

**Law as Rationalization:
Getting Beyond Reason to Business Ethics**

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ABSTRACT

Embedded in the way we use the law is the tendency of human reason to justification, in the words of one philosopher, “the thirst for rationality that creates lies.” I contend that this tendency is exacerbated by the conflation of what is knowable as a matter of science, and that which we might believe is normative. I rely on Kant’s critique of theoretical and practical reason to assess claims to objectivity in social science approaches to law, and to suggest it is not surprising that the operation of theoretical and practical reason would tend to the conflation of the descriptive and the normative. When we understand the illusions of which reason is capable, we may be more circumspect about claims of objective knowledge and more willing to challenge assertions of a single right answer on normative issues (the *modus operandi* of most legal argumentation).

Nevertheless, we have a sense that there are objective standards of right and wrong, bespeaking right answers, if not single right answers, on difficult issues, and these are the basis for ethics, if not law. How does one bring broad universalisms down to practical application, and have the confidence one’s judgments are right, and not someone else’s view of dogmatism? I discuss the mystery that lies behind the process of judgment, and conclude that the best check against the illusions of reason is our ability to have a relation with, and understand the viewpoints of, others. In particular, I consider Buber’s concept of dialogue, and how it might affect common types of ethical decisions in business.

TABLE OF CONTENTS

- I. INTRODUCTION
- II. FROM REASON TO LAW'S RATIONALIZATION
 - A. Knowledge and Belief Distinguished
 - B. Narrowing the Gap
 - C. From Reason to Self-Deception
 - D. Legal Discourse as Rationalization
 - E. Skepticism and Illusions of Certainty
- III. THE MYSTERY OF ETHICAL JUDGMENT
 - A. Judging is Different than Knowing
 - B. Distinguishing Legal Rules and Ethical Standards
 - C. Finding an Ethical Standard
 - 1. Appeal to Natural Law
 - a. Modern Natural Law and the Single Right Answer
 - b. Contemporary Application of Traditional Natural Law
 - 2. The Promise of Intuitionism
 - a. The Right versus the Good
 - b. Intuitionism Distinguished
- IV. A SECOND PERSON APPROACH TO GETTING BEYOND REASON
 - A. Truth, Argumentation, and Justification
 - B. Law, Subjects and Objects
 - 1. I and You
 - 2. Dialogue
 - 3. Dialogue as the Source of Business Ethics
 - a. Difficult Choices
 - b. Opportunism
 - c. Conflicts with Business Opponents
 - d. Conflicts between Right and Right
- V. CONCLUSION

[T]here is a natural and unavoidable dialectic of pure reason, not one in which a bungler might be entangled through lack of acquaintance, or one that some sophist has artfully invented to confuse rational people, but one that irremediably attaches to human reason, so that even after we have exposed the mirage it will still not cease to lead our reason with false hopes, continually propelling it into momentary aberrations that always need to be removed.

- Immanuel Kant¹

I. INTRODUCTION

In this Article, I want to reconcile philosophically how we approach and deal with the difference between law and ethics in business decisions, particularly when the argumentation of the law may only tells us what is required or permitted, on the one hand, as against what ethical duties or responsibilities might demand, on the other.

Sometimes the issue of ethical duty is wholly internal to the individual with no clear legal implication. Many years ago, KFC had been recently purchased by R.J. Reynolds. I recall one of the lawyers for KFC quietly telling me how uncomfortable it was to be working for a tobacco company. I thought about it. How would I react? Would my moral qualms about the sale and marketing of tobacco cause me to consider changing jobs? But I had young children at the time. Imagine the conflicting duties. My

¹ Immanuel Kant, CRITIQUE OF PURE REASON, trans. Paul Guyer & Allen W. Wood (1998), at 386-87 (A298/B354).

wife and children rely on my income, and are settled in a community because of my job. Do my moral concerns about contributing to the success of a tobacco company outweigh the difficulties I might cause to my family if I change jobs? How might I go about deciding and justifying the decision?

Sometimes there is the same kind of issue of internal conscience, but with broader moral if not legal ramifications. I left the law firm and became a senior executive in a series of industrial companies. One of them made automotive components. There was a committee of engineers and lawyers known as the Product Integrity Committee. Its job was to investigate claims of product defects, and to determine whether there was a defect, and to recommend, if necessary, broad warranty campaigns or even product recalls. Determining that federal law required a recall involved a two-step analysis: was there a defect, and did the defect pose an unreasonable risk to highway safety? There often was, at least in theory, a defect, though even that inquiry had its gray areas. The harder determination was whether the company believed the defect posed an unreasonable risk to highway safety. The issue was not so simple as merely to issue a recall for every suspected failure – if one recalled 400,000 vehicles for an illusory or inconsequential defect, and it took the dealer three hours to replace the part at, say, \$35 per hour, the cost to the component company could be in excess of \$40 million, often for a part that was originally sold for a few cents. How did one, in those circumstances, balance the conflicting duties to the public and of financial prudence?

Later, I worked for a chemical company that made flame retardant additives for plastics. There was no question that the product, in preventing furniture fires, or fires in television or computer or printer housings, saved lives. But there were open and

unresolved questions (all being subjected to scientific study by the industry and environmental groups) about the environment impact of the product – its pervasiveness and persistence in the environment, its ability to accumulate in our bodies, and its toxicity, if any. There the issue was slightly different. Thousands of jobs and livelihoods depended on the production of the product. There were legitimate concerns and arguments on both sides of the environmental debate – and how did one make the utilitarian judgment of the greatest good when weighing short-term benefits and long-term costs were almost impossible to calculate?

Those all invoked one broad set of conflicting duties and responsibilities. There was another kind, however, and not always as sharply focused. These were conflicts that arose between and among people or groups of people, sometimes involving conflicts of duties but sometimes not. One set involves the difficult choice: harm to someone is inevitable, and the choice is where it will fall. I am writing several days after Delphi Corporation, the auto parts company created as a spin-off from General Motors, has become the largest corporate bankruptcy in the history of the United States automotive industry.² Delphi hired Robert “Steve” Miller, a chief executive described as “Mr. Fix-It for American industry, stepping in to help large, once-dominant businesses confront and manage ugly realities, sorting through hard choice about wage cuts or plant closures or termination of pension plans.”³

The reverse, it seems to me, of the tough choice, is the one in which it is not clear that any real harm will result, but there is tremendous conflict between people or organizations, with an overwhelming drive to prove that one’s side is right. I had

² Jeffrey McCracken, *Reassembling Delphi*, WALL ST. J., Oct. 17, 2005, at B1.

³ Id.

observed the drawn out battle over what often seemed to be ephemeral territories in corporate and law firm life: central office versus the outlying branches; support functions versus line management; debates between business units over fixed cost allocations that had no impact on the corporate bottom line; lawyers who saw business clients as rash, sloppy and unthinking opportunists, and business clients who saw lawyers as impediments to getting anything done.

Consider all of these issues then (and hundreds more like them) faced in business (if not in life) every day, and how they might be addressed within the legal academy. And imagine my surprise, returning after an absence of a quarter-century to academic exegesis on the law, to find the dominance that economic thinking, as a subset of a more general scientific or naturalistic world view, had come to have. And while one must give credit to the subtleties that behavioral economics and the old and new institutional economics seek to add to the much simpler models of economic actors as wholly rational calculators of their best interest, nevertheless, the idea that there might be science that could explain or predict or direct an ethical decision – that almost transcendental moment of exquisite judgment – was to me just plain counter-intuitive.

Moreover, it seemed to me possible, indeed commonplace, to adopt a utilitarian ethic in this circumstance, and justify harm to others by concerning for the greater good. If we do not sacrifice the jobs of X number of employees, many times X will suffer. It is possible to make those decisions with all the moral insight of Judge Posner's memorable allusion to the internal decision-making process of the rational economic actor, which is

to say: none. We might as well be speaking not about the mind and soul of a human being, but of a frog.⁴

I believe there is a thread that connects the examples of ethical or moral dilemma in business decision making, and I am not satisfied that invoking the discipline of social science adequately describes it or provides guidance. The issue, I believe, goes to the dignity and discipline of the answer. I am not preparing to say that I or anyone else has access to the literal mind of God, or as a next best alternative, a derivation from natural law, by which the answers to these question appear magically in moments of blinding insight. We do a disservice, however, not to expose lawyers to world views other than the purely scientific, and teach some of the secular thinking, developed over centuries, that probes fundamental questions of duty in a way that is just as rigorous, just as disciplined, and just as worthy of respect, as the application of formulas, algorithms and cost curves to the data of experience. We live in a world in which bad things happen, and the laws of economics operate inexorably, and yet we may make decisions about what to do in a way that is morally more acceptable (even if no easier) than counting noses and minimizing the cost of severance.⁵

⁴ Richard A. Posner, *ECONOMIC ANALYSIS OF LAW*, 6th ed. (2003), at 17:

The basic assumption, that human behavior is rational, seems contradicted by the experiences and observations of everyday life. The contradiction is less acute when one understands that the concept of rationality used by the economist is objective rather than subjective, so that it would not be a solecism to speak of a rational frog. Rationality means little more than a disposition to choose, consciously or unconsciously, an apt means to whatever ends the chooser happens to have.

⁵ For evidence that rational actor theory continues to live on in the legal academy, and, indeed, is applied to questions of professional responsibility (if not ethics), see David McGowan, Some Realism About Parochialism: *The Economic Analysis of Legal Ethics*, 8 *LEGAL ETHICS* (2005). One cannot accuse Professor McGowan of incipient Platonism in elevating rational actor to a theory of everything. Rather, I would call his approach *pragmatic defeatism*: because we can never agree on values (his characterization, not mine), we are better off simply calculating the consequences of a particular policy. I also take issue with the assertion that being forced to do a cost-benefit analysis of a policy “forces one to look at all sides

Let me lay out what I think are the roots of the problem. Studying law is, in the first instance, a descriptive enterprise about we may do, but it is closely aligned with, or overlapping, or perhaps identical with what we ought to do. From the first day of torts and contracts and civil procedure, we are asking the question: what is the law governing this issue? If I fail to perform the contract, will I held be liable for damages? If I am sitting in the stands at a baseball game and am hit by a broken bat, do I have a claim for damages against the baseball club? If I believe the facts alleged in the complaint do not articulate a recognized cause of action, what are my procedural options?

But there is also an ongoing normative aspect, in which we either judge the law itself against some other standard – justice, fairness, efficiency – or compare the result of the law to the result we would expect from our sense of morality. In a classic case used to teach the concept of a unilateral contract, one in which the offer makes it clear that it may be accepted only by completion of performance and not by a counter-promise, the offeror, knowing that the offeree is knocking at the door, calling out that he is prepared to complete the performance, the offeror revokes the offer, and the offeree is left without recourse.⁶ One must, I think, ask the students to consider whether that result comports with their own sense of justice; indeed, later developments in the binding effect of a promise on which the offeree reasonably relies to his detriment make it clear there was a normative issue at play.

I suspect none of the foregoing has changed much in law school in the last hundred years. What has changed over that same period is the inter-disciplinary way we

of a question.” Id. Indeed, this becomes an easy, if not particularly rigorous or satisfying, epistemology: “[Cost-benefit analysis] forces you to ask how you know what you claim to know, which pushes thinking toward consequences and away from concepts. Such consequentialist reasoning is necessary to accommodate the conflicts of interests heterogeneous societies always have.” Id.

⁶ *Petterson v. Pattberg*, 248 N.Y. 86, 161 N.E. 428 (1928).

think about and study law. Here is the irony, or dilemma, I contend we face. The study of law as social science imputes science, and I am comfortable that the descriptive and explanatory enterprise is perfectly amenable to scientific structures. We may be awed by the order we see in nature (the philosophical term is “teleology” which implies ends or purposiveness to the universe), but that is a wholly different from the answer to the question: what caused the phenomenon that inspired such awe. “Intelligent design” is a perfectly acceptable matter of discussion for religion or secular philosophy, but it is unacceptable for science.⁷ Nevertheless, the hybrid discipline that is academic law has never, to my mind, satisfactorily sorted out the distinction between its fit into modern interdisciplinary social science and the oft-cited mission to educate lawyers as problem-solvers. Hence, it is all well and good for Judge Posner to suggest even a rational frog would make sense as the subject of economic modeling, but does that model or any other purporting to be science aid the frog in making *ex ante* decisions about what it ought to do?

In a letter to Stanford Law School alumni,⁸ Dean Larry Kramer addressed the issue of educating lawyers in an increasingly inter-disciplinary academic environment. Citing “a weakness of traditional legal training”⁹ and an education that remains “too narrow and technical”¹⁰ Dean Kramer’s vision is ambitious:

[T]his is about more than enhanced skills training or keeping up with the Jones. Lawyers are actors in all of the most important aspects of governing a liberal democratic society. The world needs lawyers with the perspective and vision to make positive contributions to the problems we

⁷ See Thomas Nagel, *Secular Philosophy and the Religious Temperament*, available at http://www.law.nyu.edu/clppt/program2005/readings/secular_philosophy.pdf (last visited, Oct. 6, 2005).

⁸ Larry D. Kramer, *Creating Interdisciplinary Education*, 71 STAN. LAW. 3 (2005).

⁹ *Id.*

¹⁰ *Id.*

face, and who can do so with responsibility and comprehension, not merely by settling into the role of lawyer/advocate.¹¹

Is the scientific study of law prepared thus to educate lawyers?¹² Do our current academic endeavors encourage responsibility as well as comprehension, and if so, by what standard?

Whether or not he meant it that way, Dean Kramer captured the tensions that result from academic law's transition to inter-disciplinary scholarship out of its professional trade school roots.¹³ I interpret comprehension to include the "what" and "why" of the law – as I tell my students, not just the instrumental approaches one takes as the lawyer for a party, but understanding what is happening from our standpoint as historians, philosophers, economists, linguists and social critics. Does the comprehension of that "what" and "why" also, without more, teach responsibility? It certainly teaches what we might do, but that is a far cry from teaching what we ought to do.

Responsibility implies ethics: not the comprehension of what *is* the law, but the consideration of what we *ought* to do, which in turn may or may not be addressed by the law. Moreover, if academic law has been, in the words of one legal philosopher, the subject, of "technological colonization,"¹⁴ how do we address the "ought?" After more than a century of critique by consequentialists, pragmatists, realists, and positivists on the

¹¹ *Id.*

¹² When I refer to the study of law as "science" I mean primarily the scholarship of the last forty years or so, including the Wisconsin law and society school, the predominance of law and economics, and the recent development of so-called "empirical" approaches.

¹³ See Brian Leiter, *Why Is It So Easy to Get Tenure in Law Schools?* available at http://leiterreports.typepad.com/blog/2004/06/why_is_it_so_ea.html (originally posted, August 23, 2003; last visited, September 29, 2005). See also ABA Section of Legal Education and Admissions to the Bar, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992), at 3 ("The transition during this century from a clerkship/mentoring system of educating lawyers to reliance on professional schools in a university setting has been traced by many observers to the acceptance of the Langdellian appellate case-method, which views the study of law as an academic science.")

¹⁴ Linda Ross Meyer, *Is Practical Reason Mindless?* 86 GEO. L. J. 647, 673-74 (1998).

extent to which the positive law incorporates natural law truths about what we *ought* to do, by and large, legal realism and positivism dominate current thinking.¹⁵ The law is a social institution, informed, perhaps, in moral societies by morality, but not necessarily so. To suggest, as does Professor Dworkin, that there is an accessible but transcendental codification of right and wrong, is to leave us wondering how it is we merely accept, on his word, his version of the “deep structures” of law.¹⁶

That we continue to debate the interrelationship of law and morality is *prima facie* evidence of conflation and confusion of the two. There is a distinction between the ability of the social science models of the law to aid in the construction of policy, versus the ability of the models to provide the basis for secular ethics. Indeed, that is the begged question in Judge Posner’s set of assumptions. Even granting that rationality means nothing more than the ability to choose the means to an end, whence comes the end? The synergistic effect of legal positivism and an interdisciplinary approach to law and the “human sciences,”¹⁷ it seems to me, is a presumption of a consequentialist view of morality, if any view is to be taken at all.¹⁸ My goal is not to critique movements like

¹⁵ Natural law, legal positivism, and legal realism are succinctly summarized in three essays: Brian Bix, *Natural Law Theory*, in Dennis Patterson, ed., *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* (1999), at 223-40; Jules L. Coleman & Brian Leiter, *Legal Positivism*, *id.*, at 241-60; and Brian Leiter, *Legal Realism*, *id.*, at 261-80.

¹⁶ Ronald Dworkin, “Hart’s Postscript and the Character of Political Philosophy,” 24 *OXFORD J. LEGAL STUD.* 1 (2004); Dennis Patterson, “Dworkin on the Semantics of Legal and Political Concepts,” 25 (2005), forthcoming, 25 *OXFORD J. LEGAL STUD.* <<http://ssrn.com/abstract=688781>>; Jeffrey M. Lipshaw, “Freedom, Compulsion, Compliance and Mystery: Reflections on the Duty Not to Enforce a Promise,” forthcoming, *LAW, CULTURE & THE HUMANITIES* (2006).

¹⁷ See Ian Shapiro, *THE FLIGHT FROM REALITY IN THE HUMAN SCIENCES* (2005), at 2 (“quantitative and formally oriented social sciences that are principally geared toward causal explanation”).

¹⁸ See Anita Bernstein, *Whatever Happened to Law and Economics?* 64 *MD. L. REV.* 303, 311-15 (2005) (describing the debate among advocates of differing consequentialist theses – efficiency versus wealth maximization versus welfare). Professor Bernstein also aptly characterizes the black box that is the mind of the rational frog of Judge Posner’s metaphor: “We believe the frog pursues here own ends, but we have nothing but her behavior to look at when we seek support for that belief.” *Id.*, at 311. Judge Posner hardly invented the concept of consequentialist morality; it was David Hume who most famously observed that reason is slave to our passions. For a comparison of Posnerian and Humean skepticism, see Martha C. Nussbaum, *Still Worthy of Praise*, 111 *HARV. L. REV.* 1776 (1998): 1776: “Reading Richard Posner’s

law and economics (Professor Bernstein and others have already done a thorough job of it) but deal with how we, as complex humans, might rigorously explore the *ex ante* issues of “ought” from a non-consequentialist perspective.¹⁹ Indeed, I prefer to think of ethics as the deontological *ex ante*: not knowing what the consequences will be, and not being, in every instance, mere rational frogs, what ought to be our ends?

But there are voices, particularly after the corporate scandals grouped under the rubrics “Enron” and “WorldCom,” groping for a way to articulate a secular “ought” that goes beyond mere rational calculation.²⁰ We are exploring that moment of transcendence in the application of a rule, and what, if not religion, guides us? To use the jargon of the physical or social scientist, there is data suggesting that purposes and ends make a significant difference in the world. If you are a positivist, and do not believe any human can claim knowledge of (versus the occasional and fleeting insight into) the mind of God, still: why care? Why strive? Why do pragmatic philosophers seek to justify pragmatism? How is that possibly pragmatic? Go do something useful instead. Even pragmatists, I think, want to believe there is something out there beyond the cold parsing

[‘Problematics’ article] is something like reading Hume’s *Treatise* with the Hume removed: like, that is, encountering the implausibly mechanistic picture of human personality and the defiant debunking of reason’s pretensions without at the same time, and inseparably, encountering the gentle, playful, and many-colored mind, thoroughly delighted by reason and human complexity, incomparably deft in argument, that again and again soars beyond and dives beneath the rigid structures it has erected for itself.”

¹⁹ Professor Bernstein observes that consequential theory is more focused on the *ex ante* policy making perspective: “those who make law ought to strive to improve welfare not so much by reaching the right answer in a particular dispute but by writing doctrine that would foster the goods that law and economics says we all pursue: efficiency, wealth-maximization, welfare, better-offedness, or what you will.” Bernstein, *supra* note , at 326. Professor Bernstein cites several “ex post” antagonists to

consequentialism: corrective justice theorists, who emphasize compensation over deterrence in tort law, retribution tradition in criminal law, and “the embrace of Kantian theory within legal theory.” *Id.*, at 327.

²⁰ I note two articles that raised interesting questions on this subject from the 2003 corporate law symposium at the University of Cincinnati. Donald Langevoort approached the question of intra-corporate candor – clearly an issue of ethics – within a broader treatment of agency law. Donald C. Langevoort, *Agency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187 (2003). Marleen O’Connor addressed the question who, if anyone, is responsible for teaching ethics and values (like candor). Marleen O’Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1315-16 (2003).

of positivist classification; in a charming phrase, they seek to dispense with “theory guilt,” even though they feel compelled to theorize philosophically why they ought not to feel guilty.²¹ Pragmatism has a feel to others (like me) of so much question-begging (even if on a day-to-day basis it is so, well, *pragmatic*).²² Yet much of the serious epistemic wrestling in the law nowadays is left to legal scholars with a particular religious outlook, and who are willing to engage in public reconciliation of those deeply held beliefs with the modern scholarship of law.

I will argue that the confusion between the “is” and the “ought” of law starts with fundamental confusion over the extent to which even scientific knowledge is possible. The first task is to disentangle the proto-science and ethics of the law, and this entails unpacking the workings of reason itself in the scientific effort of comprehension and normative effort of responsibility. In Larry Kramer’s terms, comprehension of the law as social science is critical for policy. If we fail to create rigorous predictive theories, the use of law as social curative is mere gambling. But we need to be very, very careful in positing those things we know *a priori*, for fear of clothing a deontological source for conclusions in scientific jargon. Making claims of knowledge is the very essence of science, but those claims are always contingent and not necessary, and, at least in theory, are capable of disproof by contrary empirical data. Claims of what we ought to do are equally capable of purported universality, but they are never capable of disproof, and,

²¹ Catharine Pierce Wells, *Why Pragmatism Works for Me*, 74 S. CAL. L. REV. 347 (2000).

²² In her biting critique of law and economics, Professor Bernstein contends that, as its ability to be coherent as a scientific theory has come under attack, law and economics has morphed in various ways. In particular, she observes that “Judge Posner sought to recharacterize law and economics as a subset of ‘pragmatism,’ jettisoning for his purpose more familiar philosophical understandings of this word. Bernstein, *supra* note , at 322-23. For another view of how Judge Posner’s pragmatism is significantly more doctrinaire in its conclusions than other forms, see Jeffrey M. Lipshaw, “Contingency & Contracts: A Philosophy of Complex Business Transactions,” *DePaul Law Review* 54, (2005): 1077, 1109-13, 1120-25.

hence, never of knowledge. To put it otherwise, if there is already a teleological aspect to science – that the empirical world may be made intelligible by operation of our reason – then it is not surprising that other less universal assumptions about ends (e.g. that welfare or wealth maximization ought to trump fairness in determining policy) seep into what purports to be the descriptive study of law.

Having set the bounds of what we may know as scientific truth, the second task is to articulate a basis for ethics, or what Dean Kramer calls responsibility. If theory-driven social science is bad for science, it is also bad for how we think about ethics. It suggests either that morality can be scientifically derived, or presumes, if we are to think about the “ought” of responsibility, the way to go is some form of consequentialism. But therein lies the problem with the conflation of science and morality in the law. It is an empirical reality that when we do search for purposes and ends (assuming that we have not pragmatically dispensed with the need for the search), it most often a schizophrenic exercise. We recognize there is mystery, and perhaps universal truths, but, at the same time we clearly understand, despite a lifetime of searching of effort, we are doomed to fail in anything but the faintest approach to an answer. And in the face of that fatalistic understanding, we search anyway. No wonder that as social scientists in this hybrid realm, we loathe the very idea we may be incapable of clear and ultimate answers to our hardest cases.

Is there a way to articulate, much less teach, responsibility? Here, I want to learn from, yet reach beyond, Kant. Kant knew that he could not state the categorical imperative as a matter of truth. What he drew from the transcendental was practical reason, the ability of the mind to derive ends as a matter of duty that was free of all

physical desires and material inclinations. While Kant himself articulated applications of the categorical imperative, his great contribution was the architectonic, the structure of moral thought. We are still left to fill in what practical reason demands in each instance, and one person's duty can be another person's dogmatic horror. To rely on the categorical imperative as somehow putting forth a guide to action in each specific instance is to beg the question. We cannot prove it, but the universality of first assumptions tells us there is something else, and it is the source of all judgments.

It is fashionable now to pick apart the work of Ronald Dworkin (I have done it myself); yet the liberal values he espouses, and wants us to admire in the law, are ones we often share. But we are unwilling to take as a given, merely on his word, or anyone's word, that those values are the ones that must be embedded in positive law to make it legitimately law. Nevertheless, serious scholars continue to explore the mystery, usually without acknowledging it as such – in attempts to find unified theories of contract,²³ to put economic structure around altruism,²⁴ or in the notion that the remedies of torts satisfy a human need for justice and balance.²⁵

What I have been trying to do is help revive the dignity of secular and universal discussion about teleology – the notion that we are hard-wired to see purposes and ends and intelligibility in all things. I am interested in the indeterminacy that rests at the core of all attempts to know or to decide or to judge. That is to say, I wish to illuminate, recognizing I will never explain, that moment when we fit, or do not fit, data into a pre-existing model. That was Kant's enterprise in the *Critique of Judgments* -

²³ Nathan Oman, *Unity and Pluralism in Contract*, 103 MICH. L. REV. 1483 (2005); Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 PHIL. ISSUES 420 (2001).

²⁴ See note .

²⁵ Alan Calnan, *A REVISIONIST HISTORY OF TORT LAW* (2005).

showing the transcendence of either determining or reflecting judgments: there is no rule for the application of a rule. It is a wholly unscientific project, because while I puzzle with it, and struggle with it, at the same time I know I can never resolve it. The sheer volume of writing on the subject tells us there is some overlap between law and morality, and it is therefore not far-fetched to suggest lawyers who are not also ethicists may unduly emphasize the legal over the moral.²⁶

I believe when we understand the extent to which our reason incorporates ends into scientific inquiry, we are (a) more circumspect in claiming what is true or good as a matter of science, and (b) humbler and more reflective, if no less principled, concerned, or passionate, in making claims about what is right. Indeed, the process of legal argumentation is gasoline on the fire of rationalization. Whether or not we have an experiential basis for so concluding, our reason drives us (out of what needs for comfort, security, reassurance, wholeness, who knows?) to conclusions about truth. Whether or not it comports with truth, we are consumed with proving that we are right. The resort to law to resolve disputes is precisely this process of justification. In the typical business conflict, what the economists perceive as opportunism may instead be the rationalization of the current “is” to what we desire that it ought to be.

The real answer is that judgment, particularly when it comes to ethics, is not purely an exercise in reason. There is no rule for the application of a rule. I will argue

²⁶ I think the most articulate expression of this is Martha Nussbaum’s “Still Worthy.” She captures what I think are both the limits and the opportunities of this project:

Probably argument rarely persuades people to depart altogether from their most settled views. What it more commonly does, however, is to bring to the surface a part of one’s moral view that has been obscured or inconsistently applied. Frequently the systematic power of ethical theory is a great help in this sort of argument, ordering what is until then disordered, rendering explicit what is nameless and thus easily denied or effaced.

Nussbaum, *supra* note , at 1793.

that modern natural law theories fail to work as the basis for an ethical code, not because there is anything particularly troubling with the behavior they advocate (unlike the normative implications of rational choice or behavioral economic theory). The real problem is the answer “because I said so” in the modern sensibility. Any claim to insight into natural law as a matter of knowledge has stepped beyond that which can be argued. So to argue, a la Dworkin, that something in the empirical world, like law, can only be considered law if you buy his noumena, seems to be really beyond argument. Moreover, both natural law and virtue ethics presume, fundamentally, a linkage between the right and the good, that virtue leads to happiness, and that is simply too much for the modern sensibility. It is far less satisfying, epistemologically, to come to terms with the idea that we simply must live with the questions rather than the answers, but I think that is at least an intellectually honest answer that resonates with thoughtful people. Thus, I turn at last to the concept of a defeasible intuitionism – one that acknowledges the mystery at the core of these issues, and provides a basis for constructive and inferential dialogue about the “ought.”

Is it possible to make a universal claim about ethics? It seems to me, yes, but only in the very broadest sense and with a humble insight into what is right (or even dictated by natural law), versus what is articulated by rule.²⁷ Yet believing one has access to the “ought” as though it were truth brings us right back around to dogmatism or absolutism. What I hope to achieve is a basis for a reflective intuitional ethics (as distinct

²⁷ I have previously visited the subject of the inadequacy of rules in the context of corporate governance. See Jeffrey M. Lipshaw, *Sarbanes-Oxley, Jurisprudence, Insurance, Game-Theory and Kant: Toward a Moral Theory of Good Governance*, 50 WAYNE L. REV. 1083 (2005): 1083-1146. For a less theoretical statement of the same point, see the advertisement for the services of PriceWaterhouseCoopers suggesting that rules, such as those set forth in Sarbanes-Oxley, must defer to principles we think “on a macro level.” “Can everyone be expected to do the right thing?*” WALL ST. J. (Sept. 27, 2005), at A13.

from law) in the conscious, conscientious and persistent effort to overcome rationalization. That is not to say we are never right. It is to say instead that ethics involves being open to truth rather than justification. I think an answer lies in the philosophy of second-person relationships. But merely understanding such relationships as conferring a unique status to make claims and demands on another is insufficient, in my views, for distinguishing law from ethics. Claims, demands, and their defenses are still creations of reason, and therefore subject to the dark side of reason: dogmatism and rationalization. I contend that there is something to our non-inferential intuitions about others and that reason is capable of explaining them away, or justifying action not in accord with the intuition. Only through a direct second-person understanding of others do we avoid justification.

II. FROM REASON TO LAW'S RATIONALIZATION

Bernard Nussbaum, a senior partner at Wachtell, Lipton, Rosen & Katz in New York City, became Counsel to the President in 1993. He resigned in March, 1994, due to the political fallout after having counseled the President and First Lady to resist the Justice Department's attempt to search the office of Vincent Foster immediately after Foster's suicide. "Asserting a lawyer's prerogative to control information, Nussbaum insisted that he review all the documents in Foster's office first, in order to decide whether any of them should be kept confidential. . . . Months later, when Nussbaum appear before the [Senate] committee, he professed bewilderment at the fuss his obstruction had provoked. Virtually any lawyer would have done as he did, he said, with unfortunate plausibility." Nussbaum claimed his resignation was "the result of a controversy generated by those who do not understand, nor wish to understand the role and obligations of a lawyer, even one acting as White House Counsel."²⁸

²⁸ William H. Simon, *The Confidentiality Fetish*, ATLANTIC MONTHLY (December, 2004): , http://www.law.columbia.edu/law_school/communications/reports/winter2005/confidential; Letter from Bernard W. Nussbaum to the Honorable Bill Clinton, March 5, 1994, *available at* <http://www.resignation.com/15.html> (last visited, Jan. 11, 2006).

How could a lawyer as brilliant and accomplished as Bernard Nussbaum make such a calamitous misjudgment? To answer the question, I propose to go back to the very process by which our minds (particularly legal minds) make sense of the world – or, in the most general way, how we recognize what is and what ought to be. Part of what we do, whether as lawyers or physical scientists or social scientists, is to explain the world as it is – to engage in what is commonly referred to as a descriptive exercise. Indeed, we often disclaim any aspect of normativity in the exercise. I can hear a chief executive officer or a law firm senior partner saying “don’t tell me what I ought to do – tell me what the law is.” And we view that as a legitimate request, perceiving that we are capable of describing acts and consequence within a model of the world that is the legal system. Nussbaum, I believe, was following in a rich, century-old tradition of Langdellian or Holmesian legal science, and, no doubt, doing his best not only to advocate for his client, but to predict for his client, to the best of his ability, how a court of law (not public opinion) would ultimately judge the act of resisting the Justice Department investigation.

Academic law is different now than it was in the days of Langdell and Holmes. While we still teach doctrine, we now regularly seek to explain the law in cross-disciplinary fashion, using the models of physical and social science – economics, psychology, and anything else that might bring enlightenment to bear. So we seek to explain, to theorize, to find causal connections like social scientists, but we are doing it in the context of a discipline whose practitioners will also be required to advise their clients on what they ought to do. So I want to understand the process by which the very way we think may cause us to confuse the descriptive exercise with the normative.

While I will be discussing what we might know objectively and what we might not, and about distinctions in our ability to make truth claims in matters of nature versus matters of morality, I do not intend to get bogged down in analysis of the various “-isms” into which my own philosophy may fall.²⁹ It is entirely possible I am trying to have my cake and eat it too as regards the issue of objective knowledge. Kant scholar Susan Neiman argues that, despite the epistemological quandaries driving modern philosophy, the “natural, urgent and pervasive” questions arise out of our “demand that the world be intelligible” as a matter of practical and theoretical reason.³⁰ And despite the heavily epistemological focus in what follows, I agree with her general conclusion: “The question of whether this is an ethical or metaphysical problem is as unimportant as it is undecidable, for in some moments it’s hard to view as a philosophical problem at all.”³¹ Am I arguing there is no objective knowledge, even in matters of nature? Of course not. What I am grappling with is a practical problem – what should we do. Common sense tells me there is a significance difference in the objectivity possible as between nature and morality, yet at the margins less so than we might otherwise think. All of this is even more confused because our moral judgments feel like they ought to be describable in terms of truth or falsity.

I claim no victory or easy answers in trying to sort this out; indeed, David Hume, more than two hundred years ago, wryly observed the problem of conflating what is with what we contend ought to be. Hume noted that “the author proceeds for some time in the ordinary ways of reasoning, and establishes the being of a God, or makes observations

²⁹ For a compact summary of the classifications of modern ethical philosophy, see the editors’ introductory essay *Toward Fin de Siècle Ethics: Some Trends* in Stephen Darwall, Allen Gibbard, & Peter Railton, ed., *MORAL DISCOURSE & PRACTICE* 3 (1997).

³⁰ Neiman, *EVIL*, *supra* note , at 5-7.

³¹ *Id.*, at 7.

concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*.”³² I believe Nussbaum made the jump from “is” to “ought” in just this way. He saw the world as it was with the eyes of a lawyer, and moved immediately to the conclusion that “is” bespoke “ought:” legal justification would serve as general justification of an action. I can only speculate that, within the four walls of the offices in which he and his clients discussed the response to the controversy, he was reasoned, persuasive, and truly believed himself to be acting with the legal and ethical bounds of a lawyer’s professional canons. His fundamental failure was not a legal error (indeed, he may have been entirely correct) nor even, really, a political one. The real problem was, I think, that he persuaded himself he was right, because his reason told him what ought to be the legal result, and that effort was a massive exercise in self-deception, not because he was wrong about the law, but because he was wrong about the world.

The very process by which we reason to conclusions (or, like lawyers, create argumentation in support of our positions) is capable of pouring gasoline on the fire of difficult decisions or disputes. Our reason is capable of allowing to solve problems, but it is also capable of rationalization, justification, and in the end, self-deception. When we add to the mix the possibility of jumping from what we claim to be an impartial description of what is) to often unstated presumptions about what is either good or right, we go to the heart of the dilemma of business ethics. The point of business is utilitarian: to maximize something we have concluded is a good – profits, productivity, sales, or share price, to name some of the common alternatives. But the business game has rules,

³² David Hume, *A TREATISE ON HUMAN NATURE*, Ernest C. Mossner, ed. (1985) (1739), at 521.

and companies espouse values, and the question is whether, when there is a tension between the right and the good, are we capable of justifying whatever conclusion we want? I am arguing that lawyers need to reflect on their own capabilities of rationalization, to find a way to go beyond reason and rational calculation as a means of ethical decision-making.

The thread we will follow is the role of reason not just in tying together the bits of empirical data that create scientific knowledge, but in the effort to see, to rationalize, and to justify the world as a whole. Even if we no longer engage in theodicy, is it possible that the same reason that could justify God's creation of the best of all possible worlds might also justify our own internal re-creations? I believe the answer is yes, and that skill in reasoned justification, the forte of the lawyer, is capable of creating just the kind of troubling gap between the legal and ethical that brought down Nussbaum's career as a White House Counsel.

A. Knowledge and Belief Distinguished

In his *Critique of Pure Reason*, Kant argued that synthetic *a priori* knowledge – knowledge accessible to us only through reason and not experience – was possible.³³ Indeed, his argument was that such *a priori* knowledge was necessary even for a skeptic like Hume to pose the question “how do we know?”³⁴ But Kant reached a surprisingly nuanced conclusion: the only things we can judge to be true are those which, in the first instance, are the subjects of our experience (or possible experience).³⁵ Knowledge comes about through the operation of our sensibility – i.e. our perception of objects in the world – and our understanding – i.e. the way our minds sort and process the objects of our

³³ Kant, *CRITIQUE OF PURE REASON*, *supra* note 1.

³⁴ *Id.*, at 146-48 (B20).

³⁵ *Id.*, at 99 (a xvii).

sensibility.³⁶ The way we perceive that experience is shaped by certain concepts, which together constitute our understanding that we simply could not have acquired from experience: unity, causation, substance, plurality and others.³⁷ In short, in the first part of the *Critique of Pure Reason* (entitled the “Transcendental Analytic”), Kant deduces that, subjectively, we are able to order and explain our experience only with an already ingrained take on the world.³⁸ Moreover, he deduces there is objective knowledge: we observe a world that can be other than it seems to us, and which exists independently of our perspective on it.³⁹ Kant rejects the pure idealistic notion that everything happens for a reason – that there is either a specific or a general Providence knowable to us objectively.⁴⁰ But in the world of experience, there is an objective law of causality: as to empirical events in time and space, everything that happens is bound by cause and effect.⁴¹

Kant tells us that reason is something different than our faculty of understanding or cognition, which orders the impressions conveyed to us by our sensibility. Reason is not “a genuine source of concepts and judgments that arise solely from it and thereby refer it to objects.”⁴² It is, instead, the faculty by which we derive rules that explain what we perceive, and the logical conditions underlying those rules. And reason’s goal, whether or not it is even possible, or tied to empirical reality, is to reach the

³⁶ *Id.*, at 172 (A19/B33).

³⁷ Kant called these “categories.” *Id.*, at 210-14 (A77/B103).

³⁸ “The form of judgments (transformed into a concept of the synthesis of intuitions) brought forth categories that direct all use of the understanding in experience.” *Id.*, at 399 (A321/B378).

³⁹ *Id.*, at 219-329 (A84/B116 et seq.)

⁴⁰ *Id.*, at 116.

⁴¹ *Id.*, at 304-05 (B233).

⁴² *Id.*, at 390 (A305/B362) (translator’s note omitted).

unconditioned proposition – a process Kant describes as reason’s “vain but confident treasure hunting.”⁴³

We will often see the terms “constitutive principles” and “regulative principles.” A statement like: “All molecules are composed of atoms” is a constitutive principle. It is a proposition that asserts a claim of knowledge, and in this instance, “is a principle of the possibility of experience and of the empirical cognition of objects of sense.”⁴⁴ Moreover, the constitutive principle is a proposition about how the empirical world works, and more than mere perception of the world, which is the application of our *a priori* intuitions to our sense perceptions. The processes by which we may come to constitutive principles are regulative principles, the rules by which we reason, whether or not that reasoning is ultimately borne out by correspondence with the real world. “Thus the principle of reason is only a **rule**, prescribing a regress in the series of conditions for given appearances, in which regress it is never allowed to stop with an absolutely unconditioned.”⁴⁵

May one’s reason – the regulative principle – lead one to a constitutive claim that goes beyond what we presently know? Kant says yes, and that should be apparent to anyone who has ever engaged in speculation ranging from the mundane to the apparent ability to fathom the mind of God. Application of the regulative principle beyond what we presently know is certainly something of which our minds are capable: the regulative principle of reason “is a principle of the greatest possible continuation and extension of experience, in accordance with which no empirical boundary would hold as an absolute

⁴³ *Id.*, at 398 (A319/B376). For a clear and powerful elucidation of the distinction between the faculty of cognition and the faculty of reason, which is thinking, see Hannah Arendt, *THE LIFE OF THE MIND* (1978), at 53-65.

⁴⁴ Kant, *PURE REASON*, *supra* note 1, at 520 (A508/B536).

⁴⁵ *Id.*

boundary; thus it is a principle of reason, which as a **rule**, postulates what should be effected by us in the regress, but **does not anticipate** what is given **in the object** prior to any regress.”⁴⁶ As we will see, this is the basis by which scientific or theoretical reason allows us to hypothesize what might be versus what we current believe is. But may one’s reason lead one to a constitutive claim that goes beyond any experience or possible experience? Kant says no, because of the paradox inherent in the infinite regress. Indeed, proving the existence of the infinite, the Unconditioned (or God) as a constitutive principle is the ultimate conflation of constitutive and regulative principles. The use of reason to propose constitutive principles beyond experience or possible experience is, as Kant says, “the ascription of objective reality to an idea [i.e. the infinite regress to the Unconditioned] that merely serves as a rule.”⁴⁷

B. Narrowing the Gap

Susan Neiman argues it is the same process of reason that propels us to claims of knowledge in science, and imperatives of action in morality.⁴⁸ Reason is a regulative process in both instances; reason may lead to constitutive claims only in matters of experience or possible experience. “Theoretical reason’s success is crucially dependent on the cooperation of the world. Practical reason, by contrast, can achieve its ends alone. We do not control the forces of nature, but we do control our wills.”⁴⁹

Is scientific inquiry itself wholly objective? The answer is: only as a matter of degree. It is an illusion to believe that descriptive study is somehow superior to moral inquiry because the reasoning process is more objective. Scientific inquiry itself swirls

⁴⁶ *Id.* (A509/B536).

⁴⁷ *Id.*, 521 (A509/B536).

⁴⁸ Susan Neiman, *THE UNITY OF REASON: RE-READING KANT* (1994).

⁴⁹ *Id.*, at 128.

around a paradox of reason. Science is the search for knowledge (or *constitutive* principles) through reason, but ultimate knowledge – the final Unconditioned proposition – is impossible to obtain.⁵⁰ “Reason’s drive to seek the Unconditioned is absolutely necessary; for it is an analytic proposition that once the conditioned is given, a regress in the series of all of its conditions is set us as a task. . . .”⁵¹ Yet therein lies the paradox or antinomy, because within the very experience that science seeks to explain, there is no end to the conditions (“all the way down”).⁵²

But it is reason that supplies the regulative principle that there is an intelligible world to begin with. “For as we have seen, the knowledge that every event has a cause is useless without the idea that human reason is capable of tracing the series of causes to a point at which the events that make up the world become intelligible.”⁵³ The essence of the paradox is that it is not a necessary conclusion that nature necessarily match up with reason’s insistence on ultimate intelligibility. “We cannot ensure that nature’s conclusions – the conditioned given of the experienced world – have adequate grounds in a series of conclusions that, as a whole, is fully explicable. But reason has a right and a

⁵⁰ *Id.*, at 64.

⁵¹ *Id.*, at 63.

⁵² There is debate about the origins of this allusion, but you see it regularly when a philosopher wants to make a visual statement about infinite regress. See http://en.wikipedia.org/wiki/Turtles_all_the_way_down. Stephen Hawking popularized one version of it:

A well-known scientist (some say it was Bertrand Russell) once gave a public lecture on astronomy. He described how the Earth orbits around the sun and how the sun, in turn, orbits around the centre of a vast collection of stars called our galaxy.

At the end of the lecture, a little old lady at the back of the room got up and said: "What you have told us is rubbish. The world is really a flat plate supported on the back of a giant tortoise."

The scientist gave a superior smile before replying, "What is the tortoise standing on?"

"You're very clever, young man, very clever," said the old lady. "But it's turtles all the way down."

Stephen Hawking, *A BRIEF HISTORY OF TIME* (1988), 1.

⁵³ *Id.*

need to assume this to be the case.”⁵⁴ Neiman argues that the drive to science is teleological, requiring the assumption of order and systematicity.⁵⁵ Whether or not the scientist admits it, the process of scientific reason, in presuming intelligibility, presumes something like a purposive “wise and omnipotent author.”⁵⁶

Moreover, while the knowledge claims of science are tied to what is confirmable in the real world, it takes reason’s ability to conceive of what ought to be to posit any hypothesis that goes beyond mere cognition of the world as it is.⁵⁷ “The capacity to demand explanations of experience requires the capacity to go beyond experience, for we cannot investigate the given until we refuse to take it as given. To ask a question about some aspect of experience, we must be able to think the thought that it could be otherwise. Without this thought, we cannot formulate even the vaguest *why*.”⁵⁸ Karl Popper captured the regulative power of reason inherent in the scientist’s conjecture, noting that “[w]hat the great scientist does is boldly to guess, daringly to conjecture, what these inner realities are like. This is akin to myth making . . . The boldness can be gauged by the distance between the world of appearance and the conjectured reality, the

⁵⁴ *Id.*

⁵⁵ *Id.*, at 82.

⁵⁶ *Id.*, at 81. Cf. Steven Smith’s search for a transcendent “author” of the law in *LAW’S QUANDARY*, *supra* note . . . Smith’s discussion in the chapter “Authors Wanted” (*id.*, at 126-53) and his invocation of Joseph Vining’s mysticism on the subject in “The Transcendent Author” (*id.*, at 173-74) is really a parallel description of this same paradox between the constitutive goal of knowledge and the regulative and teleological impulse of reason. With all due respect, I disagree with the conclusion Justice Scalia reaches in his review of *Law’s Quandary*: that, out of academic correctness, Professor Smith has shied away from simply identifying this transcendent author as God. See Antonin Scalia, Review of *Law’s Quandary*, *First Things* 157 (2005): 37, 46. As I will discuss below, the attribution of authorship to God as a matter of belief is wholly acceptable, but claiming it as knowledge is not.

⁵⁷ Kant, *PURE REASON*, *supra* note 1, at 540-41 (A548/B576).

⁵⁸ Neiman, *UNITY*, *supra* note , at 59.

explanatory hypothesis.⁵⁹ In short, our inquiry into what is, is forever shaped by our minds' construction of what ought to be.

How we reason about moral ends is remarkably similar. The unique contribution of Kant to practical reason was his conclusion that we are capable of reasoning our way to moral ends (versus the empiricist's view that ends are solely determined by our desires or inclinations).⁶⁰ Reason's relentless yet ultimately futile drive toward the Unconditioned – the regulative principle seeking to make constitutive claims – is the same drive that explains the regulative principles of morality. Here is Kant's basic metaphysical distinction: in practical matters, reason is capable of letting us decide what we ought to do – it makes no claims as to truth or falsity.⁶¹ But the claim is stronger than that: reason is capable of determining moral ends even if those ends are not borne out by experience.⁶²

The fundamental struggle at the core of being human is between the freedom and autonomy of the self, on one hand, and inclination and heteronomy of the world of

⁵⁹ Karl Popper, *The problem of demarcation*, in Nigel Warburton, ed., *PHILOSOPHY: BASIC READINGS* (1999), at 275, 278-79.

⁶⁰ In Kant's moral formulation, the ends derived through reason are categorical imperatives – statement of the “ought” that apply universally, regardless of person or circumstance. The first is so well known that it is not just a categorical imperative, but is generally referred to as “the Categorical Imperative:” act in a way that the principle of your action would be, by your will, a universal law of nature. Immanuel Kant, *GROUNDWORK OF THE METAPHYSICS OF MORALS*, trans. Mary Gregor (1997), at 31-36. The second, known as the Formula of Humanity, is to act so as to treat humanity whether in my own self or in that of another, always as an end, and never as a means only. As we must respect the autonomous rational agent that is our own self, we treat others as autonomous beings, and ends in themselves. “Beings whose existence depends not on our will but nature's, have nevertheless, if they are irrational beings, only a relative value as means, and are therefore called *things*; rational beings, on the contrary, are called *persons*, because their very nature points them out as ends in themselves.” Id., at 185-86. Finally, every rational being must act as if he or she were both a sovereign and a member of a kingdom of ends. This recognizes that each of us has a free and autonomous will that is sovereign for us, but which is required to see others, also having free and autonomous will also as ends. Yet, reciprocally, as to that other, we are the end contemplated by the other's sovereign will. We are thus obligated, even while recognizing that the kingdom of ends is an unattainable ideal, to attempt to achieve it. Id., at 190-91.

⁶¹ Immanuel Kant, *Selections from Critique of Practical Reason* in *BASIC WRITINGS OF KANT*, trans. Allen W. Wood (2001) (“Kant, *Practical Reason*”), at 225-26.

⁶² Neiman, *UNITY*, *supra* note , at 115.

experience on the other. Neiman writes: “human nature is perpetually torn between its knowledge of the way the world is and its vision of the way the world ought to be – between the actual and the possible, the natural and the reasonable.”⁶³ Just as there must be *a priori* assumptions about the intelligibility of the universe as a whole in order to ask questions about possible experience, so must we assume that the moral ends derived by our reason are attainable, even if we have no guarantees they will be attained.⁶⁴ The essence of being human is to be free, to legislate moral ends for oneself, without any assurance that happiness will be the result of virtue. Even understanding the idea of freedom itself, like the Unconditioned, is something to which we aspire but never achieve. “But Reason would overstep all its bounds if it undertook to *explain how* pure reason can be practical, which would be exactly the same problem as to explain *how freedom is possible*.”⁶⁵

C. From Reason to Self-Deception

Kant cautions against overconfidence either about claims of knowledge or claims of morality. Where the power of our reason causes us to confuse what ought to be with what is, we have engaged in what Kant calls “transcendental illusion.” In that case, reason has deceived us by appearing to cast subjective illusions as objective truth.⁶⁶ If one misunderstands the principles of pure reason “and takes them to be constitutive principles of transcendent cognition, then they produce a dazzling but deceptive illusion, persuasion and imaginary knowledge, and thus also eternal contradictions and

⁶³ *Id.*, at 108.

⁶⁴ *Id.*, at 113.

⁶⁵ Kant, GROUNDWORK, *supra* note , at 62

⁶⁶ Kant, PURE REASON, *supra* note 1, at 386 (A297/B353). This aspect of reason is, in Kant’s view, neither good nor bad. It simply is.

controversies.”⁶⁷ The same caution applies when we try to determine whether we have undertaken any particular action out of moral duty or material inclination.⁶⁸ Neiman writes: “Practical reason, like theoretical reason, has a natural tendency to illusion, which leads to its misuse in subtle and spurious exercises that we today call rationalizations.”⁶⁹ The lesson is, therefore: be humbler about the claims of knowledge, because the reason that derives them is no different than the reason that derives ends. And when we are humbler about the claims of knowledge, perhaps we might be more confident in the claims of duty.

There is a substantial and concentrated body of philosophical and psychological literature on self deception,⁷⁰ but I want to focus on the question how, when we persuade ourselves that we know something as a matter of fact or duty to a theoretical or moral certainty, do we know we are not fooling ourselves? The philosopher David Sanborn provides an epistemic “why” of rationalization.⁷¹ The example is a man who has told himself his new car is a bargain in order to justify his pleasure in having bought it, and Sanborn uses it to demonstrate the gap between the irrational pleasure that is honest and a justifying “thirst for rationality [that] is a major source of lies.”⁷² These invented reasons are *ostensible*, which Sanborn distinguishes from the more paradigmatic view of self-deception: “The car buyer invents the belief that his new car is a bargain. The lie, which

⁶⁷ *Id.*, at 621-22 (A701/B729).

⁶⁸ Kant, *Practical Reason*, *supra* note , at 165.

⁶⁹ Neiman, *UNITY*, *supra* note , at 125.

⁷⁰ In addition to the other sources cited, see Mike W. Martin, ed., *SELF-DECEPTION AND SELF-UNDERSTANDING: NEW ESSAYS IN PHILOSOPHY AND PSYCHOLOGY* (1985); Mike W. Martin, *SELF-DECEPTION AND MORALITY* (1986); Alfred R. Mele, *SELF-DECEPTION UNMASKED* (2001); Roger T. Ames & Wimal Dissanayake, ed., *SELF & DECEPTION* (1996); Jean-Pierre Dupuy, ed., *SELF-DECEPTION & PARADOXES OF RATIONALITY* (1998); Robert Audi, *Self-Deception, Action, and Will*, 18 *ERKENNTIS* 133 (1982); W.J. Talbott, *Intentional Self-Deception in a Single Coherent Self*, 55 *PHIL. & PHENOMENOLOGICAL RES.* 27 (1995).

⁷¹ David Sanborn, *Self-Deception as Rationalization*, in McLaughlin & Rorty, *PERSPECTIVES*, *supra* note , at 157.

⁷² *Id.*, at 157, quoting T. Penelhum, *Pleasure and Falsity*, 1 *AM. PHIL. Q.* 81 (1964).

here has the thirst for rationality as a source, is the second-order belief that one believes the car to be a bargain. The car-buyer somehow really knows that the car is not a bargain, but he deceives himself into thinking that it is.”⁷³ In contrast, what makes a reason ostensible is not that it is necessarily false (indeed, in Sanborn’s example, we are to suppose that the buyer can in fact demonstrate support for his belief that the car is a bargain); it is ostensible because the reason is a rationalization to cover for other more honest reasons (like I just *want* it!)⁷⁴ Self-deception may consist not of persuading oneself that the false is true, or vice versa, or even of holding inconsistent belief. The very process of rationalization, whereby we adopt anticipating and ostensible beliefs (versus the honest but perhaps irrational ones), constitutes self-deception.

Sanborn claims there can be no self-deception that is free of rationalization, but notes his qualms about the role of rationalization in making that very assertion: “Those who defend theories often provide striking examples of rationalization. Although the defender of the theory thinks he regards the theory as adequate because he thinks there are no genuine counterexamples, his treatment of putative counterexamples is actually heavily biased by his fondness for the theory.”⁷⁵

Legal scholars have posited at least two answers to the epistemological question: how do we know whether we are fooling ourselves? One is to give up on epistemology

⁷³ Sanborn, *supra* note , at 157.

⁷⁴ *Id.*, at 158-59. Sanborn offers a more general description of ostensible reasons: “Generally, one’s attitude A is an ostensible reason for one’s attitude B when one overestimates how much one’s having attitude A contributes to the reason for one’s having attitude B.” *Id.*, at 160. Last weekend, I bought myself a pair of \$300 Bose Noise-Canceling headphones, without telling my wife, who was out of town. I knew that she would not understand why I bought them; indeed, would consider it irresponsible on my part. I resolved simply not to tell her, but was found out when the anti-fraud department credit card company called to confirm the purchase (because the store had punched in the wrong expiration date). When I was called out, I had a number of ostensible reasons for the purchase (they made sense if I was traveling, my old headphones were uncomfortable, etc.), all of which were ostensible to the real reason: I thought they were cool.

⁷⁵ *Id.*, at 163-64.

altogether. Pragmatists, by and large, reject the inquiry either because they (a) deny the existence of an external reality accessible only by reason, or (b) if they do not deny it, they do not believe it has any value in addressing the problems of contingency.⁷⁶

Others retreat to the apparent objectivity of science. I focus on Judge Posner (whom I believe has the courage to articulate a philosophy to which others accede but not publicly), would, I believe, take Kant at his word, claiming that the use of reason in the pursuit of knowledge or truth is legitimate, but its employment in the pursuit of moral ends is not. This is borne out in Judge Posner's own oddly inconsistent treatment (such as it is) of reason. He clearly grasps (and articulates) a Kantian view of the regulative nature of reason in science. "Neither logic nor any empirical protocol guarantees truth. So even scientific knowledge is tentative, revisable – in short, fallible."⁷⁷ But Judge Posner gives more credit to reason's power than Hume, who denied any ability of a priori reason in scientific explanation. To Hume, ideas were merely copies of our sense impressions, and had no utility for explanation of physical events.⁷⁸ Judge Posner endorses reason's power to theorize, but that power is only valid when "it is about observable phenomena and 'real' (physically existing), entities, [and] can be tested by comparing the predictions generated by the theory with the results of the observations."⁷⁹ So far, Judge Posner might well be a Kantian: Kant would agree that the application of theoretical reason to matters other than experience is an exercise in theodicy, not science.

⁷⁶ Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L. J. 2071, 2075-76 (1996).

⁷⁷ Richard A. Posner, *LAW, PRAGMATISM, AND DEMOCRACY* (2003), at 6.

⁷⁸ David Hume, *HUMAN NATURE*, *supra* note , at 462.

⁷⁹ Richard A. Posner, *PROBLEMATICS OF MORAL AND LEGAL PHILOSOPHY* (1999), at 13.

Where Judge Posner departs from Kant is in the ability of reason to dictate moral ends (what he calls “academic moralism”), particularly in contrast to science.⁸⁰ This hits at the heart of ethics, and of the conflation of science and morality in the law.

Notwithstanding his concession to the mere regulative power of reason in science, there is little doubt that Judge Posner (speaking, I think, for many who would not agree with him on other matters) is endorsing a fundamental distinction between the power to *know* through reason and the power to *decide* through reason what we ought to do. It must follow, under Judge Posner’s analysis, that theoretical reason in science may allow us to approach the truth, but practical reason in morality cannot. But we have seen that the process and structure of reason, as applied to issues of science or morality, are the same. The difference is the role of nature, and the ability in matters of science whether it corresponds with reason’s hypotheses.

D. Legal Discourse as Rationalization

Rationalization of conduct – remaking the “ought” to comport with the “is” – may well be another description of what lawyers do. But what is the dark side of that process? We may bias our perception of the “is” of sensibility and understanding by virtue of our ought-belief. We see the world, or more particularly others, in the way we believe it or they ought to be. We fail to see malfeasance because we do not believe others are capable of it, or to see the reality of our own mistakes or failures because we ourselves ought not to fail or be mistaken. Or we may blame the world or others for the state of the “is.” We do not change the heteronomous “is” of inclination but justify our complacency in not acting according to the ought-belief to which reason directs us. In Sanborn’s car-buyer example, what the buyer knows as the “ought” is that he does not

⁸⁰ *Id.*, at 7.

need the car, but that he might rationalize the “ought” to conform with the “is” of his material desire. That is, he harmonizes the “is” and the “ought” not by changing the “is” – overcoming his inclination – but by finding a way to articulate an “ought” consistent with the inclination.

The moral problem is that we recognize, at some level, consciously or unconsciously, there is a universal law we would legislate for ourselves: we know we are engaging in spin. That is, our opponents or the moral issues themselves are obstacles to the fulfillment of our inclinations and desires. We will justify the “is” of our inclinations against the “ought” of our duty. This is the justification exercise of reason writ small; writ large it would involve a complex exercise of legal reasoning to demonstrate why we were, after all, right. Indeed, we may attribute a malevolent or mistaken ought-belief to others. We hold our derivation of the “ought” as superior, and attribute bad faith or malevolence to others when they appear not to concur in it. We simply need consider Sanborn’s account of the possibility of rationalization and self-deception in theory- or position- defense. How often do we attribute malevolence to our intellectual opponents, and they back to us, when we know certainly that *we* operate only in good faith and in the pursuit of truth?

I am far more comfortable dealing with my own exercises of self-deception than ascribing it to someone else, but it strikes me that Bernard Nussbaum’s dilemma from the outset of the chapter, which combines the “we-they” of politics and the argumentation of the law, displayed a number of these characteristics. Nussbaum and the Clintons saw the world legally, and presumed the way they thought the world ought to work was the way it did work. Rather than concluding perhaps he had done something wrong, Nussbaum

continued, long after his resignation, to justify what he did.⁸¹ It was certainly consistent with Sanborn's characterization: we were right, and our opponents were politically motivated.

In *What is Wrong with Self-Deception?* Marcia Baron acknowledges the pervasiveness, indeed, necessity in some instances, of self-deception: "self-deception is, for most of us, virtually indispensable. And this is the case not merely because there are episodes in most lives in which we cannot bear to face the truth; it has more to do with the opacity of self-knowledge."⁸² Yet her description of the move from the benign to the wrong is nuanced, and touches of our exegesis of reason. Knowing ourselves is a struggle, and sometimes self-knowledge only occurs as a result of the very "instability of the state of self-deception."⁸³ Indeed, the role of reason in reconciling the "ought" with the "is" is at the heart of her defense: "Self-deception is a sort of extension of something that we all do, and couldn't but do []: we pick a story, though not *just* any story, to make sense out of our lives."⁸⁴ Moreover, how self-deception transforms from a benign exercise to one that is less so is at the heart of my distinction between the process of law and the process of ethics:

Self-deception's greatest evils do not lie in deceiving oneself in the first place, but in refusing to call into question one's beliefs (or "stories"), and in struggling to maintain those beliefs; or in refusing to engage in self-scrutiny, a refusal often conjoined with a tendency not to notice that what one does or how one lives has profound and far-reaching effects on others.⁸⁵

⁸¹ *The Role of a Counsel*, HARV. L. BULL. (Spring, 2003), http://www.law.harvard.edu/alumni/bulletin/2003/spring/feature_1-side.html (last visited, January 12, 2006).

⁸² Marcia Baron, *What is Wrong with Self-Deception?* in McLaughlin & Rorty, PERSPECTIVES, *supra* note , at 431, 441.

⁸³ *Id.*, at 441.

⁸⁴ *Id.*, at 442.

⁸⁵ *Id.*, at 443-44.

If rationalization as self-deception has any benign aspect for law, it is that we have at least created institutions in which the parties may tell a third party the stories they have created for themselves to justify what they are doing, and often, why, in the case of conflict one is right and the other is wrong.⁸⁶ That the rationalization of one's position through litigation is *legal* does not mean it is necessarily *ethical*. The distinction, I contend, lies in one's willingness, as individual or business, to call into question the product of one's own reason or rationalization: to defeat self-deception.⁸⁷

E. Skepticism and Illusions of Certainty

If we accept the Kantian epistemological model, consider how little difference there is between knowledge and belief, as least as constructed by reason. Reason's essence is the derivation of the conditions to any proposition, but reason is not bound by experience in that process. Moreover, there is a common teleological aspect as between the application of reason to determining knowledge, and reason's derivation of moral ends. Hence, the only real difference between scientific and moral methodology is the ability to demonstrate that any proposition that is the product of reason can be disproved by falsifying evidence that is not merely another product of reason. To put it otherwise, reason's application of regulative principles – how things ought to be may not match the reality of the world, but nothing constrains reason's derivation of what we ought to do. Whether as a matter of science or a matter of morality, reason's desire is to reconcile the

⁸⁶ Jeffrey M. Lipshaw, *The Bewitchment of Intelligence: Language and Ex Post Illusions of Intention*, 78 TEMP. L. REV. 99, 149 (2005): 99.

⁸⁷ *Id.*, at 150 (“I have no illusion about creating a legal model that is based on an underlying assumption that perfect knowledge and rationality will eliminate conflict. In my experience, that is not the way the world works. I hope instead the inevitable conflict is resolved as reasoned discourse, between parties who recognize each other as rational subjects, and not objects to be dominated.”)

“is” of the world that comes to us through sensibility and understanding and the “ought” that reason is capable of determining apart from any tie to experience.

Moreover, if we accept a more generalized epistemology of self-deception – that it is practical reason turning to that “subtle and spurious exercise” of rationalization of the “ought” and the “is” – then how do we distinguish, if at all, rationalization as self-deception in the pursuit of science (employing theoretical reason) from that of moral reasoning (employing practical reason)? What then of a social science discipline, like many comprehensive approaches to law, that purports to be capable of constitutive claims of knowledge devoid of any regulative or normative principles? And what of the same discipline when its practitioners must come to terms with moral ends? Is it possible that the “is” of comprehension might be conflated with the “ought” of responsibility? And, in an exercise of epistemic self-deception, that failure to act responsibility might be justified or rationalized in light of desires or inclinations – whether defense of a theory, or the obstruction of an investigation, or the need to make the financial targets for the current quarter?

Particularly in a discipline like law that purports to make claims of descriptive truth and regulative imperative, to what extent does reason itself cause the conflation of dogma and belief, on one hand, and science and truth, on the other? Indeed, I am claiming that well-developed reason is as capable of illusion as it is of insight, Kant’s transcendental illusion is more the rule than the exception, and that we regularly, in life, law practice, and academic pursuit, deceive ourselves by mistaking belief for knowledge, and knowledge for belief.⁸⁸

⁸⁸ I am not going to claim that every exercise in law as social science is an exercise in illusion. Cass Sunstein, for example, has tried to reconcile economists and philosophers, focusing on the ability of

Kant recognized the urge of unrestrained metaphysical meandering as the road to a dogmatic creed, deceived in its belief that it alone had reached the Unconditioned, but wholly or partially untethered to experience. I am therefore not particularly surprised that radical skepticism and dogmatism, as the products of attempts to build or deconstruct systematic metaphysics (whether so understood or not) continue in the name of social science. Between the extremes of systematic metaphysics and radical skepticism, our sensibility of the empirical world is often impacted by reason's tendency to the Unconditioned, and our morality directed not to transformation of the social order, but to justification of the world and ourselves as they are. Nothing exempts the social scientist from this process.

To be fair, we need to examine the question "why be ethical?" and whether there is science that might be helpful in answering the question. One of Judge Posner's great contributions to this dialogue is that he will say in print what others may believe (or want to believe) about what is achievable through scientific explanation about human behavior, but decline, perhaps because the implications are so disturbing. Hence the debate between rational actor economics and behavioral economics is instructive. Behavioral economic theorists acknowledge people do not always act in accordance with what seem to be the assumptions of rational actor theory;⁸⁹ rational actor theorists respond that by

economic analysis to assess the efficacy of the positive or prescriptive aspects of law. He defines the "prescriptive" work of economics as something less than full-fledged normative assessment of what the law should be. "Economists are . . . helpful in giving accounts of how law comes into being and in showing the best way to achieve specified ends. At the more normative level, they are most helpful in showing that if some X is the goal, some instrument Y will or will not achieve it." Cass R. Sunstein, *On Philosophy and Economics*, 19 QUINNIPIAC L. REV. 19 333, 334 (2000).

⁸⁹Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1471 (1998).

trying to explain everything, you end up with a theory of nothing.⁹⁰ This is not to say that Judge Posner does not have his own unified theory of behavior: the concept of “fairness,” for example, “can be made precise, and explained, and subsumed under a broad conception of rationality, with the aid of the evolutionary biology of positive and negative altruism.”⁹¹

Nevertheless, we still have the problem of science and the “ought.” It is not surprising that Judge Posner has made that almost imperceptible jump from positive to normative analysis – the move from “is-is not” to “ought-ought not” – that Hume questioned. If our theory of the “is” posits rational behavior, and we observe the “is not” of what appears to be anomalous, then we ought to explain it. Here is Judge Posner’s description of the thinking process: “Faced with anomalous behavior, the rational-choice economist, unlike the behavioral economist, doesn't respond, “Of course, what do you expect?” Troubled, puzzled, challenged, he wracks his brains for some theoretical extension or modification that will accommodate the seeming anomaly to the assumption of rationality.”⁹² Indeed, the notion that we “ought” to explain it, to wrack our brains for an explanation is another demonstration of the regulative nature of reason at work. Unless we have a pre-existing idea that people ought to be rational, we would not wrack our brains to explain the anomaly.

But in the rational-choice theory espoused at least by Judge Posner, “ought” goes beyond that imbedded in epistemology, and turns quickly to the ends derivable by practical reason: “One might have thought that behavioral economics had at least one

⁹⁰ Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1561 (1998):.

⁹¹ *Id.*, at 1561.

⁹² *Id.*, at 1567.

clear normative implication: that efforts should be made through education and perhaps psychiatry to cure the cognitive quirks and weakness of will that prevent people from acting rationally with no offsetting gains.”⁹³ In short, by this account, if behavioral economics teaches us anything positively, it is that all of our flaws (including that stubborn notion of fairness) are curable by education and psychiatry.

III. THE MYSTERY OF ETHICAL JUDGMENT

A. Judging is Different than Knowing

Kant was the first to observe that judging is not the same as knowing.⁹⁴ It is not mere application of our faculty of cognition to the real world (i.e. the application of rules like causality or substance so that we might order our sensible perceptions). Judgment is instead “the faculty of **subsuming** under rules, i.e., of determining whether something stands under a given rule . . . or not.”⁹⁵ Nor is judgment an exercise in the kind of logic that constitutes the employment of reason (the derivation of the conditions of propositions through logic). The attempt to set rules for the application of rules leads to an infinite regress. If you try to determine what circumstances fit within a rule, setting another rule merely leads to another rule to another rule to another rule, all the way down. Hence, according to Kant, “the power of judgment is a special talent that cannot be taught but only practiced.”⁹⁶

Hence, there is no rule for the application of a rule. Indeed, if Kant captured anything in the interplay between rules and examples, it is the battle that law professors undertake with their first year students. In the hoary law school test-taking methodology

⁹³ *Id.*, at 1575.

⁹⁴ Immanuel Kant, *Selections from Critique of Judgment*, in BASIC WRITINGS OF KANT, trans., Allen W. Wood (2001), at 273-366.

⁹⁵ Kant, PURE REASON, *supra* note 1, at 268 (A132/B171).

⁹⁶ *Id.*

of IRAC (“issue-rule-application-conclusion”), the real exercise of judgment is the A of application, not the mere memorization of rules. It is as though, seeking to derive through the power of logic a universal statement of a rule, the law student falls into precisely the errors Kant anticipates. The student may have all the hornbook and study aid rules memorized, “yet can easily stumble in their application, either because he is lacking in natural power of judgment (though not in understanding), and to be sure understands the universal *in abstracto* but cannot distinguish whether a case belongs *in concreto* under it has not received adequate training for this judgment through examples and actual business.”⁹⁷

There is, moreover, a difference between the kind of judgment (namely, pattern finding in experience) we undertake in science, and the kind of judgment we make when we decide that a particular circumstance falls within a more general legal, moral or ethical rule. Where the general is given, the process by which we determine that a particular instance falls under it is called “determinant” judgment.⁹⁸ Where the particular is given and the universal rule must be found, the judgment is called “reflective judgment.”⁹⁹ Kant appreciates the power of the inference of ends to inanimate nature: even though nature gives us no reason to believe that its various components relate to each other as means to ends, the very inference of causality implies an order we can never prove.¹⁰⁰ There is no necessity to nature other than our ordering brings to it: “nature, regarded as mere mechanism, could have fashioned itself in a thousand other

⁹⁷ *Id.*, at 269 (A134/B173). Whether or not Kant had in mind a greater emphasis on clinical education in the modern law schools, the point here is that law professors should not see this solely as a problem of the student.

⁹⁸ Kant, *Judgment*, *supra* note , at 279.

⁹⁹ *Id.*

¹⁰⁰ *Id.*, at 314-15.

different ways without lighting precisely on the unity based on a principle like this, and . . . accordingly, it is only outside the conception of nature, and not in it, that we may hope to find some shadow of ground a priori for that unity.”¹⁰¹ Kant stresses that this inference of ends (“teleology”) is by analogy only. We are merely engaged in deriving, through use of reflective judgment, those laws that appear to govern an objective, yet blindly operating, world. Suggesting there really is a conscious design to nature “would mean that teleology is based, not merely on a regulative principle, directed to the simple estimate of phenomena, but is actually based on a constitutive principle available for deriving natural products from their causes; with the result that the concept of an end of nature now exists for the determinant, rather than the reflective judgment.”¹⁰²

In short, the reflective judgment is the usual process of induction tied to experience. It goes beyond what we can know to say that the rule that we have derived by induction from experience truly is – shall we say it? – an intelligent design – one with conscious purpose and ends in mind (i.e. a “constitutive” principle or one of real knowledge). Determinant judgment is even more slippery. It is an exercise by which we now attach a particular example to the general rule. Our reason has conceived of an order, an end, a system into which this example falls, but nature is random and fortuitous, and it may not turn out that way. To suggest we can both know and not know an end in nature is obviously a contradiction, and the answer is we cannot know. Thus, Kant distinguishes the more speculative essence of the determinant judgment from the reflective judgment. The moment of judgment – the sense of fit to an end – “is transcendent for the determinant judgment if its object is viewed by reason – albeit for

¹⁰¹ *Id.*, at 315.

¹⁰² *Id.*, at 316.

the reflective judgment [inferring a pattern from events] it may be immanent in respect of objects of experience.”¹⁰³ As Professor Linda Meyer notes, “The key step, the perception of relevance, is not predetermined by the rule. That perception of relevance is driven by a deeper sense of “fit” or “sense of fairness” that is not reducible to rules and remains in the background, expressible only through metaphor or analogy, tangible only in connection with concrete examples. We point to fit or sense, but we cannot give a rule for it.”¹⁰⁴

B. Distinguishing Legal Rules and Ethical Standards

To judge we need a rule to apply. But let us first distinguish the rules of law and the rules of ethics. In the process by which we reason our way to legal conclusions in matters of private law, we might, but are never required to, ask the question “what ought?” as a matter of universal application. Certainly in the realm of public law, this statement might be construed as inviting a debate along the well-trod lines of Hart, Fuller, Raz and Dworkin: does law, to be considered *law*, incorporate some kind of moral baseline, or is it merely the positive law? But when I am faced with a moral dilemma in a matter that, if resolved by law at all is a matter of private law, we go outside of what is merely legal. While the law may have a significant bearing on my decision (because I place a value on adherence to law), the determination what the law requires may differ significantly from the decision what I ought to do.

Regardless of one’s position on the positivist-naturalist debate, it seems to me hard to deny this bit of legal realism: at least in matters of private law, the statement of the applicable law in a particular instance is the result of someone’s exercise of determinant judgment. Indeed, whether we look at the positions of the parties or the

¹⁰³ Kant, *Judgment*, *supra* note , at 336.

¹⁰⁴ Linda Meyer, *Between Reason and Power: Experiencing Legal Truth*, 67 U. CIN. L. REV. 727, 745 (1999).

ruling by the court, the argumentation of law is one in which we look at what is or has been, and by the exercise of determinant judgment, decide whether the general rules of legal entitlement govern the particular instance. What have we accomplished in that exercise? We have taken the general rule of legal entitlement in that instance as a surrogate for what ought to be and shown how it governs what has happened or what will happen. Most lawyers will work their entire careers without reflecting for a moment on the philosophical essence of law, but very few will pass even a day without exercising determinant judgment about what the law in a particular circumstance *is*.

But there is no rule for the application of a rule. So the process of determinant judgment must be influenced by something outside the rule itself. When we find ourselves in a circumstance of business decision or business conflict, it is entirely possible we are influenced by the desire to find a universal statement of “what ought.” But when we consider the application of the legal rules (the general principles) to the circumstances (the particular) example, I suspect we are more likely influenced by our own instrumental and consequential ends. Indeed, the process of law when directed at the redemption of our particular wants and needs is a process, above all, of *justification*. We will justify those ends by making arguments that says this particular rule ought to govern, but that is simply another way of saying what the law in the particular circumstance is.¹⁰⁵ Put another way (reflecting Kelsen’s Pure Theory of Law), the process of legal argumentation is simply the identification of the legal consequence that flows from a particular set of facts. That, and nothing else, is the positive law.

¹⁰⁵ See my *Freedom, Compulsion, Compliance and Mystery: Reflections on the Duty Not to Enforce a Promise*, LAW, CULTURE & THE HUMANITIES, forthcoming (2006), in which I discuss Hans Kelsen’s positivism.

But having reached, even provisionally, a determination of the positive law (i.e. the legal “ought” in Kelsen’s terms that constitutes the positive law), there is still the question “what ought” by appeal to a universal moral standard that may or may not match the legal “ought.” Within the legal academy we have one school suggesting scientific methodology gives us the optimum general rules through the process of induction (“we have determined that we are all better off when we adopt legal rules that maximize welfare over those concerned with fairness”), and another that claims there to be a single right answer (determinable through the exercise of reason) to every hard question of the “ought.” Neither approach tells us how to decide in the moment of judgment. Indeed, the dangers in that moment are polarities of transcendental illusion: the subtle and spurious rationalizations of which reason is capable either in the name of science, at one pole, or morality, at the other.

There is a moment of judgment, in which no rule, no logic, no showing of the predictive power of a particular economic model can tell us what to do. In science, theoretical reason acts as a regulative mechanism pushing us, untethered to experience, to predictions of what will be, and what makes it science is its tie to experience or possible experience. We can never reach the Unconditioned, even in knowledge, but we can approach it, and theoretical reason may be trumped (i.e. falsified) by experience. In morality, practical reason drives us to what ought to be, and we are able to reason to ends by deciding whether the principles governing our action are universals – ones we would have apply to anybody in this circumstance. In either case, I am concerned about the thirst for rationality that creates lies, and the assertion of ostensible reasons for an act we ought or ought not to undertake. As an *ex ante* source to which we might turn in deciding

what to do, law only answers to the question “what are we entitled to do?” *Ex post*, it is primary a means for justifying what we did by reference to what we were entitled to do. In making judgment about actions, we need to separate the questions of “what is” from “what ought,” and do so without conflating the two.

C. Finding an Ethical Standard

The real problem of reflection on ethics is that it invokes a philosophical dilemma: how do we make judgments reconciling the right and the good? If doing right – being virtuous, or abiding our duties – always coincided with an increase in happiness – the amount of good in the world – there would be no problem. Whether they realize it or not, business managers confront this issue all the time. For example, most contemporary businesses would say that they are concerned not just with financial or operating performance but with values. Indeed, if performance – the accomplishment of the good – and values – the accomplishment of the right – are placed on horizontal and vertical axes, the dilemma is not dealing with the coincidence of the right and the good, but the troubling state of affairs when they do not match. Regardless how he operated in practice, Jack Welch, the former chairman and chief executive officer of General Electric, claimed that there was no place in the organization for the executive who accomplished the good but not the right.¹⁰⁶

Ethical decision-making would be less troubling if every case of incongruity between the right and the good were at the extremes. In an ideal world, the wrongs would be so clear that any resort to justification by the good would be irrelevant. The real world is not so accommodating. Consider the following hypothetical:

¹⁰⁶ Noel Tichy, CONTROL YOUR DESTINY (OR SOMEBODY ELSE WILL) (1992).

The company has two valuable and high-potential employees, Jack and Stephanie. They are managing the critical launch of the company's newest product, one upon which the future of the company rides.

An internal audit reveals that the two have been using Jack's company credit card to purchase personal items that have no conceivable connection to the company (a new DVD recorder, for example).. The human resources manager confronts Jack, who admits that his personal finances had gotten out of control, that it was a bad mistake, but he was desperate, and at some point, intended to repay it. Jack says that he told Stephanie what he was doing, learned that she also was in bad financial straits, and lent the card to her. Jack is terminated for cause immediately and escorted out of the building, and does not contest the termination.

The human resources manager then confronts Stephanie. Stephanie first admits that she used the card, then claims later that she did not, and that Jack purchased the items for her, without her knowing the source of the funds. Over the next two days, as the manager investigates the situation, Stephanie consults with a lawyer, who insists that the company does not have a basis for a termination with cause. In order to get the matter behind him, the manager agrees that Stephanie will be allowed to sign a routine separation agreement and mutual release, and to receive two weeks' severance pay, half of the amount to which she would have been entitled under the company policy.

Friends of Jack complain that concessions made to Stephanie are not right, and that there has been unfair and unequal treatment of the two: if Jack was terminated for cause, Stephanie should have been as well.

Was it wrong, or even unethical, for the human resources manager to have treated Jack and Stephanie differently, merely because Stephanie "lawyered up?" When we are trying to decide in the context of business ethics what we ought to do, we have two problems. First, what is the ultimate aim of our deliberation? Is our task to determine a duty and to act in accordance with it? Was it the manager's obligation to determine his duty (I suppose, in this case, of justice) and to do what is *right* regardless of the consequence (e.g. the drain on his time by fighting the termination with cause issue with Stephanie)? Or are we obliged to determine the good or bad that will be the consequence

of our decision, and choose on that basis? In that instance, is it permissible to conclude that Jack, notwithstanding his serious violation of the rules, is a valuable employee and the ultimate good in his contribution to the success of the company outweighs the need for discipline?

All of this falls under the rubric of practical reason, the method by which we go about making decisions not about whether something is true or false, but about what we ought to do. In Aristotle's practical reason, we look for and act on those virtues that are the mean between polar values; in Kant's deontological practical reason, in which we derive broad and immutable duties prescribed by the moral law and follow their dictates regardless of consequences; in utilitarian ethics we deny there is any "right" other than the "good" and view the issue only in terms of maximizing whatever is good in actual experience.

Even if we agree on the standard by which to make the ethical decision, what is the decision-making methodology? How do you go about, on a day-to-day basis, deciding whether duty prevails over consequence? We have explored the errors possible when we reason our way from broad statement of what is right or what is good. For example, even though Kant tells us, in principle, our duties under the moral law are determinable by the exercise of practical reason, consider the distance between theory and practice. First, our duty is our ultimate freedom from the pulls, inclinations, and desires of the physical world. When we determine our duty as the rule we would make universal in that circumstance, we have determined good for its own sake, not for any instrumental reason. But, Kant concedes, we cannot explain how freedom is possible without circularity or antinomy. Second, we cannot be sure that our determination

emanates from practical reason and duty or from some underlying inclination. Third, there is always the possibility of transcendental illusion. We mistake the universality of the practical rule for a statement of epistemological truth. That is the road by which reason can lead to rationalization which in turn may constitute self-deception.

“I know it when I see it.” We can never quite get to “it” but “it” somehow, nevertheless, manages to inform our decisions. “It” does seem to say that we manage to apply basic notions of things like fairness or justice or mercy, even if we cannot always articulate precisely how we are doing it. In the face of a hard decision, “we sleep on it.” We do not make progress in sorting through conflicting values by more thought, as much as by isolating that one bothersome tickle at the innermost core of our concern.

Various ethical traditions have tried to make the “it” more concrete without suggesting there is an algorithm by which we might calculate the correct decision. There is a real appeal to virtue ethics. The Aristotelian notion of the golden mean pulsates with common sense. But, for the actor making the decision, virtue ethics beg the question. In a way (and not surprisingly having been first articulated by Aristotle) virtue ethics are the product of inductive through reflective judgment. Looking back at all the data, the best decisions tend to have been made by virtuous people. So we are best off having virtuous people continue to make our critical judgments.¹⁰⁷

¹⁰⁷ I do not mean to give short shrift to virtue ethics and virtue jurisprudence. The classic modern defense of virtue ethics is G.E.M Anscombe’s classic essay *Modern Moral Philosophy*, in which she urges the abandonment of deontology as the basis for modern moral and ethical philosophy in favor of one that looks to particular virtues. Hence, we would not ask “was that wrong?” or “did she do something she ought not to have done. Instead, we would simply consider a particular virtue, like being just, or being kind, or truthful, or chaste, and measure the person’s action against that virtue. G.E.M. Anscombe, *Modern Moral Philosophy*, in A.Martinich & David Sosa, *ANALYTIC PHILOSOPHY: AN ANTHOLOGY* (2001), at 381-92. Professor Lawrence Solum suggests we turn to virtue ethics as the basis of jurisprudence. He finds a middle way between utilitarian and deontological conceptions of what is moral as follows: in applying rules to facts in difficult cases, what we need to do is entrust the decision to virtuous judges. Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 *METAPHILOSOPHY* 178 (2003).

Similarly, modern natural law theory may strike some as an unsatisfying basis for ethics not because there is anything particularly troubling with the behavior its theorists advocate (unlike the normative implications of rational choice or behavioral economic theory). The real problem is the answer “because I said so” in the modern sensibility. Moreover, natural law presumes, fundamentally, a linkage between the right and the good, that virtue leads to happiness, and that is simply too much for the modern sensibility. It is far less satisfying, epistemologically, to come to terms with the idea that we simply must live with the questions rather than the answers, but I think that is at least an intellectually honest answer that resonates with thoughtful people.

1. Appeal to Natural Law

If you already adhere to a particular body of, or approach to, religious or natural law, it is not hard to be influenced by specific dictates given authoritatively by representatives of that body of thinking, whether the church or Ronald Dworkin. Here is the conundrum: despite my conviction there are universalities available to me by intuition, I continue to rebel at religious or natural law dictates. And I ask myself “why?”

The first thing we need to do is clarify what we mean by natural law. As Brian Bix points out, we use natural law to describe two separate modes of thought. The first is the traditional view: that natural law is something “higher” than mere positive law, is just, true, unchanging over time and universal, and is accessible by human reason.¹⁰⁸ The second is the “modern” view (although it would be incorrect to suggest, as I will discuss, that the traditional view has no modern adherents). Modern natural law theorists deny

Robert Audi’s critique of virtue ethics resonates with me: “many morally reflective people . . . find that determining what conduct is virtuous requires going beyond virtue ethics and appealing to principles or standards not clearly implicit in any pure virtue ethics.” Robert Audi, *THE GOOD IN THE RIGHT* (2005), at 197.

¹⁰⁸ Bix, *Natural Law Theory*, *supra* note , at 224.

the positivist claim that there is a necessary separation between law and morality. I will focus particularly on Ronald Dworkin because of the clarity of his claim that the process by which judges fit their present decisions to previous cases, and justify the present decision within acceptance moral boundaries.¹⁰⁹ In either case, I want to wrestle with what seems to me to be the blocking issue: not just that we talk about answers to hard moral and legal cases *as if there were* an single answer already determined by some omniscient Author and merely discoverable by efforts of reason, but the conclusion *there is* such a single answer.

I believe the fair approach is to consider the most articulate contemporary discussions of traditional and modern natural law, and to determine how far I may travel along the paths they suggest, and where I turn away. So let us turn briefly to them.

a. Modern Natural Law and the Single Right Answer

The most articulate advocate of “modern” natural law is Ronald Dworkin. In *Objectivity and Truth: You Better Believe It*,¹¹⁰ and in a more recent sequel available online,¹¹¹ Dworkin addresses the modern skepticism toward truth, morality and responsibility. I know I am not the kind of post-modern skeptic Dworkin derides in *Objectivity*, but I was not sure as I read the article whether Dworkin would agree.

The issue, from the first paragraph, is whether there is any objective truth about anything. Are our most “confident convictions about what happened in the past or what the universe is made of or who we are or what is beautiful or who is wicked” mere conventions? Do we deceive ourselves into thinking we have discovered “some external,

¹⁰⁹ *Id.*, at 234-37.

¹¹⁰ Ronald Dworkin, *Objectivity and Truth: You Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996).

¹¹¹ Ronald Dworkin, *Truth and Responsibility and Morality as Interpretation*, available at http://www.law.nyu.edu/clppt/program2005/readings/Hedgehogs_2and4.pdf.

objective, timeless, mind-independent world” or are all of our most universal moral truths things “we have actually invented ourselves, out of instinct, imagination and culture?”¹¹² Dworkin’s answer (and it is consistent with his theory of the law spelled out in *Law’s Empire*¹¹³) is that there are objective moral truths, but inquiry into the metaphysics from which they might derive is a waste of time.

Dworkin uses hot button issues like genocide or abortion, but I prefer to think in more mundane, yet equally troubling examples. A chemical company needs to make a decision about the continued sale of a chemical flame retardant product used in furniture and mattress foam. The balance is between a significant positive – lives saved or debilitating burns avoided by the use of the chemical – and a potential negative - there is also evidence that the chemical is accumulating in human fat tissue, with no present evidence that accumulation has a toxic effect on humans.

Dworkin distinguishes what he terms “internal skepticism” from “external skepticism.” Internal skepticism is an attitude to which we are entitled if we are engaged in making moral decisions. Dworkin views the skepticism as “internal” because the skeptic acknowledges some moral decisions are right and some are wrong, some are better and some are worse; the internal skeptic plays within the game of moral judgment, but is not skeptical as to the very possibility of moral judgment at all.¹¹⁴ “An internally skeptical position, then, denies some group of familiar positive claims and justifies that denial by endorsing a different positive moral claim – perhaps a more general or

¹¹² Dworkin, *Objectivity*, *supra* note , at 87.

¹¹³ Ronald Dworkin, *LAW’S EMPIRE* (1986).

¹¹⁴ In *Law’s Empire*, Dworkin makes this distinction as to the question of interpretation: an internal skeptic may be skeptical of an interpretive conclusion, but does not question the validity of making any interpretative judgments. *Id.*, at 78-79. He applies the thesis to moral judgment explicitly in *Objectivity*, *supra* note , at 89-94.

counterfactual or theoretical one.”¹¹⁵ In the instance of the flame retardant, we may believe we have reached the right answer by resolving the situation in favor of continuing to manufacture and save present lives, but others are entitled to be skeptical of the conclusion because they hold a contrary view of morality.

Nevertheless, Dworkin would insist there is a single right answer to the issue, even if we are uncertain what it is. Here Dworkin distinguishes between *uncertainty*, which he holds to be a valid, if weaker, position than either a positive or negative view on an issue, and *indeterminacy*, which he rejects as a valid philosophical position.

Indeterminacy, in turn, is of two kinds. It is first person if you decide that because you cannot make up your mind, there is no determinable right answer. It is third person, if observing a dispute between others, you conclude that it is simply not possible to determine who has the better of the argument. So while Dworkin may change his mind on abortion, for example, depending on his mood or the argument, and I may go back and forth on the flame retardant issue, that merely means we are uncertain about the right answer, not that there is no determinable right answer.¹¹⁶

To get to Dworkin’s ultimate claim about the objective truth of “moral facts,” we still to work through what Dworkin calls “external skepticism.” External skepticism is not a moral position, but a metaphysical one: it rejects the belief “that one interpretation of some text or social practice can be on balance better than others, that there can be a ‘right answer’ to the question which is best even when it is controversial what the right answer is.”¹¹⁷ Dworkin coins the phrase “archimedean” to describe external skeptics: “they purport to stand outside a whole body of belief, and to judge it as a whole from

¹¹⁵ *Id.*, at 90.

¹¹⁶ *Id.*, at 129-31.

¹¹⁷ Dworkin, *LAW’S EMPIRE*, *supra* note , at 80.

premises or attitudes that owe nothing to it.”¹¹⁸ It is important to understand what Dworkin is rebutting. It is not the radical skepticism who says we have no basis for making any moral judgments at all. In a paraphrase of the “liar paradox” inherent in the statement “there is no truth” (i.e. if the statement is true, then the statement itself must be false), Dworkin disposes quickly of this radical skepticism all the way down.¹¹⁹ The more difficult issue is that of the so-called selective archimedean, who believes first-order moral propositions like “abortion is wicked” or “genocide is wrong” but is skeptical of any metaphysical basis on which one might contend those first-order propositions are objectively true.¹²⁰ So a selective archimedean might agree that genocide is wrong but deny the truth of the second-order statement “it is always and objectively the case that genocide is wrong.” This is primarily a response to post-moderns, who assert rightness or wrongness in specific contexts, but deny any basis for saying, ultimately, that one may make objective judgments about right and wrong.

Dworkin’s technique is to collapse the first-order and second-order propositions together, contending that the second-order proposition is meaningless, because any moral proposition itself makes a claim that it is an objective truth. He does not really seek to refute the skeptical response to the second-order proposition, as much as simply to announce an alternative: morality is so deeply imbued in our experience of the real world, we ought to just accept it as a thing in itself, and disdain further metaphysics.¹²¹

In the follow-on chapter to *Objectivity* (posted on the NYU Colloquium), Dworkin is consistent in seeing moral propositions either as, or akin to, objective facts.

¹¹⁸ Dworkin, *Objectivity*, supra note , at 88.

¹¹⁹ *Id.* For a brief summary of the paradox, see Roger Scruton, MODERN PHILOSOPHY (1994), at 5-6.

¹²⁰ Dworkin, *Objectivity*, supra note , at 92-94.

¹²¹ Dworkin, *Objectivity*, supra note , at 128.

He proposes a “quotidian” view of meta-ethics and moral theory, one insisting “that the traditional questions of moral philosophy, including the question whether moral values are real and whether people can achieve moral knowledge, are intelligible and can be answered only if we understand them as ordinary, everyday substantive moral questions.”¹²² He offers an involved epistemology of morality, including a comparison scientific reasoning to moral reasoning, all of which seems to assume ab initio that there are “moral facts” but they may not have the same “causal relationships” as scientific facts. All of this seems to work off of the assumption (and one I have previously addressed) that noumena are knowable as truth.¹²³ If it there is an objective truth, we may be uncertain about it, but it does not negate its existence.

b. Contemporary Application of Traditional Natural Law

My casual empiricism leads me to conclude that the introduction of metaphysics into contemporary consideration of law and ethics within the legal academy is largely the province of writers who are willing to engage in public reconciliation of deeply-held religious beliefs and the scholarship of the law. One will find, for example, a significant body of Catholic reaction to issues, for example, of law and economics,¹²⁴ corporate

¹²² Dworkin, *Truth*, *supra* note , at 2.

¹²³ Lipshaw, *Freedom, Compulsion*, *supra* note .

¹²⁴ Mark A. Sargent, *Utility, the Good & Civic Happiness: A Catholic Critique of Law & Economics*, 44 J. CATH. LEGAL STUD. 35, 37 (2005):

A Catholic jurisprudence may draw on different sources of inspiration such as Scripture, natural law, Thomas Aquinas, the Magisterium of the Church, Catholic social thought, or any combination of those approaches; but all presume the knowability of the Good. While recognizing that no human social, political, or legal arrangements in the fallen world can embody the Good, Catholic thought hardly shares the indifference to ends central to the utility maximization norm. A Catholic jurisprudence ultimately will be about ends. It will make judgments about the values implicit in those ends, and will critique and prescribe legal rules on the basis of those judgments. Nothing could be less like law and economics..

law,¹²⁵ or the matter of justice generally.¹²⁶ There are arguments, based in Jewish tradition, that the law must have some fundamental and universal source, beyond merely the expression of human beings.¹²⁷ There are reconciliations of contract law and Christian conscience based in Mormon theology.¹²⁸ There is an initial and obvious answer to the attempt to use religion or traditional natural law as the basis for a set of business ethics: whether or not the doctrine states universal principles or claims to be universal (and remember that catholic *means* universal), we grow up sectarian. I respect your right to believe, and even the belief itself, but I do not believe it.¹²⁹

¹²⁵ Susan J. Stabile, *A Catholic Vision of the Corporation*, available at <http://ssrn.com/abstract=761605> (2005): 40 (footnotes omitted):

[A] religions support communitarian values, pointing “the way beyond ourselves to a deeper connection, both to others and to something sacred, immortal, and timeless. . . [motivating people] toward a sense of wholeness from which they are inspired to serve humanity.” Thus, the notion of the common good and of the need for all human institutions to promote that common good is not unique to Catholic Social Thought. Catholic Social Thought contributes uniquely to the discussion, however, because it has a much more organized and well-developed body of social teachings, embodied in numerous papal encyclicals and other documents over the years, than do other religions.

¹²⁶ Amelia J. Uelman, *An Explicit Connection Between Faith and Justice in Catholic Legal Education: Why Rock the Boat?* 81 U. DET. MERCY L. REV. 921 (2004).

¹²⁷ David Novak, *Law: Religious or Secular?* 86 VA. L. REV. 569, 594 (2000):

But if law is to intelligently order our interpersonal desires in such a way that the common good is properly served, how could that law be the product of the desires of any of those who need to be governed by it? Thus it must come from the will of someone not governed by it. Once there is an externally imposed law on our desires, here is a god of some sort or other. It would seem that we only want to obey someone generically different from and superior to ourselves. Thus, for example, once we discover our parents are generically similar to ourselves, that they are mortal like us and we like them, we have already divested them of the godlike status they had in our infancy. We now honor and respect them because of the command of the everlasting God, who is different in kind both from us and from them and thus prior to their claims on us. The question, then, is not a god or no-god. The question is whose god.

¹²⁸ Val D. Ricks, *Contract Law and Christian Conscience*, 2003 BYU L. REV. 993.

¹²⁹ At least in some religious traditions, there is an overlap between religious dogma and the claim to natural law, for example in the philosophy of Thomas Aquinas. See Bix, *Natural Law*, *supra* note , at 225-27. The mission statement of the Ave Maria School of Law, states, for example: “Ave Maria School of Law affirms Catholic legal education’s traditional emphasis on the only secure foundation for human freedom — the natural law written on the heart of every human being. We affirm the need for society to

If there is any scholar, however, whose attempt to grapple with traditional natural law in a contemporary setting might appeal to the secular seeker, it is Professor Steven D. Smith. His book *Law's Quandary*¹³⁰ asks if we all are now legal positivists and realists, believing that the law is what the judge says it is, based on all the predilections, prejudices, mores, and standards prevalent at the time of the decision, then why do we continue to speak of the law as though it were something that existed before the onset of the present dispute, and which must, upon discovery through argument and application, inexorably apply to the present matter? What is particularly appealing about Professor Smith's approach is that, while he is clearly a devoted Christian, his humility and openness to the intellectual struggle shine through. His essay, *Hollow Men: Law and the Declension of Belief*, is as forthright and articulate defense of the contemporary vitality of belief itself, if not belief in a traditional natural law.¹³¹

I will briefly reconstruct Smith's argument, but in a slightly different order than he presents it. Unlike reasoning, or emotion, or sociability, all of which human beings share with other species or beings, human uniquely have the capability to believe. Indeed, Smith argues, what makes us uniquely human is our capacity to believe, which itself reflects our "our distinctive relation to truth – not just truth in the sense of mundane fact . . . but to Truth in the upper case."¹³² Given this predicate, loss of belief or an inability to believe makes us less human – hollower, as it were. Like Korsgaard, Smith sees the decline of belief in the modern age largely as the result of the predominance of

rediscover those human and moral truths that flow from the nature of the human person and that safeguard human freedom." Mission Statement, available at <http://www.avemarialaw.edu/prospective/philosophy/phil1.cfm> (last visited, Jan. 10, 2006).

¹³⁰ Smith, *LAW'S QUANDARY*, *supra* note .

¹³¹ Steven D. Smith, *Hollow Men: Law and the Declension of Belief*, available at <http://ssrn.com/abstract=672681> (2005)

¹³² *Id.*, at 2.

the naturalistic or scientific world view. If no theory in science is ever final (as we have seen), then suggesting anything is final or eternal is subject to question, leaving us with a belief system anchored in doubt.

Smith posits four reactions to the challenge to constitutive religious or natural law belief claims: apologetics, abandonment, self-deception, or the most significant, the declension of belief itself (sort of a “lowered expectations” strategy to the whole idea of belief). The declension strategy Smith assesses is the “pragmatic turn:” to the extent belief or the idea of Truth are *useful* to us, there is some reason for them to exist. He concludes the strategy is ultimately self-contradictory. The value of faith is in its intrinsic not its instrumental value. Believing something merely because it is useful to believe it (and not because it is true) “necessarily involves the believer – or the half-believer – in self-deception, or at least in a sort of Orwellian double-think.”¹³³ I think the point Smith wants to make in *Law’s Quandary* which he repeats and enhances in *Hollow Men*, is that the reason for our talk of the law, even in an age of legal positivism and realism, as though it were natural law is that there *is* a transcendent Author, God, who writes the natural law. Yet he expresses a vision for Christian jurisprudence – that this element of the law that seems to presuppose an ascertainable Truth is an avenue by which “we may glimpse ‘the dearest freshness deep down things.’”¹³⁴

I think Smith’s claims, ironically, though based in more traditional natural law are humbler, and therefore more revealing than Dworkin’s. What Smith identifies is the apparent paradox of our continuing need to believe (and the logical next step, that there is

¹³³ *Id.*, at 15.

¹³⁴ *Id.*, at 30.

a Truth in which we may believe) in an age when belief no longer suffices as a means of explanation, and the idea of Truth is at best difficult.¹³⁵

Is it possible to articulate a secular transcendentalism, an acknowledgment of mystery that takes one to the edge of belief, but not to the more concrete faith of a Christian? I think that is the natural import of reason's regulative practices: we propose order and purpose because, well, we just propose order and purpose. I agree with Dworkin that we cannot stand outside of reason to understand reason. Indeed, I return once again to Kant's wisdom on this subject. That we presume a God because of "the dearest freshest deep down things" or perceive that the world is "charged with the grandeur of God" is the basis for the argument from design, the proof of God Kant said "always deserves to be named with respect."¹³⁶ But our presumptions about God or Truth need to remain, it seems to me, beliefs, and hence I will continue to recoil whenever someone tells me, as though it were Truth, what God is thinking or God wants or God does as though the person just finished an in-depth conversation with God (or nowadays, I suppose, received a message on his Blackberry). Kant recognized that even though we can, and indeed, must presuppose a "unique wise and all-powerful world author," we have nevertheless not extended our cognition beyond the field of possible experience "[f]or we have only presupposed a Something, of which we have no concept at all of what it is in itself (a merely transcendental object). . . ."¹³⁷ Kant anticipates the seeker who asks, "Yet may I regard purpose-like orderings as intentions by deriving them from the divine will, though of course mediately through dispositions toward them set up

¹³⁵ *Id.*, at 3 (footnotes omitted).

¹³⁶ Kant, PURE REASON, *supra* note , at 579-80 (A623/B651).

¹³⁷ *Id.*, at 619 (A697/B726).

in the world?”¹³⁸ The answer is yes, you can, but you can never know that is the case: “where you do perceive purposive unity, it must not matter at all whether you say, “God has wisely willed it so” or “Nature has wisely so ordered it.”¹³⁹ I ask again: “but may I say that I *know* this ordering to be true as a matter of God’s law or universal natural law?” And while Kant acknowledges my continuing aim “to seek out the necessary and greatest possible unity of nature,” even “to have the idea of a highest being to thank for this so far as we can reach it,” the answer is no.¹⁴⁰ Whether it is Dworkin’s voice or the voice of a prophet claiming to be the intermediary with natural or God’s law, and as much as I agree that belief is hardwired into us, and makes us human, I cannot accept the intermediate’s articulation of the dictates of either law as Truth.

I will return to Martin Buber in far more detail in the next section, but I think his insight on our ability to dictate, much less teach, rules as the source of ethics is helpful. Buber talks about the education of character, and considers the impact of teaching moral rules as though they were equivalent to the axioms of algebra. He may explain that envy, or bullying, or lying are wrong, and the reaction from his students tells him: “I have made the fatal mistake of giving instruction in ethics, and what I said is accepted as current coin of knowledge; nothing of it is transformed into character-building substance.”¹⁴¹ But he observed:

After all, pupils do want, for the most part, to learn something, even if not overmuch, so that a tacit agreement becomes possible. But as soon as my pupils notice that I want to educate their characters I am resisted precisely by those who show most signs of genuine independent character: they will not let themselves be educated, or

¹³⁸ *Id.*, at 620.

¹³⁹ *Id.*

¹⁴⁰ *Id.*, at 620-21.

¹⁴¹ Martin Buber, *BETWEEN MAN AND MAN*, trans. Ronald Gregor-Smith (2002), at 124.

rather, they do not like the idea that somebody wants to educate them. And those, too, who are seriously laboring over the question of good and evil, rebel when one dictates to them, as though it were some long established truth, what is good and what is bad; again how hard it is to find the right way.¹⁴²

I think Buber is onto something universal: we understand intuitively how hard it is to make good judgments, and that there is no rule for the application of a rule. Like the scientist creating the hypothesis as a product of reflective judgment, and not the mass of underlying data, or the judge, as a matter of determinant judgment, deciding that this case is a particular example of a general rule, we know the right decisions are too nuanced to be dictated to us. In either case, traditional or modern natural law, what I think drives thoughtful people to skepticism or pragmatism is the implausibility of the single answer.

2. The Promise of Intuitionism

a. The Right versus the Good

Nevertheless, I have a strong sense of right and wrong. Calling it a sense of right and wrong implies the very objectivity and truth that underlies natural and religious law. How then do we make our way through all the apparent paradox? As free rational agents we legislate to ourselves, but are restrained by norms. We acknowledge the general rules of law, but the need for the exceptions of equity. We acknowledge that the capacity to believe makes us human, but rebel against the claim that belief equates to truth or knowledge. We see the power of reason in allowing us to conceive, in science and morality, the possibility of what ought to be, unconstrained by what is, and yet understand the power of reason to drag into transcendental illusion, rationalization, dogmatism, and self-deception.

¹⁴² *Id.*, at 124-25.

If there is any common theme regardless of the standard by which we make the judgment, it is that we so often turn not just to the product of reason and reflection, but to an intuitive sense. Even Richard Posner, who espouses a pragmatic skepticism that denies moral universals, nevertheless appeals to an intuitive practical reason as the basis for deciding cases: “anecdote, introspection, imagination, common sense, intuition (due apparently to how the brain structures perceptions, so that, for example, we ascribe causal significance to acts without being able to observe -- we never do observe -- causality), empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, "induction" (the expectation of regularities, related both to intuition and to analogy), ‘experience.’”¹⁴³

G.E. Moore began a century-long debate over the idea of “intuitionism,” an ethical philosophy that addresses the difficulty of bringing broader principles down to specific instances, either as a matter of utilitarianism or consequentialism (which focus on the maximization of the good and the minimization of the bad) or deontology with its array of conflicting duties that constitute the “right.”¹⁴⁴ W.D. Ross rejected Moore’s consequentialism, arguing that the aim of ethics is not necessarily the good, but doing what is right, and disagreed with Moore’s claim that the ultimate “right” was doing that which increased the good. Ross’s intuitionism was based in a list of prima facie duties: fidelity, reparation, justice, gratitude, beneficence, self-improvement and non-injury.¹⁴⁵ The duties are prima facie because each indicates a moral reason for action, but the act may not reflect our final duty because of competing duties that might override the first.¹⁴⁶

¹⁴³ Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 838 (1988).

¹⁴⁴ For a summary history of intuitionism, see Audi, THE GOOD IN THE RIGHT, *supra* note , at 5-39.

¹⁴⁵ W.D. Ross, THE RIGHT AND THE GOOD (1988), at 21-22.

¹⁴⁶ *Id.*, 19-20.

An example is the person who breaks a promise (the duty of fidelity to one's word) to meet a friend for breakfast because her child is ill and needs attention (the duty of non-injury).¹⁴⁷ “The central idea underlying the Rossian notion of a prima facie duty is that of a duty which is – given the presence of its ground – ineradicable but overridable.”¹⁴⁸

It seems to me Ross's contribution to intuitionism is two-fold. First, there is the deontological intuition itself – that, contrary to Moore's contention, it just cannot be that the right means only that which produces the good in a utilitarian sense. We will obviously never resolve the issue, but Ross's appeal to a common sense that we perceive duties not necessarily co-extensive with their consequences is at least as compelling as Judge Posner's opposing view. Note the emphasis: “we have to ask ourselves whether we really, when we reflect, *are* convinced that this is self-evident, and whether we really *can* get rid of our view that promise-keeping [as one example of a prima facie duty] has a bindingness independent of the productiveness of maximum good. In my own experience I find that I cannot, in spite of a very genuine attempt to do so; and I venture to think that most people will find the same. . . .”¹⁴⁹

Second, Ross, it seems to me, more directly addresses the process by which we decide among all the conflicting parameters than the utilitarians, and does so in a way that is consistent with what we have observed about judgment. Ross asks why, if we are permitted to weigh all of the consequences of an act, we should not also be able to weigh the prima facie duties before coming to a conclusion about our actual duty.¹⁵⁰ Moreover, whether we were to weigh duties or consequences (even knowing beforehand the extent

¹⁴⁷ *Id.*

¹⁴⁸ Robert Audi, *THE GOOD IN THE RIGHT*, *supra* note , at 23-24.

¹⁴⁹ Ross, *supra* note , at 39-40.

¹⁵⁰ *Id.*, at 17-18.

of the good or bad consequences), “there is no principle by which we can draw the conclusion that it is on the whole right or on the whole wrong.”¹⁵¹ Indeed, though not expressly, it is clear Ross draws on the Kantian exposition of judgment: “the judgement as to the rightness of a particular act is just like the judgement as to the beauty of a particular natural object or a work of art.” Judgment of right and wrong is not simple calculation (there is no rule for the application of a rule); “both in [the case of beauty] and in the moral case we have more or less probable opinions which are not logically justified conclusions from the general principles that are recognized as self-evident.”¹⁵²

Robert Audi has recently sought to re invigorate a Rossian intuitionism that is reflective and flexible.¹⁵³ That is, intuitions *are* non-inferential – we simply come to know or to believe – but intuitions are *fallible* (they may be wrong), *defeasible* (one can come to see they are wrong by circumstances or another intuition), provide an irreducible plurality of basic moral principles which associate with different grounds for duty.¹⁵⁴

Audi’s intuitionism is Kantian, however, in its approach to conflicting duties.¹⁵⁵ Ross’s

¹⁵¹ *Id.*, at 31.

¹⁵² *Id.*

¹⁵³ *Id.*, at 47-48.

¹⁵⁴ *Id.*, at 40-41. Audi claims that Rossian intuitionism is commonly misunderstood as positing “indefeasible justification. . .for any cognition constituting a genuine intuition.” *Id.*, at 30.

¹⁵⁵ Audi is not the only philosopher to attempt to bring the broad, and seemingly inflexible, principles of the categorical imperative down to everyday moral decisions. Christine Korsgaard also argues for the defeasibility of “ideal” Kantian prescriptions in the non-ideal world, focusing particularly on Kant’s infamous and counter-intuitive dictum that the duty to tell the truth overrides the duty to save someone from a pursuing murderer. “The Formula of Humanity and its corollary, the vision of a Kingdom of Ends, provide an ideal to live up to in daily life as well as a long-term political and moral goal for humanity. But it is not feasible always to live up to this ideal, and where the attempt to do so would make you a tool of evil, you should not do so.” Christine M. Korsgaard, *The Right to Lie: Kant on Dealing with Evil*, originally published at 15 PHIL. & PUB. AFF. 325 (1986), anthologized in Stephen Darwall, *DEONTOLOGY* (2003), at 212, 230.

Nevertheless, Susan Neiman suggests that we ought not ascribe to Kant this level of rigidity in the application of the categorical imperative. “The ‘play-room’ that Kant . . . maintains to be necessary in observing the moral law extends not only to an open-endedness in the very examples that the Groundwork may have seemed to determine categorically, such as lying and suicide. . . . Further, those very circumstances on which nearly every ethical decision turns are described by Kant as empirical and hence not a part of ethics proper, which must be a priori.” Neiman, *UNITY*, 123.

meta-theory held that all prima facie duties were accorded equal weight, and the determination of overriding duties was a matter of practical wisdom and rules of thumb.¹⁵⁶ If not adopting all of Kant's moral philosophy, Audi takes the view that the Rossian duties might nevertheless be systematized by over-arching moral theory.¹⁵⁷ Audi chooses, if not all of Kant's own ramifications, the universality and intrinsic ends formulations of the Categorical Imperative.¹⁵⁸ Finally, Audi moderates Rossian intuitionism not only with defeasibility of the intuition of duties, but something that is expressly non-deontological: consideration of intrinsic value, the good or bad that may be the consequences of the action.¹⁵⁹ Again, Audi position is grounded in what to a non-philosopher (or perhaps to an Aristotelian) would seem like ordinary good sense: there must be some way to incorporate the notions of human flourishing – good or bad consequences – at the same time we consider our duties.¹⁶⁰

b. Intuitionism Distinguished

Of course, the objection to intuitionism is obvious. If we have conflicting intuitions, how is my intuition any different from your natural law or religious dogma? What makes mine right and yours wrong? I do not know. I do, however, find myself moved by a concept of defeasible intuitionism, one that acknowledges the mystery at the core of these issues, and provides a basis for constructive and inferential dialogue about

¹⁵⁶ Audi, THE GOOD IN THE RIGHT, *supra* note , at 92-93.

¹⁵⁷ *Id.*, at 83.

¹⁵⁸ *Id.*, at 90-94.

¹⁵⁹ *Id.*, at 121-38.

¹⁶⁰ *Id.*, at 159.

The intrinsically good and the intrinsically bad kinds of things in question can be non-inferentially and intuitively known to be good or to be bad, as some of the principles that reflect them can be non-inferentially and intuitively known to be true. And, without the burden of having to maximize any value, moral agents can see themselves as realizing the good in fulfilling their obligations.

the “ought.” That, however, leads us to the most difficult concept of all: how we might go about finding grounds to defeat what comes to us intuitively, to sort through what is merely suppressed (or not-so-suppressed) desire or inclination, what may be the transcendental illusion of dogmatism, and what may truly be an intuition of ethical rightness, fairness or justice.

The appeal of moderate intuitionism is its very reasonableness. The knife-edge on which we walk, however, is creeping dogmatism; i.e., the danger in believing that one has access to the “ought” as though it were knowledge and not belief. I acknowledge the problem with walking the knife-edge: it is difficult not to wander off, and the concentration it takes to keep one’s consistent balance may be too much to ask. Recall again the difficulties of this approach to ethics: we are going to acknowledge intuition, but refrain from calling the moral insight either fact or truth, and the source of that insight will always remain a mystery to us. Indeed, that is the paradox that seems to me to want to reify itself in natural law as an accessible truth: on one hand, we rely on intuitions emanating from a mysterious source that cannot be deemed truth or knowledge, and, on the other hand, we will act on those intuitions which seem to us to have aspects of universality – i.e. the natural law as applied to the circumstances before us.

The latter issue is, I believe, only resolvable by a conscious effort to defeat the power of our own reason, and that effort must involve our relationship with others. I have already suggested reason as a source of universalisms may as much lead to transcendental illusion, rationalization or self-deception (whatever you want to call it) as to an acceptable universal moral rule. I have acknowledged the inherent common sense of virtue ethics, but find it inadequate either for explanation or prescription in difficult

situations (particularly where the continuum of extreme to extreme wherein I should be finding the mean is not overly clear, as in conflicts between the good and the better, or between two evils). So I have proposed a defeasible and reflective intuitionism, but what, you may fairly ask, is the source of the intuition? Must it not be some variant of natural law, just, true, unchanging over time and universal, and accessible by human reason? Indeed, have I staked out a position that tries to be everywhere and is in fact nowhere, skeptical equally of science and received morality?

It is a fair question to ask what differs between my view of access to ethical decision making through intuition, and Dworkin insistence that there are objective and knowable moral facts or truths. I do not agree with his contention that it is bad philosophy to consider the epistemology of morality,¹⁶¹ and conclude that there is something different between the objectivity of knowledge we can test in nature, and the moral conviction that seems to us objective and yet can never be proved or disproved. Dworkin's answer to the mystery at the core (or "all the way down") is the mirror-image of the radical skeptic (which we considered earlier). The radical skeptic says there is nothing all the way down; Dworkin says there has to be something, so you might as well assume it is in the quotidian moral proposition itself.

To understand why I find Dworkin's path unsatisfying as a basis for ethics (i.e. my moral propositions just *are* what I believe they are, from a first person standpoint, and what I might assess as correct from a third person standpoint), I want to return once again to the reason itself. Dworkin acknowledges something about reason and morality: "We cannot climb outside of morality to judge it from some external archimedean tribunal, any more than we can climb out of reason itself to test it from above." So we employ

¹⁶¹ Dworkin, *Objectivity*, *supra* note , at 139.

reason as best we can within morality to determine true propositions, understanding we cannot test what we take as objective truth, any more than we can test reason.” As Professor Zangwill, one of the commentators on *Objectivity*, observed, this is simply the mirror-image of archimedean skepticism.¹⁶² A skeptic holds, but can never prove, that there is no a priori basis for any moral truth. Dworkin says a moral proposition is because it is and always has been and always will be, and that is objective, eternal and unchanging truth. And while I would rather believe Dworkin about what is true than the skeptic, I still have no basis for concluding Dworkin’s first-order propositions (or my own for that matter) as products of reason are not the subject of transcendental illusion, rationalization and self-deception.

Should we make the flame retardant? I think it through and reason to a conclusion that we should. Suppose I call on Professor Dworkin for his advice on the ethics of my decision, and he tells me I am wrong, not just because we disagree, but because it is an objective truth that corporations ought not to be making products whose side effects can injure unknowing non-users, and the users of products protected by the flame retardants ought to find another solution. Why is that not a misunderstanding of the fruits of reason? It seems to me I am justified in responding: “you have worked this through in your own mind, employing your faculty of reason, and come to a non-empirical conclusion that you have then mistaken for constitutive principles of transcendent cognition, what you think is knowledge, but which is dazzling but deceptive illusion, persuasion and imagination.”

¹⁶² Nick Zangwill, *Zangwill Reviews Dworkin*, available at <http://www.brown.edu/Departments/Philosophy/bears/9612zang.html> (Dec. 2, 1996).

IV. A SECOND PERSON APPROACH TO GETTING BEYOND REASON

Understanding the role of reason, its capability for rationalization and self-deception is what focuses us on ethics rather than law. The process of ethics, I contend, is not just one of reason. Instead, it is the application of determinant judgment (which is distinct from either theoretical or practical reason) in which the application of the general to the particular is guided by our most fundamental intuitions about virtue. But the application of judgment, the determination of duty, is the essence of our personal autonomy, our freedom to legislate for ourselves the rule we would make universal. How, then, do we avoid transcendental illusion – mistaking the universality of the practical rule for a statement of epistemological truth? How can we have confidence our well-reasoned arguments are not rationalization and self-deception?

The answer is that we can never be sure. The answer lies somewhere in this same paradox of that which cannot be proved and is yet self-evident – the maddening question why, if a Designer chose to design the universe, did such Designer leave just enough evidence of the lack of a design to give the skeptics the basis for the counter-argument? Indeed, for all of our confidence that we know surely what is right and what is wrong (at least in the clear cases), we remain open to a smidgen of doubt. Most moral dilemmas are not as clear as genocide in Bosnia. That is why they are dilemmas. So we permit our intuitions to be defeasible. But how? The problem, in Kantian terms, starts with the process of legislating for ourselves our own morality as autonomous agents. For as Kant recognized, there is no guarantee that each of us will reach the same conclusions. This solipsistic figure, seeking out the universal law, in the case of Kant's moral everyman, or

Judge Hercules, in Dworkin's vision of the law, is a subject, and nothing compels the incorporation, or even understanding, of the views of another. Indeed, even the second articulation of the categorical imperative, the Law of Humanity, is directed at each agent's responsibility within himself, and not to addressing another in the second person. We are to treat others never as means only but always as ends – others are to be subjects, and worthy of the same respect we would accord ourselves. Because so much about our moral judgment resides in personal autonomy, it seems to me the check must lie in our relationship with others, not as objects to be analyzed, but as other subjects each making his own judgments, some of which may not only conflict with mine, but may be better. If my own autonomy is first-person, and my analytic relationship with others and the world is third-person, then the relationship with another moral agent must be second person.

The second-person relationship is already the subject of some discussion within the legal academy. Robin Bradley Kar, taking from the work of Stephen Darwall, has attempted to reconcile the “hard” or exclusive positivism of Joseph Raz with the “soft” or inclusive positivism of H.L.A. Hart.¹⁶³ Put briefly, the debate is this. Hart's positivism identified primary law, the law that affects us from day to day, as that which is issued pursuant to the Rule of Recognition – the social convention under which certain norms are recognized as law. Hart seemed to be saying that moral considerations could be part of primary law, so long as the Rule of Recognition allowed for it. Raz, on the other hand, viewed law as law only when it provided a reason for acting or not acting exclusive of any moral consideration. (In other words, law would be meaningless as a basis for action

¹⁶³ Robin Bradley Kar, *How an Understanding of the Second Personal Standpoint Can Change Our Understanding of the Law*, available at <http://ssrn.com/abstract=782525>. Professor Kar insightfully distinguishes between the first person perspective of reflection, and the objective view of the world that is inherent in a third person perspective. In particular, the third person view is the one we undertake when we undertake science.

if it merely mapped precisely on the independent moral reasons, and would be irrational if it contradicted other good moral reasons for acting. “The claim to legal authority is based on the thought that the reasons law provides replace the reasons that otherwise apply to us because acting on the former will enable us more fully to comply with the latter than we will by acting on the basis of them directly.”¹⁶⁴)

Professor Kar’s project is to suggest that Hart can be seen implicitly to have incorporated Raz’s theory of authority without abandoning the position that moral considerations can be incorporated into the law. Professor Kar does this by proposing a view of legal positivism that incorporates a second person perspective – one that is neither the pure self -reflection of the moral agent, nor the detached perspective of the third-party observer. “The second personal perspective is the perspective from which we address one another with claims and grievances, or respond to such claims with apology, excuse or justification.”¹⁶⁵ Rather than focusing solely on the role legal reasons (as opposed to all other reasons) might play in the first person reflection of the actor, Professor Kar would justify the role of the law as reason for action from a second person perspective: “the law provides us with exclusionary reasons for action, which can have genuine and distinctive practical effects in our lives, insofar as the breach of a legal obligation – however identified – gives some other person or group the second personal standing to raise a legal claim for non-compliance.”¹⁶⁶

I want to unpack the nature of a second person relationship as it is distinguished in matters of law – the resolution of claims and grievances – and ethics – the

¹⁶⁴ Jules L. Coleman & Brian Leiter, *Legal Positivism*, in Dennis Patterson, ed., *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* (1999), at 241, 255.

¹⁶⁵ *Id.*, at 2.

¹⁶⁶ *Id.*, at 31.

consideration of the other in deciding what we ought to do. I think the second person perspective is critical to overcoming rationalization and self-deception in making ethical decisions, but I think it is wholly distinct from the justification of law as law by reference to the second person perspective. Indeed, I would argue what Professor Kar sees as second person is not really second person at all. In Kelsen's view, the basic norm is *a priori* (i.e., one we must assume at the outset, apart from any experience in the world) and "a hypothetical judgment that expresses the specific linking of a conditioning material fact with a conditioned consequence."¹⁶⁷ In assessing the claim of another person as the basis for acting, the first person actor is really making a scientific third person assessment of the likelihood that another will succeed when that person invokes the adjudicative process. That may well reconcile Hart and Raz, but nothing in the theory compels the actor to consider the position of the second person as a check against rationalization and self-deception. Indeed, considering the possible *legal* claims and grievances of the second person may be nothing more than an invitation to justify our inclinations and desires by means of the invocation of legal rules. There is nothing in the process that demands we reconsider our intuitions about the normative rightness of our position.

Indeed, if we look at Stephen Darwall's account of the second person relationship, we get some idea of what it answers and what it does not.¹⁶⁸ The essence of the concept is that there is something different and fundamental in the authority of one person to demand or claim respect and dignity from another that is distinguishable from what is

¹⁶⁷ Hans Kelsen, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY*, trans. Bonnie Litschewski Paulson & Stanley L. Paulson (2002), at 23.

¹⁶⁸ Stephen Darwall, *Respect and the Second-Person Standpoint*, Presidential Address to the Central Division of the American Philosophical Association, April 24, 2004, reprinted at <http://www.lsa.umich.edu/philosophy/Darwall04.htm>.

essentially a third person contemplation about the respect and dignity owing to persons generally. Moreover, this relationship is as a priori and synthetic as any categorical imperative: “To be a person just *is* to have the authority to address demands *as a person to other persons*, and to be addressed by them, within a community of mutually accountable equals.”¹⁶⁹

But Darwall’s construct of the second-person standpoint bears, at least as I understand it, the same relationship to specific second-person obligations as Kant’s categorical imperative bears to specific moral decisions generally. That is, it establishes the idea that there is a basis for making second-person claims and demands, without suggesting how one might go about determining what one’s obligations to the other are. The parallels are particularly evident when Darwall accounts for the second-person standpoint within Kant’s writings on ethics. Self-love – “the ‘natural’ ‘propensity’ to take ‘subjective determining grounds’ of the will to have normative significance” – can be cured by one’s own contemplation of the moral law. When we consider whether we would legislate the principle as a universal rule of nature, we will conclude that our subjective grounds are not in accord with what we ought to do. Self-conceit, on the other hand, is the fantasy “that one has a standing to make claims and demands on others that others do not have.” This problem cannot be cured merely by one’s internal reflection; the fantasy will be broken only by making the agent accountable to another agent’s claims and demands.

But with all of this, we have only gotten through the issue of standing, either legally or morally. What about the second-person claim itself? It is not surprising

¹⁶⁹ *Id.*, at 9. Going back to the tortoises, Darwall contends the authority to make claims on one another is second-personal “all the way down.”

Darwall's account was attractive to Professor Kar, because it seems to me casting the second-person relationship as one of right to make claims and demands on another is essentially *legal*. It focuses on the rights of the aggrieved party more than it does the question what the actor ought to do. With the same authority the sergeant issues a drill order, in reaction to a particular circumstance, A makes a claim of dignity and respect on B. Now what? What is B supposed to do?

Sometimes we are debating pure issues of fact: If we raise prices, how will our competitors respond? In an initial public offering, how many shares will we be able to sell and at what price? What was the cause of the factory fire? Will the acquisition be accretive to share price? Those matters are properly the subject of argumentation, a particular kind of communication.¹⁷⁰ But practical questions of what we ought to do are different, because, unlike questions of fact, the answers depend on our interests, and are not testable against experience. If being ethical means facing down one's own interests (whether material interests or one's stake in one's own vision of what ought to be), we know how difficult that will be. Reason's regulative nature inclines us always to believe we are dealing in truth, whether or not experience will bear it out. My concern with Darwall's structure is where it leaves us hanging: in exercises of rationalization and self-deception, where A and B employ reason to claims and defend against claims, albeit of a second-person nature.

How do we go about responding to the second-person claim, to making judgments what we ethically ought to do, rather than simply determine that to which we are legally entitled? If we have learned anything so far, it is that all the science in the world will not tell how to choose. Moreover, we are too humble to believe that we have access to a

¹⁷⁰ See Jürgen Habermas, *TRUTH AND JUSTIFICATION* (2003), at 269.

single correct answer (as if it were truth) as posited by the modern natural law theorists and are unsatisfied epistemologically with simply relying on the judgment of virtuous people, as posited by the virtue ethicists. We are left then only with a continuing mystery at the heart of judgment, and defeasible intuitionism by which we make non-inferential judgments to guide our ethical choices.

A. Truth, Argumentation, and Justification

Trying to establish the normative as truth, as though it were science, is at its most benign, futile, and at its worst, self-deceptive. As Dennis Patterson has argued, law, as means of adjudication (i.e. as an institutional way of having a third party determine what two or more opposing parties ought to do), is an exercise in language, and consists of argumentation.¹⁷¹ It may consist of civilized discourse, but at its heart, adjudication, from the parties' perspective, is an argument about events that took place in the past, in which the parties and their lawyers tell narratives justifying why each of them is right. There is no need to see the circumstance from the other party's point of view, except as a tactical or strategic matter. Within the bounds set by the procedural and evidentiary rules, any argument, regardless how ostensible, is permitted.

One can adopt what sounds like a postmodern attitude toward truth, and contend there is nothing but the subjective (as I think Patterson is wont to argue). It seems to me the implication of this is the complete denial of any universals obtainable through reason or intuition. I do not believe that is a necessary conclusion. What I have tried to show through the first five chapters is that reason itself, by its regulative nature, demands that we pursue the conditions of propositions "all the way down" in pursuit of an unattainable

¹⁷¹ Dennis M. Patterson, *LAW & TRUTH* (1996).

Unconditioned – the “truth.” Where reason pursues matters of experience or possible experience, we have at least some basis for calling what we conclude “knowledge.”

But in ethics, we deal with the “ought” of responsibility, and separating it from the “is” of comprehension (as through law as social science) is critical. So Patterson and I agree that truth is a misplaced objective for the normative. We also agree that the process by which the resolution of dispute is played out, whether in law or ethics, is in the medium of language.

Where I think we differ is in the possibility of defeasible universals of which we are capable, so long as we do not deceive ourselves into believing they represent knowledge. What is clear is that the parties in adjudicative legal discourse are not seeking to determine what is right. In discussing the legislative process, Jürgen Habermas observes, “No doubt one can use moral discourse of application as a model for investigating legal discourses, for both have to do with the logic of applying norms. But the more complex validity dimension of legal norms prohibits one from assimilating the legitimacy of legal decisions to the validity of moral judgments.”¹⁷² The adjudicative process further separates discourse theory from what happens in a trial.

The point is that, for the parties, the game is not to find an answer, but to persuade the judge that each is right. “The parties are not committed to the cooperative search for truth, and they can pursue their interest in a favorable outcome through ‘the clever strategy of advancing arguments likely to win consensus.’”¹⁷³ Put another way, each party argues the rule to apply is the one that will benefit the respective party. Because there is no rule for the application of a rule, we are really arguing that a universal-

¹⁷² *Id.*, at 233.

¹⁷³ *Id.*, at 231.

transcendental-idealized norm requires the application of the rule in our favor. That is a process that may or may not produce justice, but will always involve justification. And where justification involves rationalization, there lies the possibility of the thirst for rationality creating lies.

B. Law, Subjects and Objects

It seems to me, then, we need a way to test whether we are rationalizing the “ought” to conform to our inclinations and desires, rather than changing what we do to correspond with the “ought.” It is possible that our litigation claims are ostensible reasons and, if we believe them, we are engaged in self-deception. It seems to me we need to delve deeper into the nature of the second-person relationship, and consider how we leave ourselves open to the possibility there is merit in what our opponent (real or imagined) asserts.

To accomplish this, I think, ironically, we need to get beyond reason, and consider the role of intuition. We have intuitions about the right, and the issue is whether the intuition is one based in reality and justice, or instead in self-deception and justification. Searching for a basis of our intuition in truth, or grounding the basis for our intuition in argument, it seems to me, is misdirected. The first is futile and the second reinforces whatever tendency we might have to avoid reality and to justify. We are entitled to our strong intuitions about moral choice; we are not entitled to a view that they are eternally infallible or indefeasible. How do we walk that line? Not easily. One way to begin is to consider, when encountering contrary intuitions, the source of the contrary intuition as subject rather than object. Another is to consider the role of virtues, like

humility, not to supplant but to mediate what Kant described as the tendency of reason to dogmatism.¹⁷⁴

As an alternative, I want to consider Martin Buber and the concept of “dialogue.” Buber, notwithstanding his status as one of the foremost philosophers and theologians of the 20th century, has a reputation as a mystic, yet he is circumspect in his “mystical” claims and concerned not so much about any person’s relationship with God, as with relationships with each other. It is to his surprisingly worldly view I turn.

1. I and You

Calling on Buber for insight into business law and ethics is, no doubt, a long stretch to many, so I feel compelled at the outset to make clear what this is not about. The irony is that *I and Thou*, the primary statement of Buber’s philosophy, is not revered as a Jewish document – its fame spread as the result of acclaim by Protestant theologians.¹⁷⁵ Moreover, it claimed no access to mystical insight. Walter Kauffman observed, “What is so remarkable is that a sharp attack on all talk about God and all pretensions to knowledge about God – a sustained attempt to rescue the religious dimension of life from the theologians – should have been received so well by theologians.”¹⁷⁶

If I believe that Darwall and Habermas are correct in seeing the second-person relationship as critical to ethics, but believe at the same time that reason turned back upon itself as rationalization is corrupting of ethics (whether or not it is *civilized* as a matter of dispute resolution), then Buber, to me, articulates the second-person “all the way down.”

¹⁷⁴ Daniel Statman, *Modesty, Pride & Realistic Self-Assessment*, 42 PHIL. Q. 420 (1992).

¹⁷⁵ Walter Kaufmann, *I and You: A Prologue*, in Martin Buber, *I AND THOU*, trans. Walter Kauffman (1970), 20.

¹⁷⁶ *Id.*, 20-21.

Buber's own "conversion" was the result of having had a conversation with a young man who had sought Buber's advice out of despair. While Buber recalls that he was friendly, and conversed "attentively and openly," he had returned from a morning of traditional "religious" experience (no doubt a morning prayer service), but met with the young man "without being there in spirit." The irony was not lost on Buber.¹⁷⁷

If what I am arguing is religious, so be it, but if that is the case, then every attempt to deal with the *a priori* (unless, of course, we choose the course of simply denying the apparently *a priori*) is religious. But just as Darwall claims the second person authority to make claims and demands just *is* and yet falls legitimately into secular philosophy rather than commonly-held notions of what is religious, so too the ensuing discussion of the second-person relationship that may provide a check on self-deception. No wonder Walter Kauffman observed about *I and Thou*: "The book does not save, or seek to prop up, a tradition. Even less does it aim to save any institution. It speaks to those who no longer believe but who wonder whether life without religion is bound to lack some dimension."¹⁷⁸

Why do I say Buber's philosophy is second-person all the way down? It is because he takes the second-person relationship to its epistemic limit, one beyond even the power of reason to make claims and demands and to respond. Buber sees our relationship not as the world acting upon us, or other acting upon us, but in the very pairing of us and the world or others. Hence, the third person relationship is not merely "I" and "It." Instead, it is symbolized in language by a word pair "I-It." Similarly, the

¹⁷⁷ Martin Buber, *BETWEEN MAN AND MAN*, *supra* note , at 16-17.

¹⁷⁸ Kaufmann, *supra* note , at 32.

second-person relationship is not “I” and “You.” The relationship itself is a basic word composed of “I-You.”¹⁷⁹

The “I-You” relationship is the unmediated second-person relationship. It is the pure *encounter* between two beings. It is not “I” making claims or demands on “you.” A claim or demand is conceptual. “Nothing conceptual intervenes between I and You, no prior knowledge and no imagination; and memory itself is changed as it plunges from particularity into wholeness. No purpose intervenes between I and You, no greed and no anticipation; and longing itself is changed as it plunges from the dream into appearance. Every means is an obstacle. Only where all means have disintegrated encounters occur.”¹⁸⁰ It seems to me Buber must have intended this as a reference to Kant’s Formula of Humanity: there we are obliged always to treat humanity, in ourselves and others, as an end also and never only as a means. The pure encounter of I and You has no element of means – You are purely an end.¹⁸¹

Were Buber to expect us to live our lives in a way that the pure encounter of I-You predominates, this would be a journey into a never-never land of mysticism. That is not his expectation. The third-person relationship with the world as experience is the “I-It.” When we experience the world, the experience occurs in our processing of the experience – it is not generally a matter of relation with experience. (Buber suggests we might be in a state where it seems as though we have an I-You relation with nature. His

¹⁷⁹ Martin Buber, *I AND THOU*, trans. Walter Kaufmann (1970), at 53-54. There is an important point here. The title of the work in German is *Ich und Du*. German, like French or Spanish, but unlike English, has a formal “you” (*Sie*) and an informal “you” (*Du*). *Du* is the form of address between friends and lovers. As Walter Kauffman noted, “*Du* is spontaneous and unpretentious, remote from formality, pomp, and dignity.” Nevertheless, the original translations of the work were by theologians, who focused on its religious aspect, and the informal you of relationships became the formal “Thou” in English that is evocative of God. Kaufman, *supra* note , at 14-15.

¹⁸⁰ Buber, *I AND THOU*, *supra* note , at 62-63.

¹⁸¹ Kaufmann, *supra* note , at 16-17.

example is the contemplation of a tree; mine would be a sunset. The important thing is that we sense the world not as an observer of third-party experience, but as actually having a relation with the thing being observed.¹⁸²) As Walter Kauffman observed, “Even when you treat me only as a means I do not always mind. A genuine encounter can be quite exhausting, even when it is exhilarating, and I do not always want to give myself.”¹⁸³ Buber said: “Genuine contemplation never lasts long; the natural being that only now revealed itself to me in the mystery of reciprocity has again become describable, analyzable, classifiable – the point at which manifold systems of laws intersect.”¹⁸⁴ It is, however, possible to live a life defined entirely by the I-It, and I think that is a life in which our own reason is paramount, and the thirst for rationality that creates lies is born. We are able to move back and forth from “It-world” to “You-world,” and this, it seems to me, is the way we check the process of reason.

One cannot live in the pure present: it would consume us if care were not taken that it is overcome quickly and thoroughly. But in pure past one can live; in fact only there can a life be arranged. One only has to fill every moment with experiencing and using, and it ceases to burn.

And in all the seriousness of truth, listen: without It a human being cannot live. But whoever lives only with that is not human.¹⁸⁵

I do not disparage reason any more than Buber disparages the It-world. We cannot live without the It-world, and we have no ability to move forward in it without reason. We can justify our positions by reason and never leave the world of experience. We can hear and respond to the second-person claims and demands of others, and never

¹⁸² Buber, *I and Thou*, 57-59.

¹⁸³ Kauffman, 17.

¹⁸⁴ Buber, *I and Thou*, 68.

¹⁸⁵ *Id.*, at 84-85.

truly enter into an event of relation. We may have discourse in which we analyze and justify assertions of truth or normative rightness, and still never experience a second-person relation. Indeed, oftentimes, we will contemplate the circumstances, and conclude that we do not want to enter into such a relation, either personally or in our business and professional lives.

It seems to me, however, that a business or professional life, as much as a personal life, is fraught with the possibility of transcendental illusion, of mistaking knowledge for belief, or vice versa. In the world of I-It, there is no other acting as a check on the product of our own reason, because every It is an object or obstacle with which we must deal. Recall Kant's skepticism about whether we might ever be able to know if our determination of the "ought" in a particular circumstance is the product of practical reason, or our own material inclinations. It is possible that what we learn during the process of litigation can shed light on our own motivations. But, it seems to me, without some fundamental change in perspective, our response in the context of litigation stands a good chance of being rationalization all the way down. For just a fleeting moment, we need to stand in relation to another, see that other not as an It but a You, and consider the implications on our choice of action.

2. Dialogue

Buber plants his feet firmly in this world in *Between Man and Man*. Buber is rightly called a theologian, and his writing is no doubt more lyrical than is common for the hard-headed world of business. But if we take religious dogma as the ultimate in deeply-held belief, and consider what Buber has to say about dialogue in that context, we ought to be able, *a fortiori*, to draw conclusions about secular beliefs no less deeply held.

The essence of dialogue is rooted in a relationship between one person and another, and that relationship transforms the nature of the communication. “Moreover it is completed not in some “mystical” event, but in one that is in the precise sense factual, thoroughly dovetailed into the common human world and the concrete time-sequence.”¹⁸⁶ Dialogue, moreover, does not occur when I perceive you in my capacity as observer or onlooker: the person observed “is for them an object separated from themselves.”¹⁸⁷ In dialogue, I perceive in the other person “something, which I cannot grasp in any objective way at all, that ‘says something’ to me.”¹⁸⁸ How I receive this something is a matter of real speech (not a metaphor for speech), and is second-personal in a way that is even more fundamental than the second-person authority described by Darwall.¹⁸⁹

This, it seems to me, is the heart of the mystery that lies beyond reason. I think Buber has touched on our ability to employ reason to rationalize and justify when he observes:

Each of us is encased in an armour whose task is to ward off signs. Signs happen to us without respite, living means being addressed, we would need only to present ourselves and to perceive. But the risk is too dangerous for us, the soundless thunderings seem to threaten us with annihilation, and from generation to generation we perfect the defence apparatus.¹⁹⁰

The moment of intuition, reality untarnished by self-deception, occurs in moments that “stir the soul to sensibility.”¹⁹¹ I find in Buber’s lyricism the synthesis of all I have discussed here: an intuitional sense, derived from a second person relationship, that the

¹⁸⁶ Buber, BETWEEN MAN AND MAN, *supra* note , at 5.

¹⁸⁷ *Id.*, at 11.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*, at 11-12.

¹⁹⁰ *Id.*, at 12.

¹⁹¹ *Id.*

world is something other than what I have rationalized and justified it to be. “It can neither be interpreted nor translated, I can have it neither explained nor displayed; it is not a what at all, it is said into my very life; it is no experience that can be remembered independently of the situation, it remains the address of that moment and cannot be isolated, it remains the question of a questioner and will have its answer.”¹⁹² We check our tendency to self-deception not by argumentation (which as an exercise of reason is subject to the same tendency) or even by understanding and responding to an authoritative second-person claim or demand, but by the inexplicable intuitive insight we obtain only by hearing and accepting what something says to us. I do not believe that we are required to satisfy the questioner, but only to hear the question: “The basic movement of the life of dialogue is the turning towards the other.”¹⁹³

It is interesting to consider how pragmatic Buber is on the subject of dialogue, particularly as contrasted with monologue. The problem with monologue is not (as we have seen) a failure in richness of visions and thoughts. If monologue is reason, and is checked in the empirical world by correspondence to empirical reality, in matters of ethics, dialogue is a way we might test the validity of the principles we, in our freedom, legislate for ourselves. It is not inconsistent with Kantian freedom and autonomy to observe: “He who is living the life of monologue is never aware of the other as something that is absolutely not himself and at the same time something with which he nevertheless communicates.”¹⁹⁴ Dialogue is a relationship in which we hear the

¹⁹² *Id.*, at 14.

¹⁹³ *Id.*, at 25

¹⁹⁴ *Id.*, at 23.

questions of another; it is not altruism and it is not love.¹⁹⁵ Indeed, Buber concludes his introduction to dialogue by confronting the question whether he has articulated an other-worldly mysticism, and not a way of approaching this world. He acknowledges he has selected his examples as paradigm (“for this reason I appear to draw my tales from the province which you term the ‘intellectual’ . . .”). He is, however, concerned not with the pure, but with the mundane break-through.¹⁹⁶

3. Dialogue as the Source of Business Ethics

How could the process of making difficult business decision possibly be informed by the philosophy of Martin Buber? Buber raises the question himself: “You ask with a laugh, can the leader of a great technical undertaking practise the responsibility of dialogue?” and answers “He can.”¹⁹⁷ I want to pose some hypothetical situations, and consider the role of Buberian dialogue in them. I am willing to concede the simultaneous operation of economic laws and moral laws. In questions of ethics, we are always dealing with both the right and the good. They are, respectively, the embodiments of the critical distinction in Kant between autonomy and instrumentality. Our needs in everyday life – the good – are fulfilled by instrumental relationships all the time. Physical and economic laws are discernible that govern the satisfaction of what Kant calls our inclinations (our tangible and intangible needs). The principle of microeconomics that a rational firm shuts down the plant when the marginal cost

¹⁹⁵ *Id.*, at 24. “This man of modern philosophy, however, who in this way no longer thinks in the untouchable province of pure ideation [who takes up nature and addresses it in his own thought], but thinks in reality – does he think in reality? Not solely in a reality framed by thought? Is the other, whom he accepts and receives in this way, not solely the other framed by thought, and therefore unreal? Does the thinker of whom we are speaking hold his own with the bodily fact of otherness?” *Id.*, 32.

¹⁹⁶ *Id.*, at 41.

¹⁹⁷ *Id.*, at 44.

exceeds the marginal revenue is morally neutral (at least it is to me, but I recognize others, socialist or critical legal theorists, for example, may disagree).

Audi is correct in perceiving that real-world ethics cannot merely be the elevation of duty over consequence; there must be some accommodation of principle to pragmatics. Hence, the “ought” of business must be based on consequence as well as duty. As in the case of Jack and Stephanie, there is no perfect justice. We might, however, define achievable justice as the appropriate reconciliation of the “is” and the “ought.” If the world is not as we believe it ought to be, we may react to the gap in several ways. We may work to close the gap. Or we may justify the gap. But we must, if we recognize there is a gap between the *is* and the *ought*, reconcile it somehow. The reconciliation may direct itself outward in action, or inward in contemplation, or both. We can close the gap by moving the world as it is outwardly closer to the way it ought to be. We may consider the views of others and conclude that our view of the “ought” needs to change. But the process of achievable justice is always distinct from justification: that smug self-satisfaction in the way things are, and, indeed, the proof by means of social science methodology that way things are is the way they ought to be. Nor is justice the knee-jerk rejection of anything that is merely because it is or has been that way in favor of a personal vision of what ought to be.

So I propose an addition to the mix by which we make difficult ethical judgments not just consideration of Rossian duties and intrinsic value (i.e. the determination of the good or bad that may result from acting out of a perceived duty). I think we have an intuitive sense of the extent to which we are rationalizing and justifying that might

become apparent to us when we consider not just the claims and demands of, but our very relationship to, another.

a. Difficult Choices

A troubled company hires a new CEO. Within the first several weeks, it becomes clear to her that the demand for the company's product has diminished almost overnight (like buggy whips or mainframe computers or VCRs) because of the rapid appearance of a superior substitute. She determines there is no option but to write off some assets and sell others. The consequence will be that 2,000 people will be laid off, but for 8,000 others, the business and their jobs have a chance to survive.

This situation, it seems to me, is another difficult choice between the good and the right. There is no perfect answer, and moral qualms in any course of action, even if legally justifiable. I believe it is an illusion (indeed, a dangerous one at times) if the “is” or “ought” prevails automatically, and moral error if there is no struggle to reconcile them. I think it is an abdication of responsibility in the world of experience not to consider the need to reduce staff if conditions warrant, and to act on the need. The moral question, on the other hand, is: are they people or things to you morally at the time the real world makes you do that? How do you handle the layoffs? Do you provide outplacement? Is the severance sufficient? Have you developed your employees so they have transferable marketable skills? Take the example regarding the toxicity of the flame retardant chemicals. To what extent is the decision being motivated by short-term earnings versus scientific evidence? To what extent is the view of the evidence itself tainted by the outcome you want it to show?

b. Opportunism

Your client is a large Atlantic City hotel/casino. It has a non-binding letter of intent under which a frozen yogurt shop owner will close her operation in Newark and take space in the hotel. The negotiations have been going on for six months but no final binding agreement has ever been

*signed. The corporate development officer of the owner of the hotel/casino says "We have just come up with a more synergistic alternative to fill the space, and, now that we think about it, it's really a better deal. Is there any reason why we can't do it?"*¹⁹⁸

In economic theory, at least, “the fundamental function of contract law . . . is to deter people from behaving opportunistically toward their contracting parties, in order to encourage the optimal timing of economic activity and (the same point) obviate costly self-protective measures.”¹⁹⁹ The preceding hypothetical is taken from a New Jersey case in which the court held the hotel/casino liable on a theory of promissory estoppel, even though a definitive agreement (one that presumably would have embodied the promise) had never been executed. I once argued to my contracts class that the case, even if correctly decided on its particularly egregious facts, should not be expanded to impose the gray standards of reasonable reliance on the kinds of pre-contractual investments a sophisticated party might make in a complex business deal. But the law on that subject is relatively indeterminate and results hard to predict, even under law and economics.²⁰⁰

Does this situation invoke an ethical issue? I think so. I am not sure whether the law should or should not incorporate the doctrine of promissory estoppel in this situation, but I have no problem in concluding, were I the hotel/casino management, that we were ethically bound to our word, and that, in any event, taking the position that we were wholly without any responsibility, legally or otherwise, because there was no completed contract would have been wrong. Part of my intuition in this particular case has to do with the relative size of the parties, because I do not have the same intuition about pulling

¹⁹⁸ See *Pop's Cones, Inc. v. Resorts International Hotel, Inc.*, 307 N.J. Super. 461, 704 A.2d 1321 (1998).

¹⁹⁹ Richard A. Posner, *ECONOMIC ANALYSIS OF LAW*, 6th ed. (2003), at 94-95.

²⁰⁰ See Lucien Arye Bebchuk & Omri Ben-Shahar, *Pre-Contractual Reliance*, 30 J. LEGAL STUD. 423 (2001).

out of a deal well into the negotiation in say, a merger of equals between two very large companies where there is no legal obligation to close.

The beloved manager of a plant in a small town in Alabama dies in a freak boating accident over the Memorial Day weekend. It turns out he had already been “managed out” of the organization and his severance package was dependent on his staying with the company for a transitional six-month period. By dying, he has technically not fulfilled the condition of the severance package. His company-sponsored life insurance is, however, available to his young widow.

I was faced with this issue. Our divisional vice president of human resources asked me to get involved in defending the decision a business unit human resources director had made to deny the severance benefit to the widow, and to leave her only with the life insurance benefits (the theory being that, by dying, the manager had failed to fulfill his end of the deal). I listened to the situation, and argued that it was untenable for us to be taking that position, regardless of the technicalities of the employment agreement. Clearly, there were utilitarian arguments – what would the effect on the company be if we were perceived to be taking an unjust or overly technical view in a dispute with the young widow of a beloved employee in a small town? It seemed to me, however, that there was a deeper issue of right and wrong. (Fortunately, our corporate vice president of human resources overruled the decision, and both benefits were paid.)

I tell the story not to demonstrate any unusual righteousness on my part, but to demonstrate what I think most of us sense without knowing the source: doing the right thing is something beyond the use of instrumental reason and the employment of norms and maxims (including legal norms) to achieve an end. It involves the whole of one’s substance, one’s active participation in all of the reality of the world, not merely reliance

on habits and customs.²⁰¹ Do we then live in some kind of moral anarchy, without norms, and in reliance on each person's intuition? Again, I find something of a satisfying answer in Buber, consisting with something I have said before: all we can do is commit ourselves to the struggle to reconcile law and equity, rules and exceptions, and live the question.²⁰² And, finally, we undertake the struggle not just in our solitary reflections (which may be self-deceiving) but from a second person standpoint, cognizant of our relationships with our opponents as well as our allies.

c. Conflicts with Business Opponents

The company has signed a definitive agreement to sell one of its divisions. The acquiring company has had trouble raising money for the purchase. The definitive agreement provides Seller may factor accounts receivable of the division until the closing. In practice, what this means is that Seller sells the accounts receivable to a bank (a factor) for a small discount, and takes the cash out of the business. Under the framework of the agreement, it all should work out in the wash, because the post-closing adjustment, which compares the net assets of the division as of the closing with a base line net asset figure, should account for it. Acting on this legal right, the company has factored \$50 million in receivables, and so it will owe the Buyer that \$50 million (plus interest) in about six months when the parties resolve all the post-closing adjustment claims. On the day of the closing, Buyer advises the company that its financing is conditioned on the accounts receivable being there to help finance the business over that intervening six months, and because of what Seller did (perfectly permissible under the contract), \$50 million will be missing from the business. The Buyer will be in breach of loan covenants from the day it first owns the business, and perhaps even insolvent in the equity sense (unable to pay bills as they come due). Hence it is threatening not to close.

What I have found unique among great business leaders is their ability to listen to their own lawyers and executives argue passionately why the company's position is right, and then make decisions that transcend the particular legal rights and duties in play at the time. While it is certainly possible this is a wholly consequential process, my casual

²⁰¹ *Id.*, at 135

²⁰² *Id.*

empiricism is that it is not. In considering the opponent, the great business leader thinks of her not only as means, but as ends also. I believe it is because the leader puts herself, in reality or hypothetically, in an event of relation with the other side, and sees the dispute from the perspective of the other leader.

The preceding story was in fact the circumstance we faced as sellers in closing an acquisition valued at almost three-quarters of a billion dollars. As a result of prior disagreements, the deal had been re-negotiated to require the buyer to pay \$100 million in liquidated damages if it failed to close. For whatever reason, the buyer did not tell us about the problem it faced until late in the evening preceding the scheduled closing. I was at the law office where we were preparing the closing documents; the senior executives of the buyer were present, but our company's senior executives were not. We scheduled a conference call between the buyer's executives and our chief financial officer at 2:00 p.m. The arguments were like ships passing in the night. In particular, our CFO kept repeating the theme that the contract gave us the right to do what we did, and it was the buyer's fault if it did not read or understand the contract. The call ended in an impasse.

I was the working in-house lawyer for the company; my job was to get the deal closed. It was not to make fundamental decisions about whether to stand on our contract rights and litigate, or make a concession and close. I was sure that the buyer was not bluffing; unlike our other executives I could see the sweat beads and the shaking hands during the two o'clock call. A solution was available: we could reverse the effect of the factoring, and put the cash back into the business, but it would mean losing the leverage that the CFO wanted in the post-closing adjustments by being the party owing the money

(an instance of the Golden Rule in business: “he who has the gold rules”). I participated in a phone call with my boss, the company’s general counsel, the CFO, and the company’s chairman and chief executive officer, widely regarded as one of the great business leaders of his generation. I listened to the CFO argue his position to the CEO, why it is was we had been justified in factoring the receivables under the contract, his distrust of the buyer’s inclination to perform a fair post-closing adjustment, and his desire to have the leverage by holding the cash. The CEO listened, and quickly replied, in so many words, “look, whatever the contract said, I would have been upset with us too, if the other side had done that.” Our internal impasse broke; we made the decision to put the cash back, and the deal closed.

The important thing to understand is that the CEO’s reaction was not a foregone conclusion. Whether the decision itself was ethical, whether it emanated from some idea of moral duty or consequentialism, nevertheless, it was different than a purely legal calculation of rights and duties under the contract. And its essence, it seems to me, was for just a moment, considering not just the claim of the other, but the relation with the other.

d. Conflicts between Right and Right

You are managing a fairly significant piece of litigation. Your view of the probability of an unfavorable outcome will likely determine both whether the case is disclosed to the public, and whether an accounting reserve is set (i.e. the estimate of liability is taken as a current expense). Intuitively, you know there is about a 75% chance the case will end up settling for a figure that is material to the company’s earnings in a specific quarter, but almost no chance that it will threaten the long-term viability of the company.

The context here is not direct conflict, but issues between people in an organization whose job responsibilities drive them toward different conclusions on particular issues.

Think, for example, of the inherent conflict between the sales department and the credit department. What is the function of the sales department and how it is measured? The answer is: by selling products to customers. Of course, if the bill is not collectable, there is no profit and the sale was pointless. But if the sales department is measured on sales (or more significantly, sees its own success in terms of making sales), the collection of the proceeds is someone else's problem. Someone else is the credit department, which is measured on collections (or more significantly, sees its own success in terms of having a low bad debt as a percentage of sales). There is a natural conflict between sales and credit.

Consider the information technology department. The IT department is generally managed by a senior IT vice president in the corporate office. The job of the IT department is, among other things, to insure dependability and security in the company's computer networks. That takes money. The job of the business division is to make profits, which involve increasing revenues and reducing costs. When the IT relies on its functional expertise to incur costs in the business division, there is a natural conflict with the leader of the division whose job it is to reduce costs.

Lawyers are not immune from this kind of conflict. In the hypothetical at the beginning of this section, let us now also assume the CEO believes the company's stock price will fall in the short term if the current earnings are required to reflect a charge for the outcome of the present litigation. Moreover, there are no other litigation charges for the quarter, and so disclosure of the litigation reserve that would be established will tell the other side not only how much the company expects to have to pay, but that the amount has already been reserved, so that future earnings will not be affected (although

cash flow will be) if the case is settled up to that amount. The auditors insist, on the other hand, that if the lawyers believe there is more than a 50% probability of an unfavorable outcome, and the amount can be reasonably estimated, that amount must be reflected as a charge to current earnings.

What are the implications of law and ethics in this situation? Under the securities laws, the company would be liable if it made a materially misleading statement or omitted to state a fact required to make a statement not misleading.²⁰³ We may assume that, if litigation outcome is material, failure to disclose it would be an omission making the financial statements misleading. Moreover, under the Statement of Financial Accounting Standards No. 5 (“FAS 5”), part of the definition of generally accepted accounting principles (“GAAP”), if an event is probable and the amount of the loss is reasonably estimable, FAS 5 requires that the obligation be booked as an accrual (an expense, and hence a charge to earnings) on the income statement and a liability on the balance sheet.²⁰⁴ Accountants and auditors use the word “probable” to indicate one of three different states of likelihood – the other two are “reasonably possible” and “remote” – that future events will confirm the incurrence of a liability. “Probable” is defined as “[t]he future event or events are likely to occur.” Telling an auditor one has a better than even chance of losing a case in which the amount of the loss can be estimated is tantamount to incurring the expense. Lawyers, on the other hand, use loose language of probability to convey a sense of the outcome to their clients on a regular basis. “Your odds of winning are 50-50, 60-40, one in ten, etc.” The ABA has attempted to cover these conflicting uses of language in its Statement of Policy Regarding Lawyers’

²⁰³ [cite to Rule 10b-5 and representative cases]

²⁰⁴ *AICPA Professional Standards* (1987), AU §337C, 407.

Responses to Auditors' Requests for Information by claiming that accountants and lawyers simply use the word "probable" in different ways.²⁰⁵

I can say categorically that I do not know what the ethical answer is, or even if this constitutes an issue of ethics. The ABA policy provides enough cover for a lawyer to justify a conclusion that any outcome is not "probable" by disclaiming any meaning to the way lawyers refer to the probabilities of outcomes (the justification being that the amount of variability in the estimate means that the statement of probability is inherently unreliable). What I do know is that lawyers, auditors, and CEOs will often butt heads over the answer not in any sense because they want to get to the right answer, but because they believe they have a professional responsibility to put the answer in a particular way. The accountants and auditors want to follow the dictates of GAAP; the lawyer wants to avoid prejudicing her ability to litigate the case to a favorable outcome; and in the face of conflicting views from the professional functions, the CEO is inclined not to take a charge to earnings anything that is not required (unless, of course, he views it as being to his advantage to take the charge, in which case several of the positions are reversed).

V. CONCLUSION

Obviously, Martin Buber never faced any of these particular situations. But he did suggest a concept of ethical character I believe is as applicable in business as it is in any personal decision we might face. It starts with facing every bit of reality inherent in the situation – oneself, one's colleagues, one's adversary, the uncomfortable possibility

²⁰⁵ *Id.*, at 409-10 ("Concepts of probability inherent in the usage of terms like "probable" or "reasonably possible" or "remote" mean different things in different contexts. Generally, the outcome of, or the loss which may result from, litigation cannot be assessed in any way that is comparable to a statistically or empirically determined concept of "probability". . . . Lawyers do not generally quantify for clients the "odds" in numerical terms; if they do, the quantification is generally only undertaken in an effort to make meaningful, for limited purposes, a whole host of judgmental factors applicable at a particular time, with any intention to depict "probability" in any statistical, scientific or empirically-grounded sense.")

that a rule does apply or does not apply, the uncomfortable possibility that one's most deeply held beliefs or desires are wrong, or might not be satisfied.²⁰⁶

I started my career as a litigator, and how I approached conflict was structured by maxims and habits. Our goals were dictated by our clients' demands, and we worked within a constrained model, like rational frogs, employing instrumental legal reasoning to win the argument. I used to suggest that one of the differences between being a business litigator and a transactional lawyer was the familiarity with the turf. In business litigation, the business person is in the realm of the lawyer and his system. The maxims, habits, customs are foreign to the business people. Data, such as hearsay, on which she might normally rely in making a decision, is legally irrelevant. The mode of discourse, as borne out by every pre-testimony preparation session between witness and lawyer, is artificial and designed not for explanation but for advantage.

When I became a transactional lawyer later in my career, the turf changed. In a business deal, the transactional lawyer is on the business turf. At least at first, the maxims, habits, and customs are foreign to one trained in the law. But after a while, those maxims, habits and customs become clear. There is a sequence to the completion of an acquisition. There is appropriate disclosure, and an understanding, by and large, of the rules by which risk is allocated between buyer and seller. Nevertheless, our goals continued to be dictated by the clients' demands, and we employed the tools of our trade to accomplish them.

It was not until I was an in-house lawyer that the distinction between being a great lawyer and having ethical character began to become clear to me. (That is not to say that lawyers cannot have great ethical character. Of course they can. But it arises outside of

²⁰⁶ Buber, *BETWEEN MAN AND MAN*, supra note , at 134-35.

the mere application of maxims and habits.) I remember feeling, and expressing to a former law firm colleague, that every bit of my personality, every bit of accumulated wisdom (such as it was) or experience, factored into the advice I was giving, and the decisions I was making.

When I am faced with a hard choice, I fear nothing like my ability to persuade myself. Kant understood that we can never really tell if the principle of our action is determined by our material wants and inclinations, or by recognition of the universality of the rightness in what we are choosing. I agree. Whether in our own minds, or in a group of like-minded executives, we are wholly capable of mistaking what makes us happy or fulfilled for what is right. And the only check on the power of reason, and its thirst for rationality that produces lies, is openness to the insight and reality, however uncomfortable or distasteful or opposed to my own reasoned conclusions, that come from another.