Principled Consequentialism

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Abstract
This Article characterizes and seeks to reconcile two competing approaches to legal reasoning, through the lens of the problem of the determinacy of legal doctrine. On the “neo-formalist” approach, characteristic of many modern liberal scholars, the appropriate doctrinal answer to any legal problem can be determined by working out, in a quasi-deductive way and in isolation from consequentialist considerations, the implications of a small and stable set of legal principles. On the “neo-realist” approach, characteristic of many economic analysts of law but also of certain leftist critics of liberalism, principles provide no determinate answer to legal problems; the only way to decide on the appropriate legal doctrine is to ask about the effects of adopting that doctrine on some favored value. The Article accepts the neo-realist claim that doctrine is indeterminate, but also accepts the neo-formalist claim that principles matter. It is argued that legal reasoning can, and should, follow a method of “principled consequentialism”. That is, legal decision-makers can use legal principles to establish a range of acceptable legal doctrines, and can then consider the consequential effects of those doctrines in choosing among them. The possibility and desirability of understanding legal reasoning as a form of principled consequentialism is illustrated through an examination of several specific legal doctrines, in particular, the problem of choosing appropriate standards of fault for criminal liability.
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I. INTRODUCTION

At least since the days of the early legal realists, it has been persuasively argued that the abstract normative principles that the law seeks to express cannot determine particular legal doctrines.\(^1\) The claim that legal principles do not determine doctrine has several contemporary forms, including the skeptical or neo-Nietzschean\(^2\) effort to unmask law’s 


\(^2\) I adopt this term from Charles Taylor, *Sources of the Self* 99-103 (1989). “Neo-Nietzschean thinkers have ... tried to show how various forms of social exclusion and domination are built into the very definitions by which a hypergood perspective is constituted ...” *Id.* at 71. (Taylor defines “hypergoods” as “goods which not only are incomparably more important than others but provide the standpoint from which these must be weighed, judged, decided about.” *Id.* at 63.) The exemplary neo-Nietzschean among contemporary legal theorists is perhaps Stanley Fish. While he shares many of the
pretensions to neutrality, equality, and principle, the leftist vision of a legal order free from domination and exploitation, the pragmatic rejection of the idea that legal doctrine derives directly from principle, and the legal economists’ attempt to render legal

Critical Legal Scholars’ attitudes, and can carry out a Critical unmasking of liberal legal doctrine with unsurpassed verve and clarity, he stands apart from the Critics in an important respect: he insists that what replaces the liberal legal mask is always another mask. See, for example, STANLEY FISH, DOING WHAT COMES NATURALLY 315-467 (1989); STANLEY FISH, THERE’S NO SUCH THING AS FREE SPEECH … AND IT’S A GOOD THING, TOO 141-230 (1994) [hereinafter FISH, FREE SPEECH]. Compare FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL §4 (1886) (Walter Kaufman trans. 1966): “To recognize untruth as a condition of life—that certainly means resisting accustomed value feelings in a dangerous way; and a philosophy that risks this would by that token alone place itself beyond good and evil.”


4 See ROBERTO UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996) [hereinafter UNGER, LEGAL ANALYSIS].

5 JULES COLEMAN, THE PRACTICE OF PRINCIPLE 5-6 (2001) [hereinafter COLEMAN, PRACTICE]; Margaret Jane Radin, The Pragmatist and the Feminist, in PRAGMATISM IN...
principle determinate by invoking the concept of economic efficiency. The realist or critical claim that doctrine is indeterminate might seem to be so well established, or at least so frequently argued for, that there is no purpose in making it again. But under the influence of what I will call the neo-formalism of late 20th-century liberal political and legal theory, the claim that doctrine is determinate has not lacked defenders. Indeed, 


Ronald Dworkin’s claim that there is a right answer in every case, no matter how hard or politically charged the case appears to be, puts the claim for determinacy as high as it can go.9

The stakes in this debate are high. For some neo-formalists, the determinacy of doctrine is intimately connected with the distinction between law and politics. They fear

11 (1990). I use the terms “neo-formalism” to highlight two related attributes of this kind of argument: (1) the rejection of realism and positivism as ways of understanding the law’s functions and origins; and (2) the quasi-deductive method of working from principles to doctrines and then to particular results in cases.

The inclusion of Dworkin among the neo-formalists may seem odd in light of his commitment to an interpretive understanding of law. But his equally important commitments to right answers and to a certain form of principled argument are quite formalist, perhaps even Kantian. See James Boyle, Anachronism of the Moral Sentiments? Integrity, Postmodernism, and Justice, 51 STANFORD L. REV. 493, 502-510 (1999); SCHLAG, ENCHANTMENT, supra note 3, at 68.

8 The neo-formalist claim that doctrine flows in a reasonably determinate manner from principled legal argument typically does not extend to the stronger claim that the results of particular cases are determined by principle or by doctrine: see, e.g., WEINRIB, supra note 7, at 222-6.

9 See DWORKIN, RIGHTS, supra note 7, at 81-130; DWORKIN, PRINCIPLE, supra note 7, at 119-145.
that if doctrine is not determined by principle, it will be determined by something else: majoritarian conceptions of the good, subjective judicial preference, the rhetorical operations of advocates, or the straightforward operation of force.\(^{10}\) If doctrine were determined by these forces, the law could not defend its claim to be a normative ordering distinct from politics and morality. On the other hand, for the neo-realists, the indeterminacy of doctrine proves the futility of appealing to principle, and thus enables us to recognize the forces that really determine the content of doctrine.\(^{11}\) For the neo-formalists, the soul of law is principled argument; for the neo-realists, the soul of law, if there is one, is to be found in its consequential effects on other values; and each position is associated with a view about the legitimacy and determinacy of legal doctrine.

In this article, I take a step towards the reconciliation of neo-realism and neo-formalism. I accept the neo-realist claim that legal doctrine cannot be derived in any determinate way from abstract principles — indeed, I re-assert the claim through a critique of several contemporary neo-formalists. But I argue that the mere fact of doctrinal indeterminacy does not make principled legal argument impossible, as the neo-realists assume. The indeterminacy of doctrine means only that there may be more than one doctrine (or set of doctrines) that adequately expresses the principles underlying the law. Principle operates as a normative constraint — a rather loose one, to be sure, but a constraint nonetheless — when a legal decision-maker chooses one doctrine over another.

\(^{10}\) DWORKIN, LAW’S EMPIRE, supra note 7, at 190-195; see also id. at 214; Owen M. Fiss, The Death of the Law? 72 CORNELL L. REV. 1 (1986).

\(^{11}\) SCHLAG, ENCHANTMENT, supra note 3, at 30-39.
But the indeterminacy of doctrine implies that within the loose constraint of principle, the
decision-maker is free to consider factors that both neo-formalists and neo-realists take to be excluded by principle. In particular, since principled argument does not determine
document by itself, legal decision-makers can be expected, implicitly or explicitly, to make
consequentialist arguments in choosing among competing legal doctrines. Decisions
reached in this manner should not be considered unprincipled; nor should they be taken to indicate that principled legal decision-making is impossible. Neither principled argument nor an analysis of the consequential impact of the law fully determines legal doctrine;
instead, consequentialism can operate within a domain of doctrinal possibilities that are consistent with principle.

This approach — which I shall call principled consequentialism — is perhaps best understood as a variety of legal pragmatism. Imagine a legal decision-maker deciding, not a particular case, but the content of the doctrine to be applied to that case. Should liability in tort be strict or fault-based? Should liability for a given criminal offense require proof of a subjective form of *mens rea* or merely a departure from a standard of reasonable behavior? The decision-maker will pay respect to principles such as freedom, fairness, and equality, but will recognize that expressing respect for those principles through legal doctrine and decision-making can never be disentangled from the consequences of adopting that doctrine. Thus, he or she is neither wholly principled nor wholly consequentialist; he or she is ready to accept evidence concerning how effectively the doctrine chosen embodies principle and forwards other goals, and to change his or her mind if the doctrine does not work out as expected. He or she will reject doctrines that plainly violate principle, but will not expect principle alone to determine doctrine;
instead, he or she will allow practical and empirical arguments about the effects of legal
doctrine on other values to play a role in the decision. He or she believes that the answer
chosen is correct, not in the strong sense of being the unique expression of the governing
principles, but in the weaker sense of being consistent with those principles. He or she
recognizes that both the doctrinal answer and the principled, practical, and empirical
arguments on which it was based, are subject to reconsideration and revision in the light
of experience. 12 He or she is, in short, taking up a pragmatic attitude towards the task of
determining legal doctrine. 13

12 See CHARLES SANDERS PEIRCE, VALUES IN A UNIVERSE OF CHANCE 118-30
(Philip P. Wiener ed. 1958); WILLIAM JAMES, PRAGMATISM, IN WRITINGS 1902-1910 479
(Bruce Kuklick ed. 1987) [hereinafter JAMES, PRAGMATISM]; CHERYL J. MISAK, TRUTH
AND THE END OF INQUIRY (1991); [hereinafter MISAK, INQUIRY]; CHERYL J. MISAK, TRUTH,
POLITICS, MORALITY (2000) [hereinafter MISAK, TRUTH]; ELIZABETH ANDERSON, VALUE
IN ETHICS AND ECONOMICS 91-116 (1993); HILARY PUTNAM, REALISM WITH A HUMAN
FACE (1990) [hereinafter PUTNAM, REALISM]; RICHARD J. BERNSTEIN, THE NEW
CONSTELLATION: THE ETHICAL-POLITICAL HORIZONS OF MODERNITY/POSTMODERNITY
(1993); HILARY PUTNAM, PRAGMATISM: AN OPEN QUESTION (1995) [hereinafter
PUTNAM, PRAGMATISM]; COLEMAN, PRACTICE, supra note 5, at 3-10.

13 See Radin, Pragmatist, supra note 5; Daniel A. Farber, LEGAL PRAGMATISM AND
THE CONSTITUTION, 72 MINN. L. REV. 1331 (1988); Thomas C. Grey, HOLMES AND LEGAL
PRAGMATISM, 41 STANFORD L. REV. 787 (1989) [hereinafter Grey, HOLMES]; Frank
Michelman & Margaret Jane Radin, PRAGMATIST AND POSTSTRUCTURALIST CRITICAL LEGAL
My task in this article is to defend this pragmatic model of decision-making about legal doctrine against the neo-formalist claim that it is unprincipled and against the neo-realist claim that it cannot be principled. Neo-formalism claims that without principle, the law would be an incoherent jumble of competing policies and interests; neo-realism claims that principle serves at best to obscure, and at worst to mystify, the operations of


Richard Posner identifies himself as a pragmatist, and his jurisprudential writings illustrate many of the themes associated with both philosophical and legal pragmatism. See POSNER, PROBLEMS, *supra* note 6, at 454-69; RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 227-310 (1999) [hereinafter POSNER, PROBLEMATICS]; RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003). But his pragmatism is of a very instrumental variety, as illustrated by his extreme skepticism about the value of principled legal argument and his unrelentingly consequentialist account of adjudication. See POSNER, PROBLEMATICS, *supra*, at 3-38, and footnotes 65-74 *infra* and accompanying text. For the purposes of this paper, Posner is more plausibly classified as a neo-realist than as a legal pragmatist.
policy and interest. The pragmatic understanding of legal decision-making accommodates and structures both of these claims. Without principle, the law would have no purpose; but since principle is a rather loose constraint on doctrine, there is ample room for the play of policy and interest — and in particular for visions of the good — to operate.

II. PRINCIPLES, CONSEQUENCES, AND LEGAL REASONING

A. Principles, Doctrines, and Rules

Principles, doctrines, and rules are all legal norms in that they demand compliance by legal actors and legal decision-makers. Legal principles are the most abstract legal norms; they state, in general and often uncompromising terms, norms to which legal doctrines and legal rules should comply. A legal doctrine stands somewhere between a principle and a rule. It is an attempt by an authoritative legal decision-maker (a legislature, a court, an administrative tribunal) to articulate a legal principle or policy in a rule-like way. A doctrine is thus more particularized and less abstract than a principle, but more abstract and less rigid than a rule.14 A doctrine does not apply itself once the facts are determined, in the manner that a rule is supposed to; rather, a doctrine states a legal

14 For the rigidity of rules in this sense, see DWORKIN, RIGHTS, supra note 7, at 24-27. My understanding of the relationship between principles, doctrines, and rules is somewhat akin to Hall’s. See JEROME HALL, PRINCIPLES OF CRIMINAL LAW 9-11 (1947).
consideration that may or may not apply to a given set of facts, depending on the
influence of other doctrines and subsidiary rules.

To see these distinctions, consider the following example. According to the
Canadian constitution, “Everyone has the right to life, liberty and security of the person
and the right not to be deprived thereof except in accordance with the principles of
fundamental justice”.\textsuperscript{15} This is a very abstract constitutional guarantee, the content of
which depends on filling in the meaning of words like “liberty” and “fundamental
justice” in a principled way. Canadian courts have done so with reference to the values
that animate the Canadian Constitution as a whole.\textsuperscript{16} One way in which this principle has
been filled in is with the further principle that punishing the innocent offends the
principles of fundamental justice. This principle, in turn, supports various specific
doctrines that depend on how the court understands innocence; it is, for example, a well-
established doctrine of Canadian constitutional law that a person is, for penal purposes,
innocent unless some fault has been demonstrated; accordingly, liability without fault

\textsuperscript{15} Canadian Charter of Rights and Freedoms, §7.

\textsuperscript{16} The foundational case is Reference Re s. 94(2) of the Motor Vehicle Act (B.C.),
[1985] 2 S.C.R. 486 [hereinafter \textit{Motor Vehicle Reference}], where the Supreme Court of
Canada explicitly rejected an originalist interpretation of the Canadian Charter even
though evidence of some of the drafters’ intentions was readily available: \textit{ibid}. at 495-
509. On the underlying values of the Canadian Constitution more generally, \textit{see}
Reference}].
offends the principles of fundamental justice. Consequently, it is a rule of Canadian constitutional law that imprisonment for an offense of absolute liability violates §7 of the Charter and, absent a justification under §1, imprisonment for an offence of absolute liability is unconstitutional.


18 The term “absolute liability offense” is used in Canadian criminal law to describe what is called a “strict liability offense” in other jurisdictions. That is, an offense is one of absolute liability where the prosecution is not required to establish fault, and the accused has no opportunity to establish lack of fault, so that the accused is liable regardless of fault. In Canadian criminal law, the term “strict liability offense” is a term of art used to refer only to those offenses, typically enacted to enforce regulatory statutes, which have the following structure: the prosecution is required to prove the *actus reus*, but the accused may avoid liability by establishing a defense of due diligence on a balance of probabilities. *See R. v. Sault Ste Marie (City), [1978] 2 S.C.R. 1299.* In *R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154*, the Supreme Court held that, in the regulatory context, strict liability offenses did not offend the Charter of Rights.

19 These rules arises as follows. § 7 of the Charter is engaged where state action affects life, liberty or security of the person; everything the state does that affects one of these three protected interests must comply with the principles of fundamental justice. “No liability without fault” is a principle of fundamental justice. Therefore, a person cannot be imprisoned (deprived of liberty) when penal liability is imposed without proof of fault. *See Motor Vehicle Reference, supra* note 16, at 575; *R. v. Hess; R. v. Nguyen, [1990] 2
The American constitution has a similar principle: “No person ... shall be deprived of life, liberty, or property, without due process of law”. Yet American constitutional doctrine relating to fault in penal law is quite different from Canadian doctrine. Although there is a strong presumption in favor of fault as a matter of statutory interpretation, it has never been held that due process forbids strict liability for regulatory offenses, and there appears to be no constitutional rule prohibiting strict liability in the criminal law.

S.C.R. 906, 918; R. v. Pontes, [1995] 3 S.C.R. 44, 59-60. This chain of reasoning — whether conducted at the highest level of principle, the intermediate level of doctrine, or the lowest level of rule application — does not itself determine what counts as “fault” or as a deprivation of “liberty” (though imprisonment is an easy case).

20 U.S.C. Const. Amend. V; see also Amend. XIV.


22 Shevlin-Carpenter v. Minnesota, 218 U.S. 57 (1910); United States v. Balint, 258 U.S. 250 (1922); United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Freed, 401 U.S. 601 (1971). In Balint, narcotics offenses were characterized as *mala prohibita* rather than *mala in se*. It is far from obvious that this characterization would be appropriate today.

The doctrine concerning the constitutionality of strict liability for true crimes, or *mala in se*, is mixed. It has on occasion been held that the due process clause prevents a
Principles, doctrines, and rules should thus be thought of as lying on a continuum of ease of application. A principle is very general and requires a host of supporting state from eliminating the knowledge element of an offense, though usually not because strict liability in itself is unconstitutional: see, e.g., People v. Estreich, 75 N.Y.S.2d 267 (1947) (elimination of “diligent inquiry” defense to offense of receiving stolen property by junk dealer unconstitutional because “an illegal and arbitrary interference with a lawful business”); Smith v. California, 361 U.S. 147, 152-155 (1959) (city ordinance making possession of obscene material an offense of strict liability struck down as violating freedom of the press). Other cases have upheld offenses lacking knowledge requirements for critical components of the actus reus: see, e.g., United States v. Ranson, 942 F.2d 775 (10th Cir. 1991) (district court’s ruling that defendant could not assert defense of reasonable mistake of age to statutory rape charge did not deprive him of due process); Commonwealth v. Miller, 432 N.E.2d 463, 465 (Mass. 1984) (absence of any knowledge element for offense of statutory rape not unconstitutional). In Smith, supra, at 150, the Supreme Court stated that “it is doubtless competent for the States to create strict criminal liabilities by defining criminal offenses without any element of scienter ....” Under Canadian constitutional doctrine, such offenses would violate §7 of the Charter. See notes 16-19 supra. For a persuasive critique of the United States Supreme Court’s approach to mens rea in federal statutory offenses, see Richard Singer and Douglas Husak, Of Innocence and Innocents: The Supreme Court and Mens Rea since Herbert Packer, 2 BUFF. CRIM. L. REV. 859 (1999); see also Alan C. Michaels, Constitutional Innocence, 112 HARV. L. REV. 828 (1999).
doctrines and rules to be applied to a given set of facts; a doctrine is more rule-like than a principle but requires a degree of judgment in its application; a rule is (or is meant to be) easily applied once the facts are known. Another way to put the point is that if a principle or policy is a normative “concept”, then different doctrines stand as different “conceptions” of that “concept”.23 The claim that doctrine is determinate is the claim that one set of doctrines (conceptions of a principle) can be picked out as the correct consequences of adopting a set of principles (concepts); the claim that doctrine is indeterminate is the claim that there may be more than one set of doctrines that adequately expresses a set of principles, or, in its more extreme form, that any doctrine is consistent with that set of principles.24

23 For the concept/conception distinction, see RAWLS, LIBERALISM, supra note 7, at 14; DWORKIN, RIGHTS, supra note 7, at 134-135; DWORKIN, LAW’S EMPIRE, supra note 7, at 70-72.

24 My use of the terms “doctrine” and “doctrinal indeterminacy” is thus narrower than Singer’s. He defines “doctrine” to include “both legal rules and arguments” and says that a “legal theory or a legal rule is determinate if it tells us what to do”. Joseph William Singer, The Player and the Cards, 94 YALE L.J. 1, 11 (1984). Contemporary neo-formalists believe that principle and doctrine are determinately related; they do not, however, believe that either principle or doctrine determines the outcome of particular cases because there is an irreducible element of judgment in the application of doctrine to facts. See WEINRIB, supra note 7, at 166-7 and compare Hamish Stewart, Is Judgment Inscrutable? 11 CAN. J.L. & JURIS. 417 (1998).
B. Principles and Consequences

To set the stage for the debate between principled and consequentialist approaches to determining legal doctrine, it is first necessary to indicate why there might be a conflict between them by outlining the difference between deontological and teleological approaches to normative reasoning. Teleological theories are those which take the promotion of some conception of the good as the only value, while deontological theories take the view that considerations of right must, at a minimum, constrain the pursuit of the good. 25 Consequentialism, a species of teleology, is the view that the value of an action (or a rule) should be judged solely by the consequences produced by performing that action (or by following that rule). 26 An argument in favor of a proposed legal doctrine can take a deontological or a consequentialist form. If the argument is that the doctrine best expresses the conception of the person underlying legal relations, or best vindicates the parties’ rights and duties, then the argument has a deontological form. If the argument is that the doctrine will have some beneficial effects in the world — such as

25 Compare RAWLS, JUSTICE, supra note 7, at 24-30.

promoting economic efficiency, a sense of community, a desirable distribution of income, or some other goal that is desirable independently of the rights and duties at issue — then the argument has a consequentialist form.

Deontological and consequentialist arguments frequently conflict with each other in the sense that the actions they require of a person, or the decisions they require of a decision-maker, are different. When they do conflict, a choice must be made. If a legal decision would have desirable consequences but would violate a deontological principle, the neo-formalist will characterize the decision as wrong, no matter how fervently he or she believes in the good of the consequence. Put another way, the neo-formalist insists on the priority of the right over the good. The neo-realist will make the opposite choice. He or she will embrace the desirable consequence and will urge the neo-formalists to admit that legal reasoning is nothing more than an instrument for the promotion of some conception of the good. The pragmatist, in contrast to both these views, believes that it is possible to choose legal doctrines in a principled way while admitting consequentialist arguments for and against a given doctrine.

To clarify the contrast between these positions, it is necessary to say something about the types of consequences that might count in a consequentialist argument. A neo-formalist might object to my claim that neo-formalism excludes consequences on the


28 POSNER, PROBLEMATICS, supra note 13, at 30-8, KAPLOW & SHAVER, supra note 6.
ground that principled legal argument is sensitive to consequences in the following sense. If a judgment fails to recognize and vindicate a right, the world is, in a sense, a worse place than it would have been if the judgment had recognized and vindicated the right.\footnote{For an argument of this sort, advanced by an economist who remains a consequentialist but is open to taking rights seriously, see Sen, Rights, supra note 27.}

The world is worse both because the particular plaintiff’s right has not been recognized and because the decision may act as a precedent for future violations of right. The effect of legal doctrine and judicial decision-making on the achievement of rights is, in this sense, as much a “consequence” of the doctrine as its effect on incentives to behave in particular ways. Call this view “doctrinal consequentialism.” Now, any normative approach that cares at all about what judges actually do is going to support doctrinal consequentialism. But doctrinal consequentialism is a weak form of consequentialism because it does not assess legal doctrines according to their successes or failures in promoting an idea of the good. More robust forms of consequentialism look to the desirability of states of affairs that are likely to be promoted by adopting one doctrine rather than another. For example, an argument that a given doctrine of tort law is more likely than another to promote an efficient allocation of resources to safety precautions is consequentialist in this more robust way. But it will be useful to draw a further distinction between two forms of consequentialism that look to desirable state of affairs. What I shall call “restricted consequentialism” asks: “What would be the best doctrine, considering those consequences within the range of consequences appropriate to legal
reasoning?” What I shall call “full consequentialism” asks simply: “What would be the best doctrine, all things considered, in light of the best theory of the good?”

Restricted consequentialism tends to be a feature of pragmatism, but it is ruled out by neo-formalism and by certain forms of neo-realism. Since legal pragmatism, like its philosophical cousin, takes a certain kind of success as a measure of truth, the usefulness of a doctrine in promoting a good state of affairs must be relevant to reasoning about that doctrine. Yet the pragmatist does not expect law to solve all the problems of the world, so full consequentialism would be inappropriate. For the neo-formalist, in contrast, legal doctrines are to be determined by appeal to principles alone. Restricted consequentialism cannot be part of the neo-formalist model of legal reasoning because it would permit something other than principle to play a role in the choice of doctrine. For the neo-realist, principle cannot constrain the pursuit of desirable consequences in any serious way; it can at best be a source of rules of thumb for promoting the good.

The neo-formalist might argue that restricted consequentialism must collapse into doctrinal consequentialism because the only normative considerations that are legitimately within the law’s domain are principles. Conversely, a neo-realist might argue that restricted consequentialism must expand into full consequentialism because legal decision-makers, as moral agents, ought to be concerned with what would be best,


31 Compare KAPLOW & SHAVELL, supra note 6, at 63-9.
all things considered. In response to the neo-formalist, I will argue below that determining doctrine on the basis of principle alone is impossible. In general, there are several doctrines that will survive the test of principle; the choice among them must be determined by something, and there is no better candidate than the likely consequences of applying them. In response to the neo-realist, I would point both to the undesirability of using the law to enforce a full theory of the good (what Rawls calls a comprehensive position\textsuperscript{32}) in a liberal society, and to the unlikelihood of a legal decision-maker having adequate access to all the considerations relevant to determining the best state of affairs. It is sufficient for a legal decision-maker to confine his or her attention to the purposes of the law, and to take those purposes as defining the consequences that are within the domain of the law. For example, deterring harmful behavior is among the purposes of criminal law, but in a liberal society we do not expect courts deciding criminal cases, or legislatures enacting criminal statutes, to define “harm” so broadly that the criminal law amounts to a method of pursuing what are the best outcomes, all things considered. Rather, the criminal law protects certain basic interests that we are all taken to have, regardless of our views about the good; indeed, sometimes the criminal law takes us to have certain protected interests even if our own theory of the good rejects those interests.\textsuperscript{33} Within the rather loose constraints imposed by principle, often expressed in

\textsuperscript{32}RAWLS, LIBERALISM, \textit{supra} note 7, at 175.

\textsuperscript{33}Typically, a person cannot consent to death or to the infliction of serious bodily harm, and such consent is not a defense for the person who inflicts it: \textit{see} MODEL PENAL CODE §2.11(2) (1962); CRIMINAL CODE, R.S.C., ch. C-46, §14 (1985) (Can.); R. v.
doctrines and rules of constitutional law and in presumptions about the interpretation of penal statutes, it is legitimate for a legal decision-maker to consider the effectiveness of a criminal law doctrine in deterring harm.\textsuperscript{34}

\textbf{C. Three Models of Legal Reasoning}

In this section, I briefly describe the three styles of legal reasoning that are at issue in this article. The first and third of these — the neo-formalist and the pragmatic — can claim to be principled in the sense that they do not treat legal doctrine as a mere mask for the operation of other concepts or interests but as part of a normative structure defensible in its own right. One implication of being principled in this sense is that the right, as embodied in the doctrine, will be prior to the good and, therefore, respect for right will on occasion interfere with the achievement of the good. But neo-formalism and pragmatism differ in the strength of their claim that principled argument — the claims of right — determine the content of legal doctrine. For the neo-formalist, principle determines doctrine; for the pragmatist, principle merely acts as a loose constraint on doctrine. The second style — the neo-realist — rejects principled legal argument altogether.

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\textsuperscript{34} This view is akin to, though structurally the reverse of, Hart’s. He held that the criminal law had a generally utilitarian purpose, but that the pursuit of that purpose was constrained by principle. \textit{See} \textsc{H.L.A. Hart, Punishment and Responsibility} 1-28 (1965).
1. Neo-formalism: Reasoning from Principle to Doctrine

At some point in the 1960s, positivist, realist, and process-oriented jurisprudence was seriously challenged (though never entirely replaced) by a neo-formalist turn to conceptual analysis, formalism, and principled argument. Dworkin’s anti-positivism and the Kantian constructivism of Rawls’s moral and political theory are two leading examples of this style of theorizing.\(^35\) The characteristic of neo-formalist theorizing that I am particularly concerned with in this article is its understanding of principled legal reasoning. Neo-formalist legal theorists are concerned to limit the arguments that can legitimately be made in or adopted by a court and to describe philosophically the difference between a legal argument and some other sort of argument.\(^36\) On the neo-formalist view, legal argument — and, \textit{a fortiori}, legal decision-making about doctrine — should depend \textit{solely} upon principle. A principled legal argument is one that explains legal doctrine (and indeed the outcomes of particular cases) as instances of the abstract legal norms that govern the interactions between persons in private law and the

\(^{35}\) Other examples include \textit{George Fletcher, Rethinking Criminal Law} (1978); \textit{Weinrib, supra note 7}; \textit{Ripstein, Equality, supra note 7}; \textit{Brudner, Unity, supra note 7}; and \textit{Scanlon, supra note 26}.

\(^{36}\) This theoretical ambition does not require judges to be aware of the philosophical structure of legal argument. Rather, it takes comfort in the extent to which legal practice reflects that philosophical structure. \textit{See, e.g., Weinrib, supra note 7}, at 12; \textit{Dworkin, Law’s Empire, supra note 7}, at 10.
interactions between persons and the state in public law. The effect of principled legal argument is to exclude certain values, particularly those relating to the achievement of some conception of the good, from the purview of the legal decision-maker.

Principled legal argument has an uneasy relationship with consequentialism, and for good reason. If the consequences produced by adopting a particular legal doctrine are taken into account, then it seems that the expression of principle through doctrine is hostage to the ever-shifting empirical evidence concerning the effects of legal doctrines on some set of desired outcomes. Indeed, it may seem that I am equating “principled” with “deontological” and placing all other views, including the pragmatic view, in the consequentialist camp. It will be objected that this division cannot be correct. After all, it was John Rawls, the dominant neo-formalist of our time, who said: “All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy.” 37 At the same time, both the founders of pragmatism and its modern exponents have drunk from the same Kantian spring as Rawls. 38 But a certain style of principled legal reasoning is indeed deontological, and therefore anti-consequentialist in a very important way: it excludes arguments about the likely effect of legal doctrines on the good (however the good is envisaged). On this view, in the forum of principle it does not count for or against a legal doctrine that it would deter harmful behavior, or that it would promote economic development, or that it

37 RAWLS, JUSTICE, supra note 7, at 26.

38 See, e.g., PEIRCE, supra note 12, at 183-4; PUTNAM, PRAGMATISM, supra note 12, at 39-45; PUTNAM, REALISM, supra note 12, at 3.
would promote a sense of community, or that it would support a fair distribution of
income or resources. The neo-formalist’s fear is that to admit these arguments would
be to reduce legal doctrine to an instrument for the advancement of the good, and thereby
cause legal reasoning to lose its autonomy, its claim to principled force, and its
legitimacy.

To illustrate principled legal argument, I will consider two representative neo-
formalist accounts of tort law — those of Ronald Dworkin and Arthur Ripstein — but the
same kind of analysis can certainly be found elsewhere. For Dworkin, legal argument
should appeal only to principle and not to policy, while for Ripstein, legal argument
should reflect only a set of Kantian and Rawlsian ideas concerning the proper grounds for
the use of force by public officials. But at this level of generality, the distinction
between principle and policy is purely formal: the substantive difference between the

39 IMMANUEL KANT, THE METAPHYSICS OF MORALS *211-214 (Mary Gregor
trans., 1996) (1797); DWORKIN, PRINCIPLE, supra note 7, at 60-5; WEINRIB, supra note 7,
at 48-50.

40 DWORKIN, RIGHTS, supra note 7, at 82-88; DWORKIN, LAW’S EMPIRE, supra
note 7, at 221-224.

41 RIPSTEIN, EQUALITY, supra note 7, at 6-9; Arthur Ripstein, Authority and
Coercion, 32 PHIL. & PUB. AFF. 3 (2004) [hereinafter Ripstein, Authority]. See also
RAWLS, LIBERALISM, supra note 7, at 231-240 (Supreme Court decisions should
exemplify public reason by invoking only those values that belong to public reason).
neo-formalist view and other approaches to legal reasoning depends on the difference between an argument of policy and one of principle. The substantive distinction is usually cast in terms of arguments from welfare versus arguments from rights, or teleology versus deontology, or some other opposition that reflects the difference between instrumental or consequentialist reasons and conceptual or non-consequentialist reasons for adopting a doctrine. The basis for these distinctions is the neo-formalist view of human agency that the law is supposed to reflect. Human beings are conceived of as individuals with the capacity to choose and to pursue their own goals; since human beings cannot avoid interacting with each other, their legal rights and duties are seen as making the pursuit of goals mutually possible and consistent. Kant understood right as a system of “reciprocal coercion” in which a limit on one person’s freedom may be justified only in the interest of another’s freedom. The neo-formalists are all Kantian to the extent that they accept some version of this picture of human agency and the concept of right. Accordingly, they must reject the idea that the law is best understood and justified as an instrument for pursuing some conception of the good, because judging a law by its consequences is to attribute a conception of the good to the law and therefore to justify state coercion on a basis other than freedom. Put another way, principled legal

\[\text{\textsuperscript{42}}\text{Compare KANT, supra note 39, at *232.}\]

\[\text{\textsuperscript{43}}\text{Id. at *230-1.}\]

\[\text{\textsuperscript{44}}\text{Ripstein, Authority, supra note 41, at 8-11; see also DWORKIN, FREEDOM’S LAW, supra note 7, at 24-6; RAWLS, LIBERALISM, supra note 7, at 18-22; WEINRIB, supra note 7, at 84-113.}\]
argument takes the right to be prior to the good and so excludes arguments that appeal to
some conception of the good, whether it be cost-benefit analysis, balancing of interests,
or an attractive picture of human association;\textsuperscript{45} while policy-based argument takes a
conception of the good as relevant to the formation, at least, of legal doctrine.

As will be discussed further below, Ripstein’s account of tort law is squarely in
the Kantian and Rawlsian tradition of political and legal thought. The key to Ripstein’s
argument about the structure and content of tort law is the notion of a fair division of risk.
Each person is envisaged as an actor with an interest in liberty and an interest in security;
in light of these interests, the law treats everyone as an equal by dividing the risk of
conduct fairly.\textsuperscript{46} It might therefore seem that empirical questions about whether a
doctrine encourages or discourages risky behavior would be relevant to its adoption. But
Ripstein nowhere refers to such empirical questions; and his discussion of the ways in
which courts divide risks through specific rulings suggests that he regards them as

\textsuperscript{45} WEINRIB, supra note 7, at 109-113; DWORKIN, PRINCIPLE, supra note 7, at 191-
192. Rawls’s view of the relationship between the good and the right is somewhat
different from these. He argues that a conception of justice cannot get along without
some notion of the good, but he tries to specify the good as minimally as possible for that
purpose: see RAWLS, JUSTICE, supra note 7, §60; RAWLS, LIBERALISM, supra note 7, at
173-200. For a discussion of the priority of right in liberal accounts of practical
reasoning, see Samuel Freeman, Utilitarianism, Deontology, and the Priority of Right, 23

\textsuperscript{46} RIPSTEIN, EQUALITY, supra note 7, at 50-53.
irrelevant.47 For Ripstein, the interests in liberty and security are very general and are not meant to be attached to the pursuit (let alone the achievement) of any particular projects or any particular values. (This is one of the ways in which Ripstein’s project is Rawlsian: the kind of liberalism it embodies is meant to be neutral among varying views about what a valuable achievement would be.) But the effectiveness of a legal doctrine would typically be measured with reference to some such project or value, for example economic efficiency, or solidarity, or well-being, and so would almost certainly require the compromise of either liberty or security, and thus of equality, in the pursuit of that project or value and thus undermine the fair division of risk. So for Ripstein, a legal argument that depended on the effects of a doctrine on actual interests is impermissible, at least in tort law, because it makes the good prior to the right.

Dworkin’s account of tort law reaches less definite doctrinal conclusions than Ripstein’s, but his well-known distinction between principle and policy reflects a similar effort to protect principled decision-making from consequentialism. However, Dworkin’s account presents a problem of exegesis that must be resolved before turning to the substance of his claims about tort law. Dworkin defines the distinction between principle and policy as follows:

Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community. … Arguments of

47 Id. at 55-58.
principle justify a political decision by showing that the decision respects or secures some individual or group right.  

He then argues vigorously that arguments of policy are impermissible in adjudication. The basic claim is that to admit arguments of policy would be to deny that the legal system was one of right:

Arguments of principle attempt to justify a political decision that benefits some person or group by showing that the person or group has a right to the benefit.

Arguments of policy attempt to justify a decision by showing that, in spite of the fact that those who are benefited do not have a right to the benefit, providing the benefit will advance a collective goal of the political community.

But it is not immediately clear what sort of arguments Dworkin means to put in either category. Consider the following argument: “The court should not enjoin a factory owner from emitting pollution because the harm the emissions cause to the neighbouring properties is less than the benefits accruing to society from carrying on production.” On

48 DWORKIN, RIGHTS, supra note 7, at 82.

49 DWORKIN, RIGHTS, supra note 7, at 96-97, 298-299; DWORKIN, PRINCIPLE, supra note 7, at 69; DWORKIN, LAW’S EMPIRE, supra note 7, at 243-244.

50 DWORKIN, RIGHTS, supra note 7, at 294.
Dworkin’s view, is this argument one of policy or principle? Since it appeals to the costs and benefits likely to flow from the court’s decision, it appears to be one of policy: it is directed at maximizing the economic value of the emitting factory and the neighbouring properties taken together. But, in responding to some criticisms by Greenawalt, Dworkin stated that consequentialist considerations were not excluded from the forum of principle. Indeed, he offered certain consequentialist claims as instances of *principled* argument. Similarly, in discussing a point of evidence law, Dworkin said that his “normative argument does not in itself condemn judges who consider the social consequences of one rule of evidence against another”, merely that it prevented the merits of the case being determined on the basis of policy. But Dworkin then resiled from the position that these are arguments of principle, on the ground “that accepting that sort of reason for refusing to recognize a concrete political right is tantamount to denying that any abstract political right exists at all, so that it is inconsistent to concede the abstract right and yet refuse to enforce it in a case like this.” Again, in his discussions of freedom of expression, Dworkin has repeatedly rejected the relevance of the long-run

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52 DWORKIN, RIGHTS, *supra* note 7, at 296.

53 DWORKIN, PRINCIPLE, *supra* note 7, at 76-77.

54 Id. at 76.

55 Id. at 297.
benefits of competing regimes for regulating speech in favor of an analysis based on the
“right to moral independence”\textsuperscript{56} and on the non-instrumental values of expression,\textsuperscript{57}
which in turn spring from the requirement that the state treat each of its members with
equal concern and respect.\textsuperscript{58}

It is thus difficult to say, exegetically, whether Dworkin’s arguments of principle
include or exclude consequentialist “policy arguments” as traditionally understood. If
not, then Dworkin’s framework for legal analysis is as uncompromisingly principled as
any other.\textsuperscript{59} But if consequentialist policy arguments are allowed to influence the
determination of what the rights of the parties ought to be, then Dworkin’s view reduces
to the purely formal proposition that once a decision-maker has formulated a doctrine,
taking everything into account, it would be contrary to the idea of right to ignore that
doctrine. This formal proposition is perfectly consistent with the pragmatic view outlined
above, or indeed with a rule-utilitarian understanding of legal doctrine, and is far too
weak to support Dworkin’s claims about rights. Moreover, Dworkin’s central political

\textsuperscript{56} Id. at 353-365.

\textsuperscript{57} Id. at 335-353; Dworkin, Freedom’s Law, supra note 7, at 199-209.

\textsuperscript{58} Ronald Dworkin, Sovereign Virtue 134-47 (2000); Dworkin, Rights,
supra note 7, at 201-4.

\textsuperscript{59} Subject to one proviso: Dworkin does concede that, on occasion, extremely
urgent matters of policy can override matters of principle. See Dworkin, Rights, supra
note 7, at 92.
value is the idea of equal concern and respect. One implication of equal concern and respect is that the state should leave its members free to determine for themselves which conception of the good to endorse and pursue; in determining individuals’ rights, it should therefore refrain from taking up strong positions on this question.\textsuperscript{60} But deciding questions of policy nearly always requires just such a position because it requires weighing the concrete interests of one against those of another. Policy arguments must be banished from the forum of principle in order to protect the requirement that the state show equal concern and respect for each of its members. Therefore, for the purposes of this paper, I will resolve the exegetical question in favor of the first view: Dworkin’s understanding of principled adjudication requires the exclusion of policy arguments, understood as arguments “promot[ing] some conception of the general welfare or public interest.”\textsuperscript{61}

Neo-formalist legal argument, then, typically begins with a relatively abstract picture of human beings as agents interacting with one another, and seeks to provide an

\textsuperscript{60} \textsc{Dworkin, Sovereign Virtue}, \textit{supra} note 58, at 153-5; \textsc{Dworkin, Principle}, \textit{supra} note 7, at 182-204.

\textsuperscript{61} \textsc{Dworkin, Principle}, \textit{supra} note 7, at 11. See also \textsc{Stephen Guest, Ronald Dworkin} 62 (1991) (the principle/policy distinction “is one of form only in the sense that it defines the setting in which rival conceptions of what is politically justified may be argued. But it is a distinction of substance, too, in the sense that it requires a strong, separate sense in which principles are not reducible to policy.”); \textsc{Neil MacCormick, Legal Reasoning and Legal Theory} 259 (1978).
account of their rights and duties that eschews, as far as possible, a conception of the
good. Legal doctrines are to be understood (as far as possible) without reference to their
probable consequences in order to preserve (as far as possible) the moral independence of
the individual human agent.

2. *Neo-Realism: The Rejection of Principle*

The neo-realist asserts that the principles and concepts that feature so prominently in
judicial decision-making and academic commentary are essentially meaningless. At best,
they stand in for, and at worst they disguise, what is really going on: the use of state
power to forward some goal that is external to the law. Some neo-realists take the next
logical step and assert that the law ought expressly to promote a particular external
good.62

Certain strands of economic analysis of law nicely illustrate the neo-realist
approach. Tort law concepts such as duty, causation, and remoteness are explained in
terms of the fundamental goal of tort law: the efficient allocation of resources to the
prevention of accidents.63 In its clearest normative form, the economic claim is that,
regardless of the substantive content of traditional tort law concepts, the law of tort ought
to orient itself exclusively to the goal of promoting economic efficiency.64


64 Kaplow & Shavell, *supra* note 6, at 85-114.
Richard Posner, who is both a leader of the law and economics movement and a severe critic of deontological approaches to law, has often argued that principles have little or nothing to offer a judge trying to decide a hard case, and in particular that a judge tends to fall back on principles only when he or she doesn’t know enough about the consequences of choosing one doctrine over another.\textsuperscript{65} At best, in Posner’s view, “Notions such as toleration and equality … can be treated as policies instrumental to various social goals such as peace, strength, prosperity, and the conciliation of the potentially disaffected.”\textsuperscript{66} The neo-realist, then, has no normative interest in legal principles for their own sake; he or she is interested only in the effect of the application of legal principles on normative values that are wholly independent of the law.\textsuperscript{67}

\textsuperscript{65} POSNER, PROBLEMATICS, supra note 13, at 107-15; POSNER, PROBLEMS, supra note 6, at 351-20.

\textsuperscript{66} POSNER, PROBLEMATICS, supra note 13, at 111.

\textsuperscript{67} For a pure instance of neo-realism, see SHAVELL, supra note 63. Shavell’s masterly exposition of the economic approach to tort law gives no normative weight whatsoever to the idea that tort law should regulate the interactions of free and purposive agents, or to lower-level tort doctrines such as the requirement of fault, the requirement that the plaintiff prove causation, or the effect of remoteness on the plaintiff’s recovery. The highest normative value in Shavell’s analysis is the maximization of an aggregate of expected utility: \textit{id.} at 3. Tort law concepts are analyzed solely in terms of the effect of their application on this aggregate.
3. **Principled Consequentialism**

Principled consequentialism — a form of legal pragmatism — is motivated by the thought that both neo-formalism and neo-realism are incomplete. Neo-formalism is incomplete because it is in general not possible to determine legal doctrine on the basis of principle alone.\(^{68}\) Neo-realism is incomplete because its relentless attention to consequences gives us no reason to take an interest in any consequences in particular. Legal reasoning ought to be based on legal principles; but since legal principles do not determine doctrine all by themselves, it is necessary to refer to the likely effects of adopting one doctrine over another in order to choose between different possible doctrinal expressions of the underlying principles.

To see how principles consequentialism operates, imagine a case that is hard in the sense that it is unclear what doctrine should be applied to the facts. For concreteness, suppose that an individual is accused of an offense and the question is what form of fault (if any) the prosecution must prove to obtain a conviction. The resources available to a judge deciding such a case include the existing corpus of legal materials (statutes, case law, and commentary), the arguments of the parties, and the judge’s own political morality. The legal materials will contain abstract principles; legal doctrines that attempt to express those abstract principles; and legal rules. The principles, doctrines, and rules may or may not be binding on the judge, depending on their source and on the judge’s authority, and apart from their bindingness, they may have more or less persuasive force.

\(^{68}\) *Infra*, Part III.
The parties’ arguments will naturally refer to these materials, but are likely also to contain consequentialist arguments directed at the desirability of adopting one doctrine over another. Furthermore, the judge’s political morality will more or less consciously influence his or her analysis of the materials and the parties’ arguments.

This description of the judge’s task is familiar from the literature concerning legal reasoning. But note that the neo-formalist and the neo-realist approaches radically simplify the judge’s task, though of course in different ways. For the neo-formalist, the question is to be determined solely on the basis of principle, so that any consequentialist

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See Dworkin, Law’s Empire, supra note 7; MacCormick, supra note 61; Larry Alexander, The Banality of Legal Reasoning, 73 Notre Dame L. Rev. 517, 518-22 (1998); H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 661-5 (1958) [hereinafter Hart, Positivism]. Dworkin, as is well-known, describes and recommends an interpretive, two-stage method of reasoning about hard cases. The ideal judge should first determine the consistency, or “fit”, of possible doctrines with the extant legal materials. Doctrines that do not fit are inadmissible solutions to the case. At the second stage, from the doctrines that fit, the judge is to choose the one which shows the legal material in its best light. This question of justification is inevitably one of political morality, but not one of the judge’s subjective beliefs; rather, Dworkin argues that the American legal system contains a liberal political morality of equal concern and respect to which judges should adhere, regardless of their private political beliefs. See Dworkin, Rights, supra note 7, at 101-30; Dworkin, Freedom’s Law, supra note 7, at 37-38.
argument concerning the effects of the decision will be irrelevant. For the neo-realist, any reference to principle (or for that matter to precedent) is at best window-dressing; what really matters is the consequential effects of the doctrine chosen. The pragmatist has quite a different view about how to resolve a hard case. Principled consequentialism permits an answer that neither relies solely on principle nor wholly subordinates principle to the pursuit of desirable consequences. So the question of the appropriate fault standard for a particular offense should be determined with reference to both principles and consequences. A system of criminal law might be committed to principles that connect the imposition of criminal liability with the rights and duties of individuals. These abstract principles will create pressure to understand the interaction between accused persons and alleged victims of crime in terms of concepts that are familiar from moral philosophy and criminal law theory: is there any conduct that can be properly attributed to the accused? What was the accused’s attitude towards the conduct and towards the victim? What was the effect of the conduct on the victim’s rights and interests? The abstract principles will therefore tend to support the doctrine of fault-based liability because imposing liability without fault significantly attenuates the notions of responsibility and attribution. But the abstract principles also tend to support doctrines that make violations of victims’ rights, or serious effects on victims’ interests, central to the imposition of criminal liability. The accused and the victim are both persons; principled legal analysis should therefore attend to both of them. 70 But, consistent with

70 It is difficult to draw precise doctrinal conclusions about offense elements from the literature on victims’ rights, partly because that literature is more concerned with
this attention to both parties to the interaction, there are many possible fault standards. Therefore, consequentialist arguments are likely to be highly relevant in determining which doctrine to adopt. For example, the judge may want to know whether adopting one doctrine over another is likely to have any effect in deterring the wrongful behavior at issue. While principled legal argument typically does not rely on deterrent-based arguments (because they are consequentialist), it might be contended that the better a doctrine is at deterring wrongful behavior, the better it is at protecting the rights of potential victims. But whether a particular legal doctrine has or has not a deterrent effect is an empirical question.\footnote{It appears that neither the doctrines of criminal law nor the severity of the sentence imposed on an offender has any significant deterrent effect: see Paul H. Robinson & John M. Darby, \textit{Does Criminal Law Deter? A Behavioural Science Investigation}, 24 Oxford J. Leg. Stud. 173 (2004); Anthony N. Doob & Cheryl Marie Webster, \textit{Sentence Severity and Crime: Accepting the Null Hypothesis}, 30 Crime and Justice: A Review of Research 143 (Michael Tonry ed. 2003). But the point I am}


wrongful or harmful behavior — comes into play to help a legal decision-maker choose a doctrine where principled legal argument cannot.

Thus, principled consequentialism draws from, but differs from, both the neo-formalist and the neo-realist approach. For the neo-formalist, there could be only one principled answer to the doctrinal question posed, and a failure to adopt it would simply be legally erroneous. But it is not plausible to argue that there is for every contested doctrinal question only one answer consistent with principle. For the neo-realist, principle would not constrain the answer in any meaningful way: only consequences should count. But consequentialist argument cannot provide a complete solution to the question posed because there is no reason to attend to any consequences in particular without some normative basis that is best expressed in principled terms. This point is a familiar objection to utilitarianism, but it also applies to other consequentialist approaches. Consider, for example, Posner’s explanation of the role of principle in criminal law:

… we can decide to treat criminals with dignity not because we buy into the Kantian notion that people are entitled to be treated as ends but because we think making here is not about the answer to the question, but about the legitimacy of the question.

The objection is that utilitarianism treats persons merely as locations for the accumulation of utility; but under this conception of a person, there is no particular reason to value utility. See note 195 infra and accompanying text.
… that cultivating a “we-they” or “enemy within” or even a “medical” or “therapeutic” mentality of criminal punishment can have untoward political consequences and even impair the deterrence and prevention of criminal behavior. You wouldn’t have to be a utilitarian to make a judgment of this sort. The point would be not that the “enemy within” approach to crime reduces the sum of American (or human, or cosmic) happiness, but that it collides with specific political and criminological objectives of our society. A moral vocabulary would be adopted for pragmatic purposes. 73

The suggestion is that Kantian (or any other) principles are unnecessary to the determination of the desirability of legal doctrine concerning punishment because the decision about doctrine can be made solely with reference to the consequences of adopting it. But consequences do not arrive in the world already labeled “desirable” or “undesirable”. 74 We need a normative theory — a set of principles — to tell us which consequences count and how. Any capable Kantian political theorist will have no difficulty in connecting the notion that individuals are “are entitled to be treated as ends”

73 POSNER, PROBLEMATICS, supra note 13, at 112.

74 Though Posner argues that there is nothing intelligent to be said about this labeling exercise: id. at 45-64.
with society’s “political and criminological objectives”, though he or she will of course take the individual end-status of persons as a serious constraint on what can be done in the furtherance of that objective. Neo-realism’s injunction to attend only to the consequences of legal doctrine is incomplete without a principled account of which consequences count. Principled consequentialism incorporates both the neo-formalist demand that legal reasoning be principled and the neo-realist claim that consequences matter.

On this view of legal decision-making about doctrine, legal reasoning is a species of practical reasoning over a particular domain. Legal reasoning is principled in that it

75 For Kant’s own views on this matter, see Kant, supra note 39, at *305-8; see also Ripstein, Authority, supra note 41, at 26-35.

76 The incompleteness of legal neo-realism is one instance of the incompleteness of a purely instrumental approach to any problem. Compare Grey, Holmes, supra note 13, at 850 (“Holmes’ predicament … was to be an instrumentalist without an adequate system of ends.”); Max Horkheimer, Eclipse of Reason 3-57 (1947); Hamish Stewart, A Critique of Instrumental Reason in Economics, 11 Econ. & Phil. 57 (1995) [hereinafter Stewart, Critique]; and, in a slightly different vein, Zipursky, Pragmatic Conceptualism, supra note 13, at 475-6.

77 By “practical reasoning”, I mean simply that the law is a social institution that is supposed to tell us what to do, within the area that it applies to. I do not necessarily mean to endorse the descriptions of law as practical reasoning that have been offered as alternatives to neo-formalism and neo-realism, though this article is motivated by many
respects the abstract, deontological principles embodied in legal materials, such as respect for human agency and dignity, equality, and procedural fairness. It does not subordinate the individual to strong conceptions of the good or presume that individuals must adopt any conception in particular. But legal reasoning is attentive to the consequences (in the restricted sense) of adopting one legal doctrine over another because it must be: since principles do not in themselves determine doctrines, a decision-maker should attend to the probable effects of his or her decision on the generalized interests that the criminal law is concerned with. Legal reasoning can be deductive in a limited sense: since many legal rules state that certain results should flow from the presence of certain factual elements, a legal result can be deduced from the presence of those elements. But the deductive use of legal rules is purely formal: the pragmatist has no expectation that the features of a case can be uncontroversially classified as legally


MACCORMICK, supra note 61, at 19-32. Note also his proviso on the limits of deductive reasoning in generating the judge’s order: id. at 65-72.
cognizable facts for the purpose of deduction,\textsuperscript{79} or that doctrines can be uncontroversially derived from abstract principles. Legal reasoning is pragmatic because it is concerned with both principles and consequences: it strives to give expression to the principled notion that the legal order should recognize human agency, but it understands that any expression of principle is going to depend on what counts as a desirable consequence and therefore on some understanding of the good.

\section*{III. PRINCIPLED REASONING AND DOCTRINAL INDETERMINACY: TWO EXAMPLES}

Some years ago, Michelman and Radin conveniently summarized the argument that doctrine is indeterminate as follows: “from highly abstract principles of right, convincingly neutral and consistent treatment of cases cannot be derived.”\textsuperscript{80} This


\textsuperscript{80} Frank Michelman and Margaret Jane Radin, Pragmatist and Poststructuralist Critical Legal Practice, 139 U. Pa. L. Rev. 1019, 1035-1036 (1991) (characterizing a post-structuralist argument against universal principles in law). See also Kennedy,
statement was not intended to be controversial; it was offered as an uncontroversial characterization of a familiar argument in a symposium on the normativity of law.\textsuperscript{81} In this part of this article, I restate the claim that doctrine is indeterminate even when abstract principles are agreed upon. But, one may ask: why bother? What is the purpose of arguing yet again for a proposition that has been so widely accepted for so long? I have two reasons for doing so. In the first place, whatever Michelman and Radin and their fellow symposiasts may have anticipated, many scholars still engage in the style of theorizing which deduces legal doctrine from abstract liberal principles.\textsuperscript{82} Indeed, in the

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\textsuperscript{82} I will be particularly concerned with Ripstein, Equality, supra note 7, but also with Weinrib, supra note 7; Dworkin, Rights, supra note 7; Brudner, Unity, supra note 7; and Rawls, Liberalism, supra note 7. See also Ronald Dworkin, Darwin's New Bulldog, 111 Harv. L. Rev. 1718 (1998); Charles Fried, Philosophy Matters, 111 Harv. L. Rev. 1739 (1998); Anthony T. Kronman, The Value of Moral Philosophy, 111 Harv. L. Rev. 1751 (1998); John T. Noonan, Jr., Posner's Problematics, 111 Harv. L. Rev.}

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years since Michelman and Radin’s statement was written, the scholars with whom I am particularly concerned have all published comprehensive works of principled legal analysis without showing any particular concern for the problem of doctrinal indeterminacy. Second, this style of theorizing remains extremely valuable; while it cannot deliver determinate doctrinal results, it does indicate some of the constraints that might be imposed upon, or at least the considerations that might inform, the construction of legal doctrine.

In the two examples which follow, I outline how proponents of principled legal analysis draw rather precise doctrinal conclusions from abstract principles. I then argue that their conclusions are not sustainable without some tacit reliance on factors that are usually excluded from principled legal argument: in particular, on what counts as a good consequences and therefore on some conception of the good. Finally, I indicate how a pragmatic approach to doctrinal decision-making might deal with these two examples, aspiring to express principle while taking consequences into account.

A. The Standard of Liability in Tort Law

A recurring doctrinal controversy in tort law concerns the appropriate standard for liability: should tort liability be strict — the defendant is liable for any harm he or she causes — or fault-based — the defendant is liable only for harm caused by his or her

departure from a standard of care? I begin with the views of those who argue for one or the other for non-instrumental reasons of justice or fairness. While the views of these scholars differ in many respects, they share a liberal conception of the person and of the law. The person is imagined as an agent, capable of having projects and of acting in pursuit of those projects, capable of bearing responsibility for actions and consequences, and capable of bearing rights. The law is imagined, not as directing itself towards any particular purpose, but as constraining agents in the pursuit of their own purposes. 83 From this liberal conception of the person, different scholars derive different answers to the doctrinal question of the proper standard of liability.

Richard Epstein argues for strict liability rather than negligence as the standard of liability in tort on the ground that strict liability appropriately puts the costs of a person’s actions on that person and not on others. Consider the facts of the famous and puzzling case of Vincent v. Lake Erie Transport. Co. 84 The captain of a ship tied his ship to a dock

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during a storm, without permission from the owner of the dock. The dock was damaged. Although the court agreed that the ship was entitled to take refuge at the dock, the court held the owner of the ship liable for the damage to the dock. Epstein observes that this result “seems inconsistent with either of the customary explanations, moral or economic, of negligence in tort law.” He then asks his readers to imagine that the ship and the dock had been owned by the same person. This person would then have to make some decision about what to do in the storm, but whatever the decision, he or she “would bear the consequences and would have no recourse against anyone else.” This approach becomes paradigmatic for tort law as a whole. Generally speaking, one ought not to be permitted to shift the costs of one’s activity onto others. “The action in tort enables the injured party to require the defendant to treat the loss he has inflicted on another as


86 *Id.*
though it were his own.” 87 Hence, liability in tort should be strict: everyone should be liable for the harm that his or her conduct causes, subject only to various defenses. 88

This argument rests on “the assumption that the term causation has a content which permits its use in a principled manner.” 89 Rejecting both the cause-in-fact and cause-in-law dichotomy found in the case law and the policy-driven analysis of causation found in much of the academic literature, 90 Epstein avoids offering a general definition of causation and instead develops “four distinct paradigm cases covered by the proposition ‘A caused B harm.’” 91 These paradigm cases are intended to justify the use of the word “cause” in a common sense manner by analogy with these cases. 92

87 Id. Compare id. at 158-9 (“The argument applies equally to cases where there is only the risk of harm. If the defendant ... took the risk of injury to his own person or property, he would bear all the costs and enjoy all the benefits of that decision whether or not it was correct. The same result should apply where a person ‘only’ takes risks with the person or property of other individuals.”).


89 Epstein, Strict Liability, supra note 83, at 160.

90 Id. at 160-165.

91 Id. at 166.

92 “Epstein ... autocratically stipulat[es] the meaning of cause. The paradigm cases, he decrees, as cases of causation. ... [But] the paradigm cases of causation identify
As has often been pointed out, for Epstein’s account to hold together, the “cause” of an accident must be identifiable independently of any normative theory of the purposes of tort law, or of the rights of the parties; otherwise, it will be that normative theory, rather than the common sense notion of causation, that drives the analysis. Put another way, for Epstein it is the notion of causation that is supposed to define the parties’ tort rights, not the other way around; but if it is not possible to insulate the determination of causation from normative questions, Epstein’s argument is incomplete or even incoherent. As Ripstein, echoing Coase, puts it, “Interaction is always reciprocal in the way that [Epstein’s] account needs to avoid”. In general, either party could have done

the bearer of legal responsibility only because Epstein arbitrarily excludes troubling examples from the paradigm.” BRUDNER, UNITY, supra note 7, at 162.

93 This point is thoroughly argued by Stephen Perry, The Impossibility of General Strict Liability, 1 CAN. J. L. & JURIS. 147 (1988) [hereinafter Perry, Impossibility]; see also Stephen Perry, Risk, Harm, and Responsibility, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 321, 339-343 (David G. Owen ed. 1995); COLEMAN, RISKS, supra note 84, at 273-275; BRUDNER, UNITY, supra note 7, at 161-165. For a related point aimed at a different target, see Stewart, Contingency, supra note 79, at 23-48.

94 RIPSTEIN, EQUALITY, supra note 7, at 39; see also RONALD COASE, THE FIRM, THE MARKET, AND THE LAW 96 (1988). Epstein was, of course, well aware of Coase’s critique of the common law approach to causation and offered his four paradigms in response: Epstein, Strict Liability, supra note 83, at 164-165. But Epstein offered
something to avoid the harm, and in that sense it is always the case that both parties “cause” the harm. To say that one party is the legal “cause” of the harm, we need a reason to disregard the other party’s contribution to the harm; but that reason can only come from some notion of what the parties ought to be doing, namely, a view about their rights and duties.  

Some of Epstein’s critics argue further that strict liability is not merely dependent on a conception of rights, but inconsistent with the underlying picture of human action that Epstein himself uses, and therefore inconsistent with the idea of right itself. Only the negligence standard, it is argued, adequately recognizes both the plaintiff and the defendant as actors in the world. Ripstein, arguing that only the negligence standard fairly divides the risks of action between persons, puts the point this way:

The fault standard holds agents responsible in a way that aims to be fair to both the injurer and the injured party. Each has a liberty interest in going about his or her own affairs, and a security interest in being free of injury. Pursued to their limits, these interests are bound to conflict. An unlimited interest in security would prevent others from acting, because virtually all action creates a risk of injury. Conversely, an unlimited interest in liberty would make the security of one person hostage to the choices of others. Either of these approaches would

nothing more than an appeal to common sense as a reason to reject Coase’s characterization of problems of causation as reciprocal.

95 BRUDNER, supra note 7, at 163.
violate the fundamental principle of equality, which requires that one person may not unilaterally set the terms of interaction.\footnote{Ripstein, Equality, supra note 7, at 49; see also Brudner, Unity, supra note 7, at 189-90. Weinrib argues in the same vein that strict liability amounts to “hold[ing] the agent liable for being active” and is therefore inconsistent with the equal status of plaintiff and defendant. Weinrib, supra note 7, at 181.}

Thus Ripstein argues against strict liability on the grounds that it “would prevent others from acting, because virtually all action creates a risk of injury”\footnote{Ripstein, supra note 7, at 49.} and that “[t]o make injurers bear the full risk [of injury] would forego the interest in liberty”.\footnote{Id. at 50.}

These neo-formalist arguments against Epstein’s approach, if persuasive, have sweeping consequences for tort doctrine. They purport to show that a quite abstract idea about how the actions of equal persons should relate to each other directly resolves an important doctrinal controversy; they require either rejection or extremely creative analysis of the rare occasions on which the common law recognized strict liability;\footnote{Weinrib, supra note 7, at 187-90; Ripstein, Equality, supra note 7, at 70-2.} and they imply that the American law of products liability is incoherent with this abstract idea and to that extent unjust.\footnote{Compare Weinrib, supra note 7, at 184 n. 24.}
But these arguments are not fully persuasive as they stand. Imposing strict liability rather than negligence does not in itself violate equality or make agents liable just for being agents; rather, replacing negligence with strict liability in the way Epstein proposes would change the activities that a person could undertake without liability. Put another way, a change in doctrine from negligence to strict liability would change the costs and benefits associated with actions. To show that this change is unfair, unjust, or undesirable would require further argument, perhaps including empirical consideration of the effects of each form of liability on important values. For example, strict liability for defective products, in those jurisdictions where such liability is in force, has neither prevented manufacturing from occurring nor negated manufacturers’ liberty. Strict liability may, or may not, have affected the allocation of resources to safety, the price of the products, the degree of care exercised by consumers; it may, or may not, have prevented certain products from being manufactured altogether, but it has not made manufacturing impossible. Again, if there were strict liability for motor vehicle accidents, people might, or might not, drive differently. They would not be prevented from driving. Nor, with some control on the scope of causation, would they be liable for all the effects of their driving. A change in the tort regime does not make action 101

101 The neo-formalist critique of Epstein’s theory of strict liability is persuasive to the extent that it demonstrates the incoherence of Epstein’s attempt to identify the cause of a harm apart from any normative theory about rights and duties. But, as long as the need for some normative theory that controls the scope of causation is recognized, the standard of strict liability is not itself subject to the critique.
impossible but changes the costs and benefits of various actions. We require further
normative argument to determine whether these changes are desirable.

If we were to continue in a neo-formalist vein, we might seek that further
normative argument in Ripstein’s larger purpose, which is to offer an account of the
doctrines of tort law as flowing from reasonable terms of social co-operation:

The basic strategy for dividing risks is to look to the interests in both security and
liberty that all are presumed to share. If neither liberty nor security interests are to
totally cancel the significance of the other, some balance must be struck between
them. Rather than trying to balance those interests across persons ... the fault
system balances them within representative persons. By supposing that all have
the same interests in both liberty and security, the fault system treats parties as
equals, by allowing a like liberty and security to all.102

This is a very plausible claim, but it is a retreat from the claim that strict liability
somehow undermines the very idea of action; rather, it is a claim that strict liability
represents an unfair division of the risks of action in that it favors security over liberty.
But, again, we must ask whether even this weaker claim flows from Ripstein’s normative
premises. As Ripstein himself says, a “fair division of risks required that particular risks
... be assigned to activities in contexts.”103 Indeed; and reasonable people, constructing

102 RIPSTEIN, supra note 7, at 50.

103 Id. at 51.
legal doctrines reflecting fair terms of social co-operation in which no-one gets to set the
terms of interaction unilaterally, might well conclude that in the context of defects in
manufactured products, the risk of injury owing to defects ought to be borne as far as
possible by the manufacturer rather than the user. The importance to security of avoiding
personal injury to living a life of one’s own might well outweigh the liberty interest in
manufacturing soft drinks or automobiles for profit. In another context, the fault
standard, or allowing losses to lie where they fall, might well be appropriate. Or it might
not; my point is simply that the principle of dividing risk through fair terms of social co-
operation, however important and attractive it may be as a principle, does not by itself
determine the appropriate legal regime for tort liability.

A parallel point might be made with respect to a less demanding standard of fault. Imagine that liability in tort depended on subjective fault: a defendant would not be liable
unless he or she realized that his or her conduct departed from the relevant standard of
care. Ripstein might plausibly regard the subjective standard as promoting a Hobbesian
state of nature by eliminating security interests altogether, or at least as unacceptably
subordinating security to liberty.\textsuperscript{104} Now, I would certainly not argue for a subjective
standard of fault in tort, but I suspect that such a standard would not destroy personal
security; rather, it would change the costs and benefits of action, this time (presumably)
favoring certain defendants and disfavoring certain plaintiffs. It would neither eliminate
the security interest nor deny the juridical equality of plaintiff and defendant. It would

\textsuperscript{104} Similarly, Weinrib regards the subjective standard as inconsistent with the
particular type of equality vindicated by tort law. \textit{Weinrib, supra} note 7, at 177-179.
simply offer a different conception of the proper relationship between security and equality.

Ripstein’s arguments against strict liability in tort are not without force: they simply show less than he thinks. It is indeed incoherent to assert that liability should depend only on the effects of action, not because it would “hold the agent liable for being active”\(^\text{105}\), but because it is not possible to describe what the effects of the agent’s actions are without a normative theory that picks out some of those effects as properly attributable to the agent.\(^\text{106}\) Thus the neo-formalist argument turns out to be not an argument against strict liability as such, but an argument against Epstein’s refusal to engage in the required normative exercise, or perhaps against Epstein’s common-sense version of the exercise. Once that exercise was engaged in, there might well be an argument for strict liability. It would not be Epstein’s, but could take the following form: “In light of the values relevant to tort law (e.g., security, liberty, equality), and with a proper limitation on the scope of causation, defendants should be strictly liable for certain effects of their conduct because the standard of strict liability furthers some conception of the public welfare better than the standard of negligence.” An argument of this form combines principled legal argument and consequentialism: it recognizes that a legal doctrine cannot be based on the denial of agency, but it asserts that more than one doctrine may respect principle and that the consequential effects of doctrinal choice are relevant to that choice.

\(^{105}\) Weinrib, supra note 7, at 181.

\(^{106}\) Perry, Impossibility, supra note 93, at 163-6.
The principled, liberal starting-point that Epstein and Ripstein share — the idea that tort law should structure the interactions of free, purposive agents — rules out the initially appealing notion that everyone should be liable in tort for the harm he or she causes. This standard would be impossible to apply, owing to the irreducibly reciprocal nature of causation. But Ripstein’s principled argument favoring negligence over strict liability does not succeed in showing that strict liability is inconsistent with principle. Instead, it shows something less sweeping but still important: any argument for or against a particular standard of liability in tort law must attend to the effects of the proposed standard on agents’ ability to act and to be secure from the effects of others’ action. The final choice of doctrine must therefore be made with reference to the consequences that are likely to flow from the choice.

B. The Requirement of Fault in Criminal Law

A recurring doctrinal controversy in criminal law concerns the requirement of fault. It is usually agreed that criminal liability should depend on proof of fault; but there is much judicial and scholarly debate as to what type of fault should be required. Should liability depend on proof of subjective fault (the accused intended a consequence, or knew of a circumstance, or was aware of a risk) or merely on proof of objective fault (the accused ought to have known that his conduct would cause a consequence, or ought to have been aware of a circumstance or of a risk)?

107 Two classic discussions favoring the requirement of subjective fault for criminal offenses are found in HALL, supra note 14, at 169-246, 279-322 (1947);
criminal liability might be justly imposed without fault of any sort? While most scholars
are prepared to accept subjective fault as a requirement for the gravest offenses, there is
controversy about which offenses fall into this category, which actus reus elements
require a corresponding subjective fault element, and whether all criminal offenses also
require subjective fault. These debates about particular offenses reflect a larger debate

GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 30-99 (2d ed. 1961). The
distinction between subjective and objective fault has taken on constitutional significance
under §7 of the Canadian Charter of Rights and Freedoms with the development of the
doctrine that the fault element of an offense must be proportional to the stigma of and
S.C.R. 701, 813-20; DON STUART, CANADIAN CRIMINAL LAW: A TREATISE 196-208 (4th
ed. 2001); Alan Brudner, Proportionality, Stigma, and Discretion, 38 CRIM. L.Q. 302
(1996) [hereinafter Brudner, Proportionality]; George P. Fletcher, The Meaning of
of “Fault” in Canada: A Normative Critique, 42 CRIM. L.Q. 227 (1999); Hamish Stewart,
9 (1999) [hereinafter Stewart, Step Forward]. The development of a comparable doctrine
in American constitutional law seems to have been arrested by a line of cases beginning
with Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910) and United States v. Balint,
258 U.S. 250 (1922). In these cases, the Court held that the due process clause did not
prevent the legislature from creating a strict liability offense. See also note 21 supra.
about whether it is intentional wrongdoing or serious harm-doing that is paradigmatically
criminal. My purpose here is not primarily to rehearse these debates but, as in the
previous section, to criticize the suggestion that they can be determined simply by
adopting an overarching normative principle. Various fault standards for various
offenses may be consistent with any given principle, leaving the choice between them to
be made on the basis of other criteria.

Again I begin by considering a liberal concept of the person and of the law.
Persons are conceived of as agents who have purposes and who are capable of acting in
pursuit of those purposes. The law constrains not their purposes but the means they may
use in pursuit of their purposes. It is a little difficult at first glance to see what role this
concept of the person has for criminal law. If we are concerned not about purposes but
about the extent to which one person’s conduct impinges on another’s right, why should
we care about why a wrongdoer has infringed a right or about punishing the wrongdoer
(rather than deterring the wrongdoer or compensating the victim)? One possible

108 This problem arises in, among other places, Kant’s discussion of criminal
punishment. He accepted the basic distinction between criminal (intentional) and civil
(unintentional) wrongdoing, but argued that the law was concerned only with the external
relationships between agents and not with their motivations. KANT, supra note 39, at
*223-224, 320, 214. Thus, it is not obvious why he required the distinction between
criimes and private wrongs. To put the point another way: For Kant, the distinction
between crimes and other wrongs has to do with the maxim on which the criminal acts;
but it is unclear why, for Kant, the criminal’s maxim matters for legal purposes (though it
answer is provided by Ripstein who, it will be recalled, presents an account of law as expressing fair terms of social co-operation or interaction between free and equal agents. These agents would, Ripstein argues, divide the risks of conduct, or set the boundaries between persons, on the assumption that persons are equal in the sense that each has an interest in liberty and security. The resulting legal rules are reasonable in the Rawlsian sense of expressing "an idea of fair terms of social cooperation." The function of the criminal law is "to protect and vindicate fair terms of interaction":

Criminal acts are those acts in which one person seeks to substitute private rationality for public standards of reasonableness. … Punishment is required in order to address the wrongful substitution. It takes the form of hard treatment because it addresses itself to the putative rationality of the wrongful deed.110


109 RIPSTEIN, *EQUALITY*, supra note 7, at 134. While this passage may be reminiscent of Hegel’s view that the criminal wills his own punishment, its emphasis on
Various doctrinal consequences are said to flow from this understanding of criminal law, including a doctrine of fault:

Intent or recklessness is an essential element of core areas of criminality because a person must be aware that the rights of others are in jeopardy if his action is to count as ... a substitution [of private rationality for public reasonableness].

For this argument to work, Ripstein must show both that subjective fault is a satisfactory standard for core criminal offenses and that subjective fault does not in itself convert non-criminal wrongs into criminal offenses. I want now to argue that his argument fails on both counts, and thus to suggest that the doctrinal consequence (subjective fault) does not flow directly from the normative principle (protecting and vindicating fair terms of social cooperation). Consider, again, the fault requirement for sexual assault and its relationship to the defense of mistaken belief in consent. What is wrong about a sexual assault is not that the accused had made sexual contact with the complainant. It is the

the public aspect of crime and punishment distinguishes it from Hegel’s more metaphysical account. Compare id. at 183-187 with G.W.F. Hegel, Philosophy of Right ¶¶90-102 (T.M. Knox trans. 1952) (1821) and with Brudner, Unity, supra note 7, at 231-235; see also Ripstein, Authority, supra note 41, at 34-5.

111 Ripstein, Equality, supra note 7, at 134.
fact that the conduct was non-consensual or unwanted by the complainant. Thus, one would expect the prosecution to be required to demonstrate not only that the complainant did not consent but that the accused was in some way at fault in failing to recognize the absence of consent. So an accused who asserts that he did not realize that the complainant was not consenting — the “defense” of mistaken belief in consent — is, in effect, asserting that he lacked the required fault element.

But what kind of mistake is necessary for acquittal? Is it enough that the accused subjectively believed that the complainant consented; that is, does the prosecution have to prove knowledge of lack of consent? Or must the mistake be reasonable; that is, does the prosecution have to prove only that the accused’s mistake would not have been made by a reasonable person? Or is there any justification for having no fault element at all with respect to the victim’s non-consent? Given Ripstein’s claim about the centrality of subjective fault to criminal liability, one would expect him to argue for some version of subjective fault. But that is not what he does. Instead, he argues that fair terms of social cooperation require that a mistake as to consent should only be a defense to sexual assault if it is reasonable:

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112 I refer to adult complainants only. Sexual offenses against children do not depend on absence of consent.

Like certain other activities, sexual intercourse is essentially consensual; nonconsensual sexual intercourse is rape. To say that these activities are essentially consensual is to make a claim about their legal status: Those who engage in them are not engaged in self-regarding activities in which they need to take care not to accidentally impinge on the rights of others. Instead, they are engaged in activities that are legitimate only with, indeed because of, the voluntary participation of others. Those who fail to properly check for consent cannot have made an inadvertent mistake, because they intend to engage in a consensual activity.\textsuperscript{114}

While this argument seems compelling, it is inconsistent with Ripstein’s earlier claim that subjective fault is required for core criminal offenses. A man, however deluded, who honestly believes that he has secured a woman’s consent is not “aware that the rights of others are in jeopardy”\textsuperscript{115}, nor has he chosen the consequence of his action;\textsuperscript{116} it is precisely his delusion that makes him unaware that others’ rights are in jeopardy and that the consequence is going to come about.\textsuperscript{117}

\textsuperscript{114} Ripstein, \textit{Equality}, supra note 7, at 204, original emphasis.

\textsuperscript{115} Id. at 134.

\textsuperscript{116} Id.

\textsuperscript{117} Compare Brudner, \textit{Proportionality}, supra note 107, at 309.
Perhaps aware of this difficulty, Ripstein attempts to reinforce his argument by arguing that an unreasonable mistake about consent is a mistake of law which does not exculpate. Ripstein takes consent to be public in that consent is established by external manifestations such as words and gestures, rather than by what is going on in the victim’s mind. Consequently, a mistake about consent is a mistake about a public fact:

If we understand the boundaries between persons in terms of reasonableness, the person who makes an unreasonable mistake has made a mistake about the rights of others. The mistake is not simply about how those rights apply in a given case: It is a mistake about the kind of thing that counts as consent. Those who make reasonable mistakes, by contrast, make mistakes about how rights apply in a given situation; as a result, their mistakes are mistakes only of fact.

But this argument surely proves too much, in that it conflates mistakes by the accused, which affect culpability, with mistakes by the complainant, which cannot on their own make the accused culpable (at least until the complainant makes sufficient public manifestations of non-consent). Indeed, it would be more accurate to say that in

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118 RIPSTEIN, EQUALITY, supra note 7, at 211-214.

119 Id. at 211.

120 Id. at 212.
Ripstein’s account, where the victim mistakenly consents, the accused has made no mistake at all:

If the accused’s belief about consent was reasonable in the requisite sense, then the victim has consented. If it was unreasonable, there is no consent.¹²¹

This formulation eliminates the possibility of a reasonable mistake by the accused altogether: once the prosecution has established non-consent in the proper public sense, there is nothing the accused can do to exonerate himself. The offense of sexual assault thereby becomes one of strict liability: once the prosecution has established non-consent, any mistake must be unreasonable, and the prosecution is not required to prove any form of fault. And strict liability is, in Ripstein’s view, an unfair division of risk.

Even if Ripstein’s argument concerning mistake of law were accepted, it would be the beginning, not the end, of an argument for culpability. The doctrine that mistakes of law do not excuse is subject to numerous exceptions and fails to identify its own rationale.¹²² As Fletcher has argued,¹²³ the question should not be whether a mistake is

¹²¹ Id. at 202.

one of law or fact, but whether the mistake goes to the accused’s culpability. If the mistake is one that negates culpability — that justifies or excuses the conduct — then the accused ought to be acquitted, whether or not the mistake is better described as one of law or one of fact. Or, as a neo-formalist might say, the question should be whether the mistake is one which manifests disrespect for the agency of others;\textsuperscript{124} if not, it would be an excuse. In the context of sexual assault, the claim that a mistake about consent is a mistake of law is not the end of the analysis: the mistake must still be of a sort that is culpable. Thus, to say that an unreasonable mistake about consent is a mistake of law does not by itself advance Ripstein’s argument; he is thrown back on his argument about what is culpable about this sort of mistake, an argument which, as we have seen, is inconsistent with his claim about the function of fault in a system of criminal law.

It would be more plausible to say that the unreasonably mistaken accused is justly held liable because he ought to have been aware that the complainant was not consenting; or that sexual assault is such a serious crime that a change from subjective to objective fault is desirable for educative and deterrent purposes; but these arguments would evidently bring consequentialist considerations into the determination of legal doctrine, and are therefore barred by Ripstein’s commitment to the neo-formalist style of legal reasoning.

\textsuperscript{123} FLETCHER, RETHINKING CRIMINAL LAW, supra note 35, at 736-758; see also Stewart, Mistake, supra note 122, at 486-508.

\textsuperscript{124} Compare Brudner, Proportionality, supra note 107, at 309-13; BRUDNER, UNITY, supra note 7, at 223-6.
We need next to consider whether, on Ripstein’s account, punishment can be confined to criminal conduct. Anglo-American law standardly does not punish torts, breaches of contract, or non-criminal invasions of property rights; while punitive damages may on occasion be awarded, their rationale remains elusive, and there is no private law equivalent of criminal sanctions such as imprisonment or probation. For Ripstein, criminal punishment is triggered by substitutions of private rationality for public reasonableness. But such substitutions are in no way limited to the criminal realm. Negligent conduct might be intentional in the sense that the defendant knows that he or she is falling below a standard of care. Breach of contract is probably intentional as often as not. Indeed, an intentional breach of contract provides a particularly good ground for testing Ripstein’s distinction between criminal and private law because it frequently involves precisely the same substitution of private rationality for public reasonableness: the seller decided not to deliver the goods that the purchaser agreed to buy for $10 apiece because the market price has risen to $20, and so pursues his private ends rather than vindicating the fair terms of cooperation expressed in the contract. Why does that not make the seller a criminal? Ripstein argues that “intentionally breaching a contract does not constitute a crime because both parties to the contract have already consented to treat its subject matter as tradeable.” This explanation will not do: the parties to a contract are of course dealing with a subject matter which the law considers


126 RIPSTEIN, EQUALITY, supra note 7, at 158 n. 46.
tradeable or alienable, but in a contract the seller has, precisely, given up his or her right to trade it elsewhere or, put another way, has agreed not to trade it. The buyer has acquired a right for which the seller shows disrespect by not honoring the agreement.

There are, of course, many good reasons for not criminalizing breaches of contract. Breaches of contract typically do not cause the harm that crimes cause; they can typically be adequately compensated for by an award of damages; they do not usually involve morally repugnant behavior; there is no reason to think that the costs involved in the criminal prosecution of breaches of contract would have any corresponding social benefits. But for Ripstein to invoke any of these would once again involve giving up the apparently close connection between principle and doctrine on which his account depends — that is, the claim that the principles he begins with can, on their own, deliver a clear set of doctrines about which wrongs are crimes and which are not.

Yet there is something attractive and important about a neo-formalist starting-point such as Ripstein’s. It is the notion that the core of criminal liability concerns conduct that involves a particular kind of wrong to others, a wrong that the compensatory remedies of private law cannot fully recognize. The pragmatist accepts this insight, but is not thereby committed to the idea that intentional wrongdoing is the only way of committing such a wrong, or that all intentional wrongdoings are such wrongs. Sometimes mere negligence can be criminal, where the stakes for the victim are high enough; and there is no way to assess whether the stakes are high enough without measuring the consequences of different kinds of behavior.¹²⁷ Sometimes intentional

¹²⁷ Compare Sen, Rights, supra note 27, at 19.
wrongdoing is not criminal, for a great variety of reasons which again typically cannot be captured without some sense of the consequences of treating those wrongs through the criminal justice system rather than with other legal instruments.

Principles provide reasons, occasionally decisive reasons, for or against doctrines; but they typically do not have enough power to determine legal doctrines. When supporting one doctrine over another, neo-formalists tend to over-state the power of their principled reasons: they tend to represent possible doctrinal consequences as necessary doctrinal consequences of principle. While it is always possible that someone, someday, will persuade us that negligence (or strict liability) must flow from principle, or that criminal fault must be subjective (or objective), the discussion in this part of this article is meant to show that no neo-formalist has done so yet.

C. Recapitulation

In this part of the article, my purpose has not been to argue for or against any particular legal doctrine proposed by Ripstein, Dworkin, Epstein, or any other theorist mentioned above. My purpose has been rather to show that the doctrines do not flow inexorably from the theorist’s normative premises. The claim that the standard of liability in tort should not negate the concept of human agency is consistent with a variety of fault standards; the claim that criminal law should punish wilful departures from the fair terms of social cooperation is consistent with a variety of fault standards for core criminal offenses, and does not in itself demand that criminal liability be limited to these core offenses. The neo-formalist picture of human agency is the correct starting-point for many doctrinal problems, for without this principled starting-point it is often unclear why
we are bothering with law at all. But principles do not get us very far: they act as a rather
loose constraint on the doctrines that a court or a legislature might choose to define the
rights and duties of individuals. The choice among the various doctrines that are
consistent with principle depends on many factors, most notably the impact of legal
document on the achievement of desirable outcomes.

IV. RESPONSES TO DOCTRINAL INDETERMINACY

So far I have argued that accounts of tort and criminal law containing a certain liberal
conception of the person do not deliver determinate doctrinal answers to very basic legal
questions. In particular, the most fundamental question of tort and criminal law — the
standard of fault applicable to the defendant — can be answered in several ways
consistent with that liberal conception of the person. It is therefore entirely legitimate for
a legal decision-maker to appeal to consequences in choosing one doctrine over another.

In this part of the article, I describe four responses to the claim that doctrine is
indeterminate. The first — Ronald Dworkin’s “right answers” thesis — rejects the claim.
The second, third, and fourth accept the claim but differ in their response. The approach
of economic analysis of law is to remedy indeterminacy by bringing to bear a value
external to the law: economic efficiency or wealth maximization. The Critical Legal
Scholars are also quite happy to bring external values to bear, but at least in recent years
have been uncertain about what those values might be. Finally, the principled
consequentialism that I adopt in this article accepts that legal doctrine cannot be
determinately derived from or related to the principles that underlie the law, and proposes
that doctrine can be made determinate by considering the consequences of adopting one
doctrine over another to the extent that pursuing those consequences is consistent with principle.

A. **Right Answers?**

A consequence of the claim that principle does not determine doctrine is that a principled legal decision-maker who is in a position to make doctrine has the freedom to choose among various doctrines. One might think of a legislator contemplating a change to some area of the law, a judge deciding what Hart would have called a case in the penumbra,¹²８ or a judge in a new constitutional order interpreting the language of a recently enacted bill of rights.¹²⁹ If the consequences of principles for doctrine are indeterminate, then a decision-maker in this situation is entitled to make any of several possible decisions, none of which will be wrong in principle.

Ronald Dworkin has argued that we should reject this model of decision-making about doctrine on the ground that even in a hard case there is a right answer. This argument, if correct, would be fatal to the pragmatic position I am trying to develop in this article. Dworkin’s “right answer” thesis is developed with a negative argument


¹²⁹ See, e.g., *Motor Vehicle Reference*, supra note 16, at 495-513 (interpreting the phrase “principles of fundamental justice” in § 7 of the Canadian Charter); S. v. Makwanyane and another, 1995 (3) S.A. 391 (Const.Ct.) (declaring capital punishment inconsistent with §§ 9, 10, and 11(2) of the Constitution of the Republic of South Africa Act 200 of 1993 and not justified by § 33(1)).
intended to demonstrate the implausibility of the “no-right-answer” thesis, and a positive argument demonstrating how a judge goes about deciding a hard case. The negative argument takes on several versions of the “no right answers” thesis and attempts to refute each of them. I want to consider one of these versions, which is perhaps the most closely related to the claim that doctrine is indeterminate and which Dworkin himself describes as “the most influential”.130 This is the “argument from controversy”, or the claim that “[i]f it is inherently controversial whether some party has a particular legal or political right, then, according to this argument, it cannot be true that he has this right.”131 Dworkin approaches the argument from controversy indirectly, exposing and attacking what he calls “the demonstrability thesis … [which] states that if a proposition cannot be demonstrated to be true, after all the hard facts that might be relevant to its truth are either known or stipulated, then it cannot be true.”132 Dworkin argues against the demonstrability thesis, asserting that there exist both “hard facts,” to which the demonstrability thesis may apply, and other facts, to which it certainly does not apply. These other facts might include “moral facts” in the legal and political realm, and “facts of narrative consistency” in the aesthetic realm.133 The demonstrability thesis thus depends, Dworkin argues, on the implausible assumption that “there are no facts in the

130 DWORKIN, PRINCIPLE, supra note 7, at 137.

131 DWORKIN, RIGHTS, supra note 7, at 281.

132 DWORKIN, PRINCIPLE, supra note 7, at 137.

133 Id. at 138.
I am inclined to agree with Dworkin that there are facts of several kinds and that the demonstrability thesis is therefore false. But refuting the demonstrability thesis does not go very far to support the right answers thesis. If the demonstrability thesis is true, then doctrine is indeterminate; but the falsity of the demonstrability thesis does not entail the truth of the right answers thesis. Indeed, it is not necessary to hold the demonstrability thesis to adopt the pragmatic approach; the pragmatist would agree with Dworkin that there is no profound methodological difference between science, history, and law, and that in none of these disciplines does the mere fact of controversy prove that its propositions are indeterminate. Therefore, the refutation of the demonstrability thesis contributes little if anything to Dworkin’s right answers thesis.

Dworkin’s best argument against the “no right answer” thesis is not his attack on the demonstrability thesis, but his positive claim that his theory of law as integrity provides an account of legal decision-making that will generate right answers. As is well-known, Dworkin argues that a legal decision-maker (a judge) approaching a hard question with integrity works along two dimensions. The first is the “

\[134\] Id.

\[135\] Dworkin seems to recognize this point: id. at 145.

\[136\] DWOR\-KIN, RIGHTS, supra note 7, at 281-282; see also MISAK, TRUTH, supra note 12, at 79-85; PUTNAM, REALISM, supra note 12, at 163-178.

\[137\] I draw primarily on DWOR\-KIN, LAW’S EMPIRE, supra note 7, at 238-258.
The judge must consider the possible answers to the hard question and determine their compatibility with the existing law. Those answers that are sufficiently compatible to count as an interpretation of past practice rather than as an invention pass the test of fit. The second is the “dimension of justification.” The judge “must choose between eligible interpretations by asking which shows the community’s structure of institutions and decisions—its public standards as a whole—in a better light from the standpoint of political morality.” The judge’s decision on both dimensions is one of principle, not policy, and is to be made in accordance with the correct political morality. That is, the judge is to make “decisions about what rights people have ... rather than decisions about how the general welfare is best promoted”, and rights are generated from the liberal egalitarian principle that persons are to be treated with equal concern and respect.

This picture of judicial decision-making seems structurally sound. While Dworkin’s over-arching political theory is controversial, one can imagine conducting a basically similar exercise under the guidance of a different political theory. The dimension of fit captures much of the lawyer’s common sense about the way the law is

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138 Id. at 66.

139 Id. at 256.

140 Id. at 255.

141 DWORKIN, PRINCIPLE, supra note 7, at 69.

142 DWORKIN, RIGHTS, supra note 7, at 272-278.
structured and the way new problems are assimilated to that structure, while the
dimension of justification provides a plausible description of the choice among
competing doctrines that fit. But the associated claim that there are right answers to
difficult questions of legal doctrine requires a further claim: that in every case one, and
only one, answer can satisfy both the dimension of fit and the dimension of justification.
If no answer survives, then too many constraints have been imposed on the judge, and
something must give way for a result to be reached: typically, one thinks of some
principle of political morality overcoming fit. If more than one answer survives, then
there is what Dworkin calls a “tie” and what I call a case of doctrinal indeterminacy.

Dworkin argues that in a sufficiently complex legal system “ties” between
doctrines will be rare because if the legal system is “thick with constitutional rules and
practices, and dense with precedents and statutes,” the probability that more than one
answer will fit is low; and if more than one answer does fit, the tie can be resolved on the
dimension of justification. The proposition that “ties” between doctrines are likely to
be common is not susceptible of proof in any logical sense; as Dworkin rightly says, the
proposition “is not an ordinary empirical question” and the likelihood that a “tie” will

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143 At least in common law jurisdictions.

144 DWORKIN, RIGHTS, supra note 7, at 285.

145 Id. at 286; see also DWORKIN, PRINCIPLE, supra note 7, at 143.

146 DWORKIN, PRINCIPLE, supra note 7, at 143.
occur cannot be measured in any obvious way. I therefore offer three reasons to think that ties may be more common than Dworkin believes.

Consider first the interpretive nature of reasoning about legal doctrine, on which Dworkin rightly insists. A decision about which legal doctrine to adopt requires, in Dworkin’s model, a judgment about how the doctrine fits with the existing practice and a judgment about how to show the practice at its best in light of a moral and political theory. But it is at least odd to describe an interpretive practice as having to issue a correct answer. To see this oddness, consider the artistic analogies Dworkin is so fond of. Dworkin asks us to think of the common law as a sort of chain novel: one novelist writes the first chapter, a second novelist writes the second chapter, and so forth. Dworkin quite reasonably observes that if the authors behave with some sense of artistic integrity, they will operate under certain constraints: “every novelist but the first ... must decide what the characters are ‘really’ like; what motives guide them; what the point or theme of the developing novel is; how far some literary device or figure, consciously or unconsciously used, contributes to these”, and so forth. I do not propose to quarrel

147 Id. at 144; see also DWORKIN, RIGHTS, supra note 7, at 359-360.

148 DWORKIN, LAW’S EMPIRE, supra note 7, at 45-113, 410-413.

149 DWORKIN, PRINCIPLE, supra note 7, at 158-164.

150 Id. at 158.
here with this picture of how the authors should operate;\textsuperscript{151} but notice that the “right answers” thesis, as applied to this chain novel, implies that once the first chapter is completed, \textit{the same novel will be written} no matter what order the remaining authors work in. If each author’s treatment of what has gone before is a matter of interpretation, this conclusion is deeply implausible: a more natural interpretive conclusion would be that the content of the chain novel will vary depending on the order in which the authors work. It may be that the work will have integrity no matter what the order is, but that is not the same thing as saying that the order does not affect the result. Each of the alternative sequences would produce a different, yet equally sustainable, interpretation of the first author’s starting point.

\textsuperscript{151} It has been pointed out that Dworkin presupposes a certain aesthetic of fiction which in turn creates the constraints under which the novelists work. \textit{See} Fish, 	extit{Doing What Comes Naturally}, \textit{supra} note 2, at 95; Costas Douzinas, Shaun McVeigh, & Ronnie Warrington, \textit{Is Hermes Hercules’ Twin? Hermeneutics and Legal Theory}, in \textit{Reading Dworkin Critically} 123, 136 (Alan Hunt ed. 1992). This aesthetic is analogous to the political theory under which the judges in law as integrity operate, and Dworkin of course recognizes that a judge who operates under a political morality different from his will reach a different result in a hard case: \textit{see} Dworkin, \textit{Law’s Empire}, \textit{supra} note 7, at 256. But I am concerned with the possibility of disagreement within a given political morality.
Or consider a different artistic analogy. There are many recordings of Beethoven’s C minor piano sonata, op. 111. The text of the sonata, unlike the text of Dworkin’s chain novel, is reasonably fixed. But each recorded performance is different from the others: the differences include matters of tempo, rhythmic phrasing, dynamic contrast, pedalling, emphasis, and articulation. All of the recordings pass a test of fit: they show sufficient respect for the printed score. On the dimension of justification, I assume good faith, in that each pianist offers an interpretation which, by his or her lights, makes the work the best it can be. None of the interpretations seems wrong in any meaningful sense: they are just different from each other. Indeed, to claim that one is right and the others are wrong, or to claim that in principle a Herculean pianist could produce the definitive interpretation of the sonata, would be to stultify the development of any given pianist’s musicianship, bringing the process of interpretation to an end.

Now, the law is neither literature nor music. A performance of a Beethoven piano sonata may make the world richer or poorer from an aesthetic point of view, but it will not send anyone to jail or require anyone to pay damages. In contrast, at the end of litigation, there will be a successful and a disappointed litigant and perhaps a new legal rule; at the end of a legislative process, a new or revised statute affecting citizens’ rights and duties will be in place. In these situations, it will hardly do to assert that,

\[\text{\textsuperscript{152}}\] For the record, my collection of recordings includes performances of Beethoven’s op. 111 by Ashkenazy, Backhaus, Barenboim, Brendel, Buchbinder, Gilels, Goode, Gould, Guller, Kempff, Kovacevich, Kuerti, Pollini, Richter, and Schnabel.

\[\text{\textsuperscript{153}}\] Though there are some startling wrong notes in Schnabel’s 1942 recording.
aesthetically speaking, one answer is as good as another. There is some sense in which citizens have a right to wise legislation; certainly a civil litigant has a right to win if the law is on his or her side; and an accused person has a right not to be punished if his or her guilt cannot be established. Dworkin relies on the idea that people have rights to support the right answer thesis; and his reliance on our understanding of rights leads to a second reason for thinking that “ties” may be relatively common. Dworkin expresses the core of the right answer thesis as follows:

… even when no settled rule disposes of the case, one party may nonetheless have the right to win. It remains the judge’s duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively.\footnote{154 DWORKIN, RIGHTS, supra note 7, at 81.}

If the litigants in a hard case have no right to a particular decision, it is both pointless and unfair to let the case between them be decided by a controversial (or for that matter uncontroversial) decision about the rights they have.\footnote{155 \textit{Id.} at 281.}

The argument is an attractive one: if we are to say that a litigant has a right, then there must be a right answer in his or her case; otherwise, he or she did not have a right to begin with. In other words, the right answer thesis must be true for a litigant to have a right to win. But this argument, though attractive, is not valid: it does not support but
presupposes the right answer thesis. If the right answer thesis is correct, then a litigant has a right to a decision reflecting the right answer. But the fact that a decision must be made in no way establishes that there is one right decision; and if there is no right answer, then a litigant has only a right to a “choice … made honestly and in a cool moment, free from bias or passion or zeal.” Thus, the idea that people have rights says nothing in itself about whether there will be a right answer in a difficult case, and is no obstacle to the thought that “ties” may be relatively common.

Consider, third and finally, the strangely subordinate place of legislation in Dworkin’s account. Dworkin does offer a principle of integrity in legislation which is different from the principle of integrity in adjudication and which apparently offers the legislature more room to maneuver than the courts. But one might think that the right answer thesis does not permit this distinction. Suppose a court deciding a hard case (whether at common law or in the interpretation of a statute) decides that a particular legal doctrine should be in force. For concreteness, suppose the case in question is

156 Id. at 279.

157 Compare Hilary Putnam, Replies, 1 LEGAL THEORY 69, 76 (1995): “Dworkin writes as if the existence of a correct answer simply followed from the fact that legal statements and ethical statements are truth-value worthy.”

158 On the subordinate place of legislation in contemporary legal theory more generally, see JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

159 DWORKIN, LAW’S EMPIRE, supra note 7, at 176-224.
Henningsen,\textsuperscript{160} where the court had to consider whether a warranty guaranteeing replacement of defective parts and excluding all other forms of liability was effective in a case where a motor vehicle had been effectively destroyed by an apparent manufacturing defect. The court held that neither the manufacturer nor the dealer could rely on the warranty, and that the purchasers of the vehicle could rely on an implied warranty of merchantability against the manufacturer and the dealer. This result was achieved despite the absence of “any statute, or … any established rule of law, that prevented the manufacturer from standing on the contract.”\textsuperscript{161} Now, suppose the legislature doesn’t like the result, and therefore enacts a statute reversing the result; that is, the legislature decides to impose a different legal doctrine. In particular, imagine that after Henningsen the New Jersey legislature, in an effort to encourage purchasers to negotiate protection from injury, or to protect dealers and manufacturers from liability, enacted a statute abolishing the implied warranty and requiring courts to give effect to contractual limitations of liability. There are three ways of understanding the rightness of the legislature’s response to the court’s decision: (1) the legislative response is wrong; (2) the court’s decision was right, but the legislative response is permissible because it is based on a consideration that the court was barred from hearing; (3) both the original decision and the legislative response are right in the sense that each is a permissible interpretation of the demands of justice. The first understanding is of course always possible; the positive supremacy of the legislature in non-constitutional matters does not mean that we


\textsuperscript{161} DWORKIN, RIGHTS, supra note 7, at 23.
are bound, as citizens or as lawyers, to say that the legislature is always right. The third understanding is not available to Dworkin because it is inconsistent with the right answer thesis. Dworkin in fact adopts the second understanding, but I want to suggest that there is a class of cases, including our hypothetical reversal of *Henningsen*, in which it is not available to him. Legislatures make all sorts of policy decisions that are not usually justiciable: whether to change a tax rate, whether to subsidize a particular activity, whether to ratify a treaty. In such cases I have no quarrel with Dworkin’s general description of the difference between the legislative and the judicial role. But legislatures also make decisions about questions of legal doctrine that would normally be justiciable: they create, modify, and repeal rules of tort law, contract law, criminal law, and so forth. In these cases legislatures ought, on Dworkin’s account, to be subject to the same constraints of integrity and with the same attention to equal concern and respect as a court. They therefore must reach the same decision as the court. If Dworkin’s right answer thesis is correct, then a legislature which reverses a judicial decision must be wrong—in the sense that its enactment does not reflect the best political justification for the material (which now includes the court’s correct decision) that existed just before the enactment.

If the “right answer” thesis has the implications for legislative action that I have suggested, then some of Dworkin’s examples of integrity in legislation need to be revisited. Consider the following:

162 DWORKIN, LAW’S EMPIRE, *supra* note 7, at 244; DWORKIN, RIGHTS, *supra* note 7, at 302-303.
Suppose the legislature is persuaded that the standing scheme of accident law, which allows people compensation for defective products only when the manufacturer is negligent, is unjust, and therefore it proposes to enact a scheme of strict liability for defective automobiles. Integrity would require it to enact strict liability for all other products as well.\textsuperscript{163}

The argument from integrity is appealing on its own terms; but if the right answer thesis is correct, one must ask what business the legislature has in changing the standard of tort liability in the first place. Assuming that standard to have been determined judicially, and assuming the right answer thesis is correct, the legislature must be wrong in proposing to change it. But if the legislature’s view about the proper doctrine satisfies the requirements of integrity, then it would have been proper for the court to have adopted it, and hence no more wrong than the answer that the court did adopt.

The point might also be put this way: if, as Dworkin argues, people have rights, and if these rights are consistent with the demands of integrity, it is hard to see how those rights can ever be changed in a principled way. Once Hercules has told us the right answers to all the hard cases, there is no more doctrinal work to be done by judges or by

\textsuperscript{163} DWORKIN, LAW’S EMPIRE, supra note 7, at 218. Boyle, supra note 7, at 507-508, points out that Dworkin offers no reason to confine the scope of his tort principles to the domain of product liability.
legislatures. Surely Dworkin does not believe this; yet the right answer thesis, if taken seriously, seems to drive us to this result.

A more natural understanding of the relationship between the court and the legislature in a case of this sort is the following: unless the enactment is unconstitutional (or otherwise grossly deficient) it is no less right or wrong than the decision it overturns. So if the court had chosen a rule that was in substance the same as the new enactment, that would not have been wrong either.

The “right answer” thesis in its positive form has, then, at least three flaws. It is not supported by the analogy to artistic interpretation; it relies on a question-begging argument about rights; and it demands an implausible account of the relationship between the courts and the legislature. The “right answer” thesis need not trouble the pragmatist or prevent him or her from drawing on other aspects of Dworkin’s account of legal reasoning.

B. Economic Analysis of Law

Economic analysis of law, in its positive guise, helps us understand the effects of legal doctrine on the behavior of individuals. In its normative guise, it offers a guide to the choice of doctrine: the court should choose the legal rule that will maximize wealth\textsuperscript{164} or some other measure of well-being.\textsuperscript{165} In its jurisprudential guise, it asserts that legal

\textsuperscript{164} Posner, Problems, supra note 80, at 374; David D. Friedman, Law’s Order: What Economics Has to Do with Law and Why It Matters 44 (2000).

\textsuperscript{165} Kaplow & Shavell, supra note 6.
doctrines is best understood as if it had been designed to maximize wealth. Economic analysts are hostile to the idea of legal principle because they see legal concepts as mere reflexes of other, more important, normative values. In this article, I focus on the normative claim, which is said to remedy the indeterminacy that plagues other accounts of doctrine.

I argue, first, that the normative claim does not in fact resolve the problem of indeterminacy; and, second, that the normative claim is in any event unattractive.

1. The Indeterminacy of Wealth-Maximization

The normative claim of economic analysis of law states, in essence, that legal rules should be chosen so as to maximize wealth, or to ensure that resources are allocated to

166 Posner, Problems, supra note 6, at 358-61. With respect to tort law at least, the jurisprudential claim has often been persuasively criticized. See, e.g., Weinrib, supra note 7, at 46-8; Coleman, Practice, supra note 5, at 13-24. Recently, distinguished economic analysts of law have tended to emphasize their positive and normative claims while resiling from the jurisprudential claim: see Kaplow & Shavell, supra note 6, at 4; and compare Arthur Ripstein, Too Much Invested to Quit, 20 Econ. & Phil. 185 (2004) (book review).

167 “Although there are other possible goals of judicial action besides efficiency and redistribution, many of these (various concepts of ‘fairness’ and ‘justice’) are labels for wealth maximization, or for redistribution in favor of powerful interest groups”: Posner, Problems, supra note 80, at 360.
their highest-valued uses. For example, where the assignment of a property right is at issue and there is reason to believe that Coasean bargaining will not occur, it is often suggested that the right should be assigned to the party who values it most highly, as this assignment will mimic the market outcome that would occur if the conditions for the application of Coase Theorem were at least approximately satisfied.\textsuperscript{168} Or it is suggested that a legal rule should be chosen to provide people with incentives to behave in a wealth-maximizing way.\textsuperscript{169} The standard of liability in tort law, for instance, should ensure that parties (both plaintiffs and defendants) take all cost-justified precautions, but no more.\textsuperscript{170}

Normative theory of this sort is attractive because it seems to offer a determinate solution to some of the doctrinal problems which, as we have seen, cannot be determined by liberal principles alone. But it is important to understand that this apparent determinacy is an artifact of economic analysts’ casual and customary disregard of the consequences of one of their own most important assumptions: that value depends on willingness to pay. The basic point is straightforward. The efficient outcome cannot in general be identified independently of the legal rule because the legal rule affect wealth and therefore willingness to pay; consequently, it is not in general possible to determine

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\textsuperscript{168} \textsc{Richard A. Posner, Economic Analysis of Law} 58 (5th ed. 1998)

\textsuperscript{169} \textsc{Posner, Economic Analysis, suprana note 63, at 5-7.}

\textsuperscript{170} \textsc{Shavell, supra note 63, at 34; Cooter & Ulen, supra note 63, at 300-19.}
\end{flushright}
which legal rule maximizes wealth, ensures efficiency, or promotes any other economic value. This “income effect” is a simple consequence of equating value with willingness to pay and thus making it a function of ability to pay. 171

To see this point, consider a standard type of nuisance case often employed to illustrate the economic approach. Imagine a factory that produces a desirable

171 The income effect should not be confused with the endowment effect, though both effects create indeterminacy in the normative recommendations often thought to flow from the Coase theorem. The endowment effect occurs if the amount a person is willing to pay at the margin to acquire an item is less than the amount he or she is willing to accept to sell the item at the same margin. See Duncan Kennedy, Cost-Benefit Analysis of Entitlement Problems: A Critique, 33 STANFORD L. REV. 387, 401-421 (1981); DWORKIN, PRINCIPLE, supra note 7, at 238; Herbert Hovenkamp, Marginal Utility and the Coase Theorem, 75 CORNELL L. REV. 783, 797-808; Daniel Kahneman, Jack L. Knetch, and Richard H. Thaler, Experimental Tests of the Endowment Effect and the Coase Theorem, 98 J. POLIT. ECON. 1325 (1990). In contrast, an income effect occurs when a person’s demand schedule changes because his or her budget constraint changes. See J.R. HICKS, VALUE AND CAPITAL 26-37 (2d ed. 1946); ANGUS DEATON & JOHN MUELLBAUER, ECONOMICS AND CONSUMER BEHAVIOR 35-6 (1980); Kennedy, Cost-Benefit Analysis, supra, at 422-429. Income and endowment effects are independent of each other: either one may occur without the other. In my view, in any situation where valuable property rights are at stake, income effects are likely to be much more significant than endowment effects.
consumption good and smoke. The factory’s neighbors dislike the smoke. The factory is willing to pay, if necessary, to continue producing the consumption good, and the neighbors and are willing to pay, if necessary, to abate the smoke. The Coase theorem tells us that, if transactions costs are negligible, it doesn’t matter what the legal rule regarding the smoke is. Suppose the factory values the right to produce smoke more than the neighbors value clean air. Then, Coasean analysis tells us, even if the neighbors obtain a court order enjoining the production of smoke, the factory will pay the neighbours to give up their rights under the injunction. Either way, pollution will continue. Suppose, conversely, that the neighbors value clean air more than the factory values the right to produce smoke. Then even if the neighbors are unable to obtain a court order enjoining the production of smoke, they will pay the factory to cease its emissions. Either way, emissions will cease. It is the parties’ valuations, not the legal rule, that determine the outcome. The implication for legal decision-making is that if transactions costs are substantial, so that bargaining after the court’s decision is unlikely to occur, the court should try to allocate the right to control the factory’s emissions to the party who values it most.\footnote{This example is quite standard: see, e.g., FRIEDMAN, supra note 164, at 39-40; HAL R. VARIAN, MICROECONOMIC THEORY 203-7 (1978).}

But this analysis ignores income effects. The right to control a factory’s emissions is very valuable; consequently, the ownership of the right is likely to affect the
neighbours’ willingness to pay for clean air. If clean air is a normal good,\footnote{For a normal good, the quantity demanded at a given price increases when income rises; for an inferior good, the quantity demanded at a given price decreases when income rises. \textit{See Deaton \& Muehlbauer, supra} note 171, at 43-6. It seems unlikely that clean air is an inferior good, but even if it is, the main point made in the text is, \textit{mutatis mutandis}, still valid: the level of pollution will depend on the assignment of the property right at issue because that assignment will affect the parties’ wealth and therefore their demand for goods, whether those goods are normal or inferior.} the neighbours will be willing to pay more for any given unit of clean air if they win the injunction than if they lose. Thus, even with zero transactions costs, we can expect less pollution if the neighbors have the property right. It is not possible to determine the “most efficient” allocation of the property right because the efficient allocation of resources varies with the allocation of the property right. \textit{A fortiori}, the outcome with no transactions costs gives the court no guidance as to the proper solution when transactions costs are substantial.\footnote{For a formal analysis of the situation outlined here, \textit{see} Hamish Stewart, \textit{Wealth Effects and the Coase Theorem} (2003) (unpublished manuscript on file with the author).}

A similar point might be made about choice of doctrine in tort law. A change in the legal rule—say, moving from fault-based liability to strict liability—will affect the cost of engaging in various activities, reducing the wealth of some and increasing the wealth of others, thereby changing the efficient outcome. One might anticipate that a
change from fault to strict liability would increase the wealth of people who have reasons to engage in risky activities, and thereby increase the overall level of these activities; though one could not be confident of this conclusion without a full theoretical and empirical analysis. 175

Changes to the doctrines of the criminal law would have to be analyzed in the same manner. Economic analysis of law treats the criminal law as yet another policy tool for achieving an efficient allocation of resources; yet, because of the wealth effect, the efficient outcome will vary as criminal law rules change, just as the efficient outcome varies when tort law rules change. If conduct should be defined as criminal only when it is not wealth-maximizing, 176 then an unwanted sexual encounter becomes a sexual assault only when the losses it imposes on the victim exceed the benefits it generates for the assailant. On this view, the fault element of the offence should be set, as far as possible, so as to make wealth-reducing sexual interactions into crimes and wealth-enhancing

175 Existing economic analysis of tort law tend implicitly to assume away the wealth effect and thus avoid this question altogether. For instance, in Shavell’s model of accidents, the behavior of potential tortfeasors and potential victims is driven by the costs associated with accidents and with precautions; but those costs are not themselves a function of the tort rule chosen. See SHAVELL, supra note 63, at 32-46. This approach amounts to assuming away the wealth effect. This point is not meant as a criticism of Shavell’s analysis: there is, of course, nothing wrong with assuming away the wealth effect for the purpose of investigating other effects.

176 Compare KAPLOW & SHAVELL, supra note 6, at p. 320 n. 54.
sexual interactions into innocent conduct. But the choice of fault requirement will itself change the wealth of potential victims and potential assailants. The subjective fault standard favors potential assailants by effectively reducing the value of victims’ property rights in their own bodies; the objective standard favors potential victims by strengthening their property rights. The more valuable the victims’ property rights, the wealthier potential victims will be, and the less likely any given assault will be wealth-maximizing; consequently, the wealth-maximizing level of assaults will be lower under the objective standard than under the subjective standard. Wealth-maximization cannot determine which doctrine supports the efficient outcome because that outcome depends on the doctrine. The problem is quite general: the economic approach cannot make the allocation of a property right or the choice of doctrine in any area of law determinate.

177 See, e.g., Jeffrey S. Parker, The Economics of Mens Rea, 79 VIRGINIA L. REV. 741 (1993). Parker argues that the economic function of mens rea is to reduce overdeterrence of activities defined as “crimes” by ensuring that punishment is inflicted only when the actor’s costs of determining whether what he is doing is a crime are zero — i.e., he knows what he is doing — or quite low — i.e., he could easily determine what he is doing. If punishment is inflicted without reference to fault — i.e., whether or not it is costly for the actor to determine what he or she is doing — there will tend to be overdeterrence in that actors will spend too much to find out what they are doing.

178 Dworkin makes this point very clearly without actually using the term “income effect”:
The way in which the income effect makes some of the normative recommendations of economic analysis of law indeterminate is so obvious — and, at a theoretical level, so well-recognized\textsuperscript{179} — that it is astonishing to see it so frequently.

If A is B’s slave he may not be able to buy back the right to his labor; although if he were not B would not be able to buy that right from him. If economic analysis makes someone’s initial right to his own labor depend upon whether he would purchase he right if assigned to another, that right cannot be “derived” from economic analysis unless we already know who initially has the right. This appears to be a serious circle. We cannot specify an initial allocation of rights unless we answer questions that cannot be answered unless an initial allocation of rights is specified.

\textbf{Dworkin, Principle, supra note 7, at 253.}

disregarded. Posner dismisses it as “a technical difficulty”\(^\text{180}\) while Coase comes close to denying its existence altogether.\(^\text{181}\) But these responses really will not do. If value is based on willingness to pay, then income effects must be central, because they affect willingness to pay.

The income effect is just one manifestation of a more general problem. This problem is, once again, well-understood by economists but largely disregarded by economic analysts of law: in a normative framework where satisfaction of preferences is taken as the supreme value, there is no way to measure “wealth” or “income” independently of a set of prices, and since, in general, prices will change when property rights are re-allocated and legal rules are changed, there is no general way to compare the

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\(^{181}\) Coase, *supra* note 94, at 170-179. One comprehensive introduction to economic analysis of law ignores the wealth effects of reassigning property rights altogether: see Friedman, *supra* note 164.
“wealth” of a society before and after such a change.\textsuperscript{182} Thus, the criterion of wealth-maximization is incoherent on its own terms.

2. \textit{The Normative Failures of Economic Analysis of Law}

If wealth-maximization is an incoherent normative standard, it might be argued that normative economic analysis should focus directly on a normative value that would not be vulnerable to changes in legal rules. Rather than understanding “efficiency” as wealth-maximization, perhaps we should understand “efficiency” as the maximization of an aggregate of well-being. The classical economists, for instance, treated “utility” as a measure of subjectively experienced happiness or desire-satisfaction, and treated the aggregate of everyone’s utility as the normative objective of public policy.\textsuperscript{183} Despite

\textsuperscript{182} See \textsc{Robin Boadway} \& \textsc{Neil Bruce}, \textsc{Welfare Economics} 262 (1984) (outlining the restrictive assumptions necessary for the aggregation of individual preferences into a measure of social welfare); \textsc{Deaton} \& \textsc{Muehlbauer}, \textit{supra} note 171, at 148-66; Allan M. Feldman, \textit{Welfare Economics, in The World of Economics} 713, 725 (John Eatwell, Murray Milgate, \& Peter Newman eds, 1991) (“measuring the size of the economic pie, or judging among divisions of it, leads to ... paradoxes and impossibilities”); \textsc{John Hicks}, \textsc{Wealth and Welfare} 153-159 (1981); \textsc{Kaplow} \& \textsc{Shavell}, \textit{supra} note 6, at 36. This problem is evaded in an otherwise useful and non-technical introduction to economic analysis: \textit{see} \textsc{Friedman}, \textit{supra} note 164, at 18-21.

\textsuperscript{183} \textit{Compare} \textsc{I.M.D. Little}, \textsc{A Critique of Welfare Economics} 6-10 (2d ed. 1957).
cogent objections to the classical utility concept, dating back at least as far as the
1930s,\textsuperscript{184} some economic analysts continue to rely on a measure of value that is in
principle akin to the classical utility concept.\textsuperscript{185} It is very doubtful that it is possible, in
principle or in practice, to construct a stable, measurable and interpersonally comparable
conception of subjectively experienced well-being along the lines of the classical utility
concept. But even if it were possible, there is an important and familiar objection to the
idea that efficiency, understood as the maximization of the sum of everyone’s
subjectively experienced well-being, should be the sole normative guide to social policy:

\textsuperscript{184} See, e.g., Lionel Robbins, \textit{Interpersonal Comparisons of Utility: A Comment},
48 \textit{ECON. J.} 635 (1938); \textsc{Paul A. Samuelson}, \textit{Foundations of Economic Analysis}
90-100(1947). Dissatisfaction with the classical utility concept led to the development
and elaboration of the idea of Pareto efficiency. A social state $x$ is Pareto superior to
social state $y$ if at least one person prefers $x$ to $y$ and no person prefers $y$ to $x$; $x$ is Pareto
optimal if there is no social state that is Pareto superior to it. By referring only to
preferences, the Pareto concept avoids reliance on classical utility (or any other cardinal
measure of well-being) but is of very limited application because it says nothing by way
of comparing social states $w$ and $z$ if some individuals prefer $w$ to $z$ and other individuals
prefer $z$ to $w$. \textit{See} Amartya K. Sen, \textit{The Possibility of Social Choice}, 89 \textit{Am. Econ. Rev.}
349, 352 (1999) [hereinafter Sen, \textit{Possibility}].

\textsuperscript{185} \textit{See Kaplow & Shavell, supra} note 6; Hamish Stewart, \textit{Persons and Their
Well-Being: A Critical Discussion of Kaplow and Shavell’s Fairness versus Welfare}, 30
there is no reason to think that such a measure would capture everything that is of normative significance. This objection may be put in various forms, depending on which other normative value one is concerned about: efficiency is concerned only with the relationship between means and ends, and cannot take into account either the quality of ends or the importance of a person’s ability to reflect on ends; it cannot take into account anything that is valued for non-instrumental reasons; it cannot take into account any value that cannot be traded off for another value; it is insensitive to violations of right and so, to the extent that the protection of rights is valued intrinsically

186 This is one of the principal objections to Kaplow and Shavell’s proposal that welfare should be the only normative value: see KAPLOW & SHAVELL, supra note 6, and, among others, Richard H. Fallon, Should We All Be Welfare Economists? 101 MICH. L. REV. 979 (2003) (book review); Stewart, Persons, supra note 185.


189 Margaret Jane Radin, Market-Inalienability, 100 HARV. L. REV. 1849, 1870-87 (1987); ANDERSON, supra note 12, at 44-64.
or instrumentally, it is unresponsive to that normative dimension;\textsuperscript{190} it is insensitive to the distribution of income, unless by chance the distribution is itself something people have

\textsuperscript{190} DWORKIN, PRINCIPLE, supra note 7, at 242-243; Sen, Rights, supra note 27.

The clash between right and preference-based methods of evaluating social welfare was made very pointed by the so-called “Sen paradox” in which the Pareto principle generates one outcome and a plausible specification of individual rights generates another outcome, suggesting that the achievement of Pareto optimality is inconsistent with respect for rights. \textit{See} Amartya K. Sen, The Impossibility of a Paretian Liberal, 78 J. POLIT. ECON. 152 (1970). The secondary literature on the Sen paradox is vast: three useful starting points are KOTARO SUZUMURA, RATIONAL CHOICE, COLLECTIVE DECISIONS, AND SOCIAL WELFARE 180-238 (1983); JOHN L. WRIGLESWORTH, LIBERTARIAN CONFLICTS IN SOCIAL CHOICE (1985); Sen, Possibility, supra note 184, at 363-364. Kaplow and Shavell present what is in effect an extension of the Sen paradox and argue that the conflict between welfarism and other values is in itself a decisive reason for abandoning all values other than the promotion of well-being. \textit{See} Louis Kaplow & Steven Shavell, Any Non-welfarist Method of Policy Assessment Violates the Pareto Principle, 109 J.POLIT.ECON. 281 (2001); KAPLOW & SHAVELL, supra note 6. As several commentators have pointed out (and as the Sen paradox was originally intended to show), the fact of a conflict between two values does not in itself give us a reason to give up either one of those values; consequently, for their argument to succeed, Kaplow and Shavell need to show not just that welfarism conflicts with other values but that welfarism is itself an
preferences about;\textsuperscript{191} and it is not even a good measure of the things people need to satisfy their basic needs.\textsuperscript{192}

Thus, the indeterminacy of wealth-maximization is not just a technical issue but is connected with the normative unattractiveness of economic analysis of law. Moreover, it is not necessary to go outside the mainstream of economics to see this connection. General equilibrium analysis is one of the great intellectual achievements of modern economics; and one of the things that it tells us is that under the most standard assumptions about preferences, technology, and markets, the final distribution of goods depends on the initial allocation of resources.\textsuperscript{193} Hence the Coase theorem, if interpreted attractive moral value: see Jules Coleman, \textit{The Grounds of Welfare}, 112 \textsc{Yale L.J.} 1511, 1526-8 (2003) (book review); Stewart, \textit{Persons, supra} note 185, at 6-8.

\textsuperscript{191} Stewart, \textit{Persons, supra} note 185, at 23.

\textsuperscript{192} For this reason, Sen has proposed that economic well-being be assessed not by measures of preference satisfaction but by indicators of what he calls “capabilities”. \textit{See Amartya K. Sen, Inequality Reexamined} (1992).

\textsuperscript{193} General equilibrium analysis is the branch of economic theory that analyzes the conditions for the existence of a market-clearing equilibrium for all goods and services. For the classic presentation of the problem and the solution, see Kenneth J. Arrow & Gerard Debreu, \textit{Existence of an Equilibrium for a Competitive Economy}, 22 \textsc{Econometrica} 265 (1954); for less technical overviews and presentations, \textit{see Frank Hahn, General Equilibrium Theory, in Equilibrium and Macroeconomics} 72 (1984);
strongly to mean that the initial allocation of a property right does not affect the allocation of resources, is false. Closely connected with the general equilibrium research program was the effort to analyze the normative properties of equilibria using preference-based measures such as the Pareto criterion. This effort has shown that a satisfactory money measure of economic welfare based on preferences, such as Posner’s wealth-maximization, can only be constructed on very restrictive assumptions about preferences. If we take these bodies of scholarship seriously, as we should, we cannot accept the proposition that economic efficiency by itself can capture all the normatively significant features of the law.

KENNETH J. ARROW, General Economic Equilibrium: Purpose, Analytic Techniques, Collective Choice, in 2 COLLECTED PAPERS OF KENNETH J. ARROW: GENERAL EQUILIBRIUM 199 (1983); VARIAN, supra note 172, at 136-96. The first theorem of welfare economics states that under certain rather restrictive conditions, an equilibrium (if it exists) is Pareto-efficient allocation; the second theorem of welfare economics states that any given Pareto-efficient allocation can be achieved as an equilibrium by a suitable redistribution of agents’ initial endowments. See GERARD DEBREU, Valuation equilibrium and Pareto optimum, in MATHEMATICAL ECONOMICS: TWENTY PAPERS OF GERARD DEBREU 98 (1983); VARIAN, supra note 172, at 147.

A weak version of the Coase theorem, which states that the final allocation of resources is efficient regardless of the initial allocation of property rights, remains true but indistinguishable from the main theorems of welfare economics stated in note 193 supra: see Cooter, supra note 179.
Finally, and perhaps most decisively, the relentlessly aggregative structure of wealth or utility maximization is normatively unattractive because it requires the effective disappearance of the individual interests that made maximization of a sum of values a plausible normative goal in the first place. To maximize wealth (or utility) is to maximize the sum of every individual’s wealth (or utility). In the aggregate, individual persons appear only as locations for the accumulation of wealth or utility, not as individual holders of wealth or utility, much less as agents or as bearers of rights. Thus, their individual interests are submerged. It makes no difference to the aggregate if an equal amount of wealth is taken from one and given to another. Furthermore, if taking everything from one person will, for some reason, increase the aggregate of wealth, the wealth-maximizer would have to support that change, regardless of its effect on the one. Indeed, if taking all resources from everyone except one person and giving them all to that one person one would, for some reason, increase the aggregate, the wealth maximizer

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195 This is the point of Rawls’s famous observation that “Utilitarianism does not take seriously the distinction between persons.” RAWLS, JUSTICE, supra note 7, at 24; see also H.L.A. HART, ESSAYS ON BENTHAM 98-99 (1982); Stewart, Persons, supra note 185, at 26-31; Williams, supra note 26, at 108-18; Amartya Sen & Bernard Williams, Introduction: Utilitarianism and Beyond, in UTILITARIANISM AND BEYOND 1, 4-5 (Amartya Sen & Bernard Williams, eds., 1982); JOHN RAWLS, The Independence of Moral Theory, in COLLECTED PAPERS 286, 295-301 (Samuel Freeman ed. 1999). Rawls’s observation applies a fortiori to wealth maximization, where what is measured is nothing of direct normative interest but an instrument for well-being.
would have to support that change as well. Yet wealth and utility are normative concepts that are of interest only insofar as they pertain to individuals. An aggregate of wealth, apart from its assignment to particular persons, is of no normative interest; an aggregate of utility has no meaning apart from its assignment to particular persons. Thus, even within economic analysis of law, there is no reason to accumulate wealth unless individual persons are taken seriously. The exclusively aggregative focus of wealth or utility maximization does not take individuals seriously and so is inconsistent with the normative reasons for taking wealth or utility seriously in the first place.

The normative unattractiveness of the aggregative structure of wealth- or utility-maximization is most obvious in the economic analysis of crime. As noted above, there is no distinctive category of “crime” in economic analysis; a “crime” is simply an inefficient behavior that the state tries to deter with penal sanctions. The harm to the victim, or the violation of the victim’s rights, counts only to the extent that it detracts from the aggregate of wealth or utility; the harm or the wrong is not itself a reason to prevent the conduct that generates the harm, as the harm might be outweighed by benefits to others. The victim’s role in the analysis is to act merely as a location for a particular consequence. Yet, unless the victim matters in a larger sense than this — unless there is a reason to be concerned about the loss to the victim apart from its contribution to the aggregate of wealth or utility — or, indeed, unless there is a reason to care about the benefit to the accused apart from its contribution to the aggregate — the aggregate itself is of no normative interest.

Neither of my criticisms of wealth-maximization is meant to suggest that economic analysis has no normative value; positive economic analysis is central to any
understanding of the effects of legal rules on the social world, and is therefore important in making informed normative choices between legal rules. The point is simply that economic analysis is not normatively self-sufficient. If we want to make a principled choice between fault and strict liability in tort law, or between subjective and objective fault in criminal law, or among any competing doctrines in any area of the law, we need to understand what economic analysis tells us about the likely effects of the choice, but we cannot rely solely on economic analysis, any more than we could rely solely on the neo-formalist conception of the person, to determine the doctrine.

C. Critical Legal Studies

Much of what I have said to this point has a Critical Legal ring to it. The observation that doctrine is not a determinate consequence of principle has certainly been a commonplace of Critical Legal scholarship,196 as has the critique of economic analysis197 and the claim that the space left by indeterminacy is filled with ideological choices and the operations of power.198 The critical legal scholars’ claims, if accepted, threaten the contemporary liberal project because they undermine liberalism’s aspiration to be neutral between


197 Kennedy, Cost-Benefit Analysis, supra note 171.

198 KENNEDY, CRITIQUE, supra note 3, at 4-14; SCHLAG, ENCHANTMENT, supra note 3, at 30-39.
competing conceptions of the good; what it worse, these claims suggest that a legal
decision-maker who does not acknowledge them is systematically, if unconsciously,
misrepresenting what he or she is doing. The decision-maker is, in Kennedy’s phrase,
operating in “bad faith”. 199 Do these claims also have force against the pragmatic picture
of legal reasoning that I seek to defend? It seems at first that they do. I have claimed that
principle creates a zone in which various doctrines may be chosen, and that the choice of
doctrine should depend on an assessment of the effectiveness of each doctrine in
achieving some favored state of affairs. The claims of the Critics might seem to
undermine the pragmatic model in two quite distinct ways. First, although “principle” as
I understand it is simultaneously less demanding procedurally and more demanding
substantively than the neutral principle of liberal political theory, it nonetheless is meant
to constrain legal argument in somewhat the same manner: it has the effect of ruling out
certain legal doctrines regardless of their beneficial effects. Second, even if principle is
satisfied, the assessment of effectiveness itself is surely fraught with the same ideological
struggle that principled legal argument is meant to suppress. 200

But neither of these Critical points has much effect on the pragmatic model, for
the simple reason that the pragmatist can scarcely deny them without denying his or her
own pragmatism. The constraining effect of a principle expressed as generally as some
of those I have mentioned above (e.g., the principle of respecting agency in imposing
tortious or criminal liability) is generally so weak as to constitute no bar to the contention

199 KENNEDY, CRITIQUE, supra note 3, at 4.

200 Id. at 109-111.
of ideology (understood as competition between implicit conceptions of the good), while the constraining effect of principle expressed more strongly (e.g., the principled argument for subjective fault in criminal liability) is never an absolute but always a possibly temporary phenomenon. Similarly, at the stage of choosing among several principle-respecting doctrines, there is really no escape from the struggle of contending ideological views. Any ideal which strove to contain this struggle would itself take on the status of a principle whose consequences for doctrine could be no more determinate than those liberal principles it supplemented.

But the pragmatist differs from the Critic in taking a more relaxed view of ideological struggle in the determination of cases. First, while there is no logical reason why one case rather than another should become a site for struggle, it has to be admitted that, empirically speaking, most cases are not of this sort. They administer previously-arrived-at ideologies and so postpone ideological struggle and allow us to get on with our lives.\textsuperscript{201}

Second, “ideological struggle,” understood as “open-ended disputes about the basic terms of social life”\textsuperscript{202} need not be as disruptive as it sounds. Consider several debates that have troubled courts, legislatures, and citizens: the criminalization of

\begin{enumerate}
\item \textsuperscript{201} \textsc{Altman}, \textit{supra} note 83, at 184-186.
\item \textsuperscript{202} \textsc{Roberto Mangabeira Unger}, \textsc{The Critical Legal Studies Movement} 1 (1986).
\end{enumerate}
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obscene expression,\textsuperscript{203} the legality of indefinite detention of suspected terrorists,\textsuperscript{204} the permissibility of assisted suicide,\textsuperscript{205} and the definition of the proper standard for unfair labor practices in collective bargaining.\textsuperscript{206} These are all, to be sure, “disputes about the basic terms of social life.” The pragmatist does not expect them to go away merely because he or she uses principled legal argument to assist in resolving them. The persistence or recurrence of such disputes indicates only that they are important and

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{203} Joel Feinberg, Offense to Others 97-287 (1985); Dworkin, Freedom’s Law, supra note 7, at 214-243; Catharine MacKinnon, Only Words (1993); Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973); R. v. Butler, [1992] 1 S.C.R. 452; Bad Attitude/s On Trial (Brenda Cossman & Shannon Bell eds, 1997).
\item \textsuperscript{205} Joel Feinberg, Harm to Self 344-374 (1986); Dworkin, Freedom’s Law, supra note 7, at 130-146; Ronald Dworkin, Life’s Dominion (1993); Cruzan v. Director, Missouri Dep’t of Health, 497 U.S. 261 (1990); Rodriguez v. British Columbia (Attorney General), [1993] 1 S.C.R. 519.
\end{enumerate}
\end{footnotesize}
difficult, not that their resolution in accordance with principle is impossible or that any particular resolution is permanent. Nor does the fact that ideological struggle is pervasive provide, in itself, a reason to adopt any particular ideology. The typical Critical Legal Scholar is a leftist, but there is nothing in his or her method that would startle a fascist like Carl Schmitt\textsuperscript{207} or a liberal like Richard Rorty:\textsuperscript{208} all three regard debate, or struggle, over the basic terms of social life as central to politics, but each draws dramatically different political conclusions from it.

Third, the fact that not all legal reasoning is principled does not mean that no legal reasoning is principled; and the fact that principles themselves are infested with ideology does not mean that they are not principles. The Critics and other critics have repeatedly argued that liberalism’s claim to be neutral between substantive moral positions or contending conceptions of the good or even between different religious beliefs is impossible to achieve or a sham (or both).\textsuperscript{209} But if liberalism is understood not as


\textsuperscript{208} RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 1-95 (1989). See also FISH, DOING WHAT COMES NATURALLY, supra note 2, at 315-341 (denying that anti-foundationalism has any consequences); FISH, PRINCIPLE, supra note 4, at 285-292 (same); STUART HAMPSHIRE, JUSTICE IS CONFLICT (2000).

\textsuperscript{209} SCHLAG, ENCHANTMENT, supra note 3; FISH, PRINCIPLE, supra note 4, at 153-210; ALLAN C. HUTCHINSON, WAITING FOR CORAF 88-153 (1995).
demanding strict neutralism but as committing itself to certain principles that admittedly exclude some forms of life, then the attack on neutrality has no force against liberalism.210 If liberal principles were understood as substantive rather than neutral, then the Critical attack would have to be directed at the desirability of the form of life supported by those principles. It would be part of a debate over the basic terms of social life, rather than a complaint that the debate was being avoided.

The question of the proper construction of liberalism is far too large to answer properly in this article. But I will briefly indicate why the Critical program is less threatening to law understood as part of a non-neutral liberal order than to law understood in its neo-formalist guise as neutral mediator. The critique of liberal neutrality, in a nutshell, is that liberalism cannot live up to its aspiration to neutrality among all possible conceptions of the good because the very institutions of the liberal state through which this aspiration is expressed favor some forms of life and disfavor others.211 The neo-formalist response to this critique has been a kind of confession and avoidance: it is conceded that liberalism favors some forms of life over others, but it is claimed that as long as public policy is neutral in intention, regardless of its effects, the principle of


liberal neutrality is respected. Now, this concession makes liberalism’s aspirations weaker than they might have been; moreover, as an answer to those whose ways of life are in fact destroyed by liberalism, it is not wholly satisfactory. A more forthright and defensible response would be to admit the inevitable non-neutrality of liberalism and to defend its attractive features. Whatever its flaws, I understand the basic principles underlying the liberal legal order in this substantive manner. They include such obvious features as representative democracy, basic political, economic, and conscientious freedoms, a culture of respect for rights, and a substantial degree of tolerance. Our main

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212 Rawls, Liberalism, supra note 7 at 191-194; Dworkin, Sovereign Virtue, supra note 58, at 282-4. Dworkin’s view is, at first blush, quite different from Rawls’s on this point. Dworkin takes the distinctive feature of liberalism to be a commitment to a substantive moral value: the requirement that the state show equal concern and respect for all its subjects. Neutrality between forms of life is required only to the extent that it is a demand of equal concern and respect. Dworkin, Principle, supra note 7, at 205-213. But in the end Dworkin understands liberal equality itself as incorporating a standard of neutrality between conceptions of the good life: id. at 191-192.


214 Galston, supra note 211; Raz, supra note 26, at 124-33; David Dyzenhaus, Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Herman Heller in Weimar 248-258 (1997); Misak, Truth, supra note 12, at 108-17.
grounds for finding a society with these features attractive are our experiences with it and the alternatives to it. But ideological contention within such a society is to be expected rather than avoided.

These three observations about ideological contention in law are meant to suggest a more serious objection to Critical Legal Studies as a route to take in response to doctrinal indeterminacy. That objection is simple: Critical Legal Studies offers no such route because it provides no model of legal reasoning; and, however compelling its picture of how we should live may be, the attractiveness of that picture is independent of its critique of mainstream legal reasoning. I spell out this objection with reference to two important statements of the Critical project.

1. Kennedy: The Retreat to Aesthetics

In his *Critique of Adjudication*, Duncan Kennedy associates himself with a left-wing/modernist/post-modernist agenda, or “left/mpm project”.[215] The “left” part of this project is “to change the existing system of social hierarchy, including its class, racial, and gender dimensions, in the direction of greater equality and greater participation in public and private government.”[216] The “mpm” part has “the goal of achieving transcendent aesthetic/emotional/intellectual experiences at the margins of or in the

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[215] KENNEDY, CRITIQUE, supra note 3, at 8.

[216] Id. at 6.
interstices of a disrupted rational grid.”

The two projects share attitudes of “oppositionism” and of “‘postness’”, i.e., “‘loss of faith’ … toward the rationalizing, universalizing claims and aspirations of modern elites.”

Kennedy, well aware of the tension between the two parts of his project, nonetheless hopes that their encounter will be fruitful.

The principal focus of Kennedy’s *Critique* is not the left/mpm project itself, but an obstacle to the project: contemporary American legal culture. Adopting the usual

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217 Id. at 7. This view of the post-modern aesthetic is at sharp variance with an early and authoritative account (if “authority” is the right word to use in connection with a post-modern claim):

The postmodern would be that which, in the modern, puts forward the unpresentable in presentation itself; that which denies itself the solace of good form, the consensus of a taste which would make it possible to share collectively the nostalgia for the unattainable; that which searches for new presentations, *not in order to enjoy them but in order to impart a stronger sense of the unpresentable.*


218 KENNEDY, *CRITIQUE*, supra note 3, at 8.

219 Id. at 11-12.
Critical view that the determination of legal rules is ideologically charged, Kennedy diagnoses certain features of American adjudicative practice that derive from the desire “to show that judges are not or should not be ideological actors, even though they are unquestionably law makers.” He first identifies three characteristic postures that judges adopt in dealing with the inescapably ideological character of adjudication.

“These are the postures of the constrained activist, the difference splitter, and the bipolar judge.” The constrained activist does her best to develop an interpretation of the law that will fit her ideology, but, if she fails, will submit to another interpretation. The difference splitter tries to find a middle ground between contending ideologies: “He lets ideologues decide him indirectly by setting up a choice and then refusing it by choosing the middle.” The bipolar judge alternates between ideological positions, contributing to the development of each but finally choosing neither.

To the extent that these postures succeed in concealing the ideological character of adjudication, current legal practice has three significant effects on “our … system of

\[\text{References:}\]

\[\text{220 Id. at 39-70.}\]

\[\text{221 Id. at 70.}\]

\[\text{222 Id. at 180.}\]

\[\text{223 Id. at 182-184.}\]

\[\text{224 Id. at 185.}\]

\[\text{225 Id. at 186.}\]
lawmaking through adjudication”. The “moderation effect … is the reduction of the power of ideologically organized legislative majorities, and ideologically oriented high-court judges, whether liberal or conservative, to bring about significant change in any subject-matter area heavily governed by law.” The “empowerment effect” is “the empowerment of the legal fractions of intelligentsias to decide the legal outcome of ideological conflict among themselves”. The “legitimation effect” is “an increase in the appearance of naturalness, necessity, and relative justice of the status quo, whatever it may be, over what would prevail under legislative revision.” All three effects protect the legal regime from ideological change, and the devices that judges use to conceal the ideological character of adjudication are therefore crucial.

All of these effects combine to prevent the open contention of ideologies and to support the ruling division between liberalism and conservatism, both of which are committed to capital-L Liberalism, defined as “[a] larger unit … made up of the theoretical commitments that liberalism and conservatism share, including rights, majority rule, the rule of law, Judeo-Christian morality, and a regulated market economy with safety nets.” A different practice of adjudication would, Kennedy speculates,

226 Id. at 216.

227 Id. at 216; see also id. at 217-224.

228 Id. at 216; see also id. at 224-235.

229 Id. at 216; see also id. at 236-263.

230 Id. at 56.
reduce the moderation, legitimation, and empowerment effects, and thereby produce different “political results,” perhaps including elements of the left/mpm project.

One might expect all of this analysis to be followed by a call to political action, perhaps by a claim that a left legal discourse could produce its own version of the three

\[231\] Id. at 215.

I would not be too sanguine about this. In Ontario, the dissolution of what Kennedy would identify as the traditional capital-L Liberal consensus produced a shocking legislative lurch to the right, with the election and re-election of a Progressive Conservative government dominated by that party’s most business-oriented, most punitive, and least socially-progressive fraction. See John Ibitson, Promised Land: Inside the Mike Harris Revolution 99-269 (1997). The response of the courts to constitutional challenges to this rightward turn was mixed. See Lalonde v. Ontario (Commission de restructuration des services de santé), 208 D.L.R.4th 577 (Ont. 1999) (Commission’s order closing a hospital serving the Franco-Ontarian community quashed on constitutional grounds); Wellesley Central Hospital v. Ontario (Health Services Restructuring Commission), 151 D.L.R.4th 706 (Ont.Div.Ct. 1997) (transfer of services from hospital providing abortion and contraceptive services to hospital not providing such services not infringing Charter of Rights and Freedoms); Ontario Public School Boards’ Assn. v. Ontario (Attorney General), 151 D.L.R.4th 346 (Ont.Gen.Div. 1997) (sweeping reorganization of public school boards not violating constitutional principles). The return of the Liberals to power in 2003 has not generated a substantial progressive tilt in legislative policy.
effects and thus support the left project that Kennedy began with. But, rather than uttering such a call to action, Kennedy contents himself with a curious and unsatisfactory aestheticism associated with the mpm part of his project, intended apparently to provoke not political action but an emotional response rather than. The critique of rights, he says, “is not about the question of how we ought to define rights but rather about how we should feel about the discourse in which we claim them.” The mpm project, “rather than putting a new theory in place, … looks to induce, through the artifactual construction of the critique, the modernist emotions associated with the death of reason—ecstasy, irony, depression, and so forth.” Similarly, the mpm understanding of the state’s authority does not lead Kennedy to seek to use that authority in the pursuit of his goals:

A left/mpm program for the transformation of society would have aims that could not be simply imposed by law. First, the ability of the state qua state, the state without “legitimacy,” to coerce obedience is obviously limited. Second, much of the behavior a left/mpm program would like to change is so fine-grained, so much

233 Kennedy lists, for example, a number of “‘empowering’ … solutions” that various Critical scholars have endorsed in the past. KENNEDY, CRITIQUE, supra note 3, at 262.

234 KENNEDY, CRITIQUE, supra note 3, at 334, original emphasis.

235 Id. at 342.
involved with “attitudes” and spiritual orientations to action, that it couldn’t possibly be mandated in all its detail from above.

If it could, and people just obeyed a totalitarian code, the program would have failed for the reason that the program aims at conversion to a kind of antinomianism, rather than at obedience to correct thought. “The letter killeth …” is not an entailment of postmodernism (there are none), but it is a core maxim of left/mpm. A second core maxim is that we study state power to resist it, not to seize it.\(^{236}\)

At this point, the tension between the “left” and the “mpm” parts of Kennedy’s project becomes irreconcilable. The leftist is bound to regard the post-modernist’s preoccupation with aesthetics at best as a distraction from the project of advancing left goals through law, and at worst as a self-defeating substitute for action.\(^{237}\) The post-modernist is bound

\(^{236}\) Id. at 271.

\(^{237}\) Kennedy’s project is a sophisticated instance of the “politically paralyzing skepticism” that leftist critics of post-modernism reject: see Terry Eagleton, Where Do Postmodernists Come From?, in IN DEFENSE OF HISTORY (Ellen Meiksins Wood & John Bellamy Foster eds. 1997) 17 at 24. Fredric Jameson’s early articulation of the post-modern aesthetic already contained a more positive political program than Kennedy’s retreat to aestheticism: see Fredric Jameson, Postmodernism, or the Cultural Logic of Capitalism, 146 NEW LEFT REV. 53, 85-90 (1984); see also DAVID HARVEY, THE CONDITION OF POSTMODERNITY 329-45 (1990); TAMAHANA, supra note 13, at 253-4.
to regard the leftist’s commitments, to the extent that they depend on a master narrative of equality or humanity, as naïve or irrational.238 For a legal decision-maker who is trying to resolve a difficult doctrinal question, such as the proper fault requirement for the offense of sexual assault, it hardly seems appropriate to take up a purely aesthetic attitude; yet Kennedy’s postmodernism seems to leave him only weakly committed to the values that might make one think such doctrinal questions were urgent in the first place. There is nothing in Kennedy’s account to make the pragmatist abandon his or her understanding of legal doctrine as the pursuit of desirable consequences within the constraint of principle.

2. Unger: The Attack on Stability

Like Kennedy, Unger diagnoses a feature of American legal thought and sees it as an obstacle to desirable change. Unger describes the dominant mode of American academic-legal discourse as “rationalizing legal analysis”:

Rationalizing legal analysis is a way of representing extended pieces of law as expressions, albeit flawed expressions, of connected sets of policies and principles. It is a self-consciously purposive mode of discourse, recognizing that imputed purpose shapes the interpretive development of law. Its primary distinction, however, is to see policies of collective welfare and principles of

moral and political right as the proper content of these guiding purposes. The generalizing and idealizing discourse of policy and principle interprets law by making sense of it as a purposive social enterprise that reaches toward comprehensive schemes of welfare and right. Through rational reconstruction, entering cumulatively and deeply into the content of law, we come to understand pieces of law as fragments of an intelligible plan of life.\(^{239}\)

Unger’s objection to rationalizing legal analysis is that it “helps arrest the dialectic between the rights of choice and the arrangements that make individual and collective self-determination effective”.\(^{240}\) The academic habit of using rationalizing legal analysis rather than analogical reasoning has consequences analogous to Kennedy’s legitimation, moderation, and empowerment effects:

Too much pretence of discovering the ideal conceptions ready-made and fully potent within the existing law, and the legal analyst becomes a mystifier and an apologist. Too much constructive improvement of the law as received understanding represents it to be, and he turns into a usurper of democracy. In fact, because the apologetic mystification may be so insecurely grounded in the actual materials of law, both these countervailing perversions of rational

\(^{239}\) Unger, Legal Analysis, supra note 4, at 36. Unger might well be describing, though he does not cite, any of Dworkin’s major theoretical statements.

\(^{240}\) Id. at 39.
reconstruction are likely to end in an unjustified confiscation of lawmaking power by the analyst.\textsuperscript{241}

Rationalizing legal analysis is contrasted with “the looser and more context-oriented analogical reasoning that continues to dominate … much of the practical reasoning of lawyers and judges.”\textsuperscript{242} Analogical reasoning “refus[es] to climb up the ladder of abstraction, generalization, and system”;\textsuperscript{243} it engages in a “dialectic between ascription of purpose and classification of circumstance”;\textsuperscript{244} its “guiding interests or purposes … are open-ended”;\textsuperscript{245} it is “noncumulative … because the guiding interests or purposes do not move towards a system of axioms and inferences.”\textsuperscript{246} Because it lacks a “drive toward systematic closure and abstraction”\textsuperscript{247}, analogical reasoning is suited to a world in which rationalizing legal analysis is replaced with “the idea of legal analysis as

\begin{footnotes}
\item\textsuperscript{241} Id. at 37; see also id. at 47-50 and at 178.
\item\textsuperscript{242} UNGER, LEGAL ANALYSIS, supra note 4, at 37.
\item\textsuperscript{243} Id. at 59.
\item\textsuperscript{244} Id. at 60.
\item\textsuperscript{245} Id.
\item\textsuperscript{246} Id. at 61.
\item\textsuperscript{247} Id. at 114.
\end{footnotes}
institutional imagination.”248 The exercise of this imagination would assist in the construction of various “imagined futures” or “alternative conceptions of the desirable sequel to social democracy as it is currently understood and practised”.249 Unger considers three in particular. The first is “extended social democracy … animat[ed by] the belief that the privileged area of experience is the life of the individual: the ability of the individual to define and to execute his own life projects”;250 the second is “radical polyarchy … [which] wants to devolve central state power to local or specialized communities”;251 the third is “mobilizational democracy … [which] wants to heat politics up, both the macropolitics of institutional change and the micropolitics of personal relations, and to loosen all factional strangleholds upon the key societymaking resources of political power, economic capital, and cultural authority.”252

248 Id. at 129.

249 Id. at 135.

250 Id. at 138.

251 Id. at 150.

252 Id. at 163.
Each of these imagined futures has its own appeal and its own dangers. But I am less interested in the pros and cons of these or any other imagined futures than in the role of legal analysis in each. In particular, I want to suggest that a form of rationalizing legal analysis is likely to emerge under any of Unger’s imagined futures. No matter what the form or animating principles of a legal system, there will be disagreements about the application of those principles to particular disputes. Those disputes will have to be decided in some way, and the parties to those disputes will try to characterize the governing law, whether it is statutory or constituted by previous decisions, in ways that are favorable to the outcomes they desire. They will, in short, attempt to generate doctrine from principle. One can imagine the parties to a dispute in a radical polyarchy appealing to competing conceptions (or concepts) of what it really means to devolve central state power to local communities, and one can imagine the legal scholars of such a polyarchy poring over the resulting decision to determine its relationship with previous

253 This proposal is, at least, less frightening and more coherent than the “destabilization rights” Unger once proposed; though one could imagine such rights being an institutional feature of “mobilizational democracy.” See UNGER, CRITICAL LEGAL STUDIES, supra note 202, at 52-56. For a brief but compelling critique of Unger’s program of destabilization, see GALSTON, supra note 211, at 58-62.
decisions. It will not be the form of the reasoning, but the normative principle under which the reasoning occurs, that will differ. 254

Imagine rationalizing legal analysis stripped of its claim to correctness. I submit that this chastened form of “rationalizing legal analysis” would not differ significantly from Unger’s preferred mode of reasoning by analogy, or indeed from the neo-pragmatic position outlined in Parts II.C.3 and IV.D of this paper. The habits of “representing extended pieces of law as expressions … of connected sets of policies and principles”, of “making sense of [law] as a purposive social enterprise” and of “understand[ing] pieces of law as fragments of an intelligible plan of social life” 255 inevitably emerge from anything more complex than a laundry list of cases; the impulse to abstraction is inevitably engaged in reasoning by analogy; and the “arrest[ing] of the dialectic” reflects the need for stability (perhaps only temporary) in legal matters. A commitment to justice, in the minimal formal sense of treating like cases alike, is enough to generate all the features of rationalizing legal analysis that Unger objects to, but does not eliminate the analogical reasoning that Unger prizes. 256

254 In a similar vein, Andrew Halpin analyzes four of Unger’s proposed new rights and shows that they have the same formal characteristics as the traditional rights Unger objects to. See Andrew Halpin, New Rights for Old? 53 CAMBRIDGE L.J. 573 (1994).

255 UNGER, LEGAL ANALYSIS, supra note 4, at 36.

256 On all of these matters, see MACCORMICK, supra note 61, at 73-86, 97-99, 152-194.
legal analysis from legal discourse would impoverish legal reasoning in much the same way that the neo-formalist exclusion of policy argument does: it would bar the claim that there was a recognizable normative pattern in a body of law.

D. **Principled Consequentialism**

Neo-formalist reasoning from principle cannot determine doctrine because there are typically several doctrines consistent with any set of principles. Dworkin’s model of law as integrity does not eliminate “ties” between possible legal doctrines in hard cases. Economic analysis cannot determine doctrine because of the fundamental indeterminacies in determining what is an economically efficient outcome and because of the inherent normative limitations of the idea of economic efficiency. Critical Legal Studies offers no new and improved picture of legal reasoning. Yet there is something valuable in each of these approaches. The principles championed by the neo-formalists speak to a deep sense of what it means for the law of a liberal state to respect persons. Dworkin’s model provides a plausible account of the structure of legal decision-making, even if it does not in itself support his claim that attention to rights can determine the single correct answer in a hard case. Economic analysis of law, whatever its normative shortcomings, is perhaps the most useful tool yet devised for predicting the effects of legal doctrines on behavior. And the Critical Legal Scholars’ suspicious reading of legal doctrine is sometimes justified: sometimes a claim to principle, neutrality, or reason is indeed a mask for interest, partiality, and ideology; though sometimes it is not.257

There is, I suggest, one theoretical attitude that accounts for the simultaneous appeal and limitation of all of these perspectives. That attitude is pragmatism. Philosophically, pragmatism stands for understanding concepts in terms of their practical consequences,\textsuperscript{258} for understanding truth as a certain kind of usefulness,\textsuperscript{259} for thinking of truth as the limit, or the result, of a process of inquiry rather than as the product of any

\textsuperscript{258} JAMES, Pragmatism, supra note 12, at 506; MISAK, TRUTH, supra note 12, at 84-9; Zipursky, Pragmatic Conceptualism, supra note 13, at 471.

\textsuperscript{259} JAMES, Pragmatism, supra note 12, at 512-520. Perhaps the weakest section of Dworkin’s otherwise powerful account of law as integrity is the crude instrumentalism he attributes to pragmatism; curiously, he cites no leading pragmatists in support of this attribution: DWORKIN, LAW’S EMPIRE, supra note 7, at 151-175. Dworkin’s account of law as integrity should appeal to pragmatists at least because of its insistence on the way that past and current judicial decisions fit together: “ideas (which themselves are but parts of our experience) become true just so far as they help us to get into satisfactory relation with other parts of our experience ...” JAMES, Pragmatism, supra note 12, at 512, original emphasis. James’s pragmatism, though more instrumentalist than Pierce’s, is far less crudely teleological than Dworkin supposes. For persuasive readings of Dworkin as a pragmatist, see Steven D. Smith, The Pursuit of Pragmatism, 100 YALE L.J. 409 (1990); FISH, FREE SPEECH, supra note 2, at 224-230 (1993); see also Farber, supra note 13, at 1345-6.
method we already possess,\footnote{Peirce, supra note 12, at 130-6; James, supra note 12, at 583; Misak, Truth, supra note 12, at 51-7, 95-101; Misak, Inquiry, supra note 12.} for refusing to draw sharp methodological distinctions between disciplines,\footnote{Misak, Truth, supra note 12, at 78-83} for believing both that the world is really out there somewhere and that our access to it is always mediated by concepts,\footnote{Peirce, supra note 12, at 130-4; James, Pragmatism, supra note 12, at 593-596; Putnam, Pragmatism, supra note 12, at 68-74; Grey, Holmes, supra note 13, at 803-4. This particular aspect of pragmatism forges perhaps its most important link with Kant’s thought: compare Peirce, supra note 12, at 24-7.} and for taking all beliefs to be in principle revisable.\footnote{Coleman, Practice, supra note 5, at 8-9; Misak, Truth, supra note 12, at 48-57; Bernstein, supra note 12, at 327.} Legally, pragmatism stands for understanding doctrine in terms of its uses, but without too much dogmatism about what those uses might be;\footnote{Michelman & Radin, supra note 80, at 1047; Farber, supra note 13, at 1343.} for thinking of principles as very abstract desiderata for the just treatment of individuals rather than as axioms from which doctrines can be indisputably derived,\footnote{Michelman & Radin, supra note 80, at 1035-39; Grey, Pragmatism, supra note 13, at 26-7.} for refusing to
draw a sharp distinction between legal reasoning and other types of reasoning, and for treating the law as a human phenomenon to be simultaneously understood and created.

For the legal pragmatist, legal principles are neither the strict determinants of doctrine nor mere instruments for the promotion of a comprehensive conception of the good. Rather, legal principles are general statements about how the legal system should treat people. We know they are valuable not only because they are supported at the most abstract level by the idea that individual persons are of ultimate value, but also because of our accumulated experience concerning how different ways of expressing these principles in the form of specific legal doctrines has played out. Thus, while the legal pragmatist does not expect that doctrine can be deduced from abstract principles, he or she is

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266 “No bounds can be fixed a priori on what shall be allowed to count as an argument in law.” Posner, Problems, supra note 80, at 459. “I cannot think of a characteristically legal reason that does not have a familiar analogue in common experience and judgment.” Greenawalt, supra note 268, at 199. “There is no such thing as ‘legal reasoning’: a permanent part of an imaginary organon of forms of inquiry and discourse, with a persistent core of scope and method. All we have are historically located arrangements and historically located conversations.” Unger, Legal Analysis, supra note 4, at 36. See also Allan C. Hutchinson, It’s All in the Game 151 (2000) [hereinafter Hutchinson, Game]; Alexander, supra note 69.

267 Hilary Putnam, Are Moral and Legal Values Made or Discovered? 1 Legal Theory 1 (1995); Coleman, Principle, supra note 5, at 143-7; Zipursky, Pragmatic Conceptualism, supra note 13, at 470-8.
prepared to rule out certain doctrines as gross violations of those principles, and to entertain reasoned explanations of why one doctrine is more consistent with a principle than another. The pragmatist does not expect these exercises to determine doctrine in very many cases, and so is prepared to entertain argument as to the beneficial or harmful consequences of adopting one doctrine rather than another. Because our social world is pluralistic, and because the law is only one of many features of that world, the pragmatist does not have to adopt a strongly teleological view or a comprehensive theory of the good to think about consequences; he or she is content to consider those consequences suggested by the legitimate legal purposes of the body of law in question.

This picture of pragmatic legal decision-making about doctrine is not particularly novel. Some of its features may be reminiscent of certain features of other descriptions of legal reasoning: it resembles what Greenawalt calls “the intuitive perspective of most lawyers [and] … law teachers who concentrate on particular subject matters”268 as well as MacCormick’s model of legal reasoning.269 It might be one of Rawls’s “mixed


269 MacCormick, supra note 61; see also Neil MacCormick, Legal Right and Social Democracy 136-138 (1982).
conceptions of justice”\textsuperscript{270} or Sunstein’s incompletely theorized agreements.\textsuperscript{271} Boyle’s discussion of the role of integrity in a post-modern moral universe\textsuperscript{272} is pragmatic in spirit, as is Radin’s interpretive reconstruction of the rule of law.\textsuperscript{273} To the extent that it eschews strong methodological commitments, it is akin to Posner’s skepticism about legal method,\textsuperscript{274} though it does not share the outright, even scornful, rejection of principle that dominates his more recent contributions to jurisprudence.\textsuperscript{275} Structurally, it resembles Chapman’s notion of conceptually sequenced argument,\textsuperscript{276} in that the demands of principle are indeed prior to the consideration of consequences, though they are a somewhat loose constraint on the consequences that count.

\textsuperscript{270} RAWLS, JUSTICE, \textit{supra} note 7, at 277. For Rawls, a “mixed” conception is one which accepts his first principle of justice (equal right to liberty) but replaces his second principle with something else. Rawls rejects such “mixed” conceptions while recognizing their appeal: \textit{id.} at 278-282.

\textsuperscript{271} CASS SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35-61 (1996).

\textsuperscript{272} Boyle, \textit{supra} note 7, at 514-527.


\textsuperscript{274} POSNER, PROBLEMS, \textit{supra} note 80, at 459-463.

\textsuperscript{275} See \textit{POSNER, PROBLEMATICS, supra} note 6.

The pragmatic view of legal decision-making has been criticized by contemporary neo-formalists and neo-realists alike for this very lack of dogmatism: its ability to accommodate any argument, its consistency with a wide range of political positions, and its apparent moral emptiness.\textsuperscript{277} I suggest that pragmatism’s accommodating view of argument should be seen as a strength, not a weakness, and that its morality is less empty than the criticisms suppose. If pragmatism in philosophy is a view about truth, then pragmatism in law is a view about the correctness of legal doctrine.\textsuperscript{278} Like


philosophical pragmatism, legal pragmatism recognizes the human interests behind truth claims; it does not provide any deductive procedure for determining correct legal doctrines; and it takes experience to be an important indicator of which doctrine should be adopted. It must therefore begin with some conception, perhaps a thin one, of the human good to be promoted, and it must be catholic in its methodology. These determine the precise nature of the relationship between philosophical and legal pragmatism than to note their common attitude towards their tasks.

279 Dworkin takes this to be an objection to pragmatism rather than simply one of its unavoidable features:

Pragmatists argue that any moral principle must be assessed only against a practical standard: does adopting that principle help to make things better? But if they stipulate any particular social goal—any conception of when things are better—they undermine their claim, because that social goal could not itself be justified instrumentally without arguing in a circle.

Dworkin, *Darwin’s New Bulldog*, supra note 35, at 1735. This criticism is unjustified. In any instrumental argument, the goal to be pursued cannot itself be justified by the instruments used to pursue it; but all this shows is that instrumental arguments are incomplete in themselves, not that they undermine themselves. Problems arise with instrumental reason not because the means do not justify the ends, but because means and ends cannot in general be neatly isolated from each other. See Putnam, *Realism*, supra note 12, at 163-78; Stewart, *Critique*, supra note 79, at 62-74. But pragmatism is far
strengths are illustrated by the discussion of tort and crime in Part III above: where the neo-formalist approach seems to demand a particular doctrinal result, without any sensitivity to the consequences of adopting that doctrinal result, and where the neo-realist denies that the doctrinal result has anything to do with principle, the pragmatist connects the doctrinal result to the principle through a process that takes into account the effects on the social world of adopting the doctrine.

To illustrate the approach that principled consequentialism would take to a particular legal problem, I return, once again, to the issue of the fault requirement for the offense of sexual assault, where the \textit{actus reus} element at issue is the complainant’s lack of consent. There are many possibilities. At one extreme, the accused might be judged solely in terms of his own world view; that is, the prosecution might be required to prove not only that the accused was aware of the complainant’s lack of consent but that he knew it was wrong to proceed with sexual contact in the face of absence of consent.\footnote{All legal systems that I am aware of would treat the accused’s claim as a mistake of law that was irrelevant to culpability, but at this point in the analysis, I do not want to take this possible fault requirement off the table merely by referring to another legal doctrine.} At the other extreme, the prosecution might not be required to prove anything at all about better at taking account of these means-ends interactions than either pure instrumentalism or neo-formalism because it keeps instrumentalism in its proper place, as the servant, and not the enemy or the master, of our efforts to find a satisfactory form of life. See, for example, PUTNAM, PRAGMATISM, \textit{supra} note 12, at 73-74.
the accused’s mental attitude towards the complainant’s consent. A principled consequentialist would take these two extremes to be impermissible on grounds of principle alone. The hyper-subjective, accused-centered perspective on the interaction simply fails to take the complainant seriously as a person and fails to recognize the wrong done when the accused treats her merely as a thing. But the strict liability approach, requiring no demonstration of fault whatsoever, is equally inconsistent with principle in that it fails to attend in any serious way to the accused’s exercise of agency, that is, to the accused’s reasons for acting as he did, and thus permits the state to treat the accused as something less than a person.

But between these two extremes, there are several possible fault standards. The law might adopt the usual criminal requirement of knowledge, so that the prosecution would have to prove that the accused was aware of the complainant’s lack of consent. Or a more objective model of fault might be adopted. Perhaps the prosecution should be required to prove only that a reasonable person would have been aware of the complainant’s lack of consent, or that the accused failed to exercise due diligence to ascertain consent. How should a legal decision-maker choose between these alternatives? Consider the following two opposed arguments concerning the mens rea requirement with respect to the complainant’s lack of consent, one favoring the subjective standard, the other favoring an objective standard:

Rape is a crime requiring mens rea.

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That is, the offense might be one of strict liability in this respect.
Mens rea means intention or recklessness.

If the man believes that the woman is consenting he does not intend to rape, and is not reckless.

Therefore even an unreasonable belief [in consent] negatives liability.\(^{282}\)

There can be no doubt that it is a major harm for a woman to be subjected to non-consensual sexual intercourse notwithstanding that the man may believe he has her consent. There can be little doubt that the cost of taking reasonable care is insignificant with the harm which can be avoided through its exercise: indeed, the only cost I can identify is the general one of creating some additional pressure towards greater explicitness in sexual contexts. To accept an honest but unreasonable belief in consent as a sufficient answer in these circumstances is to countenance the doing of a major harm that could have been avoided at no appreciable cost. Therefore, [a mistaken belief in consent should be reasonable to be a defense to rape].\(^{283}\)


\(^{283}\) Toni Pickard, Culpable Mistakes and Rape: Relating Mens Rea to the Crime, 30 U. TORONTO L.J. 75, 77 (1980). See also FLETCHER, RETHINKING CRIMINAL LAW, supra note 35, at 704-706; Celia Wells, Swatting the Subjectivist Bug, 1982 CRIM. L. REV. 209, 212-213; SUSAN ESTRICH, REAL RAPE 96-98 (1987). In Canada, the subjective
The first argument, with its deductive structure and its resolution of a doctrinal problem on the basis of a fairly abstract idea about criminal liability, sounds like a classic argument of principle. The second, with its appeal to the harm of rape and to the costs and benefits of the proposed doctrine, sounds like a classic argument of policy. But principled legal reasoning — and, in particular, the requirement that the law treat both the complainant and the accused as responsible agents — is simply too abstract to determine the choice between these two alternatives. Both of them recognize the role of each party to the interaction; they simply place different burdens on the parties. For the principled fault standard for sexual assault, or “the rule in Pappajohn”, supra note 282, has been modified by statute: see CRIMINAL CODE, R.S.C., Chap. C-46, §273.2 (1985); the modification was held to be constitutionally valid in R. v. Darrach, 38 O.R.3d 1 (1998). The Supreme Court has not expressly overruled Pappajohn, but held in R. v. Ewanchuk, [1999] 1 S.C.R. 330, that to negate mens rea, a mistaken belief in consent must be a belief that the complainant has communicated consent by words or conduct. This holding, combined with §273.2 of the Criminal Code, in my view effectively imposes a reasonableness requirement on the defense of mistaken belief in consent. For further discussion of the relationship between these changes in the law and Canadian constitutional doctrine concerning fault for criminal offenses, see Stewart, Step Forward, supra note 107; HAMISH STEWART, SEXUAL OFFENCES IN CANADIAN LAW ¶3:600 (2004) [hereinafter STEWART, SEXUAL OFFENCES].
consequentialist, it is legitimate to consider the probable consequences of adopting one doctrine over the other in choosing between them.

If, for example, there were empirical evidence suggesting that an objective fault element would better deter sexual misconduct or would promote more respectful behavior in sexual relationships, such evidence would count in favor of the objective fault requirement. The suggestion in the second quotation that the costs to men of checking for consent are trivial compared with the benefits to women would also count in favor of an objective model of fault. The argument may have an economic aspect to it, but is not founded on the normative considerations that normally inform economic analysis. The claim is not that adopting an objective fault requirement would make society as a whole better off in terms of some aggregate of wealth or welfare, but that the interests specifically protected by the law of sexual assault — everyone’s interest in both freedom to act and in bodily security in respect of sexual contact — would be better protected by the objective standard.

On the other hand, if the empirical evidence pointed the other way, or if (contrary to the actual situation in all jurisdictions that I am aware of) sexual assault were a very rare social occurrence, it might be appropriate to adopt the subjective standard simply on the basis of the usual grounds for having subjective fault in criminal law. In short, the point of the example is not to resolve the doctrinal question, but to show how principled consequentialism excludes some answers while leaving others open, and to show how it

\[284\] Compare Parker, supra note 177, at 783-5.
permits both the appeal to consequences, which neo-formalist principled reasoning is often taken to forbid, and the appeal to principle, which neo-realist approaches exclude.

V. **DETERMINACY AND LEGITIMACY**

The claim that the law provides determinate answers based on principle alone is often connected with a certain type of claim about legitimacy. This claim runs roughly as follows. Legitimacy depends upon the rule of law, not the rule of men and women. The rule of law requires that the answer to a hard case “does not depend on something idiosyncratic about the person who is deciding, or on controversial moral and political claims that are the stuff of debate in the legislative process.” Therefore, the rule of law and legitimacy both require that the law provide determinate answers.

Neo-formalists and neo-realisits generally accept this argument, but draw different conclusions from it. For the neo-formalists, the argument shows the need to adopt a model of legal reasoning that renders doctrine reasonably determinate; for the neo-realist, the argument shows that the legitimacy of law must be rooted in something other than determinate doctrinal answers based on principle. One branch of Critical Legal scholarship accepts this argument, but argues that it shows the impossibility of the rule of law.

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286 Fiss, *supra* note 10. Similarly, for Dworkin, the “right answer” thesis is required for legitimacy because law as integrity is required for legitimacy, and the right answers thesis is a central feature of law as integrity.
law. The law does not provide determinate answers; therefore, the rule of law, conceived of as the rule of neutral principle, is not possible; therefore, the law is not legitimate.287

Another branch of Critical Legal scholarship concedes that something like the rule of law is a nice idea, even if it is cannot exist in the form posited by contemporary liberals.288

If doctrinal determinacy is not possible, then there is not much point in making law’s claim to legitimacy depend upon it. But the observation that doctrine is not determinate does not in itself eliminate the rule of law. If it were the case that we had simply no idea what would happen in any case, even without factual dispute, there would indeed be a problem of legitimacy; if it were the case that the judge’s personality was the decisive factor in every case, there would again be a problem of legitimacy. The pragmatic view asserts that principles provide some boundaries for possible answers in hard cases, and that all sorts of policy considerations may properly inform the choice of doctrine. In this model, there is no escape from the possibility that the identity of the judge289 or the quality of the parties’ advocates may have some effect on the outcome. On what basis can it claim legitimacy?

287 SCHLAG, ENCHANTMENT, supra note 4, at 20-39.

288 KENNEDY, CRITIQUE, supra note 3, at 13-14.

289 Dworkin is quite explicit about this. Thus, he objected to the nominations of Robert Bork, Clarence Thomas, John Roberts, and Samuel Alito to the Supreme Court of the United States on the ground that they had erroneous theories of constitutional adjudication. See DWORKIN, FREEDOM’S LAW, supra note 7, at 265-320; Ronald Dworkin, Judge Roberts on Trial, 52/16 NEW YORK REV. BOOKS 14 (Oct. 20, 2005);
First, the pragmatic view asserts that the result in the great run of cases is reasonably predictable.\textsuperscript{290} Some degree of certainty about outcomes is part of what makes a legal system legitimate. Second, and far more important, by admitting a wide range of arguments into the determination of a hard case, the pragmatic view aspires to a more democratic model of the judicial process than that of the contemporary liberal. The traditional liberal legitimating move has been to \textit{exclude} forms of argument from legal argument: Dworkin’s principle/policy distinction excludes arguments seeking to show the good or bad effects on collective goals that a legal doctrine is likely to have; Rawls’s political liberalism excludes reference to comprehensive moral positions in legal argument; Ripstein’s neo-formalism excludes arguments based on conceptions of the good altogether. The pragmatic legitimating move is rather to \textit{include} forms of argument, to say that, at least in hard cases, almost anything goes.\textsuperscript{291}

The pragmatic approach thus reduces the distinction between legal reasoning and other forms of practical reasoning, while contemporary liberals seek to draw a fairly sharp distinction, and the Critics, at least in their more extreme moods, deny the possibility of legal reasoning altogether. For the contemporary neo-formalists, legal

\textsuperscript{290} Greenawalt, \textit{supra} note 268, at 134–48.

\textsuperscript{291} Cf. DYZENHAUS, \textit{supra} note 214, at 248-258 (1997); Hutchison, Game, \textit{supra} note 266, at 327.
reasoning is distinctive because of its basis in principle, where principle is understood as
the refusal to hear arguments about the moral, political, economic, or other effects of a
legal doctrine on the achievement of some conception of the good. Many contemporary
liberals urge us to leave these arguments to the legislative sphere;\(^{292}\) though on a strict
neutralist liberal view, it is doubtful whether they belong there either.\(^{293}\) But even some

\(^{292}\) See, e.g., Dworkin, Principle, supra note 7, at 181-204.

\(^{293}\) Rawls considers two views about the extent to which underlying moral values
may enter public reason. According to the “exclusive view … on fundamental political
matters, reasons given explicitly in terms of comprehensive doctrines are never to be
introduced into public reason.” According to the “inclusive view … citizens [may], in
certain situations, … present what they regard as the basis of political values rooted in
their comprehensive doctrine, provided they do this in ways that strengthen the ideal of
public reason itself.” Rawls, Liberalism, supra note 7, at 247. While the exclusive
view may seem truer to the spirit of Rawls’s enterprise, he chooses the inclusive view
because it is more likely “to further the ideal of public reason.” Id. at 248. The
constraints of public reason apply to legislative decisions: id. at 252, 337-340. A
comprehensive position “includes conceptions of what is of value in human life, and
ideals of personal character, as well as ideals of friendship and of familial and
associational relationships, and much else that is to inform our conduct, and in the limit
to our life as a whole.” Id. at 13. Therefore, in Rawls’s view, arguments from
comprehensive positions are admissible only where they are advanced not for their own
sake but for the sake of public reason itself. It is not clear how this constraint could ever
contemporary liberals doubt whether a sharp distinction between legal and other forms of reasoning can be upheld; and, if legal reasoning is distinct, it is certainly hard to understand the common practice of hearing from intervenors in constitutional litigation and other hard cases.

Indeed, I would argue that the exclusion of appeals to consequences, and therefore of appeals to conceptions of the good, does not support but undermines the legitimacy of decision-making in hard cases because it excludes almost all the reasons one might have for changing from one doctrine to another. Without appeal to consequences, one is left with appeals to principles, which do not themselves determine legal doctrine.

The principal reason for excluding appeals to the good is the fear that permitting appeals to the good will result in rights being overridden in the pursuit of the good. This is a real fear, to the extent that we believe that rights have either intrinsic or instrumental value, but attempting to insulate the content of rights from debate by excluding appeals to consequences is not the answer; rather, one must have, as Dyzenhaus puts it, a

be observed in practice, and whether Rawls’s adoption of the inclusive view is not inconsistent with the limited role that comprehensive positions are supposed to play. See also Dyzenhaus, supra note 214, at 226-227.

294 Greenawalt, supra note 268, at 199. The differences between legal reasoning and other forms of reasoning are, for Greenawalt, more a matter of degree and emphasis than of method: id. at 202.
“democratic trust in deliberation,” a hope that legal actors, and citizens in general, will remain capable of recognizing that rights are part of what make liberal societies good to live in. In any event, if people do not recognize that, nothing will protect us from the infringement of rights.

To illustrate these points, I return, for the last time, to an example I have used above. Suppose an appellate court has to determine the fault requirement for the offense of sexual assault. The trial court has found that the victim did not consent to the accused’s sexual conduct, but that the accused honestly believed she had consented. On appeal, the legal issue is the appropriate fault element for sexual assault. Assume that the law on the point is not clear: to use Greenawalt’s terms, it is not the case that “virtually any lawyer or other intelligent person familiar with the legal system would conclude, after careful study, that the law provides [an] answer.” The answer may be unclear because the offense is defined at common law and the precise point has never arisen; or because the statute does not define the fault element; or because the case law contains competing interpretations of a statutory definition; or because the constitutional

\footnote{DYZENHAUS, supra note 214, at 225.}

\footnote{Id. at 258; see also GALSTON, supra note 214, at 224-225; JOHN FINNIS, NATURAL LAW AND NATURAL RIGHT 218 (1980).}

\footnote{GREENAWALT, supra note 268, at 3.}

\footnote{As in Morgan, supra note 282.}

\footnote{As in Pappajohn, supra note 282.}
validity of the statutory definition is in issue. Consider four possible answers to the question. (i) The accused’s honest belief that he did not, as a matter of law, require consent negates liability (hyper-subjective fault). On this model, the accused would have to be acquitted. (ii) The accused’s honest belief in consent negates liability (subjective fault). On this model, the accused would again have to be acquitted. (iii) The accused’s honest belief in consent negates liability only if it was reasonable (objective fault), or the accused’s honest belief negates liability only if he took some steps to investigate the victim’s consent (due diligence model of fault). On these models, a verdict could not be rendered without further factual findings relating to the accused’s exercise of due diligence. (iv) The accused’s belief in consent, honest or otherwise, is irrelevant: if the complainant did not consent, the accused is guilty whatever his beliefs about consent (absolute or strict liability). On this model, the accused would have to be convicted.

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300 As in Darrach, supra note 283.

301 One might well see the due diligence model as a branch of, or even as identical to, the objective liability model, on the ground that a reasonable person would make some inquiries. I distinguish them because the “reasonable steps” requirement under the Canadian Criminal Code has struck many judges and commentators as being different from a straight reasonableness requirement, though there is disagreement about which is more stringent. See Stewart, Step Forward, supra note 107, at 22 n. 41; STEWART, SEXUAL OFFENCES, supra note 283, at ¶3:600.30.20.
As argued above,\textsuperscript{302} principled argument from liberal premises about human agency excludes the first and fourth solutions. The first fails to take the complainant seriously as a person, while the fourth fails to take the accused’s agency seriously. The choice among the remaining doctrines depends on some assessment of the relative importance of freedom of action and sexual autonomy. Contemporary neo-formalists may agree so far; indeed, Ripstein claims that his approach dictates a unique choice of doctrine on this basis, and I have criticized his claim above. But a court might also consider the empirical effectiveness of the various doctrines in controlling sexual assault; this sort of argument is excluded from the neo-formalist approach to determining the fault element. But an American or Canadian appellate court hearing such a case today is likely to hear from a variety of intervenors who will direct argument at these very questions. Specifically, feminist interest groups are likely to intervene and to argue in favor of an objective fault element. A feminist intervener will likely point out that even if sexual assault is defined in gender neutral terms, the vast majority of offenders are men and a somewhat smaller majority of victims are women; that the fear of being sexually assaulted has a peculiarly constraining effect on women’s behavior; that the subjective model of culpability serves only to reinforce men’s bad attitudes about women’s sexual availability; and that the objective model requires men to attend to women’s expressions of non-consent in a way that the subjective model does not.\textsuperscript{303} These arguments, if

\textsuperscript{302} See notes 280-284 supra and accompanying text.

\textsuperscript{303} For writing that pursues some of these themes, see Pickard, supra note 283;
Brenda M. Baker, \textit{Understanding Consent in Sexual Assault} in \textit{A Most Detestable}
accepted, provide good reasons to adopt doctrine (ii) or doctrine (iii). But note that they fall outside the range of principled arguments that a neo-formalist could accept because they are empirical claims founded on the desire to promote a partial vision of what makes a society good: a certain conception of proper relationships between men and women and of the attitudes that men should take up towards women.

Now, which form of legal decision-making has more legitimacy? The principled model which neither agrees nor disagrees with the feminist intervenor but refuses to hear her at all? Or the pragmatic model which recognizes her arguments as relevant to a decision which cannot be made on a purely principled basis in any event? To ask the question (as the judges say) is to answer it: legitimacy in doctrinal determination depends not merely on the determinacy of the outcome, but also on the range of voices heard in the process. Pragmatism creates room for those voices without denying the role principle in limiting the range of possible solutions.304


304 For a rather different reconstruction of the rule of law in the face of indeterminacy, see TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW 185-203 (2000).
VI. CONCLUSION

This article recommends that legal decision-makers see themselves as pragmatic in the sense of trying to do some good within a framework of principle. This recommendations flows both from the inherent attractiveness of pragmatism itself and from the unviability of the alternatives. The recommendation that legal decision-makers act purely on the dictates of principle, in its neo-formalist guise, cannot be followed because the dictates of principle are rarely, if ever, sufficiently specific to determine doctrine. The neo-realist or Critical observation that principled arguments and decisions all too often mask operations of power and ideology is useful for making liberals uncomfortable, but as yet has offered legal decision-makers nothing at all in the way of useful advice. The relentless instrumentalism of some practitioners of economic analysis of law is necessarily incomplete because of the limited normative claims that can be made on the basis of modern economic analysis. Pragmatism offers the following thought: we can combine principles and consequences by asking of any doctrine, in light of the relevant legal materials and purposes, the following questions: is it consistent with the relevant governing principles? If so, does it do any good? Compared with the ambitions of some legal theorists, these questions may seem modest indeed; but they should be enough.