ARTICLES

LAWYERS, JUDGES AND BIOETHICS

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This article began as the opening sections of a book on various problems in bioethics, but it got out of control. The intended audience was not restricted to lawyers or judges, so it seemed appropriate to explain why one would want to read something on bioethics by a law-trained person. I hope to explain this below through an account of the role of legal analysis and process in bioethics.

I. PROLOGUE: ARE THE GODS CRAZY OR ARE WE?

A film from South Africa called *The Gods Must Be Crazy*[1] had the movie equivalent of fifteen minutes of fame in the mid-1980s. Some thought it clever, funny, well performed, and unintrusive.[2] Some thought it tainted by its failure to denounce apartheid (which was not directly at issue) and by its portrayal of the Kalahari Bush people as stereotypic amusing innocents.[3] Some thought all of these things.[4]

I mention this film not for artistic or political reasons, but because it contains a theme about the difficulties of absorbing innovations into existing social and conceptual systems—including legal regimes. Fortunately for film art, the point was not squarely addressed in *Gods*. Perhaps unfortunately for scholarly art, I address

1. THE GODS MUST BE CRAZY (C.A.T. Films 1984).

2. *See, e.g.*, Judy Klemesrud, *"The Gods Must Be Crazy"—A Truly International Hit*, N.Y. TIMES, Apr. 28, 1985, § 2, at 15 (quoting Jamie Uys, the film's creator, as stating that the film is not patronizing and that "everybody's funny, whether white, black or brown").

3. *See, e.g.*, Sheila Benson, *Critics' Notes; 2 Movies: When A Bill of Fare is a Bill of Goods*, L.A. TIMES, May 5, 1985, at 24 (stating that the movie perpetuated racial stereotypes and was patronizing toward the bushmen, and that the filmmaker's description of the "ingrained shame of apartheid" as "silly and naughty" made people uncomfortable with the movie).

4. *See, e.g.*, Vincent Canby, *Film View; Is "The Gods Must Be Crazy" Only a Comedy?*, N.Y. TIMES, Oct. 28, 1984, § 2, at 21 (stating that the film is genuinely, nonpolitically funny, but that there remains a feeling that any South African work that does not denounce apartheid, condones it through silence).

this theme here because a technological or social innovation's apparent "lack of fit"[5] within standard ways of thinking and feeling (in law or elsewhere) may be one of its prime characteristics. This anomaly—fully perceived or not—may press us to ban, limit or "undo" the innovation and to rectify any harms it may have caused. It may also move us in another direction: to revise our thought—and perhaps certain behaviors—in order to accommodate the change. Moreover, these two arms—pressure to limit use and pressure to revise our thinking and behavior—seem linked: many of us are likely to resist changes that challenge our current ways of thinking.[6]

The story in *Gods* goes this way:

A Kalahari Bushman, Xi, sees a Coke bottle fall to the ground. It had been tossed from an airplane. He of course does not see it as a Coke bottle, or indeed as anything in particular. The Kalahari's pre-existing ways of thinking are portrayed as inadequate to classify and make proper use of the object. So it was not as if Xi had merely discovered, say, a new plant or animal and needed only to compare it with others in deciding how to deal with it—though that too poses categorization problems. There was presumably no classification below "thing" that reflected what the Coke bottle was, did or was good for.

In itself, this was benign. But the Kalahari immediately discovered practical applications for the bottle, such as pounding things or just playing with it, and its very usefulness caused problems. It was unique, physically indivisible (breakage aside), and produced an immediate need for rationing its use. But (according to the script) the Kalahari had no rationing or time-sharing mechanism (at least in that context), so fights broke out over who was to have custody and control of it. The frustrated Xi, bottle in hand, treks to the ends of the earth (a cliff) and, after assorted misadventures, throws it over the edge. He destroys the technology to save his society.

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5. This phrase resists precise definition. It should become clearer through examples as we move on. For elaboration, see Michael H. Shapiro, *Fragmenting and Reassembling the World: Of Flying Squirrels, Augmented Persons, and Other Monsters*, 51 OHIO ST. L.J. 331 (1990). At bottom, the issue of lack of fit concerns whether an *X* should be viewed as a *Y1*, a *Y2*, etc., or whether it falls into more than one category, or escapes all of them, or whether we can even specify what *Y1*, *Y2*, etc. might be.

6. A similar starting point is taken in my earlier work, *id.*, and in DAVID F. CHANNELL, THE VITAL MACHINE: A STUDY OF TECHNOLOGY AND ORGANIC LIFE (1991). The brief discussion below on fragmentation, reassembly, classification and connected matters is adapted from the former.

So the movie went. It seems unlikely that any human social system would so swiftly fail in this way, but the questionable idea that the Kalahari had no cultural or conceptual tools for managing the Coke bottle's use is what drives the movie's beginning.[7] A parallel idea—which I elaborate below by describing assaults on important category systems—helps explain some of our difficulties in managing biological technologies.

It is easy to see that technological change can create legal difficulties. New products and processes bring patent and accident problems; new medical therapies raise distributional issues and opportunities for new forms of malpractice; and so on. But of what use are "legal modes of thought"[8] generally in dealing with problems of biomedical technology? The existence of patent, accident and malpractice law doesn't explain why legal analysis should infect, across the board, all the problems of biomedical ethics. Why would anyone be interested in a "lawyering" and "judging" approach to the problems of biological technologies?

The explanation takes a while, partly because ideas such as "lawyering," "adjudicating," "legal process," and "legal analysis" are not simple. I start in Part II, which (drawing on earlier works) makes several summary comments about "fragmenting and reassembling the world" as a useful brief description of a major aspect of some biological technologies. The discussion after that—Part III—tries to explain the advantages of legal analysis and legal process in working with biological technologies. One of the core ideas underlying the analysis is that the world of lawyering—which necessarily deals with rival perspectives—is linked to the ideas of fragmentation, reassembly and the multiplication of such perspectives. Finally, I try to chart some

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7. Canby, *supra* note 4, at H21. As Vincent Canby put it:

> To the tribe of bushmen who find it, the bottle is a gift from their gods, something that's not only beautiful to look at but, being the hardest object they've ever come upon, is infinitely useful for all kinds of daily chores. However, as the ponderously facetious soundtrack narrator points out, the bottle also introduces the bushmen to feelings of envy and ideas of ownership, thus threatening their idyllic society that, until then, has existed without poverty, greed or crime.

There is a sequel which does not expressly pursue this theme of anomaly, though it again portrays the collision between technology and supposed innocence. *See* THE GODS MUST BE CRAZY II (Columbia Pictures 1990).

8. I use scare quotes because I find most efforts to describe how various disciplines "think differently" from each other to be hard to understand. Comparing what, say, scientists, lawyers, judges and moral philosophers do may yield important similarities, even beyond the obvious ones involving logical rules of inference and problems of categorization that are part of the fabric of all these domains. But I do not press the comparison here. *See infra* note 42 (reference to Posner) and text accompanying note 223.

asserted limitations and disadvantages of taking the lawyers' stance, and conclude that overall the good outweighs the bad.

II. CARVING UP THE WORLD

We saw that in *Gods* the use of the Kalahari's Coke bottle supposedly didn't fit within their systems of thought and behavior. It didn't fit the categories—the thinking tools—that the group used to shape conduct and define the community. This idea about eluding, straddling, or transcending given classification systems is fairly simple. Anthropologists, cognitive psychologists, philosophers—and lawyers—use it in various forms, but its simplicity reflects neither triviality nor obviousness.[9] Abstract thought by definition involves classification: there is no escape from it.[10]

Many technologies—both by design and effect—separate, recombine, and reform what we see.[11] The result may be a process, outcome, relationship, or thing that no one has encountered before and is not squarely addressed by existing category systems for describing and evaluating the world and our actions. Such rearrangements do not inevitably pose threats to ideology. If you mix iron with carbon you get steel, an unnatural hybrid metal, but this result doesn't seem morally untidy to most persons. An appendectomy is performed by separating a piece of our body from us, but this bare fact is not morally troubling in most forms of Western secular ethics.

Quite another situation occurs when we are, for example, faced with unheard of *conceptual* quarrels about identifying a child's

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9. *E.g.*, MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO 166-67 (Ark Paperback 1984). See the discussion *infra* part III.

10. There are many ways of putting this. *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES 18, 38 (1991) ("To generalize is to engage in a process that is part of life itself."); *see also* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979). Kennedy comments:

> It is impossible to think about the legal system without some categorical scheme. We simply cannot grasp the infinite multiplicity of particular instances without abstractions. Further, the edifice of categories is a social construction, carried on over centuries, which makes it possible to know much more than we could know if we had to reinvent our own abstractions in each generation. It is therefore a priceless acquisition. On the other hand, all such schemes are lies. They cabin and distort our immediate experience, and they do so systematically rather than randomly.

Id. at 215; *see also* STEVEN J. BURTON, JUDGING IN GOOD FAITH 251-56 (1992) (criticizing "particularism" in certain forms).

11. For some remarks on technology, see MICHAEL H. SHAPIRO & ROY G. SPECE, JR., CASES, MATERIALS AND PROBLEMS ON BIOETHICS AND LAW 24-25 (1981). On the idea of separating, recombining and reforming what we see, see generally Shapiro, *supra* note 5.

mother, as when one woman provides an egg and another woman carries it to term. Or about whether a breathing, pulsing organism in human form is "really" dead because all signs of active personhood—cognition, affect, and so on—are gone. In both cases, there has been a double fragmentation. First, life processes have been interrupted and separated—genetics from gestation, cardiovascular function from neurological function. Second, social processes must as a result deal with new interests in conflict[12]—e.g., between persons claiming to be the one true mother, or between partisans of life-as-organic-processes versus life-as-consciousness.[13]

These fragmentation and reassembly processes plainly pose problems of classification within familiar category systems—and many "bioethical"[14] issues exemplify these difficulties. Just why some category challenges are troubling and others are not I can't settle, but there are partial explanations: where categories are morally freighted, our society will likely perceive classification anomalies as serious threats to normative ordering.

The connection between these observations and what I say about the legal process is simply this: there is an affinity between a major task of law persons—to identify and evaluate perspectives, arguing and judging from them to end or avoid disputes—and the idea that some technologies break up life processes and reassemble them, creating new entities requiring our attention. The multiplication of new

12. Because perspectives often closely track interests, I sometimes use the former term as a proxy for the other. The terms are not synonymous. On the terminology of "perspective," "framework," and so on, see *infra* note 15.

13. For a more elaborate discussion of "fragmentation and reassembly," see Shapiro, *supra* note 5.

14. I do not try to define "bioethics" precisely, though the discussion will clearly suggest that a central feature of many bioethical problems is that they challenge important category systems for describing and judging the world and our actions. I elaborate the idea of bioethics as posing special challenges to how we think in an earlier work. *See* Shapiro, *supra* note 5. I note here that the fragmentation-reassembly image, although it can be stretched pretty far, is not the only way of looking at how biological technologies occasion major challenges to existing conceptual systems. For example, there is the idea—although nowhere near realization—of the fully determinate person: one's behavior is completely understood and highly predictable. This notion of a predictable, manageable person does not fit well with our traditional notions of human freedom. Technology can also make possible the substitution or narrowing of purposes for using life processes. One example of using the procreative process in a largely unprecedented way is conception for the purpose of aborting fetuses so their tissue can be transplanted. *See generally* John A. Robertson, *Fetal Tissue Transplants*, 66 WASH. U. L.Q. 443 (1988); 42 U.S.C.A. § 289g-2 (West Supp. 1966) (regulating use of fetal tissue in transplantation). Another illustration is reproduction where the threshold decision to have a child is driven by the hope of providing a "donor" for transplantable tissue. For a report, see James J. Rodriguez, *Woman Leads Fight to Save Sick Children*, L.A. DAILY NEWS, Jan. 31, 1996, at SC1.

and competing perspectives thus maps onto the familiar task of lawyers and judges—to see, defend, and adjudicate among competing frameworks that represent conflicting interests.

III. VANTAGE POINTS AND LAWYERING: VIEWS FROM SOMEWHERE

A. A First Look at "The Legal Perspective"

1. *In General*

One can only speak from somewhere—that is, from some point(s) of view.[15] By "points of view" I mean, loosely, the differing frameworks for perceiving and evaluating that we all carry with us. "What we say about reality . . . depends on the perspective in which we throw it."[16] This is as trite as "This is where I'm coming from," but triteness bears no necessary connection with triviality; it may even go the other way.

I add that I am not offering definitions and comparisons of the terms "point of view," "framework," "perspective," or "conceptual system/structure." Nor is there any pressing need here to link these concepts to the more pejorative ideas of "bias," "prejudice," and "ideology.[17]

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15. *See* Thomas Nagel, The View From Nowhere 3 (1986). Moreover, the very description of where one stands is itself tendered from some vantage point. In some contexts, we may describe "objectivity" or "detachment" as "perspectivelessness"—where analysis will "neither reflect nor privilege any particular perspective or world view." Kimberlé W. Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 Nat'l Black L.J. 1, 2 (1989). But the goal is not to eliminate all frameworks or points of view; it is to select certain characteristics of the analysis as immaterial (at least for certain stages of the discussion)—"positing an analytical stance that has no specific cultural, political, or class characteristics." *Id.* For an account of "professional detachment," see *infra* note 133.

The discussion of perspectives here deals only briefly with the idea of systematic exclusion of particular frameworks through an inappropriately constructed legal system (or perhaps any legal system). For a review of "perspectivism" in this sense, see Burton, *supra* note 10, at 245-56.

16. William James, *Pragmatism, in* Pragmatism and the Meaning of Truth 118 (1978).

17. Completeness of analysis would require such an enterprise, however. There are questions about the "illumination" offered by frameworks embodying "prejudice," and about the credibility and character of those who perceive through them. *See generally* Eugene Garver, *Point of View, Bias, and Insight*, 24 Metaphilosophy 47 (1993). For careful elaboration of ideas about conceptual systems, see Paul Thagard, Conceptual Revolutions (1992).

A complete analysis would also deal with the perspectives associated with various groups or movements. In Academia, for example, the frameworks of "law-and-economics" and Critical Legal Theory are under more or less constant scrutiny. Although these are, as "frameworks," far different from those identified with, say, a particular litigant, some similar comments apply:

In any event, these variant perspectives may reflect interests that can collide,[18] whether among persons or within oneself. And where a technology has carved up and rearranged a life process, there may be new interests reflecting new perspectives held by new entities or by familiar entities in novel circumstances. Gestational mothers and cryopreserved embryos are already familiar examples. The novel entities include not just physical objects in varying circumstances, but new relationships, such as that between gamete sources and a gestator who agrees to transfer the child to its genetic parents.[19]

I do not argue that these varying perspectives and interests are all of equal moral stature.[20] Nevertheless, they are "there" and this is an appropriate point to ask bluntly: Why should we address all these points of view?

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like all frameworks, they emphasize and deemphasize various aspects of reality, and highlight and distort all at once.

Later, I discuss the idea that the legal perspective is "empty" or at least radically incomplete. The claims seem to be that insofar as it is neutral or detached its usefulness is compromised; and that whatever dominant perspectives it contains excludes all others. See *infra* text accompanying notes 133-44.

18. Note that to refer to "rival" or "competing" perspectives is not to claim that they are wholly disjoint or at war. *See, e.g.*, SCHAUER, *supra* note 10, at 19 ("The categories we employ are neither mutually exclusive nor rigidly distinct, but instead overlap and are nested within each other . . . .").

The idea of a perspective is of course not that of a simple unitary entity. To speak of a given person's perspective is to encompass an array of frameworks and conceptual structures within still larger structures. In a larger work, it might be useful to speak at length about how "insiders" and "outsiders" deal with perspectives, but I simply mention the idea here and there. *Cf.* Thomas Morawetz, *Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging*, 141 U. PA. L. REV. 371, 445-46 (1992) (distinguishing participation from the outside and the inside and saying that Richard Rorty "speaks from an impossible position, that of the pure outsider who is not a participant in practices and Rorty's recommendations about using the notions of truth and objectivity are made from that perspective."). *See supra* note 17.

19. *E.g.*, Sarah Franklin, *Making Representations: The Parliamentary Debate on the Human Fertilization and Embryology Act*, *in* TECHNOLOGIES OF PROCREATION: KINSHIP IN THE AGE OF ASSISTED CONCEPTION 96, 128-29 (Jeanette Edwards et al. eds., 1993). Franklin writes:

> This study began with the assumption that new reproductive technologies not only create new persons, but new relations, in both senses of the term . . . . [T]he new reproductive technologies not only create new conceptions in the procreative sense, but in the cultural or imaginative sense as well. Not only are new individuals conceived, but new conceptions of kinship and relations are also 'born.'. . . One does not only derive new relations, but new ways of understanding relatedness, new implications of relatedness, new joys of relatedness, and new fears about the danger of relatedness, or of bringing new relations into being.

Id.

20. The moral relativism vs. antirelativism debate now is often couched in terms of "(anti)foundationalism." *See* Morawetz, *supra* note 18, at 390-92. *See generally* Joan C. Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, 1992 WIS. L. REV. 131.

An initial answer is not hard to formulate, but fully explaining and defending it requires a separate work of scholarship. One obvious reason for considering all the perspectives is that they map onto persons, and respect for personal autonomy and dignity presumptively requires at least respectful attention to those frameworks. Moreover, democracy is founded partly on the idea of autonomy (having a say in what affects you is an aspect of autonomy), and taking multiple perspectives into account seems instinct with democratic processes. Searching out perspectives also enhances our grasp of the import of a dispute or problem.[21] Though "import" is itself a function of what normative or political theories we apply, "perspective shopping" serves at least the heuristic purpose of giving us a more complete picture of a pressing situation. Spinoza said something similar:

> [M]en's natural abilities are too dull to see through everything at once; but by consulting, listening, and debating, they grow more acute, and while they are trying all means, they at last discover those which they want, which all approve, but no one would have thought of in the first instance.[22]

This is as good a point as any to mention the possibly massive effects of "shifts of frame" on the decisions one takes. "Reframing" refers (roughly speaking) to a redescription of a situation, event, transaction, etc., that emphasizes or obscures some of its concurrent features. The proposition that such reframing can have striking results on the way in which one perceives and evaluates it is well supported by empirical studies. To say, for example, that a risky enterprise permits a 40% chance of survival may have different effects from saying that it poses a 60% chance of death. Impressive squadrons of investigators are at work seeking explanations and further confirmation.[23] An example familiar in bioethics concerns reframing transactions from "actions" to "omissions." Often, we can accurately

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21. This is a matter of special importance when dealing with a culturally diverse community. *Cf.* Amy Gutmann, *The Challenge of Multiculturalism in Political Ethics*, 22 PHIL. & PUB. AFF. 171, 187 (1993) ("Political relativism rightly endorses argument, negotiation and adjudication among people with diverse cultural identities and conflicting moral positions.").

22. BENEDICT DE SPINOZA, A THEOLOGICO-POLITICAL TREATISE AND A POLITICAL TREATISE 376 (R.H.M. Elwes trans., 1951).

23. *See generally* Edward J. McCaffery, Daniel J. Kahneman & Matthew L. Spitzer, *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341 ("jurors" estimates of damages differ when they are asked what would "make whole" an injured party—the *ex post* perspective—rather than what a person's "selling price" would be if put to the choice of accepting injury for a price *ex ante*); *see also* Jon Elster, *Belief, Bias and Ideology*, *in* RATIONALITY AND RELATIVISM 123, 127 (Martin Hollis & Steven Lukes eds., 1982) ("*Preference change by framing* means that the relative attractiveness of options change[s] when the choice situation

describe situations either way—sometimes as a matter of logical entailment. Thus, characterizing the actions of unplugging a respirator and removing nutrition and hydration as "failures to continue care" facilitates the conclusion that there is no criminal homicide, because omissions are not actionable unless coupled with a duty.[24] And describing probabilities in varying ways—all simultaneously accurate—may affect decisions taken when deciding upon treatment or participation in research.

At least some of what both lawyers and judges do, then, involves trading on the effects of reframing, both in cases where reframing *should* make a difference—because it highlights a morally relevant feature—and where it should not. (Given this "highlighting" effect, we cannot fairly say that lawyers and judges trade *only* on the possibility of "cognitive error.").

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is reframed in a way that rationally should have no impact on the preferences."); RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980); SOCIAL COGNITION 231 (Susan T. Fiske & Shelly E. Taylor eds., 1984); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 457-58 (1981).

I add here a point concerning comparisons between the alternative frames. The example in the text and the familiar "half-full"-"half-empty" idea concern redescriptions that are logical entailments of each other. However, not all redescriptions are formed by such logical equivalences. Paying someone to allow infliction of injury, for example, is not a logical equivalent of paying them because they have already been injured (though of course one can select descriptions of these events that are logically equivalent, such as comparing the physical differences between injured state and the noninjured state, whichever is taken as the baseline). Accordingly, different kinds of framework shifts and redescriptions exist. As suggested in the text, two that are especially pertinent here concern actions and omissions, and alternative descriptions of risk and benefit (which may or may not be logically equivalent).

24. *E.g.*, Barber v. Superior Court, 195 Cal. Rptr. 484 (Ct. App. 1983). For an effort to show that a subject's assent to medical research is often tainted by framing problems in describing risks, benefits, alternatives and randomization, see Dean Cocking & Justin Oakley, *Medical Experimentation, Informed Consent and Using People*, 8 BIOETHICS 293 (1994).

Even something as simple as a preference for "lumping" items together rather than "splitting" them apart (or the reverse) may sharply skew matters. If, for example, one has an expansive view of liberty interests under the Fourteenth and Fifth Amendments, perhaps one is more likely to lump "the right to hasten one's death" into the preexisting constitutional "right to refuse medical treatment" (Cruzan v. Director, 497 U.S. 261 (1990))—and to lump a right to assisted suicide within the "hastening" right. *Cf.* Compassion in Dying v. State of Washington, 79 F.3d 790 (9th Cir. 1996) (finding that a right to physician-assisted suicide for terminally ill patients is protected by the Fourteenth Amendment). Of course, the penchant for lumping or splitting may be driven in a given case by a preferred conclusion. Lawyerly tendentiousness is not a universal virtue nor is it popularly perceived to be so. *See, e.g.*, Joe Klein, *Lawyering the Truth*, NEWSWEEK, Jan. 22, 1996, at 34. See also section III.C.4, *infra*.

What vantage points should we use to best evaluate biological technologies—and with what standard of "bestness" for which technologies? Which disciplines, frameworks or bodies of knowledge provide the most comprehensive perspective, or the best array of perspectives, or the best way to "integrate" or "aggregate" perspectives—while at the same time leaving them intact and acknowledging their force?[25] I am not searching for a theory of everything—just good places to stand. Nor am I specifying any particular connection between exploring perspectives and reaching sound results—beyond the simple claim that such exploration may unearth morally relevant issues, ideas and facts.

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25. Combining or aggregating perspectives does not, whatever it does, destroy them. (This is mentioned again, *infra* at text accompanying notes 114-16 and 119-21.) In a legal dispute, the defeated viewpoints are suppressed, but not "annihilated." *See* BERNARD WILLIAMS, MORAL LUCK 73-74 (1981) [hereinafter WILLIAMS, MORAL LUCK] ("The [obligation] that outweighs has greater stringency, but the one that is outweighed also possesses some stringency . . . ."). In some cases,

> an agent can justifiably think that whatever he does will be wrong: that there are conflicting moral requirements, and that neither of them succeeds in overriding or outweighing the other. In this case, though it can actually emerge from deliberation that one of the courses of action is the one that, all things considered, one had better take, it is, and remains true that each of the courses of action is morally required, and at a level which means that, whatever he does, the agent will have reason to feel regret at the deepest level.

Id. at 74; *see also* BERNARD WILLIAMS, PROBLEMS OF THE SELF 172 (1973) [hereinafter WILLIAMS, PROBLEMS] ("I think, . . . in terms of acting for the best, and this is a frame of mind that *acknowledges* the presence of both the two *ought's*."). "As in metaphysics, so in the realm of practical reason the truth is sometimes best understood from a detached standpoint; but sometimes it will be fully comprehensible only from a particular perspective within the world." NAGEL, *supra* note 15, at 140. Perplexity may even be something to celebrate. *Id.*

But the ideas of acknowledging and combining perspectives in tension may seem to be flat nonsense to many. The idea of taking rival views, principles—whatever—and "putting them together in a coherent whole" or even "taking them into account" in a rational way seems absurd where true contradictions or practical oppositions are involved. *See id.* at 3, 11. Even if such "consolidation" efforts are not nonsensical, it is not clear how to pursue them. Compromises that, say, apportion damages may afford practical accommodation, but this is not always possible because some disputes do not involve battle along a continuum. A cryopreserved embryo either is brought to term or it is not.

In discussing what he calls the subjective and objective standpoints, Nagel says that there are "ways in which the two standpoints cannot be satisfactorily integrated, and in these cases I believe the correct course is not to assign victory to either standpoint but to hold the opposition clearly in one's mind without suppressing either element." *Id.* at 6. "Objectivity" thus seems to entail abstracting out certain features of one's position. *See* Amartya Sen, *Positional Objectivity*, 22 PHIL. & PUB. AFF. 126, 127 (1993) (focusing on the "inescapable positionality of observations" and referring to objectivity as involving "personal invariance without making a blanket demand for positional invariance at the same time."); JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1971) (discussing the "veil of ignorance" idea).

I use the vantage points of a lawyer and legal scholar.[26] This is the path of least resistance for an academic lawyer—but I argue there are independent benefits. I intend the account that follows to be suggestive only. It is difficult even to describe law and legal process, let alone evaluate them, without begging some much-argued questions. I am not trying to provide an apology for all aspects of any working legal system, but to argue for the lawyer's perspective as a tool (among others) for analyzing the issues of biological technology raised here. I also defend the actual use of formal legal processes.

2. *Disputes and Perspectives*

I start with the (more or less) obvious: the business of lawyers and judges deals, in part, with disputes or controversies, whether by way of trying to avoid them or managing them when they arise.[27] (This sort of avoidance-or-management I will loosely refer to as "ordering.")[28] To deal with disputes is necessarily to deal with rival

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26. I of course do not claim that the remarks here are typical of what any given Anglo-American law-trained person would say. Even more importantly, when I speak of "lawyers," "the lawyer's perspective," "judges," and so on, I am not referring to any unitary perspective. Even at a high level of generality, it would be hard to define such a perspective. Despite such difficulties, I do not think it is bootless to try to identify characteristics shared by law-trained persons, even if they hail from different kinds of practice or even from different national traditions.

I sometimes use "lawyer" to comprehend a very large domain, including advocates, judges and legal scholars, though there are sharp differences as well as expectable similarities among these groups. I try to avoid conflating their functions.

27. This is not the only business. More, the ways in which the disputes are dealt with are often intended to reflect and implement basic values. But specifying what values are in this set and how they are ordered is not the target here. *See generally* STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING (1985) ("legal reasoning" as mechanism for dispute anticipation or resolution in advanced societies; other methods of dispute resolution generally); *see also* JOHN BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS 7 (1983) (adjudication and resolution of disputes); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 423 (1990) ("[M]uch of law's social value lies not in resolving disputes but in preventing them from arising by laying down the rules that people live by . . . ."). *See generally* LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 17-20 (1975).

The idea of dealing with disputes—whether by anticipation or resolution—as part of the core "stuff" of law is quite broad. One needs to add some criterion of (semi)formality, or else processes such as parental discipline become "law." They are law-like and may bear some of the characteristics of external legal authority (minors are in many ways in their parents' charge, by law), but it is a bit much to say they are law. I do not try to identify a set of necessary and sufficient conditions for identifying legal systems. *See generally* H.L.A. HART, THE CONCEPT OF LAW (1961). On the problem of distinguishing law and custom and "defining" law generally, see E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN 18-28 (1954).

28. I'll leave "ordering" as a primitive term. Legal scholars regularly use the term, e.g., as in referring to lawyers as "specialists in the normative ordering of human relations." *The Rule of Lawyers*, ECONOMIST, July 18, 1992, at 3 (quoting Harvard Law School Dean Robert Clark).

perspectives and frameworks that track various interests, and in doing so to create or revise ways of seeing and judging.

Lawyers and judges thus have the vantage point of persons who traverse and (in a limited sense) embrace a series of vantage points. The latter vantage points are of course ultimately attached to persons (even if corporations or other complex entities are involved). What are the lawyers' and judges' more specific missions under these circumstances?

There are two lawyerly missions that we need to specify. While they may seem to be "contrary" in some ways, they are closely aligned. A primary mission is to defend a client's interests.[29] One way of pursuing this is to describe and defend the client's frameworks of perception and evaluation, and in doing so, to place her interests within the protective aspects of a rule system. (This system is taken to include entities such as principles and standards.)[30] To "present and defend a framework" refers roughly to describing a party's interests, how they are affected, and why this matters under a given rule system—in a way that favors the party's interests. Here, tendentiousness is a virtue.

The lawyer of course argues this to a decider—a court, a jury, whatever—by reference to supposedly authoritative criteria for decision. The lawyer (on most theories), however, does not necessarily embrace the party's perspective (or "have" it) as an "internalist"; her stance, as a lawyer, is neutral and detached[31]—though she may run thought experiments in which she tries to take the internal stance, or may really hold to it. Note again that the analytic aspect of lawyering

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29. It is at least a mission in many "modern" legal systems. I will generally avoid adding this qualifier.

30. Continued reference to "rules, standards and principles" might be more accurate, but for economy, I use "rules" only. There is an argument that standards and principles are a particular kind of rule. On the distinctions among rules, standards and principles, see Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967). On standards as a type of rule, see POSNER, *supra* note 27, at 44.

31. *E.g.*, William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36-37 (principles of neutrality and partisanship as lawyers' first and second principles of conduct). Simon later states:

> [T]he need for adversary advocacy arises not, as in Positivism, from divergent ends, but from the problem of cognitive dissonance. The separation of functions within the trial contributes to an informed decision by assuring that no aspect of either side's position will be overlooked. The advocate's partisanship is a psychological convention designed to enable him to achieve the benefits of specialization.

Id. at 70. I do not discuss the deeper philosophical problems of analyzing the idea of neutrality. *See generally* BURTON, *supra* note 10, at 239-45.

here is useful as a tool, even where invoking the legal process is undesired or unlikely: one can proceed—in part—*as if* the lawyerly mission were being carried out in formal legal processes.

But the larger role for lawyers is not confined to winning in court: it involves doing well for their clients, and this includes pursuing closure through settlement, compromise, negotiation and bargaining.[32] (Judges may also have a duty of sorts to facilitate settlement.)[33] If there is a "rule system" that governs this, it is looser and more inchoate than what one finds in adjudication. Here I discuss adjudication only.

A prime judicial mission within an adjudicatory framework is to understand and explain the contending points of view and to choose among them—or to restructure and recombine them—but in accordance with that rule system.[34] Of course, use of "that rule system" presupposes some way of identifying it and distinguishing it from neighboring systems. And the system may itself be revised under the very pressures of identification and testing through adjudication.

Whatever the paths taken, both lawyers and judges must work with the abstractions—the classification schemes—that inform the rule system. (To "work with" involves analysis, revision and possibly abandonment of categories[35]—enterprises that are "conservative" and "volatile" all at once.) These abstractions are supposed to enable us to describe, evaluate and manage the embattled situation at hand.[36]

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32. Consider the wide range of processes invoked by legal systems and private ordering systems to deal with disputes. *See, e.g.*, BRIAN BARRY, POLITICAL ARGUMENT 84-93 (1965) (types of social decision procedures).

33. *See generally* FED. R. CIV. P. 16(a)(5) (court may order pretrial conferences to facilitate settlement). *Cf.* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 711 (1986) (statistics on high incidence of settlement).

34. *E.g.*, POSNER, *supra* note 27, at 232 ("[Judges'] business is to resolve disputes in a way that will vindicate [official] norms and, more fundamentally, satisfy social needs.").

For present purposes, I do not think that anything turns on variations in modes of judging within the Western world—on whether, for example, the judge is part of an "inquisitorial" system instead of an "adversarial" one. *Cf.* Dan L. Burk, *When Scientists Act Like Lawyers: The Problem of Adversary Science*, 33 JURIMETRICS J. 363, 365-66 (1993) (mentioning the distinction).

35. There are important problems left aside here of distinguishing among "interpretation," "revision," "abandonment," and the like. And whatever the maneuvers are called, there are "rule of law" issues to be dealt with: revision and abandonment suggest true judicial legislation.

36. A simple law-teaching example may help: If a law prohibits motor vehicles from entering the park, is it violated by bringing in a nonoperational Model T Ford to put on display? By bringing in a motorized tricycle for the kids to ride? The abstraction is "motor vehicle"; the situation—captured by a more specific abstraction—is "old nondrivable car on display" or

To advocate an interest adequately, lawyers often must become instinct with the viewpoints they are hired to present, and must also investigate the threat of competing perspectives.[37] This is true whether the lawyer is operating in the most rigorously adversary manner—as in formal adjudication—or in other formats, such as negotiation and mediation. Similar observations apply to good judging—and, for that matter, to good legislating, rule making and many other decision-making enterprises. In many contexts, then, certain forms of tendentiousness produce more benefits than burdens.[38]

3. *Applications to Interpretation*

Of course, lawyers and judges cannot fully discern or "evaluate" interests, frameworks and points of view without using the frameworks and points of view that are supposed to guide their decision making. It is not a neat, sequential process. Adequate representation within an explicitly rule-governed system thus requires reliance on rational argument framed in terms of the system.[39] Because the system is almost certainly embodied (in large part) in legally authoritative texts—principally constitutions, statutes, regulations, and judicial opinions—interpretation is a central task of lawyers and judges pursuing this rational argumentation.[40]

Because of the nature of the abstractions that characterize all complex thought, including both the creation and use of rules, adjudication faces a variety of problems: choosing the text to interpret

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"child's tricycle." For a more extended and detailed analysis of legal problem-solving techniques, see Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313 (1995).

37. Some advocacy may be more effective where lawyers blind themselves altogether to other viewpoints and countervailing considerations. However, in the general run of cases, this seems unlikely to be so.

38. Thomas Morawetz makes much the same point:

> The vital stake that each participant has in ways of thinking will tend to perpetuate such debate, but the fact that their ways of thinking incorporate active consideration and evaluation of others' ways of thinking moves them toward change and accommodation. The most legal theory can tell us is that all debate is carried out in tension between these tendencies. The normative lesson, such as it is, is to maximize empathic consideration of alternative ways of thinking.

Morawetz, *supra* note 18, at 433.

39. *E.g.*, BURTON, *supra* note 27; BELL, *supra* note 27, at 23; Richard Warner, Note, *Three Theories of Legal Reasoning*, 62 S. CAL. L. REV. 1523 (1989). This is precisely the point at which some observers focus their claim of law's conservatism: the very viewpoint that viewpoints must be assessed within any rule system is ordinarily not challenged. Is adhering to that viewpoint indeed a disadvantage across the board or in any particular case, and in what sense of "disadvantage"?

40. I bypass entirely the question of the legal authoritativeness of these texts.

(sometimes by interpreting a "higher" text); choosing from an array of rules that seem available in the larger text or canon; characterizing facts within the categories embraced by the rules; and, possibly, challenging the categories themselves as wrongly identified.[41] So, when law persons talk of legal reasoning as reasoning by example or analogy through discerning similarities and differences,[42] they are referring, at least in part, to a process of determining how the situation at hand fits—if at all—into a classification scheme.

One may well argue that this is not the whole of legal reasoning (indeed, no one thing is the whole of legal reasoning[43]—here, as elsewhere, nothing is everything). There may be no apparent criteria for deciding on relevant similarities or differences.[44] The participants in the law process may also, as suggested, try to revise the very classification scheme that drives the investigation of similarities and differences (without challenging the notion that some categorization is required).

One might, on the other hand, also say that these processes of revision are themselves forms of argument by analogy within a "larger" set of abstractions that explain the relevance of similarities and differences by identifying key criteria for classification. I do not pursue this. I simply say that law is partly a set-theoretic enterprise. We ask if X is a Y for purposes of C, and we ask if Y is the right category, and if X has been rightly selected as a candidate for characterization, and if we have understood C rightly.

So, to draw on bioethics once again: Is a gestational mother—who of course has no genetic connection to the child—a mother for

41. "Text" here covers statutes, judicial opinions and other standard sources of law. The general term, of course, omits importance differences (as between the text of a statute and the text of a judicial opinion and its constituent "rules of decision").

42. *See generally* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948); BURTON, *supra* note 27, at 25-40; Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993). *But see* POSNER, *supra* note 27, at 459. Posner writes:

> [T]here is no such thing as "legal reasoning." Lawyers and judges answer legal questions through the use of simple logic and the various methods of practical reasoning that everyday thinkers use. In part because of the law's (salutary) emphasis on stability, the scientific attitude and the methodology of science are not at home in law.

Id.

43. *Cf.* BURTON, *supra* note 10, at 22-27 (discussing various characterizations of law).

44. Sunstein, *supra* note 42, at 773.

purposes of resolving a custodial dispute?[45] Should a person in a permanent vegetative state—his presence as a functioning person irretrievably lost—be viewed as dead for purposes of deciding on withdrawal of care and burial (and for all purposes whatever)?[46] Do Dr. Jack Kevorkian's actions belong in the category "assisting suicide" or "killing" for purposes of deciding what offense he committed, if any?[47] Is a cryopreserved embryo the sort of entity that has a right to life?[48] And—again—have we identified the right categories at the right levels of generality?

Problems of this sort strikingly illustrate what some interpretation theorists speak of as the "open texture" or relative indeterminacy of language—an idea that goes well beyond the simpler notions of vagueness and ambiguity.[49] The phrase indicates doubts about knowing whether an *X* is a *Y*—doubts generated in part by uncertainty about the nature of both *X* and *Y*. Because of this inescapable imprecision, lawyers, judges and legislators are forever pressing and exceeding the boundaries of existing concepts and classifications—though the legal system generally seeks "the least intrusive" conceptual change appropriate for the preferred result. The process, once again, has both conservative and dynamic aspects, inextricably connected. ("Conservative" may mean "resistant to change" or may characterize

45. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (gestational surrogacy contract upheld, in the sense that it helped establish the statutory meaning of "natural mother" through applying the concept of "parenthood by intention"; award of custody to genetic parents upheld).

46. *See generally* In Re T.A.C.P., 609 So. 2d 588, 595 (Fla. 1992) (anencephalic newborns are not dead under Florida law; donations of their organs are illegal). For a debate, compare Michael B. Green & Daniel Wikles, *Brain Death and Personal Identity*, 9 PHIL. & PUB. AFF. 105 (1980) with George Agich & Royce Jones, *Personal Identity and Brain Death: A Critical Response*, 15 PHIL. & PUB. AFF. 267 (1986).

47. *See, e.g.*, David Margolick, *Jury Acquits Dr. Kevorkian of Illegally Aiding a Suicide*, N.Y. TIMES, May 3, 1994, at A1. *But cf.* People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994) (ruling, among other things, that it is not unconstitutional to impose criminal penalties on one who assists another in committing suicide).

48. *See generally* EXPERIMENTS ON EMBRYOS (Anthony Dyson & John Harris eds., 1990).

49. The phrase "open texture" is strongly associated with Friedrich Waismann and has been invoked many times. *See, e.g.*, BELL, *supra* note 27, at 25-26; SCHAUER, *supra* note 10, at 34-37. It designates a form of indeterminacy that cannot be resolved "by giving more accurate rules" and is thus different from simple vagueness; terms that are open textured are always "corrigible or emendable." Friedrich Waismann, *Verifiability*, *in* LOGIC AND LANGUAGE 117, 120 (Antony Flew ed., 1st ed. 1952). I make no effort to define "indeterminacy" precisely. The meaning of "indeterminacy" may itself be indeterminate. Certain forms of indeterminacy seem to be at work in the "fuzzy logic" domain of not-fully-determinate sets. *See* Bart Kosko & Satoru Isaka, *Fuzzy Logic*, SCI. AM., July 1993, at 76, 81 ("[F]uzzy logic can often better model the vagueness of the world than can the black-and-white concepts of set theory."). On indeterminacy in law generally, see Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

particular views or philosophies, whether reflected in existing conditions or not. The emphasis here is on the former.)[50]

Here, however, we must face the objection that if it is difficult to apply categories because they seem (partly) nullified or inapplicable, we are left without thinking tools and thus bereft of "law." *Ex nihilo, nihil fit.* We probably do not see ourselves as bereft of law when we are puzzled about whether, say, a motorized tricycle falls under the ban on motor vehicles in a park. The puzzlement is of a different sort, however, when we are supposed to identify a "natural mother" but the procreative process has been fragmented—the child's genome is not derived from the woman who gave birth to her. We are accustomed to thinking that "natural motherhood" has a logic entailing that there be exactly one mother for any given child. It is not the vagueness of a continuum or hierarchy that poses difficulties: the size, speed, power, and purposes of using a motorized tricycle can be compared with exemplars of motor vehicles without making us seriously question the very grounds of our system of abstractions. But separating gestational contributions from genetic ones does not simply move standard reproduction along a continuum or hierarchy; it seems to blow up the "motherhood" abstraction.

Paradoxically, it may be that precisely where category systems blow up, "the law" (in some form) is most urgently needed, as I try to show later. Law persons, as keepers of the categories, are among those we look to when those categories are under assault. Part of the very function of these keepers is testing the foundations of the abstractions they work with in the process of applying them.

A further look at the judicial perspective may shed more light on the uses of taking the law person's vantage points. Consider the widespread hostility to judicial action in certain contexts. Adjudication is often blasted as "judicial legislation," and its critics distinguish between "applying the law" and "creating it."[51] But these claims reflect vast oversimplification. On one view, both applying and withholding a classification to an unforeseen circumstance look like "making up the law." On another view, reaching a legal conclusion that is

50. Compare John Bell's observation that "[o]n the whole, the western conception of adjudication accepts that resolving disputes according to the standards of the legal system may involve the formulation of new legal norms." BELL, *supra* note 27, at 8. Those new legal norms may embody various forms of conceptual adjustment and reclassification, at various levels of generality.

51. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 17 (1990) (discussing "judicial activism").

not deducible from any handy set of givens is simply an inevitable aspect of the inevitable process of interpretation, and it seems bootless to insist that judges are "acting like legislators" in doing what they *must* do—absorbing and choosing among the rival perspectives hurled at them within an extant rule system.[52]

"Judicial legislation" may seem more palatable to some in a constitutional context (though equally bad or even worse to others). I mention this because bioethics litigation, predictably, is often infused with constitutional argumentation. Many, perhaps most, of the bioethical problems we address move us to invoke our most basic values, and we think that the Constitution has something to say about at least some of them: it's a text that supposedly has been packed with (all?) first-rank values. The right to custody of a child, for example, deals with the very point of procreational autonomy, and with the values of familial association, and (more generally) liberty, equality, fairness and justice. Whether medical and nonmedical care should be withheld or withdrawn from patients—or imposed upon them—raises questions about fair procedures and appropriate criteria for the preservation or loss of life and liberty.[53]

I add a short note on constitutional argument structures, because they illustrate the law's search for relevant perspectives but may compound fears of "judicial legislation." U.S. constitutional law embraces a set of argument structures ("models," "schemas," "meta-rules") for identifying, characterizing and ranking constitutional claims. Important constitutional rights trigger one set of argument structures, lesser rights trigger others. The study of these structures, often known as "standards of review", occupies much of constitutional law courses.[54] Each structure directs us to ask and answer critical questions about the practices, actions or circumstances at issue. These templates may at any given time be in rapid flux. For example, the Supreme Court

52. "Within an extant rule system" is an important weasel phrase. It is obviously vague (e.g., where does a rule system begin and end?), and it also slides around problems of "nontranslatability" or "incommensurability" between different systems, cultural or otherwise. *E.g.*, Morawetz, *supra* note 18, at 436. *Compare* Max Gluckman, *Concepts in the Comparative Study of Tribal Law*, *in* LAW IN CULTURE AND SOCIETY 349 (Laura Nader ed., 1969), *with* Paul Bohannon, *Ethnography and Comparison in Legal Anthropology*, *in* LAW IN CULTURE AND SOCIETY, *supra*, at 401 (debating issues in comparative studies). *See generally* Richard Warner, *Incommensurability as a Jurisprudential Puzzle*, 68 CHI.-KENT L. REV. 147 (1992) (discussing the problem courts face when they are forced to compare incompatible claims).

53. *See, e.g.*, Thor v. Superior Court, 855 P.2d 375 (Cal. 1993) (holding that a competent, informed adult has a fundamental right to forgo medical treatment even at the risk of death).

54. *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 532-758 (2d ed. 1991) (covering standards of review in equal protection cases).

seems bent on shifting from talk of "implied fundamental rights" (such as "privacy") to "liberty interests." That move evidently displaces the standard of review known as "strict scrutiny," under which government must, in defending itself, show that its conduct is necessary to promote a compelling interest. The Supreme Court's replacement standard in the abortion contexts is identified as an "undue burden on the interest" test—which seems to be an adjustment that lightens the government's burden of justification but fails to explain clearly the criteria for "undueness."[55] The point to note here, however, is that these standards of review are explicit directions to investigate clashing perspectives and (in some cases, at least) to "balance" interests.[56] They are entailed by constitutional hierarchies.

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55. *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Planned Parenthood v. Casey, 505 U.S. 833 (1992). The joint opinion in *Casey* attempts to explicate this standard, mentioning the notions of a "substantial obstacle" and the displacement of the woman as ultimate decision maker, but there is no need to consider this here.

Many have attacked the way in which the Supreme Court has dealt with standards of review, but I avoid this debate and assume that standards of review, as "second-order rules," have some content that instructs courts on what stance to take with respect to certain kinds of competing claims (e.g., what presumptions to start with, what may overcome them). I do not think that these "metarules" are "extratextual" in any significant sense, for they are text-driven—at least given long-held views that one can infer from constitutional text/structure various hierarchies of rights, interests and powers. That is, such metarules are driven by hierarchic relations within the constitution itself: hierarchy entails standards of review. If you buy into interpreting, say, "liberty" to include some strongly protected rights, this necessarily yields an escalated burden of justification on the state. Nor is it useful to view standards of review as "circular" in the sense of reflecting a preconceived view as to the outcome. Increasing the likelihood of a specified outcome under given circumstances is one of the functions of a presumption. In affecting such likelihoods, standards of review thus implement the constitutional valuation process that precedes the identification of a standard of review. The invocation of a standard of review thus reflects a prior (if collapsed) process of constitutional interpretation that sorts certain things (e.g., liberties, powers) into hierarchies. There is no need to reinvent the wheel every time a standard of review must be selected. If no standard is expressly selected, the same processes of sorting/valuation must be carried out. I plan to elaborate these propositions in an article in preparation.

56. The default standard of review (the "rational basis" test) may also involve forms of balancing in applying ideas of rationality. That standard applies where no specially protected liberty interests or rights are at stake, or where no suspect or "semisuspect" classifications are involved. The question in any given case is whether, under that standard, the court is doing any review at all. For an essay on the nature and logic of balancing, see Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992). I do not claim that every judicial instance of invoking "heightened scrutiny" in fact entails a balancing, and leave open the issue of whether we can speak of domains of absoluteness in constitutional law where no balancing takes place. Bear in mind that what passes for "rationality analysis" may acquire greater strength in an equal protection context. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

4. *Law and Category Busting*

We now have a rough schema of law as (in part) a system for (1) dealing with disputes (2) that reflect varying perspectives. The legal system does so (3) by relying on rational arguments involving (4) interpretation of authoritative texts (5) that contain rules framed in terms of imprecise or "open-textured" category systems that must be applied and, if necessary, challenged.

This schema helps explain why law is a useful vantage point for dealing with category-shattering technological fragmentations: the legal process is not nullified by challenges to category systems; such challenges are an integral part of what law necessarily deals with, to a greater or lesser degree in varying cases.[57] (Historical examples having no direct connection with bioethics are numerous. The segregation cases,[58] for example, represented a sharp challenge to certain given understandings of the meaning of "equality.")

By arguing this, I do not deny that dealing with anomalies by eradicating or transforming categories may stretch legal process—standing alone—to the breaking point: the creation and reform of law is not "autonomous" in the sense that it looks only to its own previously identified texts, canons, and frameworks to reconstruct the law.[59] Nevertheless, category busting doesn't destroy the role of law persons, and law persons are likely to propose modifications, qualifications and replacements that at least allow management until creative social and legislative acts occur that reconstruct the reigning abstractions. Indeed, this is part of their role. In *In re Baby M*,[60] for example, the genetic and birth mother, Elizabeth Whitehead, received visitation rights, despite her agreement to terminate her maternal

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57. The idea that "law is argumentative" may suggest a similar point. *Cf.* RONALD DWORKIN, LAW'S EMPIRE 13 (1986) (referring to legal practice as argumentative).

Of course everyone—not just "legal formalists"—works with classification systems. Formalism is under siege in part because of the way in which it interprets and works with classifications and classification systems. As Justice Souter said in *International Society for Krishna Consciousness, Inc. v. Lee*: "Public forum analysis is stultified not only by treating its archetypes as closed categories, but by treating its candidates so categorically as to defeat their identification with the archetypes." 112 S. Ct. 2711, 2724 (1992) (Souter, J., concurring and dissenting).

58. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

59. The fact that interpretation of a given text requires attention to "outside" considerations for the interpretative process—a dictionary, a scientific fact—does not alone necessarily compromise "the autonomy of law," but this is a large topic tangential to the current enterprise. For a brief analysis of "the autonomy of law," see Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

60. 537 A.2d 1227 (N.J. 1988).

rights for the benefit of the genetic father and his spouse.[61] Gestational and genetic mothers might under some circumstances share custody, even though we have not openly reinvented our category systems to allow for two mothers.[62]

Law persons thus deal with many categories which are in some respects contingent, malleable and adjustable to unforeseen circumstances. Lawyers have asked why one form of biological connection—e.g., genetic or gestational—should be valued over another; about the comparative physiological effects of genetics and gestation; about the nature of the personal bonds formed by gestation and genetic contribution; and about the governance of the original intentions of the contending parties—all as part of the process of identifying and using extant categories.

Having said all this, one might urge that the foregoing is simply a defense of thinking in certain ways, but not of submitting a matter to the legal system for decision. Indeed, popular sentiment argues that

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61. *Id.* This was a "traditional" surrogacy case. A married couple, the Sterns, asked Mrs. Whitehead—herself married and with children—to be artificially inseminated with Mr. Stern's sperm. Mrs. Stern believed she might have multiple sclerosis and feared that pregnancy would be unduly dangerous for her. The Sterns were awarded custody.

62. I am not recommending this—particularly under circumstances where an advance agreement specifies otherwise. For discussion of these custody issues, see Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (gestational surrogacy contract upheld as such on "parenthood-by-intention" standard, and award of custody to genetic parents upheld), *cert. denied*, 510 U.S. 874 (1993). The court rejected the argument by the American Civil Liberties Union that two natural mothers be recognized, 851 P.2d at 781 n.8. Characterizing the California Supreme Court's position on the status of the gestational surrogacy contract in that case poses some difficulties. The Court clearly looked to the gestational surrogacy contract to establish the intentions of the parties, which the court held material—in the case at hand—to the meaning of "natural parent" under the Uniform Parentage Act, CAL. FAM. CODE §§ 7600-7954. In Moschetta v. Moschetta, 30 Cal. Rptr. 2d 893, 900 (1994), the Court of Appeal stated that the contract in *Calvert* was not held to be "enforceable per se." But contracts are often enforced in light of the demands of statutes or bodies of common law doctrine, and it does not seem misleading to say that the contract in *Calvert* was upheld as such. The provisions in the agreement, after all, ultimately determined the outcome, given the statutory constraints. *See also* Adoption of Matthew B., 284 Cal. Rptr. 18 (1991) (allowing child of traditional surrogacy agreement to remain with biological father and adoptive mother; court declined to rule on validity of surrogacy contracts). On the "parenthood-by-intention" standard, see generally Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297; John L. Hill, *What Does it Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991); R. Alta Charo, *United States: Surrogacy*, *in* LAW REFORM AND HUMAN REPRODUCTION 223 (Sheila A.M. McClean ed., 1992) (recommending we acknowledge that two women may be biologically related "natural mothers," without specifying which may have superior claims to raise a child, and that neither "mother" be entirely cut out of the child's life regardless of the court's decision about who has a primary role in raising the child).

some matters are "not for the law" or at least "not for lawyers and courts"[63]—a view that coexists in sharp tension with calls to submit hard moral issues to a secular authority that decides "from above."[64] I deal with this briefly later, but, for now (paradoxical as it sounds) I simply note that coercive legal process may vindicate individual autonomy by establishing criteria for private choice, to be presumptively and formally protected against outside intrusion.[65]

B. DISCLAIMERS

I do not mean to paint too rosy a picture of legal analysis and legal process, or to draw too much from a restricted set of legal-technological problems. But simply saying these things conveys little, so here are some disclaimers.

i) I am not recommending lawsuits as a way of life. I am talking about using legal-analytic techniques to help get a grip on difficult problems. I am also suggesting that formal adjudication promotes certain goals and may be desirable in various circumstances, but I do not tout it as the default mode of managing disputes or ordering our lives.[66]

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63. *Cf.* Norman J. Finkel et al., *Right to Die, Euthanasia, and Community Sentiment*, 17 LAW & HUM. BEHAV. 487, 502 (1993) (finding jury nullification in active euthanasia cases where right to die is asserted); *see also* POSNER, *supra* note 27, at 437-38. Posner writes:

> [T]he system of rules has gaps, and (only partly for that reason) the rules themselves are constantly undergoing creation, modification, and destruction. To determine what to do when the rules run out requires a judgment of policy, and nothing in a conventional legal education or in the experience of practicing law equips a lawyer to make policy judgments to which the community has compelling reasons to defer as it defers to scientists in matters of scientific judgment.

Id.

64. 2 MAX WEBER, ECONOMY AND SOCIETY 760-65 (Guenther Roth & Claus Wittich eds., U. Calif. Press 1978).

65. Indeed, since the advent of the "right to die" issue, the courts have tried to specify circumstances in which judicial review is unnecessary and perhaps inappropriate. *See generally* ALAN MEISEL, THE RIGHT TO DIE iii-xix (Cum. Supp. No. 2 1993).

66. *See generally* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991). For a critique of the role of law in bioethics, see ROGER B. DWORKIN, LIMITS: THE ROLE OF THE LAW IN BIOETHICAL DECISION MAKING (1996). Although Professor Dworkin stresses that "our [legal-institutional] tools for dealing with social problems posed by rapid change in biology and medicine are limited at best," *id.* at 18, he also states that "[t]o suggest that the law has no role to play in the area of biomedical advance would be both stupid and unrealistic." *Id.* at 2. In this article, I am stressing whatever fraction of the glass is full. *See also* Carl E. Schneider, *Bioethics in the Language of the Law*, HASTINGS CENTER REP., July-Aug. 1994, at 16, 18 ("the idioms of the law are often less apt than they might appear. They have arisen in response to needs for social regulation, but the systemic imperatives that shape the law are sometimes a poor pattern for bioethical discourse."). As I argue here, the fragmentation/

ii) I am not suggesting that problems posed by the life sciences are unique in benefitting (or suffering) from the attention of law persons.[67] I am instead suggesting that some of these problems have characteristics that make them appropriate targets for legal analysis and legal process.

iii) I am not offering any specific methodology for dealing with any class of problems or disputes: I do not know how to aggregate or combine perspectives and frames of reference into a coherent, objective reality, nor how or to "create" them where appropriate; and, as I said, I do not specify any particular connection between the investigation of perspectives and ultimate moral judgments. Indeed, some might argue (hyperbolically) that what I say here is anti-methodology. A better account would be that we are somewhere between precise algorithmic problem solving and conceptual chaos, perhaps closer to the latter than the former. Although there is a prescriptive core to what I am saying (lawyers and judges ought to be involved in various stages of dealing with the problems posed by developments in the life sciences), I try to explain this by describing what lawyers and judges do, and mapping their work onto a set of technology-driven problems.

iv) Despite the emphasis on the multiplicity of perspectives here, I do not take any position on value pluralism or (anti)foundationalism, or offer detailed analyses (moral or psychological) about dealing with disagreement, building consensus, and the like.[68]

v) Despite the use of the phrase "the legal perspective," I do not posit an all-encompassing unitary legal framework.

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reassembly image strikingly reveals some of this "inaptness" of legal language—but it also suggests that some normative discourse is similarly inapt. *See supra* text accompanying notes 9-14. I argue, however, that this may call for legal process, rather than preclude it. *See infra* text accompanying notes 217-20. *See also infra* note 166.

67. By "law persons" I mean primarily lawyers and judges, although whatever is said about them may apply in part to persons whose work goes by different names but seems to involve "legal process." *See supra* note 26. I do not mean to suppress the sharp differences between lawyering and judging. I am simply in a "lumping" rather than a "splitting" mode.

68. *Cf.* Morawetz, *supra* note 18, at 430-33 (discussing value pluralism and consensus theory). In short, despite the measured endorsement here of a search for and through perspectives, this is not a work of philosophy presenting a particular theory of knowledge or ultimate reality. For remarks on "perspectivalism" as a philosophical position, see generally Williams, *supra* note 20, at 131 n.1 ("Perspectivalism is another term for nonfoundationalism that stresses that, without absolutes, we cannot achieve a 'view from nowhere'."). The variant term "perspectivism" is sometimes used to denote claims that an institution or practice systematically excludes certain perspectives. *See* BURTON, *supra* note 10, at 245-56.

vi) Some might view the account of lawyering and judging outlined here as just a description of rational thought and persuasion under particular circumstances, having nothing distinctively to do with legal process or with identifying what problems a legal system ought formally to address. (On this view, the phrase "thinking like a lawyer" would be systematically misleading.)[69] At bottom, the style of thought common to lawyers and judges is determinative, not the formal legal process—and these law persons have no monopoly on such modes of thinking.

Within limits, these points are sound. In fact, they are part of my case, rather than an assault on it: I mean the account here to be about rational thought and persuasion under various circumstances.[70]

But these observations confirm my point about the utility of lawyering. By virtue of training and professionalization, law persons may be more likely to engage in certain useful forms of thought than are others—although perhaps also more likely to engage in various counterproductive behaviors. Of course, the formal processes of law are themselves often needed—not just their associated forms of thought.

vii) I somewhat idealize the versions of lawyering and legal institutions presented here, though I try to take account of real world constraints. (There are puzzles about what should be contained within the ideal, but resolving them is not necessary for present purposes.) In particular, there is a distinction between the ideas (or ideals) of legal analysis and process, and the skill with which they are pursued. And where we find that analysis and process are not going well, we have another distinction to consider: an underlying "design" defect in the institutions driving the weak performance as opposed to a sound design being poorly implemented.[71] But where lawyering and judging go well, the design of the institutions is partly accountable for this because its characteristics stimulate and reward certain forms of training and practice.

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69. For one explication of "thinking like a lawyer," see Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 U. MIAMI L. REV. 409, 423-64 (1986) (discussing, among other things, use of analogies and handling of apparent contradictions). *Cf. supra* note 42 (reference to Posner).

70. Burk, *supra* note 34, at 365 (disciplines of law and science "encompass the same cultural assumptions, and employ the same tools of inductive and deductive logic."). Burk goes on to compare and contrast "the professional norms of science and law." *Id.* at 364-68.

71. Some designs may be defective largely because they increase the likelihood of poor performance by personnel.

viii) As I said, I draw attention below to the supposed limitations and risks of the use of legal modes of thought and of legal process. Some of these risks are inextricably connected with the very benefits of such use. Here, one needs to distinguish between a cognitive core of lawyering—seeing frames of reference and describing and characterizing them in different ways for different purposes—and the realities of adversariness as single-minded advocacy of a point of view. These are different aspects of adversariness.[72] While any of them may be beneficial under various circumstances, vigorous legal combat isn't always wonderful.[73]

Indeed, to say that legal processes and legal thinking may have some limitations may seem a radical understatement.[74] The idea that lawyers are in any way helpful—especially in times of jarring change—seems counterintuitive to many. Many think, for example, that lawyers and judges are forces for conservatism and reaction, not change and accommodation.[75] Canonical rules and the idea of precedent, they say, bind rather than liberate. And the focus on perspectives as part of one's advocacy or representation of an interest may induce a kind of willful blindness and intransigence concerning other points of view.[76] The enhanced clarity of vision may dazzle and thus, paradoxically, limit one's vision. The outcome is thus the nonrecognition and annihilation of perspectives—precisely the opposite of what is touted here. This feature of lawyering may have its benefits in producing, from time to time, effective advocacy, but its overall effect is not so clearly advantageous. Moreover, the technologically driven

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72. Some may object to viewing the identification and evaluation of different perspectives as "adversarial," but it is strongly linked to what everyone would describe as an adversary process.

73. *See, e.g.*, Burk, *supra* note 34, at 370-71 (discussing "consequences of adversary science" and contrasting "adversarialism" with "scientific responsibility"). Burk recounts a case involving DNA testing in which rival experts assembled and presented a consensus report to a court. *Id.* at 371 (discussing People v. Castro, 545 N.Y.S.2d 985 (N.Y. Sup. Ct. 1989)).

> As one expert later put it, 'The court system is adversarial, and expert witnesses are encouraged to go further in their statements than they might otherwise be prepared to go.'. . . As the same expert put it, 'We all did much better when we sat down without the lawyers and had a reasoned scientific discussion.'"

Id. But cf. James Glanz, *Debating the Big Questions*, 273 SCIENCE 1168 (1996) (discussing a conference designed to assess the disagreements among cosmologists on the nature and history of the universe): "The conference . . . adopted what one participant called a 'confrontational astronomy format.' Freestyle presentations were followed by often raucous exchanges among the 200 or so astronomers and cosmologists in attendance. The aim was to break down scholarly reserve and highlight the points of dispute and consensus."

74. For a much more comprehensive critique, see Simon, *supra* note 31.

75. *See infra* part III.C.5.

76. *See infra* part III.C.4.c.

shredding of the very categories that lawyers and judges work with simply makes lawyering useless (so the argument goes). The insights necessary for constructing or discovering appropriate abstractions come from "outside" the law: it is not an "autonomous" discipline. What good are lawyers when it comes to choosing whether a genetic or gestational mother is to have custody of a child, or whether a person in a persistent vegetative state is alive or dead? Lawyers and judges have no special claim to the ultimate normative insights that inform a moral system.

The claims that legal process is necessarily reactionary or useless are wide of the mark, but reflect some sound points which I discuss later.[77] In advance, I simply note that of course legal process has "conservative" vectors: that is part of its purpose, and this is generally a benefit, not a disadvantage.[78] But these conservative vectors are intertwined with drives toward revision and even abandonment of categories. Because of the very structure of legal process, lawyering's supposed adverse effects (e.g., the attenuation of moral judgment) seem bound up with its supposed benefits (e.g., the identification and clarification of perspectives). For example, the emphasis on separate perspectives serves to advance individuality and autonomy, but differentiates and separates persons.[79] To lose the disadvantages, then, one may have to give up at least some of the advantages.[80] (And these advantages do not suggest some special normative aptitude of lawyers that is lacking in others. They suggest acquired skills in discerning

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77. *See infra* part III.C.5.

78. *Cf.* SCHAUER, *supra* note 10, at 155-58 (discussing the "argument from stability," i.e., "the argument that rule-based decision-making narrows the range of potential decisions, and in doing so makes changes from the status quo, both for better or for worse, more difficult than would be the case were decision-makers freer to depart from the categories and prescriptions of yesterday.").

79. The very idea of what constitutes a benefit or a harm is itself uncertain. The individuality/separation effects just mentioned illustrate the point.

On lawyering as involving an overly simplified, amoral (and ultimately immoral?) process, see Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 5-6 (1975) ("What is characteristic of this role of a lawyer is the lawyer's required indifference to a wide variety of ends and consequences that in other contexts would be of undeniable moral significance. Once a lawyer represents a client, the lawyer has a duty to make his or her expertise fully available in the realization of the end sought by the client, irrespective, for the most part, of the moral worth to which the end will be put or the character of the client who seeks to utilize it.") Wasserstrom characterizes the lawyer as an "amoral technician," and asks whether this aspect of professionalism is justifiable: "At a minimum, I do not think any of the typical, simple answers will suffice." *Id.* at 6.

80. *See infra* part III.C.4.

issues and raising questions designed to deal with them—skills that strongly promote moral analysis.)

There is thus no inconsistency in claiming that, all things considered, it is often better to apply at least some aspects of legal process in certain contexts than not to; indeed, various features of lawyering and adjudicating may well have been instrumental in facilitating important social changes (although tracing causal networks is extremely difficult).[81] Different styles of adjudication—none of which can flatly be ruled out as jurisprudentially impermissible—may bear the stamp of "inflexibility" to a different degree.[82] Some of these styles may thus be well suited to marked shifts in doctrine.

I add that describing something as an "important social change" does not establish that the *substance* of the change—apart from the mere fact of change—is "liberal" or "conservative," and is not meant to be an endorsement of the change, nor an approving commentary on all the forces working toward the change. Some argue, for example, "that the law in some circumstances will come to favor the interests of attorneys. Where attorneys have a financial interest in the outcome of litigation (as through a contingent fee), then their interests in precedent may determine the shape of the law."[83] Of course, to show that such reshaping is a bad thing requires more than accounting for its genesis. The interests of lawyers *qua* lawyers may or may not coincide with The Good.

ix) The role of "the law" is not confined to what lawyers, courts, or any other particular institution or institutions do: reductivism has its uses, but it doesn't work as a complete account of law (or of most other useful abstractions).

x) I make no effort at describing and fully justifying lawyers' and judges' roles, or tracing these roles out in different cultures. In particular, I do not grapple with competing visions of "legal virtue"—as in

81. *E.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); *see also* GEORGE J. ANNAS, STANDARD OF CARE: THE LAW OF AMERICAN BIOETHICS 3 (1993) (arguing that "American law, not philosophy or medicine, is primarily responsible for the agenda, development and current state of American bioethics.").

82. *Cf.* Catharine P. Wells, *Improving One's Situation: Some Pragmatic Reflections on the Art of Judging*, 49 WASH. & LEE L. REV. 323, 330-34 (1992) (pragmatism vs. formalism in adjudication).

83. Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807, 827 (1994).

the collision between "zealous advocacy" and "justice" conceptions of lawyers' efforts.[84]

xi) I do not intend anything I say here to commit me to any position on what the content of any particular "law" ought to be, nor how far law ought to go in the scope or detail of its regulation. We may well complain, for example, of "too much law" or a "rights rush,"[85] but we cannot plausibly ascribe overregulation to some "lawmaking imperative" that drives lawyers—above all others—to fill all available legal space with expansive prescriptions, acting out another instantiation of Parkinson's Law. Other causal factors—including preferences concerning various basic values—bear investigation here.

xii) Many have said that law—as a calling, as a mechanism to promote the right and the good, as . . . whatever—is in "crisis."[86] These are serious charges by serious authors, but matters this global are not directly addressed here.

Having eliminated many of the more interesting topics, I go on.

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84. *Cf.* Amy Gutmann, *Can Virtue Be Taught to Lawyers?*, 45 STAN. L. REV. 1759 (1993) (arguing that these conceptions are incomplete in neglecting the virtue of lawyers deliberating with nonlawyers about the effects of legal action and alternatives to it). For an extended critique of lawyering in the U.S., see MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994).

85. *See* PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA 11 (1994) ("Detailed rule after detailed rule addresses every eventuality, or at least every situation lawmakers and bureaucrats can think of. Is it a coincidence that almost every encounter with government is an exercise in frustration?"); and *see id.* at 118 ("The Great Rights Rush"). *See also infra* note 152 (lawmaking habits in Germany) and accompanying text. Howard goes on to refer to Gilmore's idea that "The idea of law was ridiculously oversold . . . ." (*See* GRANT GILMORE, THE AGES OF AMERICAN LAW 105 (1977) (referring to the half century preceding the 1970s)). He adds that: "The rules, procedures, and rights smothering us are different aspects of a legal technique that promises a permanent fix for human frailty." HOWARD, *supra*, at 185. I do not think, however, that Howard views the legal suffocation of America as simply a product of legal analysis and process. But Gilmore, referring to "periods in which the formalistic approach is dominant," argues: "The result, both in the legal mind and in the popular mind, is the deeply held belief that law is an engine for curbing our social ills through an enforced adherence to predetermined patterns of behavior." GILMORE, *supra*, at 109.

86. *E.g.*, ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 1 (1993) ("This book is about a crisis in the American legal profession. Its message is that the profession now stands in danger of losing its soul.") Kronman urges the reestablishment of the "lawyer-statesman ideal." *Id.* at 368.

C. Some Elaborations on the Legal Perspective, and Some Problems With It

1. *Texts, Textures, and Interpretation*

The ideas about legal analysis and process recounted above may be unfamiliar to nonlawyers (perhaps even to some lawyers), so they bear some further exploration. I pursue this by stating some well-known objections to using the lawyer's and judge's lenses. Most have been anticipated in earlier remarks.

One such objection to using a legal perspective is that, far from helping us to understand things, it will hinder us because law is, well, "legalistic"—constipated, rigid, unduly conservative and hidebound, partly because it by nature defers to frameworks already in place. Moreover, it cannot offer any guidance in areas of uncertainty and confusion because legal analysis is always a ham-fisted process dealing with rules, and rules—new, old, reinterpreted or revised—cannot do justice to the variety of life.[87]

This seems to be a view widespread among persons without legal training (although some lawyers and judges may think so too—despite the fact that they probably argue cases in much the same way as those who think otherwise).[88] Law-trained persons alive today know that this claim, posited as a universal description, is too simple, but they are likely to concede the "stickiness"[89] of legal thought—one of the characteristics suggested by the term "legalistic."

One response is to deny again that law is a calculus and that much of its utility lies precisely in not being one. (Its virtues in this respect may be compromised, however, when lawyers have an interest in maintaining a very high level of legal uncertainty in order to keep

87. See David Adams's description of the "museum" view of the law in David M. Adams, *Introduction*, *in* Philosophical Problems in the Law 1, 1 (David M. Adams ed., 1992) (describing and criticizing the view that law is definite, clear and unproblematic and that problems can be resolved by locating the correct book); *see also* Ronald Dworkin, A Matter of Principle 11-23 (1985) (criticizing rule-book conception of law); Schauer, *supra* note 10, at 38-52 (discussing "the entrenchment of generalizations").

88. Investigating why the public mythology about lawyering and judging is so off the mark (in some respects) is itself a worthwhile project for social psychologists, but not part of my plans here.

89. "Rules are necessarily *sticky*, resisting current efforts to mould them to the needs of the instant." Schauer, *supra* note 10, at 82.

their services useful.)[90] Not being a calculus, it is not predictable or precise. But it is also more protean and hence adaptable. Depending on where we are in legal or political processes, the mechanism for dealing with disputes is the creation, recognition or identification of a set of rules selected from texts (laws, opinions) that must be interpreted, and one must see that neither selection nor interpretation are simple matters. This holds whether we are speaking of legislation that tries to anticipate specific disputes, or of courtroom adjudication. The abstractions embedded in legislation or judicial rules of decision are then used to describe and evaluate circumstances and actions, and interpreters must select the appropriate abstractions and fit things into them. The creation and interpretation of these texts, as we saw, necessarily involves far more than the construction and application of fixed formulas.[91] It requires forms of abstract thinking with complex concepts that characterize human thought generally.[92] Lawyers, if they are performing well, work at this in a focused and explicit way, making manifest the underlying abstractions that must be selected and applied, and refining the ways in which we all think things through. There is thus no discontinuous conceptual gulf between legal analysis and everyday abstract thought.

Of course, engaging in legal processes comprehends a wide variety of operations and styles, which may take greater or lesser (or no) account of what Frederick Schauer calls "recalcitrant experiences."[93]

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90. *See* Rubin & Bailey, *supra* note 83, at 827-28 (predicting "increased uncertainty and unpredictability in the law" under certain circumstances, as part of a process of law "com[ing] to favor the interests of attorneys.").

91. At a high level of generality, one can capture legal rules and arguments in symbolic, computable form and generate useful deductive results. *See generally* COMPUTING POWER AND LEGAL REASONING (Charles Walter ed., 1985) (containing research papers on artificial intelligence, legal information retrieval and legal reasoning). The editor asks, "Is it possible to use computing to do what legal experts do?" Charles Walter, *Introduction*, *in id.* at 1, 2.

I do not mean to say that computer scientists, engineers and mathematicians do not recognize the relative indeterminacy of dealing with real life. They speak of "fuzzy sets," for example. *See* Kosko & Isaka, *supra* note 49.

92. I am not claiming that lawyers have no moves that are not distinctive, but these moves can be viewed as the crystallized products of legal systems generally and of given legal systems in particular. One example is burdens of proof (and related concepts), which are not ordinarily invoked as decisive in ordinary conversation. *See supra* note 69 ("thinking like a lawyer").

93. "[C]ontrast this malleable conversational model of prescriptive rules with an entrenchment model. Under an entrenchment model of prescriptive rules, the occurrence of a recalcitrant experience, although conflicting with the prior generalization in any of the foregoing ways, would not prompt reformulating the generalization. Even in the face of a recalcitrant experience, an entrenched generalization would still *qua* generalization control the decision." SCHAUER, *supra* note 10, at 45. Later, Schauer argues that "[r]ule-based decision-making is thus to be distinguished from particularistic or 'all things considered' decision-making,'" *id.* at 86,

(The remarks below on interpretation bear this out.) Not every example of legal process will exhibit a refined analysis of abstractions under assault. Indeed, there are countless examples from all periods of legal development that display a kind of "formalism" in the sense of inattention to the difficulties of using legal abstractions under novel conditions—in effect, an overly narrow view of what is normatively relevant to the issue of whether an anomalous X is a Y.[94]

Despite wide variations in practice, however, most legal scholars now believe certain things about the nature of interpretation in law, though much will probably remain disputed until the last proton decays. One belief is that there is no single simple criterion for sound

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thus identifying the very idea of decision by rules with "excluding from consideration some [relevant] properties of the particular event that a particularistic decision procedure would recognize." *Id.* at 78. "Particularistic decision-making," on the other hand, "comprehends everything about the particular decision-prompting event that is relevant to the decision to be made." *Id.* at 77-78. (Doesn't particularistic decision making involve generalizations and abstractions that are at least rule-like?) Note that there is a debate in the bioethics literature concerning "principlism"—but this is not about principlism as the reign of principle generally, nor about the polar distinction between abstraction and concreteness. "Principlism," within the framework of this debate, involves the use of "what has sometimes been called the *four-principles approach* to biomedical ethics, and also called, somewhat disparagingly, *principlism*." TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 37 (4th ed. 1994). The four "clusters of principles" are respect for autonomy, nonmaleficence, beneficence, and justice. *Id.* at 38. Briefly and loosely, then, the debate concerns the use of these "intermediate" level abstractions in illuminating and resolving certain disputes. Beauchamp and Childress contrast "principles" with ethical theory (more abstract), rules (less abstract), and particular judgments. *Id.* at 15. For one critique, see Ronald M. Green, Bernard Gert & K. Danner Clouser, *The Method of Public Morality Versus the Method of Principlism*, 18 J. MED. & PHIL. 477 (1993). One might compare principlism in this sense with Jonsen & Toulmin's account of casuistry: the latter apparently uses abstractions of lesser generality than "principles"—e.g., "maxims," comparisons involving "paradigm and analogy," and "circumstances"—who, what, where, etc. *See* ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING 13 (1988).

> When properly conceived (we claim), casuistry redresses the excessive emphasis placed on universal rules and invariant principles by moral philosophers and political preachers alike. Instead we shall take seriously certain features of moral discourse that recent moral philosophers have too little appreciated: the concrete circumstances of actual cases, and the specific maxims that people invoke in facing actual moral dilemmas. If we start by considering similarities and differences between particular *types* of cases on a practical level, we open up an alternative approach to ethical theory that is wholly consistent with our moral practice.

Id. For a comparison of principlism and casuistry, see BEAUCHAMP & CHILDRESS, *supra*, at 92-100; *see also* Alexander M. Capron & Vicki Michel, *Law and Bioethics*, 27 LOYOLA L.A. L. REV. 25, 28-29 (1993) (commenting on Jonsen and Toulmin).

94. For a discussion of formalism, see Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988). *Cf.* Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 948 (1996) (referring to "black letter ethics codes, which are quite likely to stimulate technocratic virtues at the expense of ethical ones, thereby reducing lawyers' chances of being good ethical deliberators."). Feldman describes the "technocratic lawyer" as "a kind of legal minimalist. She aims essentially for instrumental efficacy in accomplishing goals set by her client." *Id.* at 886. Perhaps this is a species of legal formalism.

interpretation—not legislative intent, not social consensus, not tradition, not plain meaning, and so on. (This is not to say that these different paths have no connection with each other or cannot be used together.)[95]

A connected view is that interpretive difficulties arise because the abstractions used by human beings cannot, except in limited pockets of activity, be defined by necessary and sufficient conditions. (Some but not all mathematico-logical concepts are exceptions.) Even if we did purport to have a single criterion for interpretation, it would be difficult and sometimes impossible to apply. The author's intent, for example, may be unknown or even nonexistent on some point; and there may be no social consensus that enables us to infer what anyone's intentions would be under actual or counterfactual circumstances. Moreover, intentions are complex, whether we speak of one person's intentions or those of a group, and are generally framed in much the same abstractions that the resulting texts are. (What did Senator Jones mean when she said her intention was to promote "equality"? Does her notion require, forbid or allow "affirmative action"?) Consensus or tradition are equally complex and fractured ideas.[96] (Is the "consensus" on active euthanasia measured by the formal absence of a "mercy killing" defense or by the relative failure actively to prosecute or to punish such killing?)

When we deal with legal texts, then, the very idea of "what the law is" is at issue in a theoretical sense, not just an empirical one.[97] (Whether a given sequence of words was "duly enacted and enrolled"

95. *Cf.* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1285 (1987) (discussing "the problem of how different kinds of constitutional argument are appropriately combined and weighed against each other within our constitutional practice").

96. The investigation of tradition is one method identifying strongly protected "liberty interests" in constitutional analysis of the Fourteenth and Fifth Amendments (and in interpreting other portions of the Constitution). Note the disputes about "level of generality" in describing the traditions said to underlie constitutionally protected liberty interests. *See generally* Michael H. v. Gerald D., 491 U.S. 110 (1989) (finding no tradition of paternity rights for a biological father where the child's mother was married to someone else). For analysis, see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990); Timothy L.R. Shattuck, Note, *Justice Scalia's Due Process Methodology: Examining Specific Traditions*, 65 S. CAL. L. REV. 2743 (1992).

97. There is an immense literature on "what the law is," including offerings from legal positivism, conventionalism, legal realism, naturalism, and assorted jurisprudential "isms." These "isms" may be directed at quite different targets. Some are theories of what law in general is, some are theories of what adjudication is (these theories of course overlap), some are theories of what law and adjudication ought to be, and so on. *See generally* Adams, *supra* note 87; Richard H. Fallon, Jr., *Reflections on Dworkin and the Two Faces of Law*, 67 NOTRE DAME

is usually not a big issue.) This point can be put in several related ways by challenging familiar distinctions—between finding and following the law (on the one hand) and making it or going "beyond" it (on the other); between something being "in" a text or "outside of it";[98] between imposing one's values and sifting out the text's actual content;[99] between "politics" and "judging."[100]

Most rational interpreters will try to "make sense" of the law by dealing with a variety of criteria (perhaps ordered in some way)[101]—expectable purposes and intentions, public expectations and traditions, an ideal of coherence, dictionary definitions, and a sense about moral constraints.[102] (But note the remarks below on the supposed evacuation of "value," "emotion," and "ideology" from law.)

Though creating texts is in many ways obviously different from interpreting them, the two are strongly connected. The former is what legislatures and constitutional framers are said to do—though courts in stating "rules of decision" are also doing something of the sort. But the framer must interpret the text she creates—else she is like one of the fabled primates typing endlessly at the keyboard, churning out "great literature" by accident. Text creation presupposes text interpretation, as well as the reverse: one frames and interprets all at once.

It bears repeating that interpretive uncertainty is inevitable: it is built into "conceptual reality." Skill in formulating the law will reduce but not eliminate it. Indeed, efforts to be precise may be inappropriate in certain contexts. Rules may for a variety of reasons be drawn broadly (as where due care is defined by reference to reasonableness) or specifically (reasonable under the circumstances or not, don't go over fifty-five miles per hour). It depends on how tightly we wish to bind ourselves, on the degree of chaos reigning in a given area of human behavior, and on how uncertain we are about what ought to be done or avoided. Moreover, different legal systems and styles of law

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L. REV. 553 (1992); Owen M. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985).

98. Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797 (1982) (on the problems of determining what is "inside" or "outside" the Constitution's text); *see also* Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419 (1992) (finding vs. making law).

99. *Cf.* DWORKIN, *supra* note 57, at 48 (in the example he presents, "[v]alue and content have become entangled").

100. BELL, *supra* note 27, ch. 1; DWORKIN, *supra* note 87, ch. 1.

101. Fallon, *supra* note 95. His discussion of ordering is in *id.* at 1243-46.

102. Dworkin puts this by saying that interpretation involves assessing the relevant materials in their best moral light. DWORKIN, *supra* note 57, at 52-53.

may generally select different degrees of "bindingness" of rules and select different ways of dealing with the irreducible domain of choice inhabited by judges.[103]

For all these reasons, one often cannot simply "look up" the law and answer questions the way one can prove a theorem or find the recommended dosage of a drug. For closure of interpretive decisions, one must look outside the sequence of symbols setting forth "the law."[104] (This is not to say that "looking outside the sequence of symbols" is going "outside the law" or even "outside the text." Checking a dictionary—another text—to assay a current or past meaning of a term in the text is part of sticking to the text. This is part of working with a language.)[105] Even violations of "specific" rules of the road are subject to defenses, say under emergency circumstances, and the idea of an excuse or justification cannot be made fully precise. The text's texture is "open" in various senses—e.g., the lack of a fully explicit account of what will count as a defense.[106]

Given this degree of uncertainty, many speak of the "creative" role of judges and lawyers. One cannot easily state precisely in what sense, and within what limits, judges and lawyers may be "creative."[107] The term is a bit too bloated to be serviceable. Disputes rage about whether this room for "discretion" requires or permits courts to make independent value judgments when trying to leap to a conclusion which is not a deductive consequence of anything they can find in a text.[108] Have we delegated this moral role to courts? To legislatures?

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103. The analysis of "discretion"—its nature, how it should be exercised and bounded—is one path toward generating many significant jurisprudential debates. For remarks on the idea of discretion, see BURTON, *supra* note 10, at 43-50; BELL, *supra* note 27, ch. 2.

104. *See* Gary Melton, *The Law Is a Good Thing (Psychology Is, Too): Human Rights in Psychology Jurisprudence*, 16 LAW & HUM. BEHAV. 381, 383 (1992) (arguing that law is not fully autonomous and so mechanical decision making is impossible). But here too, one may argue that "outside" isn't really outside; texts directly authorize us to invoke certain considerations.

105. Put otherwise, we do not deal with "texts" understood simply as a sequence of marks bearing no meaning or semantic specifications.

106. *See generally* MICHAEL MARTIN, THE LEGAL PHILOSOPHY OF H.L.A. HART 115-43 (1987) (legal definition and elucidation).

107. *See* BELL, *supra* note 27, at 30-35 (concentrating on creativity as "making a choice of the values to be applied where there is no consensus on what is the appropriate standard for the situation in question").

108. "Independent" here means that the judges are not simply reporting what they believe, as an empirical matter, to be community values. But compare Thor v. Superior Court, 855 P.2d 375 (Cal. 1993), where the court, recognizing a fundamental common law right to refuse treatment (understood to comprehend tube-feeding), expressly absorbed philosophical accounts of the status of autonomy as part of its legal argument structure. One plausible interpretation of the opinion is that the court conducted a somewhat haphazard empirical investigation. The

Or are courts required to determine as an *empirical* matter what the community's moral judgments are, rather than undertake their own moral analysis? What if there is no "community judgment"?

One may at first have difficulty believing that such foundational questions about the meaning and role of judicial value judgment in adjudication are still open, but the foundations of many fields have well-known problems. Indeed, on reflection, one may wonder how the law's conceptual "foundations" could ever be in good repair: foundations are precisely where some of the most fundamental moral conflicts reside.[109]

In any event, this problem of fuzzy borders between judging and legislating confronts all fields, including bioethics, and maps onto the familiar problem of assigning tasks to courts and legislatures. It is characteristic of technological innovation that when matters go to court, courts and counsel lament the absence of guiding legislation, and when matters go to the legislature, the legislature punts the ball back to the courts.[110] When the people's representatives fear making a moral judgment not reflecting clear citizen consensus, they often leave the courts to take the heat.

But this is hardly surprising, given the moral and practical difficulties attending many of these problems. We see this vividly when we deal, say, with who is to decide upon custody in surrogacy or frozen embryo cases.

The ideas just described concerning uncertainty and the role of moral judgment in legal interpretation have long been a part of the U.S. jurisprudential scene; they are not recent discoveries by partisans of "deconstruction" or "critical legal studies."[111] And they lead very quickly to several much-discussed sets of problems that cast doubt on

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investigation suggested to the court a community consensus on autonomy as encompassing treatment refusal and enshrining bodily integrity as a major feature of autonomy (and perhaps related values). These "empirical" tasks are so difficult, however, that finding an answer to issues of community values may well be driven by individual moral judgments. The distinction in practice may thus break down.

See BELL, *supra* note 27, at 9-21, 184-246, which discusses the "consensus," "interstitial legislator," and "rights" models of adjudication. The first model roughly describes what is in theory a complex empirical task. The other two models may require independent value judgments by courts. As suggested, however, the amorphous nature of the empirical inquiry may leave the outcome a function largely of the moral views of the deciders.

109. I return to this briefly *infra*, part III.C.3.a.

110. *Cf.* Barber v. Superior Court, 195 Cal. Rptr. 484, 486 (Ct. App. 1983) ("[A] murder prosecution is a poor way to design an ethical and moral code for doctors . . . .").

111. *See generally* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

the utility of resorting to legal analysis and process. One set concerns radical skepticism and nihilism (in certain senses of these terms).[112] Another concerns impairments of democracy, autonomy and privacy. Still another involves some supposed evils of adversariness: contentiousness, dissembling, insincerity.

2. *Skepticism, Pragmatism, the Systematic Exclusion of Relevant Perspectives, and Emptiness*[113]

a. Skepticism:

The idea of radical skepticism is, briefly and loosely, that there is no law but the law of personal preference (however soundly based); one can get any result out of any cloud of words and assert that it is "the right answer."[114] But if everything is right, nothing is right—or "right" means nothing. To admit of any uncertainty, to admit of the role of anything other than logical rules of inference and empirical testing of matters of fact (even that is suspect), is to give up the ship and enter the disordered domains of morality, policy, and whimsy—i.e., into arbitrary personal choice. But the law indeed admits of such uncertainty. The rule of law, then, is just a set of supposedly "authorized" decision makers (that too is up for grabs) doing what they will. The better decision makers identify "the law" with what they think is best, all things considered, without the constraint—just the pretense, perhaps—of having to interpret an intervening text. Since the determination of moral bestness is itself arbitrary, however, the result is the same: an exercise of violence.[115] More, what looks like a respectful attention to various perspectives is in fact a process that "destroys"

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112. *See* Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

113. Complaints about law's emptiness (a sort of amorality) seem to presuppose moral objectivity in complaining about the value bankruptness of legal process. I do not deal with what might be called "nihilism," which seems related to ideas of skepticism. On nihilism, see Singer, *supra* note 112, at 47-56 (describing senses of "nihilism"—e.g., nihilism as "anything goes"; or as a view that no consistent principles unify legal reasoning; and so on); *see also* John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986).

114. For a review of skepticism, see generally Richard H. Popkin, *Skepticism*, *in* 7 ENCYCLOPEDIA PHIL. 449 (Paul Edwards ed., 1967). On moral skepticism, see generally Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1071-1105. *See also* KRONMAN, *supra* note 86, at 160 (discussing the impact of the case method of law teaching "[I]f values are plural and the tensions among them ineliminable, then doubts are bound to arise regarding the point of morality itself, and of law to the extent its purposes are conceived in moral terms.").

115. Robert Cover argued that "[j]udges are people of violence." Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983). But to take one aspect of legal authoritativeness (the threat and sometimes actuality of violence) and ascribe it to the whole is a questionable move. (For one brief expression of disagreement with Cover, see John T. Noonan,

the losing perspectives.[116] (This claim is related to the charge that law is "empty," but I do not probe the connection.)

I address these claims less by analysis than by giving examples of both ease and difficulty in doing law.[117] I make several points here and then leave the debate.

First, as many have urged, ingrained professional habits of lawyering and judging help bring order and stability to the law—but *not* certainty: we examine text interpretations for coherence[118] by relying as much as possible on crystallized notions of legal rights, principles, and standards, and on customary norms that embrace them. This is a familiar point.

Second, there is no more reason to think that "the law" is pure chaos than there is to believe this of everyday life. Doing law bears important similarities to doing the everyday work of making decisions, though these realms of endeavor may differ greatly. We do not usually think that personal decision making is utterly chaotic—that the coverage of our self-imposed standards, our rules of personal interaction, our very habits, are wholly indeterminate and that we might as well flip coins to make all our decisions. (For those who do think all is chaos, of course, the response that law is no more chaotic than life in general will not impress.)

Jr., *Horses of the Night:* Harris v. Vasquez, 45 STAN. L. REV. 1011, 1022 (1993).) Indeed, Cover urges that "judges are also people of peace." Cover, *supra.*

116. Pierre Schlag, *Clerks in the Maze*, 91 MICH. L. REV. 2053, 2053-54 (1993) (quoting Cover, *supra* note 115, at 53). Cover states: "Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest." Cover, *supra* note 115, at 53.

117. For extended analytical works on jurisprudence and legal philosophy, see, e.g., NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978); THOMAS MORAWETZ, THE PHILOSOPHY OF LAW: AN INTRODUCTION (1980); Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981).

118. "Coherence" is a basic—if overused—term which must remain largely unstudied here. (Perhaps "coherence" is incoherent.) Many interpretation theorists and philosophers of science rely heavily on notions of coherence in constructing their preferred modes of interpretation or in explaining conceptual structures in science and elsewhere. The idea of consistency is a major component of the idea of coherence, but is not the whole of it. A system of claims of whatever sort may be internally coherent and a coherent element of a larger system and still be wrong, but if we have no way of checking "wrongness" from "outside" the system—which seems often to be the case—the claim of wrongness becomes difficult to credit. For a discussion of the role of coherence in legal justification, see DWORKIN, *supra* note 57, at 19-20; MACCORMICK, *supra* note 117, at 106-08, 152-94; Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273 (1992). For some general remarks on coherence theory, see Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424, 2494-98 (1992). For an account of conceptual coherence in science, see THAGARD, *supra* note 17.

Third, the idea that the conceptual scheme or perspective that wins the day has improperly "destroyed" rival frameworks is too unspecific to be accurate. In some senses, the claim is trivial, simply reflecting the fact that in some disputes, some parties—and some of their accompanying frameworks—win a battle where the stakes are all-or-nothing. But a framework's "loss" in one case ("This isn't a First Amendment case at all; the words of the conspirators are just being used to prove the conspiracy.") doesn't foreclose its efficacy in another ("This is a case of vigorous advocacy, not incitement to crime."). The "undue burden" framework is not destroyed by upholding 24-hour waiting periods for abortion; it rises again to strike down spousal notification requirements.[119] In short, seeing something one way does not annul other ways of seeing that may affect one's conclusions and decisions over a range of cases—including whatever case is at hand.

If the complaint lies in the fact that a preferred framework loses in a given case, then the problem concerns the very use of a rule that "defeats" that framework under those circumstances. The objection may simply reflect a preference for an absolute rule ("Nothing may defeat a woman's interest in having an abortion before fetal viability") or at least for a reevaluation of interests. But adopting one absolute defeats other candidates for status as absolutes—or even as relevant criteria. Absolutes defeat absolutely: investigating and applying contending perspectives in a given case does not. If one wishes to say that applying a rule and its interior visions "destroys" other visions and interests, so be it, but the realistic alternatives are hard to chart. Even Robert Cover, who described the "jurispathic" nature of judging—the "destruction" of competing "legal traditions" (or conceptual systems) and the "violence" of judges—urged that "judges are also people of peace. Among warring sects, each of which wraps itself in the mantle of a law of its own, they assert a regulative function that permits a life of law rather than violence."[120] This seems akin to the point—if not

119. Planned Parenthood v. Casey, 505 U.S. 833 (1992) (using the undue burden standard in upholding a 24-hour waiting period but invalidating a spousal consent requirement).

120. Cover, *supra* note 115, at 53. Although the analogy may seem far-fetched, the idea of a persisting perspective that is on a given occasion "defeated" or "outweighed" parallels ordinary perception—different ways of seeing an object or drawing, for example. This is well captured in "optical illusions" such as the Necker cube, or the duck-rabbit noted in LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 194 (G.E.M. Anscombe trans., 1953). The duck-rabbit is also described in the discussion of "the two faces of law" in Fallon, *supra* note 95, at 575 n.108. The "conflicting" aspects are not merged, but each survives the transient domination—even perceptual "annihilation"—of the other: the missed perspective can be recaptured by a kind of shift in

the exact point—made here about the "warring" interests and perspectives offered to the judge, and their survival beyond localized defeat.[121]

b. Pragmatism:

Rather short of being skeptics and nihilists—indeed in many ways opposed to them—are the legal pragmatists. They argue that while legal outcomes are not radically "indeterminate," the focus on rules and the abstractions within them is misplaced. Judges (indeed, anyone trying to describe and evaluate the everyday world) may reach conclusions without explicit or focused reliance on legal or moral rules.[122] In describing how people do in fact make decisions—both in everyday life and in the law—much is made, appropriately, of the idea of identifying varying perspectives and moving toward resolutions.[123]

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perceptual orientation (itself perhaps driven by some arch-perspective). This notion bears some affinity to moral and legal analysis. Recall the "persisting oughts" suggested by WILLIAMS, PROBLEMS, *supra* note 25. *See also* KRONMAN, *supra* note 86, at 155-56 ("The attractions of the losing principle—which, by assumption, came very close to winning [in a case worthy of appeal]—typically exert a counterpressure against the interpretive expansion of its victorious adversary."). *Cf.* Madhusree Mukerjee, *Strings and Gluons—The Seer Saw Them All (Profile: Yoichiro Nambu)*, 272 SCI. AM. 37, 39 (1995):

> While working with Nambu, I noticed that he would look at a problem from several different, yet simultaneous, points of view. It was as if instead of one mind's eye he had at least two, giving him stereoscopic vision into physical systems. Where anyone else saw a flat expanse of meaningless dots, he could perceive vivid, three-dimensional forms leaping out.

Id.; *infra* note 195 (reference to Wittgenstein's 'seeing an aspect'). *See* NAGEL, *supra* note 15; WILLIAMS, MORAL LUCK, *supra* note 25; WILLIAMS, PROBLEMS, *supra* note 25.

121. The judicial process seems more like traveling through several proffered perspectives and choosing among them, rather than like a search and destroy mission leaving only one candidate alive.

122. Catharine W. Hantzis (Wells), *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 Nw. U. L. REV. 541, 573 (1988) (in the course of discussing Holmes); *see also* Catharine P. Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990).

Pragmatists may well acknowledge the necessary role of principles and rules. *See* Wells, *supra*, at 275, 289. Perhaps the dispute about the role of abstractions has more to do with views about the psychology of decision making than with rival ontological visions.

I mention one other aspect of pragmatism here, and that is its attention to the recognition and formulation of perspectives in decision making. It is not clear, however, how these perspectives are to be compared, ordered or aggregated. On legal pragmatism, see generally *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990); PRAGMATISM IN LAW AND SOCIETY (Michael Brint & William Weaver eds., 1991) [hereinafter PRAGMATISM].

123. *See* Wells, *supra* note 82, at 337 ("[A]n important project for legal theory is to develop a more rigorous analysis about the effect of viewpoints on legal decisionmaking and to develop ways in which the law could become more responsive to disparities in viewpoint.").

Some modern "casuists" offer similar arguments, but stress a sort of "intermediate" set of abstractions contained in practical maxims.[124]

It is difficult to know exactly what to make of this deemphasis on the influence of (certain sorts of?) rules on decision making. There are several related components to this move. (I do not claim that these components are necessary or sufficient elements of pragmatism or casuistry.) One is an "antifoundationalist" view that rejects the idea of "objectively" verifiable claims about truth and reality, whether we are speaking of law, science, or morality.[125] Another is a psychological point about the way thinking and decision making are in fact pursued. For the most part, we do not formulate a clear, canonical text in our heads and explicitly ask ourselves, "What is subsumed here?" With our pragmatically schooled minds, we see chairs as chairs without heavy thinking about the concept of a chair (unless, say, we see some innovative furniture), and we move along complex mental paths in ways that do not fully track elegant proofs in formal logic. In this sense, much of pragmatism is descriptive psychology and perhaps accurate.

A third component is the pragmatist reminder that generalizations do not yield conclusions without the aid of more particular premises.[126] In any given case, the major dispute may well be not about the choice of abstractions or even their interpretations, but about what happened in what situation. In turn, this enterprise may affect our view of (and choice among) the abstractions.[127] (Describing "what happened" is no easy matter either—it too requires working with abstractions applied to masses of information.) Nonpragmatists can easily accept such views because much of what we do is rationalizable—that is, one can reconstruct thought and action so that its rational underpinnings are clear. Underlying the chaotic aspects of life is a degree of order imposed by rational thought processes.[128]

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124. *See* JONSEN & TOULMIN, *supra* note 93, at 13.

125. *See* David Hoy, *Is Legal Originalism Compatible with Philosophical Pragmatism?*, *in* PRAGMATISM, *supra* note 122, at 343, 344. See also the discussion of coherence theories as "nonfoundationalist and empiricist" in Moore, *supra* note 118, at 2494.

126. Which is presumably at least part of what Holmes meant when he said that "[g]eneral propositions do not decide concrete cases." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Of course, neither do "particular" propositions. One needs both.

127. A recent account of casuistry takes a somewhat similar path. *See* JONSEN & TOULMIN, *supra* note 93, at 13.

128. *But see supra* note 23 and accompanying text on cognitive frameworks and cognitive error.

Moreover, as legal pragmatists themselves may concede, there is no sharp gulf between "rule-bound" thinking and "other" ways of proceeding to a decision. All modes of rational thought require, at some point, the selection and interpretation of abstractions contained in rule-like structures.[129] Beyond that, pragmatists offer limited decisional guidance for dealing with the welter of perspectives that they may unearth. Perhaps claiming that such guidance is possible would be inconsistent with their very position.[130]

c. Emptiness:

As for "emptiness": the idea here, derived in part from some critiques of law teaching and legal academia, is that law and legal reasoning systematically ignore or exclude the real issues—the underlying moral outrages or necessities—in favor of an arid tinkering, usually driven by hidden, dominant perspectives.[131] (Plainly, to assert that there are indeed real issues to be ignored entails a rejection of more radical forms of skepticism.) "Legal norms monopolize discourse in ways that exclude alternative views of justice."[132] Some observers may also think that particular legal perspectives—e.g., that of "law and economics"—are so restrictive that they greatly compound these exclusions.

The emptiness/systematic exclusion thesis is thus a set of connected claims about law's moral vacuity or moral perverseness (though moral perverseness doesn't seem "empty"), deriving in part from its minimization of relevant perspectives.

If the emptiness thesis is true, then looking to legal process traps us in a paradox: we use it to unearth different viewpoints while it systematically "excludes" many of the most important ones. One cannot dismiss this by saying it isn't the fault of legal process but that of the underlying society it reflects. Even if society drives the exclusions, legal process compounds and ratifies them. This is a point of special importance in a domain like bioethics, where questions about research and experimentation, genetic analysis, death, distribution of scarce

129. *E.g.*, Catharine Wells, *Situated Decisionmaking*, *in* PRAGMATISM, *supra* note 122, at 275, 289.

130. Dworkin urges the vacuity of legal pragmatism for this reason—i.e., their own position annihilates itself. *See* Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, *in* PRAGMATISM, *supra* note 122, at 359, 361. But note the views of JONSEN & TOULMIN, *supra* note 93, stressing the role of maxims in reaching decisions.

131. *See, e.g.*, KELMAN, *supra* note 111.

132. ROBERT GRANFIELD, MAKING ELITE LAWYERS 72-73 (1992).

resources, and more, heavily affect all the groups that society historically has dealt with unjustly.

But these objections about emptiness combine several claims that must be sorted out. One claim may be that defending certain interests and even discussing certain topics reflect moral indifference and cause harm, at least if outrage is not expressed by the discussants. (Lawyers defend rapists and law professors discuss slavery.) The "emptiness" of law is reflected in its unthinking and offensive detachment.[133] The supposed advantage asserted of law's capacity to unearth and address a variety of perspectives is, on this view, either absent or desiccated, as when the law identifies and touts the wrong perspectives. More, the law never even properly deals with the wrong perspectives because its view is external and objective: it can neither endorse the right ones nor reject the wrong ones. And it cannot truly promote the interests of the oppressed because their interests are irrelevant to lawyers who will adopt any perspective for a price. The harm is compounded when one considers arguments "on all sides"—i.e., roaming from one framework to another in an effort to assume a detached view from nowhere or from some unified "aperspectival" perspective.

Different law-jobs may be "empty" and characterized by "detachment" in different senses of these terms. In advocacy, for example, emotional detachment is linked to argumentation for particular views or interests. Even if one is personally committed to the claims in

133. *Cf. id.* at 5 (moral transformation of law students). For a definition of "professional detachment" or "nonaccountability," see WOLFRAM, *supra* note 33, at 569 ("[A] lawyer is not to be associated with the client's social, moral, political, or economic views or objectives in any way."); *see also* Wasserstrom, *supra* note 79, at 8 (expressing uncertainty "that it is a good thing for lawyers to be so professional—for them to embrace so completely this role-differentiated way of approaching matters"); and *see infra* notes 195 and 196 and accompanying text. The call for detachment may be too much for some to bear in certain circumstances. A brochure announcing a conference on *The Role of Advocacy in the Classroom* (Modern Language Association, Pittsburgh, June 2-4, 1995) (on file with the *USC Interdisciplinary Law Journal*) asks, among other things, "To what extent are students in courses on religion correct in hearing the call for critical distance as a challenge to their religious identities?" Kronman, in discussing efforts "to sympathize with [a given] perspective and not simply tolerate it," notes that "[s]ome [law] students find this disturbing and complain that the case method, which makes every position respectable, undermines their sense of integrity and personal self-worth." KRONMAN, *supra* note 86, at 114. Kronman also comments on the advantages of the case method (it "multipl[ies] moral perspectives and compel[s] students to adopt them as their own . . . while at the same time encouraging an attitude of judicial dispassion remote from any interested point of view . . . ." But "[t]his attitude can of course degenerate into indifference and apathy, as it did for many stoics.") *Id.* at 160. *See also* Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741, 745 (1993) ("Both feminists and Critical Race Scholars have challenged law's dominant mode of detached impartiality, offering in its place scholarship that is more contextualized and based on narrative and experience.").

questions, the advocate must nevertheless "stand back" and view the commitment "from above." In law teaching, the detachment involves standing back still more: one critically appraises not only the views presented but their advocacy. One is not arguing on a partisan basis for action—the arguments (whether by the instructor or by others) are there for study. In judging, there is in the final stage a commitment to some outcome, and this involves a blend of detachment and of "allegiance" to one's own decision. In scholarship . . . I think I'll leave that aside.

Another claim about law's vacuity may be that certain rule structures—not necessarily all rule structures—render important considerations irrelevant, when an enlightened moral consciousness would think otherwise. Emptiness is not intrinsic to law; emptiness is characteristic of the wrong laws. And the wrongness of these laws derives in part from the restricted viewpoints of their authors, who hold legally immaterial the interests of disfavored groups.[134]

Still another complaint is that law itself inherently excludes many or most of the basic moral truths by trying to order human behavior at all. More narrowly, one might urge that overreliance on rule structures induces modes of thought and conduct that prevent the relevant considerations from being implanted in the law through various lawmaking processes—i.e., any law or legal process is systematically warped in excluding important frameworks and exemplars because of lawmakers' hidebound habits of thought.

Finally, some may argue that legal resolution inappropriately "freezes" the moral evolution of contested matters.

This is not the place to pursue these charges of emptiness in detail, but here are some brief responses (not necessarily in the order of "emptiness" elucidations just given).

First, a sound theory of interpretation must address (in various ways, in various cases) matters of value and ideology: to complain that given interpretations ignore relevant perspectives may be a criticism of those interpretations or the interpretive styles they reflect (e.g., an exclusive reliance on Framers' intent), not necessarily of law and legal process generally.

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134. *See generally* Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987) (discussing the effects of excluding particular groups from the making and practice of law).

Second, to complain that under a given rule structure certain paramount values are ignored is largely a criticism of that rule structure, not necessarily of rule structures in general or of lawyering or judging in general. In some cases resort to legal process under these circumstances ratifies and compounds the harm.[135] But to throw out reliance on legal process on these grounds in the United States seems pretty foolish. Resort to legal processes in the United States today, as a whole, is likely (though not certain) to at least accord a hearing to variant voices, unheard in earlier times.

Third, we cannot easily assign content to the idea that living under certain rule structures can induce a morally eviscerated way of life by inhibiting attention to other ways of doing things. Rule systems carry a certain inertia and resistance to easy change (their very status as rules and rule structures might be attenuated otherwise),[136] though some may do this far more than others. But to implant new considerations into the law presupposes that *some* body of rules will endure as the implants take root.

The alternative? Even pragmatism does not truly dispense with rules—it may alter our focus and introduce new ways of handling rules, but rule structures remain. Deracination of rules, standards, and principles seems both incoherent and a possible source of evil. It is true that real-life implementation of any rule-governed system is likely to develop practices that seem ill-advised. Where you find rules, you find formalists (in a pejorative sense). But more is required to trash the legal perspective than to show that some law persons do not practice their craft in a sufficiently enlightened way. And I do not think anyone has shown that law and legal rule structures as such induce mindless insensitivity in the community generally.[137]

Fourth, as to the claim that some lawyers and judges are unduly restricted by an arch perspective (law and economics, law and whatever): In some ways—and in the right hands—these particular "law-and" enterprises reflect an enhancement of some perspectives without loss of others. (Isn't it useful in considering tort law to ask, *among other things*, who is the party who can most efficiently reduce

135. *See* Hugh T. Scogin, Jr., *Withdrawal and Expulsion in Germany: A Comparative Perspective on the "Close Corporation Problem,"* 15 MICH. J. INT'L L. 127 (1993) (discussing Nazi-era dissociation of Jews from close corporations).

136. *See supra* text accompanying note 38.

137. At any rate, stories about pounding emotion and ideology out of the heads of law students at some times and some places don't establish the general indifference of law to morally relevant considerations. *Cf.* GRANFIELD, *supra* note 132.

the risk of accidents (the cheapest cost avoider)?) They may also reflect a reordering of values—or a simple highlighting of them—rather than a full displacement of them.

More fundamentally, the "ands" in "law and X" and "law and Y" are usually followed by a reference to disciplines or lines of thought that are themselves broadly inclusive, though of course with distinct constituent viewpoints. For example, the idea of efficiency applies to social systems viewed not simply as producers of goods and services but as, say, vehicles for promoting certain attitudes and beliefs. (This may be a fruitful way of assessing rival modes of dealing with bioethical problems in reproduction, genetics, death and dying, and distribution of scarce resources.) One can then rate various social institutions on an efficiency standard that includes consideration of how well social norms are reinforced. Nothing in economic theory suggests that this is beyond the ken of economic modeling.[138]

Fifth, as for the risk of "freezing" certain developments: for one thing, development of law, either through legislation or decisional development, cannot simply be characterized as "freezing." Any student of the common law (or civil law for that matter) will find abundant examples of judicial evolution and revolution alongside instances of (inappropriate?) stasis. For another, some matters are ripe for "freezing," at least at certain levels of generality. (Would it have been right to object to a court articulating a general—but not absolute—requirement of informed consent in medical transactions on the ground that it was freezing a questionable development into law?) And even if one concedes that crystallizing a contested matter through adjudication may genuinely retard or prevent better developments, this disadvantage has to be arrayed against the benefits offered by resort to the legal process generally.

Sixth, consider now the charge that law does not countenance alternatives to itself—"anti-law" perspectives.[139] One can say a number of things in response. (a) Law cannot be expected fully to embrace its "negation" without ceasing to be law. (b) The idea that law fails in certain forms even to conceptualize alternatives to itself is simply false. For one thing, adequately rationalized legal arguments often compare the regime of the preferred rule set with "looser" ones—perhaps even some that might compromise the rule of law, at

138. For elaboration of this suggestion, see Michael H. Shapiro, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, 55 U. PITT. L. REV. 681 (1994).

139. *See supra* note 130.

least as understood by some.[140] ("If we adopt any other rule system, chaos will reign.") In this sense, the alternatives to more rigorous legal process are indeed considered, but rejected. For another, legal evolution has in fact generated mechanisms in which conceptual structures thought to be too rigid (and for that reason unjust) have been replaced by others—arbitration, alternate dispute resolution, settlement procedures, and so on.[141] One may even argue that under certain circumstances, randomization as a decision technique is endorsed and encouraged by law. For example, experimental therapies are sometimes distributed through randomization—which is hardly a paradigm of legal process.[142]

Seventh, to the charge that legal process and legal training may entail some loss in emotional involvement and some restrictions on the range of one's thinking, one can only assent. Doing law entails both "losses" and "gains." The idea that a lawyer, at least on some occasions and to some extent, ought to suppress her revulsion for a client or an interest reflects an aspect of rational human thought generally. The "suppression" is part of the very process of seeing other views and frameworks. Suppression of one's revulsion for bloodsucking landlords who keep wanting to raise the rent may enable one to identify groups of landlords who have low incomes and little wealth and who rely on their property as the only asset keeping them from disaster and allowing them a measure of dignity. How does one reach these variant frameworks without listening to supposed oppressors as well as apparent victims?

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140. A work on "lawyers, judges and bioethics" might seem to require some reference to the idea of "rule of law," but this would take us too far from the narrower goal of assessing the lawperson's perspective. For a brief discussion of ideas of rule of law, see SCHAUER, *supra* note 10, at 167-74.

141. *See* ELLICKSON, *supra* note 66, at vii-viii.

> This book seeks to demonstrate that people frequently resolve their disputes in cooperative fashion without paying any attention to the laws that apply to those disputes. . . . [R]ural residents in Shasta County were frequently applying informal norms of neighborliness to resolve disputes even when they knew that their norms were inconsistent with the law. In short, contrary to standard law-and-economics analysis, in many contexts legal entitlements do not function as starting points for bargaining.

Id. One might argue, however, that the irrelevance of particular laws does not establish the irrelevance of law generally, nor does informal resolution establish "non-law." Law remains in the background as an underpinning, lawyers on the scene or not. *See* John Brigham, *Order Without Lawyers: Ellickson on How Neighbors Settle Disputes*, 27 LAW & SOC. REV. 609 (1993) (book review). Of course, one can press "law" too far. It doesn't cover everything.

142. *See* Sheryl Stolberg, *A Lottery with Very High Stakes*, L.A. TIMES, Jan. 6, 1994, at A1 (new multiple sclerosis drug). Of course, under many circumstances randomization in selecting human subjects is a requirement of sound research methodology, and such randomization must be disclosed to prospective subjects.

In general, then, whatever losses arise from various forms of emptiness in doing law are often inextricably connected with gains that are facilitated—perhaps made possible by—the detached traveling across perspectives (perspectives surfing?) that characterizes much of legal process. In given situations, losses might well exceed gains, but our legal system reflects a plausible belief that overall the balance is to our advantage.

3. *Compromising Democracy, Autonomy, and Privacy by Resorting to Legal Process*

Do some kinds of judicial decision making compromise democratic values and intrude on autonomy and privacy? If so, is this sufficient reason to avoid the courts?

a. Democracy:

Democratic ideals suggests to some that in certain kinds of cases, one should avoid courts and wait, if at all possible, for legislative action. (No theoretically satisfactory account of what these cases are seems available.) The challenge to democracy arises because courts are said to be "creative" in certain senses, as we saw.[143] They do not merely produce a bare outcome—plaintiff wins or loses. They announce a rule of decision, either by way of interpreting a statute, regulation, or the language of a precedent, or by announcing new rules. One may well ask why judges, who either are not elected at all (as in the federal system) or are electable/removable only at rare intervals, are entrusted with this sort of power to construct new rules, whether through doing so by openly looking to "public policy" or by reconstructing earlier decisions (or both). The claim is not, however, the absurd one that all adjudication is undemocratic; it is only adjudication that suffers from some "excess."

This question may seem all the more troubling when unforeseen problems—including many of those arising in bioethics—seem to resist being captured within our existing modes of thought. If we are to revise these modes of thought and work these revisions into the legal system, our elected representatives, not judges, should act for us.

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143. *See, e.g.*, DWORKIN, *supra* note 87, at 24 ("Do judicial decisions on matters of principle (as distinct from policy) offend any plausible theory of democracy?"). But note my remarks in the text, arguing that disputes about whether a system is democratic ought (at least sometimes) to be reframed as arguments about the appropriateness of majoritarianism. *See generally* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

That, at any rate, is the argument. But the problem of busted categories arguably cuts the other way: major category challenges should be addressed more (or at least no less) by courts than by legislatures, because they are the specialists in category assignment and revision.[144]

I said earlier that there is no escape from the "creativity" of rational adjudication through selection and interpretation of authoritative rules. The indeterminacy of the abstractions embedded in our rules makes it impossible for adjudication to be captured in a fully explicit formula.[145] "Making law" in this sense (a somewhat misleading sense) is part of the selection and interpretation of texts, an aspect of what judges must do. Some judges may create too much, some not enough, but all create in the sense of having to apply rules to circumstances that seem to depart in significant ways from prior cases or do not fit within the apparent purposes of legislation.

If we are to complain, then, that adjudication is "undemocratic," we must specify some excess. I do not know how to specify that excess (it is not clear that this can be done at all), but anyone who starts this task should make sure that his work is not burdened by major misunderstandings about either adjudication or democracy. In some cases, at least, fear of undemocratic processes may involve a misinterpretation of "democracy." Some debates about democracy are thus not properly framed.

"Democracy" designates a variety of possible systems, from wildly populistic (hook everyone up to the Internet and have the President and Congress put as many questions as possible to the public)[146] to the sort of remote popular control represented in, say, the Electoral College or (more remote yet) Congress's ultimate control over various administrative processes. Many complex governmental and social practices involving the electorate's delegation of functions to others are consistent with democracy in any of its plausible senses.

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144. Morton Horwitz suggests that before "the emergence of an instrumental conception of law," HORWITZ, *supra* note 81, at 1, 16, there was "an underlying conviction held by all orthodox nineteenth century legal thinkers that the course of American legal change should, if possible, be developed by courts and not by legislatures." *Id.* at 255-56.

145. *See generally* DWORKIN, *supra* note 87, at 11-23 (rule-book conception of law). An instructive literature addresses the propriety of judicial review in a democratic system. See, e.g., the materials and commentary in GERALD GUNTHER, CONSTITUTIONAL LAW 13-28 (12th ed. 1991); *see also* BELL, *supra* note 27, at 248-54 (democracy versus the political role of judges).

146. *Cf.* Daniel Akst, *Postcard From Cyberspace: The Internet As Polling Place—Now There's A Subject For Debate*, L.A. TIMES, Mar. 18, 1996, at D1; *see generally* EMMANUEL G. MESTHENE, TECHNOLOGICAL CHANGE: ITS IMPACT ON MAN AND SOCIETY 53 (1970).

Yet if someone complains that a given political system or judicial practice is undemocratic, it seems too glib simply to say "there are many kinds of democracy," or "democracy means many things and there has never been a 'pure' democracy, so having judges decide some issues isn't clearly undemocratic."[147] The obvious response is, "*this* kind of democracy, for *this* kind of enterprise, is no good." But why good or no good? What are the criteria? The very terms of the debate—"Is this undemocratic?" are too general.

What is at stake is majoritarianism—majority rule by some defined and suitably numerous set of electors (whether "citizens" acting directly or elected representatives themselves selected through a majoritarian process). It is, in some form, central to any system claiming to be a democracy.[148] The question then becomes, What issues ought to be dealt with by submission to a direct vote of citizens (or their elected representatives), rather than left to certain kinds of delegates who are not "representatives" in the usual democratic sense (judges, executive officers)?[149]

This approach yields better inquiries. Is judicial invalidation of legislative acts appropriate, given that the measures struck down were enacted by a majority vote of the legislators—themselves selected by some majoritarian process? If elected representatives decide, for example, that paid surrogacy should be criminalized or otherwise discouraged, why should a court even consider invalidating such laws as inconsistent with a constitutional liberty interest in reproduction? The community, acting through the legislature, evidently doesn't value this right as much as it values the countervailing social interests—so the argument would go.

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147. Some common arguments are that all democracies restrain unrelieved majoritarianism, whether by law or custom, through articulating principles to be applied without regard to popular sentiment (as in a bill of rights); that the "town meeting" model is inappropriate for large political units (perhaps for small ones too!); that elected representatives are meant to exercise (semi)independent judgment and not reflect an aggregation of preferences. For a review of the "democracy vs. judicial review" debate, see generally ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 5-21 (1987).

148. The moral foundations of majoritarianism are not always expressly considered in works on democratic theory. (The very concept of "majoritarianism" poses difficulties that are not always addressed, but it is clear enough for present purposes.) Here I suggest only that within communities, majoritarianism may arise if community members have significant preferences for personal autonomy and equality. Majoritarianism thus rests at least in part on autonomy and equality. *See* SHAPIRO & SPECE, *supra* note 11, at 40. Why and how people form communities and how we identify communities are issues not touched on here.

149. I leave aside the questions of how the issues are to be framed, the agenda problems, the constituencies addressed, and so on.

We can also ask if common law announcement of what seem to be radical new rules of decision is inappropriate. Should a court be able to say that "brain death" is the right standard for determining death, even though existing statutes say nothing about that (in so many words) and speak in terms of "heartbeat," "pulsation," and "respiration"?[150] Should a court be the decisional unit to say whether the "true" mother is the genetic mother—the source of the egg—or the gestational mother who carried the child?[151]

One can of course ask of any kind of decision, whether currently made by individuals or groups, who should make it? Individuals? Groups? A community? An adjudicator? A dictator? An oracle? And so on. In many cases, there is no serious issue: large domains of decision making are left to personal choice because not every matter in everyone's life can or ought to be subject to community ratification by majority assent.[152] (Unless there are nuisance, shortage, environmental or religious problems at stake, the time when you take a glass of water or flush the toilet is up to you, not community sentiment.)

But there are also many "community" decisions that are not majoritarian and shouldn't be. The official criminal justice system is supposedly a monopoly of the community and subject to majoritarian control, but whether someone is to be found guilty of a crime is determined by the vote of a jury or decision of a judge, not the general public (though in theory the public could act via the Internet). Depending on the reigning moral theory, such nonmajoritarianism may be obligatory; at the least, the process is affirmatively good in not being majoritarian. Majoritarianism is simply not the sole touchstone for political or moral rectitude.

One might argue more simply that if a community decides by majority vote to assign some matters to a nonmajoritarian regime—e.g., by creating a nonelected judiciary to deal with certain matters—democracy is not compromised precisely because the majority authorized the delegation. Nonmajoritarianism is thus justified on majoritarian grounds. ("Judicial review was intended by the Framers

150. *See* Lovato v. District Court, 601 P.2d 1072 (Colo. 1979) (court adopted brain death definition in absence of statute explicitly invoking that concept).

151. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993), *cert. denied*, 510 U.S. 874 (1993).

152. There are, however, societies that seem to regulate in certain domains to a noticeably greater degree than does the U.S. *See, e.g.*, Tyler Marshall, *Germans' Wish Is a Command*, L.A. TIMES, Dec. 28, 1992, at A1 ("quiet times" between 1 p.m. and 3 p.m.; regulation of names of children; hours of business operation).

and is thus democratic.") But such a majoritarian preference is a contingency. In any event, this maneuver cannot avoid the significant question: *Should* a community that prefers majoritarianism delegate particular kinds of decisions? A nonmajoritarian process might be required even in the face of a majoritarian preference the other way.

The question, then, is whether we think a court or legislature or executive is the proper forum for resolving certain issues. "Who decides and why?" may be at least as important as "What should the decision be?" Indeed, virtually every bioethical issue can to some extent be reframed in this "procedural" way.

But this procedural orientation cannot be a fully adequate reformulation. For one thing, there is a link between identifying suitable decision makers and decision procedures on the one hand, and the substantive nature of the decision on the other. For another, a failure to specify substantive rules, principles or standards for decision may lead to a kind of process-substance cycling: a lack of substantive criteria leads to efforts to specify decision makers in a procedurally adequate way, but the decisionmakers in asking themselves how to decide are likely to struggle to formulate such criteria and (perhaps) seek outside assistance.[153]

One might argue that the very novelty of a question suggests that it be left, if possible, to legislative determination. But this may not be possible if the legislature has not acted and there is a case before the

153. To explain this idea a bit further: Attention to process seems inevitable when we encounter difficulties in making decisions in accordance with substantive legal and normative criteria. (We might have problems in selecting criteria, assessing their authoritativeness, applying them, and so on.) The account of changes in decision-making procedures in GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES (1978), vividly illustrates this. But a simple thought experiment suggests that while such a process orientation has practical uses and may appear to save the day for a time, it may not be fully satisfactory. When the decision makers assemble and deliberate pursuant to procedural rules, they must eventually consider precisely how to decide matters of "substance." They can no longer defer to process alone: even a decision to use a randomization technique, such as a lottery, requires appeal to substantive criteria in deciding whether to resort to it and in identifying the participants. Nor can the judge usefully say in struggling toward a decision that "the law is whatever I say it is." *Cf.* K.N. LLEWELLYN, THE BRAMBLE BUSH 8-10, 12-15 (1930) (withdrawing his earlier reductive definition of "law" as what officials do about disputes). A "black box" technique—such as (in some respects) a jury—requires both an initial reference to criteria to justify assignment to a black box, and settlement of the ultimate substantive question by the inhabitants of the box. When these decision makers finally ask how they ought to decide, "process" standing alone provides no guidance. So we have in effect a "process-substance cycling": a failure of substance, a referral to process, and, within the process, another appeal to substance.

court. Courts indeed often protest strongly about the absence of legislation, often to no avail.[154] This argument from novelty is simply that there are no available legal principles embedded in existing law that could lead us with assurance to the right outcome (about, say, who should control a dead man's sperm, whether the gestational mother should gain custody as against the genetic mother, whether cryopreserved embryos should be held for adoption or destroyed, and so on).[155] Novelties thus have to be dealt with democratically.

This is not an effective argument. (Indeed, without more premises, it is a simple non sequitur.) What counts as a "novelty"? Novelties in some sense arise regularly in both courts and legislatures. That in general the one forum is better than the other at dealing with conceptual confusion and with the need to restructure or replace category systems is not clear. One could argue that where the interpretation of an important right or principle is at stake, the court is the preferred locus of decision, for they are "principlists" by profession and the division of labor is thus appropriate. This is one familiar argument for judicial review of legislative action. But it seems odd to argue that legislatures should not also address issues of right and principle—sometimes in the first instance.

So, a community may prefer that certain issues involving matters of high principle—even when category-busters challenge the principle—are better left to courts, who are to find or fashion archprinciples of some sort. We do not like to think of trading off important rights in a pork-barreling exchange. Still, courts are more political and legislatures are more attuned to arguments of principle than many think. "Policy vs. principle," whatever its merits as a theoretical distinction, does not exactly track "legislatures vs. courts."[156] As I suggest later,

154. Barber v. Superior Court, 195 Cal. Rptr. 484, 487 (Ct. App. 1983) (writ of prohibition issued against murder prosecution of physicians who withdrew treatment; court stated that "[t]his gap between the statutory law and recent medical developments has resulted in the instant prosecution . . . .").

155. In Johnson v. Calvert, 851 P.2d 776 (Cal. 1993), *cert. denied*, 510 U.S. 874 (1993), the court noted the absence of clear guidance from California's Uniform Parentage Act as to whether the genetic or gestational mother is the true "natural mother," and proceeded to interpret the statute to embody a theory of parenthood by intention.

156. On the policy-principle distinction generally, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22-23 (1978). The distinction between policy and principle, as suggested, does not always uniquely identify the correct forum for decision. Dworkin states that his book

> rejects the popular but unrealistic opinion that such [political] convictions should play no role in these decisions [about what the law is] at all, that law and politics belong to wholly different and independent worlds. But this book also rejects the opposite view, that law and politics are exactly the same, that judges deciding difficult constitutional

however, judicial decision making may have certain beneficial learning effects: there are disputes in which formal adjudication reinforces the reign of principle—and of particular principles.[157]

In any event, whether we speak of legislators or judges, there is a sense in which we must make up the law as we go along. How can it be the "rule of law" when judges "make up" the law as they go along? How can it not, if this is what judges must do? One project for further study is to trace the differential effects of having either kind of body "making up the law."

b. Autonomy and privacy:

Many observers feel strongly that certain matters are "outside" the law. I avoid questions about the completeness of legal systems and whether they have "gaps," and simply reformulate the objection: certain matters should not be addressed by formal legal mechanisms. One example concerns withdrawal or noninstitution of care for seriously ill persons. External (particularly governmental) intrusion into individual or familial decision making on such matters, one may argue, compromises both autonomy and privacy.[158]

Such intrusion may indeed do so—perhaps justifiably under given circumstances. But I deal with another point first: formal legal processes can, by articulating and protecting various personal interests, vindicate autonomy and privacy interests—perhaps even more so than if the issue had never come up.[159] While some may resent even this degree of external intrusion, it is hard to avoid if we are to live

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cases are simply voting their personal political convictions as much as if they were legislators or delegates to a new constitutional convention.

DWORKIN, *supra* note 87, at 2.

157. This requires elaboration in a longer work. The idea, briefly, is that a practice of adjudication expressly adhering to matters of principle reinforces the reign of principle itself. *Cf.* COUNCIL ON THE ROLE OF COURTS, THE ROLE OF COURTS IN AMERICAN SOCIETY 112 (Jethro K. Lieberman ed., 1984) ("[C]onstitutional claims involving life or death and serious liberty or property interests ought to be the staple of judicial business on any of the viewpoints we have discussed.").

158. *See generally* MEISEL, *supra* note 65, at 146-69 (discussing "clinical" and "judicial" approaches). The assisted-suicide initiatives are examples of an effort to keep an area within the domain of legal regulation but generally outside of formal adjudication. On assisted suicide, see generally Note, *Physician-Assisted Suicide and the Right to Die with Assistance*, 105 HARV. L. REV. 2021 (1992). *See also infra* note 228 (referring to Dr. Kevorkian).

159. *Cf.* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 149-53 (1985) (courts as source of rules underlying private ordering). Note Posner's reference to the "cathartic or therapeutic function of litigation." POSNER, *supra* note 27, at 206. Still, formal process has no *necessary* connection with vindicating autonomy, privacy, or the vision of rational principle.

within the legal system that drives the operations of a free republic designed (among other things) to promote autonomy and privacy.

In any event, when bioethical problems arise, early resort to the courts is often the default method of proceeding. Why is this? Why aren't the issues thrashed out privately, subvisibly, in vindication of intimate personal preferences and attitudes, without intrusion by strangers?

There is no simple answer. One can speak (among other things) of fear of liability; a sense of encroaching on the proper domain of law even as one acts "privately" (there are the menacing auras of homicide and abuse); of sheer inability to think through what an appropriate course of action might be—a situation calling for outside, perhaps authoritative, help; and of a sense of moral puzzlement that can be remedied, if at all, only by some *ex cathedra* pronouncement.

The last point requires a closer focus. The call to courts may represent not just a pragmatic search for an immediate and binding answer—for closure of some sort—but a demand for an answer "from above"—from decision makers who have authority to decide, and who perhaps are thought to have special access to a relevant domain of principle.[160] As Fiss says in arguing against settlements in litigation:

> [The official adjudicators'] job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.... A settlement will... deprive a court of the occasion, and perhaps even the ability, to render an interpretation.[161]

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160. There are some additional remarks on this in Michael H. Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555, 1566 (1988) (mentioning Max Weber's idea of innovation in legal rules through imposition "from above"). For present purposes, the idea of resolution "from above" can simply be taken to refer to an official—or at least accepted—institutional arm of the community acting to deal with a dispute. *Cf.* MEISEL, *supra* note 65, at 146 (desire for "judicial imprimatur").

I do not think this amounts to justifying judicial decisions as instances of "ritual," although this aspect of judging bears attention. For an explication and critique of "ritualist" arguments, see Simon, *supra* note 31, at 91-113.

161. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984). I am not invoking Fiss' remarks as support for the idea that courts have (or are thought to have) special access to the domain of moral principles or special insights into the structure of concepts. Nor am I necessarily accepting his valuation of the articulation of public values. For views akin to Fiss's, see GOLDBERG ET AL., *supra* note 159, at 149-53 (discussing various roles of courts, including that of acting as "the source of rules that provide the backdrop to private ordering"); COUNCIL ON THE

Formal adjudication is, then, meant to openly declare a resolution according to principles contained in a public canon. (This view does not commit one to holding that this is formal adjudication's only function.)

4. *Contentiousness, Dissembling, Insincerity, and Distortion*

a. The Problems of Advocacy:

Lawyers are trained to identify and defend rival perspectives. They are advocates for particular visions and versions of human conduct. But this very characteristic is precisely the source of many complaints. It associates lawyers with contentiousness, dishonesty, and hypocrisy.[162] How can exaggeration, hyperbole and dissembling lead to truth or even *rational* resolution of disputes?[163] (And what sort of person would engage in these practices?) How can zealous advocacy lead to justice? Even if we ascribe some measure of good faith to lawyers, their single-minded pursuit of particular perspectives—to the exclusion of others—hides the truth rather than reveals it, as one might argue. (And because the lawyers' "loyalty" is bought and paid for, it may not seem praiseworthy, even to their clients.)[164]

Moreover, while purporting to deal with one dispute, lawyers—by the very nature of what they do—just create more. Indeed, they

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ROLE OF COURTS, *supra* note 157, at 85 (referring to "[d]isputes that should not be settled privately because society has an important stake in governing them by authoritatively imposing public standards."); Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1533 (1994) (vacatur on consent "destroys law"); U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386, 392 (1994) (judicial precedents are not just the property of litigants and should stand unless the public interest would be served by vacatur); *see also* ELLICKSON, *supra* note 66, at 283-84 (reasons for preferring resolution of some disputes through law rather than norms).

162. *See* Wasserstrom, *supra* note 79, at 13.

> [E]ven if the role-differentiated amorality of the professional lawyer is justified by the virtues of the adversary system, this also means that the lawyer qua lawyer will be encouraged to be competitive rather than cooperative; aggressive rather than accommodating; ruthless rather than compassionate; and pragmatic rather than principled. This is, I think, part of the logic of the role-differentiated behavior of lawyers in particular, and to a lesser degree of professionals in general.

Id.

163. This question has been raised often in jurisprudential literature. *See* Thurman W. Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913 (1934). *See also supra* note 24 ("lawyering the truth").

164. Lawyerly "good faith" doesn't—can't—even require lawyers to believe that their arguments and characterizations are the best available. Such a requirement would impair the availability of advocates for all.

have incentives to maximize this effect. Doing their best for their clients' respective interests is not necessarily best for the community as a whole because it not only bypasses truth, it institutionalizes, encourages, and crystallizes disputatiousness. The very intrusion of the legal process highlights and exacerbates conflicts that might better be left amorphous and hidden.[165] From this perspective, the very existence of a society of advocates involves a basic conflict of interest: in pursuing their own respective best interests, lawyers damage the community—in part, by creating a regime of "adversarial legalism."[166]

Worse, the argument continues, all vantage points in legal disputation are "partisan"; there is no detached super-perspective. Judges do not have it because all they hear is distortion from persons hired to argue—persons whose fortunes rest on winning, not furthering truth or justice. They cannot manufacture a "view from nowhere" out of the hostile ravings of lawyers in combat. And getting "inside" any of the perspectives has distorting effects by crowding out the frameworks defining other perspectives. Wherever one is—"in," "out," or even "across" the battling frameworks—one's position is inadequate. Residents within rival frameworks are in parallel, disconnected universes, unable to communicate. So one can easily dismiss the lawyering perspective because it is embedded in an adversary system—especially in Anglo-American law, which in addition to capturing these features of adversariness, often seems to cultivate legal combat to an acme of unpleasantness.

But it is too simple to complain about the fragmented viewpoint of lawyers. Everyone's viewpoint is fragmented. A look at anything both reveals and distorts; one cannot see all aspects simultaneously. The descriptive metaphor here is metaphor itself. Metaphor distorts

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165. *Cf.* Gutmann, *supra* note 21, at 199 ("Deliberation may sometimes increase moral conflict in politics by opening up forums for argument that were previously closed, ensuring people access to deliberative forums and admitting all reasonable arguments onto the political agenda for decision-making purposes.").

166. *See* Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 LAW & SOC. INQUIRY 1 (1994). "Adversarial legalism" is defined as involving relatively high levels of formal legal contestation, litigant activism, and substantive uncertainty. *Id.* at 3-4. Kagan concludes that a variety of social and political forces partly account for adversarial legalism, but that important segments of the legal profession are a substantial causal factor. *Id.* at 60.

My comments are meant to be neutral on the issue of "overlegalization" in the sense that Kagan addresses. For explanatory purposes, I am stressing certain aspects of lawyering—particularly certain forms of thought and analysis—without recommending that they be put to use in *formal* ways in all conceivable human interactions. *See also supra* note 85 and accompanying text.

even as it reveals—the two are interlocked. Indeed, in some cases it reveals *by* distorting.[167] It distorts and reveals to see things as broken up; it distorts and reveals to see things as unitary wholes. (Neither lumpers nor splitters have the whole story.) If you look here, you can't see there. If you look all over (not easy with binocular vision and single-focus consciousness) you may not see distinct aspects. To make matters worse, in many cases we can't tell what "distortion" and "revelation" are—there is no ultimate baseline defining reality. In what sense is a partial view of Claude Monet's cathedral at Rouen "distorted" simply because it's partial?

In daily life, we try to move in several ways, attending to parts and "details" as well as trying to work with integrated wholes. That is what a properly working adversary system is meant to do—though it certainly doesn't always do it.[168] Adversary combat and final adjudication are designed to get at frameworks and reveal them—and (possibly) to ignore, suppress, or minimize the others. The theory, right or

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167. "To think is to forget a difference, to generalize, to abstract." JORGE L. BORGES, *Funes, The Memorious* (Anthony Kerrigan trans., 1942), *in* FICCIONES 107, 115 (Anthony Kerrigan ed., 1962); *see also infra* note 168.

168. "Adversary system" refers to a variety of possible arrangements, not some simple unitary entity. Various proposed "alternatives"—e.g., mediation or negotiation—retain certain "adversary" characteristics: the parties have contending interests that they press, either on their own or through advocates, though the format, tone, and remedy may differ from that in formal adjudication. Adversariness in that sense cannot be eliminated. For a colorful critique of some versions of adversariness, see Arnold, *supra* note 163, at 922 (referring to "the notion that courts are more apt to formulate or apply rules soundly if the opposite sides are prevented from sitting around a table together in friendly conference."). He goes on:

> Mutual exaggeration is supposed to create lack of exaggeration. Bitter partizanship [sic] in opposite directions is supposed to bring out the truth. Of course no rational human being would apply such a theory to his own affairs nor to other departments of the government. It has never been supposed that bitter and partizan [sic] lobbying assisted legislative bodies in their lawmaking. No investigation is conducted by hiring persons to argue opposite sides. The common law is neither clear, sound, nor even capable of being restated in areas where the results of cases are being most bitterly contested. And particularly with reference to administrative regulation does mutual exaggeration of opposing claims negative the whole theory of rational, scientific investigation. Yet in spite of this most obvious fact, the ordinary teacher of law will insist (1) that combat makes for clarity, (2) that heated arguments bring out the truth, and (3) that anyone who doesn't believe this is a loose thinker. The explanation of this attitude lies in the realm of social anthropology.

Id.; *see also* Edmond Cahn, *Some Reflections on the Aims of Legal Education*, 11 J. LEGAL EDUC. 1, 4-5 (1958) ("adversary distortion"). For comic relief, see JESS BRAILLIER, LAWYERS AND OTHER REPTILES (1992).

Arnold partially undercuts his own point by arguing exaggeratedly for "friendly" conferences and insisting that combat is inconsistent with scientific rationality. The latter is both theoretically unsound and historically inaccurate. For accounts of "combat" in science, see THAGARD, *supra* note 17; DAVID L. HULL, SCIENCE AS A PROCESS (1988). But, ironically and inevitably, Arnold's argumentative, adversarial hyperbole helps clarify and pushes us into further analysis.

not, is that the benefits of illumination through the presentation of many views are worth the risks of error arising from partisan partial views (if we can ever discern error and truth at all).[169]

So, advocates battle, but they do so in at least two senses. One sense refers simply to being opposed to one another—their goals conflict in the same way rival pitchers' goals conflict. The other sense of "battle" refers grandly to the clash of perspectives in argumentation, a form of abstract thinking in which we all engage, often without being aware of it. Arguments, to a logician, are sequences of propositions some of which are supposed to follow from others. Even the simplest legal arguments involve the skills of classification and characterization. (Is Socrates indeed a man? And recall the earlier examples about death, embryos, and natural mothers.) To construct and test arguments involves seeing contending issues and perspectives both within ourselves and between ourselves and others—though there may be serious "cognitive burdens" in doing so.[170] Lawyers deal with both construction and testing of arguments. No doubt they can do better, but dialectic—in the sense of seeing oppositions and moving to resolutions—is ineradicable.[171] It is an aspect of abstract thinking itself. As suggested earlier, "thinking like a lawyer" is in this sense thinking abstractly about matters that seem to compete, whether propositions, principles, goals, hypotheses, beliefs, values, and so on. It can thus distort our view to separately identify the way lawyers do things: they do what everyone does, perhaps in a more focused and explicit way—when they think abstractly in making decisions.[172]

This is not meant as a defense of obnoxious lawyering or contentiousness in all its forms. I am just extolling the mixed virtues of dialectic.

169. For an implicit official endorsement of this view, see Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 281 (1990) (upholding the state's rigorous evidentiary requirements for clear and convincing evidence of an incompetent's wishes before authorizing termination of life-sustaining care, and stating that "a State is entitled to consider that a judicial proceeding to make a determination regarding an incompetent's wishes may very well be an adversarial one, with the added guarantee of accurate factfinding that the adversary process brings with it.").

170. On the difficulty of moving from one perspective to another, see HOWARD MARGOLIS, PATTERNS, THINKING, AND COGNITION (1987).

171. On meanings of "dialectic," see Roland Hall, *Dialectic, in* 2 ENCYCLOPEDIA OF PHILOSOPHY 385, 385 (Paul Edwards ed., 1967) ("the logical development of thought or reality through thesis and antithesis to a synthesis of these opposites" (one of several meanings)).

172. For a comparison of some forms of scientific inquiry with legal process, see Murray Levine, *Scientific Method and the Adversary Model: Some Preliminary Thoughts*, 29 AM. PSYCHOLOGIST 661 (1974):

> My fourth assumption is that the scientific enterprise as a whole follows an adversary model . . . . By an adversary model, I mean that we are dealing with a situation in which there are claims and counterclaims, and arguments and counterarguments, each

In characterizing abstract thought it is crucial to see that every event, action or process falls under many simultaneous characterizations—characterizations that, taken alone, may be accurate, even if in tension with others. The Necker cube does (in a sense) face both ways at the same time, though probably not for one observer at a single sighting. "Revelation" and "suppression" occur simultaneously, the one (paradoxically?) facilitating the other.

In this respect, legal argumentation does what metaphor does—reveal by suppression (suppressing some aspects highlights others), and suppress by revelation (highlighting washes other things out).[173] There is indeed more to lawyering than revelation and suppression, but they remain key aspects of that enterprise. It thus overdoes it to say that categorization is a form of lying.[174] (But it is an instructive overstatement, as my own premises suggest I say.) If the only way to think abstractly is indeed to abstract—to leave things out selectively—then the "suppression" is not lying but a way of getting at some aspects of truth. The question of lying comes in (if at all) not at this level of generality, but in having to choose among abstractions and visions without disclosing what each leaves out. And not all such failures to disclose are profitably viewed as lies.

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side advanced by an advocate who attempts to make the best possible case for his position.

Id. at 669. Levine proposes:

> that field and clinical studies include among the staff an adversary who should be delegated the function of cross-examining all evidence from the point of view of developing the rebuttal to whatever evidence is gathered and introduced in support of any particular proposition. His objections, counterarguments, and evidence should be made a clear part of the report of any study.

Id. at 674. *See also supra* note 168 (combat in science). *Cf.* Lee Loevinger, *Standards of Proof in Science and Law*, 32 JURIMETRICS J. 323 (1992) (comparing methods of proof in science and law).

173. "Generalizations are thus selective, but as selective inclusions generalizations are also selective *ex*clusions. In focusing on a limited number of properties, a generalization simultaneously *suppresses* others, including those marking real differences among the particulars treated as similar by the selected properties." SCHAUER, *supra* note 10, at 21-22; *see also* MILNER S. BALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY 22 (1985) (parallel remarks on metaphors); Kennedy, *supra* note 10, at 215 (categorical schemes are "lies").

Although characterizing generalizations as "lies" is itself a useful metaphor, it is indeed a metaphor: it is too much to think of reasonable generalizations as true lies. Thus, the proposition in which the metaphor "generalizations as lies" appears is not necessarily itself a lie, despite my complaint about the metaphor. As Kennedy observes, one cannot think about law without categories (and this observation can't be confined to law). It is not analytically useful to describe an unavoidable thought process as one that always lies to us. As I say in the text, suppression can assist revelation.

174. *See supra* note 10 (remarks of Duncan Kennedy).

A further word about insincerity or "dishonesty" in adversariness, prompted by what Socrates said in the *Phaedo*:

> [A]t this moment I am sensible that I have not the temper of a philosopher; like the vulgar, I am only a partisan. Now the partisan, when he is engaged in a dispute, cares nothing about the rights of the question, but is anxious only to convince his hearers of his own assertions. And the difference between him and me at the present moment is merely this—that whereas he seeks to convince his hearers that what he says is true, I am rather seeking to convince myself; to convince my hearers is a secondary matter with me.[175]

One might add that in trying to convince others, the partisan may be specially tempted to distort.

But it is hard to see how lawyers, if we are to have them at all,[176] can be exclusively devoted to what they see as the truth (even truth in the sense of "the best of competing incomplete characterizations"). There are of course limits to how far they can purvey known falsehoods. Lawyers are required, for example, to cite opposing precedents to the courts.[177] But they can and must (at least once they have agreed to represent a client) argue for things with which they do not agree.[178] Their job is to represent persons taking certain positions in a dispute.

To complain about arguing to convince rather than to establish truth thus ignores the idea that hortatory efforts can direct us to missed or undervalued perspectives and make their merits vivid and compelling.[179] The result may be a closer approach to the truth. Advocacy can make one see and feel differently, and thus (perhaps) better grasp a position or idea by putting it in italics.[180] Indeed, in

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175. Plato, *Phaedo* (Benjamin Jowett trans.), *in* 7 GREAT BOOKS OF THE WESTERN WORLD 220, 238 at § 91 (Robert M. Hutchins ed., 1952) [hereinafter GREAT BOOKS]. Note also JONSEN & TOULMIN, *supra* note 93, in defense of various aspects of sophistry.

176. For a discussion of "non-professional advocacy," see Simon, *supra* note 31, at 130-44.

177. WOLFRAM, *supra* note 33, at 681-82.

178. *Id.* at 569-71 (principle of professional detachment; lawyer is bound to advance client's interests "regardless of . . . private reservations about the client's course of action based on moral, social, political or economic reasons . . . .").

179. Note the warning in NAGEL, *supra* note 15, at 87: "[T]he detachment that objectivity requires is bound to leave something behind." *See* WOLFRAM, *supra* note 33, at 581 ("As the conception of the adversary system has it, the best method of resolving disputes is single-minded representation by client-centered advocates who, in their zeal to assist their clients, are motivated to discover facts and elaborately research and argue the law.").

180. What does the law forum require? It requires the presentation of competing examples. The forum protects the parties and the community by making sure that the competing analogies are before the court. The rule which will be created arises out of a process in which if different things are to be treated as similar, at least the differences

many cases, the process of convincing ourselves about a matter for personal decision embodies an internal adversary system. We take sides within ourselves; we fragment into contending parties and marshal arguments about how to describe and evaluate matters.[181]

Out of caution I again note that I do not comment on what many refer to as "aggressiveness"—e.g., moves that are permitted but calculated to obstruct, delay, and harass.[182] Nothing I say about the cognitive and affective aspects of various forms of lawyering and judging commits me to any position on this. Nor am I bound to defend all forms of advocacy in every context.[183]

As for the legal system's incentive to preserve its source of income arising from the eruption of disputes, one can only concede it. This incentive of course has its favorable aspects. Some disputes *should* erupt, say, because justice needs to be done or values need to be articulated. More, if the lawyer's livelihood is at stake, she may strive harder.[184] And so on. The question is whether a given legal system keeps this incentive bounded, so that some optimum level of adversary combat (however ascertained) is reached. The risk of missing the optimum level of open dispute at a given time may be an acceptable price for vindicating important individual and community interests, when compared with alternatives.[185] All trades and professions, in any event, harbor incentives to invent needs and harms that

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> have been urged. In this sense the parties as well as the court participate in the lawmaking. In this sense, also, lawyers represent more than the litigants.

LEVI, *supra* note 42, at 4.

181. Once again, Nagel turns an instructive phrase: "Objective advance produces a split in the self, and as it gradually widens, the problems of integration between the two standpoints become severe, particularly in regard to ethics and personal life. One must arrange somehow to see the world both from nowhere and from here, and to live accordingly." NAGEL, *supra* note 15, at 86.

182. See the exchange of views on adversarial ethics in William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993); William H. Simon, *Reply: Further Reflections on Libertarian Criminal Defense*, 91 MICH. L. REV. 1767 (1993).

183. Some have complained about "advocacy scholarship." *E.g.*, Posner, *supra* note 59, at 778 (referring to "scholarship in which political sallies are concealed in formalistic legal discourse"); Paul F. Campos, *Advocacy and Scholarship*, 81 CAL. L. REV. 817 (1993); *Symposium on Civic and Legal Education*, 45 STAN. L. REV. 1525 (1993).

184. One effect of such an incentive is that lawyers will call attention to themselves as lawyers, and this may help some persons realize that they are rights-holders and that they may have plausible legal claims. Other effects, of course, include the rise of champerty, maintenance and barratry. *See generally* NAACP v. Button, 371 U.S. 415 (1963) (First Amendment protection for communicating to potential civil rights plaintiffs that legal assistance may be available).

185. *Cf.* Vilhelm Aubert, *Law as a Way of Resolving Conflicts: The Case of a Small Industrialized Society*, *in* LAW IN CULTURE AND SOCIETY, *supra* note 52, at 282 (legislation may create or

require attention. Physicians, plumbers and entertainers alike look harder for unremedied wants and needs when demand begins to fall noticeably.

Finally, I mention William H. Simon's "reverse" complaint that adversary advocacy "serves the goal of social stability by sublimating conflict."[186] He argues that:

> The case against adversary advocacy rests in substantial part on the conviction that the pursuit of conflict is often better than its sublimation, that conflict can unleash creative energies, that it can promote understanding and personal growth, and that it can even lead to the sharing of values needed for its just resolution.[187]

In effect, he parses the very idea of conflict and urges that in some ways and in some forms, it is a good thing. Simon's key idea is that conflict remains but is transformed by adversary advocacy into a mute, less useful form. "Procedural justice" thus impairs the value of conflict. He concludes by recommending certain forms of nonprofessional advocacy in order to pursue conflict in proper ways.[188]

But the "nonprofessional" advocacy he recommends is still a distinctive mode of dealing with disputes that shares some of the benefits and risks of standard professional advocacy and adjudication.[189] Moreover, Simon concedes that "rule of law and notions of procedural justice can make, and have made, contributions to individual autonomy, responsibility, and dignity, particularly by restraining the crueler and more arbitrary excesses of state power."[190] Still more, this "sublimation" of conflict by subjecting it to the constraints of professional advocacy and adjudication is not clearly always or even often a bad thing. Indeed, the supposed sublimation, rather than eviscerating the conflict, may be quite consistent with maintaining it openly and enduringly. But I do not know how to measure the differential effects of standard procedural justice and "deprofessionalized" advocacy and adjudication.

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intensify conflict, but this may be accepted as a social cost of a program). *But see* Kagan, *supra* note 166 (critically reviewing the role of the legal profession in generating excessive adversarial legalism).

186. Simon, *supra* note 31, at 113; *see also id.* at 119, 125.

187. *Id.* at 129.

188. *Id.* at 130-44.

189. For example, a reformed system would still be "discontinuous" from the context in which the dispute arose—a disadvantage in Simon's view. *Id.* at 141-43.

190. *Id.* at 127 n.225.

b. Moving from Contentiousness Through Perspectives to Completeness:

The idea behind this heading is implicit in what has just been said: one moves toward greater completeness of view the more perspectives one traverses and retains in mind. It is a notion that arises in many contexts, including both intra- and interpersonal battlegrounds. David Blum, for example, in his profile of pianist Richard Goode, says that "Goode's predilection for seeing more than one side of an issue [in matters of music] is born less from a spirit of contentiousness than from one of completeness. The paradox scans the fullness of life—though, as Goode has learned in the course of his career, it can sometimes hold back the flow of life."[191] (Lawyers and judges don't hold back the flow of life, do they?)

Consider the lawyer and the judge. A competent lawyer, though arguing for and from a limited number of perspectives, will consider

191. David Blum, *Profiles (Richard Goode)*, NEW YORKER, June 29, 1992, at 39, 49.

Describing and explaining how one goes from incomplete—and in some ways "opposing"—fragments to (more) complete wholes has challenged a number of writers in a variety of contexts. *See, e.g.*, Ron Cowen, *Weaving the Cosmic Web: Bottom Up or Top Down? Now the Twain Shall Meet*, 148 SCI. NEWS 202 (1995) (discussing two views of the development of structure in the universe). One source urges: "'The real universe is kind of combining the two', explains [Adrian L.] Melott. 'If you want to describe the way structure progresses, you need the mathematics of both.' [¶] Melding the theories '*is* paradoxical,' he says. 'That's why it took a very long time to get accepted.' [¶] By way of analogy, Melott recollects that earlier in this century, quantum physicists debated whether electrons and photons were waves or particles.... [¶] 'Each is a justifiable way of understanding [the phenomena], but both were incomplete. [¶] In some sense we're saying that the description of gravitational clustering is incomplete when you use either picture [top-down or bottom-up] in isolation.'" *Id.* at 203. (One can still ask about ordering among the different views.) *See also* CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 233 (1983) ("We are learning . . . something about bringing incommensurable perspectives on things, dissimilar ways of registering experiences and phrasing lives, into conceptual proximity such that, though our sense of their distinctiveness is not reduced (normally, it is deepened), they seem somehow less enigmatical than they do when they are looked at apart. Santayana's famous dictum that one compares only when one is unable to get to the heart of the matter seems to me, here at least, the precise reverse of the truth: it is through comparison, and of incomparables, that whatever heart we can actually get to is to be reached."); M. Therese Southgate, *The Cover*, 274 JAMA 4 (1995) (discussing Rene Magritte's painting, *On the Threshold of Liberty* (1937)) ("Usually he juxtaposed unlike, even contradictory, images on the canvas. His purpose was to shock viewers into discovering new meanings in the contradictions. Later he went a step farther: He continued to juxtapose unlike images on the canvas, but now he did it in such a way that viewers might be shocked into seeing the similarities in these seemingly irreconcilable, even absurd, images. In probing the nature of reality by looking first at differences and then at similarities, Magritte exposed the visible—whether object, word or image—as a facade, beyond which an unknown, but common, reality exists."). Southgate also observed: "There are, as Wallace Stevens said, Thirteen Ways of Looking at a Blackbird. And more, and all of them are true." M. Therese Southgate, *The Cover*, 269 JAMA 1348 (1993).

many of them in order to learn more about—and thereby to become better able to defend—those she is retained to present. The judge is in theory required to attend to some degree to all presented perspectives, but toward a different end.

Richard Goode's approach tracks neither of these exactly. Mr. Goode was not hired to defend (artistically or otherwise) any particular vision.[192] He is not even required to consider contending interpretations in deciding how to construct his own. Nevertheless, he does. How, exactly, does reviewing and defending different visions promote completeness of view? Unless there is some Unified Perspective Theory, the result may be still more confusion.[193]

One has difficulty being exact about this, to say the least.[194] Why does it promote understanding and appreciation of the cathedral to walk all around it and through it rather than just to stare at it from a single spot? There may indeed be benefits from a restricted focus, especially when time is short and certain tasks must be executed. ("Don't look down.") Blinders may unearth visions and sub-perspectives that would otherwise be lost by dispersing one's limited powers of attention. But moving through and across different frameworks may reveal things not seen before. (This presumably is one reason why some musicians who have achieved their maximum technical mastery still seek teachers.)

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192. But he might have committed himself to performance intended to reflect certain visions of the music rather than others.

193. *See infra* notes 195-96 and accompanying text.

194. As Simon explains:

> Purposivism began with the important insight, ignored by Positivism, that in order to further his client's ends, the lawyer needs an intuitive grasp of them. But it begged an important question in reasoning from the premise that a single lawyer cannot fully discern the divergent views of two different people at the same time to the conclusion that partisan advocacy can effectively ascertain the truth. The argument fails to explain how the divergence of views is resolved. Purposivism never explains how the lawyer translates the insights achieved from a sympathetic consideration of his client's position into a form assimilable by the judge in an impartial consideration.
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> . . . .
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> In suggesting that partisan sympathy is necessary to fully understand a person's views, the Purposivist psychology of cognitive dissonance implies that no single person can ever simultaneously grasp the divergent views of different people. It would thus seem unlikely that a judge could ever fully understand both sides of the same case.

Simon, *supra* note 31, at 75-76; *see also* Arnold, *supra* note 163. "If cognitive dissonance limits the perspectives of the roles, then it also precludes the role occupants from perceiving the limits of their role competences." Simon, *supra* note 31, at 78.

Good lawyering, then, can offer a partisan vision with such clarity that it promotes comprehensiveness from the standpoint of a complete legal process.[195] Professional detachment thus shouldn't foreclose thought experiments in which the advocate tries to see things as a committed partisan of sorts. Detachment and objectivity—in their ordinary linguistic senses—often involve a refusal to be restricted in the search for and appraisal of contending perspectives. But they do not prevent trying to think from the internal perspective. Failure to insinuate oneself into a perspective and to argue its merits may result in significant lost opportunities for insight. We teach school children the virtues of debate by making them take a side. We teach law students much the same—not just because they have to learn to take sides because that's the way the world is, but because taking sides makes them learn more about those sides and those of their rivals. At the same time, we adjure counsel to recall that they are advocates, not parties, and to retain the "meta-perspective" of the externalist even as they internalize. How is this done? One cannot easily identify just what it is to travel inside a framework and still remain outside. What sort of thought experiments or "fragmentations of identity" are entailed?[196] The lawyer is not supposed to deal with a framework simply as a committed partisan; yet one who considers a framework in

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195. "I contemplate a face, and then suddenly notice its likeness to another. I *see* that it has not changed; and yet I see it differently. I call this experience 'noticing an aspect.'" LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 193 (G.E.M. Anscombe trans., 1958), *quoted in* Judith Genova, *Wittgenstein: A Way of Seeing*, 24 METAPHILOSOPHY 326, 334 (1993). Genova states that Wittgenstein's "interest is not to show the relativity of perception, the theoretical possibilities, but the picture that might change our minds. Once the new possibility is glimpsed, the hold of the previous way of seeing is broken and we are free to explore the familiar terrain in new ways." *Id.* at 327-28.

Note once again the ambiguity of "partisan" in the text: it may reflect, for example, either an internalist or externalist position.

196. See generally the lucid account of "sympathy and detachment" in KRONMAN, *supra* note 86, at 66-74. He describes an "attitude midway between observation, on the one hand, and identification or endorsement, on the other" (*id.* at 71); distinguishes between sympathizing with certain values and taking account of the fact that certain persons affirm them (*id.*); distinguishes sympathy from "outright acceptance" (*id.*); and distinguishes compassion and detachment (*id.* at 72). He states that "if deliberation demands sympathy—an effort to see the alternatives in their most attractive light—it also requires that one abstain from actually affirming the values they represent." *Id.* at 71-72. He characterizes the attitude of sympathy as having "a peculiarly bifocal character," noting that:

> anyone who has worn bifocal lenses knows that it takes time to learn to shift smoothly between perspectives and to combine them in a single field of vision. The same is true of deliberation.... Compassion and detachment pull in opposite directions and we are not always able to combine them, nor is everyone equally good at doing so.

Id. at 72.

a noncommitted way may fail to see something that a committed partisan does.[197] (The reverse also seems true: strong commitment may have a blinding effect.) Both "detachment" and "partisanship" leave one short of divine omniscience. So, even if lawyers, judges, or anyone else could (impossibly?) devise ways to enter other minds while retaining their own (a frequent Star Trek theme), insight would remain incomplete. Indeed, the very idea of completeness itself eludes understanding.

c. Lawyering, Accommodation and Compromise:

We may sometimes have duties to deal with moral (and other) disagreements through accommodation of some sort, rather than through all-or-nothing contests (which adjudication may, but need not, be). As David Wong puts it, "A complete ethic should address the question of how people are to act toward one another when they are in serious moral disagreement. . . . [A]ccommodation is a moral value rooted in the fact that serious conflict is a regular feature of our ethical lives . . . ."[198]

If one asks how there can be compromise and accommodation where serious moral principles are involved, one answer may be that not all principles are so absolute that other principles—including a principle of harmony—cannot outweigh them under certain circumstances. Put otherwise, we may be dealing with a larger moral conflict than we thought—one in which harmony is a competing ideal (which can be compromised in the interests of harmony?). Whether such accommodation is justified or required because harmony is intrinsically or instrumentally valuable need not be dealt with here.[199] I add only that a focus on accommodation in some cases may make pursuing all-out battles in other contexts possible at lesser risk of fracturing major social bonds.[200] But what does this have to do with the lawyers and judges in an adversary system?

197. *Cf.* Rebecca S. Eisenberg, *The Scholar as Advocate*, 43 J. LEGAL EDUC. 391, 394 (1993) (noting that one lawyer-anthropologist who prepares expert witnesses to testify "attributes his growing conviction in the wisdom of the position he is advancing to his role as advocate or lawyer-to-be rather than to his expertise as a trained anthropologist.").

198. David B. Wong, *Coping with Moral Conflict and Ambiguities*, 102 ETHICS 763, 763 (1992) (footnote omitted).

199. *Cf. id.* at 776 ("Living well with others, despite one's moral differences with them, is itself a primary moral value.").

200. *Cf. id.* at 777 (on minimizing damage to broader relationships).

The legal system has long recognized that its missions include formal battle only as a means to a set of larger goals (one of which is a just peace). Once again, while lawyers are not the only parties who can facilitate this process, they are as a general matter reasonably well fit for doing so. To accommodate rationally among competing views, one needs to know these views and how they both collide and cooperate with each other.[201] Whether overall it is a good thing for accommodation processes to be affected by the hovering threat of adjudication (as peace negotiations are affected by threatened or actual war) I leave aside.

There are large questions about lawyers' incentives to promote or impede accommodation.[202] But the law business as a whole embraces both contention and accommodation—and the one may be necessary for the other. Accommodators may still be representatives for different sides, and accommodation may require preparation for battle. In any event, the fact that lawyers and judges, generally associated with what might be called the rationality of rule-governed behavior,[203] are now said to be major players in the processes of accommodation, compromise, negotiation and bargaining should not seem odd.[204]

There is thus no paradox in using legal combat troops to bring peace (whether or not it is the best way of doing so, in any given case). Legal process uses a variety of mechanisms to promote social goals, and formal adjudicative battle is just one of them.

Perhaps accommodation and compromise should not be too sharply distinguished from adversary combat. Bargaining and negotiation are themselves forms of rule-governed behavior—where "rules" is understood to refer to certain generalities (including "principles" and "standards") of a high order of abstraction. Such rules are less

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201. Wong states that learning from others may involve gaining "a more vivid and detailed appreciation of what it is like to live their ways of life, an appreciation that can only be achieved through significant interaction with them." *Id.* at 780. One might add that one form of "significant interaction" with others may be careful advocacy on their behalf. An effective advocate or negotiator tries to find and describe contending perspectives or ways of life.

202. *See, e.g.*, Laura Nader, *Introduction*, *in* LAW IN CULTURE AND SOCIETY, *supra* note 52, at 1, 6 (stating that at a conference, anthropologist Sally Falk Moore offered comments implying that professional intermediaries have a stake in prolonging negotiation). Note the recommendations concerning deprofessionalization in Simon, *supra* note 31.

203. SCHAUER, *supra* note 10.

204. *But see* Simon, *supra* note 31, at 79 ("Once he [the lawyer] adopts the perspective of partisanship, cognitive dissonance will blind him to chances to alleviate the costs of an adversary battle and to rescue viable relationships."). Simon is discussing "Purposivist" defenses of advocacy.

outcome-determinative than those that usually characterize formal law. Some may indeed prefer not to call the accommodation process "rule-governed," but my main point is that these non-adjudicatory settlement processes are not simply chaotic.[205]

One caution: as I argued earlier, formal adjudication is (among other things) a mechanism for the announcement of rules, principles and standards. A given settlement may thus represent a foregone opportunity for significant legal and normative clarification. (There may well be cases, however, in which we would prefer to leave things vague and unsettled.)[206] The settlement may also reflect the disadvantaged position of some of the litigants.[207] But I am not prepared to offer a theory that would distinguish the sorts of cases and circumstances in which different forms of formality and nonformality ought to characterize dispute resolution. I simply suggest that a high settlement rate is not at odds with the idea that one function of formal adjudication is to make authoritative pronouncements of principle.

Finally, recall Alexander Bickel's observation that some fields of action are "unprincipled on principle."[208] If our primary rules of rational ordering fail us, rationality—at a higher or "second order" level—tells us we must do something.[209] So, we invent mechanisms of accommodation—arbitration, bargaining—even lotteries. (Recall the idea that scarce resources—e.g., natural and artificial organs, access to experimental therapies—be distributed by lottery because substantive selection criteria seem unacceptable or uncertain.)[210] Where social chaos appears, we need lots of help, and lawyers and judges are again front-line (but not the only) troops in constructing both formal and nonformal decision mechanisms. I am not saying that legal process will necessarily save the day when first-order principles, standards,

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205. *See generally* GOLDBERG ET AL., *supra* note 159, ch. 1 (describing nature of alternative dispute resolution).

206. *See generally* CALABRESI & BOBBITT, *supra* note 153 (discussing decisional mechanisms we use to hide certain grounds of decision that we do not wish openly to acknowledge).

207. *E.g.*, Fiss, *supra* note 161, at 1078-82 (discussing, among other things, imbalance of power and absence of authoritative consent to settlement).

208. Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 76 (1961). But, as I argue in the text, accommodation is not really "unprincipled"; it involves principles having a different content and level of abstraction.

209. Perhaps there are certain categories of dispute where bypassing formal adjudication—either at the threshold or beyond a certain point—seems appropriate. Large-scale mass torts? *See, e.g.*, Gina Kolata, *Fund Proposed for Settling Suits Over Breast Implants*, N.Y. TIMES, Sept. 10, 1993, at A16. Workers' Compensation is of course a long-standing example of partial deformalization.

210. *See supra* note 142.

and rules fail. Deifying process in any form is a mistake, in part because of the process-substance cycling already mentioned: to impose procedures and select decision makers still requires the decision makers to invoke substance, even when the decision process is remitted to chance. Pure procedure alone cannot explain why the remission to chance should occur in specified circumstances, nor who is to be included in the set of possible distributees, nor what the inclusion/exclusion criteria are. Even negotiators use criteria. How else could they tell which bargains are better or worse?

5. *Conservatism and Reaction*[211]

There are at least two tasks here. One is to see if the logic of lawyering and judging is "inherently" conservative and in what sense. (As mentioned, "conservative" may designate inflexibility of various sorts—the sense usually intended here—or may characterize certain substantive views and ideologies.) The other is to see if lawyers and judges are in fact predisposed to resist legal and political change, whether because of something intrinsic to lawyering and judging, or for other reasons. Lawyers and judges, like everyone else, have a certain cognitive (and perhaps financial) investment in preexisting ways of thinking.[212]

The idea that the "logic" of advocacy and adjudication is inherently conservative rests largely on the very existence of rules, principles, and standards and the abstractions on which they rest. They are "there" to be used. They bind. They endure. There is an obvious sense in which, however novel or intractable a situation appears, it bears some resemblance to what has gone before and thus may get stuck in an old rule.[213] For example, gestational surrogacy's separation of genetic from gestational contributions concerns concepts and

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211. *See supra* the introductory remarks at text accompanying notes 78-79.

212. *See generally* SCHAUER, *supra* note 10, at 38 (entrenchment of generalizations); Morawetz, *supra* note 18, at 408-09, 455; *see also* Kennedy, *supra* note 10. The idea of "entrenchment" seems affiliated with that of cognitive inertia. *See, e.g.*, MARGOLIS, *supra* note 170, at 117, 183 (habitual patterns of thought; effort is required to displace deeply entrenched habits of mind); *see also* Scott Altman, *(Com)modifying Experience*, 65 S. CAL. L. REV. 293, 325-29 (1991) (belief preservation). The term "anchoring" is often used to describe "the tendency of ideas to become fixed." *See* Edward J. McCaffery, *Cognitive Theory and Tax*, 41 UCLA L. REV. 1861, 1916 (1994) and sources cited therein.

213. *E.g.*, Richard Wasserstrom, *Postscript: Lawyers and Revolution*, 30 U. PITT. L. REV. 125 (1968).

> [T]he law is conservative in the same way in which language is conservative. It seeks to assimilate everything that happens to that which has happened. It seeks to relate any new phenomenon to what has already been categorized and dealt with.... I think that

processes we know something about. To a given decisionmaker, one contribution may seem to dominate the other (whatever the reason) and she may place the transaction into the appropriate preexisting bin. She is unlikely to open another bin and rule that one may have two "natural" mothers.

More, the logic of advocacy within a rule system usually seeks to convey the impression that the preferred result represents little or no change in prior understandings of the law: the preexisting "bin" doesn't need much stretching (or shrinking). The legal system thus generally prefers the least intrusive marginal change. Yet in most cases, "change" in some sense must be acknowledged, if only in the force of the recognition that some "bin" does indeed "contain" the contested application.[214]

The fear of legal rigidity suggests, among other things, that major social problems are not to be remitted solely to lawyers and judges, a proposition few would contest. But what the argument from inherent

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persons who are genuinely concerned with far-reaching and radical—in the generic sense of the term—solutions to social ills ought to be on guard against and ought to mistrust this powerful tendency on the part of the lawyer to transmogrify what is new into what has gone before or to reject as unworkable or unintelligible what cannot be so modified.

Id. at 129; *see also* KENNEDY, *supra* note 10, at 215. Kennedy writes:

> [E]ven when we profess an extreme nominalism . . . , we cannot maintain it in practice. Categorical schemes have a life of their own. Most legal thinkers in any given period take both the existing structure and myriad particular categorizations for granted.

Id.

> The element of apology comes in because legal thought denies or mediates with a bias toward the existing social and economic order. It asserts that we have overcome the fundamental contradiction through our existing practices. Or that we can achieve that blissful state through minor adjustments of a legal regime that is basically sound, and needs only a little tinkering to make it perfect.

Id. at 217. Kennedy argues generally that "legal thinking can be a mechanism for denying contradictions." *Id.* at 214. And see Jack Himmelstein's approving comment on Wasserstrom:

> In my attempt to draw upon the past to help me through the present, I have found myself hanging tenaciously to a perceptual framework that simply will not yield to my present reality. I convince myself that this situation is just like a past one I have been in with my students. . . . I realize (sometimes) that I am holding too firmly to precedent, but my legal thinking sure doesn't make it easy.

ELIZABETH DWORKIN ET AL., BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM 153 (1981). *See also* KRONMAN, *supra* note 86, at 156 (where there is a "conflict between principles at the boundary of their respective fields of application, the victory of one principle over the other usually implies only a marginal adjustment in their relationship."). One could argue for a different vision of lawyering—but if pressed too far, it may cease to be "lawyering" as conventionally understood.

214. As Kronman observes, *supra* note 86, at 156, when closely matched principles are contested, "some such [interpretive] expansion is implicit merely in the claim that the winning principle controls the case at hand . . . ." Still, "the victory of one principle over the other usually implies only a marginal adjustment in their relationship."

conservatism ignores is that all rational analysis bears a structural similarity to the paradigm of legal analysis and judgment: fitting experience into preexisting frameworks and structures, and, through one mechanism or another, adjusting the very categories in question. What is the alternative? (It also ignores the possibility of legal change induced by interests of lawyers in maximizing their own utilities.)[215]

There are two overlapping variables to attend to here concerning our preexisting "baseline" frameworks and categories. One deals with the ways in which we use them. Another involves our commitment to the frameworks and categories as they stand, as opposed to our willingness either to revise or to discard them in favor of—not *no* abstractions—but *different* ones.[216] Here, one first stresses the similarity of law work to everyday work, and then moves to emphasizing the idea that law persons, by virtue of their focus on this process of identifying and testing abstractions, are usefully consulted when "failures" in our category system arise.

As I said, the very failure of the systems relied on by the legal process may suggest the virtue of resorting to legal process. Abstractions fail at different levels of generality and can be repaired at different levels. To say you deal with abstractions doesn't tell you how to choose the abstractions or the appropriate level of generality,[217] but lawyers in theory have certain skills in understanding how to work with abstractions. In a sense, lawyering is as much an enterprise concerned with (partial) systemic failure as it is with upholding and applying the machinery that fails.

Think again of *Johnson v. Calvert*,[218] a gestational surrogacy case. Wasserstrom warns of "transmogrify[ing]" the new to the old.[219]

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215. *See supra* note 162.

216. There is of course a problem in determining what it is to take abstractions "as they stand." Compare this with the question of whether a consideration is "in" or "out" of a text. *See* SCHAUER, *supra* note 10.

217. The level-of-generality problem can be explained by examples. If, for example, someone sought constitutional protection against a restriction on twinning human embryos, one would run into the standard that strongly protected liberty interests must be reflected in tradition. *See supra* note 96. But how are we to describe the tradition? Procreation generally (any form, any method, any technology)? With no finer description, we can say that there is a tradition of leaving prospective parents to their own devices, whatever they are. But we go too far in saying that "tradition" specifically protects embryo twinning. On level of generality problems generally, see Tribe & Dorf, *supra* note 96.

218. 851 P.2d 776 (Cal. 1993), *cert. denied*, 510 U.S. 874 (1993).

219. *See supra* note 213.

(One might warn in return against begging interpretation and categorization questions by assuming something has indeed been "transmogrified.") But just what are we to do when the woman who gestates and the woman whose genome has partly defined the child raise exclusive claims of custody? The default maneuver in any dispute of this sort is to employ the state's "monopoly of force" and invoke a decision from an authoritative source. Even if the dispute were initially left to private ordering, how would the parties (perhaps inclined toward kidnapping?) be influenced by a community unwilling to let the dispute escalate to use of force except through some quasi-legal ordering?

Once the legal system—or "the community" in some forms of private ordering—is called on, it asks, under the mantle of its existing rule structure, "Who are the rightful, the true, parents? What is the best interpretation of the category 'mother'?" What else is there to ask first in a culture that lodges "possession" of children in a single unit among many potential rivals—a unit whose preferred form is a nuclear family with a custodial mother and father, exactly one of each?[220]

The complaint about lawyering and judging here might take this form: the law person is too benighted to ask the right questions—e.g., why don't we abandon the category "mother" in favor of some other concept of "being a parent"? Or even—Why don't we abandon the idea of an individual set of parents? And even if we stick with "mother," law persons are again too mentally hidebound to truly grasp the competing pulls of genetics and gestation.

I said before that categories fail at different levels of generality. Why expect or even want the lawyer, in the course of legal argument, to urge, say, that the concepts of parenthood and custody be abandoned, or that it is time to adopt the vision of child development by a parent class in Plato's *Republic*?[221] We expect and want lawyers to raise many issues well before they try to bust categories: Is there some basis for assigning priority to one biological connection over the other? Why? What are the differential effects of the gestational process as opposed to genetic determination on the child's physical system, identity or personality? What are the criteria for assigning

220. For further comments on this case, see Michael H. Shapiro, *How (Not) to Think About Surrogacy and Other Reproductive Innovations*, 28 U.S.F. L. REV. 647 (1994).

221. *See, e.g.*, Plato, *The Republic* (Benjamin Jowett trans.) *in* 7 GREAT BOOKS, *supra* note 175, at 295, 401 (a sort of collective custody by a parental class).

weights to these different biological contributions? The amount of work involved in gestating as opposed to supplying genes? The exact differential effects just inquired about? The nature of the bond between the gestator and the developing child as compared with the bond between the genetic source and the developing child? Or is all this to be trumped by the initial agreement reached between gene source and gestator—a "parenthood-by-intention" doctrine?

Such inquiries are supposed to precede other questions that are more far-reaching, but still fall short of threatening complete category demolition: Does the logic of "mother" or "father" entail that there be exactly one of each? It is in fact commonplace to observe that one may easily have, say, five parents: a gestational mother, a genetic mother, a genetic father, and a custodial mother and father who may have no biological connection with the child in question.[222] Indeed, the number five is far too low. If we could assemble genetic mosaics by working with gametes or early embryos (this is what will happen if we pursue certain forms of germ-line genetic engineering), the number of possible "parents" is staggering. What now?

These "revisionist" paths can be traveled by anyone: you don't have to be a lawyer—but it doesn't hurt. Conceptual revisions are in fact often proposed by lawyers, because they must confront the default category system and determine whether and where it seems to fail. Having to represent sides that never existed before (the gestational mother and the genetic mother who doesn't gestate) is a frequent occurrence in legal argumentation, and skill at representing "a side" is useful when interests are being created through technological, conceptual and social fragmentation. Representation generates insights, as well as more questions.

Dynamism is thus inextricably linked with what is denounced as conservatism: this is part of the logic of working with any system of thought. Whether law persons as a group are predisposed to rigidity rather than dynamism is a question I can't answer (it may be void for vagueness), but we take a risk when we dismiss a stance that addresses

222. *See generally* Alexander Capron, *The New Reproductive Possibilities: Seeking a Moral Basis for Concerned Action in a Pluralistic Society*, 12 LAW, MED. & HEALTH CARE 192, 194-95 (1984) (charting various reproductive possibilities).

existing schemas by combining deference with a skeptical, testing attitude. In these times, at least, many law persons have a "self-consciousness of the contingency of categories."[223] As Morton Horwitz puts it:

> Nothing captures the essential difference between the typical legal minds of nineteenth- and twentieth-century America quite as well as their attitude toward categories. Nineteenth-century legal thought was overwhelmingly dominated by categorical thinking—by clear, distinct, bright-line classifications of legal phenomena. Late-nineteenth-century legal reasoning brought categorical modes of thought to their highest fulfillment.
>
> By contrast, in the twentieth century, the dominant conception of the arrangement of legal phenomena has been that of a continuum between contradictory policies or doctrines. Contemporary thinkers typically have been engaged in balancing conflicting policies and "drawing lines" somewhere between them. Nineteenth-century categorizing typically sought to demonstrate "differences of kind" among legal classifications; twentieth-century balancing tests deal only with "differences of degree."[224]

In any given case, of course, the advocate may resist anything that looks like change—but his opponent may well be moving in the opposite direction. The case against lawyering and judging is incomplete in simply focusing on the "conservative" process of working with "givens." And the conservative vector is itself not clearly misguided, for it yields its own insights and accommodations. Certain innovative remedies, for example, may vindicate new interests without openly challenging basic understandings about reigning abstractions. Thus, joint custody or significant visitation may partly vindicate gestational and genetic interests without flatly acknowledging two "natural mothers." More generally, seeking novel arrangements within existing categories is a form of compromise between rigidity and instability.

There are other examples. When lawyers argue over the fate of a person in a persistent or permanent vegetative state, the pressure of representing a side—a next of kin wanting closure, a hospital fearful of liability—may yield perspectives on the meaning of "death," and on the nature of autonomy, one's "best interests," and state concerns. When a destructive event preserves organic life processes while it

223. The phrase comes from MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at viii (1992) (referring to "interpretative and deconstructive intellectual movements").

224. *Id.* at 17.

destroys mental functioning, something goes and something remains. If so, is the category "dead" broke? Which should dominate—the persistence of organic functioning or the end of personality (can a permanently unconscious being have any interests?)? Before deciding, someone ought to see and argue for each perspective, through the interpretation of the principles and rules that best vindicate them. And that is more or less what is done with focused legal argument—not fully, not completely, but with some affirmative yield that is the resultant of the "change" vector inherent in interpretation, and the logic-of-rules vector that works to maintain the identity of the principles and rules involved in the fray.[225]

6. *The Law and Mechanisms of Learning*

The "learning effects" of social practices and institutions, whether ultimately embodied in law or not, are often overlooked or underemphasized. If one takes moral and legal analysis seriously, one should be concerned with how to construct living social/political systems that increase the incidence of right actions by reinforcing morally favored attitudes and beliefs.[226] Indeed, this may be one of the few surviving considerations left after all sides of a controversy have been trashed by standard forms of analysis.

Where legal institutions and large-scale community practices are involved, therefore, I refer to the idea of "regulation as communication"—a loose way of describing the effects of regulation, intended or not, in forming and preserving attitudes and beliefs.[227] In particular, it seems reasonable to expect that crystallized rules and their open implementation will have learning effects different from those of practices that are not endorsed by such official pronouncements and remain (partly) invisible. (Compare a situation in which a statute

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225. *See generally* MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 287 (1994) (although much of lawyering is "order-affirming," "lawyers regularly shatter order, too, as they probe the limits of, and directly attack, established procedures and institutional settlements"). *But cf.* KRONMAN, *supra* note 86, at 156 (when one principle defeats another, their relationship usually is only marginally adjusted).

226. Shapiro, *supra* note 160, at 1559.

227. *See* Shapiro, *supra* note 5, at 23-31. A similar point is made in Gary Melton, *supra* note 104, at 384 (after stating that law "confirms the worth of humanity," he argues that it "promotes a sense of community" not only through dispute resolution but by "announcing the norms of the community and thus reifying the values embedded in the culture," and "establishing structures that create or sustain social behavior consistent with those values.") *But cf.* POSNER, *supra* note 27, at 460 ("It has yet to be shown that law changes people's attitudes toward compliance with social norms, as distinct from altering their incentives.").

expressly provides for physician-assisted suicide with one in which assisting suicide remains a crime but there is occasional *sub rosa* suicide assistance that is rarely or never prosecuted.)[228]

So, despite laments about the costs of lawyers and adversariness, there are goals that may be achieved by authoritative judicial pronouncements at the conclusion of the lawyering process. Even if courts in a sense simply affirm existing practices—as in largely allowing custom to dictate certain standards of care in medical practice[229]—the official, authorized ratification of these practices alters the world. An open, accepted practice is not the same as an invisible one.[230]

The legal perspective, then, requires not just attention to particular (and possibly unnerving) features of the lawyer-driven adversary process, but to the social and political significance of the presentations of principle and the performative utterances of the court. It is a mistake to trivialize this by calling it "ritual." "Ritual" is not a universal pejorative. Rituals teach, and teaching affects behavior.

IV. CONCLUSION

I have argued that a central task of the law is to address contending interests by investigating the perspectives that underlie them, and to help construct and work with abstract frameworks for judging and "aggregating" the perspectives. The fragmentation and multiplication of perspectives worked by many modern technologies is, then, just the sort of thing the legal process may profitably be applied to—though with no guarantee of "success" in any particular sense. If this is one aspect of "lawyering the truth," so much the better for it.

Biological technologies in particular may produce results that do not fit into existing ways of thinking: they create new entities, relationships, and perspectives. They may thus challenge the very classification systems that underlie legal systems.

But challenging and testing classification systems is also what lawyers and judges do. While it may seem paradoxical that we should call upon lawyers when the conceptual and procedural systems they use

228. *See* CAL. PENAL CODE § 401 (West 1988) (penalties for complicity in suicide). Dr. Kevorkian's well-known activities of course straddle the distinction in the text: arguably illegal assistance openly rendered. *See* references, *supra* note 47.

229. *E.g.*, JOSEPH H. KING, JR., THE LAW OF MEDICAL MALPRACTICE 39-76 (2d ed. 1986).

230. CALABRESI & BOBBITT, *supra* note 153.

are under attack,[231] the paradox melts away when we see that lawyers and judges inevitably attack, defend, and revise those systems every day because of the very nature of the interpretative/argumentative process they pursue.[232] More, "legal process" is itself, in its formal modes, often challenged by law persons: various mechanisms of alternative dispute resolution, for example, were born and developed in processes heavily involving law personnel.[233] Law persons rightly work alongside those trying to manage the shredding of our forms of thought (and those doing the shredding).

The benefits I ascribe to the lawyering and judging perspectives in bioethics (and elsewhere) thus rest partly on an isomorphism between something that lawyers do (break things down into competing perspectives) and something that biological technologies do (break down life processes and accompanying social institutions into new fragments and arrangements generating new perspectives).

Law, then, is not a limiting framework but a liberating one. Individual lawyers of course do not purvey all perspectives. They're not supposed to, though they're supposed to know all perspectives that are arrayed in a given case in order to effectively present those perspectives they are hired to push. The legal system's judges must see the whole and rate the perspectives. The legal system, in the aggregate, is supposed to embrace all the perspectives, though it may not do so in fact or may do it poorly.

In saying this, I do not claim to have identified some unitary task of lawyers and judges, defined by an ascertainable all-encompassing "legal perspective." I do not posit a mythical universal framework, a

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231. *Cf.* COUNCIL ON THE ROLE OF COURTS, *supra* note 157, at 103 (arguing that "[c]ourts are not as well suited as other institutions to adjudicate disputes in the absence of an ascertainable and authoritative standard."). Much depends on the meaning of "ascertainable and authoritative standard." The existing rules concerning child custody would probably be viewed as providing such standards, but do they lose this character under particular challenges—e.g., our gestational surrogacy example? Or is there a deficit only where there is simply no text or canon to be invoked except, if at all, at the highest levels of generality? Lieberman offers the examples of selecting positions on a football team or the winner of a beauty contest.

232. This is similar to a point made in defense of casuistry in JONSEN & TOULMIN, *supra* note 93, at 285: "[P]rocedures for criticizing the core categories of moral practice are *built into* the established traditions of case reasoning in all civilizations and cultures. Questions about 'ways in which those categories might be criticized' are, thus, not external to casuistry: they are part of casuistry's own agenda." Much the same might be said about at least some aspects of doing law.

233. *E.g.*, GOLDBERG ET AL., *supra* note 159, at 5; *see also* PAUL J. SPIEGELMAN, AN INTRODUCTION TO THE LAWYER'S ROLE IN DISPUTE RESOLUTION (1985) (noting the involvement of lawyers in the processes of arbitration and mediation).

theory of everything. I have simply said that the law person's vision is protean, adjusting to the characteristics of the issues at stake, and these issues can comprehend any subject of contention. It is the skill in unearthing and scrutinizing different visions that I invoke, on the theory that such exploration is an important condition—if not universally necessary—for finding good answers to hard questions. If "we can never see [things] with any eyes except our own,"[234] we can nevertheless use the services of those who acquaint us with the eyes of others.

One might protest here that I have defined "lawyering and judging" too broadly, thus investing these processes with virtues they lack. Family peace makers, social workers, physicians, arbitrators, mediators, bartenders and butchers—they all engage in the "normative ordering of human relations"[235] by dealing with rival perspectives.

These claims are true but irrelevant. First, lawyers and judges do what I say they do; the fact that others do it too may place them in the broad field of "legal ordering" even if they are not lawyers and judges. The only reason for focusing on lawyers rather than community mediators or social workers is that lawyers are formally named as having certain exclusive functions covering a large range of legal ordering problems. The fact that other personnel act in parallel or complementary ways is not only not embarrassing, it is entirely expectable.[236] Moreover, these other workers themselves are at least as close to the

234. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921), *quoted in* Wells, *supra* note 82, at 323.

235. *See supra* note 28.

236. Here one is reminded of disputes concerning supposedly different national habits of lawyering and litigating. We are often told, for example, that the Japanese dislike litigation and value harmony so greatly that they have fewer lawyers than many other nations. These observations are confusing and misleading. First, litigation rates and numbers of lawyers may be connected, but they are different matters. And neither should be confused with degrees of harmony. Further, there are many formally licensed parties in Japan doing what we would here call legal work, though they are not members of the Japanese Bar. *See, e.g.*, *The Rule of Lawyers*, *supra* note 28, at 13:

> [B]engoshi are mainly litigators; they handle only a small portion of Japan's lawyering. The rest falls to a hotchpotch of licensed judicial scriveners, administrative scriveners, patent attorneys and tax attorneys. On top of that are in-house corporate legal staffs filled with law graduates who never bothered to pass the [extremely difficult] bar exam. . . . Add it all up and Japan has around 125,000 suppliers of legal services.

The litigation rate may also be misleading; varying factors such as opportunities for damages, access to lawyers, and so on, may generate differences in propensities to sue without reflecting enormous differences in relative harmoniousness of different cultures. Such data thus do not establish that Japanese society is more "harmonious" (a term hard to define). On the licensing of providers of legal services and on dispute resolution, see generally YUKIO YANAGIDA ET AL., LAW AND INVESTMENT IN JAPAN: CASES AND MATERIALS (1994) (the legal profession; dispute

advocacy-and-adjudication model discussed here as they are to truly private, everyday forms of dealing with or preventing disputes.

Finally, recall the widely used rhetorical maneuver of claiming that one's antagonists "just don't get it." It isn't entirely clear what this now overused phrase means, nor is it entirely clear how to get people to get it and what is supposed to happen differently when they do get it. But it is clear that getting it has something to do with varying perspectives and frameworks for description and judgment. Lawyers and judges may form only a small part of getting it—but they do form that part.

resolution). *See also* JOHN HALEY, AUTHORITY WITHOUT POWER (1991) (discussing the Japanese legal system, particularly at 83-119, "Lawsuits and Lawyers: The Making of a Myth."). Of course, I do not deny that resort to lawyers and to litigation varies greatly in different contexts, and may indeed be sharply different from culture to culture. *See* ELLICKSON, *supra* note 66. On the problems of discerning the characteristics of litigation systems, see Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147 (1992).