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The Passions of Law (Book Review) (Undetermined)

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THE PROGRESS OF PASSION

Kathryn Abrams*


Like an abandoned fortress, the dichotomy between reason and the passions casts a long shadow over the domain of legal thought. Beset by forces from legal realism to feminist epistemology, this dichotomy no longer holds sovereign sway. Yet its structure helps to articulate the boundaries of the legal field; efforts to move in and around it infuse present thinking with the echoes of a conceptually distinct past. Early critics of the dichotomy may unwittingly have prolonged its influence through the frontal character of their attacks. By challenging a strong distinction between emotion and reason, critics kept it, paradoxically, before legal audiences. Moreover, within the context of this approach, refusing the challenge posed by critics remained an intelligible response. Glimpsing, perhaps, the limits of this approach, an emerging generation of critics has embraced a new strategy. By assuming the interpenetration of reason and emotion in law, and turning a keen, evaluative eye to their complex relations, these scholars have introduced new lines of inquiry. They have also often disarmed their opponents: when one is assessing the competing claims of disgust and indignation to direct the criminal law, for example, it becomes more difficult for audiences to assert that emotions have no role in these legal processes.

Susan Bandes’s collection, The Passions of Law, is a triumphant example of this new genre of critique. “Emotion,” Bandes declares in opening the book, “pervades the law” (p. 1) — her collection takes its shape from this transformative assumption. The question raised by the thirteen provocative essays that comprise this volume is almost never, “Can emotion co-exist with the demands of reason in law?” It is, as we learn in Bandes’s illuminating introduction, “which emotions deserve the most weight in legal decision making, and which emotions belong in which legal contexts?” (p. 7) It is how to assess the varying functions that law can perform in relation to the emotions — whether ex-

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pressing, identifying, channeling, elevating, or satisfying individual or collective passions. It is how both law and the emotions that inflect it are shaped by elements of the broader culture in which both subsist. The great contribution of this volume is to shift the debate away from familiar dichotomies and toward the vast terrain that can be reconstructed by exploring the pervasive influences of the emotions in law. The gaps and inchoate elements in the collection remind us of just how large a task this may prove to be.

I. THE PASSIONS OF LAW

The Passions of Law is presented in four parts: this framework nominally takes its bearings from the character of the passion to be explored, but other organizing principles come rapidly into view. The first section, “Disgust and Shame,” features essays by Martha Nussbaum, Dan Kahan, and Toni Massaro debating the role of disgust, and secondarily shame, in the criminal law. The anchor for this debate is Kahan’s brief yet pointed essay, “The Progressive Appropriation of Disgust,” in which Kahan continues a sustained scholarly effort to use the force of shared (community) norms to enhance compliance with the criminal law. While Kahan’s earlier works focused on the ways that law could enlist the emotion of shame in inducing compliance,3 this essay turns its attention to disgust: an expression of collective disapproval that might animate the criminal law, and one of the emotions of judgment capable of eliciting shame. Kahan argues that the hierarchical judgments entailed by legal expressions of disgust are not only appropriate condemnations for certain kinds of offenders, but should be appealing to progressives who often resist their inegalitarian character. The kind of comparative judgment reflected in a public expression of disgust is not only inevitable but also valuable: it represents a potent species of expressive capital that should not be ceded to offenders alone. Moreover, competing public expressions of disgust provide occasions for glimpsing and comparing important hierarchies of value.

Nussbaum contests this conclusion by reconstructing disgust. She describes it not as expressing a hierarchy of value, but as reflecting human discomfort with our ineliminable animality, which we seek uneasily to escape by projecting it onto a specific person or group. This projection of animality onto a particular group has often been the predicate for cruel and dehumanizing treatment, in examples from Nazi Germany to the trial of Oscar Wilde. The viscerality of disgust also renders it publicly inarticulate, which causes it to compare poorly to the competing emotion of indignation. Indignation, which reflects

the anger triggered by unfitting treatment, can animate statements of public reason, making it a more suitable emotion for directing criminal legal enforcement.

Massaro, in a far-ranging essay, looks both at the public imposition of shame and at the evaluative emotions, such as disgust, that might animate it. Debates within both emotion theory and the norm theory on which Kahan draws, Massaro claims, raise questions about the use of law to induce shame in broad categories of offenders. Evidence of a broad-based human concern with status, for example, says little about whether the government might deploy that concern, through the imposition of shaming penalties, to induce compliance with law. Scholarship about the emotions suggests that there is too much uncertainty about how they are triggered, and in what combinations, and with what variation across different populations, to support the kind of simplified incentivizing system that Kahan advocates. Massaro also highlights tendencies that could be introduced into criminal justice, if the law were understood as a means of expressing disgust at offenders. Expressions of disgust entail no metric that could assess or limit the extent of punishment, making cruel or disproportionate punishments an ominous possibility. Such expressions might also be rendered banal when articulated in more widespread or ritualized form.

Part II focuses on “Remorse and the Desire for Revenge.” The first of these emotions is explored by Austin Sarat, whose nuanced examination of Tim Robbins’s film *Dead Man Walking* probes our society’s ambivalence about the degree to which we can either demand or recognize genuine remorse in the criminal offender.

The “desire for revenge” is explored in essays by Robert Solomon, Jeffrie Murphy, and Danielle Allen that examine three different variants of this emotion. Solomon’s essay invites us to consider how the often-maligned emotion of vengeance might be embodied in the law. He defends a conception of vengeance as an intense yet “cool” emotion with an element of instrumental rationality that points toward talionic notions of suitability or proportionality. This view permits him to argue that vengeance might not only be expressed, but channeled, elevated, and satisfied through its incorporation in the law. Indeed, the dominant metaphors we use even now to talk about vengeance — metaphors of debt, balance, or pollution — suggest limiting notions that might make vengeance through law containable and might foster a sense of relationship among victims, offenders, and the (legal) avenger.

Murphy, writing about retribution, reconsiders his longstanding support for a retributive theory of punishment. Building on arguments offered by Nietzsche, he questions whether either of the emotions ostensibly underlying the retributive urge, guilt or resentment, is epistemically reliable enough to provide the impetus for retributive action. More generally, he calls into question the goal of character retribution
— that the state should mete out punishments that respond not simply to the acts but to the “inner wickedness” of the offender. Using insights from Kant and Jesus Christ, he argues that we are neither so perspicacious in assessing the character of the offender, nor so free from our own failings, that we should depart as starkly as this strategy requires from a posture of moral humility.

The final essay, by Danielle Allen, is concerned with anger. Allen examines the use of retribution in ancient Athens to reflect on our contemporary discomfort with retributive justifications for punishment. In Athens, both the public and lawmakers recognized that “wrongdoing and punishment had to do with relations between people” (p. 193). Retributive sanctions thus responded to anger in the community, to an imbalance that had been created through the wrongdoer’s act. It was only, after Plato, when punishment came to reflect a defect in the offender — the “disease” to be cured was baseness in the offender rather than anger in the community — that retributive action took on the problematic character it retains to this day.

Part III of the book treats the most eclectic and far-reaching group of emotions. Cheshire Calhoun explains how laws and legal rhetoric restricting the institution of marriage to “one man and one woman” (p. 237) are based not only on an emotion, but on a socially-constructed emotion: a carefully-scripted notion of romantic love that “exceptionlessly cast[s] heterosexuals in the leading roles” (p. 222). Noting that emotions are often constructed to reinforce social hierarchies, Calhoun argues that denying certain groups the capacity to experience can be a means of subordination. Particular emotions may be “outlaw[ed]” because they presuppose, as philosophers Allison Jaggar and Elizabeth Spelman have argued,4 “the beginning of a critical social theory.”5 The argument that gays and lesbians lack the capacity to experience romantic love — a proposition fostered not only by cultural imagery but by the psychoanalytic communities of the 1950s and 60s — thus perpetuates sexual hierarchy. It should be resisted by deconstructing the cultural knowledge on which it rests.

William Miller is concerned with fear and cowardice, as reflected in the Code of Military Justice regarding “misbehavior before the enemy.”6 Leading the reader on a legal, historical and literary tour of such failings as “running away” (p. 243), “gentle offense versus craven defense” (p. 246), and “throwing away one’s weapons” (p. 250), Miller explores the subtle distinctions among different species of fear and

cowardice. He also reflects on the difficulties of inferring these emotional states from the actions of the accused.

In the final essay of this part, Martha Minow asks how legal institutions can address the emotions aroused by mass violence committed under governmental auspices. She surveys innovations such as the United Nations International Tribunal for the former Yugoslavia and the Truth and Reconciliation Commission in South Africa to suggest the role that law can play, not only in gathering facts often shrouded in secrecy, but in “reconnect[ing] individuals with a . . . community committed to establish[ing] and protect[ing] human rights” (p. 269) and providing at least some of them “a way past revenge” (p. 267). Looking both at the asserted benefits of such institutions and at their potential shortfalls, Minow then contrasts them with efforts to attend to the emotional states of participants in more familiar forms of dispute resolutions, such as ADR.7

The final portion of the book, “Passion for Justice,” explores the role of passion in the tasks of making or obeying the law. Part IV opens with an essay by John Deigh that describes obedience to the law as being fueled by an emotional bond between the citizen and those who govern him that is akin to — as well as modeled and fostered by — the bond linking children and their parents.

Following this essay, Richard Posner and Samuel Pillsbury take on what is perhaps the most familiar question in the study of law and the emotions: the role of emotion in the life and work of the judge. In Posner’s essay, the question of judicial emotion is one of several, which include the role of hatred and shaming in administration of the criminal law and the role of evidence in providing a filter that seeks to insure the proper emotional state in the judge. But what does Posner have to say about this state? Posner emphasizes the role of emotions in difficult cases that “cannot be resolved by a purely algorithmic procedure but require[] recourse to intuition, moral feelings, the balancing of opposed interest, and political preferences” (p. 321). However, reasserting the traditional dichotomy, he notes that the emotions may be out of place in run-of-the-mill adjudication where “they would interfere with the problem-solving process” (p. 321); and even in the

7. Though their emotional foci are distinct, these essays share many central themes with those of Part II. As distinct from Part I, they are concerned with the many varied ways in which law can engage the emotions: what we see in essays by Solomon, Allen, Minow and Calhoun is not simply the expression of emotion through law, but the structuring or elevation of emotion, the satisfaction of emotion, and the deployment of emotional scripts to perpetuate hierarchy. These essays are also alert to the shaping of both law and emotion by the elements of the surrounding culture. Calhoun shares this interest in cultural formation with Allen and Sarat. The essays of Parts II and III are also concerned with the epistemic difficulties of identifying emotional states with enough certainty to make them the predicate for legal consequences: here Sarat’s ambivalence about demanding remorse tracks Miller’s uncertainty about fear. Murphy’s epistemic doubts about glimpsing “wickedness” in the soul of the offender offer a similar — though less directly emotive — theme.
more complex cases, emotions can create a danger because “the resistance put up by ‘objective’ . . . considerations will be weaker” (p. 321). One key for judges may lie in identifying the emotions most appropriate to judging, or, as Posner intermittently puts it, distinguishing between “emotion” and “emotionalism” (p. 310). The first emotion that is particularly appropriate to the judge’s task is indignation, which is both “the normal reaction to a violation of the moral code of one’s society” (p. 322) and “the mode by which a violation is identified” (p. 322). The second is empathy, which Posner defines in a characteristically iconoclastic way. The point of judicial empathy is not to make immediate to the judge the plight of those before the court, but rather “to bring home to the judge the interests of absent parties” (p. 323), or to combat “the availability heuristic”: that is, “the tendency to give too much weight to vivid immediate impressions . . . and hence to pay . . . too little [attention] to absent persons likely to be affected by the decision” (p. 323).

Pillsbury, in contrast, argues that the emotions capable of shaping judging in salutary ways may be different for different judges. Forging a genre of inquiry he refers to as “emotive analysis” (p. 331), which combines elements of judicial biography with a search for the influence of emotions on appellate opinion-writing, Pillsbury examines the role of emotions in the work of Justices John Harlan and Oliver Wendell Holmes. Though Harlan appeared to be animated by outrage at group-based injustice and Holmes by a thirst for timeless intellectual achievement, both forms of “passion for justice” (p. 349) may have fueled the unique line of vision achieved by each in his landmark dissents.

II. Charting Passion’s Progress

It is one of the great virtues of this volume that virtually every essay opens up new lines of argument, incites fruitful differences of opinion, or otherwise merits extensive commentary. The limited space of a review essay thus forces painful choices on one who would assess this provident and lively collection. Instead of touching on each essay briefly, or focusing at length on a subset of essays, I will take another strategy, one specifically tailored to Bandes’s ambitious goals in assembling the volume. In the discussion that follows, I will consider The Passions of Law less as a collection of individual essays than as an effort to instigate a new generation of questions about the relation between emotions and the law. I will look at the patterns and relations among the essays as a way of identifying what questions are being raised, and how they are being handled; what issues are being elided or moved to the margins; and what kinds of inquiries might fruitfully be undertaken to supplement the effort reflected here. In so doing, I will respond to individual essays, though perhaps differently, and cer-
tainly at less length, than would be the case with a different evaluative approach. I will organize my analysis around three kinds of questions that appear to be raised most directly by the structure and content of the collection: what is the range of possible relations between the emotions and the law; which emotions should influence or should be enacted through the law and in what contexts; and whose (that is, which actors') emotions are the proper object of attention by legal analysts. In concluding, I will also touch on a fourth question, namely, how might analysis of the "passions of law" affect the sensibilities of those undertaking the inquiry.

A. Relations Among Law and the Emotions

In first-generation analyses of law and the emotions, the engagements or interrelations that were acknowledged between the two were confined to certain well-rehearsed patterns. In the many areas of law in which emotion was regarded as problematic or at least controversial — the act of judging is the most familiar example — emotion was characterized as alien, and perhaps threatening, to the processes of more detached reason that characterized the activity. Revisionary accounts sought to characterize emotion as adding something distinct and valuable to that process; yet the relation remained more or less oppositional. Moreover, to the extent that engagement produced any change in the character of the contending forces, it was emotion that modified the character of law — conceived in this case as abstract

8. Although my approach is, I believe, suited to Bandes's aspirations in assembling this collection, the categories of questions I identify here do not faithfully track those framed by Bandes in her excellent introduction. This partial divergence may be attributable to the fact that we are most strongly engaged by different questions, or that we frame those questions at different levels of abstraction. Bandes, for example, identifies virtually all the relations among law and the emotions that I discuss below, but does not focus on their (unusual) range or make the kinds of comparisons among them that I undertake here. However, I suspect that the main reason for divergence is the difference in our tasks and the orientations they produce. Because Bandes's goal is to incite an expansion in our thinking about law and the emotions, her conceptualization is provocative and allusive. She identifies a far greater number of organizing inquiries and seeks to destabilize the substantive contribution of each essay by reading it first as oriented toward one set of questions and later as engaging another. Facing this proliferation of issues and aiming toward evaluation, as well as introduction, my analysis focuses on those patterns reflecting broadest or strongest coherence within the work as a whole and imposes greater fixity on the meaning or contribution of particular essays.

9. See, e.g., Martha L. Minow & Elizabeth V. Spelman, Passion for Justice, 10 CARDOZO L. REV. 37 (1988); Judith Resnik, On the Bias: Feminist Reconsideration of the Aspirations for our Judges, 61 S. CAL. L. REV. 1877 (1988). In noting the limits of these analyses, I do not intend a backhanded critique — these were provocative interventions at that stage of the inquiry (indeed, at that point, one might more appropriately have called it a debate). It is simply that the conversation these first interventions initiated has progressed. One might take as indicative the fact that Martha Minow, one of the leading contributors to the early stages of this debate in law, has conceptualized the relations between law and the emotions in a distinct and more complex way in this volume.
reason — rather than the other way around. In those few areas — such as the criminal law — in which emotion was viewed less as an unwelcome intruder than as an organic part of the legal process, relations tended to be unidirectional and expressive; emotions explained or animated the structure of the law. The criminal law was understood as giving voice, for example, to our retributive urges in the face of wrongdoing.

One of the great surprises — and great pleasures — of The Passions of Law is the rich range of relations it conceives between the emotions and the law. The early relations are amply and interestingly represented. Posner’s essay evokes the traditional tension between reason and the emotions, yet with the acknowledgement that the enrichment of the former by the latter is possible, and with the additional hybridity implicit in judges’ efforts to confront the “availability heuristic” (p. 323). Kahan’s and Nussbaum’s essays reflect criminal scholars’ interest in the expressive functions of the law, yet extend this interest by exploring the animating emotions of disgust and indignation. Massaro branches out from these traditional concerns by writing, critically, about the role of law in evoking certain responses in offenders. And Sarat and Miller explore, with mixed fascination and ambivalence, the conditioning of legal outcomes on decision makers’ abilities to identify certain emotions, such as fear or remorse, in those who stand accused by the legal system.

Perhaps most novel and evocative, however, are a group of essays that envision a more complete interpenetration of law and particular emotions, and focus, in particular, on the way that law may shape or construct the emotions. Robert Solomon’s essay on vengeance and the criminal law, Danielle Allen’s analysis of approaches to collective anger at wrongdoing in ancient Athens, and Martha Minow’s exploration of procedures for addressing emotions aroused by mass violence are particularly illuminating in this regard. None of these essays regards the expressive function as fully capturing law’s relation to emotion, although each acknowledges this role. These essays are more concerned with the ways in which law can act on — perhaps one could say shape or construct — the emotions of individuals or communities. Solomon is concerned with the potential of law to “rationalize and satisfy” (p. 131) the constellation of collective emotions we identify with the desire for vengeance in the face of wrongdoing. Allen similarly takes up the theme of “satisfying” emotion — with an emphasis perhaps less on refinement than on catharsis — when she writes about addressing the collective “dis-ease” of anger in ancient Athens. Minow’s emphasis is on the law’s engagement with individual emotions — in this case, the emotions of the victims of mass, state-sponsored violence. She focuses on the ways that legal investigation, publicity, and affirmation, both of one’s experience of violence and of countervailing human rights norms, can make it possible to move beyond a desire for venge-
ance, or to replace that urge with a less consuming desire to hold wrongdoers responsible, so that one can get on with one's life. Minow memorably quotes Jadranka Cigelj, a Muslim victim of Serbian rape, torture and detention, who collected testimony from other survivors and pursued prosecutions in the UN International Tribunal for the former Yugoslavia:

When you think of a 15-year-old girl whose entire world was destroyed... how her youth was stolen and how she was turned into a wounded animal, you realize that what is important is to work toward a way to hold these people responsible and punish them. Then one day you wake up and the hatred has left you, and you feel relieved because hatred is exhausting, and you say to yourself, “I am not like them.” (p. 267)

For Cigelj, the law, acting on a character of remarkable resiliency, has helped transform overwhelming hatred into a more bounded desire for accountability and justice that permits the resumption of the more familiar aspects of her life.

One factor that has made possible this view of the emotions as constructed by and through law is a set of new understandings of the emotions themselves. Both Minow and Massaro point to shifts in emotion theory that characterize emotions not as raw, unmediated affect, but as having a cognitive structure or an evaluative component. Cheshire Calhoun gives this insight a more explicitly political valence when she talks about “outlaw emotions” (p. 223) as containing the seeds of a social critique. For Solomon, perhaps most clearly, his careful reconstruction of the emotion of vengeance is closely connected to its capacity to be purified or satisfied by law. When he characterizes vengeance not as a burst of anger but as a “cool” emotion with “its kernel of rationality” (p. 127), he describes an emotion that is capable of being purified or satisfied by law, often without resort to violence. The rationality, and the conceptual limits implicit in vengeance—highlighted by Solomon in his discussion of the three metaphors most consistently associated with discourse about vengeance—are what provide law its purchase when it begins to act on this passion.

This notion of the emotions as both cognitively inflected and (therefore) malleable shapes a related, fascinating feature of this collection: its view of the emotions, and the law that acts on them, as sculpted by the wider cultural context in which both exist. This view comes across most clearly in Calhoun, who writes about emotions as being “scripted” by cultural representations that are underwritten by certain forms of knowledge; but one also finds it in Allen, who contrasts the Athenian understanding of the collective “dis-ease” created by wrongdoing, with the more contemporary cultural understanding that locates the disease within the offender. Sarat envisions a more mutually reinforcing relation between law and culture when he opines that particular cultural representations, such as *Dead Man Walking,*
may reflect our ambivalence about our emphasis on, and ability to assess, remorse.

If the intriguing variety of the relations envisioned between law and the emotions is the great strength of this volume, one of its small disappointments is its failure to spell out, at least in some cases, the implications of these relations for specific legal interventions. Kahan’s discussion of disgust makes the closest approach to implementation, although even here it is not clear whether he aims simply at enhanced penalties for hate crimes, or favors some ritualized official expressions of disgust. A more important question — whether he views the legal system as a forum for airing competing conceptions of disgust or systematically implementing one conception over another — also remains unresolved. Yet most American legal scholars, I would suspect, have some feel for an expressive approach to law and the emotions; in the criminal field, as I note above, it is not entirely new. The more compelling questions concern those legal regimes that might effect the construction or transformation of emotion. This conception seems less familiar, and perhaps more daunting; I found myself reading breathlessly to see how it might be accomplished. However, few of these more inventive essays venture far into the realm of implementation. Solomon stops with the introduction of a series of metaphors, by which we might structure a legal approach to vengeance. Allen offers a vivid portrait of the satisfaction of collective anger in Athens, but neglects to tell us whether or how the temporal and cultural distance might be bridged so as to make her example germane to contemporary law and policymaking. Minow’s essay goes the farthest in this regard, interlacing explanations of various factfinding and reconciliation commissions with narrative accounts of their emotive effects on survivors of mass violence. Yet her essay provides only a brief tour of these innovations and quite intentionally raises as many questions as it answers.10 These questions of implementation are crucial, because they touch on issues — raised both by Minow, and more extensively, by Massaro — about the limits of our knowledge of the emotions and the challenges of acting on a force as volatile and variable as emotion with an instrumentality as crude as law. These reservations might seem to apply with greatest force to Kahan’s work on shame, because he projects such confidence that one can use law to produce emotional states, and because his efforts to incentivize compliance with criminal law through the production of shame in offenders envision the most direct or mechanical relation between law and emotion. Yet these questions also apply to approaches that use law not to produce but to assuage, satisfy, or transform emotion: these too may require an understanding

10. A more sustained treatment is provided in Minow’s excellent book, BETWEEN VENGEANCE AND FORGIVENESS: FAC ING HISTORY AFTER MASS GENOCIDE AND VIOLENCE (1998), from which her essay is taken.
of the factors that influence the experience of emotion, or the role of law in effecting changes in emotional states that exceed what we currently have to offer.

B. Varieties of Emotion

Which emotions are most appropriately reflected or embodied in law, and in what contexts? In answering this central question, the volume strives for both breadth and depth. The organization of the book highlights the range of passions that may be brought to bear in the legal context. Part III is especially valuable in probing emotions, such as love, fear, and forgiveness, whose life within the law has less frequently been explored. Part IV’s discussion of judging contributes to the elaboration of a cognitive strand in the emotions. Pillsbury argues convincingly that the desire for transcendent intellectual achievement—an interpersonally detached and cognitively oriented emotion—played a pivotal role in the work of Oliver Wendell Holmes. And Posner’s description of judicial empathy as an effort to combat the “availability heuristic” (p. 323) offers a potent, counter-intuitive challenge to readers, although I remain undecided as to whether this argument reflects a serious effort to reconstruct empathy, a partially ironic project of colonizing discourse on the emotions with the analytic frame of Chicago-style law and economics, or perhaps some combination of the two.

The collection’s effort to assess the contributions of different emotions to the work of the law is another of its strengths. The opening trio of essays on shame and disgust are among the very best in the book. Nussbaum’s humane and learned essay argues convincingly that the etiology of disgust in human discomfort with our irreducible animality makes it an unreliable and dangerous basis for legal enactments; she also effectively highlights the greater proportionality and articulacy of indignation. Massaro reminds us that the current state of knowledge about the emotions raises serious questions about whether they can be strategically evoked and deployed by law. This insight sounds a cautionary note, not only in relation to Kahan, but in relation to others of the authors who propose to shape emotion through law. Perhaps the greatest frustration of this excellent section is that Kahan has no opportunity to respond to these critiques. His essay is admirably focused and provocative, and he makes the interesting strategic choice of pitching it to progressives, rather than to his more natural intellectual allies on the right; yet he has almost no opportunity to address the dazzling range of reservations raised by Nussbaum and Massaro. I would have liked to hear Kahan defend the clarity of disgust’s public voice or explain whether and how shaming can be combined with the re-integration Massaro takes as crucial. It would have been fascinating to hear him reflect on whether the subtle, variable,
often elusive processes of emotional response can be harnessed by a force as crude and inflexible as law. Critiques of this quality almost demand a public response; providing one would have strengthened a theory that aspires to broad influence and enriched what is already one of the most thoughtful and provocative exchanges in the collection. Part II's reconsideration of the desire for revenge also offers powerful evaluative perspectives. Solomon's reconstruction of vengeance is valuable not only for its identification of a cool, cognitive strand in what is often conceived as fiery, impulsive emotion, but for its introduction of a series of metaphors that draw out the sense of proportionality implicit in the emotion and its potential to underscore the ties of community among the offender, the accused, and the agency of vengeance. And Murphy's essay on retribution is memorable for its vision of a major scholar explaining, with the care and humility he advocates in approaches to punishment, why Nietzsche, Kant, and Jesus have led him to change his mind on retribution.

Yet notwithstanding these considerable virtues, there are ways in which this feature of the collection falls short of its aims. Despite Bandes's efforts to cull essays reflecting a range of emotions and contexts, The Passions of Law retains a persistently criminal flavor. Of the contributors to the book, only Calhoun and Deigh steer consistently clear of criminal contexts; large segments of the book explore the motives, effects, and meanings of punishment. There is also a striking, recurrent emphasis on the reassessment — even the rehabilitation — of dark, potentially hierarchical emotions such as vengeance, anger, retribution, shame, and disgust. These features may be unsurprising, given the longstanding primacy of the criminal law within analysis of law and the emotions. They may also be fueled by movements within the contributing disciplines themselves. Explaining his focus on vengeance, Solomon notes:

[I]t seems to me that moral philosophy has for too long been suffocating from a bad case of "political correctness." Self-righteousness and professional peer pressure have converged to produce a literature that is utterly unrealistic. Praise of virtue and gentility have become de rigueur. To even consider the brutal opinions of hoi poloi is to place oneself out of bounds. And so we dismiss as beneath contempt and unworthy of discussion those powerful negative feelings that in fact move most people and help form their political views and opinions on social issues. (p. 125)

While Solomon may accurately describe the landscape within moral philosophy, no such "political correctness" is choking off discussion of "powerful negative feelings" in law. On the contrary, Miller's landmark treatment of disgust and contempt,11 and Kahan's writings on shame and disgust12 have created a virtual cottage industry focused

on these harsh and hierarchical emotions. Perhaps academic lawyers, unlike their philosophical colleagues, pride themselves on their ability to look unflinchingly at the ugliest of human emotions and to redirect them for social benefit.

In a collection in which such emotions are so thoughtfully challenged and defended, however, the question is not why they occupy the authors, but why they are not accompanied by essays probing emotions of a different sort. The virtues may be overattended in moral philosophy, but it is hard to argue that the same is true of law. And some of these virtues involve emotional states that would make promising objects of legal scholarly attention. What about courage? Miller elaborately traces the ways that the military code identifies and seeks to root out cowardice. But are there other means by which military regulations seek to foster courage? How does tort law bear on what we see in others and expect of ourselves? What is the nature of that courage that fuels a judicial departure from stare decisis? Or a fiery or provocative dissent? Such inquiries may seem to press against strongly engrained liberal instincts. To explore the relationship between law and emotions connected with the virtues might seem to breach the liberal requirement of government neutrality with respect to competing visions of the good life. But while this argument may explain an instinctive resistance to this kind of inquiry, it provides no real justification. The government, as many legal scholars have pointed out, contributes to the cultivation of what it believes to be virtues in a variety of direct and indirect ways: the tax code, the welfare laws, and the regulation of sexuality are only a few of the most obvious examples. The robust health of both libertarian and communitarian argument in law and public policy reflects this sometimes precarious balance, as well as the possibility of adjusting it in various ways through public debate. Far from placing legal scholars in conflict with the demands of a liberal conception of government, a careful mapping of the relations between the law and "virtuous" emotional states could ultimately strengthen it. It could help readers understand more precisely how law fuels, fosters, prefers, incentivizes, or reflects ambivalence toward certain virtues in our present incarnation of liberal democracy, and permit more informed debate over whether and how this engagement should be changed.

One might also think about emotions that are not so easily situated on the grid of vice and virtue. What about curiosity — surely as much an emotion as the thirst for intellectual achievement? Or the complex pleasure of what Vicki Schultz has called a "life's work"? Or, for that matter, sexual desire? These emotions may not spring to mind as readily as disgust, vengeance, or even courage; but they are passions

(1998); Kahan, supra note 3.

that, to take Solomon's terms, motivate many of us in our engagements with others and shape our political and social views. Why have legal scholars neglected to consider how we serve these emotions within the law? Some feminist legal scholars have recently argued that one answer lies in the ways that legal scholars think about law. We envision law as having a set of more or less direct relations to those states of affairs it seeks to bring about: it may enact certain institutional arrangements or prohibit certain behaviors; it may express certain kinds of collective emotions. Not only laypersons but even legal scholars tend to think far less about contexts in which the law plays a more partial, facilitating role. Thus, the more indirect, supportive role that law might play in relation to desire does not claim the attention of legal thinkers, and desire itself falls off the legal radar screen. Yet one of the great strengths of this collection is its ability to envision the law in a range of different roles in relation to the outcomes with which it is concerned, including emotional outcomes. This facilitative relation, for example, forms a part of Minow's argument about healing the wounds of mass genocide: the law cannot produce healing or demand forgiveness; it can, however, help create preconditions which make the experience of these emotions more likely. How this looser, more contingent understanding of legal effect might bear on emotions such as sexual desire is one of the questions the authors of such a volume would have been in a good position to answer.

C. Actors and Emotions

Whose emotions should be the objects of attention in legal analysis of this genre? This is a question to which *The Passions of Law* gives many answers. Kahan, Nussbaum, Solomon, and Murphy focus on the emotions expressed by the government, as it speaks for the community in the enforcement of criminal law. Allen addresses the emotions of the community as distinct from the enactments of the government. Deigh considers the emotions of the governed in their relation to the

14. See Kathryn Abrams, *The Second Coming of Care*, 76 CHI.-KENT L. REV. 1605, 1617 (2001) ("Law has too often been conceived as a means of prohibiting or bringing single-handedly into being particular arrangements or behaviors."); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 207-08 (2001) ("[H]ave [feminist legal theorists] ... fallen victim to the myopia of which our discipline in general suffers: thinking of rights and liberties primarily in negative ... terms?").

15. Franke seems to offer a similar hypothesis in *Theorizing Yes*. Franke, supra note 14, at 207-08.

16. See Abrams, supra note 14, at 1617 ("[L]aw can enable by removing constraints and ... by establishing material conditions, shaping expectations, or creating entitlements ... [I]t may be best [in certain contexts] ... to view law simply as making possible (in both senses of that word) certain practices, responses, or explorations."); Franke, supra note 14, at 208 ("[I]t may be that the best we can aspire to, as feminist *legal* theorists, is a set of legal analyses, frames and supports that erect the enabling conditions for sexual pleasure.").
government. Sarat, Miller, and Massaro focus on the emotions of the accused. Minow is concerned with the emotions of victims, in this case of mass governmental violence; and Calhoun is concerned with the "outlaw emotions" (p. 223) of politically marginalized groups. Posner and Pillsbury are concerned with the emotions of the judge. Yet notwithstanding this promising variety, there are subtle patterns in the actors to whom the collection does and does not attend, that suggest the need for additional kinds of inquiry.

The first pattern one observes is the predominance of the focus on government. This may, in one sense, be unsurprising, as this collection examines law and the emotions, and the government — in many specific institutional guises — is responsible for promulgating, enforcing and interpreting the law. But there are characteristics of the focus on the governmental actor in these essays — many of which stem from the criminal emphasis of the volume — that limit what we can learn from their exploration of "governmental emotions." The first is an assumed continuity between the government and the "community" for which it ostensibly speaks. The government, in Kahan or Solomon, vindicates our disgust or desire for vengeance: it expresses or effectuates these emotions on behalf of a collectivity of citizens. This representative fiction elides many questions about what such representation — particularly expressive emotional representation — means in the context of a morally and politically plural society. This fiction is standard, yet already strained, in the context of the criminal law: the domain is sufficiently vexed that many groups feel the government does not speak for them when it undertakes a certain prosecution or imposes a certain penalty. Sarat alludes to this tension in his discussion of Dead Man Walking, where the examination of remorse is played against a broader backdrop of roiling social contention over the death penalty. Yet this strain may become particularly acute when the government expresses not a behavioral rule but a presumed emotional state. What is the experience of, and the recourse available to, a citizen who does not seek vengeance, who feels indignation rather than disgust, or who finds disgust antithetical to the aspirations of a democratic society? Is it different from that of a death penalty abolitionist who must endure the spectacle of executions imposed (ostensibly) on his behalf? Is there something particularly acute about the words placed in the mouth of the citizen by this representation when they are not words, in fact, but feelings? These are interesting and difficult questions, and they do not always get the attention they deserve in these essays. Sarat, as noted above, points to the problem through the implicit parallel of social ambivalence about remorse and ambivalence about the death penalty. Nussbaum describes disgust as creating in-groups and out-groups, making inevitable the situation where the government does not speak for large groups of those it ostensibly represents. Kahan himself seems to suggest that the law might provide a
public forum in which competing accounts of disgust can be advanced and evaluated, though it is difficult to see how a dissenting citizen would not feel eclipsed by the kind of publicly-articulated official expressions of disgust that Kahan seems to favor. All of the essays concerned with governmental expression of emotion might benefit from a more frontal consideration of these dilemmas, yet none takes it on directly. Perhaps the closest attempt comes in an essay not primarily concerned with the expressive conception: in exploring ancient Athens, Allen evokes a time and place where the “community” on whose behalf the criminal law was enforced was a less fictional entity than is true today, and whose emotions and needs were prior to, and could be discussed apart from, the specifics of governmental action. Yet to glimpse this distinction in the context of ancient Athens is no more than the first step toward saying what it would be to see and act on it today.

The criminal backdrop of the book has a second major consequence: it means that most of the emotional contexts explored concern interactions between the government, as enforcer of rules, and citizens as accused of, or victimized by, violations. This triangulation of relations, however, is not always paradigmatic. Many pervasive emotions that law undertakes to address also arise in the relations between citizens, with the government entering in only later, in a ratifying or a remedial posture. Relations of oppression or discrimination constitute one potent example. The emotions associated with such relations are not absent from this book. Nussbaum highlights a discriminatory dynamic that is fueled or facilitated by disgust: projecting onto a stigmatized group the features of animality one finds repugnant in oneself. Calhoun identifies the way in which denying the validity, indeed the possibility, of certain emotions within a stigmatized group denies that group a resource from which it might build a social critique. Yet the emphasis is on the emotional-related repertoire of the government as a discriminating entity; this is only part of what we need to learn about the emotional dynamics of discrimination. Discrimination can be prompted by many different emotional states, particularly if emotion is understood as having a cognitive thread: fear or anxiety about, or disgust at, that which is “other”; callousness or insensitivity to certain kinds of harm or pain; (unwarranted) confidence about the universalizability of one’s own experience. Taking the government as the paradigmatic discriminator will not reliably help us learn about the quality of these emotion states, as governments do not themselves have emotions; they only imperfectly represent — or enact and ascribe — those of their citizens. The focus on the government also diverts attention from the experience of the victim. Victims again are not ignored in this volume. The criminally accused are the focus of Sarat and Miller, albeit in the context of assessing governmental factfinding about their emotional states. And the victims of discrimination are considered by
Nussbaum, Massaro, Calhoun, and Minow (the "mass violence" of whose essay is frequently a matter of racial or ethnic antagonism). Yet with the exception of Minow's essay, the emotional states of victimization are not explored in this collection. This is surprising, as this is not untitled ground in law-related scholarship. The subjective experience of both oppressor and target has been productively explored in feminist theory, critical race theory, and the emerging field of critical white studies. It remains to be systematically related to the study of emotions, although the derogation of emotion stemming from the traditional dichotomy has underwritten some of the criticism of this line of work. This collection would have been a fine occasion for beginning a dialogue between these complementary bodies of thought; that it was not represents a lost opportunity.

Yet the practice of discrimination is not the only topic about which readers might have learned from a greater focus on citizen-to-citizen interactions. Probing the emotional states of market actors, and the way that these states are shaped by instances of governmental intervention is another question that might have added range and variety to the collection. Market actors have paradigmatically been characterized as subsisting entirely within the domain of rationality; the doctrinal areas of contract or commercial transactions are frequently taught and discussed as though they were insulated from the upheavals of emotion that vex criminal or antidiscrimination law. This is perhaps one place in which the traditional dichotomy continues to reside: in the tendency to make emotion the distinctive province of particular (potentially marginal) actors and domains, while preserving the priority of reason in its pristine state in other more central legal realms. Pressing these assumptions by exploring the sentiments of greed, betrayal, generosity, and trust that seem as likely to infuse this area as others seems a promising way of contesting this final refuge of the dichotomy. Learning about the ways that contract or commercial law intervene in these emotional states will also help us to understand better these bodies of doctrine and the norms that they seek to vindicate. Such an exploration would have added range and provocation to this volume, and might profitably be undertaken in the future.

Finally, as the government comes to represent the community or the instrumentalities of discrimination in this volume, so too does the

17. For an account connecting the critique of experimental or narrative scholarship with a defense of reason, see Daniel A. Farber & Suzanna Sherry, Beyond All Reason: The Radical Assault on Truth in American Law (1997).

18. There are occasional, salutory exceptions to this general rule. The work of Peter Huang and Lynn Stout, for example, reflects thoughtfully on the emotions in commercial and corporate contexts. See, e.g., Margaret M. Blair & Lynn A. Stout, Trust, Trustworthiness and the Behavioral Foundations of Corporate Law, 149 U. PA. L. REV. 1735 (2001); Peter H. Huang, Reasons within Passions: Emotions and Intentions in Property Rights Bargaining, 79 OR. L. REV. 435 (2000).
judge come to represent the universe of potential legal actors. It is difficult, in some ways, to object when the topic is so interestingly and provocatively covered. Between Pillsbury's exploration of varied and sometimes atypical emotions that fuel judicial exceptionalism and Posner's recasting of judicial empathy, a great deal is said about the possibilities of emotion in judging that has not been said before. Yet, in other respects, a focus on judging departs least from the first-generation critiques, in ways that may ultimately reinforce the reason/passion dichotomy. If you suspect that emotion may indeed be atypical in, if not antithetical to, the law, you may be most absorbed with finding and exploring it within that central bastion of legal rationalism, judicial decisionmaking. If you believe that emotion, as Bandes boldly declares, pervades the law, the presence of emotion in judicial decisionmaking becomes less remarkable. It becomes more interesting, and imperative, to explore the operation of emotion in other legal roles, and to contrast this operation with the life of emotion in the judicial domain. It is relevant not only how emotion fuels the work or organizes the experience of the great judicial dissenters, but also how it shapes the efforts of eminent legal strategists, such as, for example, Charles Hamilton Houston. It becomes fruitful to consider whether or how emotion shifts or changes when one moves from a role of advocacy to a role of adjudication, like Ruth Bader Ginsburg, Thurgood Marshall, or Louis Brandeis. Beginning a second-generation inquiry into the emotions of a range of legal actors is an effort that might productively have been commenced in this volume and should be undertaken in the future.

III. CONCLUSION: EMOTION AND THE SENSIBILITIES OF LEGAL SCHOLARS

As The Passions of Law makes clear, the conceptual gains to be reaped from the study of law and the emotions are larger even than its early proponents suspected. But to think solely in terms of analytic progress risks recharacterizing law as a purely rational enterprise. If learning about law is an enterprise that engages our emotional sensibilities, in endlessly varied interaction with our capacity for reason, we might also ask how this new genre of inquiry affects the emotions of those who take part in it. It is a question that cannot be answered conclusively by reflecting on their work product, for scholars with certain kinds of emotional sensibilities may be more drawn to this field than to others, and their topics may make them atypically aware of the emotional states that they are communicating as they write. Yet one of the most striking features of this collection is a largeness of spirit, a vivid, non-instrumental interest in the human subjects of its inquiry. This lively and generous interest manifests itself in many different ways, but it is strikingly distinct from studied detachment or arch,
sometimes contemptuous, humor that are too often the emotion va-
rances associated with scholarship about the law. Nussbaum's moving
ovation of Whitman's *Song of Myself*, as a healing answer to the dis-
gust rained on gays and lesbians; the generosity of spirit and flashes of
humor with which Miller treats the narratives of those accused of
"throwing away [their] weapons" (p. 250); the humility and candor
with which Murphy explores the possibility of error in a substantial
portion of his scholarly work; the respectful attention, inflected with
wonder, that Minow brings to the story of Jadranka Cigelj — these are
rare moments in law-related scholarship and great gifts to the readers
of this collection. They invite us to imagine a future in which the study,
and perhaps the operation, of the law might be a more humane expe-
rience for all those involved.

A new generation of scholars has ceased the frontal assault on the
dichotomy between law and reason. They have inhabited the aban-
doned fortress and are exploring its nooks and crannies, asking how it
can be rebuilt and reintegrated into the landscape it once policed. The
consequences, as *The Passions of Law* suggests, may transform not
only the legal domain but those who participate in the effort as well.
HOW TO THINK ABOUT EQUALITY

Don Herzog*


Ronald Dworkin’s1 latest might well seem sharply discontinuous with his other work. The formal theoretical apparatus that kicks off the book is a forbiddingly abstract — some will say arcane — hypothetical auction, coupled with a hypothetical insurance market. There is simply nothing like it in Taking Rights Seriously, or A Matter of Principle, or Law’s Empire, or Life’s Dominion, or Freedom’s Law. Then again, Dworkin first published the key papers on the auction some twenty years ago and has never flagged, as far as I know, in his commitment to the basic project.2 Theorists have been waiting for the finished book for quite some time now.

It’s invigorating, sometimes delightful, wrestling with the details of Dworkin’s account, even or especially when one is unconvinced or even staunchly opposed to the project as a whole. And not just that it’s always bracing to do a round of mental calisthenics; rather that when one disagrees, as I sometimes do in ways large and small, it is really helpful to dig in and try to focus on just what else one might say about the subjects Dworkin canvasses. Then too, Dworkin’s work has the signal virtue of paying no attention to familiar skeptical objections to the possibility of substantive moral and political argument. He can urge, for instance — and rightly so — that people can make mistakes about what makes life worth living, without wringing his hands anxiously about the skeptical worry that any such view must be high-minded nonsense because realizing one’s preferences is the only game in town (note particularly his contrast between external and internal skepticism) (p. 241).


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1. Frank H. Sommer Professor of Law, New York University; Quain Professor of Jurisprudence, University College, London.

Since I think skepticism about the very possibility of such arguments is extremely boring, and since I will never understand why skepticism gets to masquerade in some circles as a highly sophisticated and challenging view, or worse yet the simple truth of the matter that the more intelligent among us finally converge on, I applaud Dworkin’s pointed lack of interest in engaging anything like meta-ethical or ontological queries. In the same vein, consider a slightly polemical aside: Dworkin is on record describing himself as a staunch opponent of pragmatism.\(^3\) If pragmatism is the view that judges should adopt rules to promote what they take to be sound social outcomes, then I’ve no interest in it. And surely nothing hangs on the meaning of the word. But if we mean by pragmatism a blithe disregard for questions of ontology, a commitment to an anti-foundationalist picture of justification, or a lack of interest in the fact/value dichotomy, then Dworkin is as pragmatist as they come.\(^4\) This sort of pragmatism, I’d hold, ought to be applauded and embraced. Dworkin’s work demonstrates conclusively that there is no reason whatever to associate pragmatism, so construed, with any general sloppiness about or cavalier contempt for developing and defending sound arguments.

Yet the book on offer looks like more of a unified and finished treatment than it is. Dworkin demurs that the previously published chapters “have been the subject of extended comment by others, and for that reason I have decided to revise them here only in minor — typographical or stylistic — ways” (p. 7). One might respond dryly that the others in question probably would rather see how Dworkin proposes to deal with their objections than see his initial statements memorialized between covers, but he does eventually get to some of the key issues.\(^5\) Dworkin’s prose style, too, ordinarily lucid and engaging, now and again betrays regrettable signs of an author in a hurry. So the passing reference to “deliberative deliberation” (p. 378); so too this bit of broken-backed syntax, from a discussion of abortion: “No matter how much one wants a child of one sex, it shows inadequate respect for a life in being to end it because its sex is the other one” (p. 432). Those who’ve had the pleasure of listening to Dworkin lecture will more than occasionally pick up the cadences of the lectern here. Even in print, there’s something right about the mischievous definition in Daniel Dennett’s *Philosophical Lexicon*: “dwork, v. (Perhaps a contraction of *hard work*?) To drawl through a well prepared talk, making

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3. **RONALD DWORKIN, LAW’S EMPIRE** 175 (1986).
5. His brief chapter 7 develops responses to G. A. Cohen and Amartya Sen.
it appear effortless and extemporaneous. ‘I bin dworkin on de lecture
circuit’ — old American folk song.”

A more serious problem is that the book cobbles together inde-
pendent publications from different venues, ranging from academic
journals to The New York Review of Books, over some seventeen
years (p. 475). The reader sometimes despairs at the thankless task of
figuring out how tightly unified Dworkin means his presentation to be
—or, authorial intentions shoved firmly aside, what the most illumi-
nating account of his text is. Just for instance, in discussing Bowers v.
Hardwick and Romer v. Evans, Dworkin draws a contrast familiar
from his previous work. Some believe our constitutional rights are
limited to those clearly affirmed in our history. Others believe we
should interpret our history in light of the political morality that
makes sense of it and then feel free — indeed, obliged — to extend
whatever principles of political morality emerge to cases they properly
govern, even if we haven’t done so historically. (No points for guessing
which side of that debate Dworkin is on.) He concludes by describing
Romer as “a victory . . . for the conviction that equality is a principle
not only of justice but of constitutional law as well” (p. 465). Stirring
words, no doubt, but I found myself in sputter-frazzle-hairpull mode:
does “equality” here point to the hypothetical-auction story? Can we
construct a plausible account leading from that latter, abstract theory
to any stance about constitutional interpretation? Or is the equality in
question just that of offering gays the same political chances to secure
antidiscrimination protection that other groups in the community en-
joy? Alas, Dworkin’s text is calmly, forbiddingly silent on the point.

But now I am jumping ahead of myself. I proceed by sketching the
lineaments of the hypothetical auction and insurance markets. I con-
sider Dworkin’s treatments of money in politics as a test case of how
his theoretical commitments bear on concrete questions of politics and
law. And I conclude by making more explicit some of the sensibilities
that fuel my discussion — and by briefly saying something about what
I take to be more promising ways of thinking about equality.

I. OF AUCTIONS AND INSURANCE

Dworkin doesn’t underline what must be a deliberate and signifi-
cant shift in his language. After years of insisting on “equal concern
and respect,” he routinely refers in this volume to “equal concern.”
But the omission of “respect,” whatever it finally signals, can’t signal
any retreat from generally Kantian sensibilities towards utilitarianism.
Dworkin wants to develop an account of what he calls equality of re-
ources. He wants to argue that this account is a fundamental alterna-

6. DANIEL DENNETT, PHILOSOPHICAL LEXICON (8th ed. 1987), available at
http://www.blackwellpublishers.co.uk/lexicon/ (last visited Feb. 26, 2002).
tive to a more familiar picture of equality of welfare, indeed that other views turn out on closer inspection to collapse into one of the two, so that actually equality of resources turns out to be the fundamental alternative on offer. And he wants to resolve longstanding worries that equality and liberty are somehow at odds by showing that equality of resources presupposes a robust conception of liberty.

The general architectonic strategy of the book is to show that all our deepest commitments in morality and politics are interlocking and mutually supportive, that we can work up views of equality, liberty, justice, autonomy, and so on that will fit together (see for instance p. 4). The fit, of course, will be complex and intricate: as his readers have come to expect, Dworkin spins off one binary distinction after another in describing and defending his views. (And as Dworkin has probably come to expect, some readers will find the distinctions deeply illuminating, while others will think they won't bear the weight he is putting on them and are really just there to evade problems.) But the aspiration is to show that the fit is elegant.

To the theory. Imagine a group of shipwreck survivors who have to divvy up the resources on their previously uninhabited island. Imagine that they agree to divide the island’s resources equally and that they interpret that as meaning no one should envy whatever basket of resources someone else commands. (The category “envy-free distribution” does lots of work in welfare economics. Still, one might worry that it unwittingly capitulates to centuries of conservative insistence that the apparently dignified demand for equality is nothing but a polite veil for mean-spirited envy and resentment.) Imagine their adopting an auction — and remember that the auction in question is wholly imaginary. Yes, Dworkin thinks, there are actual social practices besides literal auctions that have some of the relevant properties — he adduces markets and democratic politics (p. 72) — and we will be able to draw important inferences from observing them. But the imaginary auction launching the theory is explicitly a matter of “the ideal ideal world of fantasy,” not the “ideal real” world in which people are devoted to equality but face various problems implementing it, let alone the “real real” world in which many powerful players have contempt for equality, not least — but not only — because it doesn’t serve their interests (p. 172). It’s an attempt to get clear on, and to structure, some of our intuitions, so that we can then begin attacking our practical problems with some real machinery.

The auctioneer will not insist on any arbitrary division of the island’s resources into lots, but will permit any party to splinter whatever lot is proposed into smaller lots. He will allocate everyone an equal amount of some arbitrary currency and then keep trying various price structures on all the lots until all markets clear and no one, inspecting the final allocations and wishing on reflection that she’d bid differently, wishes to do the whole thing over again. The model invites
How to Think About Equality

— and receives — lots of refinement, but you can immediately see the sharp departure from equality of welfare. If you’re lucky enough to wash onto an island that happens to have stuff useful for realizing your preferences, or lucky enough to have eccentric preferences so that the goodies you crave don’t command a high market price, or lucky enough to be a good-natured bloke who’s easily made happy, you will probably end up enjoying much more welfare than your compatriots. But that counts not a whit against the claim that they have received equality of resources.

But so far we have on the table only external resources, things in the world one might claim property rights in. What about one’s own tastes, preferences, abilities, and disabilities? Some thrill to the taste of fabulously expensive wine, others cheerfully gulp down swill; some are witty, others boorish; some gorgeous, others plain or even ugly; some able-bodied, others blind or deaf or paraplegic. What does equality of resources, or our hypothetical auction, have to say about such matters?

The view puts extraordinarily heavy pressure on the distinction between traits properly belonging to the person and those belonging to his circumstances. But that’s not the distinction between what’s in the head and what’s in the world; indeed it can crosscut that distinction. Dworkin’s official account of the distinction is not, I think, what he means; at least it’s not how he uses it. It’s best, I think, to set out his language, in case I’m missing something. What belongs to the person, Dworkin urges, are “those beliefs and attitudes that define what a successful life would be like”; what belongs to his circumstances are “those features of body or mind or personality which provide means or impediments to that success” (p. 82). But this threatens to make the person nothing but a conception of the good, to make all your skills, talents, and the like part of your circumstances. Elsewhere, Dworkin’s language shows he doesn’t mean to do that: “We cannot think that we would be better off if we gave up some ambition or no longer found satisfaction in what we now find deeply satisfying. On the contrary, it is our various tastes, convictions, and ambitions that define for us what a satisfying or gratifying life would be, and treating these as impediments to our realizing such a life would be incoherent” (p. 293). The claim seems wrong, at least put so bluntly. A mathematician whose brain aches at the end of the day but who thrills to the chase of the elusive proof or new theorem every morning might perfectly coherently say that her work is deeply satisfying, but that she’d be better off if she could ditch the relevant “tastes, convictions, and ambitions” and do woodworking instead. She doesn’t even need the aching brain to entertain the thought. She might just admire the serenity of the craftsman. Still, his claim shows that Dworkin means to include more than a conception of the good in the person — or, if you like, that he has a surprisingly inclusive account of one’s conception of the good.
Still we need a crisper account of the distinction between person and circumstances.

Happily, Dworkin’s surrounding discussion (pp. 80-83) of people who find themselves afflicted with unfortunate tastes suggests three different and more useful distinctions (note too pp. 322-23). Some people who find themselves in the clutches of a craving for splendid hot fudge sundaes may experience the craving as internal to their identity, part of who they are. Others with the same craving may experience it as an impetuous but alien demand, one they still feel they must submit to. One way to draw the person/circumstances line would run this way: either craving here could belong to the person, if the person in question believes (in the first case) that part of the good life is experiencing and gratifying such burning desires or (in the second) that part of the good life is grappling with what feel like external demands. So too either craving could belong to the person’s circumstances, if regardless of how he experiences it he takes it to detract from realizing goals he properly cares about. The second way to draw the line, which comports more with Dworkin’s own application in these pages, runs this way: the question is whether the agent experiences the taste in question as his own — within his ego boundaries, as someone in the psychoanalytic tradition would put it — or as afflicting him from outside. So too with talents or more generally traits: does the agent think of them as partly constitutive of his identity? or as afflictions from outside? A third sense adds a rider to the second: reassign traits from person to circumstances if the agent would rather be without them. (Such a rider would explain Dworkin’s focus on handicaps, addiction, and the like.) These three distinctions aren’t coextensive, and the differences will matter. Think for instance of the person who has a talent that turns out to be useful for advancing projects he cares about, but who doesn’t experience the talent as part of himself at all: it’s just this lucky thing he’s stuck with. (This possibility isn’t gimmicky or contrived: I have precisely this attitude about my own perfect pitch.) Precisely because of the weight the distinction between person and circumstances bears in the theory, it is especially important to have as clear an account of its content as we can.

However we construe the distinction, though, equality of resources is targeted solely at one’s circumstances, not one’s person. Now it strains credulity to imagine the auctioneer of even an imaginary ideal ideal auction setting out lots with tastes, preferences, abilities, and disabilities, and inviting people to bid on them. But, urges Dworkin, we can naturally extend the exercise by imagining a hypothetical insurance market to cover such matters. What would you bid for an insurance policy to compensate you for the adverse consequences of, say, a desperate craving for alcohol that hinders your pursuit of the good life? If, finessing worries about adverse selection and moral hazard, we can imagine the insurance market offering coverage against such risks
at reasonable prices, and if we assume that people would in fact purchase such coverage, then we infer that equality requires offering compensation to people with such afflictions. If I understand him (see especially pp. 93-97), Dworkin believes the case of ordinary shabby looks — or for that matter downright ugliness — is no different in kind. We ask the same question. But here we find, one imagines, that the price of such policies would be too high: at the going rates, no one would reasonably invest in them. And then even if bad looks are a matter of one’s circumstances, one gets no compensation for them. The insurance market seems to be covering against downside risk, not requiring payments for lucky draws in the genetic lottery, except in the indirect and attenuated way that the subsidy payments to the disadvantaged will come in part from those luckier.

So far, we have a story only about initial entitlements. What happens over time? Dworkin concedes that equality of opportunity, properly understood, requires some background conception of equality of starting points. But he rejects equality of opportunity, even so understood (pp. 87-89). Over time, the fortunes of individuals will diverge. Some will grow rich, others poor, and not merely in their checkbook balances. There are grave complications here, aggravated when we turn to intergenerational questions of justice that Dworkin concedes he has not yet fully worked out (pp. 488-89 n.12). Here Dworkin sharply distinguishes “option luck” and “brute luck.” Equality of resources, he argues, isn’t threatened at all by — quite the contrary, it makes room for — inequalities that emerge as a result of people’s choices. If the ants put their stock of resources to work and the grasshoppers idle away their hours on the beach, the ants will likely have more in the future. Not necessarily: the most prudent investments can go sour, and then the ants will have to swallow their losses. But win or lose, at least within limits their portfolios reflect choices they’ve made, and the consequences should flow to them accordingly. But suppose instead that something bad just happens to you. Your roof falls in and leaves you with debilitating injuries. No, you’ve not been negligent maintaining your house; maybe the accident happened in a freak storm. Then equality of resources is threatened, for now you envy others’ shares in a way we can’t see as stemming from your choices and theirs. So the view also puts extraordinary pressure on the distinction between choice and chance.7

In the real world, there’s no auctioneer, no phony currency, and so on. But we can, Dworkin thinks, cast many of our policies in an illuminating light by seeing them as what such an apparently rarefied theoretical apparatus would require. If the auction and insurance story do theory from the “outside in,” so too, Dworkin thinks, we can do it

7. For a critical treatment of the distinction, see Andrew Stark, Beyond Choice: Re-thinking the Post-Rawlsian Debate over Egalitarian Justice, 30 POL. THEORY 36 (Feb. 2002).
from the “inside out” (p. 3), surveying actual policy dilemmas and trying to work up principles to make sense of them. And we can hope that as we shuttle back and forth and revise things, the inside-out and outside-in accounts connect, in what Norman Daniels has called “wide reflective equilibrium”8 and (the slightly polemical aside again!) some of us call a pragmatist approach to justification. Curious about welfare reform? Wondering whether we should withhold support from people who can’t be bothered to try to find paying jobs? Or whether we should have an absolute limit on the number of years over a lifespan that anyone can collect welfare payments? Curious about health care? Wondering what if anything the government should provide to the medically needy? Or whether it offends equality if only the wealthy can afford cosmetic plastic surgery? Then ask about the shape of the hypothetical insurance markets. Dworkin almost mischievously emphasizes how loose or impressionistic the enquiry is: “ask roughly what level of coverage against risks of the character in question would seem reasonable to the majority of people in the community, or to the average person, or something of that sort, given the likely premium structure and given most people’s needs, tastes, and ambitions” (p. 345). We’d like to hear more, of course, about just whose judgment about the policies in question is binding, and why. And one might well wonder why someone who would have purchased a policy, even a very expensive one, that most people wouldn’t should be left uncompensated if the dreaded contingency she would have wished to protect against actually arises. Is it just that it’s impossible for her to produce convincing evidence that she would have so insured herself? Or is there something more authoritative about the judgment of “the average person, or something of that sort”? Regardless, the basic project of reconstructing what judgments people would make ex ante is straightforward and alluring enough. Dworkin’s view is instructively different from Rawls’s in ways I shan’t discuss here, but in this general way — cashing out our judgments about fairness by asking what people would choose without knowing how they’d fare — they are as one.

II. MONEY AND DEMOCRATIC POLITICS

I turn to one of Dworkin’s more grounded policy discussions. Many readers will already know that Dworkin is a defender of campaign finance reform. His language here is scathing: “Our politics are a disgrace, and money is the root of the problem” (p. 351); “[w]e have as much a parody of democracy as democracy itself” (p. 369); “the most degraded and negative political discourse in the democratic world” (p. 369); “no one could mistake our huckster politics for democratic

deliberation” (p. 385); “when politics are drenched in money, as our politics now are, then we risk not simply imperfection but hypocrisy” (p. 385). But the Supreme Court largely gutted Congress’s last (odd) attempt at campaign finance reform in *Buckley v. Valeo.*

Dworkin argues that that was a bad decision.10

How, Dworkin asks, should we make sense of what many writers have sensed to be a deep structural link between free speech and democracy? He offers two rival conceptions of democracy, each of which acknowledges the link but each of which offers sharply different accounts of its implications. First is the majoritarian conception. Dworkin quickly brushes aside a flat picture of preference aggregation as obviously not very attractive. (I quite agree, but alas the flat picture is motivating a whole lot of work in political science and economics these days.) Instead, the majoritarian picture he has in mind depends on citizens having the opportunity to get information about policy issues, deliberate, and vote for representatives “whose policies match their will” (p. 357). Second is the partnership conception. This more complex conception has three salient dimensions (pp. 363-65). First comes popular sovereignty: the people, not any elite caste, are to govern. (“The people” here are to be seen as a corporate actor, not as shorthand for whatever most individuals want.) Second is citizen equality: individual citizens must be able to participate, and not just vote, in democratic politics on reasonably equal terms. Those terms can be threatened in any number of ways, not least by the access and media presence commanded by the rich and powerful. “No one can plausibly regard himself as a partner in an enterprise of self-government when he is effectively shut out from the political debate because he cannot afford a grotesquely high admission price” (p. 364). Third is democratic discourse: there must be ongoing social practices of deliberation, in which citizens meet together and hash out competing arguments on the merits.

Consider the famous maxim from *Buckley:* “The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed ‘to secure ‘the widest possible

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10. Indeed he touches on a series of recent Supreme Court decisions in this area. One might take his discussion as a model application of the approach to legal interpretation set out in *Law's Empire,* supra note 3: having shown that his preferred account fits the cases at least as well as its rival, Dworkin then argues that it is normatively superior. There are plenty of complications worth pursuing: when it comes to fit, for instance, Dworkin is concerned to show only that his account generates the same result, not that it follows the reasoning set out in the actual opinion. In fact he seems decidedly uninterested in the stated reasoning, in legal doctrine itself. Or again it remains unclear whether we should finally take fit and justification as independent dimensions — and if we do, how Dworkin proposes to secure the one-right-answer thesis. (One view might do better on fit, another on justification: then what?) But all that is a topic for another day.
dissemination of information from diverse and antagonistic
sources.”’ The second clause seems on its face to undercut the first:
surely it’s at least possible that restricting the speech of some to en-
hance the relative voice of others would in fact secure more diverse
and antagonistic information, or more generally arguments, for public
consideration. Even without the funny second clause, though, the
claim is by no means obvious on its face. At least since Alexander
Meiklejohn, some academics have been strongly drawn to thinking of
the first amendment in terms of what range of views it offers the pub-
lic, and so as only instrumentally protecting the rights of speakers.12
Dworkin urges that what he calls the “democratic wager” secures free
speech against any such incursion by urging that it is desperately im-
prudent to trust the state with such powers — and (though it is not en-
tirely clear why he thinks so) that that wager finally depends for its
plausibility on the majoritarian conception of democracy.

Does the partnership conception license — or require — state
regulation of what some call the speech market? Dworkin notices the
case that hate speech is an affront to democracy. It looks on its face
like a threat at least to the second and third dimensions of the partner-
ship conception. As part of the diffuse but powerful practices that de-
fine some members of the community as second-class citizens, it
threatens citizen equality. So too, one might think it threatens deliber-
ation by silencing some members of the community, or encouraging
others to dismiss their contributions to discussion with contempt. But
Dworkin abruptly dismisses this line of argument as confused in its
grasp of the kind of equality required by the partnership conception
(pp. 366, 368) — and drops a footnote directing the reader to his prior,
savagely critical treatment of Catharine MacKinnon’s work on these
matters.13 My own sense is that there is a genuine antinomy here —
there are perfectly plausible rival cases that democracy and free
speech must permit and must forbid vitriolic hate speech. So, even
with the gesture towards his prior work, Dworkin’s view here seems to
me peremptory. It provokes the worry that the fit between his theory
and familiar left-liberal political views is all too tight. Perhaps we
should infer not that those views turn out to be splendidly grounded
but that the theoretical apparatus in question is woefully rubbery, so
one can stretch it, within reason but still opportunistically, into what-
ever shapes one would like.

In the name of the partnership conception, Dworkin is decidedly
cautious in sketching the possibility that some limits on campaign fi-

11. 424 U.S. at 48-49 (internal citation omitted).
12. The best account of these issues remains Robert C. Post, Constitutional
nance expenditures might be appropriate. He thinks we should take seriously proposals that would improve our politics on the third dimension — that would for instance rescue us from mindless campaign jingles and shrill negative advertising — without seriously encroaching on the first two dimensions. A lot, of course, will hang on the details. And it is unreasonable to expect too much from a theory. (It's not as though anyone else has, or ever has had or ever will have, a theory that leads mechanically and inexorably to concrete, detailed policy proposals. There's always going to be room for judgment and controversy.) But Dworkin's basic stance is clear enough.

Now I want to ask: what's the connection between Dworkin's discussion of campaign finance reform and his overarching conception of equality? Are we to imagine the island's auctioneer setting out parcels of political power and trying to price them so the market clears? Or are we to imagine people purchasing insurance policies hedging against the risk that they will be left powerless? Neither: when it comes to political equality, Dworkin does not crank up the machinery of equality of resources. Instead, he returns to the abstract demand of equality of concern and wonders how it bears on political equality. It's obvious, he thinks, that we have to have democracy. The real question is what conception of democracy to favor.

No objections from this quarter to this way of proceeding; I want only to emphasize that Dworkin's discussion of political equality is in a sense freestanding from his treatment of equality of resources. And that will mean the theory is currently lacking a key prop: it needs, but does not have, an account of the proper domain of the auction and insurance stories. On what topics do we wheel them out? On what topics do we leave them in the closet? And why? He offers each as a way of cashing out equality of concern. And here too the different strands of the theory should support one another. But we must remember that at bottom the motor is equality of concern, that how we cash that out will depend on what kind of problem we're tackling, and that the auction and insurance story, while enabling Dworkin to tackle a surprisingly broad range of issues, isn't the only trick he has up his sleeve.

Still, his discussion of political equality is itself an attempt to get clear on ideal theory. Remember Dworkin's hope that the outside-in and inside-out approaches to equality will mesh. What counsel does ideal theory offer on how to think about money and democratic politics? Arguing that equality of influence is seductive but ultimately unappealing, Dworkin suggests that our concerns in this domain are bet-

14. My point here is connected to, but different from, Dworkin's passing comment on the partial arbitrariness of the distinction between political and distributional equality. P. 12. Dworkin insists, rightly I think, that it's a mistake to conceive of political impact or influence as another resource. P. 210. I'll be suggesting that he lapses into a kind of that mistake himself.
ter captured by thinking about background inequalities. So the problem isn’t, for instance, that the educated or eloquent will be more influential in democratic politics than others. The problem is that access to education is unfairly distributed. So too, urges Dworkin, for our concerns about money in politics. I want to pause over Dworkin’s language:

Limits on campaign expenditures are of course appealing when these compensate for unjust differences in wealth . . . . But if resources were distributed equally, limits on campaign expenditure would be egalitarian because they would prevent some people from tailoring their resources to fit the lives they wanted though leaving others, who had less interest in politics, free to do so. (p. 197)

There’s a footnote — “I assume, in this claim, that wealth remains equal so that no small group of very rich people could dominate politics through political contributions or expenditures” (p. 485 n.4) — but the qualification is not, I think, going to rescue the claim in the text, which I boggled at on first reading and which I continue to boggle at.15

Here’s the problem. Call something a commodity if it is properly bought and sold, for money, on a market. Fountain pens are commodities; so too, I suppose, are cruises on the Mediterranean, published scores of Morton Feldman’s spectacular late works, and plenty of other things. But it’s an open question whether or not the things we currently allocate on the market are commodities. Maybe we shouldn’t buy and sell health care at all. Or maybe Feldman’s actual manuscript scores shouldn’t be auctioned off to the highest bidder; maybe they properly belong in a museum. So too it’s an open question whether we should buy and sell things that we currently don’t. An economist might wonder, for instance, why we assign citizens the non-transferable right to cast one vote apiece: the scheme obviously creates deadweight loss, so there would be clear efficiency gains from mailing citizens coupons saying, “bearer has the right to cast one vote,” and then allowing a secondary market to spring up.

Now, Dworkin is emphatically not that economist. His account of citizen equality makes it impossible to attribute any such fantastic view to him. (If you’re wondering, the quick answer to the economist is, yes, there would be efficiency gains — don’t try to invent some odd market failure here — but we don’t care.) And while he asks us to use the auction and insurance analysis to think about such topics as social welfare and health care, it doesn’t follow that he believes they are commodities, properly up for sale in the world. It’s wholly compatible with that analysis to think that when we leave the ideal ideal world, we should draw boundaries to markets. And it’s very hard for us to

15. Dworkin has staked out the same territory before: “We do not want wealth to affect political decisions, but that is because wealth is unequally and unfairly distributed.” DWORKIN, FREEDOM’S LAW, supra note 13, at 27.
imagine some goods as commodities. To take one of Michael Walzer’s examples, the American League pennant doesn’t go to the highest bidder. It goes to the team that wins the most games (or, as we’d now have to say, the team that wins enough games to get into the playoffs and then wins the playoffs). And that team simply can’t say, we now hold a property right to play in the World Series and we propose to sell it, say on eBay, to the highest bidder. We don’t want those long-suffering Chicago fans to be able to band together and raise enough money to play. Not because we hate them or delight in their abject misery, and not again because we have some contrived story up our sleeve about market failures or externalities that would plague such transactions. Rather because the pennant, or the right to play in the Series, isn’t a commodity. So too, I think, political power isn’t a commodity. And even though Dworkin doesn’t want literally to buy and sell votes, he thinks there’s nothing wrong with citizens using their wealth to advance their political agendas, provided again the background distribution of wealth comports with equality of resources. So he doesn’t think votes are a commodity, in the term of art I’ve adopted here. But he thinks that political power, or access to political power, is in part a commodity: there are nonmonetary ways to gain it, such as eloquent, articulate argument; but there are also monetary ways to gain it, such as splashing your views across full-page newspaper advertisements.

Again, there’s nothing in the structure of Dworkin’s view that requires him to commodify political power. And I concede readily that in this domain it is hard to figure out what kinds of restrictions on market transactions would be defensible. But, as Dworkin would notice on any number of similar issues, that point is different from the issue of principle. And on the principle, I report that on sustained reflection my view stubbornly remains that political power isn’t a commodity — and wouldn’t be a commodity even in a society securing a wholly just distribution of resources. Indeed I can see Dworkin’s language — “if resources were distributed equally, limits on campaign expenditure would be inegalitarian because they would prevent some people from tailoring their resources to fit the lives they wanted though leaving others, who had less interest in politics, free to do so” — only as implying, surely not deliberately, radical transformations of our culture and practices. But is Dworkin’s passing suggestion an incidental or casual mistake? I think not.

III. EQUALITY, SOCIAL STRUCTURE, AND HISTORY

Consider the goods money — even justly distributed equal resources — shouldn’t be able to buy. We already have the National League pennant and political power. Now add, oh, verdicts in criminal trials. Imagine the judge setting aside — or preventing the presentation of — the jury verdict, gazing benevolently at those anxiously assembled in the courtroom, and intoning, “this verdict is now for sale: the high bidder may decide whether to acquit or convict.” This prospect too is utterly wacky. And it’s wacky not because we’re stuck, in the real real world, with profoundly inegalitarian distributions. Surely we would never say that if resources were distributed equally, limits on the sale of verdicts would be inegalitarian because they would prevent some people from tailoring their resources to fit the lives they wanted though leaving others, who had less interest in trials, free to do so. And we can pile on to the list of goods that aren’t commodities: positions in Congress, religious salvation, friendship, love, the respect of one’s colleagues, and on and on.

There’s a formidable literature, about which Dworkin is curiously silent, exploring the right reasons for allocating all kinds of social goods. The enquiry is often launched by thinking about the line between commodities and other goods, but we can easily generalize it to explore other kinds of differences and barriers. Religious salvation can’t be sold — that’s why simony created upheavals for the Church — but that doesn’t mean it should be given out for the same reasons friendship is, either. Teachers can’t sell grades (“okay, pay attention: What am I bid for this A?”), but they also can’t swap them for sexual favors.

These issues are already all about equality. Justice is blind: we demand, with partial success, that the criminal justice system ignore whether defendants are white or black, male or female, rich or poor, straight or gay, Republican or Democrat, Christian or atheist, and so on. Straights and gays are treated as equals at law when cops, prosecutors, judges, and juries blind themselves to irrelevant facts of sexual orientation. It of course remains controversial in some settings when such facts are irrelevant: thus for instance our ongoing struggles over whether hate crime statutes that offer harsher penalties for crimes directed at minority groups flout or respect equality under the law.

Now we can shift to a sociological perspective. Don’t think (only) of particular goods and the right reasons for allocating them. Think (also) of different social settings and what considerations are properly

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17. In addition to Walzer’s crucial work, see especially ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993); MARGARET JANE RADIN, CONTESTED COMMODITIES (1996); Bernard Williams, The Idea of Equality, in PHILOSOPHY, POLITICS, AND SOCIETY 110 (Peter Laslett & W. G. Runciman eds., 2nd ser. 1962).
relevant in them. Take the fabled separation of church and state. Whatever it’s up to, whatever goods it’s allocating or rules it’s adopting, the government isn’t supposed to notice whether you are Christian, Jew, Muslim, atheist, or whatever else. This mandate represents a concrete historical change and once was wholly unimaginable.

It gives equality a distinctive social-structural form. A differentiated society, one marking reasonably clear jurisdictional boundaries between institutions and dictating that in different roles and settings we ignore contextually irrelevant facts, is a society that treats people as equals. We can generalize the separation of church and state, or for that matter the line between commodities and other kinds of goods, by charting the contours of modern social structure: church, state, science, family, market, universities, clubs, and so on. In any and all of these settings we are equal when others blind themselves to irrelevant facts. In this sense, there’s no inequality when the most talented actress wins the role. But there is an inequality when the actress related to the director wins it (because of the relation, that is), or an actress who happens to take communion with the director (because of that religious link). I emphasize, again, that there are deep controversies about deciding which facts matter, in what ways, and which don’t. So, for another example, take labor markets. Should the employer’s private property rights include the right to discriminate on grounds of race? Or does Title VII help force employers to treat workers as equals? Notice that the state plays a double role in this view. On the one hand, it’s one institution among many, with its own jurisdictional boundaries and affairs to tend to. On the other, we often turn to law to draw new boundaries and enforce them among other social institutions. Some have seen something viciously paradoxical in this double role, but I don’t.

Someone committed to equal concern (and respect) could surely wrestle seriously with these crucial considerations of social structure. But Dworkin doesn’t. His approach, working through the ideal ideal auction and hypothetical insurance markets, or for that matter working “inside out” from particular problem areas, is somehow insistently unsociological. There are individuals, the picture is, and we should ensure they enjoy equality of resources, and then they go on to pursue their life plans. In the margins of the view we can detect social institutions: some will devote themselves to democratic citizenship and some won’t. But the institutions remain in the margin, our view of them dangerously occluded. That, I conjecture, is why Dworkin finds it easy to suggest that were wealth justly distributed, we shouldn’t worry about money in politics. That too is why he thinks of “resources” as an unspecified bundle, instead of sharply focusing on what sorts of re-

sources are helpful in what sorts of social settings for what purposes. It's not enough to respond that bidders in the auction can be perfectly well aware that some lots are more useful in some social settings than others, and will bid with that awareness in mind. For — remember that Dworkin doesn't turn to the auction or insurance markets to analyze democratic equality — it's a mistake to think of "resources" as a disparate but ultimately fungible set of goods and simply leave it up to individuals to bid for shares of what they want. Remember, we don't let people swap their votes for money, or any other goods for that matter. So the weird abstraction of the auction and insurance approach, its distance from the sociological landscape, tends to summon up a view of the entire world as a market. Dworkin writes, for instance, that "[n]o one would be forbidden by law, in a defensible distribution, to use his resources in whatever way he chooses, except as necessary to protect security or to correct for different sorts of auction or market imperfections" (p. 171). But it remains hazy at best for what resources, over what range of practices, this principle is supposed to apply.

My purpose is not to replace one picture of equality with another. Indeed I am skeptical that equality lends itself to any single analysis or portrait. After all, the concept has been invoked by a host of actors in wildly different settings for utterly disparate purposes over the centuries. Sure, it's possible that at bottom all of them were talking about the same thing or struggling, as Dworkin might put it, only over competing conceptions of the same concept. It's even possible that these actors were only hazily aware of quite what they had in mind, that it takes graduate training in economics or analytic philosophy to be fully cognizant of, and comfortable with discussing, what they were referring to. I suppose it's even possible that their talk about equality was so desperately confused that it failed to refer to anything at all. But it must be an open question whether any of those possibilities obtain. It's also possible that the endless invocations of equality are united only by loose-knit Wittgensteinian family resemblance. Or that they're united not even that much, that we'll finally have to say that equality is a homonym standing in for different concepts. The grammatically clumsy but correct question may be, what are equality?

Even if our interests are "normative," it would be rash to discard the history of equality as of little or no interest. By scrutinizing the history, we might well learn things — what's attractive and feasible, what's not, where the unpredictable or counterintuitive wrinkles are, and so on — that we couldn't figure out by reflecting on our intuitions or by trying to sort out what finally we properly care about and why. I won't try to cram in a rapid-fire history, something like the political theorist's 1066 and All That. But consider two connected points.

One: there's much of interest to collect from the curiously wandering history of the Christian insistence that each and every one of
us, however humble, has an immortal soul, each equally prized in the
eyes of God. Personhood is now officially a binary concept: you either
are a person or you're not. Arguably it used to be dimensional: some
were more fully human than others, and that mapped quite nicely onto
conventional social hierarchies, so that persons of quality and noble
lords were more fully human than simple clowns, serfs, and peasants.
Nor should it surprise you — but it should distress you — to notice
that despite our official understanding, we covertly trade on the older
model all the time. It was always possible to argue that Christian
equality didn't threaten and indeed legitimated everyday social and
political inequalities. But the privileged and powerful were anxious for
good reason. No wonder Henry VIII insisted on vetting the translation
of Scripture into English (and notice that a sense of equality is clearly
in play in the Protestant campaign to give ordinary men and women
sacred writ in a language they could understand, in the priesthood of
all believers that shatters the privileged epistemic access of the Church
—and in the ensuing experience of democratic government that Pres-
bysterians and others adopted). He wanted to ensure that none of the
tricky passages about equality seemed to have dangerous political im-
lications:

Where the *Bishops' Book* stated that all men, rich and poor, "the free
and the bond" are equal in God's eyes, Henry cut down this egalitarian-
ism with the proviso that the equality existed "touching the soul" only.
Where the book called upon the rich to succour the poor, he added the
warning "that there be many folk which had liever live by the graft of
begging slothfully" and that these "should be compelled by one means or
other to serve the world with their bodily labour."19

I don't think equality of concern and respect depends for its justifica-
tion on any theological or religious background, but it's still eye-
opening to explore that background.

Two: hierarchical social orders, at least in the West, depended on
unsavory emotional economies. Elegant superiors — "the world," in
the enormously revealing location of early modern England — looked
down on the great unwashed with unvarnished hostility, mocking
amusement, or even cold indifference. In the English case, which I
happen to know best, condescension, insolence, impudence, and espe-
cially contempt served as hotly contested political battlegrounds.20
Here it's helpful to think of equality not as an independent and af-
firmative ideal — no wonder some have trouble attaching any con-
crete content to equality of concern and respect — but as the name of
a campaign to eliminate pressing inequalities and oppression.21 Don't

(Jan. 1999).
say that we don’t know what counts as inequality until we identify equality, because it is by no means obvious that equality is the logically prior notion or that we need any priority in these matters. (A schematic suggestion you could use for beginning some historical enquiry: assailing pressing inequalities of the day, people generate provisional understandings of equality; ongoing social change and that new understanding give them new inequalities to assail, in turn leading them to revise their old understandings of equality and articulate new ones; and on and on. Don’t ask here — or elsewhere — for an end of history.)

Selective blindness to irrelevant facts, a binary conception of personhood, war on practices of contempt and second-class citizenship: these are among the chief strands we knit—or tangle—together as equality. I rather doubt they have any deep unifying structure. (One could make similar observations about liberty. Recall the tantalizing question, “do liberty and equality cohere or conflict?” The right has long wanted to say, they conflict! To which Dworkin wants to respond, triumphantly, they cohere! Better, I think, to deflate the question and say, well, it depends on which sense of each you have in mind.

Yes, unrestricted market accumulation conflicts with the commitment to keeping everyone’s wealth and income closely in line. No, the right of citizens to pursue their own plans in security doesn’t conflict with equality under the law and the rule of law’s commitments to impartiality and notice. And so on. Notice that all of these senses of liberty and equality are normative ideals, not “flat description[s]” (pp. 125-26). The question, again, is whether at the end of the day there is one basic ideal of liberty and one basic ideal of equality.) No surprise that Dworkin announces here a pending book developing his 1998 Dewey Lectures, “Justice for Hedgehogs” (p. 4). In Isaiah Berlin’s famous distinction, Dworkin has always aspired to be a hedgehog, to know one big thing. In this crucial respect, Dworkin is indeed at odds with the pragmatist tradition and its commendable fixation on nitty-gritty facts and stubborn anomalies, its native distrust of sweeping abstractions and flaccid categories. But I suspect his chosen terrain lends itself to foxes who know many little things. Vulpine theorists can’t supply the architectonic elegance to which Dworkin aspires. But they may be able, in their sly and partial ways, to get more stuff right.

I. FROM PRACTICE TO THEORY

Jules Coleman’s *The Practice of Principle* serves as a focal point for current, newly intensified debates in legal theory, and provides some of the deepest, most sustained reflections on methodology that legal theory has seen. Coleman is one of the leading legal philosophers in the Anglo-American world, and his writings on tort theory, contract theory, the normative foundations of law and economics, social choice theory, and analytical jurisprudence have been the point of departure for much of the most interesting activity in the field for the last three decades. Indeed, the origin of this book lies in Oxford University’s invitation to Coleman to deliver the Clarendon Lectures in Law in 1998, one of the greatest honors for legal scholars. Moreover, unlike many law school “legal theorists,” Coleman’s high standing within the legal academy is fully matched in the professional philosophical world. *Practice* will surely be mined for years for its many and subtle discussions of the nature of law and legal argument. The book is a wonderful achievement, both for Coleman himself, and for the development of rigorous philosophical study of the law.

Coleman’s first publication, “On the Moral Argument for the Fault System,” appeared in the flagship *Journal of Philosophy* at a time when work on first-order problems of law — as opposed to second-order questions about the nature of law — was frequently disparaged by professional philosophers as mere “application.” Coleman’s early writings helped significantly to change that, by showing that deep philosophical issues of responsibility and justice were raised by our le-
gal practices and that our concepts of justice and fault could not be fully understood apart from those practices. What Coleman brought to the field of legal philosophy was both the conceptual rigor of his graduate training at Rockefeller University as well as an interest in and sensitivity to the way risk and responsibility are actually allocated through tort law. In his own work, and in fostering the work of others, Coleman has greatly expanded the range and interest of legal philosophy, moving beyond the mainstays of jurisprudence and constitutional law to the private law of tort and contract.

His 1992 book, *Risks and Wrongs*, set out his general view of those fields. Coleman argued that tort doctrine must be understood as the institutionalization of a distinctive moral view, “corrective justice,” according to which wrongdoers bear duties to rectify the wrongful losses they inflict on their victims. Such a view is opposed, on the one hand, to the strict liability view put forward by Richard Epstein, according to which causing harm, faultlessly or not, suffices for liability; and on the other to the economic theory of tort, whose chief proponents are Richard Posner and Guido Calabresi, according to which liability properly rests with the party best able to reduce the costs of both accidents and accident prevention, independent of any causal or faulty responsibility for the accident. By contrast, Coleman’s interpretation of contract law rejected seeing it as embodying a distinctive moral conception (as, for example, Charles Fried has influentially argued). Rather, argues Coleman, contract law is best understood functionally, as a piece of a more general liberal political theory. With the economists, Coleman sees contract law’s chief justification in its facilitation of economic markets. But where the economists see the chief value of markets as lying in their promotion of allocative efficiency, Coleman understands their virtues in richer, more political terms: markets permit social cooperation in the circumstances of liberal societies, that is, divisive pluralism and individual freedom.

Coleman’s argument in that earlier work reflects a general claim, that abstract concepts must be understood in terms of the practices they structure. This claim is a hallmark of philosophical pragmatism and has been implicit in most of Coleman’s writing. Now he has paused to make it explicit, and to show how other, related, theses of philosophical pragmatism help to illuminate and ground the substantive positions he has advanced over the years.

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The Practice of Principle is, in effect, two books. The first returns to the subject of tort law. Here Coleman’s concern is not setting out his substantive view of tort law, although this work does provide an opportunity for him to knit together his corrective justice view with some other recent work coauthored with Arthur Ripstein, setting out an account of the relation between corrective and distributive justice. Rather, Coleman’s concern is methodological, with the question of what kind of account of a body of law should be deemed an adequate explanation. In this half of the book, Coleman’s principal adversary is named “the economic approach to law,” and represents not any particular figures, but rather a theoretical commitment to explaining and justifying legal institutions in terms of the economic value of efficiency. Coleman hopes to offer an exceedingly ambitious argument: not just that his corrective justice account of tort law is superior to the economists’, but that only an account like his, one that takes the internal structure of tort law seriously, could ever be a contender.

The second “book” takes up questions of general, or “conceptual” jurisprudence: what is law, what authority does it have, and how is law possible? Again, the point of Coleman’s discussion here is not to present new substantive answers to these questions, but rather to show how a position he originally put forward twenty years ago, in “Negative and Positive Positivism,” can draw upon a broader pragmatic approach to overcome powerful objections raised against his and similar accounts. Legal positivism, at the most general level, involves the claim that law is grounded ultimately and only in social facts, where “social facts” include conventions, practices, and beliefs. But positivists have disagreed whether moral criteria — tests of moral goodness — can be incorporated into the conventions defining a community’s law, with Coleman (following H.L.A. Hart) arguing for a capacious view, while Joseph Raz and Scott Shapiro argue that moral tests can never partly constitute a community’s law without undermining the basic function of law, guiding conduct. Coleman also takes the occasion to defend the general project of conceptual jurisprudence against two objections voiced by Ronald Dworkin and Brian Leiter, who criticize positivism for, on the one hand, an impossible pretense of value-neutrality; and on the other of poaching on the proper territory of social scientists in claiming to illuminate a form of social organization.

This Review will touch on the larger themes of Coleman’s book, but it cannot do justice to all its contents, for Practice is dense and

rich, with new arguments appearing on almost every page. It is also a
difficult book, in great part because of the conceptual difficulties of
the issues Coleman considers, and the great range of theoretical con-
siderations he brings to bear on those issues. While the general subject
matter should be of interest to anyone working in legal theory,
broadly speaking, the detail and rigor of its arguments may leave non-
specialists a little dazed. But for those with a serious interest in the
field of legal philosophy, this is a must-read. Even those who reject
Coleman’s methods and substantive claims will benefit from the char-
acteristic lucidity and incisiveness with which he sketches rival posi-
tions, alternatives, and problems for the field.

Just as important, a signal virtue of Coleman’s book is the excite-
ment it embodies about the state of the field. The book vibrates with
critical engagement, with both arguments and authors. The reader has
the impression of being invited to a particularly lively philosophy
seminar, whose members are both familiar (e.g., Ronald Dworkin)
and relatively new (e.g., Scott Shapiro). On every page Coleman is
confronting, criticizing, and endorsing others’ views, as well as ex-
plaining how his own views have shifted over time. The consequence
of this strongly dialectical approach is that the book does not really
purport to present definitive answers to the problems it treats;
Coleman’s views will likely shift again in the future. The book, then,
offers a snapshot of Coleman’s mind and the debates his work drives.
In that sense, the book may seem less satisfying than the traditional
philosophical treatise, in which the appearance of finality is scrupu-
ously maintained by the rhetoric of the obviousness of the author’s
conclusions. Coleman’s approach is, by contrast, refreshingly honest.
The problems are hard, and a philosopher would be a fool to think his
or her views the final words on the matter.

II. PRAGMATISM, PRINCIPLE AND TORT

According to Coleman, The Practice of Principle is supposed to
both exemplify and explain philosophical pragmatism as applied to le-
gal theory (p. xi). Because pragmatism is, to varying degrees, the uni-
fying thread of this book, it is worth getting clear from the start what
Coleman means — and does not mean — by it. For “pragmatism” is a
word much in vogue in legal academia. A recent Westlaw search turns
up nearly 200 law journal articles with “pragmatic” or “pragmatism”
in the title, on subjects ranging from administrative law, to envi-

10. The book has one serious defect: a virtual absence of specific references to the cur-
rent literature, including the works of authors Coleman discusses at length. This is particu-
larly unfortunate because it excludes interested readers who might otherwise find this a
helpful introduction to contemporary debates in this field.

ronmental law,¹³ to voting rights law,¹⁴ not to mention at least two special symposia specifically noting the emergence of pragmatism.¹⁵ These articles range in theoretical depth, and it is fair to say in many that "pragmatic" functions as a five-dollar synonym for "practical." Others invoke a more general methodological stance, one that abjures arguments from pure principle in the spirit of compromise — in David Luban's characterization, this is pragmatism as "eclectic, result-oriented, historically minded antiformalism."¹⁶

Even among the more reflective proponents of "legal pragmatism," the term seems to denote a waiver of the requirements of producing systematic theory, in favor of a bricolage of independently plausible theoretical assumptions and principles, balanced against intuitively reasonable outcomes. Daniel Farber's recent Eco-Pragmatism is typical: "Legal pragmatists are, in part, reacting against the increased obsession of some other legal scholars with grand theories such as economic reductionism . . . . We can have better hopes of building an interlocking web of arguments that will support a decision based on diverse, overlapping considerations."¹⁷ There may indeed be good reasons to avoid difficult theoretical work in particular times and places: not all debates happen in seminar rooms, nor is the solitary cool of the study the appropriate forum for hammering out policy among parties with sharply conflicting interests and conceptions of the good.¹⁸ Moreover, because philosophical theories by their nature are general and tend to underdetermine particular policy conclusions, it is often possible at the policy-making level to reach consensus on particular decisions without needing to square all theoretical premises. However, such pragmatism, or better "legal pragmatism," stands generally to philosophical pragmatism as "legal realism" stands to philosophical realism, which is to say that the resemblance largely stops at the orthography. For philosophical pragmatism represents a

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¹⁸. The case for practical agreement amid theoretical disagreement has been well made recently by CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).
A constellation of semantic, epistemological, and metaphysical claims, most of which derive directly or indirectly from arguments about the relations between theory and evidence, and from the priority of interpretation to metaphysics. In its philosophical form, therefore, pragmatism represents a deeply-considered theoretical framework, a framework congenial to a wide-range of substantive ethical and legal positions.

Coleman’s pragmatism is of the latter flavor, and the book may come as a shock to those seeking the usual pass from theory. According to Coleman, philosophical pragmatism is characterized by the following five claims or characteristics: (1) "semantic non-atomism": the idea that meanings reside not in individual concepts but holistically, in networks of concepts, so that for example the meaning of “fault” can only be explicated in terms of the related concepts of “harm,” “agency,” and “remedy,” related inferentially to the term to be explained; (2) “practical inferential role semantics”: the meaning of concepts is given by the inferences they support in the practices in which they occur; (3) “explanation by embodiment”: normative principles are explained by showing the practices in which they occur; (4) “conceptual holism”: what role a concept plays in one practice depends on its role in other, related practices; and (5) “radical revisability”: all beliefs, both theoretical and empirical, are open to revision on both theoretical and empirical grounds (pp. 6-7).

Taken together, these claims add up to a distinctive view of human language, one that sees language not as a kind of transparently Platonic mapping of reality, but rather as a tool developed and used for a range of social and theoretical purposes, of discovery, explanation, and justification. While mapping reality is, of course, a central function, linguistic pragmatism emphasizes the social context of the mapping activity — the way in which our attempts to work out an understanding of our social and physical environments are done from here, that is from a temporally and spatially limited location, using conceptual materials drawn from other activities and projects.

An example will make this clearer. Take the claim “punishment is the merited response of intentionally inflicted suffering to wrongdoers,” which might be thought definitional of punishment. According to the principle of semantic non-atomism, to understand this claim we need to understand as well the related but unmentioned concepts of “harm” and “responsibility.” Second, a complete understanding of the


claim and its subsidiary concepts is going to require more than just a
discursive account. Rather, grasping the concept of punishment means
understanding the contexts in which punishment is deployed (or ex-
cused), and how punishing relates to practices of compensation or re-
venge. And third, we might want to revise our seemingly definitional
claim about the connection of punishment to wrongdoing upon en-
countering societies with very different practices. For instance, imag-
ine a culture in which norms of forgiveness in the wake of wrongdoing
dominate, where people compete to absorb and forgive the greatest
insults and harms. In such a culture, inflicting suffering on wrongdoers
would not, "by definition," be merited. What this example is meant to
show is that what had seemed on its face a single semantic claim about
the meaning of "punishment" now turns on the relation between pun-
ishment and a congeries of associated social practices — that is, turns
on the relation between that individual semantic claim and a particu-
lar, contingent, form of life.

The pragmatic view of language defines a research program in
philosophy that treats our concepts and ideals as, in Quine's term,
immanent not transcendent, and so only understandable through an
exploration of their place in our social and physical world.21 In the case
of law, immanent exploration means taking legal doctrine and its con-
ceptual skeleton seriously, not just as independent data points which
an explanatory curve must fit but as a systematic phenomenon whose
parts interrelate both conceptually, in being mutually illuminating, and
practically, in sustaining a form of social life whose complexity and
value are recognizable to us as both inhabitants and explorers.

The antithesis of immanent exploration, by contrast, is reduction,
especially as practiced by the legal economists who serve as Coleman's
foil in the first part of the book. Reductions of some phenomena are
helpful — explanatory — when they transform the relatively mysteri-
ous into the familiar, or thereby relate an apparently singular phe-
nomenon to a range of disparate phenomena, permitting unified theo-
retical treatment. Famously, the reduction of heat to molecular motion
does both these things; equally famously, attempts to reduce mental
states like beliefs and desires to neural firings has done neither, giving
up a rich and explanatory theory of human agency for a "science" of
the brain unable to explain the mind's most salient feature, its inten-
tionality.22

For Coleman, economists' reduction of tort law's language of the
"duty of care" to "efficiency" is like the reduction of the mental to the

21. W.V.O. Quine, Replies to Davidson, 19 SYNTHESIS 303, 305 (1968). For a fuller dis-
cussion of the immanent method, see W.V.O. QUINE, ONTOLOGICAL RELATIVITY AND

22. For a polemic along these lines, see JOHN SEARLE, THE REDISCOVERY OF THE
physical, impoverishing rather than enriching our understanding. This reduction is most explicit in economists' endorsement of the "Learned Hand test" for negligence, according to which a failure to take precautions against causing injury is negligent just if the cost of precaution is less than the cost of the possible injury, discounted by the probability of its occurrence.\(^\text{23}\) (So, for instance, carmakers shouldn't be deemed negligent for failing to install $10 bumpers if there were only a 0.1% chance of a driver causing at most $9,999 in injuries.) The Learned Hand test may make good sense as social policy in deciding when it is reasonable to demand injurer compensation, since the incentives it creates for potential injurers have the effect of lowering the net social costs of accidents plus precautions — in other words, the true social costs for the potentially injurious activity. But the question of its general reasonableness as social policy and its fairness as between the two parties are two very separate things. Imagine, for example, that it is very costly for a shipping company to ensure that its drivers do not drink on the job, but that its drivers do sometimes drink, and when they do, they cause accidents. The car owner whose car is dented by a drunken driver will have a legitimate grievance against the company, a grievance expressed morally as "you need to clean up the messes your workers make," whose normative force persists even if, as a matter of overall policy, society is best off leaving the loss with the car owner.

The grievance persists because it expresses a fundamentally relational dimension of morality, the responsibility of the injurer for the injury to the victim; the Learned Hand test, by contrast, expresses a non-relational dimension of morality, the responsibility of each to bear costs when that maximizes social welfare. The two dimensions, traditionally catalogued as deontological vs. utilitarian, compete in the reasons they offer, and it is obvious that one is not fully reducible to the other. Utilitarianism, of which welfare economics is a special form, assesses acts by reference to whether they will produce more or less overall welfare in the relevant population; deontological theories, by contrast, assess acts by their conformity to principles of right — for example, whether an act expresses disrespect for a particular person, or whether the act honors a previous commitment.

Take the old chestnut of the deathbed promise: Franz asks his old friend Max to swear to burn Franz's book manuscripts upon his death, and Max so promises. But after Franz's death, Max reads them and realizes they are works of genius, sure to bring pleasure to the world. What should Max do? For a utilitarian, the matter is obvious: there is no welfare gain from keeping the promise in this instance, while publishing brings a clear gain. But to the deontological moralist, serious about the principle that promises ought to be kept, the case poses a

\(^{23}\) United States v. Carroll Towing, 159 F.2d 169 (2d Cir. 1947).
problem because the promise itself creates a powerful, if not decisive, reason to burn the manuscripts. A utilitarian might try to end up in the same place, by arguing for example that welfare is enhanced by our internalizing rules of thumb regarding promise-keeping, rules that should be put aside when welfare runs strongly the other way. But this argument would imply that any sense of dilemma Max feels is just a matter of irrational carryover, that if he saw things clearly, he would see he had no reason to honor the promise.\footnote{A utilitarian will also argue that Max has a reason to keep his promise because breaking it might encourage others, in non-welfare-maximizing circumstances, to break theirs — or will cause worry to those trying to settle their estates. But this response seems basically ad hoc, turning as it does on empirical predictions about the effects of promise breaking. It is also unprincipled, for it fails to apply when the promise breaking would not be known to anyone — yet presumably Max would still regard himself as facing a dilemma in this case. For discussion, see Samuel Scheffler, Introduction to Consequentialism and its Critics 1 (Samuel Scheffler ed., 1988).} And this seems wrong: any adequate account of human morality — one aiming to be true to both the phenomenology and the practice of promise-making and moral deliberation — has to recognize the deep force of both sorts of reasons, utilitarian and deontological. For what is at stake, in Max's deliberations and in morality's place in our lives generally, is both Max's particular relation to Franz, to whom he has made a commitment, and his relation to humanity in general. Relations to friends, family, promises, neighbors, the world at large: these structure our lives, puzzle us, and divide our loyalties. Utilitarianism, in its redescription of our relations to particular others in terms of our relations to humanity in general, fails to take seriously the complexity of our normative relations to others.

Coleman's argument against the economic approach to tort law mirrors the debate between deontology and utilitarianism. Tort doctrine's "bilateral" structure, in Coleman's term, reflects the relational dimension of morality, in its confrontation of injurer and victim. In this sense, Coleman says, tort law deeply expresses the corrective justice principle that "individuals who are responsible for the wrongful losses of others have a duty to repair the losses" (p. 15). All the central issues of tort law — who may be liable, and under what conditions — presuppose this principle, for all involve a confrontation between an injured plaintiff and an ostensible injurer. This is in fact the heart of Coleman's argument against the economic approach to tort law. Tort law fundamentally concerns what to do about what has happened. Economics, by contrast, is fundamentally oriented around the future; its concern is how to structure incentives so that future costs will be minimized. Within economic analysis, an accident's importance is purely epistemic or informational: it can reveal where attractive pressure points lie, where incentives might better be tailored, so that the future will be unlike the past (pp. 15-17). Beyond this role, however,
the fact that $A$ hurt $B$ is of no economic concern; it is merely a sunk cost.\footnote{Judge Hand’s deployment of the cost-benefit test for negligence is thus only partially compatible with law and economics, since it assumes that liability will lie, if at all, only with the injurer. Full-bore economic analysis, however, must consider the whole universe of potential cost-minimizers.}

More generally, as Coleman argues, economists have no principled way to limit their field of view to these two parties. Indeed, it is an open question whether liability might better lie with some independent third party who, for whatever reason, is in a better position yet to take precautions. To continue an example above, perhaps truckers’ mothers are in the best position to check the sobriety of the drivers, and so ought to be liable for any future accidents in order to encourage them to check their children’s drinking. If economic analyses stop short of casting the liability net so widely, there are only two possible reasons: either the contingent fact that the best cost-minimizers are, in fact, injurers or victims; or a failure by legal economists to realize how revisionary the instrumental conception of tort law really is to actual doctrine. Either way, economics fails to account for the deepest feature of tort law, its concern to repair a past harm, and thus it fails as an explanation of tort law in general.

Of course, the forward-looking perspective of economics is present in contemporary tort law, most notably in products liability,\footnote{The \emph{locus classicus} in American tort law is Justice Traynor’s concurrence in \textit{Escola v. Coca Cola Bottling Co.}, 150 P.2d 436, 440 (Cal. 1944).} as well, arguably, in older doctrines such as \emph{respondeat superior}. But these incursions of instrumentalism occur at the margins, as exceptions to the bilateral logic of tort law. Coleman’s claim, to be sure, is not that departures from the corrective justice model are unwarranted, or that a frankly revisionary conception of economic theory should not guide institutional reform. Even the plaintiffs’ bar could not argue with a straight face that tort law, with all its costs, is the only just way for a society to deal with accidental harm. Coleman, indeed, recognizes the possibility that we might be better off scrapping the tort system for an alternative, for example New Zealand’s general no fault insurance scheme (p. 59). The central point of his argument is simple: a theory of what tort law is must respect, not eliminate, its basic structure; and the economic approach to tort law fails to do this.

This flaw at the heart of the economic approach would seem to be fatal, but Coleman goes on to discuss some other ways an efficiency-centered account of law might be helpful even if it fails as a conceptual reduction. The first is if economics offered a “functional explanation” of the sort favored by evolutionary psychologists. A functional explanation of something — say, a structure such as the eye, or a practice such as altruism — tries to show how the fact that it furthers some goal
explains its presence. On an evolutionary account, the fact that (some) species have eyes is explained functionally, by the fact that eyes enhance survival. Creatures with eyes are likely to be more successful in reproducing, and so passing on the eye trait, than creatures without eyes. Thus, assuming a mechanism for generating the eye trait in some individuals (random mutation in evolutionary theory), and a filtering process by which the trait can spread through a population (reproductive competition and heritability), the presence of eyes is explained by their function of enhancing survival.

An economist trying to make a similar case for tort law would accept the complex, relational structure of tort doctrine, and then try to show how the presence of that structure, as a whole, is explained by its function of enhancing efficiency. But this is not easy, for it involves showing, first, that the structure of tort law does, in fact, enhance efficiency — at least relative to other systems of social organization that might have emerged — and, second, that there is some plausible filtering process through which the tort system, complex relational structure and all, has emerged because, in fact, it maximizes efficiency. But, as Coleman argues, no such explanations are on the horizon (p. 27). While economists have argued whether particular rules within tort law are, or are not, efficient, they have not taken up the task of arguing that tort law as a whole promotes efficiency. And even if that claim were accepted, no one has shown evidence for a filtering mechanism by which efficiency-promoting structures, rather than others, would come to dominate social practice. While there are today some economically-oriented judges on the bench, that is a very recent phenomenon and it can’t help in explaining structures of tort doctrine dating from English common law. So the functional explanation is a nonstarter.

Coleman next considers whether an efficiency-centered account might work as what Ronald Dworkin has called a “constructive interpretation” of tort law. An account provides a constructive interpretation when it shows a practice or institution in its best light, making it the “best possible example of the form or genre to which it is taken to belong.” To take Dworkin’s example, a reading of Macbeth that interpreted the play as a murder mystery rather than as a tragedy would fail as an account of that play, not because the murder mystery account could not explain all the features of the play — there are lots of bodies lying around, after all — but because such an interpretation would make it a bad murder mystery rather than a powerful tragedy. For Dworkin, understanding what a thing is is essentially a matter of seeing what it is for, what it does best. So, if economic analysis provided a constructive interpretation of tort law, it would have to show

27. RONALD DWORIN, LAW’S EMPIRE 52 (1986).
why ordering tort law around efficiency reveals it as, in some sense, a more attractive institution than do other plausible accounts. But, as Coleman persuasively argues, interpreting tort doctrine in terms of efficiency does not seem to reveal its structure in an attractive light; rather, it seems to impose upon its structure an alien organizing principle, for the reasons discussed above (p. 31). Second, there's simply no reason to think that the value of efficiency does make tort law more attractive than does corrective justice. If efficiency is where we want to go, then tort law under any interpretation may not be the way to get there. (Similarly, someone looking to read an entertaining mystery would do better to pick up an Agatha Christie novel than to force such an interpretation on MacBeth.28)

Finally, Coleman considers whether the economic account of tort law might nonetheless be more attractive than the corrective justice account because the economic account manifests the explanatory virtue of “consilience,” or the ability to explain many different, related phenomena with a single concept. Coleman suggests that if we expand the scope of the economic account beyond efficiency, to the more general goal of risk-regulation, then we might get an account of tort law that lets us see how tort law fits together with contract law, property, and perhaps even criminal law (pp. 37-38). In fact, the success of economics within the legal academy is largely a product of its purported success in providing a unifying treatment of isolated doctrinal puzzles. Coleman’s argument at this point is more generous to economic analysis. He grants that, to the extent economic analysis explains tort law at all, it does so in a way that permits tort’s explanatory unification with the rest of private law, and then some. But, Coleman argues, in perhaps the most interesting chapter in this part of the book, the corrective justice account is also nicely consilient. For not only are the central concepts of corrective justice — agency, responsibility, duty, repair — found throughout our social practices, but the corrective justice account of responsibility for misfortune can help to illuminate what Coleman sees as the basic idea of distributive justice: who owns what costs? As Coleman and Ripstein argued in “Mischief and Misfortune,”29 the question for tort law concerns the costs of accidents, and the question for distributive justice concerns the costs of congenital misfortune, such as being born poor, or disabled, or untalented. Examination of corrective justice reveals that there is no non-normative, purely naturalistic way of assigning costs to agents. Heroic attempts, notably by Richard Epstein, have been made to make causa-

28. This, indeed, is consistent with a general criticism of Dworkinian constructive interpretations: that making something the best it can be may, in fact, make it into something else.

tion the key to assigning liability for accidents; and by Dworkin to make “brute” versus “option” luck the basis for assigning responsibility for congenital misfortune. But Coleman and Ripstein show — convincingly to my mind — that neither causation nor luck on their own can determine the content of a scheme of justice. Causation is too promiscuous a concept: any necessary condition of an event is a cause, the driver driving or the pedestrian walking. And what makes congenital bad luck so hard to bear, and thus a proper object for action by redistributive institutions, is a prior conviction that undeserved harms warrant compensation. In both cases, what does the work is a more basic conception of “the requirements of political fairness as reciprocity among free and equal persons” (p. 45). And thus the elements of the corrective justice account can illuminate two bodies of normative theory initially thought fully distinct. On grounds of consilience, then, corrective justice scores at least a tie.

Coleman’s argument for the superiority of the corrective justice account in illuminating tort law is highly persuasive. Indeed, Coleman’s refutation of the economic approach is so persuasive that the reader may well wonder whether anyone today seriously holds a belief for economics as a descriptive account of tort doctrine. This is a fair question, since Coleman provides no references to economists making the descriptive claim, and the principal work setting out the descriptive account, by Richard Posner and William Landes, is now twenty years old. It is true that the economic account does still play a significant role in legal pedagogy, where its descriptive and normative aspirations are rarely disambiguated; and it is prominent in descriptive accounts of transactional law, such as contracts. But it would appear that the economists have already abandoned the descriptive project in tort for the greener pastures of reform, or for the evaluation of the relative efficiency of particular rules rather than the system as a whole. Louis Kaplow and Steven Shavell, two of the most influential legal economists working today, describe their own work as wholly normative, a technically sophisticated utilitarianism. Their argument in tort law is that legal policies should promote social welfare, which is maximized by efficiency-centered approaches, not ill-defined notions of justice or fairness. This approach takes on corrective justice as a normative, not a descriptive matter. Of course, it presumes that the structure of tort law is sufficiently compatible with the value of efficiency that reform, rather than scrapping the whole, is a live possibil-

30. Epstein, supra note 4.
33. Id. at 1039-52.
ity. In that sense, economists like Shavell and Kaplow may fail to recognize the radical alternative to corrective justice that economics presents. But even if they are right about the possibility of insinuating a forward-looking value into the structure of a backward-looking doctrine, they need not be interpreted to claim that tort law is already oriented around efficiency. Coleman’s criticisms largely pass by them, and most other legal economists working today.

In any case, the real interest of the economic account lies in its service as a foil for Coleman’s own demonstration of the pragmatic method in normative theorizing. Much modern moral and political philosophy begins from within our experience, often in the form of “intuitions” whose epistemological status as deliverances of some external moral reality rather than conventional prejudice always seems suspect. On the other hand, forms of moral and political philosophy that begin with very general theoretical principles, such as that the good consists in aggregate happiness, and then argue back to the norms and practices constitutive of everyday life, seem basically alien to the particular and partial perspectives of human agency. The virtues of Coleman’s pragmatic approach, by contrast, are the generosity of its scope and the modesty of its objectives. Starting from the rich material of our actual practice, the kind of coherent and holistic explanation pragmatism insists upon results in a theory of tort liability that shows its complex relation to human agency, social justice, and moral responsibility. At the same time, because Coleman does not claim that the corrective justice account is independently morally justified or self-justifying — he acknowledges the obvious point that there are surely better ways of allocating accident costs than private litigation — his account avoids the charge of conservatism that dogs intuitionist accounts. On the other hand, Coleman’s account makes clear how thoroughgoing a revision the economists propose, not just to our legal landscape, but to the individualistic perspective on agency to which the corrective justice account is intimately bound.

III. PRAGMATISM AND THE NATURE OF LAW

The second half of the book is chiefly devoted to a distinct problem: how to make sense of law’s claim to authority. The authority of morality’s commands lies in their intrinsic goodness or rightness. Law, by contrast, seems to command us to do or refrain simply because we are commanded. Its authority is or purports to be independent of the goodness of its dictates. This claim might be, and has been, denied in two ways: by anarchists, who deny the authority of law; and by “natural lawyers,” who see law’s authority as stemming from its capacity to help us realize the good. But explicating the familiar thought that “because it’s the law” seems to provide a prima facie reason for obedience is the challenge taken on by legal positivists. Modern legal positivism
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descends from H.L.A. Hart’s *The Concept of Law*, the most important work of legal philosophy of the last century.\(^{34}\) According to Hart, law’s authority depends only on the existence of a social convention among a group of people, who would agree in their collective practice that certain norms — don’t steal, written promises are to be kept or damages paid — were to be recognized as obligatory and so obeyed or deviations therefrom criticized. The law’s authority for those people is simply a matter of their accepting it as authoritative — a bootstrap argument of sorts. (A noteworthy feature of this account is that because law’s authority extends only to those who accept it, legal positivism takes no position on the political philosophical question whether law has any authority over subjects who do not accept the convention as reason-giving but merely abide by it, for example out of fear.) The convention observed by this group, whose practice is generally obeyed by others, is called the “Rule of Recognition;” the “rule” is the set of criteria according to which certain norms are recognized as law, not just as bits of social morality.\(^{35}\)

Many criticisms have been raised against the conventionalist account, chief among them Ronald Dworkin’s argument that conventionalism fails to capture the disputatiousness of legal practice: the ubiquity of argument about what the law is on some point despite the clear absence of any conventional answer.\(^{36}\) A different criticism of Hart’s account, and of its adumbration in Coleman’s “Negative and Positive Positivism,” has been made by Scott Shapiro.\(^{37}\) According to the most widely-accepted theory of convention, that of David Lewis,\(^{38}\) to say that a social practice is conventional is to say that the parties to that practice have preferences with a particular structure: each party to the practice prefers most to conform to whatever the general practice is, than to engage in any particular form of the practice. To adapt an example of Lewis’, many people adopt a convention that when a cell phone call is dropped, the caller is the one who calls back.\(^{39}\) This convention is maintained not because there’s any inherent justice in the caller calling back, but because the most important thing is to have some settled convention so that each party doesn’t meet a busy signal. Conventions are, in technical language, solutions to coordination


\(^{35}\) What characterizes a legal system, or “law” in a general sense, according to Hart, is the existence, manifest in social practice, of a rule of recognition, as well as primary conduct-guiding norms; secondary power-granting norms, for example governing how to make binding agreements; and other secondary norms governing legal change. *Id.* at 94-95.


\(^{39}\) *Id.* at 5.
problems: problems individuals face when they need to act together to act successfully, but could act together in any number of ways.

As Shapiro points out, the social practice governing what counts in a community as law seems quite unlike a convention, for the parties to that practice have strong preferences concerning what criteria to use in determining the law; they don't prefer conformity of any kind. In the United States, for example, legal officials share a practice of referring to the Constitution to determine in part what counts as law; this practice is stable not just because the Constitution was selected as a coordination point and all prefer to coordinate around something. Rather, officials coordinate around the Constitution because each believes it sets out the proper criteria for what counts as law. More generally, it certainly doesn't seem to be a necessary feature of a community's rule of recognition that it be followed as a convention, in Lewis' sense, for it could be followed for all sorts of reasons. And this poses a problem for the traditional positivist account.

Coleman's subtle and valuable discussion of the social foundations of law provides an answer to Dworkin's criticism. Rather than seeing law's authority as residing in an unreflective convention among officials, Coleman suggests that is a product of their active, reflective — and disputatious — cooperation. (Think of how a boxing match is both cooperative, the fighters accepting a common set of rules and trying to put on a good show, and competitive, each struggling for his preferred outcome.) Coleman's use of the term "cooperation" is technical and draws on recent and influential work by the philosopher Michael Bratman, as well as work by Shapiro. Roughly speaking, persons cooperate when their intentions to engage in some activity manifest a particular, interlocking structure: each person attempts to be responsive to the actions and intentions of the other participants; each is committed to the success of the activity, and moreover to its successful realization via cooperative activity; and each is committed to helping the other participants to achieve the shared goal (p. 96).

Agents who are cooperating are not necessarily in full agreement. You and I may be cooperating in planting our garden together, each committed to sharing expenses, digging the beds together, and working out together what to plant in them. But we may be deeply divided about what to plant, you preferring vegetables and me flowers. Our cooperative plan to build the garden does not determine this issue, but it does create a background for, and structure our, bargaining over the question of what to plant (p. 97). For if we weren't committed to gardening together, we would not be constrained at all by considerations of what the other is willing to accept, or by the budget we have jointly

pooled and so forth. Cooperation thus accounts for both agreement and the nature of our disagreement.

In the case of law, Coleman suggests that judicial practice can be understood as cooperative in Bratman’s sense: judges are mutually responsive, through doctrines of precedent; mutually committed to the existence of a stable, institutional practice of adjudication; and mutually helpful, through practices of appellate review (pp. 96-97). At the same time, the kind of disagreement that has captured Dworkin’s imagination, Coleman argues, is well accounted for by the cooperative model. What is shared by legal officials in a community is not any particular set of legal criteria, as in Hart’s account, but a commitment to a project — to working out, acrimoniously if need be, what the community’s law should be. It is this shared commitment to a project that explains how a community comes to have law; and the particular trajectory this shared practice takes explains why it has the law it does. The invocation of pragmatism here is more implicit than explicit, but no less real: while positivism’s virtue lies in situating the abstract concept of law in a particular set of social practices, its vice was not looking closely enough at the actual structure of those practices. The shift from convention to cooperation reflects a pragmatic commitment to finding law’s structure in actual practice, and so provides an object lesson in the pragmatic approach.41

One question does remain: has Coleman, by eliminating the conventionalist basis of positivism, thereby relinquished his claim to a distinctively positivist theory?42 For even a natural law adherent could

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41. I should say that while I favor the general approach advanced here by Coleman, I think the cooperative model still fails to take seriously enough the extent of disagreement at the foundation of law — principally because many participants in legal practice lack the motivation of mutual helpfulness. I prefer a weaker model of collective action to cooperative action. See Christopher Kutz, The Judicial Community, 11 PHIL. ISSUES 442 (2001).

42. This argument is pushed very hard by Dworkin in his review of Coleman. Ronald Dworkin, Thirty Years On, 115 HARV. L. REV. 1655, 1660-63 (2002) (reviewing The Practice of Principle). As I understand it, Dworkin’s central point seems to be that when positivists rely on social action defined in such abstract terms as, for example, “cooperatively attempting to determine the community’s criteria of legality,” they forgo the chief functional advantage claimed by traditional positivism: the idea that what defines a community’s law is a strict function of its members’ convergent behavior and critical attitudes. Thus, in principle an observer could determinately read off the law from an account of the commonalities in participants behavior and attitudes.

True, when the traditional positivist notion of a convention is weakened to Coleman’s point, convergent behavior and attitudes no longer serve to identify the content of a community’s law — for the simple reason that Coleman, recognizing the force of Dworkin’s argument for pervasive controversy, no longer claims that participants’ behavior must converge. But Coleman’s claim for positivism is metaphysical, not epistemological, as I argued above: positivism’s virtue is that it gives a true account of what makes a given proposition valid in a community, namely its logical relation to the cooperative practices of legal officials in that community. Coleman’s positivism may therefore be useless in the hands of an observer trying to divine a community’s law from its practices, but it still makes a clear and controversial claim about law’s nature, and thus stands as an alternative to legal theories, like Dworkin’s, that make legal validity turn necessarily on moral merit.
claim that law’s social foundation is cooperative in a relevant sense: under natural law theory, judges cooperatively seek to determine what are the morally best standards of law. The cooperation here, however is only of sociological interest, analogous to the observation that, say, experimental physics consists of scientists cooperatively trying to determine the constituents of the universe. What distinguishes natural law theories from positivist ones is the normative role played by the sociological observation. In positivist theories, the cooperative behavior of the judges makes it the case whether a given proposition counts as valid law; the judicial behavior fixes the truth of legal propositions.

To return to the physics example, positivism in law is thus equivalent to social constructionism in science, according to which scientific claims count as true just because they are so acknowledged by a community of inquiry; according to scientific realists, by contrast, the truth of those claims depends only on whether they reflect the way the world is. Since Coleman insists that the cooperation of social officials is itself what fixes the truth of legal propositions — or, more precisely, what fixes the criteria for what counts as law in that community — his abandonment of conventionalism does not entail abandoning positivism. Though I myself doubt that the cooperative picture of judicial behavior is fully adequate to the fractious nature of actual legal practice, Coleman is clearly moving in the right direction in order to save the positivist project from the meager foundations in unreflective convention that it set for itself.

There is a great deal more of jurisprudential interest in the second half, including a long discussion of the question whether legal positivism can accommodate the evident role of moral principles in particular legal systems — for example the principle in U.S. law that the legal process comport with “fundamental fairness.” This question is often referred to as the question whether “inclusive” or “exclusive” legal positivism is true, “inclusive positivism” being the view that moral criteria can count as part of a community’s law whenever social practice by legal officials makes them relevant to legal decisionmaking. “Exclusive positivists” hold that whether or not legal officials sometimes deliberate using moral criteria, a community’s “law” in the strict, definitional sense cannot include those terms. For instance, Raz, the leading exclusive positivist, has influentially argued that because law’s function in a positivist understanding is basically to resolve conflict without resort to moral argument, if moral principles play a role in legal systems, it is not as “law” but rather as binding extra-legal decisional standards.43 Shapiro has argued, relatedly, that if law functions to guide conduct, then the law must make a “practical difference” to

43. JOSEPH RAZ, The Identity of Legal Systems, in THE AUTHORITY OF LAW, supra note 9, at 78, 100.
an agent's deliberations about what to do, either by motivating the agent or identifying for her what she should do. But if the law merely says, in effect, "do what morality says," then the law is not making a difference; morality is. For law to make a practical difference, it must do so by virtue of its mere legality, that is by virtue of its form and independent of its content. Moral norms, by contrast, guide conduct by virtue of their content, and so moral standards cannot be part of law, on pain of compromising its guidance function.

Against these arguments, Coleman defends the common sense view voiced by Hart that if law is at root conventional, then some of those conventions could, in fact, incorporate moral principles as elements of law. I cannot do justice to Coleman's full response to Raz and Shapiro, particularly to the care with which he explores their views. But the general nature of his response is to acknowledge the force of their claims in defining the general character of law as a social institution, an institution whose function clearly is to provide an authoritative and decisive guide to conduct. As Shapiro and Raz argue, this function may well be a virtually defining feature of law: a community whose "law" consisted of the rule "act morally" (or consisted of nothing but more specific rules, such as "contracts must be honored when it would be immoral to break a promise," and "tort damages must be paid whenever there is a moral duty of compensation," ) would not really be a community in which law existed in any interesting sense. But, as Coleman points out, all this can be true of "law" in the sense of a "legal system," without holding true of every particular law. For surely some laws, at the margin, can fail to serve as uncontroversial or content-independent guides to conduct without undermining the general guidance function of law (p. 144). If some laws can include moral norms, then the rule of recognition for a legal community can include moral criteria, such that at least occasionally legal validity will turn on moral validity. Hence inclusive legal positivism is consistent with law's generally guiding conduct without reference to moral norms.

Coleman's pragmatism seems like an especially healthy intervention in this debate for a broader reason, which is the puzzling persistence in legal theory of claims about the "conceptual necessity" of legal systems having certain features. Philosophers generally, in our post-Wittgensteinian and Quinean age, have tended instead to reject claims about conceptual necessity, particularly in the case of artifacts

44. Shapiro, supra note 9.

45. In the Postscript to Concept of Law, Hart said that he regards Coleman's position in Negative and Positive Positivism as a fair statement of his own. HART, supra note 34, at 250-51.

46. See Dworkin, supra note 42, at 1680, for a similar point, although mysteriously directed against Coleman.
and social practices. What, after all, is a conceptually necessary feature of a chair, or (famously) of a game? For any feature one can name, there will be some variant of the thing or activity with plausible claim to the title yet lacking the feature. Legal systems are obviously enormously complex, and complexly situated, institutions, which serve or claim to serve a great range of different functions among communities whose members take very different stances towards them and their authority. Compare a piece of showboat legislation, self-evidently never to be implemented or enforced, with a core element of the criminal law, such as the prohibition of murder. The way these different examples of law relate to citizens' self-understanding, institutional expectations, and broader questions of moral and political theory are so different that no single, rigid functional characterization of a legal system's aims can adequately encompass them both.47

Pragmatism's appeal lies in its shrugging off of claims of conceptual necessity, in favor of a more supple analysis of the way and degree different features of legal systems satisfy different functional demands. Here the relevant question is: what degree of content-dependent guidance is consistent with the existence of a legal system? The answer to this question is partly empirical, partly conceptual. We can, and do, imagine a legal authority functioning as an authoritative system even if it delegates to agents some responsibility for reasoning morally about its requirements; yet at a certain point we cease being able to imagine such a system as law at all. Pragmatism tells us such a conclusion is what we should expect, for our concepts are children of our practices; they are made for our world, it is not made for them.

If one side of Coleman's pragmatism is his insistence that concepts get their content from their social contexts, its obverse is his view that concepts are not simply reducible to those contexts. This point, that concepts and conceptual structures can be the legitimate object of philosophical study, marks Coleman as a kind of moderate among fellow pragmatists. In the concluding portion of the book, Coleman defends conceptual jurisprudence against two, more radically pragmatic, alternatives: the "normative jurisprudence" advocated by Dworkin and the "naturalized jurisprudence" proposed by Brian Leiter.

According to Dworkin, jurisprudence is not a matter of giving a neutral description of law's nature, but a morally committed attempt to justify or criticize how applications of state power flow from a regime's particular history and body of principles; legal argument is perforce moral and political argument. Dworkin's insistence that claims about what law is only make sense as ways of achieving moral and po-

47. Exclusive positivism's semantic maneuver, counting deviant instances as legally binding but not law, seems to me a stubborn insistence on maintaining a thesis in the face of recalcitrant facts.
Pragmatism Regained

At the end of the day, to see the value of legal governance, the implausibly strong claim that the only way to produce such an account is by starting from moral premises.

Leiter, by contrast, follows both Quine's repudiation of traditional epistemology and last century's "Legal Realists" in seeking to explain adjudication not in terms of law's logic, with its famous indeterminacies, but rather through the causal explanations offered by psychology and political science. Against Leiter, Coleman points out that the psychologists and political scientists would have no well defined problem space in which to work — no legal system to study — without the kind of internal account of law's nature that conceptual jurisprudence aims to provide.

Coleman's arguments here are probably unlikely to convince his opponents. Dworkin simply denies what Coleman asserts, namely the availability of an external, uncommitted perspective on a regime's law on the grounds that only the committed perspective reveals the non-conventional moral standards he thinks pervasive in actual adjudication. Leiter, meanwhile, could well accept the aprioristic stage-setting role of jurisprudence and still think it is time for philosophers to close up shop, leaving the difficult questions about law's operation to social science. (In a sense Dworkin and Leiter both represent more extreme versions of pragmatism than Coleman himself.)

IV. CONCLUSION

In his recent (and peculiarly sour) review of Coleman's book, Dworkin complains about the insularity of contemporary legal philosophy, whose practitioners "teach courses limited to 'legal philosophy' or analytic jurisprudence in which they distinguish and compare different contemporary versions of positivism... attend conferences dedicated to those subjects, and... comment on each other's orthodoxies and heresies in the most minute detail in their own dedicated journals."\(^{48}\) Coming from a member of the academy, Dworkin's bleak description is bizarre in three ways: first, of course, because that description characterizes all of academic life, not just legal philosophy. Second because its bleakness seems a product of an alienated outsider, unable to perceive the excitement and interest of the debates to which his own writings have contributed so influentially. Indeed Dworkin's remark seems to reflect precisely the uncharitable interpretive stance

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he deplores as a matter of jurisprudence; it seems committed to seeing opposing views in their worst, not their best, light.  

Third, and most importantly, this book, in particular, ill deserves the charge of pedantry. Rather, *Practice of Principle* is exceptional for the fresh air it breathes into old debates, blowing aside the dust of tangential debates and leaving clean a work area in which beautiful philosophy proceeds.

49. For that matter, the extensive political philosophical debate on equality to which Dworkin has also notably contributed — whether inequalities are best measured in terms of Rawlsian “primary goods,” economic welfare levels, Sen-ic capacities, or Dworkinian resources — could be characterized in precisely the same terms by an outsider insisting on deploping it. Yet that debate, for all its occasionally claustrophobic tendencies, has clearly done a great deal in making clearer what is at stake in questions of justice and equal treatment.