Louisiana Law Review

Volume 54 | Number 1
September 1993

The Three Faces of ORPP: Value Clashes in the Law

Richard K. Greenstein

The Three Faces of ORPP: Value Clashes in the Law

Richard K. Greenstein[*]

INTRODUCTION

A. *The* Williams *Case*

On September 12, 1968, William Joseph Tabafunda, age seventeen months, died of complications resulting from an untreated abscessed tooth. His mother and stepfather were convicted of manslaughter.

The Washington Court of Appeals in *State v. Williams* described the defendants as follows:

> The defendant husband, Walter Williams, is a 24-year old [sic] full-blooded Sheshont Indian with a sixth-grade education. His sole occupation is that of laborer. The defendant wife, Bernice Williams, is a 20-year-old part Indian with an 11th grade education. At the time of the marriage, the wife had two children, the younger of whom was a 14-month son. Both parents worked and the children were cared for by the 85-year-old mother of the defendant husband. The defendant husband assumed parental responsibility with the defendant wife to provide clothing, care and medical attention for the child. Both defendants possessed a great deal of love and affection for the defendant wife's young son.[1]

That son, William, fell ill on September 1, 1968, and died eleven days later

> because an abscessed tooth had been allowed to develop into an infection of the mouth and cheeks, eventually becoming gangrenous. This condition, accompanied by the child's inability to eat, brought about malnutrition, lowering the child's resistance and eventually producing pneumonia, causing the death. . . .
>
> . . . The evidence showed that in the critical period [of William's illness] the baby was fussy; that he could not keep his food down; and that a cheek started swelling up. The swelling went up and down, but did not disappear. In that same period, the cheek turned "a bluish color

---

* Professor Of Law, Temple University. B.A., 1970, Wesleyan University; J.D., 1973, Vanderbilt University; LL.M., 1982, Temple University.

I wish to thank Jane Baron and Betsy Maurer for their exceptionally helpful comments on an early draft of this article. I also want to express my gratitude for the financial assistance provided by Temple University School of Law for the initial research.

1. State v. Williams, 484 P.2d 1167, 1169-70 (Wash. Ct. App. 1971).

> like." The defendants, not realizing that the baby was as ill as it was or that the baby was in danger of dying, attempted to provide some relief to the baby by giving the baby aspirin during the critical period and continued to do so until the night before the baby died. The defendants thought the swelling would go down and were waiting for it to do so; and defendant husband testified, that from what he had heard, neither doctors nor dentists pull out a tooth "when it's all swollen up like that." There was an additional explanation for not calling a doctor given by each defendant. Defendant husband testified that "the way the cheek looked, * * * and that stuff on his hair, they would think we were neglecting him and take him away from us and not give him back." Defendant wife testified that the defendants were "waiting for the swelling to go down," and also that they were afraid to take the child to a doctor for fear that the doctor would report them to the welfare department, who, in turn, would take the child away. "It's just that I was so scared of losing him." They testified that they had heard that the defendant husband's cousin lost a child that way. The evidence showed that the defendants did not understand the significance or seriousness of the baby's symptoms. However, there is no evidence that the defendants were physically or financially unable to obtain a doctor, or that they did not know an available doctor, or that the symptoms did not continue to be a matter of concern during the critical period. Indeed, the evidence shows that in April 1968 defendant husband had taken the child to a doctor for medical attention.[2]

In affirming the manslaughter convictions, the court of appeals concluded that

> there is sufficient evidence from which the [trial] court could find, as it necessarily did, that applying the standard of ordinary caution, *i.e.*, the caution exercisable by a man of reasonable prudence under the same or similar conditions, defendants were sufficiently put on notice concerning the symptoms of the baby's illness and lack of improvement in the baby's apparent condition . . . to have required them to have obtained medical care for the child. The failure so to do in this case is ordinary or simple negligence, and such negligence is sufficient to support a conviction of statutory manslaughter.[3]

B. Law, Valve Clashes, and Moral Visions

We define ourselves by the choices we make. We define ourselves morally by the moral choices we make. The same holds true for communities.

---

2. *Id.* at 1173-74.
3. *Id.* at 1174.

A community defines its moral self, in large part, through the decisions of its public institutions, including its courts.[4] Each legal case presents the court with an occasion to identify and apply the appropriate legal doctrine, which means to identify and apply the relevant social values; for legal doctrine expresses society's values.

The decisions of courts are particularly interesting because they unite two distinct dimensions of social values. On the one hand, judicial decisions form part of the web of social norms that structure the behavior of community members in their public and private relationships.[5] On the other hand, judicial decisions define the conditions under which the community will use its collective coercive power against particular members.[6]

The law of criminal negligence applied in the *Williams* case[7] illustrates this duality. The normative principles of criminal negligence doctrine together with sundry customary, religious, and ethical norms, define our communal expectations concerning the extent to which each person must regulate his or her conduct with regard to the well-being of others. In *Williams*, the specific issue was the care owed in the parenting of William Joseph Tabafunda. At the same time, criminal negligence doctrine identifies the specific circumstances that justify the use of the state's coercive power to punish those who carelessly harm others.[8]

---

4. To some extent, the values of society will be reflected in social customs and conventions. But a heterogeneous society will have heterogeneous customs, notwithstanding the possible dominance of the customs of one particular group.

The specific decisions of public institutions represent (in a stable society) the authoritative pronouncements of social values. They are authoritative in the sense that the community recognizes the legitimacy of the institution's power and the consequent legitimacy of its procedurally proper decisions, even when individuals and groups within the society disagree with the substance of specific decisions. Moreover, since, in a heterogeneous society, there can be no set of decisions that accurately reflects the "will of the people," the decisions of institutions stand as the only explicitly authoritative identification and application of social values. *See generally* Kenneth J. Arrow, Social Choice and Individual Values (2d ed. 1963).

5. *See generally* H.L.A. Hart, The Concept of Law 26-48 (1961).

6. *See generally* Hans Kelsen, Pure Theory of Law (Max Knight trans. 1967); Hans Kelsen, General Theory of Law and State (Editorial Committee of the Ass'n of Am. Law Schools ed. & Anders Wedberg trans. 1945).

7. State v. Williams, 484 P.2d 1167, 1169-70 (Wash. Ct. App. 1971).

8. This distinction corresponds roughly to the contrast between doing the right thing and having a right. Law is part of a more comprehensive collection of standards that define how one ought to act, but law is tautologically the exclusive source of definition regarding what one has a legal right to do.

Sometimes the law addresses both of these concerns. Thus, the law of criminal negligence both holds that one generally ought to exercise due care in one's behavior toward others and generally authorizes the use of coercive power to punish someone who has carelessly injured another. In other words, the law that announces a duty of care simultaneously creates a similar corresponding right.

Sometimes, however, legal rights do not perfectly correspond to right conduct. Under tort law, for instance, a negligent person may avoid having to pay compensation for injuries caused, in part, by his carelessness because of the contributory negligence of the injured party. Another example is the

In Parts One and Two of this Article, I will illustrate and explore these two normative dimensions of law—law as a partial source of direction for how we ought to behave and law as the exclusive source of direction for how government can force us to behave. My focus for this part of the discussion will be a ubiquitous legal construct that appears in civil[9] and criminal[10] as well as public[11] and private[12] law: the Ordinary, Reasonable, and Prudent Person (ORPP).

ORPP functions as a standard for evaluating the behavior of individuals like Walter and Bernice Williams. In Part One, I will demonstrate that the ORPP is not one standard, but three. Moreover, I will show that these three faces of ORPP reflect three distinct and irreconcilable moral visions regarding personal responsibility and corresponding liability for harm.

But, again, law also defines the conditions for the state's exercise of coercive force. How can the law use for that purpose a doctrine that expresses multiple, irreconcilable values? On the one hand, the law could limit *a priori* the meaning of ORPP to just one of its three possible meanings and apply that single understanding of ORPP to all cases. On the other hand, the application of ORPP could require each decision-maker to select *ad hoc* which of the three meanings to use; thus, each case would become an occasion not just for applying society's values to the facts at hand, but for choosing among competing values and corresponding moral visions.

These two approaches to resolving the value conflict inherent within ORPP—the *a priori* and the *ad hoc*—correspond to significantly divergent understandings of legal reasoning and decision-making. My intention in Part Two is to examine these two approaches and to tease out the theoretical significance of each.

Finally, in Part Three I will attempt to use these theoretical considerations to understand the four common components of legal reasoning: classifying a problem doctrinally; articulating the doctrinal rules, tests, principles, policies, etc., to be applied; determining the degree of abstraction with which to apply doctrine; and comparing the facts of the case with those of doctrinal precedents.[13] With respect to these phases of analysis, the courts have used each of the two approaches—the *a priori* and the *ad hoc*—with predictably different consequences.

First Amendment protection given to expressions of racial prejudice. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916, 99 S. Ct. 291 (1978).

9. *See* sources cited in Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man,"* 8 Rut.-Cam. L.J. 311, 313 nn.6 (bailments), 8 (contracts), 10 (trusts), 12 (torts) (1977).

10. *See* sources cited in *id.* at n.9.

11. *See, e.g.*, 2 Am. Jur. 2d *Administrative Law* § 686, at 572 (1962).

12. *See supra* notes 4-5 and accompanying text.

13. These components are, of course, not discrete in practice but instead interlock and overlap.

PART ONE

The ordinary, reasonable, and prudent person[14] is commonly described as "abstract," "hypothetical," and "mythical."[15] In one famous account, A. P. Herbert described ORPP as "an ideal."[16]

These descriptions are misleading because they suggest that ORPP does not have real-world qualities, but is instead an imaginary figure who lives by a standard unattainable to the actual individuals who make up society. In short, under such description, ORPP is "a fictitious person, who never has existed on land or sea."[17]

But as John Stuart Mill argued over a century ago, human beings do not think in abstractions apart from their real experiences.[18] Whatever characteristics we give to ORPP must be characteristics that we have observed in the world. We observe behavior that we regard as prudent and then "abstract" from that behavior the particular characteristics that we associate with its prudence. We construct ORPP out of those characteristics. The issue, then, is the source of ORPP's characteristics.[19]

This issue has been debated largely in terms of subjective versus objective models of ORPP.[20] It might be expressed more helpfully in terms of external versus internal standards; that is, the extent to which ORPP's characteristics are those possessed by someone other than (external to) the actor whose conduct is being evaluated. Legal doctrine employs three distinct models for ORPP, each of which resolves that issue differently.

In the first model, ORPP's intelligence, skill, knowledge, and values are defined by the qualities possessed by some other person. Often this other person is the decision-maker—or perhaps more accurately, the aspirational person that the decision-maker would like to be, based on the observed prudent conduct of

---

14. For this particular formulation, see, *e.g.*, Mikkelson v. Quail Valley Realty, 641 P.2d 124, 126 (Utah 1982); Ryder v. Murphy, 124 N.W.2d 238, 240 (Mich. 1963). ORPP has many aliases. *E.g.*, Flom v. Flom, 291 N.W.2d 914, 916 (Minn. 1980) ("person of ordinary prudence"); Trentacost v. Brussel, 412 A.2d 436, 440 (N.J. 1980) ("reasonably prudent person"); Massey v. Scripter, 258 N.W.2d 44, 47 (Mich. 1977) ("reasonably careful person"); Collins v. Altamaha Elec. Membership Corp., 260 S.E.2d 540, 541-42 (Ga. Ct. App. 1979) ("ordinarily cautious and prudent person"). For a general sampling, see W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 32, at 174 nn.5-8 and accompanying text (5th ed. 1984).

15. Keeton et al., *supra* note 14, at 175.

16. A.P. Herbert, Misleading Cases in the Common Law 8-15 (6th ed. 1931).

17. Keeton et al., *supra* note 14, at 174.

18. *See* H.L. Pohlman, Justice Oliver Wendell Holmes and Utilitarian Jurisprudence 117-24 (1984). The metaphysical antecedent to Mill's psychology on this point is nominalism, which denies that abstractions have any independent referent.

19. For a discussion of modern cognitive theory concerning the relationship between experience and concepts, see Steven L. Winter, *The Metaphor of Standing and the Problem of Self Governance*, 40 Stan. L. Rev. 1371, 1384-86 (1988).

20. *See, e.g.*, Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 Harv. L. Rev. 1 (1927).

others.[21] Sometimes (particularly when the conduct in question has an expert or esoteric dimension) this other person is an aspirational figure with the qualities of highly qualified practitioners in the actor's field.[22] Reasonableness and prudence are, accordingly, defined in terms of how the decision-maker would expect this aspirational figure (either the decision-maker's aspirational self or the aspirational ideal in the actor's field) to act.

In the second model, ORPP possesses the intelligence, skill, knowledge, and values of the actor. Reasonable and prudent actions are then defined in terms of how the decision-maker expects someone possessing the actor's qualities to act.

These two models represent distinct moral standards for judging an individual's conduct. The first model represents a teleological moral view. The ideal conduct of the aspirational figure of ORPP provides a concrete standard for notions such as duty, fault, responsibility, and blameworthiness. The conduct of real people is thus evaluated in terms of how closely it follows the aspirational standard.

The second model—centered as it is on an individualized figure of ORPP—represents an emphasis on the will of the person being scrutinized. In this model, notions like responsibility and blameworthiness are functions of the malice with which the individual acts, in light of that individual's unique configuration of characteristics. Negligence, specifically, is defined in this model as the failure to act with the degree of carefulness that can be expected from this kind of person.[23]

Put another way, the first model treats the issue of reasonable care in a relatively abstract fashion; we define the category in which the individual falls (i.e., we compare the individual to others in "the same or similar circumstances") and then judge the individual in terms of an "objective," external standard applicable to all persons in that category. By contrast, in the second model, we judge the individual in light of what we can reasonably expect from *this* person with *this* unique set of abilities and limitations.[24]

---

21. At the same time, it is important to emphasize the *aspirational* quality of ORPP. It is not proper for the jury to judge a party by what *they* would do under like circumstances. *See* Keeton et al., *supra* note 14, at 175 n.11 and accompanying text.

22. For example, a discussion of the application of the standard to the conduct of physicians can be found in *id.* at 185-93.

23. For a discussion of negligence as a culpable state of mind, see H.L.A. Hart, *Negligence,* Mens Rea *and Criminal Responsibility, in* H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 136 (1968).

24. This contrast might be compared usefully to the two modes of moral reasoning identified in the works of Carol Gilligan. *E.g.*, Carol Gilligan, In A Different Voice (1982); Carol Gilligan & Grant Wiggins, *The Origins of Morality in Early Childhood Relationships, in* The Emergence of Morality in Young Children 277 (Jerome Kagen & Sharon Lamb eds. 1987). The first approach, which submerges individual characteristics by placing the person within a more abstract category, corresponds to Gilligan's "morality of justice." The second approach, which attends to the individual's unique characteristics, corresponds to the "morality of care."

There is, however, a third model for ORPP. The first two models are designed to determine fault. Thus, model number one measures fault in terms of the distance by which the actor's conduct falls short of the aspirational standard. Model number two measures fault in terms of the maliciousness of the actor's will—i.e., the actor's failure, in light of his or her particular abilities and limitations, to behave with proper regard for the well-being of others.

The core of the third model is not fault, but harm. The goal is to prevent or provide compensation for harm to innocent victims of dangerous activities. This model defines unreasonable conduct as that which creates an unacceptable level of danger, i.e., an unacceptable risk of harm. Under this model, ORPP represents the person who would not engage in such unreasonably risky activity. ORPP, thus, serves as a heuristic device for identifying behavior that the community (through its representative, the decision-maker) considers unacceptably dangerous.

This view, which received its most powerful expression in the academic and judicial writings of Holmes,[25] employs a thoroughly objective and external standard.[26] The individual characteristics of the actor are irrelevant because the issue is the dangerousness of the activity.

The radical nature of this standard can be seen in the treatment of mental retardation. Under the first model, a substantially retarded person will generally not be liable for negligent harm. This is so because the very notion of evaluating conduct by an aspirational standard is inapposite when the actor is physiologically incapable of meeting (and thus of sensibly aspiring toward) such a standard.[27] Under the second model, the actor's conduct will be evaluated in terms of what is reasonably expected of a person with the actor's level of retardation. The conclusion will obviously vary from case to case.[28] But mental retardation is altogether irrelevant under the third model. If liability is a function of the objective dangerousness of the activity, then the state of mind or capacity of a person engaging in that activity does not matter, and a retarded person is just as liable for harm caused as an individual possessing normal mental ability.[29]

As with the first two models of ORPP, this one expresses a particular moral vision: an essentially utilitarian concern with minimizing harm to the community and its members. Like classical utilitarianism, the methodological principles are

---

25. Oliver W. Holmes, The Common Law 108 (1923); *cf.* Commonwealth v. Pierce, 138 Mass. 165, 171-176 (1884) (interpreting the standard for criminal recklessness). *See generally* Pohlman, *supra* note 18, at 136-39.

26. *See, e.g.*, New England Tractor Trailer Training, Inc. v. Globe Newspaper Co., 480 N.E.2d 1005 (Mass. 1985) (negligent defamation); Jolley v. Powell, 299 So. 2d 647 (Fla. Ct. App. 1974), *cert. denied*, 309 So. 2d 7 (1975) (wrongful death).

27. *See, e.g.*, Robinson v. Commonwealth, 569 S.W.2d 183, 185 (Ky. Ct. App. 1978).

28. *See, e.g.*, Soledad v. Lara, 762 S.W.2d 212, 214 (Tex. Ct. App. 1988); Young v. Grant, 290 So. 2d 706, 710 (La. App. 1st Cir. 1974).

29. *See, e.g.*, Wright v. Tate, 156 S.E.2d 562, 565 (Va. 1967).

"scientific." The dangerousness of an act (unlike aspirational ideals or subjective will) is subject to scientific examination. The community determines the dangerous tendencies of the actor's conduct and then judges whether the level of dangerousness is acceptable.[30]

On the other hand, it is arguable that the vision animating this third model of ORPP is not properly a moral one at all since it effectively dispenses with traditional moral notions like fault and blameworthiness. Instead, by making liability a function of the dangerousness of the act, the standard veers inevitably toward a series of strict or absolute liability rules attached to specific types of conduct.[31]

The tension among these three models is illustrated in the *Williams* case. Negligence is defined as "the caution exercisable by a man of reasonable prudence under the same or similar conditions."[32] The definition, itself, suggests a merger of the models. The phrase "man of reasonable prudence" suggests a standard external to the actor (models one and three),[33] whereas the phrase "under the same or similar conditions" seems to refer the decision-maker to the specific world of the actor (model two). Not surprisingly, the court's analysis navigates among judgments about defendants' failure to exercise "ordinary caution" (model one), expressions of understanding (even sympathy) for defendants' misapprehension of the circumstances (model two), and manifestations of horror at the consequences of defendants' inaction (model three).

When we say that people should act "reasonably," what do we mean? One thing that we have in mind is a way of behaving that is conducive to the common good and, ultimately, to the flourishing of each individual within the community. To act reasonably is to live up to that standard.

Another thing that we mean is that each of us should, to the best of his or her ability, avoid injury to others. To act with inattention to or disregard for the well-being of others is to act unreasonably.

We also mean that certain kinds of conduct present unreasonable risks of harm to others. To engage in such conduct is to act unreasonably, and one does so at one's peril.

---

30. *See* Pohlman, *supra* note 18, at 136-39.

31. *See, e.g.*, Buda v. State, 97 N.Y.S.2d 37, 49-54, 198 Misc. 165, 177-83 (Ct. Cl. 1950), *aff'd*, 278 A. D. 424, 105 N.Y.S.2d 956 (1951). *See generally* Pohlman, *supra* note 18, at 44-45.

32. State v. Williams, 484 P.2d 1167, 1174 (Wash. Ct. App. 1971); *cf.* Model Penal Code § 2.02(2)(d) (Official Draft 1962).

33. For a discussion of the gender-specific implications of the use of the word "man" in the traditional formulations, see Collins, *supra* note 9.

But now what? If ORPP has not one personality, but three, how should we decide cases in which the figure of ORPP is invoked? The question is one of great practical significance since law defines the conditions for the use of society's collective power. Will the community's coercive force be mobilized on behalf of plaintiff or defendant in civil litigation, on behalf of the government or the accused in a criminal case? When the answer turns on a determination of how an ordinary, reasonable, and prudent person will act, then it turns on the model of ORPP that is chosen.

Sometimes it will not matter which model is used. If I drive down a narrow, residential street at seventy miles-per-hour because it amuses me to do so and injure a pedestrian in the process, I will no doubt be found to have acted unreasonably and imprudently no matter how ORPP is described.

But for Walter and Bernice Williams, the particular model used was highly significant. The Washington Court of Appeals appears to have applied the first model, and the Williams' conduct was measured by how people like the judges (with their education and experience) would ideally have behaved. Not surprisingly, the parents' behavior was deemed culpable. But had a different question been asked, had the issue been how people with the cultural, educational, and experiential background of the Williams could reasonably be expected to act under the particular circumstances—then the death of William Joseph Tabafunda might well have appeared as a tragic accident.

PART TWO

The three personalities of ORPP express these three different ways of understanding what it is to act like an ordinary, reasonable, and prudent person. In easy cases (I drive seventy miles-per-hour for fun), the three models of ORPP—with their three distinct visions of how we should act toward one another—lead to the same decision. But in hard cases (the inadequate care given by the Williams), different models will lead to different outcomes.[34]

And so we need to know something more. It is not enough in *Williams* to ask whether defendants acted as would persons of ordinary and reasonable prudence. We must know which model of ORPP should be used.

The precise issue I wish to explore here is this: When do we decide which model of ORPP to use in a particular case? Two options are apparent. We can make a general decision to use one particular model and then apply that in the future to each specific case,[35] or we can make a new choice from among the three models each time we decide a specific case.[36]

---

34. For a discussion in the context of personal jurisdiction of how the multiple and irreconcilable values of legal doctrine operate in easy and hard cases, see Richard K. Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm*, 38 Hast. L.J. 855 (1987).

35. Restatement (Second) of Torts § 283 cmts. b-c (1965).

36. *See* Model Penal Code § 2.02 (2)(d) (Official Draft 1962); Model Penal Code and Commentaries, cmt. to § 2.02 at 242 (1985).

The question can be posed another way. The three faces of ORPP present three distinct moral perspectives and, hence, three distinct clusters of norms structuring our relations with one another. Each of these value clusters is advocated by members of society. Is it the function of legal doctrine to elevate one of these moral perspectives to a position of preeminence in the resolution of our disputes (the *a priori* approach)? Or is it the function of legal doctrine to reveal and illuminate the tension among these perspectives and then leave the choice of values to the decision-maker in each case (the *ad hoc* approach)?

The *a priori* approach prefers one model of ORPP and the values it represents, as a general matter, in all cases where the different values associated with ORPP clash. Thus, for instance, an appellate court might declare that mental retardation is never a defense to liability for harm caused by objectively dangerous behavior (ORPP model three).[37] This approach is characterized by a tendency to formulate legal doctrine in terms of "black letter" rules or "tests" that can be broken down into specific steps. These are then applied in an apparently deductive fashion to the facts of specific cases.

An effect of the approach is to expand the universe of functionally easy cases by prejudging and thereby obscuring the clash of values that makes cases difficult. This expansion inflates the scope and significance of *stare decisis* and consequently promotes values such as order, certainty, predictability, and uniformity. Moreover, since the traditional notion of legal rights depends upon the idea of preexisting legal norms that determine specific results in specific cases, the expansion of the number of easy cases both advances and is justified by the ideology of rights.[38]

But the most obvious account for the *a priori* approach is the perception by the court of something approaching a societal consensus on a particular ordering of values. For example, a court might well perceive a societal consensus that manufacturers ought to be strictly liable for injuries caused by their products, notwithstanding the concomitant denigration of values having to do with fault.

---

37. *Cf.* Johnson v. Lambotte, 363 P.2d 165 (Colo. 1961) (defendant was chronic-schizophrenic). *See generally* Annot., 49 A.L.R.3d 189 (1973). An interesting, but distinct, variation on this problem is presented when the choice among competing values is made by the legislature. *See, e.g.*, Cal. Civ. Code § 41 (Deering 1989) (insanity not a defense to suit for compensatory damages). The focus of this Article, however, is on courts, which, unlike legislatures, can choose between making such choices generally or making them anew in each particular case.

38. For a powerful defense of the relationship between the determinacy of legal rules and principles and the grounding of legal rights, see Ronald Dworkin, *Hard Cases*, *in* Ronald Dworkin, Taking Rights Seriously 81 (1977). *See generally* Ronald Dworkin, Law's Empire (1986). A substantial body of recent literature has attacked this classical liberal vision of law. *See, e.g.*, Robert W. Gordon, *New Developments in Legal Theory*, *in* The Politics of Law 413 (David Kairys ed., 2d ed. 1990); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L.J. 1 (1984); Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363 (1984). One response to this critique has been to search for a conception of legal rights that does not depend upon legal determinacy. *See, e.g.*, Frank I. Michaelman, *Justification (and Justifiability) of Law in a Contradictory World*, *in* 28 NOMOS 71 (Pennock & Chapman eds., 1986); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 Yale L.J. 1860 (1987).

This perception, in turn, would support the announcement by the court of a general rule of strict liability applicable in all such situations.

When such a consensus exists,[39] an argument for efficiency supports a general, *a priori* approach to hard cases. Why rehash the competing values in each case when the existence of consensus virtually guarantees that the same ranking of those values will always be reached? That guarantee flows both from the decision-maker's own membership in society (and consequent likelihood to share the consensus view) and from the potential institutional damage to the court if a decision inconsistent with the consensus were reached.

A consensus of a different type might also justify the *a priori* approach. As noted above, this approach serves the values of order, certainty, predictability, and uniformity. A consensus may exist in the community that these values are significantly more important than any of the specific values involved in the doctrinal dispute. The "mailbox rule" in contract law illustrates this situation. There are arguments, both generally and in specific cases, for either making acceptance of an offer effective when dispatched or when received. The rule dating from 1818[40] that an acceptance is effective upon dispatch has been strongly criticized.[41] But the continued acceptance of that rule[42]—notwithstanding the criticism—may well reflect an overriding community concern for predictability: the importance of knowing in advance the point in time at which a legally binding agreement has been reached. This concern requires that the court formulate a rule—any rule—and apply it uniformly, rather than determine in each individual case the most appropriate time for effective acceptance.

Conversely, the absence of any such social consensus creates an obvious argument against the *a priori* approach. As Kenneth J. Arrow effectively demonstrated, a public institution cannot through a series of specific decisions reflect public values when a division on the issue exists.[43] As a result, the fixed ranking of the multiple values buried within legal doctrine represents a kind of normative imperialism—the imposition on all members of society of the value preferences of the judge or, perhaps, of the majority.

By contrast, the *ad hoc* approach recognizes the relevance of multiple, distinct values to the particular issue. Most essentially, the approach recognizes that these distinct values are incommensurable and, hence, not susceptible to an objective ranking. Therefore, when distinct values clash, as they do in hard cases, the result is a dilemma.

---

39. Of course, a court might erroneously perceive a nonexistent consensus. Accurately determining the community's values is an institutional problem for courts, which lack many of the investigatory tools available to the political branches.

40. Adams v. Lindsell, 106 Eng. Rep. 250 (K.B. 1818).

41. *See, e.g.*, Malcolm P. Sharp, *Reflections on Contract*, 33 U. Chi. L. Rev. 211, 213-15 (1965); Ian R. Macneil, *Time of Acceptance: Too Many Problems for a Single Rule*, 112 U. Pa. L. Rev. 947 (1964).

42. *E.g.*, Restatement (Second) of Contracts § 63 (1981).

43. *See* Arrow, *supra* note 4.

Hard cases involving ORPP present a dilemma in this sense. The contrasting values represented by the three models of ORPP clash in difficult cases like *Williams*. Nonetheless, a choice among principles must be made, for the practical point of legal analysis is to determine how the coercive power of the court should be used in the particular case. Thus, under the *ad hoc* approach, the decision-maker must still choose to give priority to one set of values over the others in the instant case.

This means that the choice, being *ad hoc*, is provisional. In the next hard case involving a clash of the same values, the decision-maker (whether the same or a different person) could order the values differently. Each hard case, therefore, presents another occasion for the community's representatives to reflect upon clashing values and the need to order them to resolve the dispute. Since the order chosen on behalf of the community defines the society's moral priorities, the *ad hoc* approach to hard cases generates an ongoing community debate on fundamental issues regarding the public and private relationships of its members. And because the community's debate about its most basic values has a history as old as the community itself, the *ad hoc* approach represents a way of participating in a dialogue with the past.[44]

Needless to say, the *ad hoc* approach, in contrast to the *a priori* approach, tends to contract the range of functionally easy cases and consequently the range of substantive legal rights. Instead, the parties in hard cases are entitled merely to a conscientious consideration of the competing values prior to the rendering of a decision.[45] As a further result, the *ad hoc* approach reduces the scope of *stare decisis* resulting in the impairment of predictability, certainty, and uniformity.

However, as a practical matter the *ad hoc* approach does not dramatically undermine the law's stability. Because courts are hierarchically and pyramidally arranged, relatively few judges have the power to regulate these *ad hoc* preferences. Since these decisions reflect the judges' visions about what kind of society this should be and since in the short term those visions will be consistent and coherent, the decisions (again, in the short term) will tend to reveal a consistent and coherent pattern. What must be understood, however, is that this pattern is not imposed by principle, but by the imaginative visions of judges. For this reason, decisions under the *ad hoc* approach are both provisional and stable.[46]

---

44. This idea that the legal analysis of hard cases proceeds as a discourse that binds the community together receives powerful voice in the works of Martha Minow. *See, e.g.*, Minow, *supra* 38, at 1873-75. *See also* Dennis Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 Va. L. Rev. 937, 986-87 (1990).

45. *See* Greenstein, *supra* note 34, at 885.

46. A good illustration is the doctrine relating to the Fourth Amendment right against unreasonable searches and seizures. In the context of criminal investigations, interpretations of the amendment are suffused with the tension between privacy values and "law and order" concerns.

PART THREE

The issue of whether the multiple values that are relevant to a particular doctrinal question should be ranked in the abstract for future application (the *a priori* approach) or in the context of each particular case (the *ad hoc* approach) is not addressed by the case law in the philosophical terms of the preceding part. Rather, it plays itself out in the practical stages of legal analysis: determining the doctrinal category in which the case belongs, articulating the specific legal doctrine (the rules, principles, tests, policies, etc.) applicable to the case, determining the degree of abstraction with which the doctrine will be applied, and applying the doctrine by comparing the case *sub judice* to precedential cases.

We tend to think of these stages of legal reasoning in primarily instrumental terms. For instance, a lawyer[47] preparing arguments on behalf of a client categorizes issues, defines doctrine, employs levels of abstraction, and analogizes and distinguishes precedents in ways that will justify a particular outcome.[48] But however instrumental these activities are, they collectively express a moral vision. How one goes about legal reasoning implicitly reflects an attitude toward the multiplicity of values encapsulated in legal doctrine. Because these stages of legal reasoning apply in all areas of law, I will explore them in the following three sections using examples drawn from public and private law and from doctrines generated from common law, legislation, and constitutional provisions.

Again, the stages are: classification of the problem, articulation of the relevant doctrine, determination of the level of abstraction on which the doctrine will be discussed, and application of the doctrine through a series of analogies and distinctions. Although the characterization and classification of a legal problem is typically the first step in legal analysis, I will defer consideration of this categorization process until the broader discussion of analogy and distinction (to which it is closely related) in Section C.

Section A, then, addresses the second stage: how the doctrine relevant to a particular dispute is articulated. Specifically, the question is whether to express

---

Over the long term (i.e., since the late 1950's) this tension has produced great volatility in Supreme Court decisions on the subject. In the short term, coherent visions have characterized the rulings. Thus, the Court in the 1960's and 1970's revealed a consistent preference for privacy, while decisions in the 1980's and 1990's have reflected a shift toward a concern for social order. A recent example is the doctrinal shift regarding the scope of permissible warrantless searches of automobiles. *Compare* Arkansas v. Sanders, 442 U.S. 753, 99 S. Ct. 2586 (1979) *and* United States v. Chadwick, 433 U.S. 1, 97 S. Ct. 2476 (1977) *with* California v. Acevedo, 111 S. Ct. 1982 (1991) *and* United States v. Ross, 456 U.S. 798, 102 S. Ct. 2157 (1982).

47. Perhaps judges do this also. The classic statement of the instrumental use of legal reasoning by judges seeking to justify a particular result is Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 Cornell L.Q. 274 (1929).

48. Plausible arguments on different sides of a particular question are possible only in hard cases. In easy cases, the values at stake all point to a particular conclusion. Consequently, no persuasive argument supporting a different result is possible. *See* Greenstein, *supra* note 34, at 875-82.

doctrine as a rule or test to be applied to the problem at hand or as competing policies or interests to be balanced.

Section B is concerned with how doctrine can be understood at various levels of abstraction. Sometimes it is applied at a highly abstract and hypothetical level. Alternatively, it may be applied in very specific, contextual terms. I will use examples to illustrate both the mechanics and important consequences of this choice.

The discussion in Section C centers on analogical reasoning. In particular, two phenomena related to analogical reasoning will be scrutinized: the tendency of precedent to vary in force in different areas of the law and the problem posed by every case of categorizing legal issues for analytical purposes.

In each of these explorations, I will suggest that the way in which particular methodological questions are resolved reflects an attitude toward doctrinal value conflicts. I will seek to relate these attitudes to the *a priori* and *ad hoc* approaches discussed above.

A. Articulation of Doctrine

There are two very different ways of talking about the legal doctrine applicable to a particular case. Doctrine can be expressed in terms of "black-letter rules" and multi-part "tests" to be applied to a given set of facts in an apparently deductive fashion. Or doctrine can be expressed in terms of competing "policies" or "interests" that must be "weighed" and "balanced" in the context of the particular dispute.[49] The choice between these two ways of describing doctrine has interesting and crucially important consequences.

I will illustrate this choice with three examples drawn from different areas of law. The first example comes from constitutional law.

1. Northern Pipeline *and the Powers of Legislative Courts*

Part of the controversy over so-called "legislative courts"[50] concerns the propriety of giving such courts authority over matters normally handled by courts established under Article III of the Constitution—i.e., courts presided over by judges with life-tenure and protected salaries.[51] In *Northern Pipeline Construc-*

---

49. The distinction that I am making in this section should not be confused with a different distinction that has been proposed between hard-edged "rules" and murky "standards," Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976), which Carol Rose has recast as the distinction between "crystals" and "mud." Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577 (1988). However, an analysis of the rule-standard distinction raises issues similar to those addressed here. *See* Kathleen M. Sullivan, *Forward: The Justices of Rules and Standards*, 106 Harv. L. Rev. 24 (1992).

50. Legislative courts are congressionally created adjudicatory bodies, presided over by judges lacking the protected tenure and/or compensation guaranteed to Article III judges. *See generally* Glidden Co. v. Zdanok, 370 U.S. 530, 543-52, 82 S. Ct. 1459, 1469-73 (1962).

51. U.S. Const. art. III, § 1:

tion Co. v. Marathon Pipe Line Co.,[52] the Supreme Court confronted the issue of whether a bankruptcy court could adjudicate state-law claims related to a pending bankruptcy action. The Court's decision comprises three opinions. Of interest here are the plurality opinion, written by Justice Brennan,[53] and Justice White's dissent,[54] joined by two other members of the Court.

What is especially striking about these two opinions is the extent to which the seven justices agreed. Between the plurality and the dissent, the following points were undisputed: that the bankruptcy court was not an Article III court since bankruptcy judges lacked both life-tenure and protected salary; that state-law claims, such as those at issue in this case, were matters falling within the "judicial power of the United States," as defined by Article III; that Article III seems literally to require that matters falling within the "judicial power" be handled by Article III courts; and that the basic principle behind this requirement was the separation of powers (i.e., a measure of protection—through protected salary and tenure—from intimidation by Congress or the President in connection with issues coming before the federal courts). Moreover, the plurality and dissenters all recognized the existence of well-known historical instances in which the Court—notwithstanding the literal language of Article III—allowed Article III business to be handled by non-Article III bodies. And they understood these exceptions to exist in situations in which separation of powers is either not a problem or is adequately addressed despite the allocation of Article III business to a non-Article III body.

Yet the plurality and dissenters disagreed fundamentally over the proper approach to applying all this shared understanding to the instant case. Justice Brennan's opinion articulated the applicable doctrine in terms of a specific rule with specific exceptions.[55] The rule was that Article III business should not be given to a non-Article III body. Four exceptions were identified: (1) adjudicatory bodies in geographic areas over which the Constitution gives Congress plenary governing power (i.e., territories and the District of Columbia), (2) military courts (courts-martial), (3) bodies adjudicating cases involving "public rights," and (4) bodies that act as "adjuncts" to Article III courts. When the plurality laid this template over the instant case, it found that the adjudication of state-law claims in a bankruptcy context fell into none of the exceptions; thus, the general

---

The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

52. 458 U.S. 50, 102 S. Ct. 2858 (1982).

53. *Id.* at 50, 102 S. Ct. at 2858.

54. *Id.* at 92, 102 S. Ct. at 2882.

55. *Id.* at 63-87, 102 S. Ct. at 2867-80.

rule applied, and the bankruptcy court lacked the constitutional power to adjudicate the state-law claims.[56]

Justice White's approach was to identify the values that generated the plurality's rule and its exception in the first place. The values turned out to be precisely those that define the broader principle of separation of powers. On the one hand, Congress needs the maneuvering room necessary to carry out its constitutionally delegated authority. Sometimes the most efficient and effective way to do this involves creating quasi-judicial bodies that lack Article III protections. On the other hand, the judiciary needs the Article III protections as a defense against intimidation by the other branches of government—including Congress—with respect to matters before the federal courts.[57]

The plurality's strict "rule-plus-exceptions" approach tilted in favor of Article III courts and would carry that bias into every case raising this particular doctrinal issue. By contrast, Justice White regarded the competing interests of Congress and the judiciary to be equal and entitled to equal consideration in each case. His solution was thus to weigh the interests in the particular situation and decide which prevailed.

In Justice White's assessment, Congress' interest in effectively carrying out its Article I bankruptcy responsibilities was a strong one. By contrast, the threat to judicial integrity was minimal. (What interest did the President or Congress have regarding the adjudication of these state-law claims?) Moreover, the dissenters judged that the statutory provisions for appellate review of bankruptcy cases by Article III district courts provided Article III protection adequate for the specific situation. Consequently, they concluded that the weighing that favored the four historical exceptions identified by the plurality also favored the expansive powers of the bankruptcy courts in the instant case.[58]

2. Will Formalities and Decedents' Intent

My second example of the tension between rules and underlying values concerns determining the validity of wills. The values underlying this area of private law fall primarily into two categories. On the one hand, the doctrine is concerned with identifying and carrying out the intentions of the decedent.[59] On the other hand, the volume and potential complexity of will construction argue in favor of rules governing will validation that serve administrative ease.[60]

---

56. *Id.* at 70-72, 76, 87, 102 S. Ct. at 2870-72, 2874, 2880.

57. *Id.* at 113-16, 102 S. Ct. at 2893-95.

58. *Id.* at 116-18, 102 S. Ct. at 2894-96.

59. *E.g.*, John H. Langbein, *Substantial Compliance With the Wills Act*, 88 Harv. L. Rev. 489, 491 (1975).

60. *Id.* at 493-94.

Will "formalities," derived from the English Statute of Wills[61] and Statute of Frauds,[62] mediate these concerns. The formalities typically require that the will be in writing, that it be signed by the testator, and that it be signed by witnesses. Formalities facilitate the carrying out of donative intent through their ritualistic, evidentiary, and protective functions. At the same time, formalities facilitate administrative ease and uniformity by molding the expression of the testator's intent into a standard form.[63]

But the formalities tilt in favor of the latter concerns. That is to say, there are cases in which the strict and technical enforcement of formalities serve administrative convenience and defeat donative intent, but none in which the opposite occurs. Two New York cases illustrate this "problem." In each case, a husband and wife simultaneously executed individual wills, but inadvertently signed the will drafted for the other. In each case, the inadvertence—and thus the intention of each individual to dispose of the relevant estate according to the instrument signed by the other—was clear.

In *In re Cutler's Will*,[64] the court found that the decedent did not intend to dispose of her property according to the will she signed and had not signed the will that was prepared for her. But although the court clearly understood that Cutler intended to dispose of her estate in accordance with the will which was inadvertently signed by her husband, her failure to comply with formalities—to sign the proper will—meant that she had no valid will.[65] In other words, the court refused to distribute Cutler's estate according to her intent, when that intent could only be determined by evidence extrinsic to a "properly" signed will.

In re Snide[66] addressed the same issue with different results. A closely divided court (four to three) permitted the receipt of extrinsic evidence to show the actual intent of the decedent to sign the will signed by his wife, which was identical to the one he actually signed. The court held that no benefit flowing from the strict enforcement of formalities (including, presumably, administrative ease and uniformity) outweighed the carrying out of decedent's intent *under the particular facts of this case*:

> [T]his is a very unusual case. . . . Not only did the two instruments constitute reciprocal elements of a unified testamentary plan, they both were executed with statutory formality, including the same attesting witnesses, at a contemporaneous execution ceremony. . . . [T]he refusal to read these wills together would serve merely to unnecessarily expand formalism, without any corresponding benefit. On these narrow facts we decline this unjust course.[67]

---

61. Wills Act, 1540, 32 Hen. 8, ch. 1.
62. Statute of Frauds, 1677, 29 Car. 2, ch. 3.
63. Jane B. Baron, *Gifts, Bargains, and Form*, 64 Ind. L.J. 155, 159-60 (1988-89).
64. 58 N.Y.S.2d 604 (Sup. Ct. 1945).
65. *Id.* at 604.
66. 418 N.E.2d 656 (N.Y. Ct. App. 1981).
67. *Id.* at 658.

The dissenters in *Snide* predictably cited *Cutler*, among other cases, in support of the strict enforcement of the statute of wills: "It is never sufficient under our law that the decedent's wishes be clearly established; our statute, like those of most other common-law jurisdictions, mandates with but a few specific exceptions that the wishes of the decedent be memorialized with prescribed formality."[68]

The dissenters, moreover, understood that the strict application of the formalities furthered order, predictability, certainty, and uniformity. They saw clearly that the majority's abandonment of a precise rule in favor of a contextual, *ad hoc*, balancing approach threatened descent down a slippery slope and expressed this anxiety in familiar, *in terrorem* language:

> I fear an inability to contain the logical consequences of this decision in the future. Thus, why should the result be any different where, although the two wills are markedly different in content, it is equally clear that there has been an erroneous contemporaneous cross-signing by the would-be testators, or where the scrivener has prepared several drafts for a single client and it is established beyond all doubt that the wrong draft has been mistakenly signed? Nor need imagination stop there.[69]

3. The Rules of Decision Act

The final example of these contrasting approaches to describing doctrine involves procedural law, specifically vertical choice-of-law. Vertical choice problems raise the question whether federal or state law will supply the relevant doctrine on a particular issue. The basic federal statute governing vertical choice problems is section 1652 of the Judicial Code, the so-called Rules of Decision Act, which provides: "The laws of the several states, except where the Constitution or treatises of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[70]

Since this statute requires the use of state law only with respect to "rules of decision," the meaning of that phrase has become a central interpretive issue, especially in the context of diversity cases. The Supreme Court has, during the past half-century, employed two distinct approaches to the definition of a rule of decision.

One approach, first articulated in *Guaranty Trust Co. v. York*,[71] held that in diversity cases "the outcome of the litigation in the federal court should be

---

68. *Id.* (Jones, J., dissenting).
69. *Id.* at 659 (Jones, J., dissenting).
70. 28 U.S.C. § 1652 (1988).
71. 326 U.S. 99, 65 S. Ct. 1464 (1945).

substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."[72]

In *York*, the issue was whether a federal equity court hearing a diversity action must apply the relevant state statute of limitations. Since the statute was "outcome determinative" (application of the statute would require dismissal of the action), the statute was a "rule of decision," and the federal court was thus obligated to apply it.

The *York* outcome-determination rule was subsequently modified in the dicta of *Hanna v. Plumer*[73] to make clear that the rule was to be understood in light of the "twin aims" of the Rules of Decision Act, as interpreted by the Court in the case of *Erie Railroad Co. v. Tompkins*:[74] "discouragement of forum-shopping and avoidance of inequitable administration of the laws."[75] Accordingly, the question of outcome-determination must be viewed from the perspective of a party at the outset of the litigation. Would a departure by the federal courts from state law affect the choice of forum and unfairly discriminate against parties in nondiverse actions who consequently lacked access to federal courts?

The famous contrast to the *York-Hanna* approach occurred in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[76] In that case the United States Supreme Court addressed the issue of whether a particular factual question was to be decided by the judge, as mandated by state law, or by a jury, as permissible under federal law. The Court discussed the issue in terms of outcome-determination,[77] but ultimately resolved it by identifying any competing state and federal interests to be served and comparing their relative weights. Concluding that the "federal policy favoring jury decisions of disputed fact questions"[78] was part of "the essential character or function of a federal court,"[79] the Supreme Court held that the federal policy prevailed over the relatively weaker state interest in this context.[80]

The difference between the *York-Hanna* and *Byrd* approaches is fundamental. The outcome-determination test derives from the two principles articulated in *Erie*, which in turn derive from the competing state and federal interests that characterize federalism problems generally and vertical choice-of-law problems particularly. For the state, these interests include the integrity of its substantive law (threatened by the substitution of alternative doctrine in the federal courts)

---

72. *Id.* at 109, 65 S. Ct. at 1470.

73. 380 U.S. 460, 85 S. Ct. 1136 (1965).

74. 304 U.S. 64, 58 S. Ct. 817, *cert. denied*, 305 U.S. 637, 59 S. Ct. 108 (1938).

75. *Plumer*, 380 U.S. at 467, 85 S. Ct. at 1142.

76. 356 U.S. 525, 78 S. Ct. 893 (1958).

77. The resolution of the judge-jury problem under the outcome-determination test is ambiguous. *Compare id.* at 536, 78 S. Ct. at 900 *with id.* at 539-40, 78 S. Ct. at 901-02.

78. *Id.* at 538, 78 S. Ct. at 901.

79. *Id.* at 539, 78 S. Ct. at 901.

80. *See id.* at 535-39, 78 S. Ct. at 899-902.

and the integrity of its court system (threatened by forum-shopping). For the federal government, the independence and supremacy of the federal courts are at stake.

The *Erie* court understood the Rules of Decision Act to tilt in favor of state interests in this context, and the *York-Hanna* outcome-determination test reflects that *a priori* tilt. Thus, the test carries a state-interest bias into every case in which it is applied. In contrast, *Byrd* bypasses the test and returns to the fundamental federalism interest that animates vertical choice doctrine from within. *Byrd* consequently represents an *ad hoc* balancing of those interests, which happened to favor the federal side in the particular case.[81]

B. Levels of Abstraction

The preceding discussion suggests that the *ad hoc* approach encourages a court to be inclusive in its consideration of the facts of the case.[82] *Ad hoc* reasoning tends to be contextual because a broad sorting of relevant facts from irrelevant facts—a fundamentally evaluative operation—requires an ordering of the applicable values. The *a priori* approach, which provides such a sorting at the outset, permits an early exclusion of many facts from consideration; this early sorting pushes the subsequent analysis toward relative abstraction. In contrast, the *ad hoc* approach postpones value ranking and thus provides less initial guidance as to the relevance of particular facts.[83]

This contrast is illustrated by traditional equal protection doctrine. The so-called "rational relationship" test, which requires that classifications of persons employed by the government be rationally related to a legitimate governmental purpose,[84] mediates the various values that come together in equal protection issues. These values include the instrumental values pertaining to the carrying out of the government's police powers: government must be able to govern, and governing requires the use of classifications. (Try to imagine governmental action that does not treat groups differently.) At the same time, equal protection doctrine reflects Kantian values that require equal respect for all individuals; that

---

81. For other instances of this approach in the lower federal courts, *see, e.g.*, Masino v. Outboard Marine Corp., 652 F.2d 330 (3d Cir.), *cert. denied*, 454 U.S. 1055, 102 S. Ct. 601 (1981); Iovino v. Waterson, 274 F.2d 41 (2d Cir. 1959), *cert. denied*, 362 U.S. 949, 80 S. Ct. 860 (1960).

82. *See supra* notes 58-70 and accompanying text.

83. This section treats contextuality as a metaethical position, i.e., as a particular attitude toward the multiplicity of values that bear on doctrinal problems. But contextuality in legal reasoning can reflect an ethical stance. We saw this in Part One in the discussion of the three models of ORPP. The focus in the second model on the specific situation and characteristics of the actor, arises from a preoccupation with free will and the moral evaluation of human conduct in terms of the goodness of will. This contextual approach contrasts with that of the other models, which in turn represent different moral visions.

84. *E.g.*, McGlaughlin v. Florida, 379 U.S. 184, 191, 85 S. Ct. 283, 288 (1964). *See generally* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341 (1949).

is to say, individuals whose situations cannot in principle be distinguished should be treated the same by government, and government should never use an individual merely as an instrument to achieve some social end.[85]

In hard cases, these instrumentalist and Kantian values will clash. How this clash will be treated depends on how the rational-relationship test is applied. In cases involving challenges to state laws regulating business, the Supreme Court has generally applied the test in a highly abstract and hypothetical form. For instance, *McGowan v. Maryland*[86] involved an equal protection attack on Maryland's Sunday closing laws, which exempted certain businesses.[87] In upholding the legislation, a unanimous Court explained that

> the Court has held that the 14th Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. . . .
>
> It would seem that a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for enhancement of the recreational atmosphere of the day. . . .
>
> The record is barren of any indication that this apparently reasonable basis does not exist, that the statutory distinctions are invidious, that the local tradition and custom might not rationally call for this legislative treatment.[88]

The Court's analytical task was to determine whether the exemptions contained in the challenged enactment were rationally related to a legitimate purpose. This inquiry could have been carried out contextually by trying to ascertain why the Maryland legislature actually enacted this statute, what relationship the legislature imagined to exist between this purpose and the classifications they used, and whether that relationship could be factually verified. Instead, the Court engaged in an almost wholly hypothetical examination. The legislature was "presumed to have acted within [its] constitutional

---

85. This anti-utilitarian dimension of equal protection is developed in Ronald Dworkin's treatment of reverse discrimination. Ronald Dworkin, *Reverse Discrimination*, *in* Ronald Dworkin, Taking Rights Seriously 223 (1977).

86. 366 U.S. 420, 81 S. Ct. 1101 (1961).

87. The exempted businesses included those involving "the retail sale of tobacco products, confectioneries, milk, bread, fruits, gasoline, oils, greases, drugs and medicines, and newspapers and periodicals." *Id.* at 422-23, 81 S. Ct. at 1103-05.

88. *Id.* at 425-26, 81 S. Ct. at 1104-05.

power"; the statute would be upheld "if any state of facts reasonably may be conceived to justify it"; rather than ask what findings the legislature actually made, the Court speculated as to what "a legislature could reasonably find"; and instead of insisting that the record contain facts justifying the classification, the Court presumed the statute valid in light of a record "barren of any indication that this apparently reasonable basis does not exist."[89]

The alternative approach appears in cases like *United States Department of Agriculture v. Moreno*,[90] in which plaintiffs challenged a provision of the federal Food Stamp Act that denied assistance to households that included any member who was unrelated to the other members of the household. After announcing the applicability of the traditional, rational-relationship test, the Court looked to the text of the statute to determine the proffered congressional purpose behind the Food Stamp Act as a whole. The Court found these purposes—strengthening the agricultural and food economies and alleviating hunger and malnutrition[91]—unrelated to the statutory classification under attack. The Court then turned to the purpose of the particular section in question, as justified in the House Conference Report and in the congressional debate over the provision: preventing "'hippies' and 'hippie communes' from participating in the food stamp program."[92] The Court judged this particular purpose illegitimate.[93] Finally, the majority considered the government's argument that the challenged provision was designed to prevent fraud. After expressing doubt, in light of the statute as a whole, over whether the provision was, in fact, designed to address fraud, the Court concluded that the exclusion of households with unrelated members was, in any event, not rationally related to that purpose.[94]

What characterizes the *Moreno* Court's approach is a relatively contextual and *ad hoc* application of the traditional equal protection test. The key questions concerning purpose and the relationship between that purpose and the challenged classification were answered in terms of the facts of the case. The Court wanted to know what were the *actual* purposes of the Food Stamp Act and the exclusion provision and what was the *actual* relationship between the two.

By contrast, the *McGowan* Court was content to speculate as to purpose and relationship. This was justified in terms of a presumption of constitutionality—an *a priori* ranking of the instrumental, government-supporting values over the Kantian, individual-supporting values—that informed the Court's understanding of the rational-relationship test. *McGowan* thus illustrates how apriority can drastically constrict the range of relevant actual facts and thereby generate an

89. *Id.* at 426, 81 S. Ct. at 1105.

90. 413 U.S. 528, 93 S. Ct. 2821 (1973).

91. 7 U.S.C. § 2011 (1988).

92. 413 U.S. at 534, 93 S. Ct. at 2826 (citing H.R. Conf. Rep. No. 91-1793, p. 8; 116 Cong. Rec. 44439 (1970) (statement of Sen. Holland)).

93. *Id.* at 534-35, 93 S. Ct. at 2825-26.

94. *Id.* at 535-38, 93 S. Ct. at 2826-27.

acontextual, abstract, and (in its more extreme form) largely hypothetical analysis.

The *Moreno* Court's *ad hoc* reasoning avoided any such presumption of constitutionality. Accordingly, both the instrumental and Kantian values relevant to all equal protection issues were taken seriously by the *Moreno* Court's contextual approach.

C. Anological Reasoning and the Problem of Characterization

I have so far considered how the choice between *a priori* and *ad hoc* approaches to value conflicts in the law affects, on the one hand, the articulation of legal doctrine, and on the other hand, the universe of facts regarded as analytically relevant in a particular case. I will now address the tool that mediates between doctrine and facts: analogical reasoning. Through analogical reasoning, the judge drives toward a resolution of the dispute by comparing the facts of the case *sub judice* to the facts of the prior cases out of which the applicable doctrine arises.

Analogical reasoning reflects two different normative values. One, expressed by the phrase *stare decisis*, is a value which supports order and stability in our understanding and application of the law. The other, expressed by the doctrine of precedent, is an equality value that requires the law to treat similarly situated people similarly.[95]

The judge's choice between *a priori* and *ad hoc* approaches to value conflicts in the law directly bears on the force of precedent. Of course, the very notion of binding precedent is dependent on a degree of apriority. This is clearly true in hard cases. Whether the instant case is analogous to or distinguishable from a prior case depends on whether the similarities or differences between the cases are more relevant. But, as we saw in the preceding section, questions of relevance depend on value choices. To the extent that the choice among conflicting values is up for grabs (the *ad hoc* approach), then prior decisions are relevant as voices from the community's past (declaring how the community

---

95. *See supra* note 85 and accompanying text.

Debates about the scope of precedent follow familiar patterns. The debate is ostensibly about whether the facts of the instant case are "similar" to those of the prior case. Of course, as has been often observed, all cases are factually different in some respects. Thus, this particular debate is about whether the differences between the instant and prior cases are significant in light of the values that inform the relevant legal doctrine.

A second type of debate occurs when the parties agree that the precedent does not quite reach the present case. In these instances, the arguments proceed in terms of whether the reasoning of the prior case should be "extended" to the facts of the instant case (thereby consciously expanding the understanding of "similarity") or "limited" to its own facts. Yet a third variation casts the debate in terms of whether the prior case should be "followed" at all or instead "overruled."

These last two kinds of debate are also about the moral significance of the differences between the two cases. Additionally, they concern the degree of stability we want in the law at the expense of other values.

resolved the conflict at earlier times), but not as commands (binding in the present).

These observations can help us understand why the "gravitational force" of precedent[96] ebbs and flows among different *categories* of cases. For instance, precedent tends generally to have a greater impact in private law litigation than in public law actions. Accordingly, we find more emphasis on apriority in private law.

We see this, for instance, with respect to the competing models of ORPP. The Restatement (Second) of Torts—addressing the normative principles governing our private relationships—makes an *a priori* choice among the models,[97] while the Model Penal Code—addressing the public relationship between the individual and the state—leaves the choice largely to the decision-maker on an *ad hoc* basis.[98] Accordingly, the decisions following the Restatement will apply analogously to a wider range of cases than those following the principles of the Model Penal Code.

This all makes sense in light of the values associated with the *a priori* and *ad hoc* approaches. Order and stability, uniformity and predictability, are significant in those matters governed by private law doctrine. In our voluminous dealings with other members of our community, we require a substantial degree of normative clarity and predictability. We need to know what is expected of us. Because legal principles help shape the normative structure of our everyday lives, we "have a right to expect a regularity and rhythm from the law."[99] Apriority serves these values by fixing the hierarchy of multiple values.

That is not to say that order is not important in public law matters. Surely, the relationships between the individual and the government, between the state and federal governments, and among the branches of government require a significant dose of predictability, certainty, and uniformity. And yet judges frequently perceive a fragility about these relationships—a "delicate balance"[100] that must be struck. Protection of this delicate balance requires a sensitivity to the competing values or policies or interests—however they are articulated. It means trying to resolve disputes in terms of what will both resolve the particular matter and still preserve the relationships. Least important (but not wholly unimportant) is the effect that the resolution will have on the next case.

An extreme illustration of this juggling act is Eleventh Amendment doctrine.[101] In *a priori* terms, this field of constitutional law makes no sense.

---

96. *See* Ronald Dworkin, *Hard Cases*, *in* Ronald Dworkin, Taking Rights Seriously 110-15 (1977).

97. Restatement (Second) of Torts § 283 cmts. b-c (1965).

98. *See* Model Penal Code § 2.02 (2)(d) (Official Draft 1962); Model Penal Code and Commentaries, cmt. to § 2.02 at 242 (1980).

99. Aaron D. Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 Duq. L. Rev. 373, 382 (1971).

100. Fay v. Noia, 372 U.S. 391, 445, 83 S. Ct. 822, 852 (1963) (Clark, J., dissenting).

101. U.S. Const. amend. XI:

The Supreme Court has repeatedly interpreted the amendment to mean the opposite of what it literally says,[102] and the Court has repeatedly reached seemingly inconsistent results based on distinctions that cannot withstand even the most casual scrutiny.[103] In short, it is impossible to synthesize these precedents into a coherent and consistent set of rules or principles.[104]

But from another perspective, the Eleventh Amendment cases *do* make sense. It is possible to discern in each majority opinion a careful groping for a balance between the equally legitimate, competing assertions of federal and state power—an *ad hoc* balance appropriate *for the particular case*. Hence, factual distinctions among cases that defy principled explanation may very well have a practical significance to someone attuned to their delicate political resonances. Indeed, while creating this analytical mess during the past century, the Court has juggled—arguably with considerable success—the state's interest in protecting its sovereignty from the encroachment of federal courts with the national interest in protecting the federal rights of individuals from violation by the states.

The public law cases I have been considering demonstrate how apriority determines the controlling significance of precedent. Indeed, without an *a priori* ordering of values, it is often difficult to understand just what a prior case stands for. Accordingly, by emphasizing different values, a judge can transform the very meaning of precedents.

Consider a particularly famous example of this transformation of precedents: The facts of *MacPherson v. Buick Motor Co.*[105] arguably fell within the scope of precedents whose outcomes were animated by the contract principle that a manufacturer is not generally liable for injuries caused to a remote purchaser by

---

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

102. *E.g.*, Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 107 S. Ct. 2941 (1987) (Congress has power to abrogate an amendment's protection); Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, *reh'g denied*, 416 U.S. 1000, 94 S. Ct. 2414 (1974) (amendment prohibits retrospective legal relief, but permits prospective equitable relief); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 79 S. Ct. 785 (1959) (state may consent to suit in federal court); Hans v. Louisiana, 134 U.S. 1, 10 S. Ct. 504 (1890) (amendment prohibits suit in federal court against a state by a citizen of *that* state).

103. *E.g.*, Monell v. Department of Social Servs., 436 U.S. 658, 98 S. Ct. 2018 (1978) (suit against state prohibited, but suit against political subdivision of the state permitted); Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, *reh'g denied*, 416 U.S. 1000, 94 S. Ct. 2414 (1974) (damage relief requiring retrospective payment of money to plaintiffs prohibited, but injunctive relief requiring prospective payment of money to plaintiffs permitted); Ex parte Young, 209 U.S. 123, 28 S. Ct. 441 (1908) (suits against state for injunctive relief prohibited, but suit against state officer for same injunctive relief permitted).

104. This is not just my opinion. At least four members of the Court have argued this position in recent years and have consistently called for a fundamental rethinking of this whole doctrinal area. *E.g.*, Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 509-11, 107 S. Ct. 2941, 2964-66 (1987) (Brennan, J., dissenting); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 258-302, 105 S. Ct. 3142, 3155-78, *reh'g denied*, 473 U.S. 926, 106 S. Ct. 18 (1985) (Brennan, J., dissenting).

105. 111 N.E. 1050 (N.Y. Ct. App. 1916).

a defective product. By reinterpreting these cases in light of tort principles which make manufacturers liable for injuries proximately caused by their defective products, Cardozo was able to factually distinguish them from the case *sub judice* and hold Buick liable for the injury suffered by MacPherson, a remote purchaser.[106]

Cases like *MacPherson* result from the courts' openness to *ad hoc* reordering of competing values. Conversely, the more a court analyzes precedents in terms of a pre-established, fixed hierarchy of values, the less fluid and manipulable the meaning and scope of those precedents will appear. Their reach will be defined in terms of a single, preeminent value, rather than in terms of distinct, coequal, and competing values.

These considerations can also help us understand that critical moment in legal analysis when the decision-maker classifies the problem. For example, in *Alabama Great Southern R.R. v. Carroll*,[107] an employee of the Alabama Great Southern Railroad was injured in Mississippi as the result of the negligence of a co-worker. The substantive issue in the case—whether plaintiff had a cause of action against the railroad—turned on whether the dispute was categorized as a tort problem or one concerning the obligations of the employment contract. Classification mattered because of the choice-of-law implications. If the dispute had been characterized as a contract problem, the court would have applied Alabama law under the traditional "place of contracting" rule and may well have held that Alabama's employers' liability act (which permitted such suits against employers) was an implied term of every employment contract made in the state. By categorizing the case as one sounding in tort, the court applied Mississippi law under the traditional "place of the wrong" rule and followed Mississippi's common law doctrine immunizing employers from liability for injuries caused by fellow servants.[108]

Doctrinal areas are ostensibly distinguished along factual lines. Thus, contract law is said to deal with disputes related to promises.[109] Tort law, by contrast, is said to concern injuries that are not promissory in origin.[110] But, as *Carroll* illustrates, a particular factual situation may involve a dispute with a promissory or non-promissory base, depending on how one looks at it—more precisely, depending on which facts one chooses to emphasize.

Hence, the process of classification is one particular form of the more general process of analogical reasoning, which is to say, one particular form of the process by which we decide the relative significance of particular facts. Accordingly, which facts the court emphasizes in a case like *Carroll* will depend on which values the court emphasizes. An emphasis on fault will focus attention on the injury-causing conduct and make this dispute seem like a tort case while

106. *Id.* at 1051-53.
107. 11 So. 803 (Ala. 1892).
108. *Id.* at 807-09.
109. *See, e.g.*, John D. Calamari & Joseph M. Perillo, The Law of Contracts § 1-1 (2d ed. 1977).
110. *See, e.g.*, Keeton, *supra* note 14, §1.

an emphasis on promise-keeping will focus attention on the agreement between the employer and employee and make the dispute seem like a contract case.

In most disputes (as in *Carroll*), classification takes place rhetorically on the level of factual analysis with no reference to the underlying values. In others, the utter novelty of the facts forces the decision-maker to confront the value choices driving the categorization process. This is typically true in cases involving new technology, such as *Baby M.*[111] In that case, a woman had agreed to be artificially inseminated, to bear the child, to give custody of the child to the natural father, to permit the father's wife to adopt the child, and to waive all parental rights. Before the agreement was finally executed, the "surrogate mother" decided she wanted to keep the child. To "apply the law," the court had to decide what kind of law applied. But the dispute could easily be categorized as a contract case, a custody case, or an adoption case. And the different categorizations would have suggested different results or, at least, different considerations and emphases on the way to obtaining the result. The very process of deciding the classification issue drove the courts and commentators to confront the dramatic value issues raised by the new fertility technology.[112] Thus, disputes that present difficult questions of classification, like other types of hard cases, involve values in conflict. Different values require emphasis on different facts and pull the case into different classifications.

As with all difficult problems of analogical reasoning, the degree of apriority that the decision-maker brings to these value conflicts profoundly affects the process. A high degree of apriority proportionately fixes the reach of precedent and thereby proportionately fixes the boundaries between categories. Conversely, a low degree of apriority—an *ad hoc* approach to value conflicts—lays bare those conflicts without providing the predetermined hierarchy to resolve them.

---

111. In re Baby M, 537 A.2d 1227 (N.J. 1988).

112. *See, e.g.*, Barbara L. Atwell, *Surrogacy and Adoption: A Case of Incompatibility*, 20 Colum. Hum. Rts. L. Rev. 1 (1988); Wilfredo Caraballo, Baby M: *A Non-Contract Contract Case*, 18 Seton Hall L. Rev. 855 (1988); Janet L. Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 Buff. L. Rev. 515 (1990); Rene R. Gilliam, *When a Surrogate Mother Breaks a Promise: The Inappropriateness of the Traditional "Best Interests of the Child" Standard*, 18 Mem. St. U.L. Rev. 514 (1988); Barbara K. Kopytoff, *Surrogate Motherhood: Questions of Law and Values*, 22 U.S.F.L. Rev. 205 (1988); Brian J. Carney, Note, *Where Do the Children Go?—Surrogate Mother Contracts and the Best Interests of the Child*, 22 Suffolk U. L. Rev. 1187 (1988); *cf.* John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 Va. L. Rev. 437 (1990); Wendy D. Bowie, Comment, *Multiplication and Division—New Math for the Courts: New Reproductive Technologies Create Potential Legal Time Bombs*, 95 Dick. L. Rev. 155 (1990) (legal status of frozen embryos); John M. Aragona, Comment, *Dangerous Relations: Doctors and Extracorporeal Embryos, The Need for New Limits to Medical Inquiry*, 7 J. Contemp. Health L. & Pol'y 307 (1991) (effect of *in vitro* fertilization technology on physicians' standard of care); William J. Wagner, *The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique*, 41 Case W. Res. L. Rev. 1 (1990) (application of contract law to new reproductive technologies). *Compare* In re Baby M, 537 A.2d 1227 (N.J. 1988) *with* Surrogate Parenting Assoc. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209 (Ky. 1986).

Paradoxically, by increasing the number of hard classification problems, the *ad hoc* approach diminishes the importance of classification. Ultimately, what is at stake is the resolution of value conflicts. Doctrine is an analytical tool that is used to accomplish this, but if we can move straight to the values at stake and choose a resolution, it matters little how we label that resolution.

If, as I have insisted in this Part, the basic analytical processes of identifying, articulating, and applying legal doctrine are driven by the general approach toward multiple and irreconcilable values in the law—why is this question of the proper approach not overtly discussed in legal arguments and decisions? Except for instances like those discussed in Section A, when courts articulate doctrine in terms of the underlying values, these issues are largely absent from the rhetoric of legal analysis.

Some have argued that the effect of our rights-based legal rhetoric is to obscure the value issues at stake.[113] My attitude about this used to be the sanguine belief that the traditional rhetoric of law did not hide moral debate; rather, it constituted the vocabulary with which lawyers carried on moral debate.[114]

But surely the rules and tests and abstractions and analogies and distinctions of legal argument *do* obscure values. What must be added, however, is that this rhetorical avoidance of value conflicts is, itself, a moral stance—one that I have leadenly labeled "apriority." If we come to legal analysis having already resolved value conflicts in the abstract, there is no apparent need to address those conflicts in the particular. Indeed, the very values served by apriority—uniformity, stability, efficiency, consensus—may well demand that we not rehash the value issues. What must be remembered is that uniformity and stability and efficiency and consensus are, themselves, values. And for those who prize them, the "neutral" language of the law serves a socially vital function.

---

113. Consider, for example, Jane Baron's assertion: "Morality gets subsumed in, swallowed by, craft; in using our accustomed vocabulary, we lose sight of what we are talking about." Jane B. Baron & Richard K. Greenstein, *Rights-Talk*, 33 Vill. L. Rev. 335, 365 (1988). *See also* Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 Wis. L. Rev. 975, 1059:

> The *logic of human rights* is a human invention whose purpose is to preserve us from the notion that we must make political and moral choices. To make conscious choices, it is necessary to realize that we are making a choice. To choose wisely, we must know who gains and who loses from the concrete legal rules and what values are thereby preserved or undermined. Once we know everything that is involved in the decision, and we have not arbitrarily constricted the alternatives available to us, then we make a choice. Those decisions may be difficult and they may be painful, but making choices is what human beings do.

114. Baron & Greenstein, *supra* note 113, at 363-64.

CONCLUSION

Values clash in our moral lives. We define ourselves by the choices we make. How we act in the face of moral dilemmas and which values we exalt above others mark our individuality and say who we are.

The same holds true for communities. The community must resolve disputes among its members; it must decide hard cases; it must determine how to deploy its coercive force when fundamental values collide. And the choices—many of which are made by courts—define the community's moral self.

But these choices encompass not just the final resolutions in hard cases, but the style with which the resolutions are reached. As individuals and communities, we can confront the irreconcilable values directly, concretely, and contextually in each and every case. In so doing, we show our respect for all values; we engage in dialogue with both our present and past community; and we make our choices in humility as we acknowledge the necessarily provisional character of those choices.

But while we thereby gain respectfulness, dialogue, and humility, we subvert predictability, stability, efficiency, and the foundation for a strong theory of rights.[115] We risk losing that "regularity and rhythm" in the law.

As individuals and communities, we can instead fix our values in abstract and hierarchical terms and create rules to define our obligations accordingly. We thereby gain order, predictability, and the particular kind of moral integrity that comes from judging people according to a consistent ranking of principles.

The danger of this way lies in forgetfulness. We may forget that the origin of our choices among incommensurable values is community consensus or the preferences of individual judges, and we may forget that the ultimate justifications for a fixed hierarchy among values—whatever it may be—are efficiency, stability, and the individualism expressed in the idea of rights. We may forget and come to believe that our choices represent the way things *really* ought to be—indeed, the way things really *have to be* and that people who disagree with our choices are not just different, but wrong. In short, we may forget the virtue of respectfulness, dialogue, and humility.

These are not trivial matters. For as individuals and communities, we define ourselves by what we choose and also by *how* we choose. When we presume to instruct Walter and Bernice Williams on how an ordinary, reasonable, and prudent person behaves, we meet up with the three faces of ORPP, each expressing its unique personality and seeing the world with a unique moral vision. Our first decision must be whether to look at those faces and acknowledge each of the personalities as our own.

---

115. *See supra* note 38.