rule of Law. Functionally, Rule of Law rhetoric subordinates legislated ‘law’ to true adjudicated law, and thus pits the (relatively) non-democratic courts, and their work product, against the (relatively) democratic and more representative legislative branch of government. The Rule of Law is anti-democratic and elitist both.

Likewise, according to Rule of Law critics, this (neo)-liberal understanding of the Rule of Law rests on a deeply conservative commitment to the status quo, particularly in the economic and social spheres, and expresses an only thinly disguised contempt for regulatory and redistributive political initiatives.⁵² The Rule of Law directs courts to constrain politics both by reference to and in the name of laws settled in a distant past – either the remote past of our inherited common law of private property entitlements, or the less remote, but nevertheless still somewhat distant past, of our constitutional framers, particularly those decisions of the framers which incorporated and expanded upon those private property entitlements. The ‘state’ being constrained in the name of the Rule of Law is the legislative, democratic state that at least has the capacity – whether or not it has the political will – to redistribute entitlements so as to achieve a more egalitarian and more just civic community. The commitment to the Rule of Law, and the concomitant hostility to the political passions, speaks against this egalitarian possibility, and thus bespeaks a deeply reactionary alliance with current and historic property distributions against forward looking change. The Rule of Law, the common law which largely constitutes it, constitutional settlements, the judicial mindset, and the philosophical understanding of law on which Rule of Law rhetoric works, are all aligned against legislated redistributions, and the political tumult that must, necessarily, precede them.

Finally, according to the Rule of Law critics, the Rule of Law, whether or not incoherent, and even whether or not politically regressive, is infantilizing. As scores of critics have now argued, the attitude of cheerful and lawful obedience evoked by, reflected by, and somewhat produced by Rule of Law rhetoric is a paradigmatic example of false consciousness, and the ‘law’ as well as the ‘Rule of Law’ that elicits it, produces that good cheer primarily by masking, obscuring, and legitimating the politics, often regressive, behind the guise of neutrality.⁵³ ‘Law,’ these critics argue – here, following the lead of both English legal positivists⁵⁴ and American legal realists⁵⁵ before them – is no more apolitical or neutral than politics; indeed, law is

nothing but the product of politics. As such, it has no greater moral claim to our obedience than any other claim made by people who momentarily possess power over others. The attempt by scholars to portray Law as having an inner 'Rule of Law' morality, or as having some necessary connection to defensible moral principles, or as having virtually any moral content, solely by virtue of the fact that the Rule of Law requires that law be faithfully applied, and as hence justifiably laying some moral claim to our obedience, is nothing but complicity in a masquerade: law is an expression of power, and 'Rule of Law' rhetoric is nothing but an attempt to hide that fact. The Rule of Law, at best, does indeed 'equalize' us by imposing a duty of obedience on all, but it equalizes us by reducing us to the status of children in the face of a bizarrely Freudian totemic authority: the totem issues commands, which we feel obligated to cheerfully obey, because we have allowed the totem to convince us that its commands are not the expressions of power, but rather, something other – the expressions of an institution that has successfully displaced the harsh whimsy of personal, embodied, paternal authority, with a cool, pure, impersonal, disembodied rationality.⁵⁶

A Pragmatic Critique of the Rule of Law Critique

How to assess this critique? Both the full, or what I will call 'global' determinacy claim – that *all* judicial results are fully determined by pre-existing law – and what can be called, for the sake of parallelism, the 'global' indeterminacy claim – roughly, that none are – seem overbroad. Very likely, something like the common-sense position is in fact correct: most legal questions are both determined and determinable by pre-existing law, but some are not. It is also likely, however, that many more legal questions are in fact indeterminate than non-lawyers realize: it is certainly one of the unsettling surprises of law school to realize how unclear, and indeterminate, and 'open', is much of the law. Many legal issues, both large and small, are susceptible to multiple answers, depending on major, unspoken, and often moral or political premises that not just inform, but indeed likely facilitate, much legal argument. Nevertheless, it seems unlikely that all legal questions are indeterminate, in this manner, and it also may be, as I will argue in Chapter 4, that even questions that are indeterminate are not for that reason alone truly threatening to the objectivity required by the Rule of Law. The universal indeterminacy propounded by critical scholars over the last 30 years does seem counter-intuitive and counter-experiential both – indeed, as much so as the full global determinacy propounded by some liberal rule of law enthusiasts. But all of this is concededly speculative: to actually prove either the global determinacy or global indeterminacy of law would seemingly require an impossibly broad examination of an infinitely large universe of legal rules and principles. And to disprove either would require a knock-down counter-example of indisputable determinacy or indeterminacy, the likes of which, if we take current scholarship as a guide, may never be forthcoming.

We have lived with the indeterminacy claim long enough, however, that we can at least begin to evaluate the *costs* of this unprovable claim pragmatically – if it is true,

as I believe it is, that the law is not as indeterminate as the global thesis holds it out to be. What I want to urge here, in other words, is that there are very real costs to ascribing to a falsely global indeterminacy thesis, if, contrary to the thesis's claim, our commonsensical intuitions about this matter are correct, and that while law is somewhat more indeterminate than claimed by Rule of Law enthusiasts, it is also somewhat more determinate than that believed by its critics. In the spirit of the pragmatism often invoked by devotees of indeterminacy, the bulk of this section will explore those costs – again, the costs of holding to a falsely overbroad claim regarding the indeterminacy of legal argument. Those costs, I will argue, moral and political in nature, should make us reconsider the wisdom of continuing to subscribe to an unprovable claim so at odds with intuition and experience both.

Let me start, though, with the other side of the pragmatic coin, and that is the benefits – which are also substantial – of *correctly* acknowledging the vast area of legal indeterminacy that does seem to attach to virtually any attempt to subject human behavior to the governance of rules, to use Fuller's initial formulation of the faith at the heart of the conventional understanding of the Rule of Law. What are the consequences of a frank acknowledgement of the considerable indeterminacy that does seem to plague adjudicative law? On the plus side, the indeterminacy thesis, 30 years after its emergence on the legal academic scene, has clearly become a potent critical tool, in at least this one respect: it has the effect, if taken seriously, of forcing judges and court-watchers to confront a sort of existential inauthenticity in a judge's self-understanding. To whatever degree the indeterminacy thesis is true, a judge, when faced with decisions in which the legally determined outcome seems manifestly unjust, cannot disclaim responsibility for that injustice by disclaiming *authorship* – he cannot authentically claim that it was the impersonal law, rather than his own judgment, that forced the unjust act. To the extent the indeterminacy thesis is right, generally speaking, then to that extent a judge cannot claim his hands are 'tied.' Given the indeterminacy of law, judges in fact, whatever they claim and even whatever they might believe to the contrary, possess a great deal of power, and therefore possess sufficient power, in most if not all cases, to do what justice requires. The claim that they do not – that the law, rather than the judge's own judgment – forces a particular and particularly bad outcome, is either knowingly or unknowingly false, if the law is in fact sufficiently indeterminate to permit a range of outcomes. Judicial abdication of responsibility for the justice or ill consequences of a decision is never warranted, it is, rather, an act of bad faith.

To put the point positively, judges, according to the indeterminacy thesis, are profoundly free, in the sense meant by the mid-century existentialist philosophers, and it is the brute fact of the law's indeterminacy that forces that freedom upon them. The claim that a case *must* be decided in one way, although justice suggests it should be decided differently, and all because of the force of 'law,' is often false, and hence a paradigmatic instance of bad faith: whatever their claims to the contrary, judges are as free to decide cases in accordance with justice as with injustice. The indeterminacy thesis in effect forces judges to acknowledge their considerable power. The effect of this acknowledgement is indeed to undermine the Rule of Law, both conventionally and academically understood. The law cannot simply be 'followed,' because it must

be interpreted, which in turn requires a free act; it cannot be imposed through reason on acts of will, as its articulation and enforcement is itself an act of will; it cannot be generated through impersonal and disinterested systems, as it must be imposed by free acts of free men, and it cannot, by the governance of rules, constrain chaotic and free politics, as it is itself as free as the politics it is meant to constrain. As the indeterminacy thesis undermines Rule of Law rhetoric, however, it likewise forces a due and desirable recognition of freedom. It effectively disclaims the rhetoric of binding rules, and thereby instills a degree of honesty, and forthrightness, and authenticity, in a very human system that tends to compulsively obfuscate the inescapable facts of judicial freedom, power, and responsibility. It likewise 'frees up' serious criticism of judicial decision-making: the judge, not 'the law,' decides the case, so the judge's decision, not the legal rule, is the proper target of criticism.

Let me turn now to the costs of a commitment to an overbroad claim of indeterminacy. What I think has gone largely unnoticed, or at least underappreciated, in the critical literature of the last 30 years on the Rule of Law, is that a false claim of global indeterminacy, no less than a false claim of global determinacy, *also* badly compromises our critical acuity, and in at least two ways. The first, and perhaps the most obvious, cost of holding to a false belief in the global indeterminacy of adjudication, is that such a belief blinds its holder to the possibility of truly unjust *law*, and the responsibility of the original authors (whether they be the founders of the Constitution, the legislative sponsors of a bill, or the majority on a referendum, or any other) of the unjust law for the injustice that law unleashes. The indeterminacy thesis holds that, appearances to the contrary notwithstanding, 'law' is always sufficiently indeterminate so as to permit multiple outcomes, thereby exposing as 'false' the claims of 'false necessity,' at least when propounded by judges denying their relative freedom to decide cases in accordance with justice. But if this is right – if judges are truly as free as critics claim to reach outcomes in accord with justice – then if one is concerned about injustice, there is little point in even attending to the processes – often legislative – by which law is produced, or even to the substantive content of what it says, or how it might be changed. The consequence is that *the judge*, and the processes of adjudication, becomes the phobic, obsessive ('always-already') target of legal criticism, rather than the law and its legislative or constitutional authors. There's just no point in arguing that the Constitution itself, or the Fugitive Slave Act, or the First Amendment, or the people that created and passed those legal texts, are complicit in injustice. The judge can always reach any result under the auspices of any legal text. It is the judge, not the text, to be faulted, for any injustice that results.

At the same time, even while it facilitates one kind of judicial criticism – that a judge is inauthentic when he claims to be bound by law – an overbroad indeterminacy thesis, simply by virtue of its logic, also forecloses a different but perhaps equally vital criticism of judges, or of a particular judge: to wit, that a judge is acting *lawlessly*, when he or she acts in defiance of the law. If the judge is always, and by necessity, free, he can hardly be faulted for refusing to *submit*: for refusing to subordinate his will to a higher command. Put more prosaically, if the 'indeterminacy thesis' calls the idea that a legal decision must be and ought be legally 'correct' into question, it also calls into question the idea of judicial error: if a case cannot be

‘correctly’ decided, because of the indeterminacy of the legal rules that precede it, then presumably it cannot be incorrectly decided either, and for the same reason.⁵⁷ The indeterminacy thesis, if understood to imply the indeterminacy of all legal claims, exposes judicial inauthenticity, but by virtue of its scope, it simultaneously obfuscates, or masks, or forthrightly denies the possibility of judicial *criminality*. This is an important and not entirely happy consequence, as our recently concluded past presidential selection made vividly clear: given the indeterminacy thesis, criticism of Supreme Court decisions as wrong – and as so wrong as to be a violation of the Rule of Law, as the Law Professors’ Letter claimed – is also either incoherent, or hypocritical, if the understanding of the Rule of Law ideal on which it rests is itself incoherent. The indeterminacy thesis, in other words, exposes judicial inauthenticity, but does so by oddly obfuscating or denying the possibility of either legislative malfeasance or judicial criminality. It’s not clear this bargain is worth it.

A quite different sort of problem, however, posed by the prominence of the indeterminacy thesis in contemporary debates, although less noted, is possibly more serious. The indeterminacy thesis blinds the Rule of Law critics to both the need for and the desirability of a *larger* understanding of the multiple legalistic values promoted by the Rule of Law. If the determinacy of law is necessary to the Rule of Law, and if determinacy is an illusion, then there is no point in further developing an understanding of other values the Rule of Law represents, or protects – values which may be dependent upon, but are by no means reducible to, the partial determinacy of adjudicative law. To put the point positively, if, contrary to the critics’ claim, law is partly determinable, and if that partial determinacy is, while necessary to the Rule of Law, only a part of that complex commitment, then a false belief in law’s global indeterminacy wrongly forecloses the development of a richer conception. There is nothing about the Rule of Law that is left to discuss, if a necessary part of it – the determinacy of law – is illusory.

This ‘truncating’ effect of the indeterminacy thesis is indeed borne out in the critical literature. As far as I know, no contemporary critic of the Rule of Law has offered an understanding of Rule of Law values that extend beyond determinacy, and that might *also* be a part of our history, that might *also* be derivable from liberal principles of governance, and that might better serve us, than the anti-democratic, politically regressive, infantilizing, and incoherent dominant contemporary interpretation that they so deplore. Again – the logic seems to be, that if judicial determinacy is necessary to the Rule of Law, and if judicial determinacy is illusory, then there is no point in further discussion: the Rule of Law itself, and not just judicial determinacy, is an illusion, and should therefore be a target of critique, not an ideal requiring further interpretation. Thus, oddly, Rule of Law critics seemingly *agree* with Rule of Law advocates that this narrow, and exclusively judge-focused understanding of the Rule of Law – that law is a set of rules discovered by and then ruled over by judges, constraining both the antisocial instincts of citizens and the unruly passion of politics, and that the Rule of Law polices this profound distinction – is the only understanding possible.

Without complementary understandings, or interpretations, of possible meanings of the Rule of Law, and of the panoply of values the Rule of Law signals, the

indeterminacy critique apparently robs the ideal itself – and not just our now conventional understanding of it – of all coherence, and hence of all relevance to modern social and political critique. If the Rule of Law ‘means’ legal determinacy, and if legal determinacy is a mirage, then the Rule of Law has no content, and hence no critical force. By failing to even countenance the possibility that the Rule of Law might mean something beyond the legal determinacy of outcomes adjudicated by courts, Rule of Law critics are left with a sort of ethical null set, with respect to both the legalistic ideals central to American identity, and the moral ideals central to legal professionalism. By demonstrating indeterminacy, in other words, they have demonstrated not only the indeterminacy of judicial outcomes, but also the illusory nature of all legalist ideals.

This is, however, not to deny a part of the critics’ case, to wit, that the identification of the Rule of Law with global judicial determinacy does indeed reduce legal idealism to a set of virtues that, whether or not possible, are unquestionably *narrow*. Judicial fidelity to pre-existing law, even if possible, is only a *virtue* to the degree that the pre-existing law, like any authority, is worth one’s loyalty. This is something even very small children know. Surely, the insistence, by Rule of Law celebrants and theorists alike, that law is worth following in a Rule of Law culture simply because it is law, runs the considerable risk of dulling the ability of lawyers and judges to exercise independent moral judgment, and to recognize when ‘law,’ even if fully authorized, or legitimate, is so unjust as to not, in fact, be morally worthy of either a judge’s or a culture’s obedience. Critics are right to point out that the Rule of Law and Rule of Law ideology legitimates existing legal relations, and in the process of doing so dulls the moral sensibilities of precisely those professionals – lawyers – who ought to be specifically attuned to the particular risk of legally sanctioned, state-sponsored injustice.⁵⁸ The conventional understanding of the Rule of Law as a Rule of Judicial Reason that binds judges and lawyers to existing law, for the bare-bones reason that law incorporates an ‘internal morality’ so long as it is consistent and public, expresses a relativistic and jingoistic loyalty to extant law which any self-respecting adult – let alone relatively astute citizen or lawyer – ought strongly disavow.

But the *alternative* to the debilitating, infantile, and indeed irresponsible relativism of the conventional conception, that is implied by the Rule of Law critique, at least as it has so far developed, is basically an equally debilitating professional nihilism. It is not (I hasten to add) a blanket nihilism with respect to *moral values generally*: proponents of the indeterminacy thesis need have no particular set of views regarding the determinacy or indeterminacy of moral claims, or the relativity or stability of moral truths. Thus, one might well believe that legal results are globally indeterminate, and at the same time hold to a fully determinate understanding of the truth of various moral or political propositions. Nevertheless, there is a quite real, if more limited, nihilism implied by the indeterminacy thesis with respect to professional values specifically. If our professional sense of legal idealism is enveloped in the illusive value of the ‘Rule of Law,’ and the Rule of Law amounts to nothing more than a childish and incoherent claim of legal determinacy, then more than our ability to mount challenges to judicial decision-making is threatened: the *idea* of law no longer suggests any particular content to the work of politics, or any

particular point of reference by which political work can be criticized. The lawyer's role, accordingly, is reduced – or elevated – to that of political operative, but with no sense of the value of law that might inform that reconstructed role. Lawyers as lawyers, or law professors as law professors, or judges as judges, have nothing to say regarding our political and civic lives, and no cause for complaint when the course of those lives becomes seemingly lawless.⁵⁹

All of these problems that beset both the indeterminacy thesis in particular, and the Rule of Law debate more generally, are on vivid display in the recent article by Professor Frank Michelman of Harvard Law School mentioned above, regarding the selection by the Supreme Court of George W. Bush as President of the United States.⁶⁰ In that piece, Professor Michelman explains, and then tries to justify, his refusal to sign the 'Law Professors' Letter' circulated in the wake of the Supreme Court's decision, signed by about 700 law professors, and published in the *New York Times* and various other news outlets, in which the signatories decried the Court's actions as a violation of the Rule of Law, and hence a betrayal of the ideals to which law professors have devoted their 'professional lives.' Even though Michelman strongly disagreed with the Court's intervention and eventual decision in *Bush v. Gore*, even though he regarded it as politically motivated, and even though he was clearly alarmed at the prospect of a conservative republican presidency, and particularly by the consequences of such a presidency for the federal judiciary, Michelman could not bring himself to sign onto the sentiment expressed in the letter's conclusion: that the intervention was a 'betrayal' by the Court which ought to be protested, specifically, by 'law professors dedicated to the Rule of Law.'⁶¹ He could not sign on to that sentiment, he explained, because of the influence upon him of the Critical Legal Studies movement, and specifically, because of the power of the critique put forward by that movement of the Rule of Law, and its attendant ideology.⁶²

Well, why not? What was it, in the critique of the Rule of Law propounded by critical scholars in general and Mark Tushnet in particular, that precluded Michelman from signing on? Although he does not much elaborate, we might flesh out his complaint in this way: the Rule of Law, the Law Professors' Letter could fairly be read to imply, requires that judicial actions and decisions be grounded in, or at least (loosely) logically deduced from prior decisions and pre-existing law: in this case, primarily, the Court's prior decisions interpreting Article II Section One, as well as the Equal Protection Clause of the Fourteenth Amendment, and the Florida statutory law governing elections. But the Court's decision to stop the vote counting, the letter might be read to imply, cannot possibly be so derived, and surrounding circumstances, furthermore, make the conclusion seemingly inescapable that factors other than law dictated the Court's actions. So far, Michelman was surely in agreement – he had in fact argued as much in an article⁶³ that came out concurrently with the Law Professors' Letter. But, Michelman presumably reasoned, what critical scholarship has taught us is that the fact that the Court's decision cannot be justified by prior law, hardly distinguishes their decision from any number of others: the logical deduction of legal conclusions from what went before is often, and maybe always, flatly impossible. The inability, then, of the Court's supporters to identify a sustained line of logic from precedent to the particular outcome in *Bush v. Gore*, is

not particularly damning or even distinctive. There concededly is not some mosaic, or tapestry, or seamless web, of prior decisions – statutes, codes, decisions, constitutions, texts, primary documents, and all the inferences one can possibly draw from all of that – from which *Bush v. Gore* follows, but nor is there any such mosaic from which it follows that *Bush v. Gore*⁶⁴ was wrong. It is indeed the case that *Bush v. Gore* does not follow logically from prior decisions, but likewise all decisions, certainly including, say, *Brown v. Board of Education*,⁶⁵ or Holmes's dissent in *Lochner*,⁶⁶ hardly follow from prior decision. None of these momentous decisions follow from that which preceded them – that is what makes them momentous. But it does not follow that they violate the 'Rule of Law,' and therefore of any distinctive legalistic or lawyerly ideal.

Michelman's response to the Law Professors' Letter clearly reflects the dilemmas posed by the Rule of Law debate, and particularly the problems posed by the Rule of Law critique for the Rule of Law critics, when faced with apparent judicial lawlessness. The first problem, posed by the critique, for critics, is self-evident: given a firm belief in global (rather than partial) indeterminacy, it is virtually impossible for *Bush v. Gore*, or any judicial decision, to be *wrong* – the decision might be unfortunate, too bad, or even 'unjust' (in some sense) but not wrong. This outcome, though, is not only belied by common sense and experience, but it also leaves the critic with only tepid responses in the face of apparent judicial lawlessness, including lawlessness of truly historic proportions. The charge that a momentous decision such as *Bush v. Gore* does not follow the law, given the claims of the indeterminacy thesis, *even if true*, becomes not a damning critique of the decision and the Court that rendered it, but, rather, a true but trivial conclusion – after all, no decisions follow from what went before. At most, given indeterminacy, the complaint that the decision was wrongly decided can assert that the motives for the reasoning are not forthrightly asserted. But no matter how bad the motives, and even no matter how sloppy the reasoning, if there is no chain of logic that can rule conclusions in or out of contention, then there is simply no ground for the claim that the outcome is wrong. There is, then, no ground for the serious moral charge that the deciding authority is culpable of a wrong more serious than inauthenticity.

One might contrast, in this regard, a commentary by the noted California ex-State's Attorney, Vince Bugliosi (of Charles Manson fame), that appeared in *The Nation* shortly after the election.⁶⁷ In that article (soon to be forthcoming as a book), titled *Why Don't They Call It Treason*, Bugliosi argued that the Court's decision was so thoroughly discreditable that it amounted to a theft of a federal election, and as such constituted a *malum in se*, fully indictable crime, and ought to be treated as such. The Justices, he argued, behaved as common criminals – they stole an election, and they did so by grotesquely misstating the law that applied to the case before them.⁶⁸ They ought to be impeached, he argued, and then criminally prosecuted:

If indeed the Court, as the critics say, made a politically motivated ruling (which it unquestionably did), this is tantamount to saying, and can only mean, that the Court did not base its ruling on the law. And if this is so (which again, it unquestionably is) this means that these five Justices deliberately and knowingly decided to nullify the votes of the 50 million Americans who voted for Al Gore and to steal the election for Bush. Of course, nothing

could possibly be more serious in its enormous ramifications. The stark reality, and I say this with every fiber of my being, is that the institution Americans trust the most to protect its freedom and principles committed one of the biggest and most serious crimes this nation has ever seen – pure and simple, the theft of the presidency. And, by definition, the perpetrators of this crime have to be denominated criminals.

Since the notion of five Supreme Court Justices being criminals is so alien to our sensibilities and previously held beliefs . . . most readers will find my characterization of these Justices to be intellectually incongruous. But make no mistake about it, I think my background in the criminal law is sufficient to inform you that Scalia, Thomas et al are criminals in the very truest sense of the word.⁶⁹

My point here is not that Bugliosi was right in so alleging. Rather, my point is that the type of forceful criticism that he made – a pointed allegation that judges behave lawlessly (and hence criminally) when they intentionally misstate the law so as to achieve a result desired on political grounds – is logically unavailing, if the indeterminacy critique holds. Even if one could show criminal intent, motive, circumstance, etc., there is no way one could make out the criminal *act* – the act, after all, is theft of the election through the intentional misapplication of the law, and the law, given indeterminacy, simply cannot be so misapplied, and an election, therefore, simply cannot be ‘stolen’ by judicial malfeasance. The consequence, more generally, of the indeterminacy thesis, is that judges can basically commit no greater wrong regarding the law than the somewhat personal and decidedly precious existential sin of inauthenticity. This leaves a serious gap, when the judicial misconduct seems far greater than that, and hence the need for just such criticism arises: during times of judicial complicity – through criminality and complicity, rather than simply inauthenticity – in state-sanctioned evil.⁷⁰

Michelman’s article also, however, illustrates the second problem facing the Rule of Law critics, and this second problem is equally shared by Rule of Law advocates: blinded by the light of indeterminacy, and by the bewildering debate the indeterminacy thesis has engendered regarding the liberal understanding of the Rule of Law, Michelman sees no logical space for other values, possibly embedded in the ‘Rule of Law,’ which might have been offended by *Bush v. Gore*, to which lawyers and law professors might feel some allegiance, and as a consequence of which, might prompt a feeling of betrayal when that ideal is compromised. The ‘Rule of Law,’ Michelman suggests, requires determinacy, determinacy is impossible, hence the Rule of Law imposes nothing but an impossible constraint on judges, and therefore, there is no coherent violation of a ‘Rule of Law project’ when the Court acts ‘unlawfully.’ There is no distinctive sense of outrage, then, Michelman goes on to argue, which lawyers *as lawyers* – or at least those lawyers savvy to the indeterminacy thesis – ought feel, in the wake of a decision such as *Gore v. Bush*.⁷¹ The unstated premise of this argument is that determinacy exhausts the meaning of the Rule of Law, and the Rule of Law exhausts the distinctive ideal that lawyers hold out for law.

Through this chain of reasoning Michelman reaches what I regard as his truly depressing conclusion – the ‘Law Professors’ Letter,’ Michelman concludes, is wrongheaded in suggesting that law professors, or, for that matter, lawyers, have been

specifically, as professionals, wronged or betrayed by the Court's decision. Whatever disgust, or anger, or betrayal, law professors might feel in the wake of that decision, Michelman suggests, is political, pure and simple, not legal.⁷² There is no determinate legal ground to stand on, if one wishes to cloak that disgust in the Rule of Law, once one grasps the inescapable meaning of the indeterminacy thesis. If lawyers are disgusted by *Gore v. Bush*, they are disgusted *as citizens*, not as lawyers. There is no violation of any Rule of Law to which lawyers or law professors owe distinctive allegiance, because there is no meaning of the Rule of Law beyond determinate outcomes – a meaning proven impossible by the indeterminacy thesis of the Critical Legal Studies movement, which, he makes clear, he has found to be, apparently, largely persuasive.

This part of Michelman's conclusion, however – that because of indeterminacy, *Bush v. Gore* does not violate the Rule of Law, and therefore does not violate any distinctive aspiration of legal professionals – clearly rests on the unstated premise that the conventional, contemporary understanding of the Rule of Law as expounded in liberal legal academic scholarship – a requirement, primarily, that Courts render consistent and principled decisions – is the *only* value embedded in the Rule of Law that is even remotely consistent with our history, or with our political and legalistic ideals. And it is this premise – that legal determinacy is the only value reflected by the Rule of Law – shared by both advocates and critics of the Rule of Law – that, I think, is wrong. The Rule of Law embraces a goodly number of legalistic virtues, not all of which are reducible to legal determinacy. If that's right, and if the Court's critics are right that *Bush v. Gore* is not sustainable, then Michelman's (and others') conflation of the Rule of Law with determinacy does more than render unavailable the (rhetorically) harshest possible criticism of that decision. It also precludes the possibility, and precludes the critic from seeing the possibility, that that decision, or others, might violate core, legalistic, Rule of Law values that depend on but also go beyond the perimeters of legal determinacy and judicial fidelity to law. It thereby precludes the question of what those values might be, and how they might contribute to the imaginative construction, or reconstruction, of a lawyer's professional identity.

The Rule of Law in Hobbes's *Leviathan*

Whether or not the Rule of Law commits us to the project of determinate legal answers, through judicial enforcement of reasoned law, so as to constrain the workings of impassioned politics, there are at least two other ideals, or common projects, to which the Rule of Law commits us, and which ought to be of relevance to the workings of lawyers, that have been slighted or ignored by legal theorists over the last half century, and in large part because of our excessively court-focused debates over fidelity and indeterminacy. Both suggest the possibility of values embedded in the 'Rule of Law,' and our various 'Rule of Law' traditions, that extend beyond legal determinacy and the judicial fidelity it facilitates, or indeterminacy, and the fidelity it frustrates.

The first such ideal, and correlative non-court-centered interpretation, is indirectly suggested by the conventional conception's quasi-Lockean origins: as our modern,

court-centered conception of the Rule of Law owes its origins, in part, to the libertarian and (qualifiedly) anti-statist writings of John Locke,⁷³ one alternative to it might be found in the quite different, decidedly non-libertarian, but nevertheless equally 'liberal' conception of the Rule of Law found in the writings of Thomas Hobbes.⁷⁴ Hobbes, famously, was no early supporter of those parts of the Lockean conception eventually transported into American constitutional mythology: Hobbes saw no *prima facie* reason to prefer democracy to monarchy,⁷⁵ and saw no logical space, much less practical need, for negative, individual rights of conscience, property, or liberty against the state.⁷⁶ Both are, today, core components of our jurisprudential and constitutional self-understandings. Nevertheless, it is somewhat surprising that the contours of a Hobbesian understanding of the Rule of Law have been relatively neglected by contemporary legal scholars, both by Rule of Law critics and Rule of Law enthusiasts. Outside of legal scholarship, Hobbes's jurisprudential no less than his political writings are routinely invoked as a foundation, not the antithesis, of modern conceptions of the liberal state,⁷⁷ and for good reason: his insistence that good laws are those which inure to the benefit of the governed,⁷⁸ that judges must decide cases in accordance with equity, rather than the letter of the law,⁷⁹ that law that is not adequately communicated to subjects, for whatever reason, cannot properly be understood as law and hence should not be enforced,⁸⁰ his egalitarian claim that law, and the sovereign that creates it, must protect all equally, since all have equally entered into the compact that created it,⁸¹ and his central but often overlooked claim that the Sovereign is the representative of the Commonwealth, and acts in their capacity,⁸² all are now easily recognizable as fundamentally liberal understandings of the relation of state to subject. Most important, I will suggest below, Hobbes's insistence that a political state that monopolizes legitimate violence is to be preferred to a natural state in which all legitimately defend themselves against the aggression of others, is deservedly understood to be a cornerstone of contemporary as well as classical liberal thought. It is worth spelling out, then, what a Hobbesian 'Rule of Law' might be, how it squares with our modern understanding of liberal government, and whether or not it is compatible with American legal ideals.

Before doing so, though, it is worth emphasizing that whatever a 'Hobbesian Rule of Law' might be, it will not much resemble either the understanding of the Rule of Law implied by Locke's social contract, or the modern conception that Locke's contract, in part, inspired. One need not read between the lines to find the antipathy: Hobbes quite explicitly rejects the rhetorical, jurisprudential and political underpinnings of the conventional modern account. Thus, the relentlessly positivistic Hobbes openly derided the Aristotelian ideal, embraced by liberal theorists from Locke to Rawls and as an article of faith by legal Rule of Law theorists, of a 'government of laws and not of men':

[A]nother error of Aristotle's Politics, [is] that in a well ordered Common-wealth, not Men should govern, but the Laws. What man, that has his naturall Senses, though he can neither write nor read, does not find himself governed by them he fears, and beleeves can kill or hurt him when he obeyeth not? Or that beleeves the Law can hurt him; that is, Words, and Paper, without the Hands, and Swords of men?⁸³

He also derided Lord Coke's attempt to argue that the 'Law' properly consisted of principles of Right Reason, discernible through the long study of judges and commentators on the law. And, he was no ally of what I have above called the 'global determinacy thesis' at the core of the modern Rule of Law – the claim that all legal answers must be generated from known, public rules, and applied by judges who passively find, rather than create, pre-existing law. This, Hobbes suggests in arguments that prefigure the critical scholars' claims of indeterminacy, is just not possible, given the ever-present need to interpret law, whether it be common law, legislative, or constitutional.⁸⁵ Rather, Hobbes suggested, the Judge, as the subordinate representative of the Sovereign, who is himself the representative of the Commonwealth, must decide cases according to the will and reason of the Sovereign,⁸⁶ but at the same time the Judge must assume that the Sovereign intends results that accord with the demands of Equity and justice. The result is that legal decision-making, for Hobbes, will have the elasticity – the indeterminacy – that such an explicit reliance on Equity virtually demands.⁸⁷

Most generally, Hobbes squarely rejected the claim, common to both Locke and the contemporary conventional conception, that 'law' should be understood as a 'check' on the political state, for the simple reason that law, for Hobbes, is rigorously identified as the *product* of politics, not something standing apart from it, much less superior to it. Law, Hobbes famously held, is nothing but the Command of the Sovereign – and the Sovereign is the representative of the Commonwealth.⁸⁸ Neither constitutional law, nor common law, nor higher law, nor law in any other sense, can be anything other than the sovereign's will, and none of these sorts or sources of law, therefore, can be invoked as a check on that will.⁸⁹ As Professor Hampton has rightly argued, for Hobbes, when the judge interprets law, he speaks as the sovereign or as the sovereign's representative: no matter what the 'law' he is interpreting, he cannot possibly speak as the sovereign's *limit*.⁹⁰ Law, thought Hobbes, cannot possibly be a check on the political state. Law is the legislated *product* of the political state.

Does it follow, though, as Hampton argues, that Hobbes was therefore a critic of the Rule of Law, or a skeptic regarding the possibility of having one?⁹¹ I do not think so – to conclude that it does only begs the question of the meaning of the Rule of Law. If we assume that the Rule of Law requires judges who can interpret pre-existing determinate law, and who by so doing can limit the power of political sovereigns, then surely, Hobbes was a critic of the Rule of Law. But there is no reason to define the 'Rule of Law' in such a way. If we understand the Rule of Law, instead, as emblematic of a belief in law's value – and, correlatively, of the value of law *abidance* – then a different picture emerges: understood in such a way, Hobbes was a champion of the Rule of Law – in fact, a champion like no other. For Hobbes, law and the Rule of Law, no less than the sovereign that produces it, were social goods with considerable – indeed, nearly absolute – social utility.⁹² The difference between Hobbes's understanding of the Rule of Law, and contemporary liberal Rule of Law theorists, is *not* that Hobbes was a Rule of Law skeptic who derided law's value.

Rather, the difference between them is that for Hobbes, law derives its value not from its function as a check on the political state, but rather, from its function as a

'check' on the excesses and cruelty of private power. Life under even the near absolute power of an unchecked state – a Leviathan – Thomas Hobbes urged half a century before the revolutions that Thomas Paine's writings precipitated, is an improvement over the shortness and brutality of life in the state of nature – the very state of war that revolution demands.⁹³ Without 'law' – by which, Hobbes famously meant the positive edicts of a sovereign authority – those with momentary power in the state of nature terrorize, kill, enslave, or exploit those with less power, and as power is fleeting, all in such a state live either in servitude or in fear of it, virtually all the time.⁹⁴ Hobbesian law – facilitated by joint submission of all to an authority – is better than Hobbesian nature – joint terror of the violent propensities of the other.

Because it is better, Hobbes thought, a duty – quasi-contractual – of obedience to law flowed: citizens have a near absolute interest in consenting to the construction of a near absolute duty to obey the near absolute edicts of the Commonwealth's sovereign representative, at least so long as the sovereign's rule insures their relatively greater security in civil as opposed to natural life. A Hobbesian Rule of Law, then, might be understood in modern terms as expressing a commitment to the relative value of law – understood positivistically as the edicts of publicly recognized sovereign – over the violent, natural propensities of private parties. It is a preference for *law* – meaning, the product of virtually any sort of organized political authority – over a state of 'no law,' or lawlessness, and it is a preference for 'law' over 'no law' on the grounds that physical insecurity, in the form of vulnerability to private violence, is the greater evil to be avoided through political action. Any form of government that avoids it, has earned and deserves its citizens' obedience.

This Hobbesian Rule of Law contrasts quite sharply with the contemporary view, no less than with its Lockean counterpart to which the contemporary view claims allegiance. First, the *nature* of the duty of fidelity owed by the citizen to law is distinctively non-moral – rather, it is prudential through and through. Law, definitionally, for Hobbes, should be understood in entirely positivistic terms – it owes none of its identity to any moral criteria, whether drawn from religious or secular authorities. It is nothing but the product of organized political will. This alone contrasts with contemporary Rule of Law rhetoric as well as theory: contemporary reverence for the Rule of Law, in popular and theoretical treatment, generally rests on the claim that Law must by definition meet some moral criteria, not only so as to distinguish it from politics, but also so as to render it deserving of the citizens' respect. Second, the *source* of Law's value is distinctly different in the Hobbesian than in the contemporary conception, as is the nature of the duty to obey it. For Hobbes, law has value, and should be obeyed, not because it operates as a check on politics, but almost for precisely the opposite reason: it has value, and ought be obeyed, solely by virtue of its thoroughly political role in protecting the security of the citizen from private assault. Third, the understanding of what might be called 'Law's target' – the evil toward which 'law' is addressed – is not the political or public realm of state action, but rather the private realm of assault, violence, and private subordination. Thus, the private, legally unregulated realm, for Hobbes, is a place of violence, terror and subordination – in short, of such physical and psychological harm as to render virtually any politically organized monopolization of force

preferable. The public realm of political authority, by contrast, at least has the virtue of promoting the security of the people. Fourth, the activist state the Hobbesian envisions – unencumbered, unlike the Lockean, with natural individual rights that limit its power and authority – obviously contrasts with the minimalist state pictured by the now conventional and generally libertarian account. Fifth, the ‘law’ the Hobbesian Rule of Law endorses is the law that is produced by the legislative sovereign, not the ‘law’ produced by the restraining hand of a backward-looking court. And finally, the end, or goal, we seek to accomplish through the project of law is the end of peace and security among private parties, rather than the end, or goal, of a restrained political branch. To summarize, the Hobbesian Rule of Law is to be valued, and ought to be obeyed, not because it is a *check* on politics, but because it is a product of politics, and as such, is a thoroughly political, positivistic, and preferable alternative to the risks of private violence. The Hobbesian Rule of Law expresses the basic conviction that law – public authority – is preferable to the terrorizing and subordinating horror of unconstrained private life.

Now, this Hobbesian understanding of the Rule of Law is free of at least some of the flaws of the conventional interpretation of the Rule of Law that have been highlighted by critical scholars. Most importantly, the Hobbesian account of law and its value, unlike the conventional understanding, is in no way hostile to the state or state activism; indeed, it trumpets the political state as the antidote to private misery, and identifies the law it seeks to legitimate as the product of state politics. Nor is the Hobbesian understanding of the value of law dependent upon the coherence of the global determinacy thesis (which Hobbes did not hold). Most revealing, it does not impose impossible constraints of rationality, coherence, neutrality, or fit, on those charged with the duty to uphold it. Rather, it depends on a sovereign with political will and power. Nor does it, rhetorically, posit a realm of law, reason, and rationality separate from and a constraint upon a realm of politics, passion, and whimsy. Rather, it posits law as politics’ entirely predictable, and entirely desirable, product.

Further, Hobbes’s central insight – that freedom from private terror is a necessary part of the good life, and that a sovereign state is necessary to achieve that freedom – is by no means at odds with classically liberal theories of the state, broadly understood – although it may well be at odds with libertarian views. Indeed, if liberalism is understood broadly, it is as central as the conventional account’s mandate of judicial constraint. Thus, far from disowning or even distancing himself from a Hobbesian account of the necessity of law, John Rawls, in the same chapter on the Rule of Law in *A Theory of Justice* in which he embraces something like the modern conception’s understanding of the Rule of Law as a constraint on judicial whimsy, *also* embraces what he calls ‘Hobbes’ thesis.’⁹⁵ ‘Hobbes’ thesis,’ Rawls argues, far from being antithetical to liberalism, constitutes the core rationale of both ‘law’ and the ‘Rule of Law’ in any decent liberal society. Here, though, Rawls is clearly meaning by the ‘Rule of Law’ not judicial fidelity to pre-existing rules, or the insistence that judges decide ‘like cases alike,’ but rather, the foundational necessity of political sovereignty itself, to any measure of individual liberty:

It is reasonable to assume that even in a well-ordered society the coercive powers of government are to some degree necessary for the stability of social cooperation. For although men know that they share a common sense of justice and that each wants to adhere to the existing arrangements, they may nevertheless lack full confidence in one another . . . The suspicion that others are not honoring their duties and obligations is increased by the fact that, in the absence of the authoritative interpretation and enforcement of the rules, it is particularly easy to find excuses for breaking them. Thus even under reasonably ideal conditions, it is hard to imagine, for example, a successful income tax scheme on a voluntary basis . . . By enforcing a public system of penalties government removes the grounds for thinking that others are not complying with the rules. For this reason alone, a coercive sovereign is presumably always necessary . . . [T]he existence of effective penal machinery serves as men's security to one another. This proposition and the reasoning behind it we may think of as Hobbes's thesis.⁹⁶

The 'Hobbesian thesis' – that political sovereignty, and the law it produces (rather than the law that constrains it) is necessary to liberty and contentment – is central, not peripheral or antithetical, to liberal understandings.

Finally, how does this Hobbesian alternative fare, as a competitor with the dominant conception, as an interpretation of *American* Rule of Law ideals? Clearly, if taken exclusively or in its purest form, the Hobbesian account of the Rule of Law is unsuitable as an alternative interpretation of the distinctly American commitment to the Rule of Law: there is no pride of place, in Hobbes' jurisprudence, for either democracy or negative rights, and it is not possible to make sense of American understandings of the Rule of Law without embracing those commitments. Nevertheless, the bedrock Hobbesian understanding of the value of law, the point of law, and hence the Rule of Law, is by no means foreign to American history or practice, or to American understandings of law's value. Hobbes's understanding of the desirability of positive law, and its value as a constraint on private violence, rather than as a constraint on public will, has been shared by prominent legal movements in our history. Two in particular are noteworthy.

First, much of our constitutional history – and particularly the forward and backward progress of the ideals expressed in the Reconstruction Amendments of the United States Constitution – might be viewed as on a continuum between an increasing appreciation, and then depreciation, of Hobbes's essential insight regarding the desirability of political over natural forms of communal life. Hobbes claimed that all persons in civil societies enter into such states so as to procure the protection of the state against private violence. If so, then the quasi-contractual (and completely 'positive') 'right' of such citizens to such protection is shared and shared equally by all who have given up their natural right to assure their own self protection. Although we still do not perfectly recognize such an equalizing and universally shared right, nevertheless, through the on-again, off-again application of our guarantees of equal protection of the law and due process of law, we have (arguably) repaired our most egregious failures. Most notably, of course, pursuant to the Civil War and the Thirteenth Amendment that followed it, we no longer refuse to extend the protection of the law against private violence to a class of slaves, who, without the state's protections, are thereby subjected to the Leviathan violence of *masters*. This

expansion of liberty and freedom was fully dependent – logically and militaristically – on the extension of the *Hobbesian* – not the Lockean – Rule of Law – in Rawls’s language, ‘Hobbes’ thesis’ – to freed slaves.⁹⁷ The Leviathan must protect the slave against the subordinating violence of the master, if the slave is to be free, and for that to occur, the state must assert its power and its authority – not its self-restraint.

Similarly, the entire institutional practice of ‘lynching’ that followed emancipation was a clear, paradigmatic violation of a Hobbesian – although not a Lockean – Rule of Law: the state’s refusal to protect individual citizens against lethal assault, is a quintessential violation of the Rule of Law, meant in this purely Hobbesian sense.⁹⁸ By not policing against lynching, the state failed its one essential duty of protecting the citizen against the lethal savagery of the State of Nature. Likewise, the refusal of state authorities to protect wives and children from the violent assaults of domestic patriarchs – justified, in the nineteenth century, by a complex ideological commitment to separate, sexually defined spheres, and the need for an authority within the domestic, and in the twentieth-century by an equally complex ideological commitment to ‘privacy’ – is a stark violation of the Rule of Law, understood in Hobbes’s sense.⁹⁹ To generalize from these examples, some of the most praiseworthy ‘expansionist’ and state-activist moments in our legal history – most notably the passage of both the Thirteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment – can be understood as moved by a growing recognition of the central Hobbesian idea that citizenship rests on the expectation that the citizen will be protected against private assault. To that degree, the growing commitment to the Hobbesian (rather than Lockean) Rule of Law can be regarded as central, rather than peripheral, to America’s most transformative, and ennobling, constitutional moments – and hence to our constitutional history, narrative, and self-identity.

Second, Hobbes’s understanding of law’s value, and his less than cheery conception of private, legally unregulated life on which it rests, is at the heart of wide swaths of progressive and radical twentieth-century law reform projects. The labor movement virtually *in toto*, some strands of modern feminism, and a good bit of contemporary critical race theory, for example, share with Hobbes the unhappy, non- or anti-Rousseauian view that private life can be riddled with decidedly non-romantic violence, subordination, irrational subjugation, and terror, and that law can be understood, and ought to be valued, as an antidote to that private domination.¹⁰⁰ Contemporary efforts, based on that Hobbesian world view, to subject private behavior to the sanction of law, from unionists attempts to equalize the relations of labor and capital, to feminist efforts to criminalize domestic violence, marital rape and date rape,¹⁰¹ to critical race theorists’ efforts to impose sanctions on hate speech and to intensify criminal penalties for hate motivated crimes,¹⁰² can all be viewed as resting on a modern version of the central Hobbesian insight that the presence of law is better than the private hell people impose on each other in law’s absence. Some people, when undeterred by law, do create hellish, private states of nature for each other: in the private spheres of intimacy, some people are inclined to rape, and assault, and kill, and in the private spheres of commerce some are inclined to exploit, and subordinate, and oppress. Law, compared to these private hells, according to Hobbes, unionists, radical feminists, left-leaning or Marxist critical legal scholars, and critical

race theorists all, stands as a distinct improvement. A Hobbesian understanding of the Rule of Law, in short, is far more compatible with anti-subordinationist views of justice and of the role of law in eradicating it, than is our contemporary equation of the Rule of Law with limits on political action.

Even more broadly, though, Hobbes's commitment to an activist state, to the value of law produced by such a state, and his concomitant hostility to property or civil rights that might limit such value, render Hobbes's Rule of Law, in contrast to the Lockean, reflective of a state that is to be desired rather than to be feared, and is desirable rather than undesirable for its activism, rather than for its restraint: the law we purportedly value in a Rule of Law society, according to Hobbes, is identified with the product of state activity, not with limits upon it. For example, in lengthy passages in the *Leviathan* that prefigure contemporary scholarly attempts, by neo-civic republicans and others, to refashion a liberal argument for an activist, rather than restrained state,¹⁰³ Hobbes argued that a fundamental duty (as well as right) of the Commonwealth, or the Sovereign, whether Monarch or Assembly, was to distribute property, and to do so in accordance with the Common Goods of Peace and Security:

The Distribution of the Materials of this Nourishment, is the constitution of Mine, and Thine, and His; that is to say, in one word, Propriety; and belongeth in all kinds of Common-wealth to the Sovereign Power. For where there is no Common-wealth, there is (as hath been already shewn) a perpetuall warre of every man against his neighbour; And therefore every thing is his that getteth it, and keepeth it by force, which is neither Propriety, nor Community; but Uncertainty . . . Seeing therefore the Introduction of Propriety is an effect of Common-wealth; which can do nothing but by the Person that Represents it, it is the act onely of the Sovereign; and consisteth in the Lawes, which none can make that have not the Sovereign Power . . .¹⁰⁴

Hobbes goes on to argue, in language not dissimilar to that put forward by liberal, Sunsteinian advocates of greater state regulation of private property,¹⁰⁵ that it is therefore the Sovereign's judgment, not the individual's, that should guide the distribution of property¹⁰⁶ and, that, while the subject has the right to exclude other subjects from his property, he does not have the right to exclude the sovereign.¹⁰⁷

Thus, not just attempts to criminalize private violence, but likewise, attempts to subject the potentially injurious behavior of strong private actors of all sorts to politically derived, lawful sanction, can be understood as expressing a Hobbesian, rather than a Lockean, understanding of the value of law, and hence of the Rule of Law – including, for example, New Deal era legislation that requires minimum wage and safe working conditions in labor contracts, contemporary use of tort sanctions and punitive damages awards to sanction the behavior of corporations otherwise unconcerned with the private injuries it causes, political efforts now underway to attempt to limit the reach and impact of globalization and to do so by use of and reference to law, whether domestic or international, and attempts to force polluting industries and the countries that license them to limit the damage done, somehow, through the operation of law. All of these endorsements of 'law' over 'no-law,' might be understood as resting on the fundamentally Hobbesian understanding of the general preferability of law, and a fundamentally Hobbesian distrust of the capacity

and will of private actors to achieve the requisite level of regard for others, in law's absence. Put differently, they rest on the Hobbesian understanding that the interest of the community is best served through organized political rule, rather than through privatized efforts at self-advancement. The Rule of Law, for the contemporary proponents of these sorts of constraints, as for Hobbes, is of value, not because law limits politics, and the state, but rather, because law is the product of politics, limits private action, and evidences the presence of an active state.

How, though, should this Hobbesian Rule of Law be evaluated? On the plus side, Hobbes understood, and articulated, as has no other liberal theorist since, the need for and the positive value of states, and the laws they produce, particularly as contrasted with the violence and chaos that rule in their absence. Hobbes, more so than Locke (although Locke follows Hobbes on the point) emphasized the root *desirability* of the state, of politics, and of the law that is its product. A Hobbesian understanding of the Rule of Law, and of the 'value' of law that the 'Rule of Law' signals, should stand at least as a complement, or counterweight, to the dominant account's now excessive libertarianism, court-centeredness, and willful blindness to the value of politics. Put differently, the Hobbesian Rule of Law serves as a reminder of the limits of the dominant conception's Lockean heritage, no less than the Lockean conception of liberalism has for two hundred years now served as a reminder of the need to limit the reach of Hobbes's Leviathan. Hobbes's insight is precisely what is neglected by the dominant account's insistence that the core purpose of law is to constrain and limit the state, and to thereby maximize rather than limit individual freedom. That law is essential, in the first instance, to secure peace and cooperation, and is for that reason preferable to lawlessness, ought to be regarded as at the core of a full and fully liberal account of the Rule of Law.

The defects of the Hobbesian Rule of Law, however, are obvious to modern liberal eyes: as noted above, Hobbes disavows what we now regard as essential negative rights against a state's over-intrusiveness, sees no practical need or logical way to advocate limits on sovereign power, and makes no appeal to democratic accountability as a way to insure that the interests of the sovereign remain aligned with the interest of the governed who delegated power and authority to the Leviathan in the first instance. To put the problem in terms of Hobbes's own jurisprudence, while Hobbes clearly demonstrated the need for the Leviathan – the murderous incompatibility of human inclinations, in a state of nature – he provided no reason to think that those human inclinations would be in any way tamed, or civilized, when some, but not all, of the individuals who possess it are elevated to the status of 'sovereign.' The 'public will' he advocated as a solution to the problems posed to security and contentment by the 'private will' seem to be subjected to the same failings, if his general understanding of the nature that requires it is sound. Indeed, Mark Tushnet identifies this problem with Hobbesian thought as *the* central dilemma of classical liberalism, which leads directly to the construction of the conventional account of the Rule of Law: general legal rules, limiting sovereign authority, according to Locke, Rawls, and most contemporary liberal legalists, are the only way to address, and cabin, the Hobbesian nature of the Leviathan.¹⁰⁸ That solution, in turn, leads to the paradox, or dilemma, on which critical scholars focus: the indeterminacy

of rules cannot constrain the judge, who hence becomes, by sheer force of logic, the untamed leviathan, subjecting the citizenry to the unabated risks of a short and brutal life.

It is important to stress at this juncture (because it is often forgotten) that Hobbes himself *does* have an answer to the Hobbesian dilemma, and it is quite different from the conventional account's. Hobbes's Leviathan, according to Hobbes, differs in theory from the powerful individual in the state of nature, by virtue of the fact that the Leviathan 'represents' the commonwealth,¹⁰⁹ is legitimated by their consent to its rule,¹¹⁰ ideally acts in their interest,¹¹¹ and is owed allegiance only so long as it continues to protect them.¹¹² The Leviathan, in other words, *ought* to act differently from the powerful individual in the state of nature, and apparently, solely by virtue of his public identity, will be inclined to do so: the 'public will' just is superior to the private. The sovereign, to use H.L.A. Hart's helpful phrase, is *not* the gunman situation writ large, even for Hobbes; it is the gunman legitimately empowered by the people, constructed by the people, and with the people's interest as the end of his command. What Hobbes lacked, then, was not so much awareness of the need to differentiate the powerful sovereign from the powerful natural individual, but rather, any explanation of how to hold the leviathan's feet to the fire: how to ensure the leviathan's continuing identification with the interests of the commonwealth it represents.

One possible way to do so might be that suggested by Locke, developed by American constitutionalists, advocated by contemporary Rule of Law theorists, and then criticized by critical scholars: hold the Leviathan to the social contract through constraining rules of law, thus subjecting the political leviathan to legal constraint. But whether or not that's possible – and again, the bottom-line message of critical scholarship is that it is not – there may be other possible solutions as well. One such possibility may be democratic accountability. It may be – as the Hobbes scholar and political philosopher Jeanne Hampton has recently suggested – that the best way to complete the logical projectory of Hobbes's thought is not through the idea of constraining the Leviathan through rules enforced by courts, but rather, by ensuring the identity of interest between the embodied leviathan and the interests of citizens through the various practices of democracy.¹¹³ It is to just that possibility, and its exploration in the American patriot Tom Paine's philosophical and revolutionary tracts, that I turn in the next section.

Thomas Paine's Rule of Law

Like Thomas Hobbes, Tom Paine never spoke directly of 'The Rule of Law.' He did, however, like Hobbes, write on the value and meaning of law, of constitutions, and of courts, and, like Hobbes, he clearly had a passion for Law. In America, Paine famously declared, and we today ritualistically repeat, the 'Law is King.'¹¹⁴ But what did he mean by that? Out of context, it is tempting – but, I will argue, mistaken – to read into Paine's commonsensical claim a quasi-Lockean commitment to constitutionalism. 'Law,' on this reading, limits the sovereign, political state in a

republican democracy, just as the 'King' limits parliament in a monarchical democracy, and both do so, furthermore, on the basis of reasoned discernment of principle: the difference, of course, being that 'law' in a democratic republic is discerned by reasonable courts, while the King's edicts are determined by the whimsical King. Read in this way, Paine, like Locke, basically presents constitutionalism – and law – as a unified response to the problem of power implied by, and then left unanswered by, Hobbes: if private will is murderous, as Hobbes feared, why won't that same will, when made public through political ascendancy, be any less so? Again, out of context, Paine's basic declaration sounds like tacit support for the Lockean resolution of Hobbes's dilemma: constitutionalism, and the Rule of Law, is that which limits the sovereign, no less than the sovereign restrains the violence of individual willfulness.

Read in context, however, and against the backdrop of the totality of Paine's writings, Paine's provocative comment regarding the status of law suggests something strikingly different from this Lockean reading. From *Common Sense*¹¹⁵ itself, but also from the later essays *The Rights of Man I*¹¹⁶ and *The Rights of Man II*,¹¹⁷ it seems clear that the 'law' Paine wanted elevated to Kingship, was neither the dictate of a powerful, Hobbesian monarch, representative only through a fiction with the wellbeing and interests of the commonwealth, nor a 'higher law,' or 'Rule of Law,' that stands apart from the political state, imposed upon it in the name of reason, and enforced by courts. Rather, what Paine himself meant by the 'Law,' the status of which he sought to elevate, was the *democratic will of the people*, expressed through representative government, in a functioning, simple democracy. It was not, as in the now conventional, neo-Lockean conception, a common, higher, constitutional, or natural law imposed by courts in a way so as to constrain those democratic workings, and it was not, as in the Hobbesian alternative, the will of just *any* centralized Leviathan that can better protect the people against private power than can those individuals in a natural state. It was the product of a political state, itself democratic, aiming toward the republican end of promoting and protecting the Common Good.

Paine's political views, and the conception of law that rested on them, can be viewed as resting on two basic principles, one or the other of which, but rarely both, was also shared by his co-patriots. The first was taken, roughly, from the general philosophy of civic republicanism current among some of his political contemporaries. Thus, Paine's 'first principle' of government was that government should serve the interests and well being of the people, rather than that of an elite or a monarch. Such a government, Paine thought, is properly called 'republican.' Whether or not a government is republican, Paine urged, is entirely independent of the form it takes: a democracy, monarchy, or aristocracy all might be, or attempt to be, a republican government. Rather, a republican government is defined by its *purpose*, which is to serve the well being of the citizens. The republican Paine explains:

Government is nothing more than a national association; and the object of this association is the good of all, as well individually as collectively. Every man wishes to pursue his occupation, and to enjoy the fruits of his labours, and the produce of his property in peace and safety, and with the least possible expence. When these things are accomplished, all the objects for which government ought to be established are answered.¹¹⁸

A government that has at its object the general wellbeing of the people, thought Paine, is a good government. All others, again regardless of form, fail this basic moral test:

What is called a republic, is not any particular form of government. It is wholly characteristic of the purport, matter, or object for which government ought to be instituted, and on which it is to be employed, RES-REPUBLICA, the public affairs, or the public good, or, literally translated, the public thing. It is a word of a good original, referring to what ought to be the character and business of government; and in this sense it is naturally opposed to the word monarchy, which has a base original signification. It means arbitrary power in an individual person; in the exercise of which, himself, and not the res-publica, is the object.

Every government that does not act on the principle of a Republic, or in other words, that does not make the res-publica its whole and sole object, is not a good government. Republican government is no other than government established and conducted for the interest of the public, as well individually as collectively.¹¹⁹

Paine goes on to ask: ‘What is the best form of government for conducting the RES-PUBLICA, or the PUBLIC BUSINESS of a nation, after it becomes too extensive and populous for the simple democratic form?’¹²⁰ The question leads Paine to his second principle: rejecting the elitism, fear of the factionalized mob, and anti-democratic instincts of his fellow civic republicans, Paine asserts again and again (and throughout his political career, not only in America, but also in England, and also in France) that a *simple democracy*, in which every person participates directly and through equal vote, is the best form, at least in theory. The people, individually and collectively, as a whole, possess the knowledge of their own interest, and the best means to achieve it – neither a monarch nor an aristocracy can better know the interest of a population than the population itself. In practice, however, such a direct democracy is unavailable, where the area to be governed is large, and the population spread thin. Therefore, Paine argues, representative government, and only representative government, can best – because most knowledgeably – serve the interests of the people.¹²¹ Paine was led, then, to advocate a simple, straightforward, representative democracy, because it was best designed to achieve the republican goal of advancing the interest of the people. He admired America and America’s government as much as he did, precisely because it had self-styled itself to achieve just that end.¹²²

The ‘Law,’ implied by Paine’s politics, his understanding of human nature, and his conception of the ideal constitution, and which Paine hoped would replace the status of the monarch, was the people’s will, expressed through democratic politics. It was not a ‘law’ of either higher principle or past precedent, constraining the expression of political deliberation. The Law to be King, in America, was the expression of politics, not a check on it, and the politics that would generate that law would be representative, democratic, and republican, all. It was not a Law that limited governmental or state power, applied by Courts, through either natural or neutral principles, and as guided by rules of precedent. It was a law, rather, that was constituted by the governmental power of a representative democracy.

A Rule of Law, then, based on Paine's understanding of the Law that would be King, in America, would be a Rule of *Politics*, and more specifically a Rule of *Democracy*, not a Rule of Judicial Reason constraining politics. Thus, just as a Hobbesian Rule of Law reminds us of the value of law, contrasted with the violence unleashed by its absence, the Paineian Rule of Law reminds us of the value of democracy, and of the oppression unleashed by constraints upon it. Both insights – Hobbes's understanding of law as the product of politics, and Paine's understanding of law as the product of democracy – are obscured by the conventional account.

Let me try to sharpen Paine's Rule of Law by drawing some contrasts. How does Paine's Rule of Law – in shorthand, a rule that asks us to both participate and respect the outcomes of representative, democratic politics – compare, and contrast, with the conventional account on the one hand, and the Hobbesian alternative to it, sketched above, on the other? The contrast between the royalist Hobbes, who hated civil or revolutionary war, and the republican Paine, who convinced his countrymen of the need for it, is familiar and stark, although there are also continuities between them, which I will stress below. What is perhaps more surprising, though, than the distance between Hobbes and Paine, is the distance between Paine's Rule of Law, and the quasi-Lockean understanding that now dominates our conventional account. Paine's understanding of law, and the law that should replace the king, and the Paineian Rule of Law that is implied by it, is in many ways as far from our modern conventional understanding of the Rule of Law, as it is from Hobbes's *Leviathan*.

Let me begin, though, with the contrast between Hobbes and Paine. Perhaps the most obvious manifestation of the gaping distance between them regards their respective understanding of rights, and the relation of the role of rights to the content of the Rule of Law. The Rule of Law, in the Hobbesian version, serves the end of personal security, and personal freedom from private attack, not the end of personal autonomy, or freedom from state authority. The Hobbesian citizen has a positive right to a state that will protect him against private assault, but has no negative rights, protecting either his property against the state, or his conscience, speech, assembly or worship against unwarranted state intrusion. For Paine, by contrast, no less than for contemporary liberal thinkers, from John Locke to Ronald Dworkin, government *exists* solely so as to protect man's natural rights. Those rights consist not only of a right to security against private assault, but also of rights against intrusion by the state, and which he possesses in common with all other men.¹²³

But there is a second gap, which may be of even greater significance: there is no account of either the logic or the desirability of democracy – of the basic *identification* of the 'People' as 'sovereign' – in Hobbes's jurisprudence. For Hobbes, the legitimate, justificatory basis for the state was its ability to protect the individual against private assault, and it was an entirely contingent question what form of government would best insure that end. For Paine, no less than for contemporary liberals, this indifference to democracy renders an unadulterated Hobbesian Rule of Law so unacceptable as to be nearly oxymoronic. The legitimate purpose of republican government, for Paine, was not – or not only – to protect the security of the people against physical assault from each other. More generally, it was to reflect the will and serve the interests of the people. Not just the best, but the only way such an

end can be insured, is through the mechanism of representative democracy. Law, then, and the Rule of Law, that should displace the King, for Paine but not for Hobbes, must be identified with the product of representative democracy.

The distance, though, between Hobbes and Paine should not obscure the ground they shared. Most important, they both worked within the parameters of social contract theory: for both, the basic legitimacy of the state rested on the consent of the people. For Hobbes no less than Paine, the legitimacy of the 'law' that is the product of a state, which then coerces obedience from citizens, is grounded in a contractual delegation of authority from the governed to the governors. Although he saw no reason to ultimately prefer democracy over monarchy, Hobbes spoke of both the origins of government, and of its justification, in democratic and republican terms that Paine would have found entirely congenial: the 'Sovereign,' or the 'Commonwealth,' is the product of a democratic delegation of authority from individuals, the purpose of which is to preserve the security of the people and the peace of the collective.¹²⁴ Consequently, for Hobbes, as well as Paine, the law, and hence the Rule of Law, that is worthy of respect is the product of the state, and not a check upon it. It is not the law implied by a Rule of Reason imposed by Courts upon a political state.

Perhaps most noteworthy, though, Paine shared Hobbes's view that at least a central purpose of the state is to insure to each citizen protection against the violence and oppression of fellow citizens. Law, and the Rule of Law, Paine argued, this time echoing, not opposing, Hobbes, requires a state to whom the right of self protection has been delegated – thus according to the state a monopoly on the levers of violence. Paine makes this explicit in his discussion of the difference between those natural rights that are retained by individuals after entering into civil society, and those, like the right of self protection, which are delegated to the state. Thus, in a passage of *The Rights of Man*, noteworthy because it is almost a perfect blend of Lockean and Hobbesian understandings of the Rule of Law, Paine explains:

Natural rights are those which appertain to man in right of his existence . . . Civil rights are those which appertain to man in right of his being a member of society. Every civil right has for its foundation some natural right pre-existing in the individual, but to which his individual power is not, in all cases, sufficiently competent. Of this kind are all those which relate to security and protection . . .¹²⁵

The natural rights which he retains [after entering into civil society] are all those in which the power to execute is as perfect in the individual as the right itself. Among this loss . . . are all the intellectual rights, or rights of the mind: consequently, religion is one of those rights. The natural rights which are not retained, are all those in which, though the right is perfect in the individual, the power to execute them is defection . . . A man, by natural right, has a right to judge in his own cause; and so far as the right of the mind is concerned, he never surrenders it: But what availeth it him to judge, if he has not power to redress? He therefore deposits this right in the common stock of society, and takes the arm of society, of which he is a part, in preference and in addition to his own . . .

[C]ivil power, properly considered as such, is made up of the aggregate of that class of the natural rights of man, which becomes defective in the individual in point of power, and

answers not his purpose; but when collected to a focus, becomes competent to the purpose of every one.¹²⁶

And finally, toward the end of his career, in *The Rights of Man II*, Paine drew from this basic Hobbesian assumption the (by then) neo-Hobbesian inference, that the state has an *obligation*, not just a right, to legislate in a way that guarantees the minimal welfare of all citizens, particularly the poor and the aged. For Paine, this meant that an activist state should oversee the direct repayment, to the poor, on a schedule tied to their needs, funds that would guarantee their minimal welfare. He then laid that schedule out, and in considerable detail. The grounds for this state obligation, Paine went to lengths to argue, were decidedly not charity. Rather, the condition of the poor, at least in England, was directly attributable, thought Paine, to the corruption and self-serving nature of aristocratic and monarchic government: because English government was so profoundly anti-democratic, it had unconscionably exploited the poor, primarily through regressive taxation. The repayment to the poor, through tax rebates, should be understood as their right – indeed, an indispensable part of the Rights of Man:

Civil government does not consist in executions, but in making that provision for the instruction of youth and the support of age, as to exclude, as much as possible, profligacy from the one, and despair from the other. Instead of this, the resources of a country are lavished upon kings, upon courts, upon hirelings, imposters, and prostitutes; and even the poor themselves, with all their wants upon them, are compelled to support the fraud that oppresses them . . .

It is the nature of compassion to associate with misfortune. In taking up this subject I seek no recompence – I fear no consequence. Fortified with that proud integrity, that disdains to triumph or to yield, I will advocate the Rights of Man.¹²⁷

The sharp difference between Hobbes and Paine concerned the broader purpose of state government, and the best form of government that could achieve it: Hobbes argued that government exists so as to provide security to its citizens, while Paine urged that the purpose should be more broadly conceived, so as to encompass the interests and wellbeing as well as security of the collective, and that the best way to do so is through representative democracy. The Paineian Rule of Law, like the Hobbesian, is an improvement over the State of Nature, and is so, in large part, because the collective state, rather than the individual, is charged with the duty of protecting the individual's security. But the Paineian Rule of Law requires more of the state than does the Hobbesian, and hence imposes more duties upon it: it requires a state that protects natural rights better protected in the state than in nature, and it requires a state that serves the interest and wellbeing and not just the physical security of the people. The state best situated to do so, Paine thought, is representative democracy, and the way that it best does so, is through the passage of law. The Rule of Law that displaces nature, for Hobbes, is the protective arm of the state. The Rule of Law that displaces the monarch, for Paine, is the voice of the people expressed through the will of their representatives. The Rule of Law is the Rule of Democracy.

Now let me turn to the more striking, certainly more surprising, contrast between Paine's view and the contemporary conception. At least on the evidence of his writings, beginning with *Common Sense* and on through to *The Rights of Man I and II*, Paine obviously held out great hopes for law. And, Paine would have had no objection to the bland directive at the core of the modern conception, that courts should find and apply, rather than create, law – indeed he explicitly endorsed it. But at the same time, he almost certainly did not share the various beliefs and sentiments today routinely associated with the conventional understanding of the Rule of Law – that citizens ought respect law and that they have a duty to obey it, or that law by definition limits state power. More to the point, he clearly did not share the assumption held by contemporary Rule of Law theorists that through the Rule of Law, *courts* should limit, rather than enhance, the powers of the political branches. Rather, the 'law to be King,' for Paine, was the product of representative democracy – not a constraint upon it. Let me take up these points sequentially.

First, and whatever else Paine might have meant by declaring the Law to be King, he clearly did not mean that we should replace the habitual love and obedience traditionally accorded to monarchical authority with a love of legal authority – that we should love and obey *law*, and the state that produces it, in the way that monarchists think subjects ought to love the King and obey his edicts. Paine had nothing but contempt for the 'royal brute' and the institution of monarchy he embodied, but he also had nothing but contempt for the infantile, unthinking obedience, borne of ignorance, he elicited from his subjects. There is no reason to think that he would have been any more charitable toward unthinking obedience to 'law.' In fact, the paragraph of *Common Sense* in which Paine made his famous rhetorical claim makes clear that that such blind reverence or obedience to law was not what he intended:

But where say some is the King of America? I'll tell you Friend, he reigns above, and doth not make havoc of mankind like the Royal Brute of Britain. Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know that so far as we approve of monarchy, that in America THE LAW IS KING . . . *But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is.*¹²⁸

Rather, on the evidence of *Common Sense*, its safe to say that Paine intended his famous equation of 'Law' with the 'King' to mean something very much to the contrary: In America, he was claiming, we have no need to revere authority. We do not wish or need to have a charismatic half-mortal and half-godly creature, ruling by divine right, 'touched by the sun's rays' to use Shakespeare's line, who can do no wrong and is beyond reproach – whose 'authority,' in other words, is by definition both moral and political. Here in America, distinctively, according to Paine, we do not and should not mix political power with moral truth: might is not perceived as blended with right in that parental, infantilizing manner peculiar to the workings of functioning monarchies. Rather, we conduct our political business through political institutions,

which might earn our respect, or which might not, but which certainly have no moral or divine or charismatic claim to any sort of blind *allegiance*. If we take Paine's original arguments seriously, then we construct the Rule of Law, government, the state, and federal authority, to displace not only the particular Monarch, but also the attitude of reverence toward authority that accompanies the obedience he commands. As first uttered by Paine, the claim embodies a respectful but *morally skeptical* stance toward organized political authority, as a distinctive alternative to the charismatic and absolute moral as well as political authority claimed by Kings and Princes.

Nor is there any support, in *Common Sense* or elsewhere, for the proposition that Paine shared with his fellow constitutionalists a fear that man's asocial, selfish, self-serving instincts were so powerful as to require a Rule of Law that divides government into checking, warring branches, or houses, so as to minimize the influence of particular factions in a popular democracy. In fact, Paine most likely believed quite the reverse. Thus, for Paine, the source of human society is the human impulse toward cooperation and reciprocated sympathy, not fear of the violence of others – as it was for Hobbes – or the attempt to secure the greatest individual advantage through limited and self-interested co-operation with others – as it was for most of his contemporaries, including prominently the drafters of the United States Constitution. Consequently, considerably more was to be expected of human society than mutual restraint for reciprocal advantage. Similarly, government acts so as to perfect and underscore human society, and thus in harmony with human instinct, not to the contrary.¹²⁹ The government, then, should serve the common interests of the people, whose interests, with or without a state, are intrinsically social and connected.¹³⁰

That common interest, and that common, connected nature, Paine thought, were best ascertained through the deliberations of either direct or representative democracy, not through the deliberations of even a well-meaning monarch, or a wise, even well-intentioned, aristocratic elite: both of these alternatives breed either ignorance or corruption. Thus, Paine was not only contemptuous of the elitist pretensions of the English House of Lords, but was also (more mildly) critical of the American system of bicameralism. Both were departures from representative democracy, and both as a consequence fell short of his second general principle – that representation through democratic election is the best form of government to achieve the proper republican end of government. Paine thus rejected *both* the self-interested case for purely representative democracy – that self-interested representatives can and should simply fight for their own or their constituents' self-interests, so as to generate the greatest possible satisfactions – *and* the elitist-republican alternative – that government should seek the common good, but that to do so requires an elite that can perceive the common good, as well as checks that can limit corruption. Rather, government should aim for the common good – not the maximization of individual or factional interest – and should do so through representative democracy – not aristocratic or monarchic elitism.

Finally, to return to 'Law': there is no support, in *Common Sense* or elsewhere in Paine's writing, for the proposition that by equating Law with Kingship, Paine meant to suggest that the authority of a 'higher law' or a 'natural law' ought constrain the

workings of politics in a way analogous to the manner in which, by divine right, a King might constrain the workings of Parliament, or the House of Lords might constrain the House of Commons. To be sure, this is a grammatically permissible interpretation, if we look at Paine's rhetorical equation of law and monarchy out of context. Paine *might* have meant, in other words, by the 'law,' either the 'common law,' or 'natural law,' or 'higher law,' and by analogizing that 'law' to the King, he might have been read, or heard, as saying that 'higher law' ought occupy the hierarchic – as in the high – position of English monarchy, vis-à-vis the workings of politically motivated parliaments or legislatures. If read in *that way* – that 'in America, *higher law is King*' – then he could be read as propounding something like an eighteenth-century version of our twentieth-century Rule of Law: the Law, understood in this republican – as in anti-monarchic – but nevertheless 'higher' way, constrains, tames, and cabins 'politics,' and hence legislation, in the same way that, for monarchists, the King might be understood to have ultimate authority, both political and moral, over Parliament.

But this reading of Paine is untenable. He vehemently opposed the very idea of both sources – really, any source – of higher authority. Rhetorically, Paine was a harsh critic of the manner in which powerful conquerers usurped the moral authority of the church to augment their power by dulling the senses of the people. Sounding much like contemporary critical scholars on the legitimating power of the modern Rule of Law, Paine has this to say regarding the legitimating power of the English monarch, in the context of a discussion of the origin of England's mixed government:

Governments thus established, last as long as the power to support them lasts; but that they might avail themselves of every engine in their favour, they united fraud to force, and set up an idol which they called Divine Right, and which, in imitation of the Pope, who affects to be spiritual and temporal, and in contradiction to the Founder of the Christian religion, twisted itself afterwards into an idol of another shape, called Church and State. The key of St. Peter, and the key of the Treasury, became quartered on one another, and the wondering cheated multitude worshipped the invention.

When I contemplate the natural dignity of man; when I feel . . . for the honour and happiness of its character, I become irritated at the attempt to govern mankind by force and fraud, as if they were all knaves and fools . . .¹³¹

Rather, for Paine, here following, rather than departing, from the positivistic Hobbes – the basis for governmental legitimacy is purely contractual, nothing 'higher.' This would clearly hold, not only for the authority of kings, but for the authority of law as well.¹³²

Second, whatever else Paine might or might not have meant by equating the Law with the King, he clearly did not mean that courts ought decide cases by reference to clearly existing prior rules drawn from precedents taken from antiquity – he was no advocate of 'the common law' as a constraint on legislation. Indeed, Paine was as hostile to the authoritarian, mystifying, obfuscating traditions of the 'common law' as to the pretensions of the 'royal brute.' He clearly did not mean, then, by equating the 'law' with the 'king,' that we ought enthrone the common law as a constraint on legislation. In contrast to his critical correspondent, Edmund Burke, and both echoing

Hobbes and also prefiguring Benthamic and Holmesian critiques of judicial power as concealed in – not constrained by – precedent, Paine found the courts' slavish abidance to precedents, and to the 'Rule of Precedent,' both repugnant and somewhat comical. The result of too much respect for the common law, Paine thought, was a superstitious reliance on ancient precedent, founded on 'principle' and 'opinion' that defied, rather than embodied, reason.¹³³ He also attributed the overreliance on precedent, in England, to a *lack* of current law, a condition in turn occasioned by a government overly concerned with foreign affairs and neglectful of domestic issues. Thus the rules of precedent – judge-made common law – far from being the legal paradigm, was, for Paine, the very *antithesis* of the 'Law' for which he held out hope.¹³⁴ Might Paine have meant by the 'Law' that is to be King, constitutional law, enforced by courts and constraining the power of representative democracies? Paine did not speak to the specific issue of judicial review – that I can find – anywhere. He did, though, have a great deal to say about constitutions, and constitutionalism, from which, it seems likely that Paine did not mean, by the Law that was to be King, a permanent, stable, received Constitution, enforced through courts, that would then constrain the workings of contemporaneous democratic politics. The story is complicated, though, and the case for multiple interpretations of Paine's intent here is undeniable.

Thus, to be sure, Paine (unlike Hobbes) was indeed a friend of 'constitutionalism,' and particularly of American state constitutions, and ultimately, of the United States federal Constitution as well. He also, in an important part of *The Rights of Man* refers to a well functioning Constitution as 'a law of government' that governs government, just as government governs men:

A constitution, therefore, is to a government, what the laws made afterwards by that government are to a court of judicature. The court of judicature does not make the laws, neither can it alter them, it only acts in conformity to the laws made, and the government is in like manner governed by the constitution.¹³⁵

There are two crucial ambiguities in this passage. First, it's just not clear whether, in the first sentence, he meant to equate a constitution with laws directed to courts – which might lend support to a view of Paine as at least a friend of judicial review – or if he meant what he seems more literally to have said, which is that a constitution is directed at government (rather than courts) in the way that laws are directed at courts – which would seemingly suggest *legislative* review of the constitutionality of proffered statutes. But second, and relatedly, it is not at all clear what he meant by a 'Constitution.' Paine was not terribly clear, but in numerous passages, both in *The Rights of Man I* and *The Rights of Man II*, Paine seems to mean by the 'constitution' he is advocating, something quite different from what a 'constitution' has come to mean in contemporary United States law and politics. Thus, in Paine's longest sustained discussion of Constitutions, appearing in *The Rights of Man II*, he praised both the American states' constitutions, and the French Constitution, but he praised them precisely because, in his view, they can be *continually* revised and redrafted by the people of the generation to be affected. He praised them, more generally, because he viewed them as enhancing, rather than constraining, contemporaneous, democratic, political deliberation.¹³⁶

In similar language, Paine praised the Pennsylvania Constitution, precisely because it provided for its own redrafting every seven years.¹³⁷ Obviously, a constitution each generation is not obligated to accept, is a very far cry from the Constitution, wedded to the Rule of Law, that constrains politics – precisely by limiting the options of each generation by the presumed inter-generational consensus divined some time in the past.

More fundamentally, Paine praised the revolutionary state constitutions, and eventually the federal constitutions of America and France as well, because in his view they placed the power to form government in the hands of the people, thereby severing connections to tyrants, monarchs, conquerors, and others who rule by force. He praised them, in other words, because they enhanced, rather than constrained, democratic forces. By contrast, he was not a friend of constitutions that constrain or balance democratic forces. He was, for example, as harsh a critic of the aristocratic and monarchic elements of the British Constitution, particularly the bicameralism embodied in the undemocratic House of Lords, as he was a friend of the American states' constitutions. He was scathingly sarcastic in his critique of the 'balance' between democracy, aristocracy, and monarchy that the English constitution (which he sometimes criticized, and sometimes denied existed) attempted to achieve.¹³⁸

I would sum it up this way: the flexible, democratic constitutions that Paine imagined, idealized, and then praised, both in America and in France, were in many ways the antithesis of the stable, inter-generational document praised by contemporary Rule of Law scholars – a document revered for the wisdom of its drafters, respected for its relative antiquity, and that, in the name of the Rule of Law, checks and limits the democratic will of the people. Paine consistently favored a simple, representative form of democracy, over any kind of 'mixed' government, which, he thought, could only operate through fraud and corruption, and his faith in constitutionalism was conditioned on that commitment. Paine favored, in brief, what constitutional historian Mark Tushnet has recently and helpfully called a 'thin constitution': the general constitutional guarantees, found in the Document's Preamble, and echoed in the Declaration of Independence, that speak aspirationally of our commitment to justice and equality, and which underscore and strengthen, not undermine, democratic, representative politics.¹³⁹ By contrast, Paine seemingly had relatively little interest in what Tushnet now calls 'thick constitutions' – the substantive constitutional provisions that ultimately have the effect of requiring judicial enforcement, and thus impinging upon legislative freedoms.¹⁴⁰ More to the point, nowhere does Paine speak of a 'constitutional law,' enforced by Courts, against the will of the people. Rather, he seemingly suggests a popular constitution, enforced not through courts at all but rather, through popular discussion and correction – again, not unlike the thin constitution as envisioned by Tushnet. Thus, after praising the Pennsylvania Constitution for its flexibility, and its capacity to accommodate change, Paine goes on:

Here we see a regular process – a government issuing out of a constitution, formed by the people in their original character; and that constitution serving, not only as an authority, but as a law of control to the government. It was the political bible of the state. Scarcely a

family was without it. Every member of the government had a copy, and nothing was more common, when any debate arose on the principle of a bill, or on the extent of any species of authority, than for the members to take the printed constitution out of their pocket and read the chapter with which such matter in debate was connected.¹⁴¹

The Constitution praised, here, is held in private homes by families, regarded as a political bible, and relied upon by ‘every member of the government.’ Notable by its absence, is any reference to judicial review, or any role at all for courts, in the enforcement of constitutional limits on recalcitrant or overreaching political states.

Although surely open to interpretation, it seems to me that on the basis of Paine’s collected writings, there is no reason to think that Paine, by declaring the Law to be King, intended by ‘Law,’ the substantive provisions of an anti-democratic Constitution, enforced by unelected judges and written by prior generations, that should constrain the workings of democratic politics by reference to the wisdom of either the founders or the ages. Rather, both before and after *Common Sense*, Paine was a republican democrat – supportive of broad suffrage, and of giving the vote, rather than the King’s edicts, the effect of law. His understanding of, and praise of, constitutionalism, was entirely conditional upon his understanding that constitutions would give direct voice to the people – and thus enhance, not constrain, representative politics.

Paine’s ambitions, both theoretical and political, when identifying law as king, simply transcended any concern with the workings of courts. Paine wished to sever the states from a monarchic system he hated, and to forge a new understanding of the civic relation between citizens, as well as between citizens and their government. His declaration that ‘in America, the law is King,’ was meant to telegraph that new relation. It had nothing to do with the common law, or with the work of courts, or with the interpretation of constitutions by courts so as to check democratic will. It certainly did not dictate a preference for the reasoned, neutral elaboration of a common law, constraining the work of the representative branches. To the degree that courts thwarted the work of legislation, as, he thought, occurred through the operation of the Rule of Precedent, he stood as a critic, not a supporter, of that usurpation. The contemporary understanding of the Rule of Law as a Rule of Judicial Reason, directing courts to employ neutral principles so as to both constrain state action and limit individual freedom, whatever its merits or demerits, is not even an echo of the revolutionary implications of Paine’s commonsensical utterance.

Conclusion: Rethinking the Modern Rule of Law

So, what do we mean by the Rule of Law and what does the Rule of Law require of us? For the most part, modern legal scholars have taken the ‘Rule of Law’ to connote a culture in which courts are required to resolve cases by reference to agreed upon, determinate rules, in neutral fashion, and in a manner which is reasoned, passionless, and above all else non-political. Advocates for and theorists of the Rule of Law construe it as necessary to the preservation of both individual liberty and the ideal of a

state with limited powers, while critics assail it as antidemocratic and incoherent. As the debate between them has stalemated, however, it has become clear that there is at least this much common ground: both sides tend to agree upon the general conception. Neither has left room for other possible understandings of the legalistic sentiments expressed by the cultural commitment to the Rule of Law, or other possible values – legalist values – those sentiments might embrace.

For this common ground, both sides should be faulted. There are, clearly, other possible understandings. Following Thomas Hobbes, the father of liberalism, we might understand the ‘Rule of Law’ not as expressing a general desire for legal control, or containment, of the political process, but rather, as expressing a commitment to the political process and its legal fruits over natural warfare. If we do, then we can make sense of both ‘radical’ calls for increased legal control over private violence, and also liberal demands for an activist, responsible state that has a duty to govern over, rather than ignore, the privations that stem from private sphere oppression. And we can make sense of those calls, and those demands, furthermore, as expressive of the quintessential liberal commitment to the Rule of Law, rather than as antithetical to it. And following the father of our own American revolution, Tom Paine, we might understand by the Rule of Law, a commitment to representative government, and the laws that our representatives, acting in our interest and on our behalf, produce, rather than as a commitment to limits on that representation. Then, we can understand our American commitment to representative democracy as that which produces, rather than as that which is constrained by, our equally American commitment to the Rule of Law.

Both of these understandings of the values embedded in the Rule of Law might have their relative strengths and drawbacks, but nevertheless, they have this virtue in common: although both squarely depend on limited legal determinacy – neither Hobbesian law nor Paineian democracy can deliver its promise, if either can be utterly corrupted by judges set on their own agenda – they do not *reduce* to that value: the Rule of Law, if we take Hobbes and Paine seriously as Rule of Law theorists, expresses a commitment to politics and democracy that goes well beyond the bare commitment to judicial constraint, and legal determinacy, at the heart of contemporary Rule of Law debates. A commitment to the Rule of Law, understood in a Hobbesian, way, commits a lawyer or citizen to the value of law produced through politics, as opposed to the oppression or violence produced in its absence, and, following Paine, to the value of democracy as the best means by which to assure that the lawgiver acts in the interest of and on behalf of the governed, rather than on behalf of himself or his class. It does not limit the lawyer’s commitment to the determinacy of legal outcomes in courts.

Now, let me return to some of the questions introduced at the beginning of this chapter, starting with Frank Michelman’s dilemma: is there any reason a lawyer, a judge, a law professor, or a law student, might object to *Bush v. Gore* as offending legalistic values, or regard it as an affront to the Rule of Law, beyond its failure to ‘follow the rules laid down’? Is there any way to make sense of the law professors’ complaint, voiced in the law professors’ letter, that the court’s intervention on the political process violates the Rule of Law, as invoking anything beyond the bare

claim that the decision parted from past precedent? The answer, I think, is yes: a lawyer, as a lawyer, committed to the Rule of Law, might object to the court's intervention on a number of related grounds, only one of which is that their action did not follow from the rules that pre-existed the decision. A lawyer might also object to a decision like *Bush v. Gore* on the grounds it interfered, and badly, with the workings of representative democracy – as does, such a lawyer might reason, bicameralism and the electoral college, both clearly required by the Constitution, as well as the practice of judicial review, arguably, but not conclusively, permitted by the written Constitution. The Court's wrong decision in *Bush v. Gore*, as well as those parts of the Constitution that are in tension with principles of representation, for that reason alone, *all* violate the Rule of Law – if by the Rule of Law we mean something like Paine's Rule of Democratic Representation. A Court that insists that individuals have no constitutional right to elect a president, as did the Supreme Court in *Bush v. Gore*,¹⁴² and which insists that temporal deadlines trump the demands of electoral process, as did the Court in *Bush v. Gore*,¹⁴³ and which, most baldly, curtails the counting of legitimate votes, so as to enhance the *perceived* legitimacy of the soon to be selected President, as did the Court in *Bush v. Gore*,¹⁴⁴ has lost sight of Paine's central insight concerning law: that the purpose of government is the republican one of serving the wellbeing of the people, and that the best form for that government to take, is not a conflicted, separated, and elitist set of branches and houses, but a simple, streamlined, commonsensical system of representative democracy. If one grants the limited determinacy of law, such an objection is sustainable, furthermore, *regardless* of whether or not one believes that *Bush v. Gore* misstated the relevant law: if the decision was correct, then 'the law' (including the law as stated in *Bush v. Gore*) should be faulted; if incorrect, then the decision should be faulted, as should the (almost innumerable) legalistic and constitutional 'penumbras,' which render the decision, to many, at least plausible, and possibly convincing.

Or, a lawyer professionally committed to the 'Rule of Law' might object to the *Bush v. Gore* decision, not only because it misstated the law, but also because of the anti-legalist, anti-Hobbesian inclinations of the administration it wrongly empowered. An administration whose attorney general seeks to empower individuals to own guns by granting them a constitutional right to do so,¹⁴⁵ whose Secretary of the Interior espouses the 'rights' of corporations to pollute,¹⁴⁶ whose Secretary of Labor gets regulatory controls over the wellbeing of workers, consumers, and global inhabitants in deference to the power of private actors to wreak havoc so as to maximize profit,¹⁴⁷ whose chief executive abandons with no proffered viable alternative a negotiated international agreement aimed at controlling environmental harms and hazards,¹⁴⁸ whose foreign policy mavens turn their collective backs on international efforts to establish meaningful laws of human rights, and actively seek to disrupt, rather than hold fast to international contracts that curb nuclear aggression¹⁴⁹ international criminality and biological warfare, has lost sight of the central Hobbesian insight that the order of law is an improvement over the chaos of a state of nature. A lawyer committed to a Hobbesian understanding of law as a better way of resolving conflict than those provided by nature might object to *Bush v. Gore*, then, on the grounds that this antidemocratic decision ushered in an administration

overly committed to lawlessness. And of course, a lawyer, judge, student, or law professor might object to *Bush v. Gore* for both reasons: a judicial opinion that trumps political process, so as to inaugurate an administration hostile to the very idea of law, does twofold violence to the Rule of Law. That it does so in seeming violation of the rules that pre-existed the decision, at least for lawyers not persuaded by the indeterminacy thesis, obviously adds salt to the wound. It may well have been true, as Michelman seems to intimate, that the 700 law professors who signed the Law Professors' Letter were not unanimously committed to the full determinacy of legal outcomes. But it is not the case, as he suggests, that those signatories were therefore guilty of some form of intellectual dishonesty. What it signifies, rather, is that the Rule of Law is considerably more robust – and more complicated – than the mandate of judicial consistency that now lies at the heart of the dominant academic understanding of its meaning.

More importantly, a broader understanding of the values underlying the Rule of Law beyond that of judicial neutrality, so as to include the value of law over lawlessness, and democracy over elitism, provides a deeper account of the aspirations of lawyers whose professional lives might be dedicated to the Rule of Law, beyond the sterile ideal of judicial consistency. Minimally, when we broaden our appreciation of law's value, and expand the idea of the Rule of Law that we claim law serves, so as to include not just the value of judicial neutrality, but also the value of political ways of life that produce law over natural conflict, and the worthiness of representative democracy over other forms of government, we have a better, because larger, sense of the aspirational identity of lawyers. Lawyers who have dedicated their lives to the 'Rule of Law,' as per the Law Professors' Letter, stand not only for the importance of judicial consistency, and integrity, but also for the value of lawful order over chaos and exploitation, and the value of representative democracy, as a means of achieving republican ends, over tyranny, aristocracy, or plutocracy. Law schools could certainly include an exploration of these basic, legalistic values – their history, their theoretical strengths and weaknesses, their champions, their antagonists and their meaning – in our traditional legal education, rather than obsess, as we currently are still inclined to do, over the promise and peril of judicial fidelity to pre-existing law. By so doing, we could presumably lay the groundwork for a recognition of these values as intrinsic to the legal profession more broadly.

And finally, a more ecumenical understanding of the Rule of Law might suggest a more appealing role for lawyers to play as social critics, beyond the relatively fruitless one of arguing over possible lapses in judges' deductive logic, when they purport to reason from pre-existing precedent. A lawyer who understands the Rule of Law to which he is professionally committed as imposing nothing but a requirement of judicial consistency will have one, and only one, critical role: demonstrating where, and when, a judge has behaved inconsistently. Such a lawyer might, from time to time, if the lapse seems sufficiently consequential, plausibly claim that the judge's error really is so grave as to constitute a threat to the Rule of Law, and hence to our national identity. *Bush v. Gore* might well be such a case; so might have been *Roe v. Wade*. But the occasions for such lapses in logic constituting a serious danger, and for the plausibility of the claim that the lapse is really in logic,

rather than in arguably sustainable inferences from common premises, will be exceedingly rare.

By contrast, a lawyer who understands the Rule of Law to which he is professionally committed as expressive of the value of law over chaos – in what I have called a fundamentally Hobbesian way – might, for just that reason, have a different critical role. He or she will presumably be attuned to the *absence* of law in pockets of social life and the damage that absence causes, whether that absence occurs on school playgrounds, on which children are largely unprotected by law against threats of criminal violence, or in domestic homes, shielded from law by ‘privacy rights,’ or in the perilous state of nature consequent to the free accessibility of under-regulated guns, protected against further legal regulation by a newly found constitutional right of gun ownership. Such a lawyer might sensibly protest these instances of law’s absence as violative of a professional commitment to the Rule of Law. And, a lawyer who understands the Rule of Law to which he is committed as expressive of the value of representative democracy as the best means to protect republican ends – who understands law, in other words, in a fundamentally Paineian way – would presumably be alert to threats to representative democracy – whether those threats appear in the name of higher law, reason, tradition, neutrality, or constitutional principle. Lawyers who criticize not just court decisions, but swaths of social life for their lawlessness, and criticize politics and forms of politics – not just judicial decisions – for their unrepresentativeness and non-responsiveness, can be fairly viewed as engaging in a form of legal critique of the social world in which lawyers, as lawyers, are particularly expertly suited. Lawyers might, after all, be sensibly assumed to have a distinctive appreciation of the ways in which lawfulness – the principle of legality, rather than private rule – and representative democracy – widespread political participation, rather than elitism – sustain and improve upon social life. It should not surprise us if lawyers, understanding themselves to be speaking on behalf of the Rule of Law, engage in social criticism that reflects that expert understanding.

Notes

- 1 Harvard Law Professor Lon Fuller’s mid-century description of law’s ‘internal morality’ was an early articulation of the view, later developed in greater detail and with different emphases, that judges must apply pre-existing, known rules, if they are to be regarded as operating within a true legal system. Fuller’s own jurisprudence, however, was not by any means as ‘judge-focused’ as those whose work he inspired; he was at least as interested in the operation of law’s internal morality within the workings of administration agencies, the dealings of legislatures, and even the private contractual behavior of economic entities. See Fuller (1964, pp. 82–91).

By the mid-1960s, however, the shift to a fully judge-focused understanding of the Rule of Law, at least within the law schools, was complete, as best evidenced in the influential writings of Ronald Dworkin, possibly the most influential legal theorist of the second half of the twentieth century. See Dworkin (1978; 1985; 1986). As Dworkin himself correctly notes in his first chapter in *Taking Rights Seriously*, the focus on

judging and adjudication as the key to legalism and jurisprudence has been a defining characteristic of American legal scholarship since the early century writings of the Legal Realists and Sociological Jurisprudes. Dworkin (1978, 3–7). Dworkin, however, was the first prominent legal philosopher to turn so definitively to adjudication (rather than legislation) as the paradigm source of fundamental law, and to do so in a way that sought to affirm, rather than deny, the distinctive qualities and virtues of ‘law’ over ‘politics.’ That ‘turn to judging,’ so to speak, is nicely captured in Dworkin’s mythical Judge Hercules, who decides every case that comes before him correctly, and does so on the basis of his idealized full comprehension of all controlling rights and principles, thus fully embodying the ideal of law (*ibid.*, 14–46). Fuller, who shared Dworkin’s aversion to legal positivism, by contrast, constructed a mythical legislator (King Rex) to develop his argument regarding law’s minimal moral structure (Fuller, 1964, 33–41).

Some of the best modern discussions and recapitulations of the contemporary understanding of the Rule of Law include Burton (1994, 198) (‘The primary concern of the rule of law is that the reasons for judicial action all be warranted by the law as grounds or judicial decisions’); Fallon (1997, 3) (‘if courts (or the officials of any other institution) could make law in the guise of applying it, we would have the very ‘Rule of Men’ with which the Rule of Law is supposed to contrast’); Macedo (1994); Eskridge and Ferejohn (1994, 265) (‘[A] legal system satisfied the requirements of the rule of law if its commands are general, knowable, and performable’); Radin (1989); and Kautz (1999).

Outside of legal scholarship, political theorists and moral philosophers define the Rule of Law considerably more broadly, typically identifying the Rule of Law as requiring not only judicial fidelity to law, but also a constitutional state and the submission of state actors to legal mandates. See, for example, Schklar (1987, at 16) (identifying the Rule of Law as originating in conflicting political visions of Aristotle and Montesquieu, but as now representing ‘an essential element of constitutional government generally and of representative democracy particularly’).

2 Bork (1990, 318).

3 Scalia (1989, 1197).

4 See Dworkin (1978, 80–130; 1986, 93; 1985, 11–12); Fiss (1982). In the last 30 years, Ronald Dworkin has provided perhaps the fullest contemporary liberal development of this Fullerian understanding of the judge’s duty of fidelity of law. The striking difference between Fuller’s early account, and Dworkin’s contemporary one, is that Dworkin insists that to fulfill the Rule of Law, judges must find and apply pre-existing legal principles that are themselves aimed at protecting certain substantive rights, the content of which must be derived from some political theory of the good and the right. Dworkin (1985, 11–12). Dworkin’s account, for that reason, might best be regarded as ‘substantive.’ For Fuller, by contrast, the Rule of Law requires only that the law consist of rules, it does not mandate any particular content of those rules, beyond very general procedural guarantees of notice, process, and fair hearing (Fuller, 1964, 33–94). Fuller’s account of the Rule of Law for that reason is often called ‘procedural.’ The shared ground between them, however, is considerable: both regard the Rule of Law as requiring judicial adherence to pre-existing rules, and as forbidding judicial creativity, or ‘discretion.’

5 See Opening Statement of Robert H. Bork, to be Associate Justice of the US Supreme Court, 15 September 1987 (‘The judge’s authority derives entirely from the fact that he is applying the law and not his personal values. That is why the American public accepts the decisions of its courts, accepts even decisions that nullify the laws a majority of the electorate or of their representatives voted for . . . The judge, to deserve that trust and that

authority, must be every bit as governed by law as is the Congress, the President, the State Governors and legislatures, and the American people. No one, including a judge, can be above the law’); Testimony of Hon. Clarence Thomas, of Georgia, to be Associate Justice of the US Supreme Court, 10 September 1991 (‘A judge must be fair and impartial. A judge must not bring to . . . the court, the baggage of preconceived notions, of ideology, and certainly not an agenda, and the judge must get the decision right’); Testimony of Ruth Bader Ginsburg to be associate Justice of the Supreme Court of the United States, 20 July 1993 (‘My approach [to judging] . . . is neither liberal nor conservative. Rather, it is rooted in the place of the judiciary, of judges, in our democratic society . . . In Alexander Hamilton’s words, the mission of judges is to ‘secure a steady, upright, and impartial administration of the laws.’ I would add that the judge should carry out that function without fanfare, but with due care. She should decide the case before her without reaching out to cover cases not yet seen.’). For a general discussion, and critique, of the relation between this ritualistic incantation of Rule of Law values in confirmation hearings, and liberal theory, see Tushnet (1983, 781–5).

6 410 U.S. 113 (1973).

7 347 U.S. 483 (1954).

8 The literature is too vast to catalog. For some of the more famous examples of this sort of criticism, see Bork (1990, 110–26) (criticizing Burger Court decisions and academic support for those decisions, on the grounds that they could not be derived from existing law); Wechsler (1959) (criticizing *Brown v. Board of Education* for not having adequately defended the decision on the grounds of existing law, neutrally applied); Ely (1980, 2–3) (explaining the growing allure of ‘interpretivism’ as in part a function of the non-interpretivist, activist decision *Roe v. Wade*).

9 *New York Times*, 13 January 2001, A7. The dissenting Justices John Paul Stevens, Ruth Bader Ginsburg and Stephen Breyer also declared that the decision would undermine ‘the Nation’s confidence in the judge as an impartial guardian of the rule of law’, 531 U.S. 98, 129 (Stevens, J., dissenting). For a contrasting view, arguing that the Supreme Court’s decision in *Bush v. Gore* vindicates the Rule of Law, and that it was the Florida Supreme Court that acted unlawfully, see Friedlander (2001).

10 531 U.S. 98 (2000).

11 *New York Times*, 13 January 2001, A7. The specific language was ‘As teachers whose lives have been dedicated to the rule of law, we protest.’

12 Unger (1976, 52–76, 166–216, 238–42); Unger (1975, 88–100; 1983); Horwitz (1977); Tushnet (1983; 1988). For a general argument summarizing and commenting on the indeterminacy critique, and defending it against the charge of ‘nihilism,’ see Singer (1984). For a good critical review of this early claim of the Critical Legal Studies (CLS) Movement by an otherwise sympathetic critic, see Levinson (1983) (reviewing the collection of critical legal scholarship in the first edition of Kairys, ed. 1982).

13 See generally, for a succinct statement of the critics’ case against the Rule of Law, Hutchinson and Monahan (1987, 97–125). Hutchinson and Monahan conclude that the Rule of Law is both impossible of realization and incompatible with democratic institutions, thus capturing both the descriptive and normative dimensions of the critical legal scholars’ critique.

14 The CLS critique of the Rule of Law is related to, but nevertheless a departure from (and in some cases a response to) Marxist critiques of the Rule of Law as providing nothing but a gloss of legitimacy over unjust capitalist relations: whereas Marxists emphasize the capture of Rule of Law ideology by economic powers, critical legal scholars have emphasized instead the Rule of Law’s relative autonomy from the economic base, its

resulting incoherence, its contradictory purposes and animating forces, and hence its potential for capture by progressive as well as regressive forces. Nevertheless, contemporary Marxists, even more so than critical legal scholars, have split over the value of the Rule of Law, particularly since E.P. Thompson noted, in his historical study *Whigs and Hunters*, that the rule of law, at least when contrasted with arbitrary, absolute power, is an ‘unqualified human good’ and faulted more traditional Marxists for failing to understand or concede the point (Thompson, 1975, 258–69). For a good discussion of the intra-Marxist debate, see Taïso (1999).

Critical scholars, in contrast to Marxist, have been more uniformly critical of the Rule of Law. Thus, in his review of Thompson’s book, Morton Horwitz takes Thompson to task for failing to note or acknowledge that the Rule of Law, far from being an ‘unqualified human good,’

undoubtedly restrains power, but it also prevents power’s benevolent exercise. It creates formal equality – a not inconsiderable virtue – but it *promotes* substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes. By promoting procedural justice it enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimates an adversarial, competitive, and atomistic conception of human relations.

Horwitz concludes that he does ‘not see how a man of the left can describe the rule of law an as “an unqualified human good”!’ (Horwitz, 1977, 566).

There are, though, important exceptions to the critical legal scholars’ denunciatory scholarship. Thus, some modern criticism of the Rule of Law builds on basic critical insights, but then departs from its more extreme conclusions. See, for example Radin (1989, 812–19) (Rule of Law should be reconsidered, not abandoned, in view of likelihood that it is social practice that facilitates rules, rather than rules that lay the groundwork for social practices).

15 Michelman (2001a, 213–14).

16 *Brown v. Board of Education*, 347 U.S. 483 (1954).

17 *Roe v. Wade*, 410 U.S. 113 (1973).

18 Michelman (2001a, 199–201).

19 *Ibid.*, at 214. Michelman describes his response to the letter in this way:

It seemed that we as law professors were supposed to feel specially aggrieved because it is we who shoulder the burden of raising up young lawyers firm in commitment to a certain ‘Rule of Law’ project – a project in which ‘Rule of Law’ signifies a government of laws and not of men, and a project which must stand or fall with public faith in a constitutional judiciary who act strictly as servants of a law external to themselves and unamenable to their personal political and ideological dispositions.

I do not believe that we as constitutional law professors have a mission to propagate any particular conception of the rule of law and the conditions of its possibility. I do think a part of our job is to try . . . to develop an understanding of how it is that that a rule of law project does in fact persist, although most Americans who think about the matter probably do not in the least believe in the imperviousness of adjudication to judicial politics and personality. Being to that extent out of sympathy with what I thought the most straightforward implication of the law professors’ letter, I decided not to sign it.

20 Both sides are making the sort of global claim that can only be proven by investigating all of law. Rule of Law advocates, notably Ronald Dworkin, urge that all legal questions are susceptible to right answers. See Dworkin (1977). Rule of Law critics urge,

famously, that *all* legal questions are indeterminate. See, for example, Dalton (1985); Kennedy (1986, 560–62). Attempts to disprove either universal by providing the one clear-cut counter-example, have turned out to be unsuccessful – or at least unpersuasive. Thus, for example, Kennedy’s article ‘Critical Phenomenology,’ *supra*, begins with an example of a ‘clear-cut case’ in which the legally mandated outcome appears to be clearly against the direction in which the case should come out, and then proceeds to show the reasoning by which a judge, in good faith, and acknowledging his freedom of choice, can reinterpret the law so as to reach the outcome required by justice.

- 21 See, for example, Balkin (2001); Michelman (2001a).
- 22 Some accounts that are sometimes called ‘substantive’ begin by identifying various virtues associated with the Rule of Law, or rights that must be enforced by the Rule of Law. Those views as well, though, center almost exclusively on what those virtues or rights require of, or imply is true of, judges deciding cases. See, for example, Moore (1985; 1981); Dworkin (1985, 11–12).
- 23 For example, in her 1986 preface to her now classic *Legalism*, Judith Shklar describes the critics’ agenda in this way:

[T]he advocates of ‘critical legal studies’ believe that the welfare state has destroyed the liberal order which aspired to a neutrality it could maintain only by doing or pretending to do very little. This ex-liberal state is now a mere open battlefield for pressure groups with no claim to legitimacy. The ‘rule of law,’ the radicals contend, cannot survive as a framework for contemporary pluralism nor act any longer as a mask for a hierarchical system of domination. The law itself exists to reinforce and to hide the realities of this essentially criminal political order, acting as its prime agent . . . It goes without saying that at the end of the road there will be a communitarian, unatomized, united society which is said to be imminent even as the liberal order is collapsing under the burden of contending interests which have become more manifest in the active welfare regime. Here is recognition with a vengeance of the political role of the law . . . (Shklar, 1986, xi–xii)

- 24 During the so-called Clinton scandals, both critics and defenders of President Clinton routinely identified the ‘Rule of Law’ as the ideal under attack by either the President or his pursuers. The Rule of Law obviously had, in these contexts, a fairly broad array of meanings. Sometimes, the ‘Rule of Law’ was meant, by those who invoked it, to signify nothing but a general respect for legal authority, or a willingness to ‘follow the rules laid down’ – this is the understanding of the ‘Rule of Law’ that President Clinton’s critics claimed was so violated by President Clinton’s disingenuous responses to questions posed him during the sexual harassment complaint filed by Paula Jones. Lying under oath, Clinton’s critics repeatedly insisted, bespoke his contempt of the Rule of Law – regardless of the merits of the action, regardless of its political motivation, and regardless of the problems with the sexual harassment law his actions might have revealed. Clinton’s unwillingness to respond honestly revealed his sense of himself as not subject to the substantive or procedural demands of law – an arrogance offensive to our egalitarian as well as legalistic ideals of civic equality embedded in the Rule of Law. See, for example, Statement of Rep. James Sensebrenner Jr., reported in the *New York Times*, 9 February, 1999 at A18; Statement of Rep. Henry Hyde, reported in the *Des Moines Register*, 20 December 1998; Statements of Rep. James E. Rogan and Rep. J.C. Watts, reported in the *Washington Post*, 20 December 1998 at A42.

At other times, the ‘Rule of Law’ was meant to suggest the idea of a minimal state whose power is limited, and is limited ‘by law’ – this is clearly the understanding of the ‘Rule of Law’ that, in the eyes of Clinton’s supporters, was so deeply violated by

Kenneth Starr's reckless pursuit of President Clinton, and indeed by the entire impeachment episode. The prosecution and its aftermath, at least to the President's supporters, seemed in some fundamental way 'lawless' – violative of the Rule of Law – precisely because it was such a flagrant expression of undue state power, invested in particular persons, who were in turn seemingly bent on pursuing a personal and perverse agenda. Like any overly zealous prosecution, but in this case writ large, the entire state response to Clinton's misconduct, from the initial civil action filed against him, to the investigation conducted by the Independent Prosecutor, to the impeachment proceeding, seemed wildly disproportionate to the offense that triggered it all – and for that reason, came to be seen as itself violative of the ideals embedded in the Rule of Law. See, for example, Gordon (2001, 107–08, 110).

At other times 'the Rule of Law' was meant to refer to a commitment to individual liberty, protected by a constitutional order that limits the intrusiveness of state regulation into our private lives. This was the meaning of the Rule of Law some of the President's defenders invoked, when claiming that the sexual harassment lawsuit filed against him, as well as sexual harassment law quite generally, violated the 'Rule of Law.' See, for example, Rosen (2000). These meanings – a respect for law, a limited state, and individual freedom – permeated discussion of the Clinton scandals, and they are in fact quite representative: in ceremonial occasions as well as political and critical oratory, invocation of the 'Rule of Law' typically refers to one, or the other, or all three of these popular sentiments.

But there are, quite plausibly, any number of other possible meanings as well. The meanings are so varied, in fact, that they may be impossible to catalog. To take just one further example, the 'Rule of Law' sometimes refers to our commitment to a legal and political process involving a multitude of people, branches, and 'interests,' rather than rule by one man – this seems to be the meaning invoked by Bruce Ackerman in a recent editorial decrying President Bush's apparent unilateral abdication of the Anti-Ballistic Missile Treaty without first obtaining the consent of Congress to be a violation of the Rule of Law. See Bruce Ackerman, 'Treaties Don't Belong to Presidents Alone,' *New York Times*, 29 August 2001, at A23. Justice Kennedy has suggested that the 'Rule of Law' requires, among much else, civility in our public and political dialogue. See 'Law and Belief,' Address to the American Bar Association's 1997 Annual Meeting, quoted in Louis H. Pollak, 'Professional Attitude,' *ABA Journal*, 84, at 66 (1998). At least in the fora of public opinion, the 'Rule of Law' can clearly mean any number of things to any number of people, suitable for any number of disparate occasions.

- 25 Contrast Pilon (2000) with Kaplan and Moran (2001). The Pilon book consists of a series of articles, virtually all of which criticize Clinton's personal behavior and/or political decisions as violative of the Rule of Law. *Aftermath* is more supportive of the president, and includes a number of articles critical of Judge Starr, of the decision to impeach, and the impeachment proceedings, as violative of the Rule of Law.
- 26 Thomas Hobbes (1996).
- 27 Zuckert (1994, 67).
- 28 Paine (1995, 34).
- 29 See Fiss (1982); Bork (1990, 318); Scalia (1989). For an insightful critical and cultural overview of this central component of legal consciousness, see Kahn (1999).
- 30 In his essay 'The Legacies of Nuremberg', David Luban supplies a succinct summation of the nature of law, as required by this liberal-legalist understanding of the Rule of Law. Relying heavily on the writings of Lon Fuller, but then expanding upon his basic ideas, Luban explains:

We must review what the rule of law is. The notion of a 'rule of law, not of men' dates back at least to Plato and Aristotle, but the ideal of the rule of law has received its most thorough examination in the philosophy of Lon Fuller. For Fuller, law is a device for ordering society. To fulfill this function, law must be capable of structuring and guiding human action, and this capability in turn requires several necessary conditions for action-guiding ... [T]he important ones are these: (1) law must contain public rules; (2) these rules must not be retroactive or *ex post facto* (since you cannot follow today a rule that is not laid down until tomorrow); and (3) there must be 'congruence between the rules as announced and their actual administration' ... which implies two important corollaries (3a) like cases must be treated alike, and (3b) alternative enforcement of rules, such as lynch mobs, street violence, and vigilantism, which create incongruence between announced legal rules and social reality, must be suppressed. [and] ... (4) adjudication must respect the various elements of procedural fairness, publicity, and impartiality that constitute natural justice, due process of law conceived in its most general aspect. (Luban, 1994, 346).

To further summarize Luban's succinct summation of Fuller's quasi-definitive account, the Rule of Law, according to its liberal-legal academic theorists, requires that public rules, not retroactive or *ex post facto* in nature, be applied by neutral judges in an even-handed and consistent manner, within constraints established by moral norms of procedural fairness, and due process of law. The Rule of Law requires, in short, that judges be both reasonable and faithful to law.

- 31 Dworkin relies heavily on this argument to support his thesis that all legal arguments have determinate right answers. Dworkin (1978, 14–15, 44–5).
- 32 Yale Law Professor Paul Kahn captures this peculiarly American understanding of the dynamic difference between law and politics, and the understanding of the meaning of the Rule of Law it implies, in his recent book, *The Cultural Study of Law*. His astute description of the contrast is worth quoting in full:

Law's rule devalues the rule of men and co-opts revolution. It has a more complex relationship of suppression to ... 'political action.' Law understands the meaning of an event as an instance of a rule that already exists. As a matter of law, that rule creates the possibility of the event. Legal perception sees the event in the light of its possibility, locating what is important about the event in the rule. Legal inquiry always asks whether an event or proposal realizes a possibility that has already been established. Legal argument seeks to show that the event or proposed course of action has been 'authorized' by an insistent rule or rules ... Law is indifferent to the unique character of the acting subject or the unique circumstances of the act. For a legal decision maker to be swayed by either appears unfair and prejudicial ... Under the rule of law, the morally good do not necessarily win their cases over the morally evil. Justice under law, we say, is blind ... Only in law is blindness a good thing; in a complete inversion of our ordinary experience, sight appears to lead to arbitrary and capricious behavior by the legal decision maker.

Political action understands the event in just the opposite way. It locates the meaning of the event in the fact of its happening, not in its realization of a possibility already established by a rule. Its concern is the unique subject and the particular historical circumstances. Action sees the event as the product of particular choices made by particular subjects at unique moments. It is a matter of seizing opportunities, not maintaining the past. Political action emphasizes the subject's responsibility for the choice made: what matters is what we do, not what it is possible for us to do. Action is seen as a test of character: it tells us – and others – who we actually are. Possibilities are always indefinite and indeterminate. They cannot determine the actual course of events. For law, possibility preceded and limits actuality. For action, it is the actual choice that constructs future possibilities ...

An event is legal when it appears as an instance of an already established rule ... The particular event we are concerned with may fall within a rule established by a precedent; the precedent may be the realization of a possibility established by a regulation; the regulation, by a

statute; and the statute, by the Constitution. In such a world, nothing new ever happens, because the measure of the event's meaning is limited to its realization of a possibility. The only genuinely new event was the revolutionary founding itself. (Kahn, 1999, 69–70)

- 33 Aristotle, *Politics*, bk III, ch. 14, 1286a9–20.
 34 Plato, *The Laws*, 715d. See generally Luban (1994, 344–7).
 35 One exception might be Paul Kahn, who attempts to locate this understanding of the Rule of Law in the matrix of a conflicted, peculiarly American, set of cultural attitudes toward law and political and public life. See Kahn (1999).
 36 John Locke (1970a, sect. 137) (government must be by ‘settled, standing Laws,’ not by ‘Absolute Arbitrary Power’).
 37 Rawls (1971).
 38 This is the argument underlying Ronald Dworkin’s insistence on the determinacy of law. Litigants have a *right* to outcomes determined by pre-existing law, not by judicial whim. Therefore, judges must decide cases in accordance with that law. It is the Rule of Law that imposes this demand. See Dworkin (1978, 44–5; 1986, 93).
 39 Ronald Dworkin formulates this argument in this way:

Our discussions about law by and large assume, I suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.

The law of a community on this account is the scheme of rights and responsibilities that meet that complex standard: they license coercion because they flow from past decisions of the right sort. They are therefore ‘legal’ rights and responsibilities. This characterization of the concept of law sets out, in suitably airy form, what is sometimes called the ‘rule’ of law. (Dworkin, 1986, 93)

This understanding of the rationale behind the Rule of Law is often credited to Albert Venn Dicey, a British jurist, who put forward three necessary conditions for the Rule of Law: (1) absence of arbitrary power on the part of the government; (2) ordinary law administered by ordinary tribunals; and (3) general rules of constitutional law resulting from the ordinary law of the land. See Dicey (1902, 179–92).

- 40 This is the import of Owen Fiss’s famous piece, ‘Objectivity and Interpretation’ (1982).
 41 Scalia (1989).
 42 Rawls (1971, 237–40).
 43 Dworkin (1978, 184–206; 1985, 11–12; 1986, 93). The Dworkinian, substantive account of the Rule of Law as requiring particular rights obviously opens the question ‘which rights?’ While the rights Dworkin supplies are loosely regarded as those which might be recognized as left-liberal, others following his logic have identified the rights that must be respected by the Rule of Law with laissez-faire market freedoms. See, for example, Hayek (1955) and Epstein (1985).
 44 See, for example, Bork (1990, 318).
 45 Moore (1981; 1985).
 46 See, for example, Singer (1984, 42–3).
 47 See Tushnet (1983, 793–824); Radin (1989, 806–10).
 48 Tushnet (1983, 781–6, 821–7); Kennedy (1986, 559–62).
 49 Unger (1975, 88–100); Tushnet (1983, 781–6).
 50 Tomkins, (2002, 157–75); Horwitz (1977, 566); Hutchinson and Monahan (1987, 97–125).

- 51 See Aeschylus (1953). For an interpretation more or less consistent with that in the text, but much elaborated, see Luban (1994, 298–321). For a more conventional counter-argument regarding the meaning of the Rule of Law, and of Aeschylus' *Oresteia*, see Gewirtz (1988).
- 52 Horwitz (1977, 566); Hutchinson and Monahan (1987, 122).
- 53 See, for example, Horwitz (1977, 561–6; 1973, 281); Gabel (1977, 302); Peller (1985, 863–5).
- 54 See generally Hart (1982).
- 55 The classic statement appears in Holmes (1897).
- 56 See generally West (1986).
- 57 There are certainly grounds to doubt that this full scale skepticism regarding the possibility of judicial error besets all versions of the indeterminacy thesis. Thus, one might hold out the possibility that a judicial utterance could be clearly wrong, even if it can never be shown that any particular judicial claim is ever clearly 'right.' This seems sensible, if the 'indeterminacy claim' is at heart simply a skeptical claim regarding overblown assertions of judicial certainty. (Mark Kelman suggested this possibility in conversation.) Contrast the claim by Balkin and Levinson, however, which I take to be the more representative understanding of the indeterminacy claim and its implications: '[S]omeone with Mark (Tushnet's) views about the role of the law professor . . . could not criticize . . . *Bush v. Gore* as a bad example of legal reasoning and wrongly decided' (Balkin and Levinson, 2001, 191). Of course, the forever puckish Mark Tushnet's response to this, ultimately, was to praise the decision in *Bush v. Gore* as legally correct – in part because, apparently, in his view, over the long run, the expansive claims about the Equal Protection Clause the Court was forced to make to sustain the outcome, will eventually well serve progressive political domestic US politics. (Tushnet, 2001, 125).
- 58 For a full argument to this effect, see Simon (1998), and for a sympathetic critique, see West (1999a).
- 59 The failure to develop alternative understandings of the Rule of Law is also unfortunate for law students, and particularly for progressive law students, in search of professional aspirations. Lawyers, and students seeking to become lawyers, need and want not just *any* ideal, but a *decent* ideal for their working lives, and lawyers, whatever their motives for entering the profession, are in this sense no different from others: the existence of some such ideal is in substantial part what distinguishes a profession from a trade, and it is certainly what distinguishes a professional's self-understanding from others'. The Rule of Law, for law students and law professionals alike, is, to a considerable degree, that ideal. Given a need to find meaning and moral value in professional life, there must be some 'Rule of Law' ideal, and if the conventional understanding is the only understanding available, and if that one lacks rational coherence, then for some, the basis for the case for it simply shifts from reason to unreasoned faith. For these lawyers and for these students, commitment to the Rule of Law, along with its politically regressive and unattractive underpinnings, is thus bolstered, not weakened, by a critique of its coherence that then fails to offer an alternative understanding.

Further, for those lawyers and law students who *are* convinced of the heart of the critical legal scholars' claims – and who are largely, but by no means exclusively, liberal, left wing, or progressive, in their politics – the result of the critics' 'unmasking' of the Rule of Law is that the progressive student-lawyer is left to choose between aligning him or herself with a professional ideal that has been exposed as incoherent and worse, or abandoning the notion of a 'professional ideal' embedded in the idea of Law altogether. As particularly progressive students will readily tell you, this is more than a little

demoralizing: it leaves the soon-to-be-lawyer with no understanding of the profession's moral point, other than a discredited claim to false neutrality, which, upon closer examination, is actually not neutral at all, but is rather in service to inequality and injustice. The acknowledgement of this void does not necessarily instill sophistication, a healthy critical attitude toward legal authority, or a heightened awareness to the politics of legal practice. What it is just as likely to inspire, is the belief that there is no professionally instilled sense of law, and the morality of law, that might bolster rather than be in tension with a view of the world that views economic and social injustice as breaches that must be mended, and that views law as one way of doing it. The progressive lawyer, then, has her politics, perhaps passionately held, and her profession, but no understanding of there being any connection between the two. There is no understanding of either the point of law, or the sense of lawyering, that conceives of either as being in service to the eradication of social injustice.

60 Michelman (2001b).

61 *Ibid.*, at 213–14.

62 *Ibid.*, 200–201.

63 Michelman (2001a).

64 531 U.S. 98 (2000).

65 347 U.S. 483 (1954).

66 198 U.S. 45 (1905), 74.

67 Bugliosi (2001, 11).

68 *Ibid.*, 14.

69 *Ibid.*

70 Weisberg (1996). See also West (1999, 77).

71 Michelman (2001b, 213).

72 *Ibid.*

73 For a good discussion of the Rule of Law's Lockean origins, see Kautz (1999).

74 Hobbes (1996). For ease of reference, citations will be chapters and pages in original edition.

75 *Ibid.*, ch. XIX, 94–102.

76 See generally *ibid.*, ch. XXI.

Hobbes's sovereign power was not unlimited however: the subject retained the right to defend himself, and therefore the right to resist a sovereign's command to wound or kill himself, a right not to confess to an accusation, and a right not to kill another at the sovereign's command. More generally, the duty of obedience, for Hobbes, was extinguished wherever the Sovereign lost the ability to protect the subject. Thus, the duty of obedience was conditioned on the right to demand protection, and where the latter was not fulfilled, the former was no longer owing.

77 In political theory, liberalism's debt to Hobbes lies in his articulation of a contractual, rather than divine, or historical, or mystical, conception of state sovereignty: the state's power originates in the consent, and will of the subjects, and the state is sovereign, because, and to the extent that, it is in the subjects' rational self interest that it be so. That Hobbes coupled this generally liberal understanding of theory, is widely state's origin and *raison d'être* with an illiberal understanding of the extent of state power and correctly understood to be a function of his exceedingly pessimistic conception of human nature: given people's violent and self-aggrandizing tendencies, a state with near unlimited power is to be preferred over anything that threatens anarchy. Thus, Hobbes's main brief against democracy, or Rule by Assembly, was that the dissension it would inevitably produce would raise the likelihood of Civil War (*ibid.*, ch. XXIX, 96).

- 78 *Ibid.*, ch. XXX, 182–3.
- 79 *Ibid.*, ch. XXVI, 144.
- 80 *Ibid.*, ch. XXVII, 152–3; ch. XXVI, 139.
- 81 *Ibid.*, ch. XXX, 181.
- 82 Hobbes repeatedly refers to the sovereign as the representative of the commonwealth. In the chapter on the liberty of subjects, he explains the meaning and relevance of this designation.
- 83 *Ibid.*, ch. XLVI, 378.
- 84 *Ibid.*, ch. XXVI, 139.
- 85 *Ibid.*, ch. XXSVI. For a detailed argument to this effect, see Hampton (1994, 16–17).
- 86 Hobbes (1996, ch. XXVI, 140).
- 87 *Ibid.*, ch. XXVI, 144.
- 88 *Ibid.*, ch. XXVI, 137–8.
- 89 *Ibid.*, ch. XXVI, 138–9.
- 90 Hampton (1994, 17–19).
- 91 *Ibid.*
- 92 Law’s value, for Hobbes, derives not only from its capacity to ensure peace, but also directly from the contract that generates it (Hobbes, 1996, ch. XXVI, 138).
- 93 *Ibid.*, ch. XVII.
- 94 *Ibid.*
- 95 Rawls (1971, 240).
- 96 *Ibid.*
- 97 For a general argument that the historical meaning of the Reconstruction Amendments should be understood in this way, see TenBroek (1951). For discussions of the relevance of this historical understanding to modern controversies, see West (1994).
- 98 Steven Heyman argues persuasively that the government’s duty to protect against private violence is the ‘primary duty of government’ under even a Lockean understanding of the Rule of Law, and that the purpose of the Fourteenth Amendment’s Equal Protection Clause was to explicitly extend this first duty to the newly freed slave population (Heyman, 1991).
- 99 See Siegal (1996).
- 100 Catherine MacKinnon’s understanding of violence and the role of the state in eradicating it is very close to Hobbes’s; the salient difference is that she regards violence against women as equally egregious as violence against men. See MacKinnon (1989). See also Colker (1986). Critical race theorists as well often sound Hobbesian themes: in the absence of law, ‘natural’ (meaning simply not legally constrained) hostilities will effect the subordination of various minorities. Consequently, ‘anti-subordinationist’ understandings of equality require of the state various affirmative actions, and not just that they abstain from engaging in irrational discrimination. See for example, Crenshaw et al. (1995) and Crenshaw and Peller (1993).
- 101 See, for example, Siegal (1996); Hasday (2000); West (1990); MacKinnon (1991).
- 102 Lawrence (1990); Matsuda (1989); Sunstein (1993d).
- 103 See, for example, Sunstein (1993d); Sunstein and Holmes (2000).
- 104 Hobbes (1996, ch. XXIV, 128).
- 105 The argument over whether property is a creation of the state, or a right that pre-exists the state, the protection of which is the reason for state creation, dates in this country at least to the debates between the legal realists and the natural lawyers over Lochner-era attempts to regulate private property. See, for example, Cohen (1927); Hale (1923).
- 106 Hobbes (1996, ch. XXIV, 128).

- 107 Ibid.
108 Tushnet (1983, 805).
109 Hobbes (1966, chs XXII and XXIII).
110 Ibid.
111 Ibid., ch. XXX, 182.
112 Ibid., ch. XXI, 114.
113 Hampton (1994, 31–42).
114 Paine (1995, 34), I discuss Paine’s constitutionalism, and contrast it with John Mashall’s, in ‘Tom Paines’ Constitution’, *Va. L. Rev* (2003).
115 Ibid., 5–59.
116 Ibid., 431.
117 Ibid., 541.
118 Ibid., 585.
119 Ibid., 565.
120 Ibid., 568.
121 Ibid., 567–8.
122 Ibid., 566–8.
123 Paine (1995, 537).
124 Hobbes (1996, ch. XVIII, 88, 90).
125 Paine (1995, 464).
126 Ibid., 465.
127 Ibid., 604.
128 Ibid., 34. Italics added.
129 Ibid., 551–3.
130 Ibid., 551.
131 Ibid., 466.
132 Ibid., 467.
133 Ibid., 583–4.
134 Ibid., 584.
135 Ibid., 468.
136 Ibid., 594.
137 Ibid., 573–4.
138 See generally *The Rights of Man, II* (Paine, 1995).
139 Tushnet (1999, 9–14).
140 Ibid.
141 Paine (1995, 574).
142 531 U.S. 98 (2000), 104.
143 Ibid., 110.
144 Ibid, 112 (concurrence by Rehnquist).
145 Dan Eggen, ‘Gun Ownership an Individual Right; Letter to NRA Sparks Debate Over 2nd Amendment, Long Interpreted As Applying Collectively,’ *Washington Post*, 24 May 2001, A13 (‘Ashcroft, an NRA member, wrote in a May 17 letter to NRA Executive Director James Jay Baker that “the text and the original Intention of the Second Amendment clearly protect the right of individuals to keep and bear firearms”).
146 Eric Pianin, ‘Interior Pick Backs Off Some Earlier Stands; Norton Pledges Conservation,’ *Washington Post*, 19 January 2001, A1 (‘Norton disavowed a 1991 speech on the government’s obligation to compensate property owners hit with environmental mandates in which she said that, in some cases, property owners had the “right to pollute”).

- 147 John Judis, 'Hidden Injuries of Class; Undermining OSHA by a Thousand Cuts,' *American Prospect*, 3 June 2002, 10; Phillip Dine, 'Administration, Labor Skirmish over Ergonomics; Bush's White House Called Most "Anti-Worker" in Memory,' *St. Louis Post-Dispatch*, 17 July 2001, C1.
- 148 William Drozdiak, 'U.S. Left Out of Warming Treaty; EU-Japan Bargain Saves Kyoto Pact,' *Washington Post*, 24 July 2001, A1.
- 149 Mary McGrory, 'No Defense for the Missile Shield,' *Washington Post*, 21 June 2001, A3.

Chapter 3

Revitalizing Rights

Rights, according to our most prominent, liberal rights theorists, are based on some aspect of our human nature, and both morally and legally limit what a liberal state might do to us.¹ We are, for example, by nature, autonomous and rational individuals, equally deserving of dignity and respect, and we therefore have rights to free speech, thought, and worship, meaning that the state may not, through law, dictate our thoughts, ideas, spiritual values, or individually held visions of the good. Because we are essentially rational creatures, we must be free to determine such visions of the good and spiritual values for ourselves.² We are, to take a very different example asserted by some rights theorists, the sorts of creatures who are made secure against the natural elements, against the aggression of others, and even against the possibility of state tyranny by our ownership of private possessions, and we therefore have a *right* to property: our property cannot be taken from us by the state without compensation and process, even should the state decide to do so for the very best of reasons.³ We are also, according to a now well-established line of rights theory, much enhanced by the enjoyment of a sphere of privacy and intimacy, and we therefore have a right not to have our privacy intruded upon by the state without compelling state justification.⁴ Because our lives are enhanced by privacy, we have a right against states that seek to invade it. To take one final example, according to some rights theories, we are naturally such that we will benefit from a good, consensually struck bargain – we are natural bargainers – and we therefore have a right not to have our free markets unnecessarily overregulated. Finally, although rights theorists differ on what, precisely, we are, they agree that *all* of us, universally, share that essential core – if any of us are, then all of us, not just some of us, are sufficiently rational to formulate our own conceptions of the good, be made secure through ownership of property, benefit from unregulated trades, and be enriched through the enjoyment of a sphere of privacy and intimacy.⁵ We are all of these things by virtue of our *humanity*, not by virtue of caste, class, skin color, sex, religious affiliation or ethnicity. We therefore have a right not to be subjected to laws that invidiously and irrationally discriminate against some of us, or deprive some of us of these rights, for the benefit of others. We have, in short, a right to enjoy our rights – rights to property, privacy, free thought and speech or contract – equally.

We have these rights – rights to free speech, rights to the free exercise of our religion, rights to privacy, rights to property, and rights to the equal protection of the law – according to the dominant conception, for moral reasons. The state should not act in such a way as to interfere with our privacy, property, contract, speech, thought, or religion, and it should not do so because of who and what we are: we are creatures whose lives are best lived and whose potential is most enhanced by a state that respects these freedoms. The *justification* for rights, and for the particular rights we

have, is, in other words, distinctively moral. The *consequence* of having a right, however, is legal and political. That we have a right entails that the state may not, legally, interfere with us in those prescribed ways. That we have a right, by definition, *means* that the state is legally prohibited from acting in a certain way; should the state do so, it will have done something illegal as well as immoral. A right, to use a common metaphor, is a bridge between the moral and the legal: that we have a right means both that the state *should* not act against us in a particular way, and that, *if* it does so, it is acting illegally. Liberal rights are the means by which our natural liberty and equality become not just attributes of our nature, but the wellspring of political and legal entitlements as well. They are the means by which, to put it differently, our natural capacities become our political liberties.

Of course, for a right, so understood, to be anything but nonsense on stilts, there must be some mechanism by which rights can be authoritatively identified and then enforced against recalcitrant states. One possible way to do so is through a hierarchy of ascending law, with the highest law codifying our rights, and then somehow controlling and constraining lower law produced by the state. Thus, a liberal state's domestic law might be bound by international law, which in turn could consist, in part, of a catalogue of human rights which no state may violate. Should a state do so, it would be acting illegally: it would be in violation of international law. A second possibility is that a state could establish an independent branch – courts, for example – which could then, through common law adjudication, acknowledge, recognize, and enforce rights against errant legislative enactments. Courts could in this way recognize and articulate an evolving 'natural law,' which in turn could consist of rights loosely grounded in an idealized conception of what and who we are. Historically, a number of states have adopted one or the other or both of these mechanisms for the enforcement of liberal rights.

A third possible way for a state to acknowledge and enforce rights, which combines the hierarchic feature of the international approach and the judicial role of the common law approach, is through the adoption, interpretation, and enforcement of a Constitution. Thus, a nation or state's Constitution might enumerate certain rights (or might be read as enumerating certain rights) which the state may not legally invade, and courts might then be charged with the duty of enforcing those rights against the state's or the nation's lawmaking bodies. This third possible vehicle for the enforcement of rights – through constitutionalism – has received its greatest elaboration in the United States. In the United States, and now in an increasing number of other developing democracies adopting the US model, liberal rights are widely understood to be enumerated in the national Constitution, and then enforced against states that infringe upon them by independent courts, who possess the power to strike the offending state enactments as void. In this chapter I will sometimes refer to this model as the liberal-constitutional understanding of rights.

Rights generally, and the liberal-constitutional understanding of rights in particular, have been the subject of intense debate, and in a number of disciplines, during the 200 years since the revolutions they rhetorically inspired. In political theory, conservative theorists of the state, following Edmund Burke, have argued that rights effectively destroy the bonds of community, hierarchy, and tradition, and all in

the name of a falsely abstracted, overly rational, ideal conception of the individual.⁶ In jurisprudence, positivist critics, following Jeremy Bentham, have argued that rights obscure the political origin of law, thus frustrating or muting clear-headed criticism, and hence reform, of existing law: by obscuring the line between the is and the ought, rights unduly complicate the task of holding acts of power to the light of reason.⁷ In constitutional theory, democratic majoritarians and moral skeptics have joined force to argue that rights do nothing but stymie the will of majorities and their duly elected representatives,⁸ while ‘originalists’ add that unless clearly grounded in the intent of a constitution’s drafters, rights violate fundamental principles of the Rule of Law.⁹ In recent decades, some economists trained in law (and some lawyers interested in or trained in economics) have criticized rights on the basis of their manifest inefficiencies: rights by definition ‘trump’ utilitarian goals such as efficiency or utility, and if utility or efficiency is the lodestar of value and justice, then rights must either be limited to those which are wealth maximizing, or they are themselves unjust.¹⁰ None of these debates – what might be called the ‘classic rights debates’ – show any signs of abating. The modern economic critique of rights continues to have a substantial effect on the contours of rights scholarship, and the older, even ancient debates – primarily over the philosophical coherence and political legitimacy of rights – are as alive today as they were 200 years ago.

In the last 25 years, however, a quite distinctive line of criticism of the liberal constitutional rights tradition has developed, primarily in the legal academies of the United States, England, Canada, and Australia. The authors of this more modern criticism of rights, sometimes called the ‘rights critique,’ argue, in essence, that rights, rights discourse, and very generally the liberal rights tradition, have failed us, not so much as a matter of jurisprudential coherence, or as a matter of fidelity to history or tradition, or as a matter of democratic integrity – as argued by rights’ classic detractors – but rather, they have failed us as a matter of moral, or utopian, *aspiration*. Liberal rights have, overall, and in the long run, just not been a very good thing. Even when fully recognized by a liberal state – especially when so recognized – they have not been, to quote one of the critique’s primary architects, a victory for the party of humanity.¹¹ They have not improved the quality of either individual or community life in those liberal states which recognize them. Rather, rights, when recognized, have inspired at best a false hope, and have ideologically served to obscure rather than illuminate the contours of a truly good and just state. Accordingly, not only rights themselves, but also faith in rights – ‘rights-consciousness,’ ‘rights discourse,’ or as it is sometimes called, ‘rights-talk,’ – according to the ‘rights critics,’ have not been vehicles for justice. Rights have constituted obstacles – and in a time of global corporatism, they threaten to be ever growing obstacles – to the creation or maintenance of humanistic, egalitarian, diverse, environmentally healthy, and just communities.

The ‘rights critique,’ its label notwithstanding, is not one critique at all, but rather, a cluster (or family) of moral criticisms of the idea and history of liberal rights. Nor is it the only critique of rights currently on the philosophical landscape – as noted above, the jurisprudential, political and constitutional debates that liberal rights have engendered over the last 200 years are still very much unresolved. Nevertheless, it is

fair to say that the myriad of criticisms that are loosely embraced by the umbrella term ‘rights critique’ of the last 25 years has had a distinctive impact on the direction of rights scholarship in the latter part of this century, particularly in the legal academy from which it was born, that sets it apart from these more long-standing debates. First, unlike earlier critics, the authors of the rights critique introduced a major and unexamined question into rights scholarship: the aspirational, or moral, value of rights discourse itself. But second, the rights critics have often urged, on moral and political grounds, an *abandonment* rather than a reformation of ‘rights-talk,’ and their guidance has seemingly proven persuasive, at least to some. Rights and rights-talk *have* indeed been abandoned, rather than reformed, by at least some of the very scholars most inclined to take to heart the liberal, progressive, or universalist ideals of equality, fraternity and liberty that at least at times and at least for some animate the rights tradition. For both reasons, the rights critique is an idea – or set of ideas – that has mattered.

This chapter first explores and then briefly criticizes the major arguments behind the rights critics’ general conclusion that liberal rights fundamentally undermine efforts to secure a good society. I conclude that the understanding of rights on which this conclusion is based is not the only possible or best understanding of the American rights tradition, and that the conclusion is therefore mistaken. In the second section I urge that the pragmatic argument put forward by rights critics for forgoing rather than reforming rights-talk and rights-rhetoric, is also misguided. We need to mend it, not end it.

In the last section, I briefly describe two core rights, which, I will argue, a liberal state should recognize, and which have been underattended by rights advocates and rights critics both: first, a right to be protected against private violence, and second, a right of caregivers to give care to dependents without incurring the risk of severe impoverishment or subordination – a right, to use the provocative phrase coined by the philosopher Eva Kittay – to *doulia*.¹² Both rights, I think, are required of a minimally just and good society. Both rights also, though, could be, and should be, conceived in the most traditionally liberal and constitutional terms. The first such right – the right to protection against private violence – although now disfavored in United States rights discourse, seems fully authorized by both the liberal tradition and the American constitution itself. The second right for which I will argue – the right to *doulia* – has no similar basis of support in either liberal theory or American constitutionalism, but it is surely not incompatible with either, and is at least arguably required by the deepest commitments of both. Both the right to protection and the right to care are rights that can be framed in liberal terms, and both are rights which, if recognized, would go a long way toward securing for individual citizens rights to, and correlative state obligations to provide, the minimal preconditions of a good life in a decent society.

The Rights Critique

Liberal, constitutional rights frustrate rather than further decent goals of the ‘party of humanity,’ according to their critics, for three very basic, and interconnected, but

nevertheless distinct reasons: the first might be called ‘utopian,’ the second is political, and the third is existential. Let me take them up in that order.

Rights and the Good Society

The first, ‘utopian’ critique concerns the compatibility of rights with the critics’ understanding of what precisely is required of a good state in a ‘good society’. Any state in a ‘good society,’ according to now scores of rights critics from both the Critical Legal Studies movement and the revived communitarian and civic republican traditions, is obligated to insure that all citizens enjoy some minimal threshold level of material wellbeing, or welfare,¹³ or met needs,¹⁴ or access to primary goods,¹⁵ or, as Amartya Sen and Martha Nussbaum now argue, those ‘fundamental human capabilities,’¹⁶ such as, for example, the capability to work, play, or care for others, that are necessary for participation in a good life and civic society both. The state is so obligated, according to these and other ‘good society’ theorists, for various reasons: such a threshold might be necessary, for example, to the exercise of the various civic virtues required of individuals if they are to participate as free and equals in a liberal state,¹⁷ or, such a threshold might be necessary if citizens are to enjoy the fundamental human capabilities that are in turn necessary for the exercise of meaningful civic liberties,¹⁸ or, more simply, some minimal level of wellbeing might be required because such a threshold is necessary if citizens are to live fully human lives, and the dignity to which their humanity entitles them.¹⁹ Many citizens of even prosperous democratic states, however, cannot possibly attain such a minimal threshold, without some state involvement in the distribution and redistribution of resources, particularly with the inequalities that persist, and threaten to worsen, today. States are required, by the demand of goodness, to ensure that citizens retain the dignity to lead a meaningful life. Therefore, critical, civic republican, and communitarian theorists of the state conclude, the state is obligated to do whatever it takes to provide that minimal level of wellbeing to each of its citizens. The state is required by the moral mandate of goodness to ensure that citizens enjoy that requisite level of met need, primary goods, welfare, wellbeing, or fundamental human capability to an autonomous and dignified life.

Liberal rights, though, according not only to their critics, but also according to a goodly number of their advocates, and all of them echoing Marx’s observations about rights from over a century ago, virtually by definition, are obstacles to, rather than a possible vehicle for, any such welfare-promoting role for states, whether that role is direct or indirect, and whether framed in terms of human capabilities, human needs, civic virtue, or minimal conditions of a dignified and free life. This is not a surprising consensus. Liberal-constitutional rights, as they are now authoritatively interpreted in the United States, do not obligate the state to ensure anything even remotely resembling what various ‘good society’ advocates envision. Worse, liberal constitutional rights, as they are now authoritatively interpreted in this country, actually *limit* the state’s authority to do what it would have to do to secure the material preconditions of the good society. Based largely (but not entirely) on the state of US court-centered constitutional law and history, the conventional wisdom, at least

among US constitutional and legal theorists, now holds that individual rights on the one hand, and the state's obligation to ensure the minimal material preconditions of either wellbeing, civic virtue, or capabilities, on the other, are not mutually supportive. The good society, and the state's obligation to ensure that citizens have access to the minimal capabilities, primary goods, or met needs necessary to participate in it, must then be both conceived and achieved by recourse to some means other than liberal rights.

The relationship, therefore, between a state's potential obligation to respect its citizens' rights and a state's potential obligation to promote a good life for its citizens, is not only not mutually supportive, it is downright hostile. The good society, as envisioned by virtually all 'good society' theorists and rights critics, requires substantial state intervention into various 'private' spheres, and substantial redistribution of the goods, resources, and power that it finds in those spheres,²⁰ and liberal rights, as defended and constructed by contemporary constitutional theorists and jurists both, limit the power of states to do precisely that.²¹ Should a state go about the task of ensuring the material preconditions of a good life for all, or, in the Sen-Nussbaum-ian formulation, should a state go about the task of ensuring the preconditions for the capabilities which are themselves requisite to a 'fully human life,' it would have to puncture the walls of insularity that liberal rights, both in theory and to a considerable degree in practice, protect. To secure the minimal preconditions of the good society for all of us, then, the state would have to *violate* the rights we hold – rights of liberty, property, contract and privacy – as individuals. So, not only do we not have a 'right' to a state obligated to ensure minimal preconditions of a good society – whether the 'good society' is as envisioned by Karl Marx, John Dewey, Micheal Sandel, Frank Michelman, Mark Tushnet, William Forbath, or Martha Nussbaum – but, if anything, we have a right to a state that does not even *attempt* to ensure that the material preconditions of a good society are met. Rights protect us against the nanny state that might otherwise regard the 'good society' as any of its business.

Rights protect against a state interested in good society ambitions, furthermore, not because they are misused by machiavellian political actors, but rather, by *structural design*: rights are, by definition, *negative*. We have whatever rights we have, *against* the state, and *against* the state's actions, and against the state's actors, we do not have rights that would positively obligate the state to do something. We do not have rights that require, rather than forbid, the state to take some action. It is, of course, because we have rights *against* the state (and only against the state) rather than rights *to* some particular sort of state action or state intervention, that rights protect the individual against an overreaching state in the manner celebrated by rights advocates. But it is also because of their negativity that rights preclude the state from taking any role in securing to citizens the material preconditions of the good society. A negative right disempowers the state from pernicious, intermeddling, paternalistic or malign intervention into the private affairs of individual citizens, but by virtue of so doing, it also disempowers the state from the state from securing, on behalf of weaker citizens, the material preconditions requisite to developing the capabilities in turn necessary to a fully human life. Good society theorists and rights critics, as well as a number of

liberal rights theorists themselves, have concluded from this argument that rights, as conceived and employed in at least United States liberal and constitutional jurisprudence, are fundamentally at odds with any purported state obligation to ensure the material preconditions of a good society. If so, then, the state's obligation to promote conditions that secure either minimal primary goods, or met needs, or the minimal capabilities essential to a full human life, will have to be secured by some means other than individual rights.

Rights, Politics and Subordination

Second, according to some rights critics, liberal rights fail for a more pointedly political reason. Just as the negativity of rights blunts the power of the state to promote welfare, likewise, rights' negativity limits the state's power to fight the damaging consequences of private sphere subordination.²² Precisely because they protect individuals against state intervention, rights create entitlements to economic, racial and sexual spheres of private entitlement and private privilege, within which the powerful can exploit the powerless, with no fear of state redress. By prohibiting interference with rights, a liberalism that centers rights thereby also prohibits the state from intervening into the private sphere for the democratically progressive purpose of redistributing power or resources within it. Rights elevate, or empower, the citizen vis-à-vis an overreaching, paternalistic state, but by staying the paternalist's intervening hand, they also entrench private inequalities. Within those private spheres such actions are within the ambit of 'individual rights': the state may not intervene. Rights create, in effect, a privilege to exploit others.

Thus, the right to free speech, to take an example, does assure the individual a degree of freedom from state censorship. But on the other hand, it also assures that those who suffer the consequences of hateful utterances hurled by the rights-empowered will have no hope of redress; the right to free speech immobilizes the state from acting. The right to contract, to take another example, assures the individual that a liberal state will not paternalistically alter his or its freely struck bargains. Yet, this freedom of contract also assures that those who suffer the consequences of economic oppression will have little relief from the state: again, contractual freedom stays the state's hand. The 'right of privacy,' similarly, implies that the state will no unduly meddle in an individual's intimate affairs but, for the victim of domestic violence, what it means (or has meant) is that the violence inflicted upon her will go unchecked, and that her abuser's power, furthermore, will be imbued with constitutional majesty. The 'right to equal protection, to take a final example, requires that states refrain from legislating on the basis of race or other impermissible characteristics. It also, however, assures that those subjected to multiple and subtle forms of private racial discrimination will have a difficult obstacle to overcome, if seeking relief from the state: the state is precluded, by virtue of the individual right to be free of racially explicit legislation, from acting affirmatively so as to address private racism, just as it is precluded by virtue of the same right from malign forms of discrimination. In all these spheres, rights limit the power of states, and in all these spheres, rights perpetuate social injustice by doing so.

Why is this? Again, it is basically because of rights' negativity, that they insulate private hierarchies, thereby empowering the strong to subordinate the weak. Thus, it is by virtue of the fact that my right to free speech is a negative right against the state that it implies the disempowerment of the victim of hate speech. If that right were, instead, a positive right to speak, or a positive right to literacy, or to education, or to information, instead of a right to be free of state intervention into private speech markets, it would be an open question whether or not the right was most endangered by censorial state actors or censorial private actors, and whether the state should act or refrain from acting so as to protect that right. Similarly, it is by virtue of the fact that the right to privacy is a negative right against state meddling that it implies the disempowerment of the victim of domestic assault. If it were, instead, cast as a positive entitlement to the enjoyment of some sphere of privacy, it would similarly be an open question whether or not the right was more endangered by the private assaultive, intrusive conduct of abusive partners, or by the intervention of public actors, and accordingly whether the state should act or refrain from acting so as to protect it. It is by virtue of the fact that rights of contract and property are viewed as negative rights against state intervention that they operate as protectors of free markets, and hence of private material inequality. If they were understood as rights to the enjoyment of some minimal material quality of life, then again it would be open to debate whether the right is best protected by state inaction or state guarantees of jobs, welfare or income that limit rather than insulate labour markets. Likewise, it is by virtue of the fact that the right to equal protection is cast as a negative right against a certain sort of state irrationality that it has become such a powerful weapon against those who would use the state to rectify the imbalances created by private forms of racism. Were it understood, instead, as a positive right to be free of certain manifestations of racism, it would be an open question whether or not that right is most endangered by private or state action, and whether it is best protected by color-blind or race-conscious legislation. The rights critics' political case against the liberal rights tradition, in other words, concerns primarily that tradition's insistence that rights by definition limit, rather than inform or guide, state action.

Rights, then, whatever good they do, have this negative political externality: they create private spheres of privilege within which the exploitation or subordination of the weak by the strong goes unchecked by the state. Those spheres, and even the subordination that occurs within them, are then cloaked with the mantle of constitutional and moral righteousness. The very utopian universalism of rights and rights-consciousness instills in the privileged the false and Panglossian belief that all is morally well and fair with the world, even in the face of glaring and unjustified material inequality, because whatever may be the case with respect to material wellbeing, the rights that protect those material possessions are universally bestowed. The poor's rights to their meager belongings are, after all, no less robust than the rights of the wealthy. Even more damaging, however, rights instill in the relatively underprivileged the false sense that their own lack of material wellbeing is justified by – or at any rate morally offset by – the rights they possess: I may not have much but, by right, you cannot deprive me of what I do have. Protection of the rights of the wealthy to their wealth, I may come to believe, is simply the price paid for the

protection of my rights to my belongings against the invasive interests of those who have even less – and so on down the ladder. And they instill in all of us, privileged and underprivileged, the false belief that the rights protected by liberalism are grounded in our nature and hence immutable to change. We come to believe, wrongly, that not only is our inherited world of rights and that to which we are by right entitled a just one, but that it is a necessary and unchangeable one as well. Thus, rights, according to the rights critics, do not just protect, they also disguise private realms of abuse, violence and oppression that are sites of injustice, and they protect it against the very democratic interventions that might redistribute the power within them, or at least ameliorate the more extreme harms occasioned by them. Rights, again by definition, permit the strong to subordinate the weak in private and without intervention by the state, and then celebrate that subordination as the exercise of rights. They first politically protect, and then they ideologically valorize, private subordination and exploitation of the weak by the strong, and all under the umbrella of constitutional authority.

Rights and Community

Finally, the third major way in which rights fail us, according to the rights critics, is *existential*: it goes to how rights envision and then construct our self-identity. Rights and rights-consciousness, according to the critics, render us unduly – and inhumanely – atomized. In liberal societies that take rights seriously, individuals are first described as, but then tragically become, isolated from each other in individualized rights-spun cocoons, increasingly incapable of even approaching each other, much less achieving any meaningful moral or political empathic connections with fellow citizens.²³ No less than their negativity, rights' atomism also undercuts attempts to secure a good society, and in at least three ways.

First, for there to be a state obligation to promote, protect, or provide a good society and a good life for all citizens, at least in a democratic state in which state actors, and hence the 'state' itself, are in some way simply some subset of citizens themselves representative of the people, there must exist the political *will* for it, and that will, in turn, requires a fairly strong feeling of communal solidarity among citizens. Rights, however, disincline us to even regard each other, much less assume responsibility for each others' welfare: rights erode rather than enhance our feelings of obligations toward our neighbors, co-citizens, and arguably even our intimates and family members. Rights leave us identified with our holdings, rather than each other. For that reason alone, they undercut, and badly, the empathic solidarity necessary to sustain a democratic case for a state obligation to provide for the wellbeing of others.

Second, at least some of the material preconditions of the good life which a state is obligated by the demand of goodness to provide, are those preconditions for our capability for social affiliation or connection with others, and mutual and moral responsibility for each others' wellbeing. To live a fully human life, for example, according to Martha Nussbaum and others, *means* in part to have the capability to live responsibly and safely with and for others, at work, at home, and in the community.²⁴ The capability for doing just that, then, is part of what a just state is obligated to

ensure, if the state is obligated to ensure the ‘minimal material preconditions of a good society.’ The atomism that is at the core of liberal understandings of rights, however, implies at most an atomistic individual in need of rights of isolation, of privacy, and of individuation; not rights that might stem from a frank recognition of our social or relational nature. In terms of capabilities, current rights rhetoric implies that the capability for autonomy is the core capability in need of protection through rights, to the virtual exclusion of the capability for relationality. Because of the power of modern individualistic rights rhetoric, we not only do not have such ‘relational rights’ that might bolster our social capabilities, but we become disinclined to even envision or argue for them. In an atomistic rights culture, we come to view ourselves, and then increasingly come to be, possessors of individual rights against each other and the state, but with not only no responsibilities toward others, but also no rights to ensure that we have the capabilities to exercise those responsibilities toward others well or safely. As a result, we come to identify our ‘rights’ – our most precious political entitlements, and hence constitutive of our political identity – as rights to individuate and distance or sever ourselves from, rather than rights to safely connect or relate to, our families, intimates, communities, or co-citizens.

Third, for the state to have an obligation to ensure the ‘good life’ for its citizens, or the minimal preconditions for the development of fundamental human capabilities themselves essential to a ‘fully human life,’ the state obviously cannot be entirely ‘neutral’ toward competing conceptions of the good life. It must, rather, be committed to some vision of the good, whether defined by reference to human capabilities, need, or aspiration, and then must feel obligated to achieve it. But the same atomistic understanding of individual nature that drives liberalism’s commitment to individualistic rights also is behind its signature insistence on state neutrality toward competing conceptions of the good life: because we each, individually and idiosyncratically, author our own understanding of the good, the state, or the community, or the collective, is obviously incapacitated from doing so on our behalf.²⁵ The resulting insistence on state neutrality toward competing conceptions of the good renders liberalism, as a politics, peculiarly moot on issues regarding the nature of the good society and peculiarly incapacitated in the task of bringing it to fruition. The result is not only alienated individuals, but also a sterile and unsatisfying reluctance on the part of liberal states to endorse some conceptions of the good over others, even where such a commitment seems clearly warranted and in the national interest. More fundamentally it leaves the liberal state with no role to play, even in theory, in the creation of a good society. The individual has a ‘right’ not to the material preconditions of a good life, but to a state fundamentally disinterested in committing itself to that project. For this existential, identity-based reason as well, then, rights critics conclude that rights and rights-talk are a part of the problem rather than part of the solution: rights construct us in such a way as to virtually guarantee our disinterest or hostility toward any state obligation to ensure the good society, and the ‘we’ that is disinterested or hostile to such a project, of course, is precisely the we that would have to be charged with the duty to carry it out.

Finally, according to the rights critics, this existential ‘negative externality’ of rights, like the political ‘externality,’ is also a function of rights’ essential core, rather

than a function of their distortion. Rights theorists, according to their critics, have wrongly but emphatically embraced a fundamentally false conception of human nature. We are, each of us, according to rights' architects, self-sufficient, idiosyncratic, autonomous, free-thinking, rational, insular and atomistic. We each have a fundamental 'right to be left alone,' for example, because we each want to be left alone, and thrive when left alone. We revel in our idiosyncratic individualism, unencumbered by responsibility, connection, duty, culture or society. But that understanding of our nature – that understanding of the nature of individual life – according to the rights critics, not only has serious costs, it is also simply not a true one. We are not insular atoms, sufficient unto ourselves wanting nothing but to be left alone. Rather, for substantial parts of our lives, we are dependent on the caregiving of others for our very survival, and throughout our lives, we remain interdependent social beings. These basic social and biological facts of life, furthermore, inform not just our self-understanding, but our moral sense as well: we have moral obligations to the weak and to those dependent on us, and we know we have those moral obligations, because we know we have been, and will be, weak and dependent ourselves. We sympathize with others in crisis or in need, and we depend on their sympathetic response when we are in need ourselves. We build community because we are communal creatures who depend on it. It is, therefore, not surprising that the liberal world, justified by a false understanding of who we are, is so apparently morally barren. It is at war with out moral intuitions about the way in which we ought to live, because it is at war with the true conception of our nature that informs our moral sense.

Thus, it is by virtue of liberalism's commitment to a falsely individualistic and falsely insular conception of human nature that the individual possesses relentlessly negative rights of property, privacy and contract, and it is by virtue of those rights that the individual has the dubious and amoral freedom to both keep his wallet in his pocket and avert his gaze and conscience from the panhandler on the street. The understanding of our nature is false and hence the moral freedom posited upon it seems morally false as well. Similarly, it is by virtue of his asserted nature, and then by virtue of his rights justified by that nature, that the liberal individual need not feel or act on civic, moral or religious duties of charity or fraternity. Again, the understanding of our nature is false so the circle of obligation and responsibility constructed by reference to it is unduly circumscribed. By virtue of his profit-seeking and self-sufficient nature, an employer, whether corporate or individual, has property, privacy and contract rights, which permit him to ignore or deny knowledge of any community of human interest between his employees and himself. But we are not only profit-seeking entities, and we are not by nature self-sufficient, and so the corporate entities and individual rights that we have constructed in the wake of that false depiction seem – unsurprisingly – amoral.

To take some examples: by reference to a false conception of her insularity, liberalism has constructed a right to privacy, from which it follows that a pregnant woman need not acknowledge the gravity of her moral duties towards the human life growing within her. But she is not so insular, and she is burdened by moral obligations – the error lies in assuming them away. By virtue of their wrongly

assumed and acausal atomism, and the absolute property rights to which it leads, a gun manufacturer need not acknowledge the risk that his firearm poses to others, a polluter need not acknowledge the harms he occasions, nor the tobacco manufacturer the disease wrought by his product and profits. But again, the acausality is mistaken, we are far more connected to each other than liberalism wants to concede, and, consequently, the moral conclusion is unwarranted as well. Very generally, it is by virtue of their insulating negative rights that both individuals and corporations in liberal societies need not acknowledge their debts owed to others, their responsibilities towards them, the chains of causation that unite them, or the common fate in store for them. But it is by reference to the individual's presumed nature that those rights are in turn justified. That conception of our nature is false and the moral conclusions to which it leads are wrong. The human nature presupposed by the autonomous holder of negative rights, in short, is atomized and individuated to the point of social pathology – but falsely so. That nature is not ours. The panoply of rights constructed upon it may be liberal, but they are profoundly inhuman.

The rights critics, to summarize the utopian, political, and existential threads of their critique, are haunted by the specter of a rights dystopia, only slightly less chilling than Orwell's *1984* or Huxley's *Brave New World*. In a world defined by rights, we have rights to keep the state out of our lives, but no obligations to help each other. Children are taught the morality of individual rights, and mature into adults who abandon or neglect civic bonds – untutored, as they are, in the moral language of responsibility. Religious fundamentalists use the power of their protected rhetoric underscored by their right to religious freedom to home school their children in the lessons of contempt for those who do not share their faith. Patriarchs enjoy rights of familial privacy, and family members have no legitimate expectation that the state will protect them against his abuse. Every individual or corporate employer has the right to profit from the labor of his brother, but no one has the responsibility – and eventually, no one has the inclination – to share, or reduce, his brother's burden. Every individual has the right to be left alone and takes full advantage of it, and neighborhoods, communities, states, even families, and civic life in general wither on the vine as a consequence. This does not sound like a world anyone would want or choose to live in. It is, however, increasingly, the world that liberalism has wrought. Rights, according to their critics, are at the very heart of it.

A Critique of the Rights Critique

Why, though, if it is, on the one hand, the negativity of rights, and, on the other, a false conception of our human nature that underlie the diseased culture which the rights tradition has created, have the rights critics faulted the idea of a liberal right itself? There may be nothing intrinsic in the nature of a right that requires either its negativity, or that it be forever conjoined with a false description of our nature. If that is right, then the rights critics' conclusion – that we should abandon, rather than reform, rights – is overbroad, even if their substantive premises – that the negativity of rights protects injustice, and that their understanding of human nature is largely

false – are warranted. Some of the critics – notably, Mark Tushnet, Morton Horwitz, and Peter Gabel – have made clear their belief that their critique of rights rests on contingent features of national identity, not intrinsic features of liberal rights culture.²⁶ But these qualifications have apparently gone unheeded, and for the most part have not led to efforts to reform rights-talk in a way that retains its value. As a consequence, those of us at all persuaded by the rights critique may have thrown the baby out with the bathwater. Let me address, first, rights' purported negativity, which grounds both the utopian and political objections summarized above, and then much more briefly the overdrawn atomistic conception of our nature.

First, with regard to rights and negativity, there is nothing about a right that *logically* requires that it be understood as a constraint on state action, forbidding interference with individual spheres of privacy or liberty, rather than as a state obligation, entitling the individual, in the name of welfare, capabilities, or basic goods, to some form of state intervention. The notion of a 'positive right' may be disfavored in contemporary liberal discourse, but it is by no means oxymoronic. Ronald Dworkin, in his seminal, mid-1970s writings on liberal constitutional rights, did focus – indeed overwhelmingly – on the rights that follow from the moral constraints on liberal states.²⁷ But he suggested no reason to define rights in such a way, and at any rate, nothing in the remainder of his powerful jurisprudential treatment of rights depends on it. A right could as readily be defined as including *both* the individual entitlement that follows from the moral *obligations* of liberal states, as well as the entitlements that follow from constraints upon them – rights could be defined as the individual entitlements that follow from what states are morally required to do *and* what liberal states are morally prohibited from doing.²⁸ Doing so, furthermore, would seemingly be consistent, rather than inconsistent, with the robust Kantian moral imperative that, according to Dworkin, underlies liberalism – that every individual must be accorded equal dignity, equal concern and equal respect.²⁹ To accord all individuals dignity, concern and respect, sometimes requires the state to refrain from acting, and sometimes requires it to act.

The connection, in other words, between the liberal idea of rights, and the constraint of negativity, is clearly contingent, not logical. And, even the contingent connection is not particularly strong: rights have at different times and for different subcultures in American history, been widely understood as positive rather than negative in character. To conceive of rights as either positive or negative, depending upon contingent political necessity, would be consistent with, not a break from, those perhaps forgotten parts of our histories.³⁰ It would also be consistent with common usage in much of the rest of the world – any number of liberal states recognize positive rights – although not always in conjunction with the entailment of judicial enforcement and remedies for their breach.³¹ Nevertheless, the rights so recognized have political meaning and impact, and more to the point, the societies that recognize them do not noticeably sacrifice their liberality by doing so. Again, the connection between rights and negativity, at most, inheres in American history, and maybe not even there. It most assuredly does not follow from the nature of a right itself.

Furthermore, a recognition that rights might sometimes be positive entitlements to state action, as well as, at other times, negative entitlements to be free of it, is *truer* to

the philosophical liberal classics that animate the liberal tradition, than is the insistence of both liberal constitutional rights theorists, and their critics, on rights' essential negativity. As discussed above, Thomas Hobbes, for example, surely an important theorist of the contemporary liberal state, regarded the utterly positive *obligation* of the state to protect individuals against private violence as at the very heart of the social contract, and the individual's right to that protection as virtually the only 'right' that survives the transition from nature into civil society. Otherwise, the Hobbesian Leviathan can do what it wishes and the individual citizen must submit – the Hobbesian citizen does indeed lack negative rights – but *not so* with respect to the state's duty to protect the individual against private violence: there, the state is bound, and the individual fully entitled. This positive right of the citizen to the state's affirmative action was by no means a peripheral feature of Hobbes's jurisprudence. Rather, the bargain struck – the individual relinquishes self help, *in exchange for* the state's obligation to protect him from violence – was, for Hobbes, the *raison d'être* of the state's very existence: the Leviathan's protection of the individual against the private violence of others is the *quid pro quo* for the individual's relinquishment of his right to self-help available to him in the state of nature.³² The individual, in other words, is just as contractually entitled to receive that protection as the state is obligated to provide it – in short, the citizen has a right to it. The state's obligation to protect the citizen against private violence, as well as the citizen's continuing right to receive it, in Hobbes's view, was foundational and inalienable. If we take Hobbes seriously, so to speak, the individual clearly has a right to the state's protection against the violence or aggression of other private parties – to borrow a phrase from Steven Heyman's important article on this point, this was, for Hobbes, the 'first duty of government.'³³

And, the right to that Hobbesian protection, in turn, at least as conceived by Hobbes, is clearly positive in character: if the state is obligated to protect the citizen against private violence by virtue of the citizen's having relinquished his recourse to self-help in exchange for that protection, then the individual has a *right* to it. It is a right, in turn, not to state inaction, but rather, to the state's affirmative intervention into what would otherwise be a natural, private, and life-shortening state of war. The state is required to do something – to protect the individual – not just refrain from doing something. If Hobbes was right about this, and if this very positive right to protection against violence is central, rather than peripheral, to the metaphoric 'social contract' so central to liberalism, then the distinctively modern claim that liberal rights are *essentially* negative – whether insisted by rights proponents, rights critics, or Supreme Court or Fourth Circuit or Seventh Circuit Justices – is mistaken, and even perverse. At least according to Thomas Hobbes, the core, foundational right to which the liberal state owes its existence is indisputably positive in character.

And what of Locke? As Epstein and other libertarians and property rights advocates rightly insist,³⁴ Locke substantially modified the Hobbesian picture: for Locke, but not for Hobbes, the individual brings to the civil state rights of property bestowed by nature, which have the effect of significantly limiting state sovereignty. The tying of liberalism to these 'negative rights' that bar the state from acting in various impermissible ways stems from Locke's writings, and roughly in the way

Epstein describes. But Locke at no point *repudiated* the Hobbesian positive right of the citizen to state protection against private violence. In fact he expressly endorsed it, and expanded upon it: for Locke, the citizen has the right to expect, and demand, more from the state than just protection against violence, he also has the right to expect governance in accordance with rules, and indifferent and impartial adjudication.³⁵ At no point, though, does Locke urge that the core, Hobbesian, and positive right to the protection of the state should be displaced with a set of negative rights limiting state power. He urged, rather, that the relation of state and citizen be construed as constituted by both: the individual gives up natural powers of dominion, of punishment, and of adjudication, while the state acquires the power to administer these functions, but only toward proper ends. The citizen, from a Lockean perspective no less than a Hobbesian, has rights, logically positive in character, to a state that acts in ways conducive to his safety, not just negative rights to insist on restraints.

Other prominent liberal theorists as well have quite explicitly embraced the twinned claims that the state has positive obligations and the individual has positive rights, and expanded the list well beyond the Hobbesian positive right to protection against private violence. John S. Mill and John Dewey both emphatically insisted upon what we would today recognize as liberal welfare rights to the minimal preconditions of a good life, broadly construed: the individual, according to both, has rights the liberal state must recognize and act on, not only to safety and food and shelter, but also to meaningful work, a decent and liberal education, and participation in the society's political, civic, and cultural life.³⁶ Even Isaiah Berlin, perhaps the harshest twentieth-century critic of positive liberty, clearly stated in his celebrated essay on the topic that his fears of overintrusive states did not go so far as to obliterate in his own mind the state's positive obligation, and the individual's positive right, to ensure a threshold level of minimal wellbeing.³⁷ Indeed, there may be *no* important liberal theorist, from Hobbes and Locke through Rawls and Robert Nozick,³⁸ that insists on the tie between rights and negativity that has become such an entrenched part of the contemporary American constitutional mindset.

Third, the negativity of rights is neither required nor justified by the American constitution, as a goodly number of constitutional theorists and historians have now quite decisively shown.³⁹ This is a large debate beyond the scope of this discussion, but two points are worth noting here. The first is just logical: the widely shared conviction that 'the American constitution is one of negative rights only' seems to rest largely on the mistaken assumption that because the constitution's bill of rights addresses states, and not private actors, it therefore consists of negative rights only.⁴⁰ The state action requirement, in other words, clearly a constitutional limit on the reach of rights, is said to preclude not only the possibility that the constitution reaches private actors as well as state actors, but also that the constitution can't reach state *inaction* as well as state action. But this inference is just unwarranted: regardless of whether or not the constitution contains a 'state action' requirement that limits the constitution's reach to state and not private actors, it surely doesn't follow from the state action requirement, assuming there is one, that the rights contained are necessarily negative in character. A positive right, no less than a negative right, would be directed at states and not private actors: the difference between them is that

possession of a positive right would condemn as unconstitutional state *inaction* rather than state action, not that it would extend the constitution's reach to private actors. The difference between positive and negative rights, in other words, is *not* that the former would impose constitutional constraints on private actors. The difference between them is that the former would impose obligations to act, rather than obligations of restraint, on state actors.

Finally, both the history and the plain language support rather than undercut the existence – indeed the prominence – of positive rights in the Constitution. The plain language of the text of the Fourteenth Amendment contemplates state *inaction* rather than action as its main target: the relevant part of Section One declares that ‘No State shall *deny*’ various entitlements. It may be unfortunate that the drafters chose to use a double negative, but the meaning is not obscure: If *no* state is allowed to deny, then all states must provide. And what states must provide, again according to the clause’s plain text, is protection of the law – and equal protection at that. Historically, the Amendment’s insistence that states must provide protection of the law was the result, in part, of the refusal of the states to take action to protect both the safety and civil powers of freed slaves.⁴¹ The Fourteenth Amendment, in short, quite plainly provides for positive individual rights and explicit state obligations both.

Let me now turn to the critics’ existential argument. This, too, seems overbroad. In fact, there is even less reason to think that rights, in order to be liberal rights, must be based on a falsely atomistic account of our nature than to think that rights, in order to be liberal rights, must be negative. Rights, in the liberal tradition, are justified by some conception of our universally shared human nature – the inference from some idealized conception of our nature to our rights is not only central to the logic of rights, but also the source of their moral authority. But surely, there is nothing in the rights tradition *per se* that obligates it to honor a *false* conception of our nature. Although classical liberals undoubtedly highlighted our autonomy and our individuality, the centrality of the ‘right to be left alone’ to the rights tradition, and the neurotic understanding of our atomistic nature on which such a right rests, is a late nineteenth- and early twentieth-century invention. Such a view is not ‘central’ to liberalism and not required by the logic of rights; it is central to liberal *states*, only to the extent that the state, the Constitution, or the tradition that defines the content of the rights we actually have, designate it as such. Rights could as readily be grounded in a view of our nature that both respects our individuality and also gives full recognition to our social nature: our extended periods of biological dependence on caregivers, the resulting dependence of those caregivers on the support of others, our obligations to our communities and neighborhoods, our civic and charitable duties to others, and our responsibilities to engage in civic life. In short, neither negativity nor atomism are necessary features of the rights tradition.

Pragmatic Arguments: The Not-So-Hidden Costs of Abandoning Rights

So, why insist that they are? And what are the costs of doing so? Some of the earliest and harshest critics of rights, particularly from the critical legal studies movement, have no quarrel with the arguments presented above, and concede the possibility of

precisely the reformulation there suggested.⁴² Nevertheless, most rights critics have urged an abandonment, not a reformulation, of rights and rights discourse. The reason given for that urged abandonment, for the most part, has been largely strategic, or pragmatic, rather than theoretical or visionary. It has also had quite an impact. Welfarist theorists have seemingly turned their backs on rights, as a possible vehicle for achieving (or even articulating) the state obligations which they think are owed.

The pragmatic argument against reformulating rather than abandoning rights and rights talk, roughly, is this: rights, according to the critics, are not necessarily negative, but they are (almost) invariably negative,⁴³ and although not logically tied to a falsely individualistic account of our nature, they are (almost) always tied to just such a falsely insular account.⁴⁴ They are also (almost) infinitely malleable, or indeterminate, and accordingly easily co-opted, or subject to capture.⁴⁵ While rights may, then, from time to time, guarantee a measure of individual freedom, they also – and (almost) inexorably – are co-opted by larger forces and reformulated, so as to frustrate rather than promote the good society. However they are initially conceived, and with whatever good intentions and progressive motivations, rights end up insulating inequalities, disabling the state from redistributive regulatory governance, benefiting the privileged, giving false hope and a false sense of security to the subordinated, teaching complicity in one's own disempowerment, and holding out the possibility of small progressive steps forward only toward the end of co-opting their beneficiaries, and ultimately securing large steps back. There is nothing to gain and quite a bit to lose, then, by even envisioning a progressive or positive alternative rights agenda, much less striving to put one in place. The idea that we might profit from a reformulation of rights as positive and honoring our social rather than asocial nature, is worse than a harmless utopian chimera; it is a dangerous delusion. If put into practice, it promises at most a pointless diversion of resources. At worst, it promises continuing liberal complicity in the work of injustice. It will leave us farther, not closer, to realizing a good society, and farther, not closer, to a state obligated to commit itself to that end.

This is not a groundless worry; there is plenty in our recent and not so recent history that explains the rights critics' skepticism. The last great American rights revolution – the civil rights movements of the 1950s and 1960s – has indeed become the shell of the reactionary anti-affirmative action movement of the 1980s, 1990s and 2000s. The reproductive rights movement of mid and late twentieth century has similarly become nothing but a bare commodificationist right to purchase an abortion, rather than a positive entitlement to exercise meaningful autonomy or choice in one's reproductive life.⁴⁶ Negative rights of free speech – fervently sought by dissenters as a way to protect the interests and liberties of persecuted pacifists, anarchists and communists at mid-century – have become, at the turn of the century, the vehicle by which advertisers manipulate public desire with impunity, and corporate wealth continues its headlock on the levers of political decision-making.⁴⁷ The peculiarly American so-called 'right to bear arms,' intended to protect the rights of colonial citizens against a centralized, distant, military force, has become instead the means by which citizens terrorize each other, reducing the state to such cartoonish sub-minimalism that the right threatens to return us all to the very Hobbesian state of

nature from which the Leviathan promised deliverance. The rights critics have, in essence, urged us to internalize the moral of these examples, and inoculate ourselves against future delusions: this is the way of all rights movements, hopes, and ambitions. There is no articulable right that will not eventually, and sooner more likely than later, become the vehicle for reactionary politics. The entrenchment of the status quo achieved by such a discourse is never worth whatever momentary gain might be had through an expansion of rights.

There are, however, costs in abandoning rights, rather than joining the debate regarding their substance, and those costs are disproportionately born by efforts to achieve the good society. The first is rhetorical: it concerns the nature of moral, aspirational discourse, and the relative power or impoverishment of the rhetoric with which such discourse is articulated. When architects of the good society disown rights, they distance themselves from a tradition that has unquestionably been unduly attentive to individualistic needs for property, contract, and privacy, and insufficiently attentive to human and social needs for safe intimacy, civic participation, meaningful work, or basic welfare goods. But they also distance themselves from a discourse that whatever its historic shortcomings is *also* explicitly utopian, moralistic, and imperativist: the rights tradition directs states and state actors to attend to what we might universally share, and to focus on the utopian aspirations we might universally hold, and then to bring that vision to earth. Rights, in other words, are a list of morally grounded imperatives, not a list of suggestions for good governance. It is a language that requires lawmakers to think in terms of what we morally ought to do and be. It has indeed been a language that in modern times instructs the state to limit, in the name of justice, what it might do, but it is also a language that could goad the state, in the name of justice, to govern toward the end of creating the good society. Good society advocates should not loosely turn their backs on a discourse which has historically been the means by which we marry our moral beliefs about governance with ethical imperativism. There are not all that many ways by which critics, citizens or even legislators can make the point that moral judgment rather than realpolitik ought to – and must – guide the business of politics. It is not so clear that the abandonment, rather than reform, of one such language – whatever may be its flaws – is a wise strategy for good society advocates, or will prove to be a benefit for the party of humanity.

The second cost of abandoning rights is borne by the state of normative, doctrinal legal scholarship. Should progressive theorists who are also lawyers continue to heed the critics' call to abandon rights talk, the development, through scholarship, of various and alternative directions legal doctrine could take toward the realization of a more progressive society, will bear the mark of that abandonment. To a considerable degree, we can already trace the effects of that retreat. We still lack a credible, broad-based, coherent jurisprudence of welfare *rights*, for example, Frank Michelman's herculean efforts of 25 years ago notwithstanding,⁴⁸ and, although this is a negative that is impossible to prove, we might lack it, at least in part, because those who might have otherwise been inclined to contribute to that jurisprudence have been convinced not only of the futility of the project, but also of its counterproductivity. We lack a credible jurisprudence of education *rights*, and it is at least possible that we lack it, in

part, because of that same skepticism. We lack a jurisprudence of dignitary rights, and labor rights, and environmental rights – and, as I will discuss in a little more detail, *doulia* rights, or rights to provide care – and we lack them in part because those who might produce the scholarship have become convinced that rights and rights talk cannot be productively turned to the work of achieving or even conceiving a good society, and might even undercut it. Obviously, other factors as well have played a role – a hostile Supreme Court is surely one. At the same time as the Court turned rightward, however, leftist scholars turned to an explicitly antinormative skeptical postmodernism, which at least in part fueled a late century retreat, in the legal academy, from visionary, utopian scholarship. That scholarship, including rights scholarship, might have aimed, among much else, to carve out a constitutional argument for a state obligation to secure the minimal preconditions of a good society. The explicit disavowal of rights by rights critics and good society advocates both, is both a part of that story, as well as reflective of it.

Third, there is a doctrinal cost paid as well, when progressive lawyers, and not just social theorists, abandon, rather than seek to reform, rights and rights talk: the abandonment of rights discourse by those critical of rights' negativity, or of liberalism's excessive individualism, and more generally by those committed to constructing a good society through law, goes some way toward rendering the rights critique a self-fulfilling prophecy. When lawyers forego the task of creating a positive rights jurisprudence, they also forego the opportunity to assert a credible counterweight, *within* doctrine and within rights-structured doctrinal discourse, to the assertion of negative rights which do indeed undercut the good society, and in precisely the ways urged by the critics. With no credible counterweight, when a negative right of the sort the rights critics lament *is* asserted, it is typically met not with a positive right that might counter it, but instead with a claimed 'policy' to be weighed against it. But rights, as both their proponents and critics know, trump policy; that is their function. If we had what we currently do not have – a developed jurisprudence of positive and relational rights, constructed around the ideal of the good society – then a negative, individualist right might alternatively, or additionally, be met with the claim that it conflicts with a positive one, in courts of law and in courts of public opinion both. Conflicting rights, as Dworkin reminds us, do not 'trump' each other; rather, conflicting rights must be read in such a way as to reduce the conflict. The proponents of the good society have been dissuaded, in part by the rights critique, from developing the jurisprudence that might support precisely the arguments that could conceivably counter the rights which the rights critics rightly decry.

Let me illustrate with one example. In a now famous and worrisome case from Texas, a federal district court judge held that a man's constitutional right to bear arms was unconstitutionally abridged by a federal law which forbade domestic violence offenders from owning firearms.⁴⁹ The judge accordingly struck the law as unconstitutional. In that case, the state attempted, unsuccessfully, to meet the defendant's claimed assertion of the negative right to bear arms by arguing, first, that the Second Amendment right on which the defendant rested his case doesn't exist,⁵⁰ and second, that if it does, it should be balanced, or weighed against, or limited by, a

policy favoring public safety.⁵¹ But policy arguments do not win against asserted rights. They are not supposed to. The very logic of a right – that it must be protected even in the face of sound policies that conflict with it – virtually assures as much. Again, rights, by definition, trump policy. It is inherent in rights that they do so. In this case, once the dubious premise that there exists an individual right to bear arms was accepted by the Court, there could be no effective rejoinder.

Alternatively, if there had existed a robust and developed understanding of positive rights to which the state might have turned, the negative right to bear arms asserted in the Texas case could conceivably have been met not just with a claimed policy favoring disarmament of violent domestic abusers, but with a claimed *right*: after making the sound and central claim that no such second amendment right to bear arms exists, the state could have proceeded to urge that even if it does, it must be interpreted in such a way as not to interfere with the citizens' fundamental positive right to a liberal state that is obligated to protect all against private violence. Such a right, had it been asserted, could not simply be 'trumped' by a conflicting right. The judge would have been forced to reconcile, in a principled way, the right to bear arms it was asserting with the civil right to be protected by the state against private violence. How the court would have achieved that reconciliation is an open question; the claim that the negative right to bear arms would have to be limited so as to accommodate the positive right to be protected against a known threat of violence from an identified offender with a history of abuse, may or may not have proven persuasive. It likely would not have proven persuasive to the judge that wrote the majority opinion – although it may have captured the legal imagination of a judge writing in dissent. My point here is only that the rights critique – no doubt along with a host of other factors – dissuades us from the need to build the case for the constitutional rejoinder. That alone is a cost.

It is not hard to imagine other examples. Property owners and, increasingly, courts, argue that environmental regulations that impact upon the value of privately held property unconstitutionally restrict the property owners' various negative rights of property. Such a claim, one might think, ought ideally be met with a robust argument that we have a positive right to a state that protects our wilderness, air, water, and public health. Instead, it is typically met by a plea that the property owner's multiple and robust negative rights to own property free of state regulation ought to be balanced against environmental policy. But again, in a rights v. policy debate, the right will trump. The consequence, for environmentalism, of abandoning the attempt to construct a positive jurisprudence of environmental *rights*, is clearly not good. In a similar vein, the claim that a landlord's contract and property rights are infringed by laws requiring him to rent to couples regardless of sexual orientation, is met only by the hope that the court will in its discretion come to view such non-discrimination laws as protecting compelling state interests, rather than by a strongly asserted positive right to shelter, unburdened by litmus tests of moral propriety. The claim that a propagandist's hate speech is unconstitutionally infringed by a speech regulation, or that broadcasters' news coverage is unconstitutionally infringed by broadcast regulations, is met by asserted policies in freedom from harm or fairness, rather than with the claim that liberalism ought properly honor not only our negative rights to be

free of censorship but also our positive rights to a political dialogue unpolluted by hate or profit. In short, without a tradition of positive rights on which to draw, we meet constitutional claims of negative speech rights, property rights, contract rights, and gun rights with exhortations of policy – exhortations which sometimes are but more often are not heard, and when they are heard, are then readily trumped. But that these cases are all posed as, and understood as, asserted rights on the one hand, and policies on the other, does not bode well for the regulatory state. Again – rights, by definition, trump policy. Negative rights, unchecked by positive rights that might counter them, threaten to reduce that regulatory state to the vanishing point. Such a reduction would hardly be a victory for the party of humanity. More pointedly, a regulatory state reduced to the vanishing point is clearly not one that is obligated to secure minimal preconditions of a fully human life.

Finally, the failure to articulate a positive rights jurisprudence structured so as to constitute a state's obligation to ensure the minimal preconditions of the good society has encumbered the articulation of a meaningful counterweight not only within rights discourse, but also to the balancing of costs and benefits that increasingly dominates ordinary, or non-rights-based, legal analysis. The result is that legal analysis, across the map, is now driven *in toto* either by the logic of negative rights, or in the absence of rights, by an economic calculus that funnels all values into monetary equivalents, assigning some to the cost and some to the benefit side of the ledger, and then balancing the one against the other, according victory to whichever comes out on top. The failure to enrich the rights tradition with a positive rights jurisprudence and a defensible conception of our social nature, has thus greased the wheels of the ascendancy of an economic method of legal analysis that relentlessly asserts the comparability, fungibility, and commensurability of all values, their translation into dollar terms, and the ease of trading one off against the other: the cost of health balanced against lost profits, the value of future life measured against present dollars, the cost of suffering against the cost of prevention, the monetary benefits of speech against the cost of permitting it; the cost of sexual harassment against the benefits of non-intervention. This cost benefit analysis has, by now, widely recognized and well-known pitfalls: it relies on real or shadow market values that are themselves reflective of little but the forces of profit; it ferociously solidifies and legitimates the status quo by steadfastly ignoring the effects of given distributions on felt entitlements; it discriminates between us by valuing our lives differently on the basis of our projected or actual incomes; it creates a wealth-based mentality that measures all, including goodness, truth and justice, by reference to profit. But for all of its problems, for all of its well-known absurdities, cost-benefit analysis now dominates legal analysis. It does so primarily for the absence of credible normative alternatives.

Here again, this is a loss felt not only in theory but in doctrine as well. Costs of environmental protection to individuals and corporations, for example, are now routinely balanced against the benefits to individuals, where the benefits of health and wellbeing are then measured by projected incomes, and then discounted by various factors, such as the non-proximity of the lives in question to us, in terms of either time or distance.⁵² Rather than present a rights-based challenge to this entire normative apparatus, advocates of environmental regulation instead, typically, debate the

amounts, challenge the discount rates, or question various economic assumptions behind the economic models. What we do not hear much of any more, even from committed environmentalists, is a principled moral and legal argument, based on rights, that we are entitled by right – meaning *regardless of cost* – to some degree of state protected environmental health. Accident victims and their advocates similarly tally their costs in lottery styled torts cases, rather than assert a right to healthcare to which we are entitled, as a matter of right, and again, *regardless of cost*. Sexually harassed workers or their advocates debate the subtleties of the value of a harassment free environment as implied by their employment contracts, rather than assert a right to dignified labor, *regardless of cost*. Our legal system, as well as our discourse, have been thoroughly transformed by a cost-benefit econometric, and without a rights discourse to offset, trump, or challenge it, there is little relief in sight. By eschewing rights and rights talk, we have, arguably, engendered a more efficient state. But we have not noticeably moved any closer to achieving, or conceiving, the good society.

Toward a Jurisprudence of Positive and Relational Rights

What might be worth considering, in light of the costs of the rights critique, is the possibility of revitalizing the rights tradition, rather than abandoning it altogether, and doing so toward the end of constructing liberal rights that protect and guarantee not just individual autonomy, but also ‘good society’ ideals: a society in which, to adopt Martha Nussbaum and Amartya Sen’s formulation, citizens possess those fundamental capabilities which are themselves essential to the enjoyment of a fully human life. What might a liberal state look like, if it employed positive and relational rights, as well as negative and individualist rights, and conceived of those rights, furthermore, as directed towards the protection of capabilities and autonomy both?

There would no doubt be many similarities – as Nussbaum and others have argued, a state committed to ensuring material preconditions of the good society would also be committed to ensuring many of the negative rights now understood as essential to a liberal state.⁵³ But there would be major differences. The first major difference, I think, would be substantive: it would lie in what additional rights would be regarded as being in the ‘core,’ and in the nature of the penumbral rights that might be inferred from that core. Our current liberal state, structured by negative and atomistic rights, and committed to securing the minimal preconditions of participation not in a good society, but in a free society, has, in its core, rights of autonomy, contract and property, all now interpreted, variously, so as to ward off the danger of an overly zealous state. By contrast, a liberal state similarly structured by rights, but committed to securing the minimal preconditions of capabilities as well as autonomy, would, I think, explicitly recognize additional fundamental rights, currently unrecognized or underrecognized by liberal states overly committed to the atomism and negativity of rights, including welfare rights and rights to work. It would also, though, I think, recognize as in the ‘core’ two rights currently underrecognized by liberal states and

undertheorized by welfare advocates. Both, I think, are highlighted rather than marginalized by the 'fundamental capabilities' approach of Nussbaum and Sen.

The first such right, I would call a right to security against private violence, the rationale of which is essentially Hobbesian, and laid out above: as Hobbes claimed, our nature *is* such that the state must monopolize the tools and instruments of violence, if our lives are to be relatively secure. Security against private violence, in turn, is the core, material precondition that must be met of our capability for living safely and free of fear, and hence of meaningfully participating in a good life or good society. In terms of modern utopianists, we cannot lead 'fully human lives' without such a right. In Hobbesian terms, we would not have a state without it – it is the right for which we relinquish natural freedoms. The state therefore has an obligation – a first duty – to protect citizens against private violence and aggression, including private sexual violence and aggression, and it has that obligation, or first duty, because such an obligation is necessary to the creation of a good society: again, we cannot lead 'fully human' lives otherwise.

A liberal state that fails to provide such protection, then, violates the individual's right to that protection, as well as the state's 'first duty' to provide it.⁵⁴ What might follow from the existence of such a right? A state that failed to criminalize, or failed to enforce existing laws that criminalize, domestic violence, for example, or marital rape, or violence against lesbians and gay men, or people of color, would violate those citizens' right to protection, and not just equal protection, of the law. Likewise, a state that turned its police force on its citizenry, rather than employed it in their protection, would violate positive rights to protection as well as a negative right to be free of unwarranted state intrusion. These would be clear, unequivocal violations of the citizen's most fundamental right and the state's most fundamental duty. Less blatant, and even unintentional or neglectful failures to protect citizens from violence, however, might also violate such a right: a failure, for example, to enact adequate gun control legislation so as to ensure the safety of school children, or women, or urban residents, might constitute a failure to provide for the protection of the safety of citizens, and hence violate their rights to protection of the law. A consistent pattern of punishing violence against a group of citizens more leniently than the same crimes committed against another more favored group, might also constitute such a violation, as Randall Kennedy argued some time ago.⁵⁵

What might be the penumbral rights implied by the recognition of a core positive right to protection against private violence? It would depend, I think, on the rationale of the core right itself, and hence on interpretation of that core right. Three prominent possibilities come to mind. First, if we have a positive right to protection against private violence because of our natural vulnerability to the violent propensities of others, and the calamitous consequences of that vulnerability, then we might also want to recognize that we have a positive right to the state's protection against other sorts of natural 'violence' with equally calamitous results as well. We might, for example, have a positive right to be protected against natural disaster, misfortune, or even disfavor and bad luck, if the consequences of that disfavor are brutal. This might sensibly be regarded as the 'welfarist' interpretation of the right to security.

Alternatively, we might reason that we recognize a positive right to security, or protection against the violence of others, not only because of the calamitous potential consequences of our vulnerability to that violence, but because of the potentially subordinating, and hence inequalitarian, consequences of that vulnerability: unchecked private violence conduces to unchecked private political hierarchies, of domination and acquiescence, in those spheres in which the violence goes unchecked by the state. A security right against unchecked private violence, then, might imply not just a right to assistance in the event of natural disaster, but a quite different set of ‘penumbral rights’ to be protected against extreme forms of private aggression, whether or not that aggression takes the form of physical violence. We may, then, for example, have a positive right to be protected against the harmful effects of a polluted environment, or an unregulated and dangerous product, or exploitative employers. We might think of this as the ‘antisubordinationist’ interpretation of the security right.

Third, we might reason that we have a positive right to security against private violence, because of a yet more fundamental right to security against extreme deprivation or impoverishment that threatens fundamental human capabilities, regardless of whether that deprivation, impoverishment or vulnerability can be attributed to either undue private aggression or natural disaster. If we have a right to protection against violence, not so much, or not only, because we have egalitarian rights not to be subordinated, and not only because we have a natural right to community assistance in the event of natural disaster, but also because we have a right to a fully human life free of fear and anxiety brought on by conditions of deprivation, then we might impliedly also have a right to be freed of these non-subordinating but no less damaging sorts of vulnerabilities. This would clearly be the most far-reaching penumbral interpretation of the right to security, and might be called simply the ‘capabilities-based’ interpretation: we have a right to security, on this view, because we have a right to live the ‘fully human’ life such security in part ensures. A liberalism grounded in a ‘first right’ to protection against private violence so understood, in other words, might support the existence of penumbral rights to protection against other sorts of vulnerabilities – and hence, at the outer reaches, rights to whatever is minimally necessary to attain those capabilities in turn essential to a fully human life. Obviously, such rights would entail state obligations to act, rather than simply refrain from acting.

The second core right, that might be recognized in a liberal tradition unwedded to atomism and committed to securing the fundamental capabilities of a fully human life, and currently entirely unrecognized in liberal-constitutional discourse and badly undertheorized in the welfarist literature, might be called a ‘right to provide care,’ or as the philosopher Eva Kittay refers to it, a right to *doulia*. We do not, contrary to Hobbesian myth, spring upon this earth mushroom style, as fully formed, autonomous adults. Rather, all of us enjoy or suffer an extended period of absolute dependency upon caregivers, and most of us, as adults, enjoy or suffer (or both) an even longer period during which we bestow care upon infants and children dependent upon us, and eventually upon aging parents in similar need. The ability to give care to dependent others, and the ability to receive such care as a dependent other, is at least as fundamental to a ‘fully human life’ as is the ability to rest secure against threats of private violence or subordination. As a species, we are not just interdependent

creatures, we are also, for substantial periods, fully dependent upon others, and others are, for substantial periods, fully dependent upon us. Those simple facts of our human existence, to a considerable degree, mark our species, define and constitute our moral sense, and form the basis for our social nature.

As a consequence, when we are infants and children, and likewise when we are sick or aged, we desperately need not the rights of autonomy and independence so central to classical liberalism, but a regime that protects us in our dependent state, and protects those upon whom we are dependent as well. And, when we are acting as caregivers, we need not rights that falsely presuppose our autonomy and independence, but rights that frankly acknowledge our relational reality: when infants, children, or aging parents are dependent upon us, we are dependent upon others for support and sustenance.⁵⁶ People who are providing care to dependents are themselves in need of assistance from others, and caregivers will eventually become, again, dependents in need of care themselves. That circle of mutual need, caregiving, dependency, and assistance, is as much a part of our social contract, as is the individual's relinquishment of rights to self-defense in exchange for a right to protection against violence. A rights tradition that forthrightly acknowledged the natural reality of our inescapable dependence on each other – to say nothing of our social nature – would give pride of place to 'relational rights' that would protect the caregiver, and hence the care bestowed in dependency relationships.

Needless to say, perhaps, such relational rights are nowhere mentioned in various constitutional documents, nor are they well grounded in liberal theory. But they ought to be. We have the rights we have, in liberal, democratic societies, at least according to widely shared conventional wisdom, for essentially one (or more) of three basic reasons. First, we construct or recognize rights when, for some reason, the sphere of life, service, freedom, activity, or identity, that is protected by the right, and so necessary to flourishing, might nevertheless be systematically undervalued, or underappreciated, or underprotected, by standard political or economic processes, even in a liberal democracy. Second, at least sometimes in the United States and elsewhere, we construct rights when we have reason to believe that a particular practice or activity, if unchecked, will have a severe and adverse affect on a sub-group that has historically been subordinated. And lastly, here and elsewhere, at least on occasion, we construct rights to underscore our most fundamental and most shared inter-generational values. The panoply of rights we protect expresses our self-understanding, and more specifically, it expresses a self-understanding meant to endure even in times of the value's political neglect.

Does this widely shared, and I think, non-controversial understanding of the various rationales for rights suggest a basis for a right to give care, and a right to the *doulia* needed to support it? I think so. First, we have very good reason to think that standard political and economic tools will not generate market or political protections for this labor, or for those who provide it. Caregivers do not, as a rule, willy-nilly abandon infants or dependents, take a better opportunity as it arises, or go on strike, even under very harsh conditions. Caregivers, virtually by definition, are emotionally and ethically committed to perform the work uninterrupted once it is undertaken. That emotional and ethical attachment of caregiver and cared for that results from

caregiving labor, suggests that the work will be less supported than it should be in democratic political systems and market economies both. Caregivers have all of the vulnerability, but none of the autonomy that comes from the 'at will' employment status they share with other vulnerable employees. There is no political will or need to support caregiving labor if it is going to be performed in any event, and no organizational ability to confront that lack of will with some set of non-negotiable 'caregivers' demands,' so long as caregivers continue to provide the services regardless, enduring either impoverishment or dependency as the cost of doing so. We therefore have good reason to believe that familial and economic institutions, if unchecked, will continue to undercompensate caregiving labor, and that women will be adversely impacted, as a group, by that practice. For this utterly unexceptional reason, deeply familiar to liberal theorists, we need rights of care, then, to protect caregivers against the pendulum swings of public support and neglect for their work.

Likewise, we need rights of care to protect women from the inegalitarian consequences of that neglect, just as we need rights of non-discrimination to protect potential employees from the adverse consequences of irrational racism. It is increasingly clear that some such panoply of relational rights is necessary if women, who have traditionally assumed the work of unassisted caregiving with no correlative state obligation to protect them in that work, and who have suffered either the risk of impoverishment or subordination by virtue of doing so, are to enjoy any measure of equality in an otherwise liberal and autonomy-protecting society. Relatedly, such rights are necessary if caregivers, whether men or women, are to enjoy the rights of autonomy promised them by conventional liberalism.

Next, we need a right of care and a right to supported caregiving labor to better express our self-understanding as a species for whom caregiving is a central life activity. Clearly, our nature is such that we thrive when cared for. As a species, our period of infantile need is extended over time, and likewise is our period of caregiving labor. We flourish both individually and communally when decent care is provided, and we suffer when it is not. The better the care, the more the cared for will thrive, and the more likely they will mature to become liberal and equal citizens who can themselves provide care, as well as fulfill responsibilities of citizenship in a liberal society. And, the more demanding and consuming is the care, the harder it is to provide without support.

But most fundamentally, liberalism ought to recognize such rights because such rights are necessary to a good, and liberal, society, virtually regardless of how that society is defined. Those who give care to dependents over extended periods of time need material security against need, if that care is to be of high quality. One cannot see to the needs of an infant or an elderly parent and engage in wage-earning labor at the same time; caregiving labor, by its nature, renders the caregiver less autonomous. Falsely assuming that we can, is, ultimately, as disastrous and self-destructive as falsely assuming that grown men and women will naturally and peacefully cohabit in the state of nature. An utterly artificial, socially constructed, civil leviathan has proven necessary to protect us against the second false illusion – the illusion of our own invulnerability and natural sociability. A similarly artificial, socially constructed, civil network of support ought to be constructed to provide us protection

against the first – the illusion of our natural independence. A right to give care without risking severe impoverishment or subordination, grounded in our nature, and protective of the caregiver's security, safety and material wellbeing when she relinquishes her independence so as to care for the needs of dependent others, should be a part of that social construction.

Thus, all three rationales for rights – the dysfunction of political and economic processes for protecting caregiving labor; the inegalitarian consequences for an historically subordinated group of not doing so, and our self-understanding that caregiving is important work – point in the direction of care and *doulia* rights. Whether we are presently in a 'constitutional moment' which might support the creation of such a right is of course an open question: we may now be in a period when the jurisprudential will to support caregiving labor in any way other than through traditional family structures is at an all time low. But we are also in a political period when the need for such a right, is increasingly clear to many people who historically have had no sense of it whatsoever, and that is men who, because of feminist advances, are actually *doing* caregiving labor, and consequently experiencing some of the risks of that work. Women and men who are caring for dependents know they need support, and they also increasingly know that complete economic dependency upon a marital partner in an unequal economic relationship is not a viable long-term solution to the problem. A right to support for caregiving labor might, then, express that quite fundamental shift in our collective and social self-understanding.

What might be the practical consequences of such a right? Mothers or fathers caring for infants, and adult children caring for aging parents, protected by rights to care, might be possessed both of penumbral negative rights, recognized 'inside the courts,' against unwise state action that endangers caregiving, caregivers, and the cared for, such as the 1996 Personal Responsibility and Work Opportunity Reconciliation Act,⁵⁷ and positive rights, 'outside the courts,' to state action that support care-giving labor, such as an expanded version of the Family and Medical Leave Act.⁵⁸ Of course, such a right would be subject to interpretation, change, and re-interpretation in light of changing politics and circumstances, no less than are rights of privacy or speech. And, such a right, or rights, would share in the risks and pitfalls of rights generally, as exposed by rights critics: a 'right to care' could be subject to capture in ways both imaginable and unimaginable, or (I think) more importantly, to trivialization – the right could well become, and in short order, nothing but a commodificationist right to hire a nanny of one's free choosing, or a right to be a nanny and set one's own low wage and bad working conditions unimpeded by meddlesome and paternalistic labor regulations.

Nevertheless, we shouldn't dismiss the upside potential out of hand. A 'right to care' would share in the rhetorical power of rights discourse: acknowledgement or insistence upon the existence of such a right would honor the centrality of caregiving labor to social life. Nor would it require a Herculean effort to locate such a right in our constitutional history: the substantive due process clause, before it became, post-*Eisenstadt v. Baird*,⁵⁹ the source of individual, negative rights to contraception and abortion, did prominently include a 'right to parent'⁶⁰ – a right which, particularly if

modernized and coupled with our current recognition of the constitutional status of norms of gender equality – could easily be viewed as ‘penumbral’ to a more fundamental right to give care. As a practical matter, as mentioned, such a right, if we have it, casts doubt on not just the wisdom but also the constitutionality of legislation like the mid-1990s Welfare Reform Act,⁶¹ and such a right, were we to recognize it, gives a needed dimension of both universality and moral imperative to political demands for greater support of vulnerable caregivers. More importantly, a ‘right to care,’ if recognized, would go a long way toward aligning the idea of rights with a conception of our nature that acknowledges our natural dependencies as well as our social responsibilities toward others, rather than a conception of our nature that insists falsely and dangerously on our self-sufficiency.

Institutional Protection

Finally, a note on institutional responsibilities. A larger understanding of rights, as including, for example, positive rights to protection by states against private violence and related forms of oppression, and *doulia* rights to give care to dependents, would require a substantial reorientation of our now customary identification of rights with judicial remedies, and our now customary identification of the very idea of a ‘right’ with the possibility, and probability, of judicial enforcement. A ‘right to protection,’ if it exists, requires a state to act by creating law, not by constraining law, and it is legislatures, not courts, that have the power, capacity and primary responsibility to do so. Likewise, if we envision welfare rights, such as rights to shelter, or food, or ‘capability-protecting rights’ such as rights to work, or basic rights of wellbeing, such as a right to an income, as penumbral to the right to the state’s protection against private violence, as argued above, then it will have to be legislatures, and not courts, that give content to these rights through legal regimes. Similarly, relational rights, such as the ‘*doulia* rights’ described above, would require, primarily, legislative, not judicial activism: greater protection for the economic security and wellbeing of caregivers could only be had through meaningful legislation. A court might, in dicta, urge such legislative action, but it can by no means serve as a substitute for it.

And, laying the primary responsibility for the enforcement of a rights regime at the feet of legislatures, rather than courts, does go against the grain of at least a substantial strand of American jurisprudential and constitutional thinking. Both the core autonomy-protecting rights, and the due process and equal protection rights from the Reconstruction era are conventionally understood as triggering judicial enforcement, through courts that will aggressively invalidate legislation that trammels those rights: if a state or federal law violates a right of free speech, the court will invalidate the law; if a state law fails an equal protection test, the court will invalidate it. The conventional, dominant understanding of rights goes hand in hand with a conventional division of labor: states pass laws in the interest of their communities, and those state laws may or may not violate the rights of individuals. If they do, courts step in and invalidate the law, thereby protecting the individual rights. Rights of protection, and relational rights, envision not just a radically different substantive core, but also a strikingly different allocation of labor. If relational rights,

or rights to protection, exist, they not only *guide* legislative choices, they can only be *enforced* through legislative action. They do not exist so as to constrain legislative action. The legislature must act to enforce and give substance to the right. Its duty does not extend to simply refraining from trampling on the right by refraining from passing laws toward other ends that incidentally infringe individualistic rights.

We should be wary, though, of concluding from the ill fit between positive, relational rights and judicial enforcement, that such rights do not exist. Our identification of rights with the expectation of judicial enforcement is a product of our very contingent, could-have-been-otherwise, history of rights: again, just as there is nothing about rights which logically entails that they must be negative or insulating, likewise, there is nothing about rights which logically entails that they be the sorts of things courts enforce, rather than legislatures. And furthermore, that contingent historical identification of rights with courts and judicial activism is clearly partial. While some of our most salient moments of rights enforcement have indeed come to fruition through the vehicle of judicial enforcement, it is by no means the case that they all have. Our 'civil rights laws' of the 1960s, that provided rights to be free of racial discrimination in housing and employment,⁶² among much else, were a legislative product, and virtually revolutionized civil relations between the races, not just in that decade, but in the following half century. Likewise, the rights of women, the disabled, and the aged, to freedom from private-sphere discrimination, have all come about through the vehicle of legislative, not judicial attentiveness to rights.⁶³ Other less successful rights revolutions have also envisioned legislation, rather than adjudication, as the venue for their eventual enforcement: rights to meaningful labor advocated by unionists throughout our history,⁶⁴ as well as the nascent movement to ensure nondiscrimination rights to gays and lesbians in contemporary life,⁶⁵ both importantly envision or envisioned legislative rather than judicial action. More prosaically, advocates for a 'patient's bill of rights' have pitched their arguments at legislatures, notwithstanding their invocation of the rhetoric of rights when doing so.

More generally, there is just no good reason to constrain political and legal imagination by tying rights to judicial capability, and plenty good reason not to. Courts are disinclined to embark on legal reform projects they are institutionally ill suited to manage: if a narrow remedy can be fashioned, the court is more likely to acknowledge the violation of a right, and striking down a law, while a dramatic act, is nevertheless a relatively narrow and straightforward one. Nothing more is required, to vindicate the right, than that the law be struck, and nothing is required of the court beyond the declaration that it should be, and shall be. Obviously, if it is left to courts to recognize, and then fashion legislative content for, rights to state action, rather than rights to be free of it, such a remedy will be a long time coming, if at all. Courts are ill equipped to engage the legislative work of law-creation. The mistake, though, is in inferring from that disability, that rights have no distinctive weight, in the legislative work of deciding what does and does not merit legislative remedy. Nor does it follow that such projects do not deserve the appellation 'rights' or the rhetorical 'wind in the sails' effect they might garner, if the positive case for them could be put in terms of rights.

Nor should we allow the mistaken inference that rights can only be enforced, and therefore constituted, by courts, to effect either our constitutional understanding of what rights our constitution actually grants, or our jurisprudential and political understanding of what role rights might or should play in our civic life.⁶⁶ A number of critical constitutional scholars, I believe correctly, have argued in recent years that the practice of judicial review has unduly hampered, and narrowed, our understanding of the constitution's guarantees: we limit our understanding of the document's meaning to those interpretations which render the provisions enforceable through courts, thereby blinding ourselves to the meanings those same provisions might carry, were we to envision their interpretation as occurring 'outside the courtroom.'⁶⁷ Thus a legislator, an executive, or for that matter simply a citizen, might understand the mandate 'equal protection of the laws' very differently than might a court, simply because of their differing political and legal point of reference. The point, though, can be broadened: we need to also caution against cabining our jurisprudential, no less than our constitutional, imagination and practices. In constitutional scholarship and practice, we now habitually think of 'rights' as giving content to 'law' which informs 'Courts' how to constrain the political work of legislatures. But this is not the only way to think about the jurisprudential function of rights, as even a cursory examination of the history of the concept shows. Rights can be, and have been, conceived of as giving content to 'law' that directly informs what legislators, executives, or sovereigns can or should do: this seems to be what both Locke and Hobbes meant, for example, by the rights retained upon entering civil society. The rights we enjoy are not only those negative rights embodied in positive law that courts enforce by constraining legislation that abridges them. The rights we enjoy, quite plausibly, are also those positive rights, embodied in our legalist ideals, which legislatures, sovereigns, executives, and governing majorities, are all duty bound to protect, and to protect through legislation, not through restraint.

Rights, Liberalism, and the Good Society

Even if successful, of course, this imaginative reconstruction of rights from negative to positive and from atomistic to relational does not establish that any of these welfarist rights to enjoy basic capabilities actually *exist*: a right – whether to anti-subordination, to give care, to dignified labor, to a living wage, to welfare – must also be found in the language, logic or history of a state or a nation's constitution. Rights we actually have, rather than rights we could have, must, to use Dworkin's suggestive phrase, confront the brute facts of our legal history.⁶⁸ Constitutions may or may not explicitly provide for positive rights, and constitutions that do not do so may or may not be read so as to implicitly endorse them. There is, of course, a great deal of constitutional law, authority, and scholarship in constitutional democracies debating the interpretive limits and possibilities of particular constitutional provisions. Much of that debate, furthermore, goes to the possibility of locating positive and/or relational rights within a document that seemingly provides for negative and atomistic rights only.

Nevertheless, one obstacle to the recognition of positive and relational rights within liberal constitutional discourse and welfarist theory both, stems not from brute fact of constitutional law and history at all, but rather, from the widely held conviction that the notion of a positive right or a relational right is somehow oxymoronic – that rights *by definition* constrain states from certain acts, rather than requiring *of* them certain acts, and that rights by definition valorize individualism and denigrate dependency. But these are circular claims that ought to be laid to rest, both for the sake of liberalism, and for welfarism, at least a welfarism that has any legal bite. Let me start with liberalism. If rights exist, and if, as liberals generally contend, they are justified by reference to our human nature, then they surely direct as well as constrain states: states must act as well as refrain from acting if they are to provide for civic liberty, equality, well-being, and the ‘full human lives’ of citizens.⁶⁹ The liberal tradition, generously read, requires states to protect our individualistic capacity for free thought and our desire to master our own fate, and it requires states to do so, largely, by refraining from paternalistic intrusion. It also, however, generously read, as Nussbaum, Sen, and others have shown, requires states to protect our capabilities: our capability for self rule, for safe intimacy, and for a healthy and long life, and for productive work, and it requires it to do so because these capabilities, among others, are essential for us to lead fully human lives. The rights needed to provide that protection are distinctively positive. If they are at the heart of liberalism, then the widely held belief that liberalism can at most embrace a negative understanding of rights is deeply mistaken.

Second, if committed to a full and true conception of our social as well as autonomous nature, rather than a truncated one that denies the former and valorizes only the latter, liberal rights, and hence, liberalism itself could be aligned with the work of fashioning a social fabric that protects us in our cross-generational web of dependencies, rather than one that ignores them. Our capacity for caring over extended periods of time for those who are dependent upon us is at least as central to our human identity as our capacity for free thought, or our propensity to bargain through contracts, or the security we gain through our possessions. The nature and quality of the care we bestow upon those who are dependent upon us marks our species, and as a set of practices, is generative of an ethical way of being in the world that is at least as integral both to a well led individual life and to the wellbeing of our communities, as our individualized capacity for autonomous conviction or independent action.⁷⁰ A liberalism that embraced at its core a right to give care without incurring unjustified vulnerability – a liberalism that would marry, so to speak, a recognition of the importance of caregiving labor to the wellbeing of the species with the robustness of the liberal rights tradition – would, by so doing, thereby acknowledge a relational and communitarian world substantially different from the overly atomized individualistic hell currently decried by liberalism’s critics. A liberal society defined in part by its recognition of rights to care, and a liberal culture that took the care to embellish its assumptions, would enrich, not undermine, the egalitarianism and individualism of citizens that the liberal rights tradition to its credit has always sought to foster. It would also further, rather than hinder, attempts to construct a good society, and it would do so by obligating the state to fulfill the material preconditions of at least this one quite basic human capability.

Finally, what do good society advocates and rights critics have to gain by articulating the basis for the state's obligation to ensure the minimal preconditions of the good society in the liberal terms of citizens' rights? Most important, if proponents of the good society revitalize and refashion rights, rather than abandon them, they will not risk losing either the utopian universalism, or the imperativism, that the liberal rights tradition has long lent to political and legal practices. The language of rights connects politics with not just the hope, but the demand, that law both can and should structure a decent social world: rights are justified demands against a state, not just a catalog of ideas of good governance. How we conceive of that 'decent social world' is clearly a political question, and in a conservative and libertarian time, the language of rights will reflect those politics – the rights we have or recognize will always reflect the dominant political discourse, and our dominant political discourse, now, is conservative and libertarian both. But it does not follow that rights have a necessary connection to those or any other set of political ideals; even less does it mean that those who envision a different political ideal than the reigning one should abandon them. Rights, whatever their content, are premised on the grandly egalitarian assumption that we have a shared nature, from which universal norms follow. If proponents of the good society give up on rights, they will have given up on one way of envisioning our fate in a way that honors that humanity.

There are, of course, many ways to think and envision ideals, and it is true that political actors, no less than legal actors, can articulate visions, and urge political and action on behalf of them, in language that makes no reference to our rights. It is not the case that without rights-talk, good society theorists – whether welfarists or civic virtueists or capabilities advocates – are automatically reduced to the realpolitik of costs, benefits, preferences, markets, and sites of power and influence. There are other ways – alternatives to rights and efficiency both – to think about what a good society ought to be and what the state in a good society ought to do. Nevertheless, rights are and have been one way of asserting claims about what society ought to be, and what the state ought to do, and what the state must do, with respect to our laws, on behalf of all humanity.⁷¹ When proponents of the good society turn their backs on rights, they relinquish one way of insisting that moral judgment, moral choice, and moral vision – and not just interests, preferences, votes, power and money – guide political and legal action. They turn their backs on a path – not the only path, but a path – for transforming those universalistic utopian ideals of the good society into political realities.

Notes

- 1 See generally Dworkin (1978). A serious regard for rights, Dworkin argues, rests on 'the vague but powerful idea of human dignity . . . [which] supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust' (*ibid.*, 198). H.L.A. Hart and others have noted that Dworkin does not specify a sufficiently thick view of human nature to sustain a strong case for any particular set of rights, thus distinguishing him from

classical liberal rights theorists such as J.S. Mill. See H.L.A. Hart (1983, 218). Nevertheless, Dworkin's defense of the idea of rights itself rests directly on an appeal to a conception of human life, which he labels 'Kantian,' and from which the basic rights to equal concern and respect are directly derived. For further examples of rights arguments that rely to varying degrees on specified accounts of human nature, see for example, Tribe (1988, 1302–8); Grey (1980); Richards (1979, 964–72).

- 2 Dworkin (1996, 200–205).
- 3 See Epstein (1985, 331–4; 1984).
- 4 See Richards (1986).
- 5 Dworkin (1978, 199).
- 6 Burke (2001, 190–93).
- 7 Bentham (1995, 489).
- 8 See generally Bork (1990, 187–241).
- 9 *Ibid.*, 161–86.
- 10 Posner (1983, 238–43). See also Dworkin (1980a; 1980b). For an exchange between Dworkin and Posner on the relation of wealth and rights, see Posner (1984) and Dworkin (1984, 295–8).
- 11 Tushnet (1984, 1364).
- 12 Kittay (1999, 107).
- 13 See, for example, Michelman (1973; 1969). The welfarist conception is heavily indebted to John Rawls's early work, particularly *A Theory of Justice*.
- 14 See, for example, Tushnet (1984).
- 15 See Rawls (1971, 100–102).
- 16 See Nussbaum (2000, 55, 91–5, 105).
- 17 See Sandel (1996, 124–8, 329–38).
- 18 Nussbaum (2000, 11–14).
- 19 Michelman (1969).
- 20 Rawls of course famously argued that liberal states are obligated to redistribute toward equality up to the point where remaining inequalities benefit the least well off (Rawls, 1971, 100–102). This attempt, however, to craft a liberal state with both obligations to individual freedom and obligations to ensure the wellbeing of the least well off has not persuaded more libertarian liberal theorists, who see in Rawls's difference principle the kernel of totalitarianism. See, for example, Epstein (1985, 339–44). See also Nussbaum (2000, 55, 91–5, 105); Sandel (1996, 290–92); Forbath (1999, 8, 2001); Michelman (1969, 9–19).
- 21 See, for example, Epstein (1985, 295); Nozick (1974, 26–53). See generally Horwitz (1988).
- 22 See, for example, Becker (1992); Horwitz (1988); Tushnet (1984, 1386–92).
- 23 See Gabel (1984, 1572–6); Glendon (1992, 520–23); Sandel (1996, 16–17; 1997, 4–6; 1989, 523–5).
- 24 Nussbaum (2000, 79).
- 25 Sandel draws out the implications of this connection most clearly. See Sandel (1996, 25–54; 1998, 319–23).
- 26 Gabel (1984, 1586–90); Tushnet (1984, 1379–80); Horwitz (1988, 404–6).
- 27 Dworkin (1978, xix–xv, 184–205).
- 28 Dworkin suggests as much. See *ibid.*, 193–4.
- 29 *Ibid.*, 180–3, 272–8; Cf. Nussbaum (2000, 73).
- 30 Clark (1987); Forbath (1999); Amar (1990, 39).
- 31 For a full discussion, see Glendon (1992, 521, 523–30).

- 32 Hobbes (1996, ch. XVII, 85–8 [original pages]).
- 33 Heyman (1991, 508).
- 34 Epstein (1985, 7–10).
- 35 Locke (1970a, sects. 129–31).
- 36 See Mill (1972, 8, 13). In his celebrated libertarian essay, *On Liberty*, Mill goes out of his way to state that nothing in that work negates the state's positive obligation to intervene into private markets to insure the wellbeing of citizens. Mill (1955, ch. V, 140–44). On Dewey, see generally, Dewey (1935).
- 37 Berlin (1969, 123–4, 164–5, 169).
- 38 Nozick argued for very few positive rights, but he did urge a minimalist, rather than superminimalist state. The former is obligated to protect against private violence, the latter is not (Nozick, 1974, 26–8).
- 39 Bandes (1990, 2308–27); Heyman (1991, 507–71).
- 40 The clearest explication of this mistaken conception is found in Judge Posner's decision in *Bowers v. DeVito*, 686 F.2d. 616, 618 (7th Cir. 1982) ('The Constitution is a charter of negative liberties; it tells the state to let the people alone'). Tribe makes the same criticism of this view as is found in the text at Tribe (1985, 247).
- 41 TenBroek (1965, 4, 57–8).
- 42 Horwitz (1988, 404–5).
- 43 See Tushnet (1984, 1386–94); Horwitz (1988, 399–400).
- 44 Gabel (1984, 1566–71).
- 45 Tushnet (1984, 1371–84); Horwitz (1988, 396–9).
- 46 For a sampling of the criticism of *Roe* on these grounds, see MacKinnon (1987, 99–101; 1991, 1308–24); McDonagh (1996, 46–8).
- 47 See generally Sunstein (1993c).
- 48 Michelman (1973; 1969).
- 49 *United States v. Emerson*, 46 F. Supp.2d 598, 610–11 (N.D. Tex. 1999). The case was reversed by the Fifth Circuit, which found that although there is a constitutional right to bear arms, it can be limited by narrowly drawn regulations, and the regulation in this case was sufficiently narrowly drawn. *United States v. Emerson*, 270 F. 3d 203, 261–63 (5th Cir. 2001). As this book goes to press, the case is now on appeal to the Supreme Court.
- 50 See 46 F. Supp.2d, 600.
- 51 See *ibid.*, 609–10.
- 52 Heinzerling (2000, 189–207).
- 53 Nussbaum (2000, 111–66).
- 54 Heyman (1991, 496–512).
- 55 Kennedy (1988, 1421–9).
- 56 For a sustained argument to this effect, see Kittay (1999, 132–46).
- 57 Personal Responsibility and Work Opportunity Reconciliation Act 1996, Pub. L. No. 104–193, 110 Stat. 2105 (codified as amended in scattered sections of 7 U.S.C., 8 U.S.C., 21 U.S.C. and 42 U.S.C.).
- 58 29 U.S.C. Sec. 2601 (1994).
- 59 405 U.S. 438 (1972).
- 60 *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Prince v. Massachusetts*, 321 U.S. 158 (1943).
- 61 Personal Responsibility and Work Opportunity Reconciliation Act 1996, Pub. L. No. 104–193, 100 Stat. 2105 (codified as amended in scattered sections of 7 U.S.C., 8 U.S.C., 21 U.S.C., 25 U.S.C., and 42 U.S.C.).

- 62 Fair Housing Act, 42 U.S.C. Sec 3601 et seq.; Title VII of the Civil Rights Act 1964, 42 U.S.C. Sec 2000e et seq.; Fair Labor Standards Act, 29 U.S.C. Sec 201 et seq. (includes Equal Pay Act, 29 U.S.C. Sec 206(d)).
- 63 Title VII of the Civil Rights Act 1964, 42 U.S.C. Sec 2000e et seq.; Title IX of the Education Amendments 1972, 20 U.S.C. Sec 1681 et seq.; Americans with Disabilities Act, 42 U.S.C. Sec 12101 et seq.; Individuals with Disabilities Education Act, 20 U.S.C. Sec 1400 et seq.; Age Discrimination in Employment Act, 29 U.S.C. 621 et seq.
- 64 Forbath (1991; 1989, 1109–256); Tomlins (1985).
- 65 Feldblum (1998, 485–93).
- 66 Sager (1978).
- 67 *Ibid.*, see also, Tushnet (1999); West (1993); Sunstein (1993a).
- 68 Dworkin (1986, 255–6).
- 69 See also Sunstein and Holmes (1999, 54–8).
- 70 Gilligan (1982).
- 71 See Hartog (1987).

Chapter 4

On Formal Equality

Judges, according to our dominant understanding of the requirements of legal justice, must decide ‘like cases alike.’¹ If a case arises which in all relevant particulars appears to be similar to a case already decided, then the second case must be decided in a like manner. If it is not clear whether or not a particular case falls under a general rule, then the way to go about deciding whether or not it does so, is by examining ‘like’ cases: if the case under consideration is similar to a case that was decided under the general rule, then it too must be considered as within the rule’s ambit. If it is not clear that any prior case or line of cases is in any obvious way similar, then the judge must abstract somewhat from the given facts, and describe the case in a more general way, thus possibly opening the door to the discovery of like cases at a ‘higher level’ of abstraction. In this way, according to our dominant understandings of legal justice, litigants are accorded what is sometimes called ‘formal equality,’ sometimes called ‘horizontal equality,’ and sometimes called ‘legal equality’: all litigants are treated the same, and therefore equally, if their cases are adjudicated in a manner that respects this basic commitment.

The basic ideal of formal equality – that likes should be treated alike – also plays a major role in our now dominant understanding of the Equal Protection Clause of the Fourteenth Amendment. A Court faced with a challenge to a piece of legislation under that clause of the Constitution must ask whether the categories drawn by the legislation are ‘rational,’ and what that in turn means, is simply whether the challenged law ‘treats like groups of people alike.’² If the categories a law creates are ‘rational’ – by which is meant that they are not egregiously over- or under-inclusive – then the law is upheld. Thus, for example, a law allowing 16-year-olds but not 15-year-olds to drive may be rational, and hence not a violation of the Equal Protection Clause, if there is a measure of difference in the maturity, and hence the potential dangerousness of 15- and 16-year-olds. If, however, the categories are ‘irrational’ – if the law in question is so grossly over- or under-inclusive that it is fair to say that its major effect is to group unlikes together, or treat likes disparately – then the law that uses them runs the risk of running afoul of the Equal Protection Clause. Thus, a piece of legislation that penalizes embezzlers less severely than larcenists,³ or sellers of crack cocaine more severely than powder,⁴ or a statute that requires men but not women to register for the draft,⁵ or that requires black citizens but not whites to eat, drink, swim, ride, or be schooled at separate ‘public’ facilities,⁶ or that penalizes underage drinking by men more harshly than the same conduct when performed by women,⁷ all could potentially be struck by a court as violations of the Equal Protection Clause, and all under the same logic: these laws all (arguably) treat groups which are in fact alike, disparately. Men are, for most relevant purposes, and for the most part, ‘like’ women, and black Americans are like white Americans, and

therefore they must be treated alike. Larceny is for the most part like embezzlement, and must be treated the same; likewise, crack and powder cocaine, etc. If legislators, and hence legislation, treat these 'likes' unlike, then the suspicion is aroused that their motives for doing so are irrational at best and malicious at worst: perhaps, since blacks are like whites in their needs for education, drinking facilities, or public pools, legislation that separates them is borne of prejudice rather than rational benevolence. Perhaps the same is true of legislation that treats women and men differently, or that treats embezzlers, generally of a higher class, more leniently than larcenists, or the purveyors and consumers of crack cocaine (more often black) more harshly than those of powder (more often white). This understanding of the Equal Protection Clause, which, with only a few exceptions, has dominated equality jurisprudence of about the last 40 years, has come to be called by its critics and advocates alike, the 'formal equality' interpretation of that decidedly ambiguous phrase.

And, the formal mandate that likes must be treated alike – according to no less an authority than Justice Antonin Scalia – is also the heart of the jurisprudential movement that for at least 100 years now has been called 'legal formalism.'⁸ Indeed, according to Scalia, formalism simply *is* the jurisprudence that is committed to the proposition that judges must 'treat likes alike.'⁹ This definitional equivalence is likely overstated: 'formalism,' as it has been attacked and defended over the last century, typically embraces more than the mandate to treat likes alike. Formalists generally, (although not always) are also committed to some form of originalism, with respect to constitutional law, some form of 'plain language' textualism, with respect to statutes, and a sort of aesthetic (a century ago, a geometric, or at least mathematical) norm of coherence and elegance, with respect to common law.¹⁰ The search for a definition of formalism is complicated by the fact that until recently, the word has been more often used as a pejorative, and as such, often directed at a strawperson, by formalism's various critics. Nevertheless, Scalia's basic point has some sense to it. Whatever the definition, formalism, both historically and in contemporary discourse, rests, in some fashion, on the insistence that both judges and legislators, when interpreting or drafting law, must treat likes alike. A commitment to formal equality, one might say, may not be sufficient to make its holder a 'formalist,' but it is certainly necessary.

Finally, this ubiquitous, case-to-case, 'what's like what,' formal method of reasoning is the 'bread and butter' not just of adjudication, of constitutional equality law, and of formalistic jurisprudence, but also of legal education. Regardless of subject matter, law school classes are at root repetitive elaborations of this exercise in analogical thinking. Along with the substantive content of some limited number of rules, what students acquire, through three years of legal training, is the ability to spot, construct, or argue for relevant similarities between lines of cases, so as to facilitate their categorization, and ultimately their resolution. Legal education, perhaps uniquely, imparts the ability to do this, and to do it convincingly. The actual *content* of substantive law, while obviously important, is less central than method, as law professors readily admit: the content of law changes too quickly to make the effort to impart and absorb it in any detail particularly worthwhile. Substantive law, at least for many legal educators, is largely a vehicle for teaching the ability to 'think

like a lawyer,' and thinking like a lawyer, for the most part, means the ability to spot relevant similarities and dissimilarities, and thereby point to one or another potential legal resolution of only seemingly novel legal dilemmas.

As central as the ideal of formal equality clearly is, however, to adjudication, constitutionalism, jurisprudence, and legal education all, nevertheless, the seemingly straightforward commitment at its heart – that like cases, individuals, and groups, should be treated alike – has been subjected to a now 100-year long critical attack, put forward first by the legal realists from the first part of the twentieth century,¹¹ and then by critical legal scholars,¹² feminists,¹³ and critical race scholars¹⁴ in the second half. These critics have argued, toward varying ends, that the 'formalist' mandate to 'treat likes alike' is an undesirable, incoherent, politically regressive, or simply empty ideal, both in the adjudicative and constitutional context, and that any 'formalist' jurisprudence or pedagogy that rests on it is likewise intellectually (and perhaps morally) bankrupt. Indeed, some sort of critique of formal equality – the mandate to treat likes alike – reappears not just as a peripheral commitment, but as the very core of virtually *every* significant progressive-critical movement, in jurisprudence, of the last century: the legal realists derided formal equality as mandating a cramped, backward-looking, and even infantile judicial acquiescence to the dictates of the past; the critical scholars of the last quarter of the twentieth century have derided the ideal of formal equality as resting on an indefensible belief in the 'determinacy' of prior law, and modern 'identity theorists' today regard the same ideal as politically regressive, reifying and then valorizing the status quo – a claim which at least analytically distinguishes radical and progressive identity theorists from more 'mainstream' liberal 'civil rights' activists. For these reasons and more, and as I will catalogue more fully in the sections that follow, the *critique* of formal equality has emerged as central to twentieth century critical and progressive jurisprudence, no less than formal equality itself has been at the core of adjudicative and pedagogical legal practice during that same century.

The first question I want to raise in this chapter concerns the status of this debate, and a curiosity regarding it. Despite the strength and staying power of the critical attack on formal equality – again, some form of critique of that ideal has been a mainstay of progressive critical legal thinking now for at least a century – formalism's various critics, across the decades, have demonstrably failed to dislodge the primacy of formal equality to legal thinking, adjudication, constitutionalism, and education. Judges and lawyers continue to analogize cases to prior cases, continue to look for lines of similarity and difference between individuals, cases, and groups, and continue to resolve cases accordingly. No method – whether it be 'pragmatic,'¹⁵ openly political,¹⁶ instrumental,¹⁷ 'functional,'¹⁸ micro-economic,¹⁹ literary,²⁰ humanistic,²¹ or something other – has emerged as an adequate alternative to this widely disparaged but universally employed 'formalist' method of legal reasoning. There is, then, a seemingly dramatic disconnect between our critical thinking about formal equality and the formalism it is sometimes said to represent, and our continuing employment of those very methods in our legal reasoning, judging, and pedagogy. The most widely disparaged, thoroughly criticized legal method of the century just ended, at the same time, continues to be the most enduring, un-

untrenched, un-distabilized, even definitive, legal method of the new one. Despite the voluminous and powerful body of critique, formal equality, more than any other commitment, continues to define a distinctively *legal* approach to social discord.

How to account for this? The first half of this chapter will review the twentieth-century critique of formal equality, and then address the question why it has largely failed. Briefly, I will argue that progressive critics of formal equality, while pressing the case for the fetishistic backwardness, the logical incoherence, and the political regressivity of that ideal, have neglected to address the seeming moral imperative at its core: no matter how backward, fetishistic, infantile, ungenerous, incoherent, or politically regressive it may be to do so, courts will continue to treat like cases alike and to require legislators to do the same, because it is seemingly a requirement of justice, of fairness, and of equality, that they do so. The critical brief against formal equality, across the decades, has not engaged, or attended to, the moral case for formal equality. The consequences of this inattention, I think, have been twofold. First, critics have not well addressed the strongest arguments – which are moral in nature, and not logical or political or even institutional – for the centrality of formal equality to law. But second, and more important, progressive critics of formal equality have not proposed alternative, and arguably stronger, interpretations of that judicial ideal, and of the moral intuition that underlies it. Both consequences, I will try to show, matter. By failing to ‘take seriously,’ so to speak, the moral case for formal equality, progressive critics have pitted our critical traditions in law squarely against moral intuitions about law that are shared by large swaths of the population, and across all political divisions, including progressivism. And, we have failed to provide progressive, and possibly stronger, accounts of that moral intuition, and hence failed to provide an account of law itself which is aligned with, rather than in tension with, progressive, egalitarian and cosmopolitan political ideals.

The second half of this chapter attempts to redress those gaps. I first present and then criticize the two primary accounts of formal equality found in the contemporary literature and case-law today: first, a relatively modern ‘economic’ account put forward by some legal economists, and second, a ‘conservative’ or traditionalist account, with a longer historical pedigree if not as many contemporary adherents, but which has been forcefully revitalized for our time by Dean Anthony Kronman of Yale Law School. I will eventually argue that neither of these interpretations of the value of formal equality, although the strongest in the current literature, are very good interpretations.

Finally, I will put forward a third, although by no means new, moral argument on behalf of formal equality, which, while often noted in the literature, is relatively undeveloped, and which I will call ‘humanistic.’ I will urge, as an alternative to both the economic-utilitarian and traditionalist understanding, that the ideal of ‘formal equality’ that underlies judicial method and the mandate of equal protection, could be (and should be) understood as rooted in the liberal commitment to a shared, universal human nature, and to the Kantian ideal of the equal moral worth of all persons, grounded in that commonality. We should ‘treat likes alike,’ particularly in law, because by doing so we recognize our common nature and our moral equality both. I then examine some of the consequences of this interpretive shift, particularly for

progressive commitments to egalitarianism in domestic law, and ethical cosmopolitanism, internationally.

Treating Likes Alike: Formal Equality and its Critics

Before discussing the various progressive critiques of formal equality that have been urged over the last century, let me explore some examples of ‘analogical’ or ‘formalistic’ reasoning, the first two drawn from the core and then the margin of contract law, and the second two from the constitutional law of equal protection doctrine, so as to better elucidate what is at stake in the debate over the coherence of this sort of reasoning. I will use these cases throughout the chapter to illustrate both the meaning of formal equality in law, and the strengths and limitations of the critical claims that have been made against it.

My first example is a contracts case from the early twentieth century, *Hawkins v. McGee*,²² often included as the first case in contracts casebooks, and for many law students, the first judicial opinion they will ever encounter.²³ In *Hawkins*, a doctor promised a child’s father, that he, the doctor, could repair the child’s injured hand, by using the then novel technique of grafting skin from one part of the body to another. The doctor promised the father that if the father approved the surgery on the boy’s behalf, the boy’s hand would be much improved. The father did so, and the doctor operated. The surgery, however, went badly, and the hand was considerably worse after the surgery than it was before.²⁴

The father sued the doctor on his child’s behalf, and the court had to decide how to categorize the transaction. Was the promise from the doctor to the father most ‘like’ a manufacturer’s promise to deliver a certain ‘machine part,’ which was then breached when the product did not live up to specifications?²⁵ Or, was the injury done to the child most ‘like’ a battery – because it was not the surgery to which the father had consented?²⁶ If so, then the surgery constituted in effect an injurious and non-consensual touching. Or, was the negligently performed surgery most like the breach of the duty of care that pertains to any fiduciary relationship between a professional and a client, a duty that governs the relationship and the legal rights within it, regardless of whatever promises might have been made from the doctor to the father? How the Court ‘categorized’ the transaction would largely determine what recovery (if any) the boy and his father would receive. If the court followed the first line of reasoning, then ‘contract rules’ would govern whether, and how much, the father might recover (on his child’s behalf) for the less-than-promised delivery: a jury would be instructed to put a value on the worth of the promise (what the perfect hand would have been worth, had it been delivered) and a value on what was in fact delivered (the far less than perfect hand) and give the difference between the two. If the court reasoned that the injury was in effect a battery, or a negligent failure to live up to the standard of care required of health professionals, then the jury would be instructed to give the child some tort law-determined amount of the value of the injury – presumably, the difference between the injured hand prior to the surgery and the worsened hand afterward, supplemented by compensation for the child’s pain and suffering.

The Court ultimately decided that the case should be decided by reference to contract rules of damages – and by doing so, expanded considerably the domain of contract law, and the influence of contract and contractual ways of thinking in our daily lives.²⁷ The Court could have, but did not, regard the case as ‘most like’ any number of others in which the particular relationship, or, as it was then put, the ‘status’ of the parties, essentially governed both the reasoning and outcome of the case. Or, it could have, but did not, regard the case as an expansion of common law principles of tort, governing non-consensual but accidental injurious touchings between strangers. By resolving the case as a contract case, rather than either a status case or a tort, the Court signaled an endorsement of an expansive role for contract – and its attendant assumptions of caveat emptor, arms length bargaining, and commodification of all that can be commodified – in daily interactions. Because of that, the case itself has become canonical: it is one of several important late industrial era cases solidifying a shift from a status-driven economy and social life – with its emphasis on particular relationships and the duties that pertain to those relationships – to one governed by the sparse, but general, and extremely generalizable, principles of contract. More prosaically, the case represents (and partly caused) the dramatic expansion in the late nineteenth and early twentieth centuries of contract law, and concomitant shrinking of tort and status, as governing legal principles of the late industrial and post-industrial society.

What I want to note here, however, is not so much the outcome, as the way the Court reached this decision. The Court faced a choice between tort, contract, and status, and by opting for contract, joined a judicial movement which, in retrospect and in sum, substantially changed the way we think about law, professional relationships, and perhaps social life more generally. The Court, though, acknowledged none of this. In spite of the quite dramatic stakes, the Court did not engage in an open discussion regarding the superiority of contract over tort as governing principles for an industrial economy, or even a more limited discussion of why it would be a good thing to resolve this novel case, and future cases like it, in line with contract, rather than in line with tort. Rather, it directly and quickly analogized the hand to the machine tool hypothetical suggested above, and then immediately applied the contractual rule of damage – thus suggesting that the case *already* clearly fell under a particular line of authority, and all that the Court needed to do was to highlight the relevant points of similarity to make the analogy obvious. By so doing, the Court brought the case in alignment with pre-existing legal rules, making it simply another instance of already established legal categories, rules, and modes of thought.²⁸ The only apparently novel predicament the Court was faced with – a transaction that could potentially be thought of in contractual terms, but which had arisen in the context of what had previously been understood in status or tort categories – was made not just ordinary, but already rule-governed, or law-bound. ‘What happened’ was another example of pre-given categories, rather than a harbinger of things to come, or a turning point in legal, economic or medical history.

My second example also comes from contract. In the mid-1980s, a number of courts were faced with breaches by ‘birth mothers’ of then novel, so-called ‘surrogacy contracts’: contracts in which a woman promises, in exchange for a

promise of money, to be impregnated, gestate, and then give birth to a child, who she will then relinquish to the adoptive care of (typically) a married couple, consisting of the biological father of the child and the 'adoptive mother.' In a few of these deals (by no means most), including the deal that became the landmark case *Whitehead v. Stern*,²⁹ the 'birth mother' at some point late in the pregnancy or immediately after the birth, comes to regret the contract, usually because she has unexpectedly forged an emotional bond with the fetus or newborn. She then seeks to renounce the contract and keep the child. The would-be adoptive couple sues, basically to enforce the contract as written.

The courts in these cases (in the mid-1980s), like the court in *Hawkins v. McGee*, were faced with several legal options. They could have voided the contracts as contrary to 'public policy' because of their subject matter, reasoning that a contract for the sale of reproductive services is 'most like' a contract to sell a baby, clearly illegal and void under current law.³⁰ Alternatively, they could have 'read into' the surrogacy contract a mandatory, implied condition giving the birth mother the right to change her mind up to three months after the birth – reasoning that these contracts were 'most like' private adoptions, and should therefore be treated as such.³¹ Private adoptions, by statute virtually everywhere, are subject to such a mandatory three month (or so) grace period, so surrogacy mothers, the courts could have reasoned, should have the benefit of such a clause, regardless of whether or not they have bargained for it. Or, the courts could have decided that the adoptive parents could indeed sue under the contract, but then limit their remedy to monetary damages, rather than specific performance, reasoning that these contracts are 'most like' those in which the contract is upheld, but specific performance should not be granted because it would be too burdensome for the court to monitor the performance, or because doing so would be unconscionable. Or, they could enforce the contract as written, requiring the baby to be handed over to the contractual parents.³²

Although in fact only a few of the courts faced with this issue simply enforced the contracts, this seems to be the solution favored by a number of commentators, including, notably, University of Chicago Law Professor Richard Epstein. The birth mother's newfound emotional attachment to the baby, a few courts and Richard Epstein argued, is 'most like' additional costs discovered by a contractor midway through performance of any sort of contract, be it for personal services, industrial services, or otherwise. The risks of those sorts of unanticipated costs are precisely what is allocated in a contract, and are even in a sense the reason we have contract in the first place: to permit the general contractor in a construction contract to get out of a contract, simply because one of those risks came to pass, would be tantamount to disavowing the point of contract altogether. Likewise here, the argument for full enforcement proceeds, the birth mother's subsequent regret is but another unanticipated heightened cost of the contract to which she had freely consented. To void the contract or excuse her performance because of that cost would be to vitiate the very idea of contract. Nothing fundamental distinguishes the regretful birth mother from any other contractor who faces higher costs than anticipated. Both should be held to their contract, if either should.³³ Thus, like cases should be treated alike.

Here too, what is noteworthy, beyond the holdings of these conflicted lines of cases, is the way the courts reached them. The courts facing this issue did not (for the most part) work through the case by arguing the merits of approaching this relatively novel sort of transaction as posing potentially any number of possible resolutions, sounding either in contract, family law, or custody law, from which they could and should then choose the best legal response, all things considered. Instead, for the most part, the courts facing breached surrogacy contracts, whether they ultimately struck or upheld the contracts, resolved the enforceability question as though it posed a *descriptive* rather than normative or moral question: is this social configuration ‘most like’ a private adoption, or is it ‘most like’ the sale of a baby, or is it ‘most like’ a garden-variety contract case of breach and specific performance?³⁴ Thus, Epstein’s reasoning: despite the apparently novel subject matter of the contract – maternal gestation, labor, birth, and the voluntary relinquishment of a baby – there’s nothing *legally* novel, he explains, about the contract, its breach, or even the reason for the breach: the contract is for services and for voluntary relinquishment of rights, the breach lies in the failure to deliver the promised good, and the reason for the breach is that the performing party found the promised performance to be more costly than anticipated. But that is exactly the ‘same’ reason for any number of breaches of service contracts, maybe most. Although the contract may initially *seem* different, there’s really no fundamental difference between a woman who comes to regret a contractual promise in a surrogacy contract and a general contractor who comes to regret a promise in a construction contract: both underestimated their future costs, but both assumed the risk they would do so by entering into the contract in the first place. Consequently, there is no reason to depart from pre-existing contract law to decide the case. Likewise, although to opposite effect, the appellate court’s reasoning in *Whitehead*, which (unlike the trial court) struck the surrogacy contract: although the subject matter of the contract – the voluntary relinquishment of parental rights – *looks* novel, in fact, the Court reasoned, it is really *just like* the sale of a baby, and thus clearly violates public policy. Again the apparently novel is shown to be legally unexceptional. ‘This’ is like ‘that,’ so the same rules that have always governed that apply to this. Entering a contract to give birth and then later regretting it is ‘like’ entering a contract to sell a baby; clearly illegal under New Jersey law. Through analogical reasoning, the case becomes yet another instance of rules laid down long ago, subject to straightforward resolution under well-established and pre-existing legal principles.

In both *Hawkins v. McGee* and *Whitehead v. Stern*, the courts’ method of reasoning brought the outcomes within the mandate of formal equality. Although the cases appeared novel in their particulars, and even strikingly so, they nevertheless, the courts reasoned, were no different from any number of cases and potential cases that could be formally described as contractual. Therefore, to decide ‘like cases alike,’ meant, in each case, to highlight those aspects of the event or transaction that were no different from the larger class of contract, and then decide the cases accordingly. To decide ‘like cases alike,’ meant to highlight the universal elements within the particular, in effect deny or sideline the novel, and bring the cases in line with pre-existing authority. By doing so, the courts could decide the cases through the

reasoned search for general, applicable, and pre-existing rules. Had the courts instead highlighted the novelty or particularity of the cases they confronted, such a lawful, legalistic resolution would have been considerably harder to forge.

Now look at two cases from the constitutional context. In Equal Protection cases, in which formal equality is for most purposes the *content* of the legal constraint, the court is doubly constrained by the mandate to 'treat likes alike': the Court deciding a challenge to a law under the Equal Protection Clause must first decide whether *the law* in question treats likes alike, and then, operating in common law fashion, it has to decide whether the irrationality, if it does not, is sufficiently 'like' earlier cases or lines of cases in which irrationalities were held to be so great as to be in violation of the Equal Protection Clause. Thus, in *Rostker v. Goldberg*,³⁵ the Supreme Court had to decide the constitutionality, under the Equal Protection Clause, of a Congressional act that required men but not women to register for the draft, and derivatively, required men, but not women, to participate in military combat. The Supreme Court had to decide, that is, not the wisdom of the draft or of registration, or even the wisdom of extending it to include women, but rather, whether there were any relevant differences between men and women justifying this differential exclusion – whether the exclusion denied women (or men) the 'formal equality' to which the Clause entitles them. It then had to decide whether the irrationality of treating men and women differently in this regard, was sufficiently 'like' the irrationality in prior cases in which laws treating groups irrationally had been struck as unconstitutional. In *Rostker*, over a vigorous dissent by Justices White and Brennan, the Court essentially found that the exclusion of women from a registration requirement was not entirely irrational, because women could be rationally excluded from combat, and the purpose of registration is to prepare a combat-ready force. Furthermore, the Court reasoned, even if the exclusion could be thought to be irrational, it was not sufficiently 'like' prior cases in which that sort of irrationality rendered the classification unconstitutional – essentially because in this case, unlike prior cases, Congress had acted deliberately and thoughtfully in opting for the exclusion, and deference is owed Congress in the area of military preparedness. More recently, in *U.S. v. Virginia Military Academy*,³⁶ the Supreme Court had to decide the constitutionality of Virginia's support for an all-male private military academy that excluded women. Again, the Court had to decide not the virtue of military schooling, or even single-sex education, but rather, whether there were sufficient differences between men and women to justify the state's support of a school that treated men and women differently in this regard. And here again, the Court as an adjudicative body had to decide not only whether these groupings were rational, but also, whether the irrationality, if any, was 'like' or 'unlike' other prior Equal Protection cases so as to bring it within the domain of those holdings. The Court had to decide, in other words, whether the state's action in question treats likes alike, and if not, whether the irrationality was enough 'like' earlier cases in which laws (or other forms of state action) were held to violate formal equality, and therefore the Equal Protection Clause. Here, in contrast to *Rostker*, and with two women Justices in the majority, the Court, in an opinion by Justice Ginsburg, decided that the state's support of the single-sex military academy violated the Equal Protection Clause, primarily because

there are no substantial differences between the genders justifying the differential treatment.

Although these two cases point in dramatically different directions, for purposes of the development of the constitutionality of gender based classifications under the Equal Protection Clause, their discourse is remarkably similar. In both cases, the Court resolved the Equal Protection issue by examining groups, looking for similarities or dissimilarities, and hence for rationalities or irrationalities in the categorization of those groups, and then for similarities or dissimilarities to earlier cases in which similar rationalities or irrationalities had been tested by reference to the Constitution's Equal Protection guarantee. And, in this regard, they are fully representative of Equal Protection cases quite generally: Equal Protection cases, because of this multi-layered demand of formal equality, somewhat notoriously, are now almost nothing but this seemingly endless search for similarities, paradigms, analogies, and rational categories. The analysis in constitutional equality cases, as any number of commentators has complained,³⁷ is all in the categorizations. The result, once those categories are established, follows inexorably.

The importance of this analogical method – looking for likes and unlikes, rationality and irrationality – and the ideal of formal equality it is meant to protect, although rather easily and often derided, should not be underestimated, not only to adjudicative method and to constitutional law, but also to the very *idea* of law. Indeed, according to the jurists and legal commentators that explicitly defend it, and implicitly, the many, many more who simply employ it, it is precisely this commitment to formal equality that most differentiates 'legal' reasoning from 'political' reasoning, and the practice of law from the practice of politics.³⁸ A legislator, or legislative aide, or a voter, faced with a proposed bill or referendum criminalizing, regulating, or permitting this sort of transaction, may well consider the wisdom of allowing infertile couples to contract with surrogate mothers as a way to address their fertility problems, and may consider all sorts of reasons that weigh for and against the practice. Surrogacy contracts may, for example, be unduly exploitative of desperate women with too great a need for cash, and with too little life experience to consider the long-range consequences of contracting to deliver for money a baby they have brought into the world.³⁹ Or, the very existence of such contracts may have a deleterious effect on our socially shared reverence for life, or on our family values, or on the institution of the nuclear family itself.⁴⁰ Furthermore, their popularity and their use might rest on an ideal of maternity and femininity, and a denigration of infertile or non-parenting women, that is itself an undesirable ideal, and one we should not seek to deepen by creating markets that feed it.⁴¹ On the other hand, such contracts may offer economic growth or 'a way out of poverty' to women otherwise unable to achieve it, and whether or not that is the case, they undoubtedly meet the strongly felt desires of many couples to parent children who are genetically connected to at least one parent, and who would otherwise be unable to do so.⁴² A legislator may, on the basis of these reasons or others like them, be inclined to propose legislation that forbids the practice, or that regulates the practice, or at the other extreme, that protects the practice against various sorts of legal or constitutional attack.

Likewise, a far-seeking legislator 100 years ago may have been able to see any number of reasons to be wary of subjecting medical and professional services to the rules and strictures of commercial contracts. He may have felt that the relationships between doctors and patients, for example, are more like personal relations that ought to rest on trust, rather than calculations of long-term self-interest, and that that trust might be undercut by the prospect of civil lawsuits. Or, he might have felt that professional norms of misconduct, not legal rules of contract, should govern the behavior of medical personnel, and their relations with their patients, and their patients' families. He might have felt that the idea of subjecting such relationships to norms of contract would constitute an undesirable coarsening of human affairs, and that guarantees of the sort given by Dr McGee to Mr Hawkins ought to be thought of as unenforceable in courts of law. Alternatively, he might regard the inclusion of professional services within the ambit of contract to be an entirely desirable expansion of self governance and 'private ordering' – a recognition by lawmakers that individual citizens themselves are best able to adjudge what should be and should not be within the reach of private contract, and to behave accordingly. For these reasons or others like them, a state legislator may have felt inclined to regulate for or against the possibility of just these sorts of contractual undertakings.

The judge facing a case like *Whitehead v. Stern* or *Hawkins v. McGee*, might, but need not necessarily, address these concerns, or raise these questions, sometimes called, when they appear in the adjudicative context, rather than the legislative, questions of 'policy.' By contrast, the judge, and presumably the lawyers working on the cases as well, *must* answer a seemingly different question, and it is a question that remains foremost, furthermore, throughout the course of their engagement with the case. The judge's legal analysis, unlike the legislator's political analysis, begins – and ends – with the question 'what, in the array of already decided cases across the legal canon, is this case most like,' and the bulk of the argument the judge eventually puts forward will support the initial judgment he reaches on that analogical question. If the doctor's promise to the boy's father strikes him as most 'like' a manufacturer's promise to a buyer regarding the quality of a manufactured machine part, then the judge will apply principles discovered in those manufacturing cases; if the promise strikes him, alternatively, as most like the inconsequential conversational remarks made within the relationships of fiduciary professionals and their client-patients, he will treat it accordingly. To be sure, some of the same questions that the legislator takes up explicitly will occur to the judge, and he may be more or less explicit in acknowledging their impact: the doctor's promise may be more likely to strike him as 'like' a manufacturer's promise if he regards the arm's-length manufacturing contract as a desirable model for professional affairs (or indeed for human affairs); the judge may be inclined to find the surrogacy contract most like other sorts of contract that have been rendered void because of their incompatibility with public policy, if she regards those contracts as violative of deep human values. Nevertheless, this overlap is clearly not identity. The judge begins with and remains focused on the question whether this contract is most like this sort of relationship or that, this sort of human affair or that one. That is the question asked, and that is the question answered, in the course of a legal analysis. The legislator, by contrast, begins with and remains focused

on the question whether this sort of arrangement would be, all things considered, a good thing – something to prohibit, perhaps through a criminal sanction, something to permit but regulate, or something to honor, promote, and protect.

A similar contrast can be made in the constitutional context. A Congress passing a law creating a registration or reinstating a draft may well simply never consider the horizontal fairness, much less the ‘rationality,’ of requiring men but not women to register for services in the armed forces. They are concerned with a host of other issues, all of which focus their attention on the demands of the present and future: military engagement, procurement needs, the testimony of the Joint Chiefs of Staff; budgetary constraints; constituent interests. Likewise, a state legislature allocating funds to an all male military academy, or passing and implementing Jim Crow legislation, or granting heterosexual but not same-sex couples the ‘right’ to marry, or criminalizing homosexual but not heterosexual sodomy, is demonstrably unconcerned with the horizontal equities of the categories thereby created: in all of these cases, the assumptions regarding the groups are likely so deeply embedded as to feel too natural to question, or in the last case, to even appear as a category that could be put into doubt. The legislation is aimed toward solving a current and future problem. The judge facing a challenge to the constitutionality of any of these provisions, by contrast, *must* address the horizontal equities, fairness, or ‘rationality’ of the categories the legislature has employed to achieve them. If they are irrational, the constitutionality of the statute is in question, and if the irrationality is enough ‘like’ irrationalities struck in the past in sufficiently similar cases, the statute will and should be struck.

In both the constitutional and the private law context, the question facing the judge – the paradigmatically *legal* question of what is like what – at least appears to be radically different from the political question facing the legislator – how should social life be structured – and in at least three directions. First, the judge’s legal question looks back in time: what line of already decided cases is this ‘most like’? The legislator’s political inquiry looks forward: would this arrangement be, all things considered, a good thing for the community, or not? The judge looks to settled precedent, and seeks to ‘normalize’ the seemingly novel: this social arrangement or transaction is most like – and hence is one of – this group of arrangements which are generically called ‘contracts,’ and therefore subject to this line of analysis. In the constitutional context, the judge looks to settled precedent to ‘normalize’ the only seemingly novel challenge: this legislation treating men and women differently is being challenged as irrational, but it is really ‘most like’ this line of cases, in which just such a categorization was upheld. The legislator embraces novelty, or at least meets it head on, and responds by changing the structure and content of existing ‘law’ to meet the challenge. The judge, through law, looks to cement a connection between what occurs in the present with what has been laid down in the past. The legislator seeks to open up possibilities and potentialities for change – to alter the fabric of social life – and creates law in order to do so. The judge seeks to preserve connections with the past, to normalize novelty by subsuming it within the given, and uses existing law, in order to achieve that social stability. They ‘use’ law, in other words, toward diametrically opposed ends.

Second, the judge, seemingly, seeks to elucidate what the ‘order of things’ *is*, rather than what the order of things should be. The judge’s legal decision proceeds through

progressively fine explanations of what is like, or unlike, what. The legislator, by contrast, seeks to define ‘what is’ only so as to make clear his intention regarding what ought to be the case in the future. The judge’s task, unlike the legislator’s, is, then, at least on first appearance, descriptive in character rather than normative. He seeks to make clear what may be obscure, and that is whether an exchange of promises *is* a contract, or whether an injury *is* the result of tortious conduct and hence compensable, or whether a law treating men and women differently *is* so irrational as to be unconstitutional. The legislator seeks to alter and restructure human interaction. The judge seeks to better elucidate the essence of those interactions, and apply pre-existing law accordingly.

Third, the judge’s decision, unlike the legislator’s, is ‘categorical’ at its core, not just incidentally so. The judicial decision is overwhelmingly about what is like what, and what is not like what. The legislator too of course deals in categories when crafting law, but the categorical task is instrumental to the greater goal of changing behavior: the legislator decides that a behavior ought to be treated as a crime, and then to achieve that end defines it, or categorizes it, as a crime. The court, by contrast, decides, when faced with the case in which the criminality of the conduct is obscure, that the conduct has in fact always been or has never been criminal, although perhaps not obviously so. For the court, the legal question is almost entirely exhausted by the task of categorizing what is, into categories drawn from the past. For the legislator, the political question is almost entirely otherwise; the categorization is incidental to the task of imaginative reconstruction.

Formal equality, then, constitutes not just a particular method of legal reasoning, but also constitutes what is distinctive about law, as a discipline, as a culture, and most broadly as a way of thinking. Law is distinguished from politics, from morality, from custom, and from any number of other first cousins, by virtue of the impulse to take this way of thinking seriously: to assume that events today can be successfully embraced by rules laid down yesterday; to envision rules that have their origin in the past but that will settle conflicts in the future; to put in place a system that can ensure that today’s novelty can be subsumed within yesterday’s settled practice. The commitment to formal equality, in short, seemingly defines a commitment to law.⁴³ Judges and lawyers rely on it quite explicitly and unapologetically, and *virtually all the time*: it is what makes legal arguments legal, whether you are arguing *Bush v. Gore* or a misdemeanor in a Court of Common Pleas. Law students rely on it reflexively, and no matter how many times they have illustrated for them the futility of its logic. It is what makes law, law. Anyone can learn the content of a substantial amount of state or federal law, simply by reading a reputable national or local newspaper. To learn to *think* like a lawyer, however, you go to law school, and what you will be taught, and – non-trivially – tested on, is your mastery of the rhetoric and logic of applied analogical reasoning.

Critical Attacks on Formal Equality

The centrality of formal equality to legal thinking suggests at least three questions. The first is one of coherence: is it really possible to reason this way? The second is

(loosely) political and institutional: is this a desirable form of reasoning for courts, judges, and lawyers to engage in? Does it fit well within our scheme of democratic, participatory, constitutional governance? The third question is moral: *why should* courts, or legislators, ‘treat likes alike’? What is the content of the moral imperative that suggests to so many that they *must* do so? Very generally, critics of formal equality – legal realists at the beginning of the twentieth century, critical legal scholars and identity theorists at the end – have responded to the first two questions (or sets of questions), and have badly neglected the third.

Let me start with the legal realists. During the hey-day of that critical movement, although some attention was paid to all three of the questions suggested above, the most penetrating critiques focused almost overwhelmingly on what I have called the political question – is it *desirable* for courts and judges to reason in this way? The answer the realists gave, almost unanimously, was no. The obsession with categorization, deductive reasoning, and analogical reasoning in ordinary, common law cases, seemingly required by the ideal of formal equality and indulged by their formalist colleagues, comprised an unduly cramped,⁴⁴ ungenerous,⁴⁵ covertly conservative,⁴⁶ and even infantile and childish⁴⁷ way for judges to resolve questions that inescapably pose real choices, whether acknowledged or not, and hence inescapably have a moral and political, and not just positive and legal, dimension. Judges should never resolve a common law legal question simply by asking whether ‘x’ is ‘like’ ‘y,’ the realists argued; to quote Justice Holmes’s famous aphorism on the topic, it is just ‘revolting’ for a court to decide a case in a particular way for ‘no better reason . . . than that so it was laid down in the time of Henry IV,’ or for the reason that ‘so our fathers have done.’⁴⁸ Rather, such judgments should rest on explicitly stated reasons as to *why it is best to treat x* in the same way as y. That question, in turn, requires a decision on the merits, so to speak, of the value of the rule that establishes the treatment of ‘y’ and the value of either extending or not extending the rule so as to cover ‘x.’ Again, none were more concise (or more influential) in making this critical point than Justice Holmes:

The very considerations which judges most rarely mention and always with an apology are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient to the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy: most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.⁴⁹

Furthermore, Holmes argued, the judge should make clear the real and preferred grounds for his decision, namely, sound public policy:

I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate and often unconscious.⁵⁰

Courts could, and should, decide cases – particularly but not only hard cases – in whatever way best promotes sound policy, not in whatever way strikes a judge as analogically sound. To do otherwise is to be disingenuous, or irrational: the real ‘policy’ ground of decision is disguised, or if policy is truly disavowed or ignored, then the decision is peculiarly unjustified.

The distance between common law adjudication, and legislation, or between ‘law’ and ‘politics,’ on this Holmesian and realist conception of the judge’s task, is obviously considerably shortened. The realists, for the most part, found this ‘shortening’ both ‘realistic’ (hence the label, ‘legal realism’) – judges, the realists thought, *were* simply legislators on high benches with black robes, and ought to acknowledge as much – and desirable. The actual constraints on judicial decisions, the realists thought, were essentially no different than the constraints facing legislators, and because of that, judges ought to aim overtly (and not just covertly) for the same sorts of ‘legislative’ goals: loosely, a utilitarian, pragmatic, and widely realized conception of the social good. Judicial pretensions to certainty and stability should be set aside. Judges inescapably resolve questions of policy, not logic, when they decide cases, and they should forthrightly say so. Were they to do so, law could far more readily be adapted to the needs of a quickly changing social and economic culture. Judges, no less than legislators, could and should be drafted to the laudable, and shared, work of legislation: the benign articulation and administration of social policy, crafted with the careful and reasoned tools of the then nascent social sciences, and aimed toward bettering and uplifting the social, and particularly the economic, life of all.

Second, the critical legal studies’ ‘indeterminacy’ thesis. The contemporary critique of formal equality generated by the Critical Legal Studies movement over the last 30 years has without question echoed the realists’ overtly political themes: critical scholars, no less than their realist forefathers, forcefully argue that judges *ought* not to pretend to neutrality; judges *ought* to decide cases in ways that promote the social good, rather than in the service of whatever goals are furthered by a conservative and fetishistic obsession with formal equality. The critical scholars, though, have not stressed what are apparently highly malleable and contingent connections between formalism and political conservatism. Rather, far more than did the realists, critical scholars have focused on the first question noted above, namely, whether it is *possible* for courts to decide cases by reference to this formalist ideal. Critical scholars (as well as some of the legal realists before them) insist that it is not. Obviously, if they are right, then the desirability of doing so becomes a moot point. There’s no point in arguing that courts ought to do the impossible. Formal equality, whether desirable or not, is an illusory ideal.

The *reason* formal equality is an illusory ideal, according to contemporary critical scholars, has to do with the logic, or illogic, of categorical, analogical, or what is now sometimes called ‘essentialist,’ thinking. Categories, critics note, are made, and remade, Humpty-Dumpty style, with every act of categorization. Every linguistic utterance, including those made by judges, is just such an act. Therefore, the act of adjudicating ‘this’ to be ‘like’ ‘that’ is at heart no different from the legislative imperative act of declaring it to be so, in order to facilitate some political

reconstruction. Both adjudicator and legislator make a category that covers both 'x' and 'y'; neither one of them *discovers* 'x' to be in some pre-labeled box that also contains 'y.' This is clearly, even transparently, true in those cases like *Whitehead* or *Hawkins*, where the courts more or less acknowledge (even if just implicitly) the degree of choice confronting them. It is also, however, according to most critical scholars, true of quite ordinary cases as well. In fact, the recognition of a case as 'ordinary' requires precisely the same sort of active categorization, and hence degree of legislative involvement, by judges as is required in marginal cases.⁵¹

Why is this? Why is it so impossible to do what formalist judges insist is the core of their enterprise? The difficulty with formal equality, according to most (not all) critical scholars, has to do with the nature of language, and of the ubiquitous presence of social power in the construction of the categories in which we think. The category 'contract' is itself socially constructed, as is the decision to treat the transaction that took place in *Whitehead* as a 'contract,' rather than a 'crime,' or the one in *Hawkins* as a contract rather than a tort. The act does not come pre-labeled; somehow, the decision regarding whether to treat those features of it that are 'contract-like' as paramount over those which are 'crime-like' or 'tort-like' must be made on some basis other than the 'contractualness' of the act. This basic argument regarding legal characterization is neatly pre-figured in a now-classic passage regarding language much more generally, from Michel Foucault's *The Order of Things*.⁵² In that passage, appearing in the preface to his book, Foucault introduces the suggestion that the most basic categories that structure our thinking are of our own creation, rather than reflecting any pre-given feature of the world. The passage, because of its influence, is worth quoting in full:

This book first arose out of a passage in Borges, out of the laughter that shattered, as I read the passage, all the familiar landmarks of my thought – our thought, the thought that bears the stamp of our age and our geography – breaking up all the ordered surfaces and all the planes with which we are accustomed to tame the wild profusion of existing things, and continuing long afterwards to disturb and threaten with collapse our age-old distinction between the Same and the Other. This passage quotes a 'certain Chinese encyclopaedia' in which it is written that 'animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) et cetera, (m) having just broken the water pitcher, (n) that from a long way off look like flies.' In the wonderment of this taxonomy, the thing we apprehend in one great leap, the thing that, by means of the fable, is demonstrated as the exotic charm of another system of thought, is the limitation of our own, the stark impossibility of thinking *that*.⁵³

Of course, animals that 'from a long way off look like flies,' have something in common with cars and trains that 'from a long way off look like flies,' just as those animals have something in common with sucking pigs, animals that are innumerable, and creatures that have just broken the water pitcher. There does not seem to be anything in the things themselves that dictates the necessity for a category 'animals' and a category 'cars' rather than a word that might cover the category 'things that from a long way off look like flies.' Likewise, those gusts of wind, as well as

household domesticated pets, that have just broken the water pitcher, could be lumped together and categorized; again, there is nothing in the things themselves, rather than our use of things, that suggests a reason why that category should not be a quite basic one. The seeming naturalness of the distinctions between cars, animals, and gusts of wind, is what Foucault, reading Borges quoting from the Chinese Encyclopedia, saw, in a great leap, to be so comically problematic.

Clearly, if the Chinese Encyclopedia's taxonomy of animals leads us to question the naturalness of the distinctions we think we perceive between cars and animals – and hence the ability to unselfconsciously categorize likes and unlikes – all the more so should it make us wary of distinctions we think we perceive between 'contract' and 'tort' or 'expectancy interest' and 'reliance interest,' or the 'consideration doctrine' and 'promissory estoppel.' For these legalistic categories, more so than the divisions between the genuses and species that nature only seemingly provides, are quite *obviously* socially constructed, and socially constructed toward the political end of creating a certain set of powers, liabilities, rights and duties. It does not require a 'great leap' to see that the order of things created by and then imposed by law inheres in the law and in the minds of laws' creators, and not in the 'legal things' themselves. Whatever may be the possibility, in other words, of describing necessary and sufficient qualities so as to designate the essence of 'animals,' 'cats,' 'cars,' or 'gusts of wind,' it seems almost nonsensical to try to describe the necessary or sufficient essential qualities of 'contracts' or 'torts': these are as socially constructed a set of concepts as reality can possibly kick up. A 'contract,' for example, is no more essentially an 'exchange of promises' than it is an 'exchange of a promise for consideration,' or a 'promise under seal,' or the creation of an 'expectation of some performance' or 'a promise a court will enforce.' It might, but does not have to, and has not always, even required the presence of a promise.⁵⁴ It might, but has not always, required consideration or a seal.⁵⁵ It might be, but has not always been, the sort of thing a court will enforce.⁵⁶ Recognizing the contingency of the meaning of contract or of other legalistic concepts does not necessarily render problematic the attempt to decide like cases alike; it does, however, make clear that when doing so, reference is being made to categories of human, local creation.

What the Foucauldian-Borgian leap *does* make us acknowledge, in the context of law, is the sheer impossibility of drawing a clear distinction between the activity of creating a category, and the act of deciding whether or not something is an example of it, or lies outside its perimeters. 'Contractual promises,' in other words, Chinese-Encyclopedia style, might be subdivided into (1) those promises backed by consideration, (2) those that create reasonable expectations of their performance, (3) those that were given to Rumpelstilskin and which barter away one's first-borne child in exchange for a room full of gold, (4) those which, from a long way off, look like flies, (5) those which my son routinely makes, and breaks, regarding his willingness to do his homework during study hall, (6) those which break hearts, (7) those not included in this enumeration, and (8) those which are illegal. Deciding whether something alleged by a litigant is a 'contract,' or is contractually binding, and which might have some but not all of these attributes, does not look much like deciding what 'is,' rather than what 'ought to be,' so long as we assume a decision-maker with a

moderately facile imagination: surely there is some attribute held in common by virtually any contested event and some subcategory of 'contracts,' but just as surely there are plenty of attributes that differentiate the contested event and some, one, or all of the subcategories of contracts. The judge might just as well, then, cut through the verbiage, and just decide whether or not it makes sense, all things considered, to make this litigant pay damages. Nothing is added by doing so on the grounds that this is or is not a 'contract,' indeed, nothing is added by doing so under the guise of 'law.' In a nutshell, that is the guts of the critical scholars' critique of formal equality, and of the distinction between 'law' and 'politics' that rests on it.

At the heart of this argument is a basic, even elementary, logical insight: in the absence of a stated yardstick, there is no purely rational, legal or formal way, to decide, from a potentially infinite set of characteristics, *which* characteristics of a case, individual or group should be chosen as the basis for judging whether one thing is like another, and hence whether or not a rule or precedent applies. Case A and Case B will each have a virtually infinite number of characteristics, some of which are shared and some of which aren't, and there is simply no way to say that case A is like B, without first having some basis on which to decide to look at characteristic (x) which both cases share, rather than characteristic (y), which they do not. Given that inescapable logical incompleteness, the insistence by jurists and scholars on the pretensions and rhetoric of formal equality is nothing but window dressing, or worse. Saying that A is like B is not enough to decide a case – it declares a conclusion, it does not provide an argument. Nor is it enough to explain why a case was decided in the way it was: to say that A was decided in a particular way because it was found to be like B, does not explain why the judge deciding the case found the shared characteristics between them so salient. Formal equality is an incoherent goal, and the 'formalism' that purports to rest on it is at best an incomplete form of reasoning, and at worst a disingenuously misleading claim to neutrality.

What follows, according to the critics, is the complete disintegration of the purported distinction between law and politics.⁵⁷ Legal reasoning, so through and through dependent on formal equality, can only at most pretend to political neutrality; it can never achieve it. Legal reasoning, in the words of one of its most penetrating critics, is essentially *incomplete* or 'truncated':⁵⁸ there can never be an autonomous and closed circle of reasoning, in which one legal event is analogized to another and a dispute concerning it thereby resolved. Rather, legal argument must be completed, if it is ever to be completed, by reference to commitments, values or prejudices that are political – and hence contestable – in nature. The various promises – of neutrality, of rationality, of disinterestedness, of autonomy, of reasonableness, of judicial independence – which any ideal of formal equality that denies this holds out, then, cannot possibly be met. Legal questions cannot be resolved independently of political visions that underlie them. Law cannot be rendered autonomous from politics, or from some sort of substantive, and contestable, moral vision that guides decision-making. Judges cannot be 'disinterested,' if disinterested means capable of deciding cases without reference to non-legal factors. Law is political through and through. And the reason it is so, at bottom, is the inescapable incompleteness of formal equality: the sheer logical inability of declaring X to be 'like' Y without first

specifying some basis, likely political, for identifying which characteristics, among a possibly infinite number, are to be the basis of comparison.

What follows from this complaint? The critical scholars draw a distinctively different conclusion from their indeterminacy critique than did the realists before them. The main difference might be put in terms of the intended audience, and purpose of the criticism itself. The realists' focus, overwhelmingly, was on judges and judging: their stated intent was to change the nature of judicial decision-making. The critical scholars by contrast, for the most part, have no such ambition: judges, according to the critics, will not abandon formal equality, no matter how often its incoherence is demonstrated, so it does not make much sense to argue, realist-styled, that they should. The judicial investment in the pretensions of formal equality, and particularly in the ideal of rational, rather than political decision-making that it holds out, is just too high. The target audience, then, of the critical scholars' deconstructionist efforts and of the indeterminacy thesis in general, contra the realists, is not really judges at all. Rather, what appreciation of the Foucauldian insight – the constructedness of linguistic categories – facilitates, according to the critics, is not so much the forward looking, policy-furthering *adjudication* trumpeted by the realists, but deeper, less 'truncated,' thoroughgoing *criticism*. Somehow, judges do indeed 'group' things and somehow, they will continue to do so: they group 'freely formed intents' by differentiating them from 'causes,' they group 'promises' and differentiate them from 'predictions' on the one hand and 'threats' on the other, they group 'negligent acts' and differentiate them from risk-seeking enterprise. Those groupings may not be the product of legal deliberation – assuming indeterminacy, they can not be solely the product of legal reasoning – but they most assuredly are not random, either. They reflect what generates them, and what generates them, is some matrix of social and cultural vectors of power and influence, that in turn create habits of thinking. By exposing them, the critic can map out those vectors, and by doing that, can read through the claims of knowledge – the 'order of things' in the legal world – to the stakes of power behind them. The role of the critic is to do that. The judge's professional insistence on formal reasoning – on deciding 'like cases alike' – and the obsession with categorization and classification that mode of reasoning requires – basically provides an endless supply of raw material for this form of opened social critique.

Finally, the identity theorists' critique. The problem with formal equality, according to this 'identity-based' critique, is not that such decision making is infantile or disingenuous, or incoherent. Rather, the mandate to 'treat likes alike,' even if coherent and faithfully followed, according to contemporary identity theorists, results in a reification of the status quo, at least on issues touching race, class, and gender, and perhaps others as well. It does so, for two different but intertwined reasons.

First, 'treating likes alike,' particularly when viewed as a constitutional mandate, has the effect of further solidifying the 'normativity' – the perceived 'normalcy' – of that real or imagined essence to which comparisons are made. If *x* is like *y*, and therefore must be treated like *y*, the almost invariable and unstated assumption is that the '*y*' in this comparison represents some unchangeable, and thoroughly desirable,

essence, and that x's exclusion from the category in which x quite naturally falls, is the result of some sort of irrational, unfortunate, but easily fixable mistake. The mistake will be fixed, through adjudication, with the result that the normalcy as well as the desirability of 'y' will thereby be even further entrenched. If the Constitutional mandate of 'formal equality,' for example, requires that women be treated 'like' men, and requires that they be so treated on the grounds that women and men are for all relevant purposes 'the same,' then the unfairness of having treated women as different from men is addressed and rectified, but at a cost: 'men,' as men presently live their lives, emerge as a proper model of humanity, as well as a proper basis for comparison, and all the further insulated against any sort of critique. This has the effect, according to what is often called 'the difference critique,' of unduly celebrating an existing way of life that perhaps should be subjected to closer scrutiny.⁵⁹ If, for example, women are 'treated' the same as men on partnership tracks at law firms, tenure tracks in academic settings, and promotional settings in the military, all on the assumption that women are like men and should therefore be similarly treated, and if these various tracks expect maximal labor input during the first ten to fifteen years of an employee's working life, this has the not so happy effect, among others, of 'normalizing' and universalizing, men's relative under-participation in the reproduction and upbringing of children. Men, given current social arrangements, do far less parenting (in addition to having a substantially less burdensome biological role in reproduction) than do women, and this is reflected in workplace participation. With women treated the 'same' as men in the workplace on the counterfactual assumption that women and men are the same in all relevant respects, including involvement in parenting, the result, predictably enough, will be that women will eventually perform less parenting so as to be in fact, as well as in theory, more like men. The result will be either overworked women performing 'two shifts,'⁶⁰ or underparented children shuffled from nannies to daycare to after school activities, all designed to compensate for the parenting deficit. In an ideal world, the 'difference critique' continues, perhaps men would do more, rather than women (including nannies and daycare workers) less, parenting. This sort of obvious critical observation becomes utterly obscured by a constitutional mandate to 'treat likes alike,' where the class to which all things are compared – men – is so regarded as the norm that it blinds us to the possibility of arranging life in a less work-obsessed and more family-friendly way.

Second, the bland directive to 'treat likes alike,' where the two classes are not in fact alike, also has the affect, in some cases, not only of unduly valorizing that to which the comparison is made, but of undermining rather than furthering real attempts at achieving substantive rather than formal equality between them. 'Equal treatment,' in other words, can have a severe impact on a subordinated group's substantive equality, wherever that group is in point of fact differently situated.⁶¹ Thus, to stick with the same example, an insistence that states and workplaces treat working women who are mothers the same as all employees, may backfire against rather than promote women's opportunities for advancement: women, but not men, do in fact invest greater physical resources and typically more time in reproductive activities during those years, in order to produce the 'same' number of children.

Applying formally equal rules will either reduce their capacity to produce the same number of children as their male colleagues, or it will reduce their wages and opportunities for advancement in the workplace. If women are treated the same as men with respect to social security benefits, likewise, this may backfire against women, if women have spent substantially more of their time than have men in unpaid household labor.⁶²

Much the same can be said of the Court's laudable decision in *Virginia Military Institute* (VMI), striking the state of Virginia's support of the Virginia Military Institute, as an unconstitutional infringement of the Equal Protection Clause. The decision was a great victory for the women irrationally excluded from participation in a form of education for which they were well suited and fully prepared. Arguably however, it comes with two costs, both of which are highlighted by identity critiques of formal equality: first, it has the effect of celebrating, rather than subjecting to critical scrutiny, the sort of education and the various traditions that the VMI offers, and the State of Virginia supports. The educational package the VMI puts forward is instead presented, throughout the litigation and by both sides, as a highly desirable commodity, and as the truest, most authentic, form of elite military education – and in contrast to the pale women's academy imitation of military training that the state had made available to women, the availability of which, the state had unsuccessfully argued, cured whatever constitutional problem might have been created by virtue of the exclusion of women from the VMI. Second, according to the 'difference critique,' the insistence on the formal equality of men and women cadets or male and female applicants has the effect of further muting an exploration of the multiple differences between men and women's different *histories* – a difference that accounts for both the institution of the all-male military academies as well as the all-male draft, the disproportionate impact of entrance requirements on women, and the continuing reluctance of women – once the doors are opened – to consider or desire this form of education. Women's historical exclusion from the martial arts, from training in the tools and skills of combat, from the obligations of military service, from access to arms, as well as their social acculturation during childhood and young adulthood away from expressions of aggression, their quite explicit training in passivity in the face of force, their ignorance regarding even basic self-defense – all of this is muted, if not silenced or denied, by the counterfactual insistence that women are like men, and therefore must be permitted entrance to military academies. This comes at a cost to at least our understanding of the root causes of women's subordination to men in this society, and perhaps therefore at a cost to a clear understanding of how to rectify it.

Similar dilemmas can be found in the attempt to achieve formal equality between black and white citizens. If black and white citizens must, as a matter of constitutional doctrine, be treated 'the same,' on the grounds that they are for all relevant purposes 'alike,' then the very real differences in income, housing quality, basic health, and educational levels will have to be ignored, and ignoring those differences could well adversely impact upon the opportunities for advancement of black citizens.⁶³ More generally, 'equal' treatment and equal distribution of resources will impact adversely those with less power, when that maldistribution is blithely

ignored under the guise of formal equality. The quasi-fictional claim, now a fundamental premise of modern constitutional law, that blacks and whites are 'alike,' and men and women are for most (not all) purposes similarly alike, denies the differences in the amounts of power held by the dominant and subordinate groups – indeed, denies that either group *is* 'dominant' or 'subordinate.' The aspiration of formal equality, then, according to the various difference critiques put forward by identity theorists, in the constitutional sphere, has become a major stumbling block to egalitarian progress: legislation that treats the subordinated group more favorably, such as, for example, certain forms of affirmative action plans, can be struck, using the logic of formal equality, as an unconstitutional infringement of the Equal Protection Clause.⁶⁴ In this way, the commitment to formal equality comes at a cost to the real, substantive equality, that the historical Equal Protection Clause, as well as the reconstruction amendments in their entirety, were surely intended to promote between black and white citizens. Here as well, then, law and its most fundamental commitments – in this case to formal equality – turns out to be at war with, rather than facilitative of, egalitarian politics and political action.

Now let me quickly highlight the differences between these three strands of criticism, by returning to the examples described above of formal equality at work. Realist critiques of cases like *Hawkins v. McGee* would fault the courts that decided them for their obliqueness: in each case the court could have and should have stated explicitly that it was free to decide the case as either a tort or contract, explained what the differences would be in terms of the relevant rules of damages, and why it is preferable to think of the transaction in contractual rather than tort terms. This would have required the court in each case to *advocate* the enlargement of contract, and would require it to do so in terms of public policy, rather than to simply state it as fact: if it is better to contractualize relationships between patients and doctors, it is better to do so for some quasi-legislative, policy-oriented reason – maximizing wealth, for example, or increasing legal certainty perhaps, or increasing the flexibility with which private parties can order their affairs. Likewise, realists transported to late twentieth-century US jurisprudence might criticize the decision in *Whitehead* and the cluster of cases like it for (some of) the courts' failure to state explicitly the true policy-oriented grounds of their decisions.

Critical legal scholars, by contrast, would not necessarily fault the court in either *Hawkins* or *Whitehead* for *seeking* to appear judicial rather than legislative. Rather, critical analyses, (particularly of contract law), have highlighted the sheer impossibility of such a strategy: any decision, and whether or not guided by 'public policy,' would be as equally defensible or indefensible as any other. To decide that the contract in question is 'most like' a commercial or construction contract, or most like the promise made in *Rumpelstiltskin*, or most like promises that break hearts, or most like things that from a long way off look like flies, or most like promises that are illegal, requires the decision-maker to first, either consciously or unconsciously, pick from an infinite number of attributes those which are salient, and that logically prior question in turn requires him to invoke a host of cultural and political – and decidedly non-legal – conventions, understandings, or, to use the Gadamerian term, 'interpretive prejudices.' The role of the critic should be to ferret out those

interpretive conventions, or prejudices, and hold them up to the light of criticism.⁶⁵ Thoroughgoing legal criticism, then, or even commentary upon, the courts' contract jurisprudence, should not rest on the seemingly banal elucidation of various 'policy' arguments that can tilt courts in one direction rather than another. Rather, to be meaningful, the critic should interrogate the court's decision so as to unearth hidden or not so hidden commitments, typically although not always political in nature, that are in turn employed to obfuscate the decision's contradictions.

Identity theorists, finally, would fault at least the constitutional equality decisions for their regressivity: by aiming for formal rather than substantive equality, the Supreme Court and lower courts frustrate rather than further the projects of gender, race, or class equality. Both the formalistic outcomes, and the rhetoric of formal equality, in the most important legal arena in which this mandate is applied – the Fourteenth Amendment's equality jurisprudence – dictate a sort of equality discourse that is steeped in a denial of the country's historical record: women are not 'like' men, and blacks are not 'like' whites, and neither are 'like' latinos and latinas, because of concrete events and actions taken by conscious historical participants intended to subordinate one group to the power and whimsy of others. The rhetoric of formal equality ensnares us in this active and ongoing process of creating a quite literally 'false' consciousness – a contrary to fact insistence on the value and meaning of equality, individualism, and choice, in the face of a historical record of subordination, group movements, and politics. The constitutional jurisprudence of the Supreme Court has for the most part, although not entirely, been complicit in this regressive deployment of the rhetoric of formal equality: even when it is used to achieve momentary victories – as was certainly the case in the VMI case, in which women won the right to attend state-supported all-male military institutions – it does so at the not inconsiderable cost of promoting a mythology of formal equality untrue to the history, as well as the lived experiences, of women, African Americans, Native Americans, the disabled, and any number of other excluded, different, and marginalized groups in our current social milieu.

A Critique of the Critiques

Although often lumped together, and although there is common ground between them, realist, critical, and identity scholars are nevertheless voicing distinctly different criticisms of formal equality: legal realists highlight the institutionally regressive quality of the ideal of formal equality; critical scholars emphasize the 'truncated' quality of the entire process, the constructivity of the non-legal factors that drive purportedly legal decision-making, and the need for social criticism of those factors; and identity theorists stress the ways in which formal equality sought by courts, so conceived, is in tension with substantive equality at least sometimes sought by legislators, or more generally, through political action. The point I want to stress here, however, is that whatever the extent of their shared ground, and whatever the extent of their differences, the critical traditions that have taken formal equality as a target share common *limits*. They all in different ways challenge either the coherence or the desirability of the ideal of formal equality. None, however, as far as I

can tell, have taken seriously the possibility that behind the incoherent, infantile, undesirable, and politically regressive set of methods embraced by the umbrella phrase ‘formal equality’ there lies a sound moral intuition about law, and that because of that, the ideal should be reinterpreted, but not abandoned – mended, but not ended. And because of that failure, progressive critics of formal equality have produced neither a lasting critique of the major traditions that *have* taken that intuition seriously, nor an alternative understanding of the source of that intuition, that might better serve the radical and progressive traditions they purport to represent.⁶⁶

The limits of our critical treatments of formal equality have left a noticeable silence in our critical traditions, and a sizeable disconnect between ‘professional’ progressive legal criticism, on the one hand, and ‘popular’ progressive criticisms of law and the legal profession, on the other. While critical, realist and identity legal scholars are disdainful of and skeptical of the ideal of formal equality, *popular* progressive critics of law, including identity critics, are critical of *breaches* of that ideal – not the ideal itself. Indeed, a substantial cultural history could be compiled that would simply retrace the accounts, in novels, folksong, folklore, myth, journalism, poetry, and religion, of notorious failures of formal equality – and *all* from a progressive political perspective. If we take that cultural accounting seriously, we cannot possibly conclude that formal equality is nothing but a regressive ideal, aimed at valorizing the status quo, obscuring the real basis of political decisions, and mechanistically tethering otherwise sensible judges to arbitrary transcendental nonsense or worse, thereby frustrating the work of sensible public policy and progressive political advance. Let me mention just a few examples.

First, in perhaps the greatest short dialogue to be found in American literature, Mark Twain puts the following exchange in the mouths of Huck Finn, and Tom’s beloved Aunt Sally, following Huck’s revelation, to Sally, that a steamer had run aground:

‘Good gracious! Anybody hurt?’

‘No’m. Killed a nigger.’

‘Well, its lucky; because sometimes people do get hurt.’⁶⁷

Now, to belabor the obvious just for a moment. What strikes the reader, although not yet Huck, in this passage, is *not* a general insensitivity to injury on Sally’s part. Sally is, after all, plenty *sentimental* – she would be appropriately saddened by the death of an innocent ‘human being’ by the steamboat accident. What is chilling about the passage, is Sally’s apparent inability to react to the news of a black man’s death as she would to the news of a white stranger’s. Another way to put the point, is that what she lacks is not *proper sentiment*, but rather, any sense of formal equality *with regard to the sentiment*. Because she dehumanizes the men, women and children who were slaves, she lacks the ability to react *in a like manner to like events* – the death of a flesh and blood, mortal, vulnerable, human being, with attachments to family and friends, as well as pains, pleasures, beliefs, hopes and ambitions not dissimilar from her own, or from the ‘people’ who do sometimes get killed. Her breach of the norm of formal equality is *in part* intellectual, but it is not only that, it is also emotional and

moral: I would say, it is a moral failure to marshal an emotional response. And – it is, most assuredly, a failure of formal equality. Aunt Sally is, simply, explicitly, and brutally, not treating likes alike.

Second, in what is surely one of the better protest songs ever penned in the folk tradition of the twentieth century, Bob Dylan, immortalizing a real case, wrote of the fate of one William Zanzinger, a prominent Maryland Eastern Shore millionaire, who killed ‘poor Hattie Carroll,’ a black hotel chambermaid and mother of ten children.⁶⁸ Zanzinger, Dylan accurately reports, killed Hattie Carroll with his cane, apparently in a fit of pique, during a ‘Baltimore Hotel Society Gathering’. In the song’s verses, Dylan deplores the crime, but he pointedly tells the listener, in a chorus after each verse in which the story of the crime is relayed, to ‘Take the rag away from your face/Now’s not the time for your tears.’ In the last verse, Dylan reports, again accurately, that Zanzinger was sentenced to only six months’ jail time, by a friendly and sympathetic judge. After the verse in which he reports the sentence – and *only* after that verse – Dylan instructs the listener to ‘Bury the rag deep in your face/Now is the time for your tears.’ Again to belabor the obvious, the breach of formal equality – not the horrific crime itself – was, for Dylan, the great wrong. The judge, not Zanzinger, is the villain in the song. The breach of formal equality – the judge’s failure to sentence Zanzinger as he would have sentenced comparable killers – was the injustice Dylan put to song, and the injustice that demanded a response.

Likewise, although God only knows what songs it has inspired, the O.J. Simpson case raised in many viewers’ and listeners’ minds the suspicion that Simpson would not have received the jury verdict he was given, but for his wealth and fame;⁶⁹ and raised in the minds of many others the suspicion that he would not have been framed by a corrupt police force and then charged and tried for this crime at all, but for his race.⁷⁰ Others were of the view that Nicole Brown would not have received the beatings she sustained, and – again, more importantly – would have received greater police protection for them – but for her gender.⁷¹ All of these reactions, although obviously tending toward different bottom line conclusions, are premised on a concern over breaches of formal equality. Well before his impeachment, William Jefferson Clinton offended many of his allies as well as his foes because of the perception that unlike Kelly Flynn, who had been unceremoniously discharged from military service for her adulterous affair with a lower-ranked officer, Bill Clinton, the nominal Commander in Chief of the Armed Forces, seemed in no danger of suffering such a fate for basically the same offense.⁷² This view was widely held by many people who harbored nothing but the most modern sensibility imaginable on the moral question of adultery, and nothing but at best a lack of interest in all issues pertaining to military justice. When the Paula Jones case emerged, with its obvious potential for unseating a president, any number of commentators worried that no former president would have been subjected to the consequences of the same private conduct in which Clinton had engaged, nor would most private citizens, while still others noted that any chief executive officer (CEO) in the private sector charged with having exposed himself in a hotel room to an employee would not have survived the resulting publicity.⁷³ Again, these views were voiced by many with no interest in questions of sexual harassment, and although their analyses pointed in different

directions, *all* were offended by the breach of formal equality. Any number of critics complained, following the Supreme Court's decision in *Bush v. Gore*, that the case would have come out differently had the political parties of the litigants been reversed – and that precisely because of that, the decision was clearly politically motivated, and hence illegitimate.⁷⁴ All of these social critics – from Mark Twain to Bob Dylan through to the pundits on television talk shows – complained of a failure of legal justice, by which they meant, whether or not they used the phrase, a failure of formal equality: someone in all respects similar to others, was being treated differently, and because of a factor that should have been irrelevant. It is hard to take seriously the claim that all of these social critics – most of them quite shrewd, and many quite 'left' – were naively under the sway of an illusory, incoherent, or inevitably regressive political ideal.

There is a similar disconnect, I believe, between the critical literature on formal equality, and the ideals and values of progressive students, which I will just try to illustrate rather than prove. I teach a course called 'Legal Justice' to small classes and seminars of self-selecting first-year students, the majority of whom (according to a student-run survey a few years ago) describe themselves as progressive, liberal democrats. I always invite the students, in the first class and before they have done any reading, to think back on their lives and to report to the group on any experiences they have had of a failure of 'legal justice.' I want to know what sort of associations, and what sorts of narratives, the phrase conjures. What I hear back, overwhelmingly, are stories about breaches of formal equality: a tenant evicted by a landlord because of the tenant's sexual orientation; an employee fired without a hearing; a parent, or friend's parent, wrongly accusing a child of misbehavior, or a child being treated unlike his or her siblings (these last two, when I specifically ask for 'earliest' memories of injustice). When pressed to explain what in these situations was unjust, the answer is some version of likes not being treated alike: the tenant is not being treated like other tenants with whom she shares all relevant characteristics, the employee is not being treated like all other similarly innocent employees, and furthermore is not being treated like other accused persons, who receive a hearing before losing something as valuable as a job, the child wrongly accused is no different in culpability than the others, but being singled out for punishment, the child is just like the sibling, but not receiving the same benefit, privilege or reward. These events are felt as unjust, and the feeling in virtually all cases traces back to a belief that someone is being treated by an authority in some way that wrongly differentiates her from a larger class to which she rightly belongs.

To be sure, none of this shows or even suggests that the importance of formal equality – of 'treating likes alike' – is paramount, or that it is the *only* legalistic value we ought to recognize. Nor is the injustice that is somehow tied to not treating likes alike, the only sort of injustice to which the law, or any other authority, should respond. The child who complains that he does not receive the same privileges as a sibling, because he and the sibling are, in the child's mind 'alike,' even if the child is right (which he never is), has not been as harmed as the child who has been neglected, abused, or ignored by his parents. Likewise, the citizen treated differently by a court than a comparably situated prior litigant, may not have been as badly harmed as the

citizen who has been abandoned by the state altogether – not protected by the police force against violence, or left to fend for himself in a state of nature. The gain in ‘fairness’ of having one’s labor contracts being treated ‘like’ commercial contracts, may not be worth the consequence of the substantive rule thereby applied: such contracts and the lives of those they govern become subject to the vagaries of employer goodwill rather than legal regulation. To generalize from the metaphor, the harms of ‘subordination’ – a serious lack of substantive equality – may well, for many subordinated, relatively weak, or marginalized people – just vastly outweigh, in daily, lived importance, the harms occasioned by the by-definition occasional injury inflicted by a court, prosecutor, police officer, or jury who fails to treat likes alike.

Furthermore, the absolute importance, as well as the relative importance, of formal equality should not be overstated. Not all cases raise the stakes that were evident in the O.J. Simpson case, or William Zanzinger’s sentencing, or the Clinton impeachment; put positively, some breaches of formal equality really are trivial, and well worth whatever gain a departure from given rules and categories may facilitate. Consistency *is* sometimes the hobgoblin of small minds. Undue rigidity, lack of flexibility, insensitivity to the particular, blindness to competing equities, and narrowness of imagination, are all rightly regarded as formalistic vices, not virtues, in law as elsewhere. Sometimes the wise policy for a court or a judge *is* to change course, even if as a consequence a litigant’s right to formal equality is denied; sometimes courts are right to veer from well-established precedent. More generally, much harm can be done by fetishizing formal equality: Holmes was right that there is no reason to stick with a given paradigm *just* because of its longevity.⁷⁵ It is true that blindly following a legal path laid down generations back is no guarantee that justice will be done, or that the community will be served.

Nevertheless, the feeling of injury, or offense, or moral insult, that follows from an apparent breach of formal equality is not, for any of these reasons, *illusory*, and the conviction that when it is breached, a very real wrong has occurred, is widely held. It is also, as Bob Dylan saw, a wrong that is largely wrought by law, and those responsible for its administration: we charge judges, and derivatively lawyers, with the task of safeguarding this value, and legitimately expect their expertise in dispensing the legal justice that depends upon them understanding that. It is accordingly judges, and the legal profession from which they come, who are held accountable, when there appear to be massive departures from this ideal: when poor criminal defendants lack for representation, when wealth seems to buy verdicts, when the thief that steals London is lauded while the thief that steals bread is hanged, when users of crack cocaine receive outrageous sentences while users of powder cocaine are treated leniently, when insurers are allowed to cover healthcare for physical illness but not for mental illness, when courts say it’s okay for men but not women to be sent off to war (and, if they return well enough to enjoy them, to be rewarded with lifelong veterans’ benefits as a result); or that it’s okay for paid labor, but not unpaid household labor, to be followed by social security; when courts uphold the constitutionality of allowing heterosexuals but not gays and lesbians the privilege to marry, and so forth. When a citizen is treated differently, or singled out for harsh judgement, or exempted from laws to which the rest of us are held, or when one group of us is awarded with legal largesse while similarly

situated groups are not, we feel a moral insult, and we feel it toward the court that either breached the ideal itself, or upheld the constitutionality of the breach occasioned by the offending legislation. By failing to take either the injury, or the ideal, seriously, our critical traditions seemingly fly in the face of these quite ordinary but deeply held values, and the sense of outrage felt when they are breached.

As progressive legal critics, we also, though, forego an important opportunity, when we refuse to take the moral dimension of this legal ideal seriously, or at least as seriously as the men and women whose lives are regulated under it. Our progressive-critical traditions in law, again, over the past century, have focused overwhelmingly on the incoherence and political undesirability of formal equality as a methodology. As a consequence, we have failed to engage with, and even failed to criticize thoroughly, those attempts that *have* taken hold within the dominant approach, to explain, or at least interpret, the moral content of this seemingly ubiquitous judicial method. More important, perhaps, we have failed to develop interpretive alternatives to those approaches that now dominate contemporary literature on formalism and formal equality: there is, after all, no point in reconstructing the moral heart of a legal method that is itself incoherent or flatly undesirable. In the rest of this chapter, I want to begin to fill some of these voids: first by restating the various arguments for formal equality that have emerged in contemporary scholarship on the issue, then criticizing them, and then offering an alternative to that dominant understanding.

Why Formal Equality?

Why *should* likes be treated alike? What accounts can we give, or what accounts have been given, of the moral imperative that seemingly underlies this legalistic ideal? We can, I think, locate two (possibly three) competing accounts in contemporary scholarship: The first, which is sometimes called ‘utilitarian’, but which I think is better labeled economic, is captured in a number of writings on the idea of legal precedent by legal economists, but it also seems to be the ‘commonsensical’ position on formal equality embraced by a wide range of liberal and libertarian commentators who have addressed the question as well.⁷⁶ The second account, which I will label conservative, or traditional, has been most vigorously defended by Yale Law School Dean Anthony Kronman, and in particular in an influential and elegant, and relatively recent, article in the *Yale Law Journal*, entitled ‘Precedent and Tradition’.⁷⁷ This approach too is widely embraced, although rarely in the starkly Burkean terms in which Kronman chose to defend it in his seminal piece.

Both of these accounts, I will argue, to their credit, provide three things. First, they each suggest an explanation – or at least an interpretation – for the widely held intuition that likes ought to be treated alike. They explain, that is, why it is that we *should* ‘treat likes alike.’ Second, they each supply an account of *law* that explains why the value of formal equality is central to law. Third, they each supply an account of how formal reasoning is possible, as well as why it is desirable, once the heart of the premise requiring it is made explicit. And neither account has been particularly well engaged by formal equality’s critics.

Economic or Utilitarian Accounts

Let me start with the economic, or as it is sometimes called, the ‘utilitarian’ understanding. The economic understanding of formal equality (as is true of economic reasoning in law generally) begins with a particular description of human nature, which might sensibly be characterized as both ‘universal’ and ‘thin:’ we have one universally shared attribute, and that is the potential of each of us to benefit from the choices we make.⁷⁸ We are all natural, born, ‘traders.’ Although minimal, this account of our nature central to economic reasoning in law, and central to economic accounts of formal equality, is importantly *universal*. All of us – not just some of us – are sufficiently self-aware and self-interested to more or less consistently profit from the choices we make, so we all have much to gain by having more rather than fewer choices available to us, in virtually all spheres of life. We all benefit from choice, bargains, and, derivatively, free markets, because of our *humanity*, not because of our gender, race or class. We all share this propensity to bargain, and to gain from our free bargains in the process.

Beyond that one attribute, however, still according to the economic conception, we share little or nothing else, either with the species or with any subgroup, that should be of any relevance whatsoever to law: beyond our propensity to improve our welfare through bargaining, in other words, we are, each of us, essentially and universally, *individuals*. That is the sense in which our universal nature is ‘thin.’ There are no other common traits, either shared by many of us, or all of us. What we share universally, then, is an essential nature that is essentially individualistic and idiosyncratic.⁷⁹ What follows politically is a strong anti-paternalist presumption: we each individually, rather than all of us collectively, can and should determine what we want and what is good for us *as individuals*: how much healthcare, as opposed to entertainment; how much work, as opposed to leisure; how much mustard as opposed to ketchup on our hotdogs; how many children, if any; whether to marry or not, whether to join civic or religious associations, and so forth. Given our universal idiosyncratic individualism, these decisions should be made by individuals, rather than collectives: the answer is sensibly different for each. There is no blanket prescription for ‘the good life,’ and there is no blanket generality that can be made, regarding what we should each strive for in life, beyond the minimalist, but nevertheless universal claim that we all benefit from choices and bargains, benefit from having those choices respected and bargains enforced, and benefit from being otherwise left alone to non-paternalistically determine what we each want and what we’re willing to give up in order to get it. The importance of *law*, for such bargaining, idiosyncratic individuals, is decidedly not that law is a vehicle for collective, political deliberation on the nature of the good life. Rather, the importance of law, for such idiosyncratic, bargaining individuals, is that law maximizes the liberty of individuals to make choices. If individuals know that their bargains will be enforced and their safety ensured against private violence, they will have a vastly larger array of options among which to choose.⁸⁰

‘Formal equality,’ in turn, is a central moral value to law, perhaps *the* central value of law, on this account, because formal equality is aimed toward precisely the same

end as law itself: to maximize individual freedom.⁸¹ It does so, in turn, by increasing the law's 'predictability,' and hence the rational ability of individuals to plan their future, and their present choices, accordingly. Individuals have greater freedom when they know when and whether their conduct will run afoul of legal prescription. They can only know that – when, and how, their conduct will run afoul of legal prescription – if courts reliably decide like cases in a like manner, and if legislation reliably groups people together for particular legal treatment in a way that tracks known and clear differences between them. This is true, furthermore, regardless of the content of the substantive regime: a repressive, overly paternalistic, anti-market regime will be made even more repressive if its substantive rules are applied by courts in an uneven or erratic or irrational way, and a liberal regime that generally respects freedom will be made less liberal if its rules are applied irrationally as well. The uncertainty alone that comes from irrational judicial enforcement of law, on this view, is an impediment to freedom: it creates incalculable risks that impede, in a direct and serious way, the private planning and cooperative enterprises that expand opportunities. Deciding cases that are in fact alike in a like manner, and grouping people alike in legislation that are in fact alike, increases certainty, and therefore increases individual liberty.

In a liberal, market-oriented legal system, however, the substantive *content* of law echoes and underscores the methodological goal of formal equality: rules of the common law, in particular, with as broad a brush as possible, should maximize the ability of individuals to make choices and to co-ordinate their enterprises with others so as to maximize the benefit they receive from them. Law is about increasing individual liberty by minimizing the threat to it posed by violence and uncertainty – but the law itself can be a source of that violence and uncertainty, unless it is reined in by the constraint of formal equality. Ideally, then, the substance of the common law gives free rein, through the rules of criminal law, contract and property, to individuals to guide their own lives. Constitutional law, in turn, promotes the same goal by restraining the state's paternalistic and unjustified urgings to interfere with that liberty: because we all benefit from private choice, but have no other common traits or needs, a sizeable presumption bars the state's interference into the private sphere so as to promote 'public goods.' The mandate of formal equality – to treat likes alike – underscores and promotes these same libertarian, anti-paternalist, and minimalist state goals.⁸² Individual liberty is maximized by both the anti-paternalist and individualistic content, and the formal method, of law. Formalism, as an adjudicative method, is a natural partner, then, whether or not an inevitable one, to a libertarian and minimalist account of state authority.

Now let me return to the critics' charges. How, to start with the modern critical legal theorists, is it possible to decide that *x* is truly like *y*, given the malleability of categories and the social power, rather than essence, reflected in those demarcations? How do we know whether the surrogacy contract is more 'like' a commercial contract, or an illegal gambling contract, or a tort, or 'something which, from a long way off, looks like flies,' to revert to the Chinese Encyclopedia? The economic response is in no way illogical, or incoherent: for the contemporary utilitarian economist, there is no need to insist that the surrogacy contract simply *is* any of these things. There is no reason to insist on the 'transcendent law-box in the sky,' to mix

realist and critical metaphors, that in some imaginary way pregroups surrogacy and commercial contracts together.⁸³ Indeed, there is no reason to deny, or doubt, the central critical insight shared by legal realists, critical theorists and identity theorists all: that categories, including legal categories, by necessity, are made rather than discovered, and legal categories in particular are made, rather than discovered by judges. Rather, according to the economist, legal categories *should be* consciously crafted, rather than unthinkingly applied, and they should be consciously and instrumentally drawn by courts in just such a way that will strengthen the underlying point of law: the maximization of individual liberty. By doing so, the fully reasonable and predictable expectation of individuals in a free society – that law will promote liberty – is met, thus insuring both methodologically as well as substantively that individual liberty is maximized.⁸⁴

This economic conception of our nature, of law, and of formal equality thus has a full answer to the critical scholars' complaint that law alone cannot possibly have within it the tools to resolve particular legal questions. The answer, for example, to the question, is this surrogacy contract more like a commercial contract, or is it more like an illegal contract, or is it more like those things which from a long way off look like flies, when it is clear enough that from varying perspectives it could fairly be described in any of these ways, is provided by the economist's understanding of law's overriding purpose: the contract *should be* understood in such a way as to maximize individual liberty, and it is ordinary commercial contract principles that do that.⁸⁵ The surrogacy contract should therefore be understood as a commercial contract like any other, and should be adjudicated accordingly. The mandate to decide likes alike is thus met, and met in a way that is dictated by the overriding purpose of both formal equality and law both.

It follows, then, that the critical scholars' complaint – that judgments of likeness can only be made on the basis of values, predispositions, or prejudices, and hence the distinction between law and politics cannot be maintained – is answered, even while the premise of that argument – that the categories with which law deals are entirely a function of the social power embedded in them – is fully granted. The decision, say, in the surrogacy case, is not made less 'legal' by virtue of the conceded malleability of the categories employed to decide the question: questions of inclusion and exclusion are resolved by reference to a value, but it is a value that is at the heart of the purpose of law's method and substance both. The categories are fashioned in a way drawn from law's ideals, not from arbitrary judicial whimsy. The uniqueness and integrity of legal decision-making is retained. The moral idea of law itself, in other words, has within it the values essential to the resolution of cases made close by the social construction of linguistic categories.

The economic account of formal equality also has a response to the Holmesian, realist complaint that judges ought to decide cases in a way that is conducive to social utility, rather than in a way that blindly follows rules laid down by generations past. Deciding 'like cases alike' does not necessarily dissolve into pointless, and even infantile, submission to the authority of the past, as Holmes and his fellow realists had feared. Rather, deciding 'like cases alike' serves the end not of infantilism in judges, but rather, the liberty (and therefore, the welfare) of citizens. It requires that doubtful

cases be resolved in a manner that increases individual liberty by matching outcome with expectation, rather than by directly matching outcome with the result of a calculation of social utility. But this in turn has the effect of increasing both welfare and liberty, once the deep connection between the two is understood. Maximizing individual liberty in this way is not only the 'point' of the mandate to resolve 'like cases alike,' but it is also the point of the law that empowers judges to do so. Judicial decision making under such a mandate, then, *is* purposive, result-oriented, and aimed at social utility, in the way Holmes and his fellow realists wished it to be, but it is also libertarian and individualistic in the way they would have wished, had they better understood the basic point of law, and the basic nature of the human beast that law at its best regulates. The purpose judges can further, by a willed submission of their own discretion to the mandate of formal equality, is the distinctively legal purpose of maximizing individual wellbeing by increasing the certainty against which individuals both deal with others and map their future lives.

Likewise, the economic account has a response to identity theorists' critique of formal equality in the constitutional sphere. The economic conception of formal equality, and particularly the universal and thin conception of our nature on which it rests, has the effect in the constitutional arena, if taken seriously, of casting constitutional doubt on all sorts of legislative schemes that purport to rest on either perceived, socially constructed, or 'natural' differences between subgroups, unless those differentiations somehow serve the end of maximizing individual liberty. Pernicious Jim Crow laws that separate us on the basis of purported racial distinctions, for example, are clearly irrational – they group and separate individuals on the basis of characteristics that are inessential. Laws that separate us on the basis of gender or sexual orientation do likewise. Gender, racial, or sexual demarcations in the law are all, then, suspect, if one takes seriously the claim that the only universally shared trait individuals enjoy is a propensity to benefit from individualistic choices. By the same logic, though, laws that promote economic equality through various progressive interventions into the market are likewise irrational – they group and separate individuals on the basis of characteristics – such as purported need – which are also inessential. Again, the only trait we share, is the capacity of the individual to profit from individual choice. Beyond that, there are no shared traits, either shared by all of us or some of us. To whatever degree this understanding of what and who we are is seriously entertained, the reach of the constitutional prohibition against irrational categorization will appear to be wide indeed.

Now, the premise on which the critical identity theorists' complaint about constitutional formal equality proceeds is that formal equality, so understood, is often at odds with substantive equality: the constitutional mandate to 'treat likes alike', coupled with the assumption that previously excluded groups such as African Americans and women are more like than unlike their white and male counterparts, has the effect of rendering constitutionally suspect legislative attempts to assist relatively disempowered groups, through targeted affirmative action, as well as a host of other possible legislative remedies. But if we grant the economist's premise, this is not a flaw but a virtue: the law is not and should not be neutral between these competing ends. Rather, the point of law is to maximize individual freedom, not to

equalize the relative wellbeing or power enjoyed by particular groups. The point of *politics* may well be to equalize or in some other way change the relative wellbeing or power of particular groups, but it must do so within the constraints established by law – meaning, if not the common law, then those parts of constitutional law that put those ends beyond political challenge. Constitutional equal protection law is precisely the source of the law that puts ends beyond political challenge. Equal protection cases, then, should be resolved in such a way that maximizes individual liberty.

By doing so, not at all coincidentally, the court can at the same time underscore the conception of the citizen on which the economic interpretation of formal equality rests. The individual, on this view, participates in a universal nature, but that universality is essentially empty but for one feature – again, there are no shared traits, beyond the shared ability to profit from idiosyncratic individual decision-making. There is, accordingly, neither need nor justification for law that subdivides us, on the dubious assumption that some but not all of us share traits requiring or justifying legalistic intervention into private choice. What we all share, and share equally, is our *lack* of common traits: we have in common a desire to promote our individually held conceptions of the good, and nothing else. Laws that aggregate us according to need, then, are the result of political horse-trading, and properly subjected to constitutional constraint. They violate a legal, as well as moral intuition that we are ‘alike’ in ways that defy such common, but non-universal traits, and they can therefore be properly constrained by legal and constitutional principles.

Traditionalism

Now let me turn to the very different answer provided to the fundamental question asked above – why treat likes alike – provided by traditionalists. Why is it morally imperative for courts to treat likes alike? Why decide cases according to Rule? In his influential article ‘Precedent and Tradition’, Dean Kronman presents a strikingly conservative, Burkean response to the question, noteworthy in large part for its explicit disavowal of all utilitarian *or* deontological (referred to in Kronman’s piece collectively as ‘philosophical’) justifications for the practice. Formal equality, Kronman argues, serves not only the end of individual fairness, but also, and more fundamentally, the preservation of culture, or what might be called our ‘social architecture’: the rules, traditions, and relations that structure social life.⁸⁶ ‘Treating likes alike,’ and more generally, the judge’s obligation to follow and respect ‘precedent,’ imposes upon courts the obligation to discover and reaffirm both the categories that jointly constitute our social terms of intercourse, and the values, institutions, traditions, and social meanings on which those categories rest. By treating all merchants alike, for example, we redefine and thereby recommit to commerce and the traditions that constitute it; by treating all fathers alike, we redefine and thereby recommit to fatherhood; by treating all thefts alike we recommit to the wrongness of theft, and so on. These categories, or groupings, constitute our social life; without them, there would *be* no social life. The way that we maintain them is by continually replenishing their supply: *this* man is a father, and *this* man is a father, and *this* man is a father. By so designating each, we assure that each receives

formal fairness, but we also serve the larger, institutional role of preserving the 'institution' of fatherhood. It is the peculiar, and specific, province of the courts, through formalistic legal reasoning, to preserve and maintain that architecture.

Like the economic interpretation, this traditional understanding also rests on a view of human nature, a view of the point of law, and a view of the centrality of formal equality to law, that not only accounts for the possibility and desirability of formalistic reasoning, but also provides for substantive rules of decision in cases in which outcomes would otherwise be unclear. But the account is quite different, and at times fundamentally opposed to the economic. The traditionalist, Kronmanesque, or Burkean conception of human nature contrasts with the economic along both of the dimensions identified above: it is both non-universalist, rather than universalist, and it is robust, rather than 'thin.' To take those in order: while economists insist on our universally shared propensity to bargain, and our universally shared individualism, for traditionalists, there are virtually no universally shared attributes. We have no particular set of traits, solely by virtue of being 'human.' Thus, the non-universalism. At the same time, however, the traditional accounting of our nature is 'thick' rather than 'thin': we may not have any universal traits by virtue of our universal *human* nature, but we do have shared traits, and many of them, by virtue of our traditions, and our traditionally bequeathed identities. Each subgroup, in fact, traditionally defined, is *thick* with attributes. Thus, we are who we are not by virtue of a shared human nature (whatever might be its content) but rather, by virtue of the 'social architecture' that has produced us. Our identity is constituted by the roles we play in that social structure: as parent, child, sibling or spouse, but also as merchant, employer, investor, consumer, producer, church member, unionist, neighbor. Kronman puts it this way:

We must respect the past not because doing so increases the welfare of human beings or because their right to equality demands it. We must respect the past because the world of culture that we inherit from it makes us who we are. The past is not something that we, as already constituted human beings, choose for one reason or another to respect; rather, it is such respect that establishes our humanity in the first place. We must, if we are to be human beings at all, adopt toward the past the custodial attitude Burke recommends. That attitude is itself constitutive of our membership in the uniquely human world of culture; it is what makes us cultural beings, as opposed to animals or thinkers . . . [I]f one affirms our human condition instead of viewing it as a limit to be overcome, then one must affirm the attitude of trusteeship on which the cultural world depends – not for the indirect reasons that utilitarians and deontologists do, but because it is constitutive of that world and hence of our identity as human beings.⁸⁷

The human being, on this view, is understood as constituted *not* as an autonomous, choosing individual, with nothing in common with others other than his own idiosyncrasy, but rather, as an amalgam of his social and cultural identities: the human being is who he is – and, incidentally, is human – precisely because he is a merchant, or child, or servant, or father, or spouse, or student. Without these culturally, traditionally created identities, there would be no 'human being' beyond the animalistic. Not only is the individual *not* a function of his choices, then, but further, the human being is who he is precisely by virtue of the force of those roles

which are most *un*-chosen: family role, for example, or physical strength, or innate potentiality, or inherited wealth, or culturally conferred social status. It is these traditions, on this (Burkean) view, and not our individual capacity for choice, that make social and civilized life both social and civilized – as well as desirable and possible. The point of law, from this perspective, is essentially preservative and social, rather than libertarian and individual: it preserves the traditions that are essential to the community's identity as well as the individual's wellbeing. Formal equality is central to law, finally, because it is by virtue of this formalistic reasoning that the social categories so valued are continually given content – continually rebirthed, so to speak.

No less than the economic, this traditionalist understanding of the mandate of formal equality provides the basis for a response to realist, critical, and identity theorists' critiques of that mandate's logic. Concededly, for the traditionalist, the judge who decides that one case is like another does so only by invoking a theoretically contestable value – the value of holding firm to tradition and whatever value is embedded in the tradition itself. By doing so, however, the judge invokes a value – 'traditionalism' – that is itself at the core of law's purpose: law *exists* so as to preserve these ties to the past, and therefore decisions that invoke such a value remain firmly within the realm of the 'legal.' It does not follow, in other words, from the invocation of a value, and even a contested one, that the decision that depends upon it is necessarily 'political' rather than 'legal': there are values peculiar to law, and when decisions track those values, they do not for that reason depart from the realm of law. 'Tradition' is one such value; in fact, it is the core value. The coherence and completeness of legal decision-making can indeed only be maintained by employing values, but it does not follow that the judge has become a political rather than legal decision-maker. If the value invoked is one that is constitutive of law itself, then the decision that rests on it is a squarely legal one, made more so, not less so, by its dependence upon the ideals of law and equality both.

This understanding of the point of formal equality – and of the point of law – will in many core cases lead to results no different from the economic. Both individual liberty, and preservation of social architecture, are served by treating things that are obviously alike, alike: doing so *both* preserves the social categories in question and confirms, at the individual level, the utility of relying on commonsense understandings of law, thereby maximizing the ability of individuals to contract, plan for the future, and live in the present, secure in that understanding. There will, though, be differences, and sometimes they will be quite striking. As seen above, the economic understanding of formal equality rests on a view of law, and the point of law, that will resolve close questions in the direction of private ordering, and hence private contract: we can decide what is like what, by reference to the ideal that generates law in the first place, and that is the ideal of maximal individual liberty. The traditionalist understanding of formal equality, by contrast, rests on a view of law, and the point of law, that will resolve close questions in the direction of preserving non-contractual as well as contractual traditional social arrangements. We can resolve close questions not in the direction of private ordering, but rather, toward the end of preserving traditional ways of life – that being the point of the enterprise. The natural,

desirable conservatism of law, on this understanding, provides a rule of decision. Doubt is resolved in the favor of that form of life most sanctioned by tradition, legal and otherwise.⁸⁸

The traditionalist understanding of formal equality, then, might well point toward different resolutions of both the contracts and constitutional cases posed above. Surrogacy contracts may indeed increase individual wealth and freedom, but they do not necessarily, in turn, thereby well serve the community. By undermining the coherence of traditional categories, such as ‘mother,’ ‘father,’ ‘family,’ and ‘parent,’ in favor of contractually chosen, bargained for, and paid-for reproductive roles, surrogacy contracts starkly upset rather than promote the traditional ways of life those categories facilitate and constitute, and accordingly undermine, rather than promote, community cohesion. A court so concerned, then, certainly can and may well analogize these contracts to various sorts of illegal contracts (most plausibly, to illegal contracts for the sale of babies), thus voiding them entirely. Formal equality, on this view, is served by *voiding* the contract, not upholding it: by so doing, the court preserves the integrity of the category ‘mother’ and ‘father,’ as well as the category ‘contract’ and ‘contracts void for violating public policy,’ and does so by treating likes, alike: a surrogacy contract is most like other forms of illegal contracts that undermine traditional family structures, and is treated accordingly. Likewise, in *McGee*: a traditionalist rather than libertarian court 100 years ago might well have reasoned that the community’s wellbeing is in part tied to the integrity of the relations between health professionals and their patients, and that those relations, and traditions, are threatened, rather than promoted, by injecting into them the commercialism and self-interested behavior common to purely commercial or mercantile contracts. Such a court, in a case like *Hawkins v. McGee*, could have decided that formal equality would best be served by analogizing the injury in that case to a tort or status based injury, rather than a breach of contract, and resolve the case accordingly. Formal equality would thereby be served by preserving rather than threatening those relationships, and doing so through the mechanism of treating like cases alike: the broken promise between the father and the doctor being most like an injury sustained in a professional relationship, and most unlike a broken promise in a manufacturing contract. Formal equality – treating likes alike – then serves the interest of individual fairness, but does so by honoring rather than threatening the relational and non-commercial values at the center of traditional life.

The constitutional meaning of ‘equal protection,’ even more clearly, takes on a substantially different meaning, if one takes a traditionalist rather than economic approach to the meaning of the formal equality that is its core mandate. Again, it is widely agreed that, under the dominant understanding of the Equal Protection Clause, the point of the clause is to ensure equal protection of the law, by casting constitutional doubt on those substantive laws that threaten it through irrational categorization. A category is irrational, furthermore, according to settled constitutional principles, if it does not track a ‘real difference’ between the groups being differently treated. The *prima facie* validity of those categories inescapably depends, then, on the understanding of ‘real differences’ between groups and individuals – and hence, on the stability and desirability of the social, cultural,

traditional and possibly natural distinctions between people that in turn structure shared life. The traditionalist and economic accounts rest, at bottom, on radically divergent valuations of those traditional, cultural, and natural distinctions, and the groupings those distinctions define. For a traditionalist, doubtful questions under an equal protection analysis will predictably favor the preservation of traditional understandings of social life, rather than the maximization of individual choice.

To put it the other way around, a traditionalist understanding of equal protection, and the formal equality that is its mandate, implies a narrower reach of the equal protection doctrine, as a handful of opinions by the Court's greatest defender of this traditionalist approach to formal equality – Justice Antonin Scalia – makes clear. A legislative distinction between two groups is far less likely to offend an injunction that like cases be treated alike, if one's view of the human being is such that our very nature is derived from traditions handed down from the past, and for two reasons. First, from a traditionalist perspective, there is no universal, shared, albeit minimalist, account of our nature that a positive law could directly offend, as there is on economic understandings. Thus, there is no universal 'bargainer' who stands to lose by legislation limiting the economic freedom of some for the sake of other traditional values. But second, there are few (if any) legislative categorizations that cannot find some mirror reflection in a tradition – legislators, after all, come from their community, and the traditions that constitute them, they do not come from outside it.⁸⁹ Legislation is far more likely to run counter to a conception of 'human nature' if one's conception of human nature is explicitly conceived and defended as *untethered* to tradition – and maybe even opposed to it. Legislative distinctions are far less likely to run counter to a nature that is viewed as the product of tradition. Laws, for example, that criminalize homosexual sodomy, whether or not they offend a 'natural' propensity for open choice of intimate sexual partners, clearly do not offend a nature constructed by tradition: prohibitions against sodomy are if anything more sanctioned by tradition than positive law.⁹⁰ Laws that prohibit women from participating in the draft, likewise, may offend some universal individualism that celebrates idiosyncratic choice and denies the existence of traits defined by gender. They hardly, though, offend an account of human nature defined by tradition: restrictions on the combat capacity of women, while not universal or timeless, are hardly unknown to western culture.⁹¹ Laws that separate the races, to state the extreme case, are likewise quite clearly sanctioned by 'tradition.'⁹² And so on.

Most generally, under an economic conception of formal equality, both in the constitutional and common law context, courts ought resolve cases in line with maximizing choice, because by so doing, courts thereby further human welfare – people just are such that we benefit from freely chosen bargains. Whatever impedes those bargains – including legislation passed on the basis of perceived 'shared traits' of either all or some of us – by the same token impedes or limits welfare. Under a traditionalist conception of formal equality, by contrast, courts ought resolve cases in line with preserving tradition, because by so doing, courts thereby further human wellbeing – people just are such that they are constituted, as well as justifiably constrained and confined, by their socially and culturally determined roles.

Traditionalist and libertarian conceptions of formal equality rest on fundamentally different understandings of our nature. But they both, quite clearly, rest on some account of our nature, and for both, it is those accounts of human nature that dictates the direction that constitutional or common law analysis will ultimately take.

Traditionalism and Economic Utilitarianism: Comparison and Critique

In spite of their clear differences, there is considerable shared ground between the economic and traditionalist conception of formal equality. First, both the traditionalist and economic interpretations of formal equality aim to provide a rule of decision that will enable judges to resolve questionable cases by reference to moral ideals themselves identified with the idea of law. Both, for that reason, when viewed on their own terms, avoid the sting of the critical complaint that by virtue of their dependence upon contested values, legal reasoning is necessarily ‘political’ in nature. And, both affirm and account for, rather than discount, the force of the felt moral intuition at the heart of the ideal of formal equality – that likes must be decided alike – albeit in different ways: economists, by identifying individual freedom and wellbeing as at the heart of that moral intuition, and traditionalists by identifying cultural tradition itself, and its preservation, as central to the same mandate. And, both identify the value at the heart of formal equality with the moral value of law itself: for the economic utilitarian, law exists so as to maximize individual liberty, and formal equality serves precisely that end. Law, for the traditionalist, exists so as to preserve tradition, and formal equality serves that end. By so doing, both preserve the ‘lawfulness’ of judicial decision-making in the face of decisions that are demonstrably somewhat less than fully determined.

Second, both the economic and traditionalist interpretation of formal equality rest on an articulated description of human nature. That reliance distinguishes both from the shared philosophical underpinnings of the various critiques made against them: contemporary critical theory of all sorts, legal and non-legal, has for at least 50 years now eschewed such reasoning, and disparaged its fundamental sense. It is now a virtual article of faith in the critical traditions that dominate critical legal studies and identity theory both, that the very idea of ‘human nature’ is both incoherent and morally bankrupt: there is no shared human essence, according to critical and identity theorists, and any normative view, moral or legal, that purports to rest on one is disingenuous or confused. There are, rather, only manifestations, in our stock of ‘knowledge’ regarding our nature, of the various pockets of accumulated power of various social sectors,⁹³ and little for social critics, or legal critics, to do, but uncover those constellations of power and conceivably vie for a redistribution. There is as little point in criticizing either economic or traditionalist understandings of human nature as ‘false’ as there is in propounding such a theory: to suggest that either account is ‘false’ falsely implies that there is some potentially superior, if not ‘true’ position, against which the pretender is found wanting. The critical response to the underlying conception of human nature on which libertarian or traditionalist understandings of formal equality depend, then, is for the most part to assert those theories’ incoherence, but rarely to assert their falsity. This refusal to engage the

question of our nature leaves debate between traditionalists and economists, on the one hand, and critics on the other, only incompletely joined.

This is an unfortunate state of affairs for many reasons, but in contemporary jurisprudence, there is a particular cost to be paid: both of the dominant understandings of formal equality rest on accounts of our nature that are baldly – in some cases unabashedly – false, and it is their falsity, more than their incoherence, that undermines judicial decisions that rest on them. It may be, as economists insist, that we just *are* such that we each are inclined, at least much of the time, to bargain toward the end of maximizing our own wellbeing. But, it seems equally self-evident that all of us share further traits as well – beyond a propensity to bargain – and that some of us, furthermore, as a group, share non-universal traits that others lack. We are not just idiosyncratic individuals, and universal bargainers. We are also members of a species that itself has a nature that goes beyond such a propensity, and members of groups that have shared attributes not shared by all, as well. We each share with all humans, for example, mortality, sensitivity to pain, vulnerability to disease, and awareness of all of those potentialities. More important, perhaps, for purposes of legal and social organization, we share a lengthy period of infantile dependency, a primal desire to form powerful human attachments to meet the needs created by that dependency, as well as vulnerabilities that result from those attachments and from the longing for them.⁹⁴ Arguably, we also share a complex psychology that craves not just maximal individual welfare, but also in some ways its opposite, and perhaps in strong measure: an instinctual attraction to certainty and security, which Freud identified as ‘thanatos,’ or the death instinct, and that, when acted on, results in social arrangements that count powerfully against our own welfare.⁹⁵ As a growing number of behavioral economists and sociologists are now arguing, but as Adam Smith insisted some time ago, we seemingly share at least the potential to develop some measure of empathy for the pain of others, and a sympathetic concern for the wellbeing of even distant strangers.⁹⁶ Very likely, we share a far more powerful empathic regard for both the wellbeing and pains of those who are close to us, genetically and geographically, as well as an ability to distance ourselves morally from those who are distant in space and time.⁹⁷ We might share, as Hobbes thought, a propensity to glory and vanity, to say nothing of a willingness to inflict pain on others.⁹⁸ We might also share, as some modern cognitive and behavioral scientists are now arguing but as twentieth-century modernist novelists and others have long observed, an obtuseness rather than clear rational foresight regarding our own wellbeing,⁹⁹ an ability to relish in rather than recoil from the suffering of those same others,¹⁰⁰ an impulse to dominate as well as to cooperate, and at times, an impulse to acquiesce rather than assert, to submit to the rule of others rather than bear responsibility for our own wellbeing.¹⁰¹ We do not all of us, all of the time, exhibit all of these non-egoistic and non-self regarding irrational capacities. But we share enough of them, enough of the time, to lay bare the falsity of the minimalist account of our rational and self-regarding nature on which economic understandings of legality, and of formal equality, so squarely depend.

Likewise, while a traditionalist account of our nature undeniably at times operates as a desirable antidote, or counterpoint, to the extreme individualistic account of our

nature that is at the heart of the economic account, it too rests on a view of human nature that seems overdrawn at best. There is, *of course*, a grain of truth in traditionalism, and when contrasted with economic utilitarianism, it looks like a substantial grain indeed: I am a mother, wife, neighbor, daughter, sister, student, teacher, citizen and voter as well as a bargaining chooser, and sometimes these roles overshadow entirely my perception of myself or my behavior as an agent of free choice, or a rational maximizer of my own wellbeing. My mothering, to take just the most obvious example, takes some toll on my capacity and desire to willfully bargain myself to a point of maximal advantage in my social and economic milieu. But conformity to these roles no more defines a human essence or my human essence than does a propensity to bargain, and for at least two reasons. The first is that noted obsessively by critical theorists, and insisted upon most eloquently by Roberto Unger: we do have an ability to break free from tradition and role that seems no less essential than the capacity to conform insisted upon by Kronman and Burke.¹⁰² But, contra both traditionalists and their critics, we are not just individual choosers, and nor are we just the beneficiaries of inherited social roles. We also have traits that are a function of *neither* individual choice nor societal tradition. Some of those traits, we share with higher animals and owe little or nothing to either tradition or choice: our animalistic appetites, vulnerabilities, cravings, ambitions, pleasures and pains. Like them, we are physically needy – we need shelter, food, warmth, and others of our species for survival, development, maturation, and moral and emotional wellbeing. We also have and share species-specific traits, however, that we possess not by virtue of culture, tradition, animality, or individual choice: a propensity for intra-species competition and warfare, a heightened capacity for rational and abstract thought, a generalizable sympathy for sentient creatures, and a capacity for cruelty. A conception of our nature, and of the meaning of law and formal equality both, that disregards these traits in favor of only those which are traditionally bestowed, will be no less incomplete a conception of our nature, of law, and of formal equality, than that provided by economic utilitarianism.

These false, because limited, economic and traditionalist accounts of our nature are often at the heart of judicial decisions that seem perfectly *sound*, as a matter of pragmatic logic, but nevertheless unwise. Look again at *Hawkins v. McGee* or *Stern v. Whitehead*. In *Hawkins*, the Court decided the ‘contracts’ case in front of it in favor of decisional, individual autonomy: a breached promise to mend a hand, the Court held, was ‘most like’ a promise to deliver a machine part, which then arrives in the mail in broken condition. There is nothing illogical or incomplete about this outcome, if we grant the sensible premise that even formal judicial reasoning can never have the deductive formality of formal logic or geometry: the decision obviously requires, as a further necessary premise, that people are for all purposes, or at least for purposes of their relations with health professionals, natural bargainers looking for a good product at a good price, and that the way to enhance this natural capacity, and therefore this potentiality for wellbeing, is by protecting the integrity of the bargain and the expectancy of the bargainer against breach. And, at least for economic utilitarians, that added premise in no way untethers the decision from law: rather, the premise is central to law. Nor is it a problem that the hidden unstated premise is a

'political' one, thereby casting in doubt the autonomy of law: the premise may well be political, but it does not cast in doubt the autonomy of law if that is the very political premise that animates, or motivates, the legal tradition itself. Rather, what seems most dubious about the decision is precisely what makes so many first year students so uncomfortable about the case, to wit, the analogy at the heart of the court's reasoning: the hand to a machine part, the father and son's relation to the doctor as no different, in essence, from the relation of a manufacturer and consumer, or distributor and manufacturer. The relation between a health professional and patient may not be 'like' a commercial contract at all, any more than it is like those things which from a distance look like flies, if it is the case that our relational lives cannot be and should not be modeled on the paradigm of commerce. A patient may be seeking not a 'good deal' from an arm's length doctor, but reassurance; he may be not 'looking out for his own interest,' but rather, looking to place that interest in the hands of another; he may be looking for a relation that constitutes an alternative to commerce, and rational, self-protecting, self-seeking behavior, rather than an instance of it. If so, then the relation of health professional to patient may be much more like the primal relation of parent to child than merchant to consumer, and it may be so, *not* because tradition dictates that it shall be, but because we retain in our adult nature a propensity to seek out, benefit from, and take pleasure from just those sorts of benign, protective and intensely hierarchic relations. If so, then *Hawkins v. McGee* (to say nothing of HMOs (Health Maintenance Organizations) and 'informed consent' doctrines) will continue to strike some law students and many others as an oddity, regardless of how firmly they are pushed to see the rationality of the decision: it is inhuman, and it is inhuman not just because it callously analogizes a hand to a machine, but also, and more tellingly, because it relies on a conception of our nature that oversells our rationality and that is willfully blind to our capacity for benefiting from pointedly non-contractual – and non-profit maximizing – transactions.

Likewise, what is wrong with Professor Richard Epstein's analysis, referred to above,¹⁰³ of *Whitehead v. Stern*? Again, there is nothing illogical, truncated, or even incomplete in an argument that resolves the question presented by *Whitehead* by analogizing the surrogacy contract to all other contracts, and the surrogate mother's post-birth regret to the regret of any contractor when costs turn out to be higher than anticipated. What is wrong with the analysis is its implicit claim that the regret of a mother who has brought a baby to term and given birth, when faced with her own prior promise to relinquish her child, is 'like' the regret of a commercial retailer or service provider suddenly faced with suddenly higher costs. Again, it is not only the implicit comparison of a womb with a service, or the collapse of maternal emotions with a balance sheet. It is also the collapse of different sorts of regret, and different sorts of folly upon entering contracts. The 'rationality' of these decisions is just not comparable, nor is the relative capacity of the contracting party to predict the costs, to him or herself, of later regret, should the unforeseeable come to pass. We are just not as rational as all that, when it comes to decisions respecting our bodies, selves, and future bonds with our children. The assumption that we are looks inhuman, and wrong, rather than either hard-headedly realistic or particularly enlightened.

The constitutional mandate of formal equality also begins to look cramped or foolhardy, or worse, when it is tethered to excessively economic or traditionalist accounts of human nature, and traditionalist or economic accounts of the moral point of law. Indeed, many of our most notoriously unjust decisions are cases which are hamstrung in just this way. The *Lochner* Court's equation of labor contracts with commercial contracts, and their implicit equation of employment bargains with sales of widgets, was not noticeably illogical, nor was there anything particularly 'incoherent' in their insistence that majoritarian decision-making ought to be constrained by the formal mandate to treat likes alike, and by (their reading of) the Constitution's substantive provisions for protecting property and capital against democratic redistribution. It may also promote a sort of individual, decisional liberty, to regard labor and commercial contracts as on the same footing, and protect both against either paternalistic or redistributionist 'motives,' as the *Lochner* Court itself put it, of meddling legislatures.¹⁰⁴ If these cases look unjust to us now, it is not because they pretend to a false neutrality, or mask irrationality, or rest on incoherent premises. They do not pretend to neutrality, and there is nothing irrational in their reasoning. Nor, however, is the problem that they fail to attend to 'tradition:' although an unfettered market in labor may have upset more traditional ways of thinking about the social organization of work, there was no 'tradition' established by the time of those decisions favoring legislative intrusions into labor markets. Rather, the *Lochner* era cases seem unjust because they rested on a false view of the 'likeness' of labor and commodities sold in commerce. That falsity, in turn, was tied to the falsely simplistic and excessively economic view of human nature that underlaid it: it conflated a complex, vulnerable, mortal, flesh-and-blood, life narrative with a mechanistic conception of human life as nothing but the cumulation of willed, chosen, bargains. The problem with *Lochner*, and *Lochnerism*, is that that conflation seems untrue to our experience.

Similarly, the excessively traditionalist cast of much of the modern Court's equality jurisprudence, although a departure from the excessive utilitarianism that marred the earlier *Lochner* Court's Fourteenth Amendment analyses, renders those cases unjust, but again, not because they are particularly illogical or even disingenuous, as the anti-formalist critics complain. The Rehnquist Court's refusal in *Bowers v. Hardwick*¹⁰⁵ to strike anti-sodomy laws as unconstitutional, in part on the traditionalist grounds that such laws promote moral distinctions between good and bad sex that date from antiquity,¹⁰⁶ can hardly be faulted for pretending to be 'neutral,' or for lacking in logic: again there is nothing illogical in its major premise, that formal equality is guaranteed through maintaining, rather than challenging, the social structures, including the moral structures, we have inherited. There was no violation of either liberty or equality occasioned by anti-sodomy laws, the Court reasoned, for the logically unassailable reason that anti-sodomy laws have a long lineage, and are a part of the social architecture protected by law and liberty both. That decision seems unjust, if it does, not because this reasoning is incoherent, or because it latches onto inappropriate 'levels of generality.' Rather, it seems unjust because the conception of our nature that underlies the tradition it rests on, as well as the formal equality that maintains it, seems untrue to our experience. The distinction between heterosexuality and homosexuality has ill-served our needs for intimacy,

close communion, mutual nurturance, and pleasure, as well as our needs to be free of oppressive and misogynistic and hateful forms of sexual expression. Again, the problem is not with the Court's logic. The case is unjust, if it is, because the conception of human nature on which it rests is a false one.

Conceivably, the Berger Court's resolve to maintain an all-male draft, combat force, and registration,¹⁰⁷ like the Rehnquist Court's dissenters' disquiet in the VMI case over the majority's insistence that women be enrolled in state supported military institutions,¹⁰⁸ might be faulted on economic-utilitarian (or, more simply, libertarian) grounds: the Court, on this reading, grants too much to 'human nature' and not enough to human volition, and as a consequence articulates an argument for formal equality that hampers individual choice and destiny. But that is clearly not the only – and not even the major – basis for concern over these cases. The draft cases and the Court that decided them might better be faulted not for ascribing too little ground to individual choice, and too much to nature, but rather, for holding steadfast to a dubious and unsubtle conception of human nature, the nature of military life, and the role of gender and gender difference within it. Women and men both should claim and be charged with military obligations, not because our nature is so minimal as to make it impossible to justify distinctions between us, but rather, because both women and men *are* such – whether they choose to be or not – as to owe these obligations to the nation that protects them: equally capable, equally obligated, equally responsible, and equally entitled. To treat women as unlike men, with respect to military service, is wrong, not because we are so utterly individualistic that the majority's or legislative groupings cannot be justified, but rather, because women and men share in the nature that makes service obligatory: a dependence upon the state and civil society for a decent and safe life, a willingness to contribute to civil defense, an individual life that can only be well lived in a society that demands and honors mutual, shared sacrifice and contribution. This nature is partly reflected by tradition, partly defied by it, and partly constitutive of it. But it is on the basis of that shared nature, or something like it, that the strongest argument against an exclusively male military draft, as well as exclusively male, state-supported military institutions, rests.

Toward a Humanistic Interpretation of Formal Equality

Let me return one more time to the original question: why formal equality? What does it mean to treat likes alike, and why does this value almost inevitably appear, and reappear, as so central to law? Again, to review: one answer is basically utilitarian, or economic. By 'treating likes alike,' and by insisting that legal actors in particular do so, we thereby increase individual wellbeing. A second answer is basically traditionalist: by doing so, we preserve the cultural and social traditions that constitute our shared communal architecture. There is, though, a third possible account of the ideal, which might best be called 'humanistic.' By 'treating likes alike,' through law, we recognize and reaffirm a universal and complex human nature, and the equal moral worth of all who fall within the legal regime. When we recognize someone as 'like us,' and therefore entitled to like treatment by law, we acknowledge that shared humanity, and acknowledge the inclusion of all in a circle constituted by

mutual recognition and sympathy. Failures to 'treat likes alike' that feel (often only well after the fact) like an injustice, are so, typically, because they have upheld the letter of the injunction only through a deliberate or unconscious act of dehumanization and exclusion. When we do this – when we fail to 'treat likes alike' – we not only limit individual liberty and destroy some social tradition, but we also, in effect, *excommunicate*: we declare some people to be not worthy, and thus not 'like us,' and therefore not 'of us.' And in doing so, we uphold with fetishistic precision the letter of the injunction to treat likes alike, while effectively destroying its humanistic core ideal.

Consider in this light the examples given above of notorious breaches of formal justice, both fictional and real. The moral revulsion at the failure of formal equality, in virtually all of these cases, is much better accounted for by reference to a humanistic understanding of that ideal, than either an economic or traditionalist one. Aunt Sally's casual insistence that no one was killed in a steamboat accident, immediately after being told by Huck that a man had lost his life, reflected such a thorough and deep dehumanization of an entire population, as to be part of the social architecture – the web of tradition – she had inherited. The death of a human being 'like' us will inspire in the observer a sympathetic response to that which we could imagine undergoing: the physical pain attendant to the tearing of flesh and bone, the fear precedent to the event, the emotional and practical toll on our survivors, the loss of future pleasure from life itself, the severance of connections to intimates and community. But – because the dead man was not human, he was not of the group of 'people' who do sometimes get killed – the sympathetic response Sally would otherwise have felt, had he only been human. Only through this brutal and violent act of dehumanization and excommunication, were her exclusionary sentiments aligned with the injunction of formal equality.

Likewise, Zanzinger's light sentence for the reckless killing of a hotel employee was a failing of formal equality, and one which shocks the conscience, but not because it constituted an infringement on liberty or the dismantling of a shared social tradition (in fact, it expanded liberty and preserved tradition). Rather, the judge's offense was of the same sort as Sally's: he failed to grant the humanity of the victim, while treating likes in such a severely unlike fashion. The less privileged killers of more privileged victims received considerably more jail time than this privileged killer of a woman whose humanity was only barely and reluctantly granted by very few within the dominant white community in which she worked. O.J. Simpson and Nicole Brown both, were, in the eyes of many, victims or beneficiaries of formal inequality – but again, not *at a cost* to liberty or to tradition. Rather, the failure to protect Nicole Brown from domestic violence, or the failure, highlighted by O.J. Simpson's octane-powered defense team, to accord indigent defendants minimally satisfactory legal representation, or the failure to grant O.J. Simpson himself the same degree of presumptive innocence and freedom from corrupt law enforcement granted the white community, all, in differing directions, dehumanizes and excommunicates. It dehumanizes victims of domestic violence to leave them to the mercies of unchecked and violent intimates; it dehumanizes the poor to leave them to the mercies of the criminal justice system unchecked by the vigilance of a competent

lawyer, and it dehumanizes the black community to leave it to the mercies of a racist and corrupt police force. Pursuant to the dehumanization, all of these 'outsiders' are excommunicated – cast out of the community of equals who must be treated alike if the core mandate of formal equality is to be honored.

No less than the libertarian or traditionalist account, this humanitarian interpretation of formal equality provides an account of the moral intuition that 'likes should be treated alike,' as well as an explanation for why that intuition is so central to our thinking about law. We ought to treat like individuals alike, like groups alike, and like cases alike, because by so doing, we both express and reaffirm the universality of our nature, and the inclusion in our community of equal regard for all who share it. The intuition is peculiarly central to *law*, in turn, because law is the social institution which compensates for the limits of our natural, sympathetic capacity to treat others with an equal regard: while we can (somewhat) extend equal treatment and regard to those with whom we sympathize, those to whom we are related, or those with whom we are intimate or at least familiar, it is much harder to extend such regard to those so distant as to beyond the reach of our sympathetic capacity. We create law, in part, so as to ensure that we will accord the minimum requirements of that regard to those who are more distant, but whom we wish to regard (or must regard) as civic equals. Law is the means by which we ensure that the limits of Aunt Sally's sympathetic regard do not define the limits of our civic community. Law exists, in part, because of Aunt Sally's recognizable and flawed humanity. The point of law, then, and the point of formal equality both, is to recognize the humanity of all, and their inclusion in a community constituted by mutual regard, and to extend the reach of that community well past the point by which we would be sympathetically and naturally inclined to do so: to extend it to the outermost reach of the law itself.

And, this understanding of the point of formal equality provides a way to decide cases such as *Hawkins v. McGee* or *Whitehead v. Stern*, in the private law area, or *VMI* or the draft cases in the public, which is just as coherent, but considerably more supple, than either the traditionalist or economic conceptions summarized above. In these cases as well as more ordinary cases, judges face decisions that logically can be decided in any number of ways, as the critics of formal equality have always claimed. An economic or traditionalist understanding of formal equality, as discussed above, provides a way to complete the formal argument: given an understanding that the 'point' of formal equality is to increase individual liberty, the court's analogical reasoning is directed toward the end of maximizing contractual, individual autonomy; given an understanding that the 'point' of formal equality is to preserve tradition, the court's analogical reasoning is directed toward the preservation of our social architecture. The supplementation of legal rules with either value, does not endanger the distinctiveness of law and legal reasoning, so long as the value is itself a recognizably core legal value. Likewise, if the 'point' of formal equality, at root, is to express and reaffirm our universality, then courts may decide cases by reference to this value without endangering the distinctive nature of legal reasoning – indeed, it reaffirms it.

Now let me highlight the differences. As with the economic and traditionalist accounts, a humanistic account rests on a particular account of human nature, and it is

that view of human nature which ultimately turns decisions, particularly in close cases. But the account differs from both: it shares the *universality* of libertarianism, but not its *thinness*, and it shares the breadth and particularity of traditionalism, but not its reliance on past tradition as the marker of value and human potential. Thus: we do have shared, universal traits, but they are not limited to a capacity for choice, our desire to individuate ourselves through the exercise of our individual will, and an ability to bargain and profit through unfettered markets. We share our mortality, vulnerability to sickness and pain, needs for nurturance, a lengthy period of infantile total dependency, and a capacity for sympathetic engagement with the wellbeing of others, to name a few. We share social as well as individual needs, a capacity for communal life as well as for self-assertion. Likewise, some of us possess traits unshared by others, but which go beyond those traits we have by dint of individual choice. Unlike traditionalism, however, those traits are not necessarily tied to the influence of social architecture, and those which are so tied, are not endowed with any moral value by virtue of that fact. An inherited tradition may ill serve us, and a humanistic interpretation of the formalistic heart of legal reasoning need not tilt in favor of preserving them.

In *Hawkins v. McGee*, then, the question for the Court, once and if it acknowledges that the case could, logically, be resolved by either tort or contract principles, is not only which of these routes would better serve the individualist values or traditionalist values at the heart of law, but also, which would best serve humanistic values. To answer that question, it would not be sufficient to look only at which decision maximizes efficiency or preserves our social architecture; the court would also have to consider which would best serve our human needs and aspirations. Although in both cases, an argument can obviously be made that those human needs and aspirations are best served by maximizing contractual efficiency, there is also much suggesting the opposite: not only the ‘statuses’ inherited from a pre-modern culture, but also deeper and widely shared human instincts, may be at the heart of our resistance to fully commodify medical services.

They may also, even more clearly, be at the heart of our continuing resistance to the full commodification of reproductive services, and at the heart of our continuing unease, even after their legal acceptance, to fully endorse them. The argument against commodification, in either sphere, but certainly in the latter, is not only that such commodification would be contrary to traditionally bestowed statuses – of professional, or patient, or mother, or child. Commodification of reproductive services might also ill serve us because it does not in fact promote our wellbeing to live in a regime that commercializes, severs, and fetishizes these human bonds, so as to subject them to the willed control of contracting individuals. In the surrogacy context, that full commodification demonstrably does not serve the interest or desires of the later regretful biological mother who by definition has not exhibited the degree of self-knowledge and prediction that makes the contractual model a plausible one for human affairs: unlike the contractor, after all, her miscalculation went not to the cost of an external circumstance, but to her own future emotional responses. But it may also not well serve the interests of the larger community. The urge to control our own futures through commodification and contractual decision-making is only one trait

we share, and we share it to varying degrees. We also share the capacity to strongly identify with those lives we have brought into being and then physically nurtured, no less than a capacity to mix our identities with the products of our labor in the natural, external world. A common law court committed to formal equality, and cognizant of precedent permitting the court to strike or limit contracts on grounds of 'public policy,' clearly has the discretion, and could certainly develop the capacity, to reason in an overtly humanistic way when resolving cases that demand a choice between these two lines of authority.

The Court's decisions in the military-gender cases, however, might present the strongest examples of both the polarity created by the contrast between the dominant economic and traditionalist understandings of formal equality, and the inadequacy of either as a full model of legal decision-making. The split between Ginsburg's majority opinion and Scalia's dissent in the *VMI* case is particularly stark.¹⁰⁹ Justice Ginsburg found the state's support of a single-sex military school to be an example of unconstitutional sex discrimination, based largely and quite explicitly on a libertarian account of sex discrimination itself: what we all share, Ginsburg argued, and importantly, *all* that we share, is the capacity to benefit from individual choice.¹¹⁰ We all share that, and nothing else. Generalizations, then, about 'women's nature' or 'men's nature' are just bound to be false; the only sustainable generality about human nature is the presumption in favor of individual choice, and derivatively, the presumption against all other generalities.¹¹¹ The school's and the state's assumption that men but not women would be best fit to be soldiers and therefore better able to benefit from the academy's instruction, was unsustainable: any such general categorization would be suspect, if we share nothing, either universally or with a subgroup, but the capacity for choice. This wrongly denies those women the opportunity to make that choice, by falsely dividing women and men who are alike in this regard, and at the same time, falsely ascribes to the class of 'women' and the class of 'men' attributes that they do not have. The majority opinion that Justice Ginsburg authored strongly endorsed these individualist, anti-'stereotyping' themes.

Scalia's dissent, by contrast, is a virtual model of traditionalist decision-making. What is sacrificed by the libertarian premises of Justice Ginsburg's opinion, Scalia makes clear, is two centuries' worth of southern tradition: gallantry, nobility, genteel femininity, the militarist and masculine virtues of honor, bravery, and sacrifice. It is *this* loss, furthermore, and not any danger of under- or over-describing relevant categories, that most disturbs him about the libertarian underpinnings of the Court's decision. Again, the point of the formal equality at the heart of equal protection is to treat likes alike, and that means, for Scalia-styled traditionalists, to treat those persons alike who have been categorized as 'likes' by tradition. It is by that means, that law can then serve its overriding purpose of preserving the traditions we inherit from the past.¹¹²

But are these the only alternatives? I think not: the libertarianism of the majority opinion, and the blatantly unacceptable traditionalism of the dissent, present false alternatives. An alternative, and I think stronger ground for insisting that women as well as men be admitted to VMI (if either are) is not that women and men are all so individualistic as to have no shared, gendered nature that distinguishes them from the

other, but rather, that women and men have a shared *human* nature – pre-eminently, a willingness and desire to serve one’s country – by virtue of which they both may potentially benefit from the distinctive education VMI offers. This straightforward observation, if forthrightly declared, is not undercut by the similarly straightforward observation that entrance requirements that rely on physical tests of strength might adversely impact women’s admissions, but might also do so justifiably if those requirements can be shown to be legitimately related to pedagogical ends. Nor is it undercut by noting that most women and most men would not ‘choose’ such an education, that more men than women might choose it, or that more women than men who might choose it will not be able to obtain it, if they cannot qualify. The shared trait, neither consciously chosen, nor traditionally bestowed, that ought make the exclusion of women from both VMI and from registration for the draft constitutionally suspect, is the obligation of women as well as men, both felt and real, *to serve*. The way to best acknowledge and honor that shared human trait, and aspiration, is not by reducing us to the thin commonality of our capacity for choice, or by asserting a bland universality based on nothing but our lack of gendered characteristics, but by ensuring that the avenues for fulfilling that obligation are as open as they can be, and that the schools, programs and governmental ventures that partially exist so as to allow that obligation to be met, are worthy of the human and communal impulse that drives young women and men to seek them out.

Finally, a humanistic interpretation of formal equality responds to the heart of critical complaints without sacrificing the ideal itself. Judges should indeed, as legal realists insisted, work toward the general social good, but it is also simply true that part of the social good is respecting our need for some certainty in legal adjudication, the value of tradition, and our democratic choices. Those needs, values, and choices, however, are not absolute or unassailable: we are not just wealth maximizers, traditions – perhaps particularly those made through common law adjudication – carry with them no incantatory value, and we are not just voters. Judges can respect the mandate of formal equality without lapsing into infantile, ditto-head, ‘me-too’ decision-making, by coupling formal equality with a complex rather than reductionist account of the humanity served by law and adjudication both. Nor is such decision-making incoherent, or any more incoherent than traditionalist or libertarian decisions. Humanistic juridical method, and jurisprudential suppositions, would complete the truncated analysis critiqued by Unger and his followers, by reference to law’s deep values: creation of an egalitarian and inclusive community, grounded in but then supplementing our natural capacity for sympathetic engagement with the wellbeing of others.

Likewise, a humanistic rather than libertarian or traditionalist interpretation of the mandate of formal equality presents a stronger understanding of the constitutional mandate that rests on formal equality, and one that is not vulnerable to the sort of critique mounted by critical race and feminist theorists. The insistence that legislation treat like groups alike, and that courts treat like cases alike, does not have to rest on the assumption that the only deep trait we share is a propensity to bargain, or on the claim that we all seek and benefit from the security of traditional categories. We all share some traits beyond the capacity to bargain, and some of us share traits not held

by others. Deciding what is like what need not rest on simplistic or reductionist assumptions about our nature. We sometimes should and sometimes should not seek assimilation into governing norms, ways of life, or dominant assumptions regarding the best way to live. Constitutional norms that force decision-makers to make categorical proclamations regarding the place of assimilation into liberal society, need not rest on counterfactual assumptions that we share this blandly homogenized nature.

Conclusion: The External Morality of Law

Finally, let me conclude by contrasting these three understandings of formal equality in terms of the ‘good that law does.’ I have argued above that each of these interpretations – the economic, traditionalist, and humanistic – suggests an answer to the criticisms of formal equality that have emerged over the last century. They also, though, provide a partial answer to H.L.A. Hart’s quite different critique¹¹³ of Lon Fuller’s insistence on rules as the moral heart of law.¹¹⁴ Rules, and respect for rules by citizens, judges, and lawmakers, Fuller insisted, must be at the heart of law: by following rules, legal decisions become a part of a legal system with an ‘internal morality,’ and for some of the reasons suggested above: they provide security and certainty to those citizens who must abide by them.¹¹⁵ But, as H.L.A. Hart saw, this explanation of law’s ‘internal morality’ – that law has some essential moral value so long as it is composed of rules – does not fully convince. Rules can be as malignant and destructive as fiat. Rules providing for the poisoning of a population are surely as destructive as individual, ad hoc poisoning decisions.¹¹⁶ Unless a system of rules does some good, Hart concluded, there is no reason to think its internal morality, assuming one can make sense of the concept, much matters. And a system of rules – formal equality very much included – is all that law at its best can insure. Even if coherent, then, formal equality alone offers no necessary moral gain over ad hoc decisions. Whether or not a system of rules is a positive good, entirely depends upon the goodness of the rules. Put in terms of formal equality, deciding like cases alike – deciding cases by rule – is a good idea only to whatever degree the rules by which the like cases are decided are themselves morally good rules.

One response to Hart – different from, but not inconsistent with the ‘purposiveism’ that drove so much of Fuller’s jurisprudence – would be to articulate the good that law *does*, and does by virtue of its formality, rather than, as Fuller wanted to insist, the good that law simply *is*, by virtue of its ‘rule-edness.’ If, for example, when we ‘decide like cases alike’ (or when we decide cases according to rules) we thereby maximize individual liberty, then the law is serving to maximize liberty, which is presumably a very good thing. Liberty, on this understanding, is at least one of law’s moral externalities, and one that is specifically tied to law’s formalism; if we assume an economic understanding of the roots of formalism, furthermore, it is law’s primary, or maybe its only moral externality. Likewise, if, by deciding ‘like cases alike,’ we thereby preserve social traditions, and if preserving social traditions is a good thing to do, then the law, by virtue of its formal structure, is affecting that social good. Again, particularly if we assume a traditionalist understanding of the formalist

mandate at the heart of law, preservation of that social architecture emerges as law's primary, and perhaps sole, externality.

Thus, identifying the good accomplished, by deciding like cases alike, not only saves the ideal from incoherence, but it also accounts for its strongly moral feel. It may be, as Fuller so passionately believed, a good thing to decide cases according to rule, and decide like cases alike according to rule, but it may not be because, as he also believed, rules, simply by virtue of their rule-edness, have any 'internal morality.' It may be that it is a good thing to decide cases according to rule, because by doing so, law accomplishes something good, albeit external to the law itself. What those externalities might be, is in part, a function of our understanding of law's moral point. Again, if we understand the point of law to be the maximization of liberty, and decide cases by reference to that ethical ideal, then liberty is obviously the moral externality created by law, and maximized by decisions that assume as much. Likewise, if we assume that the point of law is to preserve our social architecture through maintaining the traditions of the past, then preservation is the moral externality created by law, and preservation is maximized if we assume as much.

Liberty and tradition, however, may not be law's *only* moral externalities. We can identify two others, particularly if we ground it on humanistic rather than libertarian or traditionalist premises. Law, at least some of the time, pushes us toward an egalitarian regard for all, regardless of status, and law pushes us toward a recognition of the worth of all, regardless of nationality. Egalitarianism, and ethical cosmopolitanism, in other words, constitute potentially, a part of what I would call the 'external morality of law.' To put it somewhat differently, they are a part of the good that law does, rather than a part of the 'internal morality of law,' or 'the good that law is.' Both are clearly connected with a humanistic, rather than libertarian or traditionalist interpretation of the formalism at law's heart. If we assume, in other words, that the point of the mandate of formal equality is that it concretizes our understanding of the universality of human nature, and if we resolve doubtful cases in such a way as to give substance to that ideal, then we will achieve, through law, a greater degree of equality, and at least somewhat greater movement toward a cosmopolitan understanding of law's reach, than if we assume either individual liberty or the preservation of tradition to be at law's center. Both egalitarianism and ethical cosmopolitanism have, at various times, been recognized as central to the moral point of law, as the reason, in essence, for law's moral goodness. These connections, though, are now being neglected, and they are being neglected, at least in part, because our critical and progressive emphasis over the last 30 years has been on deconstructing rather than interpreting formalist ideals (and other ideals) for law. That emphasis, in turn, has left us bereft of more progressive understandings of those ideals than the dominant conceptions we have so painstakingly deconstructed.

Let me start with egalitarianism. Libertarianism, because it rests on a claim of universalism, does have an egalitarian, anti-caste-like, dimension: *all* people profit from choice, not just an elite, and so all should be accorded the access to choice accorded some.¹¹⁷ At the same time, however, our abilities to profit from choice depends not just on attributes particular to each of us, but also on attributes which are inherited, unchosen, and radically unequally distributed. The operation of choice in

those circumstances will often exacerbate rather than ameliorate those inequalities. Formal equality that rests on libertarian assumptions about our nature will accordingly at times frustrate substantive equality while it enforces an equality of choice. A humanistic interpretation of formal equality, by contrast, while universalist, is not reductionist: we share many traits, some complex, some simple, some shared universally and some not, not just a capacity for choice. We aim, through law, not just to maximize accessibility to opportunities for the exercise of choice, but to accord equal regard for complexly natured beings, who sometimes profit from commodification and choice and who sometimes do not: the choice to sell babies, reproductive services, or sex are examples of choices we might be better off without. Likewise, we have shared needs that an equal regard demands must be met, and they may not be met if their realization is left to the inequality-producing vagaries of market economies. Needs for education, shelter, food, and a basic income may be of such a sort: we all benefit from having them whether or not we have the resources of will to purchase it, and subjecting these goods to the vagaries of markets might exacerbate existing inequalities to such a degree as to leave us worse rather than better off, even accounting for the egalitarian dimension of libertarian assumptions. There is, in other words, no irrebuttable presumption in favor of efficiency, contractual autonomy, or individualistic will, in a humanistic rather than libertarian account of formal equality.

Traditionalist accounts of formal equality likewise have an egalitarian dimension – all likes, traditionally described, are treated alike – but its relationship to substantive equality is otherwise hostile: Edmund Burke after all fumed above all against the ‘leveling’ effects of egalitarian notions of universal and individual rights. If there are substantive inequalities in the categories devised by our traditions, then so be it; it is the role of law to retain, not challenge those distinctions. By contrast, the connection between a humanistic interpretation of formal equality and substantive equality, is not a hostile one: the ‘likenesses’ across persons that are salient to law are not dependent upon, defined by, or constituted by, tradition. To affirm a human likeness, through law, will often require a challenging stance rather than a collaborative stance toward the traditions of the past: women as well as men have and feel they have civic obligations, to vote, serve in the military, or make and enforce law, and they have and feel they have those obligations regardless of the traditions of the past; gay men and women as well as straight men and women have and feel they have a need for lifelong, publicly recognized intimate commitments, regardless of the traditions of the past; men as well as women would benefit from a legal and economic regime that would reward them for caregiving labor, regardless of the traditional assignation of that work to women – and so on. A humanistic, rather than economic or traditionalist account of formal equality by no means implies a blanket presumption in favor of egalitarian outcomes: we also, no doubt, have universally shared needs for liberty, and universally take comfort in traditions bequeathed us by the past, and benefit from the degree of relative inequality that provides sufficient incentives for the range of life works that gives social life meaning. The difference is that a humanistic, rather than libertarian or traditionalist account does not have the presumption against the egalitarian outcome, so starkly implied, albeit for different reasons, by libertarian

understandings of formal equality on one hand, or traditionalism on the other. Egalitarianism, or substantive equality, is not one of law's moral externalities, to whatever degree traditionalism or libertarianism is understood to be law's formal point. It is, however, a part of law's external morality, if we assume a humanistic interpretation of the mandate of formal equality at its core.

The situation is more complicated, and more mixed, with regard to ethical cosmopolitanism: the equal treatment of all, and an equal regard for all, regardless of nationality. First of all, traditionalism does seem as hostile to the claims of the ethical cosmopolitan as it is to the claims of the egalitarian: traditionalism preserves distinctions between people, and the distinction of nationalism is surely central rather than peripheral to that mission. There is no ethical wrong, and much that is right, in treating citizens differently from non-citizens: doing so affirms the 'likeness' of citizens and thus preserves the tradition of citizenship, nationalism, and state sovereignty. A humanistic understanding of the point of formal equality, and the point of law, by contrast, will tend toward cosmopolitan outcomes: law acknowledges the universality of human nature, and it is that intuition that is given concrete meaning in the peculiarly legalistic mandate to 'treat likes alike.' We are alike, not by virtue of particularizing tradition, but by virtue of a general nature, and it is the essence of law, and a legal mentality, to recognize that. *Law* pushes the family to recognize the rights and formal equality of non-family members; the tribe to grant the formal equality of non-tribal members, the community to recognize the humanity of those outside it, and the nation to recognize the moral equality of non-nationals. Law has at its core an ethical insight that pushes those who accord it to respect others, and to do so beyond the point at which they would naturally do so. It pushes, in other words, toward a cosmopolitan ethical stance.

The contrast with libertarianism is quite different. Libertarian understandings of formal equality, and of law's core, also push law's followers toward a sort of cosmopolitanism: it is by virtue of our human nature, not our American identity, that we profit from the markets laws protect. A libertarian understanding of law will then align law with the growth of transnational markets, and in opposition to domestic legal domains. But the vision of transnational or international law implied by libertarianism is quite different than that implied by humanitarianism: the law's *raison d'être* is to maximize liberty, and it does so by protecting markets against intervention from either international or domestic legal sources. If the point of law, though, more generously and humanistically conceived, is to accord equal respect to all, by virtue of a shared and complex nature, then the breadth and reach of law will be considerably more expansive: it is not only our will, but our vulnerability, not only our capacity for self-assertion, but also our capacity for communal absorption that requires protection. Domestic law, then, must bend to meet the demands, needs, and rights of non-nationals, just as our state laws had to bend to meet the demands, needs and rights of the formerly disenfranchised, and for the same reason: by virtue of their humanity, they are due equal legal treatment. More important, though, international law, as it develops, if it is to be truly an expression of law, rather than power, must develop in such a way as to meet all the human needs of the world's peoples, and not just the needs of the strong and profitable to maximize their long-arm's reach.

Notes

- 1 See Scalia (1989; 1997); Schauer (1991); Sunstein (1993b); Sherwin (1999); Grey (2003). The classic defense, and articulation, of this judicial method is Levi (1949). See also, for a general description and defense, Burton (1987) and Raz (1979).
- 2 See Tribe (1988, sec. 16-2); see generally Tussman and TenBroeck (1949). Some categories, particularly those involving race, are presumptively irrational, meaning that unless a state can show a compelling justification for their use, they will be struck as unconstitutional. This 'heightened scrutiny' reflects our particular history with the malign use of racial categories to serve racist ends. Ironically, this same 'heightened scrutiny' and the judicial suspicion of racial categories it reflects, is now being used primarily as a way of attacking various forms of affirmative action plans, most of which are designed to eradicate rather than exacerbate the effects of slavery, Jim Crow, and racial segregation on our race relations.
- 3 This was found to be unconstitutional in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), in part because the irrationality of the distinction drawn between larcenists and embezzlers (and the justified suspicion that it reflected class bias) was exacerbated by the penalty, which interfered with a 'fundamental right' of procreation (Ibid., 541).
- 4 This has not been found unconstitutional, although it arguably should be. See *Holiday v. United States*, 683 A.2d 61 (D.C. 1996); *State v. Russell*, 477 N.W.2d 886 (Minn. 1991); *United States v. Burroughs*, 897 F. Supp. 205 (E.D. Pa. 1995).
- 5 This was upheld in *Rostker v. Goldberg*, 453 U.S. 57 (1981) in part because the Court found that the purpose of registration and the draft is to ensure a combat-ready armed force, and the limitation of combat to men, the court believed, is essentially rational.
- 6 See *Brown v. Board of Education*, 347 U.S. 483 (1954). Cases that followed *Brown* collectively found state legislation predicated on racial segregation unconstitutional under the Equal Protection Clause. See *Maynor & City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (public beaches and bathhouses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (municipal golf courses); *New Orleans City Park Improvement Ass'n. v. Detiege*, 358 U.S. 54 (1958) (golf courses and city parks). Lower federal courts also held racial segregation unconstitutional with respect to public facilities and transportation. See *Dep't of Conservation & Dev., Div. of Parks, of Va. v. Tate*, 231 F.2d 615 (4th Cir. 1956) (state parks); *City of St. Petersburg v. Alsup*, 238 F.2d 830 (5th Cir. 1956) (municipal beaches and swimming pools); *Morrison v. Davis*, 252 F.2d 102 (5th Cir. 1958).
- 7 This was found unconstitutional in *Craig v. Boren*, 429 U.S. 190 (1976).
- 8 Scalia (1989); see generally Schauer (1988); Posner (1987); Grey (1999).
- 9 Scalia (1989).
- 10 For an extended discussion of this full understanding of Formalism, an explication of the tensions if not the contradictions between its various tenets, and a defense of a loose version of it, see Grey (1999).
- 11 See Llewellyn (1962); Frank (1935); see generally Fisher (1993).
- 12 See Kennedy (1986; 1976); Unger (1983); Dalton (1985).
- 13 See Becker (1987); West (1990); Littleton (1987d); MacKinnon (1991).
- 14 See Gary Peller (1995).
- 15 A 'pragmatic' method of legal reasoning is embraced by a number of Formalism's critics. See Posner (1990); Sunstein (1993b).
- 16 As called for by at least some critics of formalism. See, for example, Tushnet (1988).
- 17 See Quevedo (1985).
- 18 See note 11 above.

- 19 See generally Posner (1987; 1990).
- 20 See White (1985).
- 21 See Nussbaum (1995).
- 22 146 A. 641 (N.H. 1929).
- 23 See, for example, Dawson, J., Harvey, W. and Henderson, S. '*Contracts: Cases and Comment*' 3 (7th edn) (New York: Foundation Press, 1998), 3–6.
- 24 *Hawkins v. McGee*, 146 A. 641 (N.H. 1929), 642–3.
- 25 *Ibid.*, 643.
- 26 *Ibid.*
- 27 See generally Landis (1980); Barnes (1996); Menikoff (1998).
- 28 See *Hawkins v. McGee*, 146 A. 641 (N.H. 1929), 643–4.
- 29 537 A.2d 1227 (N.J. 1988).
- 30 As the New Jersey Supreme Court did in *Whitehead v. Stern*, 537 A.2d 1227 (N.J. 1988), 1240–50.
- 31 See, for example, *Surrogate Parenting Ass'n. v. Commonwealth ex. Rel. Armstrong*, 704 S.W.2d 209 (Ky. 1986). The Court's major holding upholding the surrogacy contract was later overturned by statute in Arkansas.
- 32 Compare *Matter of Baby M.*, 537 A.2d 1227 (N.J. 1988) (awarding custody to the father and wife and the mother was entitled to visitation rights), with *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (enforcing the surrogacy agreement and declining to award the surrogate mother any legal rights). But see in *R.R. v M.H.*, 689 N.E.2d 790 (Mass. 1998) (the Court declined to enforce a surrogacy contract that was like the one in *Baby M.* on the basis that it involved money payments). A number of states, including Arizona, Michigan, New York, North Dakota, Utah, and Washington, DC have enacted legislation that bans the enforcement of surrogacy contracts. See Areen (1999, 1081). Other states, Kentucky, Louisiana, Nebraska, and Washington, bar enforcement if the surrogate receives compensation (*ibid.*). Finally, New Hampshire and Vermont 'place restrictions on who may act as a surrogate and require advance judicial approval' (*ibid.*).
- 33 See especially Epstein (1995). But see Field (1998) (arguing that surrogacy contracts made before birth should be unenforceable).
- 34 The exception is *Whitehead v. Stern*, which gave a relatively thorough discussion of the legal options the Court faced.
- 35 453 U.S. 57 (1981).
- 36 518 U.S. 515 (1996).
- 37 See especially Shaman (1984, 182) (concluding that the multi-tier approach 'has always been and always will be an overly rigid structure that retards constitutional analysis by diverting thought away from the merits of the case and by constricting thought through a priori categories'). Supreme Court Justice Marshall has been an open critic of the multi-tier level of scrutiny, claiming that it is 'rigidified' and its 'oversimplification . . . does not accurately reflect the adjudicative process in constitutional cases' (*ibid.*, 163).
- 38 Scalia (1989); Schauer (1991); Sunstein (1993b).
- 39 This was one of the concerns in *R.R. v. M.H.*, in which the Court noted that 'compensated surrogacy arrangements raise the concern that, under financial pressure, a woman will permit her body to be used and her child to be given away' (*R.R. v. M.H.*, 689 N.E.2d 790, 796). See generally O'Brien (1986, 128) (arguing that 'commercial surrogacy fosters a perception of children as commodities and contributes to the exploitation of and by host mothers'). But see Kerian (1997, 116) (arguing that surrogacy is a realistic alternative for women who are infertile and the 'potential harm and exploitation are greatly outweighed by the benefit, the birth of a truly wanted child').

- 40 See Ferguson (1995) (noting the social and legal ramifications to women, children and society); Kass (1979) (uncovering the deleterious effects that surrogacy contracts have upon children, families and society).
- 41 Feminists are split on the issue of surrogacy agreements. See Wilker (1986).
- 42 See Shalev (1989); Modjtahedi (1998); Epstein (1995).
- 43 It is therefore unsurprising that Justice Scalia, one of formalism's most ardent defenders, proclaimed the mandate of formal equality – that likes be treated alike – as the essence of formalism, which he regards as, in turn, the essence of law (Scalia, 1997, xx).
- 44 See Cohen (1935); Cohen (1936).
- 45 Pound (1908).
- 46 Cohen (1933); Hale (1923).
- 47 Holmes (1918); Frank (1930; 1932); Hutcheson (1929).
- 48 Holmes (1897, 474).
- 49 Holmes (1909, 35).
- 50 Holmes (1897, 457).
- 51 See Tushnet (1983); Unger (1983); Kennedy (1976; 1986); Kelman (1984; 1981).
- 52 Foucault (1970).
- 53 *Ibid.*, xv–xvi.
- 54 *Hoffman v. Red Owl Stores*, 26 Wisc 2d 683 (1965). See generally, Fuller (1941).
- 55 *Allegheny College v. Nat'l Chautauqua County Bank of Jamestown*, 246 N.Y. 369 (1927).
- 56 This was the realists' favored definition, but it is undercut by the apparent lack of internal contradiction in the idea of an 'unenforceable contract.'
- 57 See Unger (1975, 88–106); Kennedy (1976). For an excellent contemporaneous summary of the similar views of some realists on this issue, see Haines (1922).
- 58 See Unger (1983).
- 59 For examples of this sort of argument, see Littleton (1987a); West (1988).
- 60 Hochschild (1989).
- 61 MacKinnon (1991).
- 62 See, for example, Becker (1987, 247).
- 63 For an early example of this argument, see Fiss (1976). From critical race theorists, see Crenshaw (1988); Matsuda and Lawrence (1997). See generally, Peller in Crenshaw et al. (1995).
- 64 See *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).
- 65 For an early example of a related form of 'deconstruction' in contract law, see Dalton (1985).
- 66 By contrast, Justice Scalia (1989), its worth noting, in his important article 'A Rule of Law as a Law of Rules,' that effectively ushered in the modern revival of formalistic jurisprudence, *highlights* the centrality of the moral intuition behind the mandate of formal equality, and uses the apparent unassailability of that intuition to strengthen his argument for the necessity of formalist jurisprudence more generally:

[T]he value of perfection in judicial decisions should not be overrated. To achieve what is, from the standpoint of the substantive policies involved, the 'perfect' answer is nice – but it is just one of a number of competing values. And one of the most substantial of those competing values, which often contradicts the search for perfection, is the appearance of equal treatment. As a motivating force of the human spirit, that value cannot be overestimated. Parents know that children will accept quite readily all sorts of arbitrary substantive dispositions – no television in the afternoon, or no television in the evening, or even no television at all. But try to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed. The Equal Protection Clause epitomizes justice more

than any other provision of the Constitution. And the trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice very well. When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case be different, but that it be seen to be so. (Scalia, 1989, 1178).

Scalia goes on to argue, in what is now a staple of formalist, and anti-realist jurisprudence, that judicial discretion of the sort advocated by the realists, comes at too high a cost to the predictability essential to any decent legal system:

[A]nother obvious advantage of establishing as soon as possible a clear, general principle of decision [is] predictability. Even in simpler times, uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes. . . . As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protected uncertainty regarding what the law may mean. Predictability, or as Llewellyn put it, 'reckonability,' is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all. (Ibid., 1179).

Third, he argues, the constraint of formal equality is a necessary check on the power of the judiciary, who are not, contra the faith of the realists, necessarily constituted by a group of wise and able men:

[W]hen, in writing for the majority of the Court, I adopt a general rule, and say, 'This is the basis of our decision,' I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle. In the real world of appellate judging, it displays more judicial restraint to adopt such a course than to announce that, 'on balance,' we think the law was violated here—leaving ourselves free to say in the next case that, 'on balance' it was not. . . . Only by announcing rules do we hedge ourselves in. (Ibid., 1179–80).

67 Twain (1988, 179).

68 Dylan (1964).

69 Lorraine Adams and Serge Kovaleski, 'The Best Defense Money Could Buy,' *Washington Post*, 8 October 1995, A01; William Montalbano, 'The Simpson Verdicts; Trial Watchers Worldwide Have Mixed Reaction; Some Contend Race, Wealth & Celebrity Affected Outcome,' *Los Angeles Times*, 4 October 1995, B2.

70 Andrew Ward, 'Good Cop, Bad Cop, My Cop,' *Washington Post*, 14 October 1995, A23; Stephen Braun, 'The Simpson Legacy; Just Under the Skin; Pushed by Change, Pulled by the Past; As the LAPD Pursues Community Policing, a Paramilitary Tradition Dies Hard,' *Los Angeles Times*, 10 October 1995, S4; Paul Butler, 'O.J. Reckoning: Rage for a New Justice,' *Washington Post*, 8 October 1995, C01; Bill Miller, 'Officers' Image Tarnished; Simpson Verdict Highlights Mistrust of Police,' *Washington Post*, 5 October 1995, C01.

71 Charisse Jones, 'Nicole Simpson, in Death, Lifting Domestic Violence to Forefront as National Issue,' *New York Times*, 13 October 1995, A28; Andrea Dworkin, 'Domestic Violence; Trying to Flee,' *Los Angeles Times*, 8 October 1995, M1; Isabel Wilkerson, 'Whose Side to Take: Women, Outrage and the Verdict on O.J. Simpson,' *New York Times*, 8 October 1995, sect. 4, 1; Jackie Spinner and Anna Borgman, 'Unanimous Decision Leaves Nation Divided; Verdict Reopens Wounds Left by Domestic Violence; Women in Area Express Anguish, Ambivalence,' *Washington Post*, 4 October 1995, A27.

- 72 Martha Raddatz, 'Uniform Complaint,' *New Republic*, 30 November 1998, 18; Louise Palmer, 'Ex-military will Testify for President; "Double-Standard" Issue Weighed,' *Boston Globe*, 27 November 1998, A1; Mike Causey, 'More Thoughts on Boss's Troubles,' *Washington Post*, 21 September 1998, B02.
- 73 Meg Greenfield, 'The Real "Character Issue",' *Washington Post*, 16 May 1994, A19; 'Paula Jones and the Rest of Us,' *Chicago Tribune*, 11 May 1994, 20; Maureen Dowd, 'Suit Sets Off Rush for Highground,' *New York Times*, 8 May 1994, sect. 1, 16.
- 74 Balkin (2001); Tribe (2001).
- 75 See Holmes (1897, 1001).
- 76 For two economic treatments, see Kornhauser (1989) and Macey (1989). For a good general discussion of the approach's strengths and weaknesses, see Schauer (1987).
- 77 Kronman (1990).
- 78 Professor Fred Schauer usefully calls this the 'argument from predictability,' and goes on to urge that the value of *stare decisis*, conceived in this way, must be balanced against the costs of adhering to a suboptimal rule. See Schauer (1987). Kronman combines this argument for predictability and certainty in law, with the claim that precedent yields stronger decision-making, as it distills the wisdom of prior generations of judges facing similar sorts of problems, and then addresses them both collectively as 'utilitarian' (Kronman, 1990, 1036–8). Richard Posner presents a related economic argument in *Economic Analysis of Law* (1977, 26–7).
- 79 Thus, the overlap with liberalism, which also stresses our individualism, but not on the basis of any shared human nature, and not in such a reductionist manner.
- 80 Epstein (1985); Posner (1977).
- 81 See Rawls (1971, 237–40).
- 82 See Hart and Sacks (1994).
- 83 Posner might have been the first prominent legal economist to see this, and fashion his jurisprudence 'pragmatist' accordingly (Posner, 1990).
- 84 Posner's early work is the most thorough-going example of this mode of legal analysis (Posner, 1977).
- 85 Epstein (1995); Shultz (1990).
- 86 Kronman (1990, 1041).
- 87 *Ibid.*, 1066.
- 88 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) is as forceful an opinion as it is, perhaps, because it draws on *both* economic and traditionalist defenses of formalist decision-making. In *Casey*, Justice O'Connor argued, that the 'traditional' form of life to be preserved by her invocation of the values and ideals of formal equality – the mandate to decide cases according to already established precedent – was *liberty itself*: 'Liberty,' opined Justice O'Connor, 'finds no refuge in a jurisprudence of doubt' (*ibid.*, 844). Therefore, she argued, whatever the original merits or demerits of *Roe v. Wade*, the importance of staying true to past precedent tilted the equation in favor of not overruling *Roe*. See *ibid.*, 844, 854–69.
- 89 *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).
- 90 *Bowers v. Hardwick*, 478 U.S. 186 (1986), may be the clearest example of traditionalism at work; see also Justice Scalia's dissent in *U.S. v. Virginia Military Institute*, 518 U.S. 515, 566 (1996) (Scalia, J. dissenting); and, for an early example, *Bradwell v. Illinois*, 83 U.S. 130 (1873).
- 91 See *VMI*, 569.
- 92 See *Plessey v. Ferguson*, 163 U.S. 537, 550–51 (1896).
- 93 Foucault (1970).

- 94 There is now a vast feminist literature critical of economic reasoning, as well as of liberal political theory that begins from this premise. For recent examples that pertain to law, see Kittay (1999); Fineman (2003); Fineman and Thomadsen (1991); West (1997, 1985).
- 95 Freud (1961; 1950).
- 96 For a good discussion of Smith's classic *Theory of the Moral Sentiments*, and how it pertains to legal reasoning, see Nussbaum (1995, 72–7). See also, for various critiques of the behavioral assumptions underlying current economic thinking in law, Sen (1976); White (1986; 1989); Radin (1987); West (1985); Elster (1983; 1979).
- 97 Martha Nussbaum has elaborated in a number of recent works on the complexity of our empathic abilities and disabilities, and the consequences of that complexity for law and legal theory. See Nussbaum (2002; 2000; 1999; 1995).
- 98 Hobbes, 1996, ch. XIII, 61–3.
- 99 Kronman (1990); West (1997).
- 100 Tversky and Kahneman have pioneered much of the empirical work suggesting as much. Tversky and Kahneman (1986; 1990; 1979; 1991; 1992). For a discussion of the relevance of some of this research to legal theory and economic reasoning in law, see Kahneman (1997); West (1997).
- 101 For critiques of legal-economic reasoning that employ literature, see West (1985); White (1986); Weisberg (1984).
- 102 Unger (1984; 1983).
- 103 Epstein (1995).
- 104 *Lochner v. New York*, 198 U.S. 45, 64 (1905).
- 105 478 U.S. 186 (1986).
- 106 *Ibid.*, 196.
- 107 *Rostker v. Goldberg*, 453 U.S. 57 (1981).
- 108 518 U.S. 515, 566 (1996) (Scalia, J. dissenting).
- 109 See 518 U.S. 515, 542 (1996).
- 110 See *ibid.*
- 111 See *VMI*, 518 U.S. 515, 567–8 (1996) (Scalia, J. dissenting).
- 112 *Ibid.* The term 'fundamental rights' should be limited to 'interest[s] traditionally protected by our society,' *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989).
- 113 Hart (1961).
- 114 Fuller (1964).
- 115 *Ibid.*
- 116 See Hart (1961).
- 117 It is for this reason, among others, that liberal feminists often support market-based alternatives to traditional family organizations, such as surrogacy contracts, and contractual parenting.

Chapter 5

Conclusion: The Progressive Idea of Law

The peculiar idea, first defined by (and partly criticized and partly defended by) the political theorist Judith Shklar, of *legalism*¹ – the idea that subjecting human behavior to governance by rule is, all things considered, a morally good thing to do – is gaining adherents, worldwide, as the force of positive, international law extends its reach around the globe, and domestic law, both here and elsewhere, deepens and broadens its penetration into social life. In numerous social spheres, both positive law itself, and the idea of legalism as well, are now present where they long were absent. The reach of law forbidding the sexual use and exploitation of minor children, for example, has only very recently permeated the recesses of the Catholic patriarchy, once a place of sovereignty and subjection impervious to the reach of secular authority.² Just as consequential, certainly for our children, bureaucratized, regulatory law governing and mandating the responsibility of schools for the harassment of school children by peers, now replaces the dominance – the sovereignty – of bullies on school playgrounds, as schools accept legally imposed heightened responsibilities to police against peer on peer harassment, violence, and intimidation. Here again, then, the schoolyard playground, once a sphere of insulated political sovereignty dominated, *Lord of the Flies* style, by bullies, has been tamed by the intrusion of positive law.³ Reflecting feminist gains of the last 30 years, the reach of positive law forbidding violence against adults by intimates has similarly seeped into the sphere of traditional marriage – which, like the church, not so long ago, was a place of insulated sovereignty, impervious to the equalizing reach of legalism.⁴ In private market transactions as well, law plays a well-established and growing role, attempts of free market enthusiasts of the last 100 years to role back its presence notwithstanding. Regulatory law, to take just one example, at least as much as private contract, now governs the relationships of surrogate, contract, and adoptive parents, displacing not just traditional familial allocations of parenting obligations and rights, but also the role envisioned 20 years ago by transactional lawyers and their clients for ‘private will’ and ‘intentional parenting.’⁵ Likewise, of course, if more prosaically, the relation of buyer to seller in consumer transactions is now governed by regulatory law at least as much as by the dickering of the parties.

Internationally as well, law is gaining momentum as the preferred vehicle for control of social relations between nations, entities, or individuals, which heretofore have had no recognizably legal relations. Law, rather than private power, will have a say in the allocation of rights and responsibilities among nations and corporations for the health and cleanliness of the planet, under the Kyoto agreements, with or without US involvement. And it appears as though positive law – meaning, positive, criminal *law*, whether domestic or international, and again with or without US involvement – rather than rules of war, conventions of war, the will of the stronger, or the mandates

of a state of nature – will increasingly govern the dispensation of justice to criminals who convince others to fly airplanes into tall buildings, or to blow themselves up so as to kill others in discos or hotel ballrooms, causing casualties more often associated with the battlefield than the scene of a crime.⁶ Likewise, public international law – with courts and prosecutors ready to give it teeth – stands ready to charge, prosecute and judge the war crimes of those who, like Serbia's Milošević, led, but then eventually lost, military campaigns against civilian populations.⁷ More significantly, perhaps, public international law and emerging courts ready to enforce it, threaten at least the peace of mind, if not yet the freedom of movement, of those who may have committed crimes on their way to either covert or overt military victories against civilian populations or their democratically chosen leaders. Law plays a role in these disputes – sometimes definitive and sometimes not, but it is an actor whereas before it was absent. And so does *legalism* – the idea, again, that all things considered, it is a good thing that law do so.

All of these instances of legal expansion have been applauded, albeit with varying degrees of enthusiasm, by a wide swath of political progressives. The sheer presence of law where it once had not been – the subjection of human behavior to the governance of rules – in the cases noted above, seems to be a morally good thing, and seems to be a good thing *from a progressive political perspective*. Likewise, the *retreat* of law in deference to private power – as is evidenced, perhaps, by some international treaties governing the economic transactions between corporate entities, or the US refusal to recognize international criminal law courts and norms – is for the most part deplored by progressive legalists, no less than by anti-World Trade Organization demonstrators on the street. But why? What is the good that law does, in these scenarios, and how, if at all, does it connect with values recognizably progressive? To again employ Ronald Dworkin's felicitous phrasing, what might be the 'moral point'⁸ of all of these moves toward law and legalism, and does that moral point intersect in any way with progressive politics? Is law itself a progressive idea?

If we look at our contemporary, analytical jurisprudence, the answer seems to be a resounding 'No.' One will look in vain, in other words, for a noticeably progressive understanding of law's moral point – and not because jurisprudence, as a field, has somehow been rendered 'apolitical.' Rather, contemporary jurisprudential literature yields two different, often conflicting, but nevertheless thoroughly political accounts of law's 'moral point,' which largely echo the prominent bodies of normative jurisprudence on Rights, the Rule of Law, and especially Formal Equality that I have critiqued above, in various portions of this book: the first of which is, generally, socially conservative, in present political tilt and lineage, and the other, generally liberal or libertarian. I will briefly review each of them in a moment, but the point I want to stress here is that both of these conventional accounts of legalism fail to account for the appeal of law in the sorts of scenarios mentioned above. In fact, and as I will try to show, these two dominant accounts of law's 'moral point' suggest to the contrary that expansions of law in these cases and others like them are unfortunate, or oppressive, or even, in some elevated sense, 'unlawful.'

This disjunction – between the apparent value of at least some of these expansions of legalism, and their ill fit with now prominent understandings of law's value that vie

for prominence in contemporary jurisprudence – creates an anomaly. If these conventional accounts of law's moral point are taken as the only possible accounts, then the value of law in these instances is somehow unrelated to law's moral point: perhaps these innovative legal intrusions into various realms of 'the private' or 'state sovereignty' are good things, politically, but if so, they are good *in spite of*, not because of, their legal status. Their goodness, or the good they do, is not 'of a piece' with any general account of law's value. They are not exemplary of law's goodness. They are 'special legislation,' or interest group pandering, or, less pejoratively, equality-gaining measures – but in any event, they do not exemplify law's basic moral point. They are not the sort of thing from which a general jurisprudential account of legalism, then, can be forthcoming.

What is missing in today's jurisprudence, is a general account of the good that law does, that renders the progressive and egalitarian content of law exemplary, rather than peripheral to (or anomalous to) an understanding of law's value. Presently there is no such account, and for reasons which by now should be familiar: rather than supply the contours of an understanding of law's moral point, or, to put it differently, an interpretation of our 'natural law' traditions, critical and progressive legal theorists have been preoccupied, over the last half century, with the project of delineating the contradictions and tensions between the conservative and neo-liberal approaches worked out by others. Progressive inattentiveness to the meaning of the various legalistic virtues that comprise our overall sense of 'legal justice,' and that I have tried to highlight in the major chapters in this book, has been mirrored in progressive inattentiveness to the value of law more generally. In the remainder of this conclusion, I want to briefly address this gap, and describe what a progressive account of legalism, might look like and how it would differ from the conservative and liberal accounts that now so dominate our debates.

Conservative and Liberal Legalism

Let me start though by describing first conservative and liberal jurisprudential accounts of law's most general moral point. A conservative account of law's moral point, like the traditionalists' account of formal equality I surveyed above, owes a heavy debt to Edmund Burke. What might usefully be called 'conservative legalism' identifies the goodness of law, largely, in the preservative role law plays, *vis-à-vis* the social structure within which it is embedded. By subjecting human behavior to the governance of rules, we thereby preserve and perpetuate the social forms that generate, legitimate, and enforce those rules, and by preserving those social forms, we thereby preserve the identities those social forms enable. Rules of family law, for example, preserve the institution of fatherhood, maternity, lineage, and inheritance, and it is within those institutions, that 'real-life' fathers, mothers, servants, children, and family relations derive their very identity, or at least those aspects of identity which mark them as human. Without the family institutions, we would not have fathers, mothers, grandparents, and children, in any but a strictly biological sense, and without the rules, we would not have those institutions. Fathers, mothers, parents

and children are good things to have not only because of the social utility of families, but intrinsically as well: those social rules, and the institutions they structure, confer identity. They make us what and who we are. Without those identities (and others as well) we would be not much different from non-human forms of animal life. Likewise, to take a different sort of example, the rules of commercial law preserve the institutions of trade: bargain, contract, good faith, mutual benefit, and so forth, from which merchants, consumers, producers, and investors all derive their identity. Those institutions, and those roles, are good to have, again, not only for their utility, but for the intrinsic value of identity itself. To know oneself as a merchant, is, simply, to know oneself; it is to have an identity. Rules of citizenship, likewise, preserve the institutions of citizenship and nationality, thus likewise preserving our identities as citizens, residents, aliens, insiders or outsiders. These institutions, the rules that preserve them, and the identities they create, according to this conservative account, are what humanizes our social existence. Without them we would have no institutional memory, no sense of intergenerational existence, and no community that moves through time. Their preservation, then is an unqualifiedly good thing, and it is through law that their preservation is made possible. Their preservation then is the moral point of law.

A very different understanding of legalism might be called neo-liberal, or libertarian, or simply individualist. The moral point of law, from a neo-liberal point of view, is not to preserve tradition, but to maximize individual freedom, and to do so, furthermore, on the *anti*-traditionalist assumption that our identity (and our value) stems from our individual choices, not from our traditional and traditionally bestowed roles, and that therefore the greater our capacity for choice (and the larger the number of our choices) the more capacious our humanity. Law increases hugely the sheer number of viable individual choices, primarily, by increasing the security of those choices: by providing criminal sanctions against violence, force and coercion, and civil sanctions against breaches of promise and of trust, the law can encourage the sort of competition and limited co-operation that expands the reach, efficacy, and impact of individual choice. Law – subjecting human behavior to the governance of rules – is a good thing, then, because (and to the extent that) it facilitates the growth of the number and value of choices open to individual actors. When law steps beyond this animating role, its value drops, and it becomes incumbent upon those committed to legalism to curb it.

Taken jointly, liberal and conservative legalism constitute the field of traditional, normative jurisprudence, and of a good bit of traditional legal doctrine as well. That is, one or the other of these two understandings of law's moral point largely inform and guide decision-making by judges, legal theorizing by theorists, and legal criticism by law's critics: if a judge, theorist, or critic is steeped in (or situates himself within) one or the other of these powerful jurisprudential paradigms, he or she will have a background rule, or default assumption, under which close cases can be decided, a principle in light of which doctrine can be pointed, and a point of departure for criticism of particular laws, cases, or bodies of doctrine. It is also clear, however, as the Critical Legal Studies movement has shown, that the potential for conflict and contradiction between them is great, and often destabilizing. The contradiction

between liberal and conservative understandings of law, for example, clearly accounts not only for much of the indeterminacy in legal doctrine, but also or some of the more dramatically divided Supreme Court opinions of the last half century – to wit, the contrast between the opinions of Justices Ginsburg and Scalia in the *VMI* case discussed in Chapter 4.⁹ To the degree that our received doctrine, and theory, is rife with internal contradiction, it is largely (not entirely) because of the tension between these competing conservative and liberal accounts of law's 'moral point.'

Aside from their potential for conflict, however, conservative and liberal understandings of law's point have serious moral flaws, which have also, to perhaps a lesser degree, become familiar, over the last century of radical legal critique. Surely, conservative legalism, as has been pointed out not only by contemporary critics, but also by both English positivist and American realist critics of the last two centuries, are right to complain that it is at least *somewhat* infantile, or 'disgusting,' as Holmes (1897) put it, to decide a case in a particular way only because 'it had been done so by our fathers.' Liberal legalism, on the other hand, as again, not only contemporary but early twentieth-century critics as well, have urged, apparently rests on a barren, willed 'atomistic' conception of our nature that leaves little room for the sway of attachment, commitment, community, or even biological existence, and one, furthermore, that seemingly denies the extent to which our lives are the product of our past traditions, as well as a heroic attempt to transcend them.

These moral problems with both conservative and liberal legalism highlighted by radical critique, finally, can clearly not be answered simply by 'balancing' each with a dollop of the other. Thus, the undue reverence for precedent, or for the traditions of the past, complained of by conservative legalism's critics is not only problematic for liberal individualists: it is also problematic to those for whom the tradition has been oppressive as well as defining, but who wish to rethink or refashion it toward the end of their continuing participation within it, not toward the end of a free-wheeling individualism. The alternative to 'bad traditions,' in short, is not 'no traditions,' but 'good traditions,' and the belief that the only alternative to oppressive traditions is an equally unsatisfying radical individualism that eschews tradition altogether has the effect of masking that possibility. Likewise, individualism's commitment to the full sway of individual choice, is problematic not only for those who wish to modulate individual choice with a respect for the traditions that facilitate it, but also to those for whom the glorification of untrammelled individual choice traps them within choices that do little but ensure their continued submission to the unchecked will of the momentarily empowered. The alternative to unbridled libertarian individualism – to reification of existing choice – is not just traditionalism, but also *greater empowerment* – meaning greater empowerment of those persons hurt by the play of markets, no less than by the traditions that markets often displace. Again, the limits of a traditionalist understanding of law are not corrected by resort to libertarianism, and the limits of libertarianism cannot be cured by a resort to traditionalism. Rather, critics of legalism have largely concluded, inegalitarianism is the shared problem underlying both conservative and liberal legalism, albeit for different reasons: the first because it privileges tradition over equality, and the second, because it privileges individualistic liberty over egalitarianism. The inegalitarianism and lack

of generosity of traditionalism is not answered by the inegalitarianism and lack of generosity of the empire of individual choice.

These are familiar critiques, and although not often put in these terms, the inegalitarianism of both traditional and libertarian conceptions of law's moral point have been consistent themes of contemporary critical legal scholarship, critical feminist theory, and critical race theory. I want to suggest, however, a rather different criticism, and that is, that liberal and conservative legalism, taken jointly, do not well account for the positive value of contemporary, expansionist law efforts of the sort briefly described above. In fact, very much to the contrary: both conservative and liberal legalism seem to imply the disutility, or worse, of the sorts of domestic and international expansions of positive law. Thus, to review the examples cited above: from a conservative legalist perspective, the intrusion of positive law occasioned by the revelations of the abuse of children by celibate male priests, into the traditional, sovereign domain of the Catholic Church and hierarchy, is surely a part of the tragedy in which the Church now finds itself, and not a solution to it: the attack on the sovereign ability of the church to police its own through the traditional tools of internalized guilt and repentance for sin, as well as the attack on the infallibility of church leaders, is emerging as a larger problem for the Church than the local failings of particular priests. The insistence by outsiders that these acts are 'crimes' committed by 'criminals' – although a victory for legalism – is a nail in the coffin for dyed-in-the-wool Catholic traditionalists, and it therefore puts conservative legalists in a compromised position: conservative legalists can only endorse this development with at most great ambivalence. The presence of law, here, is not serving the ends of tradition, to put it mildly, it is undermining those ends. Likewise, the increased intrusion of criminal law into the realm of the family represented by enforcement of sanctions against domestic violence, at the least violates the traditionally protected 'privacy' of marital partners to operate as self-contained units, and at most, challenges head on the traditionally protected marital sovereignty of the father and husband to rule as he and tradition see fit. Again, this intrusion of secular law into a sphere traditionally given over to patriarchal authority, while a victory for legalism, is hardly in the service of tradition, and accordingly is an advance toward which conservative legalists will at best be ambivalent. In the international sphere as well, the expanding reach of both public and private law is at odds with conservative legalist assumptions: the increasing reach of international law directly entails a diminished role for national sovereignty and hence for national communities and national identities, just as Edmund Burke feared it would.

Liberal legalists as well have reason to decry rather than celebrate some of these expansions of positive law, although for different reasons. The imposition of a legal regulatory regime over surrogacy contracts, for example, constitutes a clear limitation on the contractual autonomy of individuals: the outright prohibition of these contracts is a clear limitation, but even imposition of mandatory terms decreases the capacity of parties to contract for a higher price with fewer protections for the surrogate. Similarly, consumer legislation dictating mandatory warranties in dangerous consumer products limits the contractual ability of buyers and sellers to contract for fewer warranties in exchange for lower prices. These sorts of rules limiting

the contractual autonomy of buyers and sellers in various sorts of markets – from lending markets, to home ownership and construction, to the sale of consumer products, to sales of sexual or reproductive services – are, now, ubiquitous, and are met with at best ambivalence by liberal legalists: they all interfere, usually for paternalistic reasons, with the functioning of free markets. Similarly, the expansion of public international law – from environmental rules to the increasing likelihood of an international criminal court with jurisdiction over all war crimes and crimes against humanity – whatever their gains in terms of global security, carry the potential to limit the autonomy of state and non-state actors, and to violate rights of liberty and property on a massive scale, again, unlike anything heretofore contemplated by our own homegrown, overzealous, statist prosecutors and regulators.

Furthermore, it is clear that the problems in these laws or legal regimes revealed by the perspective of each of these two jurisprudential perspectives are not simply outweighed by the virtues of the same laws, viewed from the opposing vantage. Put differently, the value of these laws, for their advocates, is not that they promote those values represented by *one* or *the other* of these paradigms, even at the expense of the neglected perspective. Thus, those who advocate for the victims of sexually predatory priests, for example, clearly see the extension of the legal sanction into the priest–child or priest–seminarian relationship, as a moral good, and they see it as a moral good in spite of the damage it may do to the authority, prestige, and indeed the sovereignty of the Catholic Church. As I will discuss in more detail in a moment, limiting the authority of the priest over the seminarian and the bishop over the priest, by subjecting the priest and the bishop to the authority of law, presumably, renders the relationship of priest to seminarian (or altar boy) *safer*: the lay person who is a subject of legal as well as priestly authority, can use the former status to limit the abusive impact of the latter, and is thereby somewhat empowered within the hierarchic relationship, but that relationship, including its hierarchic nature, is *in all other respects* preserved. The good that is thereby accomplished, through the imposition of law on this heretofore relatively legally unregulated relationship, is *not* that limiting the sovereign relationship between priest and altar boy in this way strikes a victory for radical individualism or for ‘individual autonomy’ – it *may* strike such a victory, but that would be a by-product, not the main target, of the legal reform. Nor is the good that of egalitarianism – again, although the power imbalance is somewhat altered, that alteration is neither the point nor the main intended consequence of the legal reform.

Rather, legal regulation of the priest–child relationship constitutes an improvement in the *safety* of the hierarchic relationship – it renders the relationship one of unequal power, but with a diminution of the possibility that the relationship becomes a site of exploitation, abuse and violence – and hence in the subjective wellbeing, as well as equality, of the child. The good that is accomplished through law is that it occasions an improvement in the quality of the child’s or young adult’s participation in religious institutions – not a displacement of that participation with the mores and rituals of radical individualism. The relationship remains hierarchic, but it is ‘defanged’ so to speak: the intellectual and spiritual authority of the priest and bishop are preserved,

but their political power that was a function of law's absence, is considerably blunted.

Likewise, feminists who have recently championed laws controlling the enforceability of surrogacy contracts, do so fully aware of the limitation those laws undeniably impose upon the contractual autonomy of individuals. Legal regulation of these contracts means, after all, that surrogate mothers can avoid their contractual obligations after freely entering into them, and that sort of regulation invariably means that the choices of would-be future surrogates are drastically curtailed: buyers will pay far less for such a service than they would if they were entering a fully enforceable contract. At the same time, however, feminist advocacy of greater legal regulation of the market for surrogacy parenting is rarely premised upon a nostalgic embrace of the traditions of natalism and maternalism that those contracts (and other vehicles for 'intentional' rather than 'natural' parenting) sought to displace. Rather, the advocacy of legal regulation of these contracts is premised upon the assumption that contractual ordering of parental obligation is no better a means of designating parental roles than traditionalism. Rather, a set of reformed traditions, as well as a set of voluntarist options, ought to develop around a conception of family that respects both the egalitarian interests and needs of mothers and children both. That conception, one might reasonably suppose, will by necessity draw on resources other than the thin reed of contemporary contractual intent, or the thickly layered but thickly misogynist web of familial traditions that have to date overdetermined so much of our personal and familial identities.

Examples could be multiplied. Gains wrought from environmental regulation, both domestically and internationally, come at the cost of individual and corporate autonomy, but those costs are not, in any obvious way, incurred in order to further entrench tradition, or traditional values. There may be a 'tradition' of stewardship, rather than exploitation, of the earth that is more than worth reclaiming, but it is surely not toward that end that environmental regulation is for the most part aimed. Rather, and more prosaically, the goal of environmental regulation is for the most part well within what used to be called the 'police powers' of the state: the safety, health and wellbeing of the community. Gains in the safety of marriage brought about through the expansion of the criminal sanction may intrude upon institutional traditions, but they are not sought, for the most part, so as to enhance the 'individual autonomy' of the marital partners. Again, it is safety within intimate relationships, not radical individualism or even individual autonomy, that is the goal of legal movements to criminalize intimate assault. The rapid development and then deployment of norms of public international law likewise may restrict individual or state autonomy, but they clearly do not do so in the name of 'tradition.' These laws seem aimed at something other than individual autonomy or the preservation of historic traditions both. Their moral point seems to lie elsewhere, and if these laws are at all typical, then the moral point of law more generally seems broader than that which is proposed by our dominant contemporary accounts.

Progressive Legalism

Against this backdrop of the increasing reach of positive law's sanction, the ill fit between our dominant legalist jurisprudence and the content of our expanding positive law, and the moral limitations of the two dominant accounts of law's promise, the lack of an attractive and explicitly progressive account of the moral good that law does – of law's moral point – is both disturbing, and consequential. For surely, even if neither liberal nor conservative legalism can well account for it, there seems to be some good in the growing reach of law suggested by these examples. Law after all, often displaces, rather than underscores, traditions and markets *both*, and an increase in the reach of the former often entails a diminution in the power of the latter. What, then, to return to the question initially posed, is the moral point of law? Where is the good, in legalism, that is not already captured by the dominant traditions? Why is it, all things considered, a better idea than not to subject human behavior of the sort described above to the governance of rules?

I think we can identify three such moral goods, all present in varying degrees in the examples of legal expansion cited above, and all slighted in our dominant accounts of legalism. First, in several of these examples, the presence of law itself has a limited but unmistakably egalitarian dimension not captured by either conservative or liberal legalism. The subjection of human behavior to rule, whenever it displaces a pre-legal sovereignty or hierarchy that carried with it a threat of violence or exploitation, equalizes, somewhat, the parties within the scope of the rule. A quasi-Kantian equality is imposed, through law, upon the pre-legal, or 'traditional,' hierarchic relation that was present in law's absence – whether it's the pre-legal Hobbesian world in which the physically strong dominate, or the pre-legal, hierarchic world of Catholic authority, in which the priest dominates over the child or seminarian, or the pre-legal, hierarchic patriarchal world of family, in which husbands dominate wives, or the pre-legal world of commerce in which the wealthy dominate by manipulating the preferences of the weak. When law and legalism displaces these regimes, the Hobbesian, or Nietzschean, *uber-mensch* relinquishes that part of his natural authority that flowed from his superior strength, and the threat of violence that superiority implied – and likewise, the patriarch in the family. In the presence of secular law, the Catholic priest likewise relinquishes some of his power that privacy and insularity had granted him, and the religious and psychological hierarchy created by the unequal power of priest and lay person is likewise tempered. In the presence of law, the capitalist relinquishes some economic power he or it possesses in law's absence, and the hierarchy created through wealth is regulated. In the presence of law, the private distribution of power displaced by law becomes equalized, by virtue of the shared subjection to the sovereignty of law. The moral good of legalism, in part, is the moral good of equality.

The parties are not, however, in any of these situations, made *equal*, nor are the 'traditions' that are legally regulated, obliterated. The result of legal intervention is not, in other words, either radical equality *or* radical individualism. The priest continues to exercise spiritual and intellectual authority over the seminarian and altar boy and the seminarian's identity continues to be defined by his participation in

tradition, not his radically individualizing choice. The husband or wife continues to exercise whatever authority might flow from his or her higher income, greater prestige or status, or greater moral or intellectual authority within the family. The capitalist obviously continues to command the labor of the worker. What does happen, is that the natural hierarchy that is embedded in the pre-legal social tradition is dismantled and reassembled, and in ways that bring it in accord with public, and civic values – the *sovereign* nature of the hierarchic relationship is displaced by the civil egalitarian relationship of law. The potential for violence, the threat of violence, and hence for exploitation between sovereign and subject in the pre-legal hierarchy is diminished, but without destroying the relationship itself, or its hierarchic quality, or the tradition in which the relation is embedded. The traditional relationship is made *safe*, by virtue of being subject to law. It is not displaced by law, or by the sovereignty of individual choice.

Second, the value of law in some of the scenarios described above – and particularly those involving limits on contractual freedoms – lies in the potential of law, and correlatively, of political deliberation, to serve as a challenge to the preferences and desires that are otherwise reflected in, and gratified in, various exchange markets, and to do so, not toward the end of enhancing tradition, but rather, of enhancing human wellbeing. Subjection of human behavior to the governance of rules, at times, better promotes human wellbeing than does the sovereignty of choice. Limits on the enforceability of surrogacy contracts, mandatory unwaivable warranties in consumer contracts for the sale of dangerous goods, various environmental regulatory regimes, laws regulating wages and hours in labor markets, and more generally, legally imposed constraints on market forces, share this overtly ‘paternalistic’ goal: the desires that would be gratified in the absence of the legal restraint on the market regime lead to outcomes radically at odds with the interests and wellbeing of the parties themselves, and the market in those industries should as a result be regulated by legal constraints. Far from being a necessary evil to be avoided at all cost, this kind of paternalistic intervention, particularly when the result of democratic participation, is a positive good: it both rests on and represents not only a healthy skepticism regarding the capacity of even adult consumers to make consistently rational choices regarding their own wellbeing, but more generally, upon the judgment that political deliberation, rationally and sympathetically engaged within a civic and republican regard for communal, and not just individual wellbeing, *ought* at times to trump individual gratification, as a mechanism for setting a shared communal path. Political, democratic deliberation regarding the dispensation of our labor, the exploitation of our natural resources, the uses and abuses of our reproductive and sexual capacities, and the marketing of dangerous but alluring products, holds out the promise (not the guarantee) of a due regard paid to long-term over short-term interest, of a sympathetic engagement with the needs and interests of many rather than the will of the more powerful few, and a rational consideration of conditions that are in fact conducive to human welfare. Impulse buying, or selling, on markets, promises none of this. The goodness of law lies precisely in its paternalistic capacity.

Third, the goodness of law – the subjection of human behavior to the governance of rules – in some of these cases, derives directly from law’s role in broadening our sense of human community, and our understanding of the circle of humanity to whom we owe duties of regard. Central to the goodness of law, in other words, is the hope that rational rule can and should displace natural ‘clannishness,’ thus at least holding out the possibility that we can regard (not embrace) as equals those who are distant and of no relation to ourselves. As our capacity for sympathy expands our natural egotism to include as within our sphere of concern the interests of those who are close to us, our capacity for law has the potential to expand our responsible behavior to include those who are distant. The most natural if the most ambitious extension of this legalistic urge is an international legal order: a law that can extend our responsible behavior to include those who are beyond our national borders. The idea of law – the subjection of behavior to rules – no less than the idea of commerce, holds out the possibility of just this sort of legally structured ethical cosmopolitanism.

The subjection of human behavior to the governance of rules is a good thing, then, in part, because it displaces cruel and brutal realms of private sovereignty, and thereby serves egalitarian ends; because it provides a vehicle for a mode of choosing between human ends that is more inclusive and reasonable than relying on the gratification of felt desire; and because it opens us to the possibility of a broad and ecumenical regard for others beyond the sphere of either our dependence, our recognized ‘similarity,’ or our felt natural sympathy. The egalitarianism, the rational, democratic deliberation directed toward the end of improving human wellbeing, and the ethical cosmopolitanism promised by law, are all, in part, what makes expansionist legal moments, like the one we may now be in, moments of some hope to political progressives. Law *itself* carries these promises, at least as much as it promises greater individual autonomy or the respectful preservation of traditions. To the extent that it does so, law is itself a progressive idea. The minimal, programmatic lesson I would draw from this, is simply that political progressives who are also lawyers should be invested in the work of understanding law’s promise, rather than exclusively indulge the attractive impulse to delegitimize the regressive, conservative, or libertarian ideals of law identified by others.

Notes

- 1 Shklar (1964).
- 2 For a sampling of commentary and reporting on the contrast between the Church’s characterization of the scandal as one involving, primarily, sin and redemption, and secularists and some Catholic laity seeking a legalist response from law enforcement, see, for example, Kraupthammer, ‘Why Didn’t the Church Call the Cops?’ *Washington Post*, 7 June 2002: A27; Michael Kelly, ‘Guilty at the Top,’ *Washington Post*, 5 June 2002: A23; Edward Walsh, ‘Prosecutors Examine Legal Culpability of Church Officials; Hiding Sex Abuse Could Bring Charges,’ *Washington Post*, 5 May 2002: A16; Frank Bruni, ‘Crime and Punishment; Prosecuting the Church,’ *New York Times*, 14 April 2002: Week in Review p. 1; Pierce, S. and Cooperman, A., ‘Pope Relays Concern Over Sins of Clergy,’ *Washington Post*, 22 March 2002: A1.

- 3 See generally 2002 Wash. Legis. Serv. Ch. 207 (S.H.B. 1444) (West); 2002 Wash. Legis. Serv. Ch. 371 (S.S.B. 6387) (West); N.H. Rev. Stat. Ann. § 193-F (2002). See generally *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2000); *Murrell v. School Dist. No. 1*, 186 F.3d 1238 (10th Cir. 1999); *Oona by Kate S. v. McCaffrey*, 143 F.3d 473 (9th Cir. 1998).
- 4 See generally Epstein (1999).
- 5 For a discussion of the arguments often asserted for the desirability of legal regulation over marriage and reproduction, as opposed to private ordering, see Singer (1992). For a contrary view, see Shultz (1990).
- 6 See generally Drumbl (2002), for an excellent discussion and endorsement of these developments in international law, in the wake of the terrorist attacks on the World Trade Center and US Pentagon on 11 September 2001.
- 7 See Bill Keller, 'The Monster in the Dock,' *New York Times*, 9 February 2002: A19; Barbara Crossette, 'At The Hague, It's a Leader on Trial, Not a People,' *New York Times*, 17 February 2002: sect. 4, p. 3; Christopher Wren, 'Sierra Leone War Crimes Court to Begin Deliberations in Fall,' *New York Times*, 21 March 2002: A13; Barbara Crossette, 'War Crimes Tribunal Becomes Reality, Without U.S. Role,' *New York Times*, 12 April 2002: A3; Editorial, 'New Era in War Crimes Justice,' *New York Times*, 4 May 2002: A12.
- 8 Dworkin (1986).
- 9 Compare *United States v. Virginia Military Institute*, 518 U.S. 515, 519 (1996) (opinion of Ginsburg, J.) with *ibid.*, 566 (Scalia, J. dissenting).

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Index

- adjudication vs legislation 19, 23–5, 117–19, 121–2
- Aeschylus 6, 24
- analogical reasoning 119
- Aristotle 19, 35
- authorship, indeterminacy thesis 27
- Bentham, Jeremy 73
- Berlin, Isaiah 85
- bicameralism 50, 53
- Bork, Robert 13
- Bowers v. Hardwick* 148
- Brown v. Board of Education* 14, 15, 32
- Bugliosi, Vince 32–3
- Burke, Edmund 51–2, 72–3, 140, 146, 157, 167, 170
- Bush v. Gore* 14, 15, 31–4, 55–8, 132
- caregivers' rights (*doulia*) 6–7, 10, 74, 94–8, 101
- Catholic Church 170, 171–2, 173–4
- citizens
- duty of obedience 37
 - protection against private assault 40, 47, 84, 85, 90, 93–4
 - vs non-citizens 158
- Clinton, William (Bill) 2, 131–2, 133
- common law 51–2, 72, 136
- community
- and rights 79–82
 - see also* Good Society; relational rights
- conflicting rights 89–91
- conservative and liberal legalism 167–72
- Constitution 4–6, 8, 13–14, 22
- Hobbes 39–40
 - Paine 50, 52–4
 - rights 72, 85–6
 - United States
 - Fourteenth Amendment (Equal Protection Clause) 4–5, 9–10, 31, 40, 86, 107
 - Thirteenth Amendment 39–40
- constitutional law 43–4, 52, 75–6, 118, 136
- contracts 122, 123–4, 128–9, 141–2, 170–71
- Hawkins v. McGee* 111–12, 113, 114–15, 117, 122, 128, 142, 146–7, 152
 - see also* surrogacy contracts
- Critical Legal Studies Movement 14, 15, 22–3
- democracy 17, 44–7, 48, 49, 50, 53, 55, 56
- Dewey, John 76, 85
- dominant interpretation of legal justice 3, 4–11
- doulia* (caregivers' rights) 6–7, 10, 74, 94–8, 101
- Dworkin, Ronald 1, 13, 22, 83, 89, 100, 166
- Dylan, Bob: *The Lonesome Death of Hattie Carroll* 131, 132, 133, 150
- economic perspective
- formal equality 134, 135–9, 151–2, 155–8
 - vs traditional account 144–9
 - rights critique 73
- egalitarianism 156–8
- Eisenstadt v. Baird* 97–8
- environmentalism 90, 91–2
- Epstein, Richard 84–5, 113, 114, 147
- equal protection right 77, 78
- Fourteenth Amendment 4–5, 9–10, 31, 40, 86, 107, 115, 127
 - Thirteenth Amendment 39–40
 - see also* private violence
- equality 35
- external morality of law 155–8
- Family and Medical Leave Act 7, 97
- fidelity to law
- citizens 37
 - judicial 14–15, 16, 17, 21, 30
- Fineman, Martha 6–7
- Fiss, Owen 13
- Forbath, William 76
- formal equality 2–3, 7–8, 10–11, 107–64

- authorship 27
 economic account 134, 135–9, 144–9,
 151–2, 155–8
 external morality of law 155–8
 humanistic interpretation 149–55, 157–8
 identity theorists' critique 125–8, 129,
 130, 138–9
 indeterminacy thesis 121
 judges' decisions 107, 108, 117, 118–19,
 120–21, 125
 legal justice 132
 linguistic critique 122–5
 realist theorists' critique 120–22, 128–9,
 130, 137–8
 traditional account 134, 139–49, 151–2,
 155–6, 157–9
 Foucault, Michel 122, 123, 125
 Fourteenth Amendment (Equal Protection
 Clause) 4–5, 9–10, 31, 40, 86, 107
 freedom of speech right 77, 78, 90–91
 Fuller, Lon 27, 155, 156
 'fundamental capabilities' approach to rights
 92–3, 101

 Gabel, Peter 83
 Ginsburg, Justice 153, 169
 global indeterminacy thesis *see*
 indeterminacy thesis
 Golding, William 9
 Good Society 75–7, 79–80, 87, 88–9, 91–2,
 100–102
 see also community; relational rights
 goodness of law 174–5
 government
 Paine's principles of 44–5
 see also state(s)

 Hampton, Jeanne 36, 43
 Hart, H.L.A. 43, 155
Hawkins v. McGee 111–12, 113, 114–15,
 117, 122, 128, 142, 146–7, 152
 Heyman, Steven 84
 Hobbes, Thomas 9–10, 17, 34–43, 56–7, 84,
 85, 93
 vs Paine 46–8, 55, 58
 Holmes, Oliver W. 120, 133, 137–8, 169
 Horwitz, Morton 14, 83
 human nature
 economic account 135
 false conception of 81–2, 86
 traditional account 140, 143
 humanistic interpretation of formal equality
 149–55, 157–8

 identity issues 140–41, 142–3
 identity theorists' critique of formal equality
 125–8, 129, 130, 138–9
 indeterminacy thesis 26–31, 32, 33–4
 costs 26–7, 28
 formal equality 121
 Hobbes 36, 42–3
 judges' decisions 27–9, 30
 individual liberty 135–6, 137–9
 individualism *vs* community 79–81
 institutional protection 98–100
 internal morality of law 155

 judges 20–21, 22–3
 adjudication *vs* legislation 19, 23–5,
 117–19, 121–2
 formal equality 107, 108, 117, 118–19,
 120–21, 125
 indeterminacy thesis 27–9, 30
 and Sovereign 36
 judicial criminality 29, 32–3
 judicial fidelity to law 14–15, 16, 17, 21, 30
 judicial inauthenticity 28–9
 judicial review 20, 100

 Kahn, Paul 18
 Kennedy, Randall 93
 Kittay, Eva 6–7, 74, 94
 Kronman, Anthony 110, 134, 139, 140, 146

 'Law is King' 43–4, 45–6, 49, 50–52, 54
 Law Professors' Letter 14, 15, 31, 32, 33–4,
 55–6, 57
 law *vs* politics 5–6, 18–19, 23–6, 30–31, 42,
 121, 124–5
 lawyers 30, 31, 33–4, 56–8, 108–109, 119
 'legal formalism' 108, 109
 legal justice
 definition 1–3
 dominant interpretation 3, 4–11
 and formal equality 132
 legalism 165–7
 conservative and liberal 167–72
 progressive 173–5

- legislation *vs* adjudication 19, 23–5, 117–19, 121–2
- liberal and conservative legalism 167–72
- liberal rights 73, 74–6
- liberal states/liberalism 18, 19–22, 35, 73
Hobbes 35–6, 38–9, 42
see also right(s)
- libertarianism *see* formal equality, economic account
- linguistic critique of formal equality 122–5
- Lochner v. New York* 32, 148
- Locke, John 19–20, 34–5, 36, 42, 43, 84–5
- MacClain, Linda 6–7
- Marx, Karl 75, 76
- Michelman, Frank 15, 31, 32, 33–4, 55–6, 57, 76, 88
- Mill, John S. 85
- moral obligations 81–2, 83
- morality of law 155–8, 166–7, 170
- negative rights 76–7, 78, 80–83
vs positive rights 83–6, 87, 89–91
- Nussbaum, Martha 75, 76, 79, 92–3, 101
- Orwell, George 4, 9, 82
- Paine, Thomas 1, 17, 37, 43–54
vs Hobbes 46–8, 55, 58
- paternalism 77, 174
- Pennsylvania Constitution 53–4
- Personal Responsibility and Work Opportunity Reconciliation Act 7, 97
- Plato 19
- political liberalism *see* liberal states/liberalism
- politics
political power 4–6, 9
representative democracy 44–7, 48, 49, 50, 53, 55, 56
rights and subordination 77–9
vs law 5–6, 18–19, 23–6, 30–31, 42, 121, 124–5
- positive rights
and relational rights 92–102
vs negative rights 83–6, 87, 89–91
- privacy right 77, 78, 81–2
- private power 36–8
private violence 37–8, 39–41
protection against 40, 47, 84, 85, 90, 93–4
see also equal protection right
- private *vs* public spheres 77–9
- private *vs* public will 17, 37–8, 39, 42
- progressive legalism 173–5
- property 41
- race issues 77, 78, 127–8, 129, 130–31
- Rawls, John 19, 21–2, 38–9
- realist theorists' critique of formal equality 120–22, 128–9, 130, 137–8
- relational rights 95, 98–9
and positive right 92–102
see also community; Good Society
- representative democracy 44–7, 48, 49, 50, 53, 55, 56
- republican government 44–5
- right(s) 1, 2–3, 6–7, 10, 11, 22
to bear arms 87–8, 89–90
caregivers' (*doulia*) 6–7, 10, 74, 94–8, 101
and community 79–82
conflicting 89–91
Constitution 72, 85–6
costs of abandoning 86–92
freedom of speech 77, 78, 90–91
'fundamental capabilities' approach 92–3, 101
and Good Society 75–7, 79–80, 87, 88–9, 91–2, 100–102
liberal 73, 74–6
natural 46, 47–8
negative 76–7, 78, 80–83
positive
and relational 92–102
vs negative 83–6, 87, 89–91
- privacy 77, 78, 81–2
- relational 95, 98–9
and state 72, 76–80, 83
vs policy 89–91
see also equal protection right
- 'rights critique' 73–82
critique of 82–92
- Roe v. Wade* 14, 15, 57
- Rostker v. Goldberg* 115, 116
- Rule of Law 1, 2–3, 4–6, 8–10, 11, 13–18
Hobbes 34–43
legal-academic debate 18–26
critique 26–34

- Paine 43–54
rethinking 54–8
- Sandel, Michael 76
- Scalia, Antonin 13, 21, 108, 143, 153, 169
- Sen, Amartya 75, 76, 92–3, 101
- Shklar, Judith 165
- Simpson, O.J. 131, 133, 150
- slaves 39–40, 86
- Smith, Adam 145
- sociocultural contexts 23
- sociocultural identities 140–41, 142–3
- Sovereign
- Hobbes 36, 37, 38–9, 41, 43
 - Paine ('Law is King') 43–4, 45–6, 49, 50–52, 54
- state(s)
- actors 16, 24
 - constraint 25
 - Hobbes 36–7, 38–9, 41, 43
 - Paine 43–4, 47, 49–52, 53–4
 - and rights 72, 76–80, 83
 - see also* liberal states/liberalism
- Stone, Deborah 6–7
- substantive law 108–109
- Supreme Court 13–15, 31, 32, 56, 89–90, 115
- surrogacy contracts 112–13, 116, 136–7, 142, 152–3, 172
- Whitehead v. Stern* 113–15, 117, 122, 128, 147
 - thin vs thick constitution 53
 - Thirteenth Amendment 39–40
 - traditional account of formal equality 134, 139–44, 151–2, 155–6, 157–9
 - vs economic account 144–9
 - 'treating likes alike' *see* formal equality
- Tushnet, Mark 14, 31, 53, 76, 83
- Twain, Mark: *Huckleberry Finn* 130–31, 132, 150, 151
- Unger, Roberto 14, 146, 154
- utilitarian perspective *see* economic perspective
- violence *see* equal protection right; private violence
- Virginia Military Institute* (VMI) 115–16, 127, 149, 153–4, 169
- Wertmuller, Lina 8
- Whitehead v. Stern* 113–15, 117, 122, 128, 147
- women
- formal equality 126–7, 129
 - Virginia Military Institute* (VMI) 115–16, 127, 149, 153–4, 169
 - 'Violence Against Women Act (VAWA)' 5, 9–10
 - see also* surrogacy contracts
- Zanzinger, William 131, 133, 150