ARTICLES

MORAL REASONING AND THE QUEST FOR LEGITIMACY

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INTRODUCTION

What judges do and what judges say are not always consistent, but those two activities—the act of decisionmaking and the act of explaining the decision—are inextricably linked. In a now-famous legal essay, Professor Robert Cover wrote that "judges deal pain and death."[1] Every decision they make imposes their will on other human beings.[2] When a judge sentences a defendant to prison, the judge's decision takes away the defendant's liberty. When a judge finds contractual liability, the decision forces one party to compensate the other. Every word, then, masks a deed. And the deed, ultimately, is one of power and coercion.[3]

Thus, like police officers, correctional officers, and even military personnel, judges are, in some respects, agents of state coercion. But judges are more than that. They do not simply execute the coercive powers of others.[4] In many situations, judges actually create the very

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1. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609 (1986).

2. *See id.* at 1601 (stating that judicial decision can have effect on someone's freedom, property, children, or life).

3. *See id.* at 1608 (suggesting that one who is punished might need to be coerced and that need for "just" punishment justifies coercion or violence).

4. Judges often interpret and enforce statutes passed by Congress and rules made by administrative agencies. As opposed to common law decisions, decisions based on statutes or administrative rules permit the judge latitude to rely on the coercive powers of others. Nonetheless, even these decisions often involve a significant amount of judicial interpretation. A judge must still interpret an ambiguous statute and decide whether an agency decision is valid. *See,*

coercion they impose.[5] Unlike police officers or military personnel, judges generally lack the physical tools to carry out that coercion themselves. A judge who imposes a prison term on a defendant must rely on other officials, including wardens, correctional officers, and probation officers, to enforce that term.[6]

Here, then, is part of the relation between what judges do and what judges say. A judicial opinion, the judge's voice, must legitimate the judge's decision. In the words of Justices O'Connor, Souter, and Kennedy, "The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."[7] Not only must the judiciary persuade other government actors to enforce its opinion; it must also make the

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e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-44 (1984) (holding that courts will uphold agency's statutory construction as long as it is not "arbitrary, capricious, or manifestly contrary to the statute" if Congress has not directly addressed issue); Board of Educ. v. Harris, 444 U.S. 130, 138 (1979) (using congressional intent to interpret Emergency School Aid Act); Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951) (reviewing agency findings under substantial evidence test based on "record as a whole"); *see also infra* note 11 and accompanying text (describing manner in which judges rely on congressional intent to legitimate decisions). Even when a court defers to an agency decision, the court is essentially sanctioning that decision by allowing it to stand.

5. Judicially created common law, in fact, could be viewed as a whole framework of coercion created and imposed by judges. For an interesting discussion of how different forms of language mask, confine, and explain violence, see Ellen W. Clayton & Jay Clayton, *Afterword: Voices and Violence—A Dialogue*, 43 VAND. L. REV. 1807, 1807-18 (1990) (incorporating views of various scholars into dialectic about violence in law, government, and people).

6. *See* Cover, *supra* note 1, at 1618-19 (discussing danger to judges caused by ineffective domination of defendants by police, jailers, and other enforcers). This is not to say that judges have no recourse to the other coercive powers of government. Historically, some judicial decisions such as Brown v. Board of Education, 347 U.S. 483 (1954), have been enforced through the use of government force. The *Brown* decision sparked massive resistance across the United States. Jack Patterson, *They Liked Ike, Loved Lucy, and Listened to McCarthy*, BUS. WK., June 7, 1993, at 14, 14 (book review). In Arkansas, Governor Faubus declared his intention to ignore the decision and to maintain segregated schools. *Id.* He only complied with the Court's mandate to desegregate when President Eisenhower sent the 101st Airborne Division to Little Rock to force Central High School to open its doors to black students. Benjamin Fine, *Troops on Guard at School; Negroes Ready to Return*, N.Y. TIMES, Sept. 25, 1957, at 1. For two perspectives on these events, see ELIZABETH HUCKABY, CRISIS AT CENTRAL HIGH (1980), which provides a teacher's version of the events in Little Rock, and Raymond T. Diamond, *Confrontation as Rejoinder to Compromise: Reflections on the Little Rock Desegregation Crisis*, 11 NAT'L BLACK L.J. 151 (1989), which evaluates events in Little Rock in light of *Brown* and examines justifications for the governor's resistance.

In most cases, however, and particularly in most civil cases, judicial decisions rarely require such direct application of the executive branch's coercive power. Indeed, the judiciary would be unable to maintain its independence at all if it had to rely on the military to enforce its judgments. The fact remains, however, that to fulfill their function of resolving disputes, judges must legitimize governmental coercion. They must do so in a way that is generally acceptable to those upon whom they rely. Because judges do not have direct control over the most formidable governmental coercive powers, they must instead employ rhetoric, logic, and other tools of persuasion to impose their decisions.

7. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2814 (1992).

imposition of governmental violence acceptable on a general level throughout the entire interpretive community,[8] and, if possible, throughout society as well. Thus, as Professor Cover recognized, "Legal interpretation is . . . a practical activity . . . designed to generate credible threats and actual deeds of violence . . . in an effective way."[9]

Part of the process of legitimation, therefore, is persuasion.[10] For those who already agree with the result of a judicial decision, such persuasion may be unnecessary. Likewise, some in the interpretive community obey simply out of respect for the court and the court's ability to administer violence; some citizens will always fear raw power. Of course, these two groups do not represent the entire interpretive community. Some who read a judge's opinion will not have made up their minds as to what result they prefer before reading it. Others, perhaps lacking expertise in a particular area of law, may not have any idea what to think before examining the opinion. Still others may be willing to change their views. For these last three groups of readers, the process of legitimation clearly must include some persuasion.

If one starts with the vision of legal texts as persuasive voices of legitimacy for institutional violence, one quickly faces the question of exactly how those texts fulfill their function. How do judges structure their texts to confer legitimacy on their decisions? There may be any number of answers to that question. For example, judges often base decisions on the language of a statute or on the intent of Congress.[11] By so doing, they essentially rest the legitimacy of decisions on the will of more majoritarian branches of the government, perhaps subconsciously expecting this co-option of majoritarian legitimacy to speed

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8. "Interpretive community" refers to those who read and study judicial opinions. This audience comprises attorneys, legislators, executive officials, other judges, and, occasionally, the general public and the media. It does not, however, usually include people whose working lives are largely unconnected to governing or to practicing law. Baseball players, factory workers, doctors, and engineers probably read few judicial opinions. This Article assumes, therefore, that judges write most frequently for the interpretive community, not for the general public. With some exceptions, judges use opinions to persuade the interpretive community. The judges, in turn, rely on the interpretive community to persuade the general public.

9. Cover, *supra* note 1, at 1610.

10. For some insight into other mechanisms of projecting legitimacy, see STANLEY MILGRAM, THE INDIVIDUAL IN A SOCIAL WORLD 102-37 (1977), which describes obedience-inducing environmental factors present in most situations involving authority. *See also* HERBERT C. KELMAN & V. LEE HAMILTON, CRIMES OF OBEDIENCE 77-135 (1989) (describing structures and dynamics common to all types of authority).

11. *See, e.g.*, Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984) (stating that courts, in reviewing agency's statutory interpretation, must first determine whether Congress has "directly spoken to the precise question at issue"); Illinois Bell Tel. Co. v. FCC, 966 F.2d 1478, 1481 (D.C. Cir. 1992) (stating that words of any statute furnish "plainest guide to congressional intent"); Tyler v. Pasqua, 748 F.2d 283, 286 (5th Cir. 1984) (examining "first the statutory language, then the legislative history").

the acceptance of the judicial decision. This Article, however, focuses on a different aspect of the quest for legitimacy: judicial use in opinion writing of moral structures and moral reasoning as a means of creating legitimacy.

Because law rests on a foundation of violence, as a persuasive tool it ultimately must also engage a superstructure of morality.[12] This is not to say that law defines or limits personal moral choices in all circumstances. Often, it does not.[13] Nor do judges necessarily impose their own notions of morality on the public through judicial decisionmaking. In many circumstances, judges may feel constrained by statutes, judicial precedent, and the structure of the law to such an extent that their own moral views matter little.

In fact, moral theory may have very little to do with the act of judicial decisionmaking. As Professor Stanley Fish points out, "[W]hen judges do what they do, they do not do it in accordance with or at the behest of some systematic and coherent account of law and its relation to morality and society."[14] Fish argues, rather, that judicial decisionmaking is an amorphous process in which judges rely on experience and intuition to reach a result.[15]

Even if Fish is right, this Article argues that theory, and particularly moral theory, has everything to do with how judges explain that result to the rest of us.[16] And it is the explanation more than the act of decisionmaking that confers legitimacy on the judicial system. As the Supreme Court has noted, the judiciary must "take care to speak and act in ways that allow people to accept its decisions on the terms the [judiciary] claims for them."[17] One would expect, then, that the moral reasoning the judge adopts in an opinion would both shape and confine the way the judge explains the decision. And, just as

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12. The term "superstructure" is used in an architectural, not a Marxist, sense. For a full discussion of the intrinsic relationship between legal authority and morality, see Heidi Hurd, *Challenging Authority*, 100 YALE L.J. 1611, 1677 (1991), where the author states that "if the law is to possess any authority at all it must be by virtue of accurately reflecting *other* obligations . . . which exist antecedent to the enactment and enforcement of the law." *But see* JOSEPH RAZ, THE MORALITY OF FREEDOM 23-109 (1986) (finding that no single universally applicable exercise of legitimate authority exists for all people).

13. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414-15 (1989) (holding that government may not prohibit flag-burning and thus cannot compel respect for flag); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding that government may not distinguish between married and unmarried person in personal choices regarding whether to bear or beget child); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (stating that government may not forbid certain types of education).

14. STANLEY FISH, DOING WHAT COMES NATURALLY 384 (1989).

15. *Id.* at 372-98.

16. *See infra* notes 78-120 and accompanying text (discussing relationship between moral reasoning and judicial opinions).

17. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2814 (1992) (O'Connor, Kennedy & Souter, J.J.).

important, because the interpretive community may view some types of moral reasoning as more persuasive than others, the type of moral reasoning a judge uses may impede or accelerate the process of legitimation.[18]

Part I of this Article briefly outlines different stages of moral development and the type of moral reasoning that persons at each stage most frequently employ. In so doing, the Article sketches both Dr. Lawrence Kohlberg's theory of moral development, based on a longitudinal study of male morality, and Professor Carol Gilligan's theory of moral development, based on a study of female morality. In Part II, the Article examines *DeShaney v. Winnebago County Department of Social Services*[19] in an attempt to show how the type of moral reasoning a judge adopts in writing an opinion shapes and confines both the text of the opinion and the justifications the judge presents for the decision.

Part III draws some startling lessons from the close reading of *DeShaney*. First, the Article advances the theory that the relationship between author and audience, that is, between the judge and the legal community, may determine which systems of moral reasoning more effectively confer legitimacy on a particular decision. Because the audience for judicial opinions, the interpretive community, is largely male and relies heavily on Kohlberg's fourth-stage moral reasoning, this Article concludes that fourth-stage moral reasoning may confer greater legitimacy on the act of judicial decisionmaking than other types of moral reasoning. This conclusion, however, is descriptive rather than normative. As the composition of the legal community changes and as the community loses some of its homogeneity in terms of moral reasoning, one might expect other types of moral reasoning to become increasingly effective tools in legitimating judicial decisions.

Part III also attempts to test this description of the legitimating effects of moral reasoning through an analysis of several landmark decisions that still form the basis for much jurisprudential debate. Although a close reading of only a few opinions hardly exhausts the topic, this Article concludes that there is some support for the proposition that the type of moral reasoning a judge employs plays a role in shaping the text of a decision and in determining that decision's ultimate jurisprudential legitimacy.

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18. *See infra* notes 143-245 and accompanying text (discussing relationship between form of moral reasoning used in legal opinions and interpretive community's acceptance of those opinions).

19. 489 U.S. 189 (1989).

I. THE STRUCTURES OF MORAL REASONING

A. Kohlberg's Stages of Moral Development

In the 1950s, Dr. Lawrence Kohlberg[20] began conducting a longitudinal study of young males in which he followed their development for a period of more than twenty years.[21] Through this research, Dr. Kohlberg developed a theory of moral development that postulates six separate stages of moral reasoning.[22] Most adults, according to Kohlberg, operate in the third, fourth, and fifth stages; only a few ever reach the sixth stage.[23]

In Kohlberg's first stage of moral reasoning, which he terms heteronomous morality, the individual acts primarily out of a desire to escape punishment.[24] What is right is determined by what action will avoid personal pain.[25] Significantly, the actor does not recognize that others in society may have interests that differ from the actor's interests or that create a different point of view.[26]

The second stage of moral reasoning is a more pragmatic one. The actor, while recognizing that others may have a different perspective in any given situation, assumes that all individuals will act to maximize their own satisfaction.[27] Moral legitimacy thus exists in the pursuit of one's interests.[28] Reciprocal exchange resting on the mutual interests of two parties is seen as inherently just.[29] According to Kohlberg, in this stage, it is "important to keep promises so that others will keep their promises to you."[30]

In the third stage, the individual begins to construct a system of shared moral norms that incorporates numerous perspectives and represents societal agreement about the way people should live.[31]

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20. Lawrence Kohlberg served as professor of education and social psychology at Harvard University from 1968 until his death in 1987. Dr. Kohlberg penned numerous books and articles, the most significant of which discusses his theory on stages of moral development. LAWRENCE KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE (1981).

21. *See* 1 ANNE COLBY & LAWRENCE KOHLBERG, THE MEASUREMENT OF MORAL JUDGMENT 82 (1987) (discussing format and chronology of Kolhlberg's moral judgment interviews).

22. *See id.* at 77-117 (1987) (providing empirical data supporting theory of moral stages originally described in LAWRENCE KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE (1981)).

23. *Id.*

24. *Id.* at 18.

25. *Id.*

26. *Id.* at 18, 25.

27. *Id.* at 18, 26.

28. *Id.*

29. *Id.* at 18, 26-27.

30. *Id.* at 27.

31. *Id.* at 18, 27-28.

The individual thus places significant emphasis on living up to societal expectations and on following society's rules, not because those rules and values have any independent justification, but simply because they seem to be imposed absolutes.[32] As a societally imposed norm, the Golden Rule, "Do unto others as you would have them do unto you," represents this stage of moral reasoning.[33]

Some scholars have termed Kohlberg's fourth stage the "law and order" stage.[34] Here, the individual primarily identifies with the need to preserve the whole sociomoral system: one obeys rules because those rules are part of a social contract, right and wrong flow from societal consensus, and majority will is the ultimate justification for the imposition of new rules.[35] An individual operating with stage-four reasoning would therefore expect strict adherence to the Constitution and statutes not because those documents embody preexisting universal ethical principles, but rather because they are manifestations of a social contract based on majority will.[36] Moreover, legal precedent, which embodies one of society's accepted historical methods of treating problems, becomes part of the necessary social contract.[37]

Likewise, in this stage, private contractual agreements are important only because of their usefulness in maintaining a smoothly functioning society.[38] Concerns about procedural justice and impartiality often emerge as central considerations in morality.[39] An individual operating in stage-four morality, therefore, might claim that "[e]xceptions to the law cannot be given. This would lead to totally subjective decisions on the part of the law enforcers."[40]

In stage five, the individual identifies universal values and human rights that exist prior to the organization of society.[41] The legitimacy of a social order, then, is judged by the degree to which that social order protects these preexisting values.[42] Under stage-five reasoning,

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32. *Id.* at 18, 27.
33. *Id.*
34. *E.g.*, Lawrence J. Landwehr, *Lawyers as Social Progressives or Reactionaries: The Law and Order Cognitive Orientation of Lawyers*, 7 LAW & PSYCHOL. REV. 39, 40 n.2 (1982) (describing Kohlberg's fourth stage of moral development as being focused on authority, rules, and social order).
35. COLBY & KOHLBERG, *supra* note 21, at 18, 28-29.
36. COLBY & KOHLBERG, *supra* note 21, at 18, 28.
37. COLBY & KOHLBERG, *supra* note 21, at 28.
38. *See* COLBY & KOHLBERG, *supra* note 21, at 18, 28 (describing stage-four perspective as subordinating individuals to system as whole).
39. COLBY & KOHLBERG, *supra* note 21, at 18, 28-29.
40. COLBY & KOHLBERG, *supra* note 21, at 29.
41. COLBY & KOHLBERG, *supra* note 21, at 19, 29-30.
42. COLBY & KOHLBERG, *supra* note 21, at 29.

law should change in a utilitarian way to protect fundamental rights.[43] The recognition that some rights exist prior to the organization of society also leads to both an obligation to uphold these rights and a concern for the protection of minorities.[44] Consequently, preexisting fundamental rights must form the basis for any social contract, even if those rights conflict with the will of the majority.[45] Although in this stage procedural due process continues to be important as a guarantor of fairness, the individual recognizes the need for judicial discretion in some circumstances.[46]

Rather than change the stage-five perspective of a moral being, stage six makes that perspective more conscious and universal.[47] At stage six, stage-five values become deliberate principles, or "universal ethical principles," that the actor can apply to any situation.[48] These principles are based less on the social contract and more on notions of trust and community that must precede any legitimate social contract and must flow from a fundamental respect for the humanity of others.[49] Thus, a stage-six actor might recognize the need to incarcerate a criminal to protect potential victims, but that actor might also want to preserve the dignity of the offender.[50] Likewise, stage-six actors often advocate the distribution of societal resources in accordance with need rather than talent or achievement, viewing accomplishment or talent as primarily the product of genetics or differential opportunity rather than the result of any specific intrinsic merit.[51]

B. A "Different Voice": Gilligan's Theory of Feminine Moral Development

Although Kohlberg viewed his stages as a universal linear process of human development, not all psychologists share his views.[52] Some

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43. COLBY & KOHLBERG, *supra* note 21, at 19, 29-30.
44. COLBY & KOHLBERG, *supra* note 21, at 19, 29.
45. COLBY & KOHLBERG, *supra* note 21, at 29.
46. COLBY & KOHLBERG, *supra* note 21, at 30. Kohlberg notes that individuals engaging in stage-five reasoning permit judicial discretion in order to effect social change. *Id.* at 30.
47. *See* COLBY & KOHLBERG, *supra* note 21, at 19, 31 (explaining universal ethical principles of justice, including equality of human rights and respect for dignity of human beings as individuals).
48. COLBY & KOHLBERG, *supra* note 21, at 19.
49. COLBY & KOHLBERG, *supra* note 21, at 19, 31-32.
50. COLBY & KOHLBERG, *supra* note 21, at 32.
51. COLBY & KOHLBERG, *supra* note 21, at 31.
52. *See, e.g.*, JAMES R. REST, DEVELOPMENT IN JUDGING MORAL ISSUES 143-45 (1979) (finding evidence of age trends insufficient to validate Kohlberg model); John R. Snarey, *Cross-Cultural Universality of Social-Moral Development: A Critical View of Kohlbergian Research*, 97 PSYCHOL. BULL. 202, 218 (1985) (identifying biases in Kohlberg's theory that favor, *inter alia*, urban and middle-class society). Norma Haan and others have noted that subjects from Western industrialized societies placed higher on Kohlberg's scale than did subjects from other backgrounds. *See*

have attacked the hierarchy that Kohlberg has erected, objecting in particular to those values that Kohlberg posits as stage-six beliefs.[53] Other psychologists have criticized Kohlberg's theory for failing to explain the moral development of women. In her book *In a Different Voice*, Professor Carol Gilligan constructs an alternative theory that she claims more accurately reflects feminine moral development.[54] According to Gilligan, women approach moral problems with a distinct language that centers around the obligation to care for and the desire to avoid hurting others.[55] According to Gilligan, the feminine resolution of moral dilemmas has less to do with "abstract moral conception than with the collision between two lives."[56] As Gilligan states:

> The moral imperative that emerges [for women] . . . is an injunction to care, a responsibility to discern and alleviate the "real and recognizable trouble" of this world. For men, the moral imperative appears rather as an injunction to respect the rights of others and thus to protect from interference the rights to life and self-fulfillment.[57]

Like Kohlberg, Gilligan posits different stages of moral development.[58] Under Gilligan's thesis, however, Kohlberg's abstract rights

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NORMA HAAN ET AL., ON MORAL GROUNDS: THE SEARCH FOR PRACTICAL MORALITY 59 (1985). Haan also maintains that Kohlberg's individualistic vision of the developmental process ignores the contextual and interactional ways in which people actually learn to make moral choices. *See id.* at 38-41, 52-60 (focusing on interdependence of people as basis of morality).

53. *E.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE 102-05 (1982) (questioning validity of stage-six morality by critiquing Kohlberg's selection of Gandhi as exemplification of stage six).

Indeed, Kohlberg and Colby acknowledge that "[t]he exact nature and definition of stage-six values are uncertain." COLBY & KOHLBERG, *supra* note 21, at 32. Interestingly, Kohlberg and Colby have had difficulty empirically verifying stage-six values in non-Western cultures. *See* Snarey, *supra* note 52, at 207 (explaining that difficulty in addressing non-Western cultures is due to sampling and statistical problems). In the 1970s, however, Kohlberg proposed the development of a seventh stage bordering on religious enlightenment that he hypothesized would exist among elderly people. *See* KOHLBERG, *supra* note 22, at 355.

54. GILLIGAN, *supra* note 53, at 1-2. Carol Gilligan is a Professor of Sociology and Psychology at Harvard University. This moral reasoning does not occur exclusively in women. Commentators recognize that men may use Gilligan's moral reasoning and that women may engage in Kohlberg's moral reasoning. Peter D. Lifton, *Individual Differences in Moral Development: The Relation of Sex, Gender, and Personality to Morality*, 53 J. PERSONALITY 306, 308 (1985). Along these lines, it is important to remember that sex and gender differ. Sex refers to the biological designation of an organism as male or female, while gender reflects the sociological constructs of male and female. ELIZABETH V. SPELMAN, INESSENTIAL WOMAN 14 (1988). Thus, gender concepts are created and imposed by society. *See id.* According to Elizabeth Spelman, gender is not a bipolar choice between masculine and feminine; "rather, gender is complex, variegated, and multiple." Joseph W. Singer, *Should Lawyers Care About Philosophy?*, 1989 DUKE L.J. 1752, 1770 (reviewing ELIZABETH V. SPELMAN, INESSENTIAL WOMAN (1988)).

55. GILLIGAN, *supra* note 53, at 30-31.

56. GILLIGAN, *supra* note 53, at 101.

57. GILLIGAN, *supra* note 53, at 100.

58. GILLIGAN, *supra* note 53, at 73-105.

and principles never adequately capture the organizing concepts of connection and care, concepts that Gilligan believes form the basis for women's moral development.[59] Gilligan believes that many women go through three separate stages of moral development in which they learn to view moral problems as conflicts between their own needs and responsibilities and those of others.[60] How a woman views the connections between actors in any moral dilemma assumes great significance in determining which stage of moral reasoning she employs.[61]

In the first stage, the actor focuses almost exclusively on caring for herself.[62] Questions of morality emerge only if the actor's own needs conflict.[63] Consequently, one woman in this stage told Gilligan that she viewed an unplanned pregnancy as both a perfect "'chance to get married and move away from home'" and a restriction on her ability "'to do a lot of things.'"[64]

Women in Gilligan's second stage of morality recognize a connection between self and others, and they articulate that link by describing concepts of selfishness and responsibility.[65] At this point, moral judgment relies on shared norms and expectations; moral good equates with caring for others, especially the dependent and less fortunate members of society.[66] The problem with the second stage, however, is that the actor's devotion to others triggers conventional, and often uncomfortable, roles of self-sacrifice.[67] Because the actor identifies goodness with self-sacrifice, she characterizes personal needs and desires as selfish.[68] This denial of one's personal needs, according to Gilligan, ultimately creates conflict within the actor herself and

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59. GILLIGAN, *supra* note 53, at 73.
60. GILLIGAN, *supra* note 53, at 73-74.
61. GILLIGAN, *supra* note 53, at 74. Like Kohlberg, Gilligan's theory has been criticized for its insensitivity to race and class distinctions. *See* Linda J. Nicholson, *Women, Morality, and History*, 50 SOC. RES. 514, 530-33 (1983) (noting that ideal of femininity has had greater influence on white, middle-class women than on black, poor, and non-Western women). Moreover, Professor Catharine MacKinnon has suggested that Gilligan's voice is the voice of women as victims. *See* Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 837 (1990) (describing MacKinnon's view that female caring is result of patriarchy); Lucinda M. Finley, *The Nature of Domination and the Nature of Women*, 82 NW. U. L. REV. 352, 379 (1988) (reviewing CATHERINE A. MACKINNON, FEMINISM UNMODIFIED (1987)) (discussing MacKinnon's belief that women's caring quality is product of subordination to men). This criticism raises questions both as to the uniqueness and the permanence of the process Gilligan describes.
62. GILLIGAN, *supra* note 53, at 74-79.
63. GILLIGAN, *supra* note 53, at 75.
64. GILLIGAN, *supra* note 53, at 75 (quoting 18-year-old woman who participated in Gilligan's study).
65. GILLIGAN, *supra* note 53, at 74, 79, 82.
66. GILLIGAN, *supra* note 53, at 74, 79.
67. GILLIGAN, *supra* note 53, at 74, 80-82.
68. GILLIGAN, *supra* note 53, at 79-81.

forces her to reevaluate the moral framework in which she operates.[69] Such an evaluation leads to Gilligan's third stage of moral development.[70]

In the third stage, the woman rejects the logic of pure self-sacrifice and begins to include her own needs within the concept of care.[71] According to Gilligan, "Care becomes the self-chosen principle . . . that remains psychological in its concern with relationships and response but becomes universal in its condemnation of exploitation and hurt."[72] A woman in this stage asks not only how she can avoid hurting others but also how she can avoid hurting herself.[73]

Gilligan and Kohlberg thus posit very different models of moral reasoning.[74] The point of this Article, however, is not to assess whether one model is more valid than the other.[75] Rather, this Article searches for evidence that the moral structures that Kohlberg and Gilligan describe shape and confine reasoning in judicial opinions.[76] If judges use particular types of moral reasoning in their opinions, and if those types of reasoning mirror the current moral stages of development of individuals within the interpretive community and in society as a whole, then the moral reasoning a judge subconsciously chooses to explain a decision may in fact help legitimize that decision.[77]

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69. GILLIGAN, *supra* note 53, at 74, 80-82.
70. GILLIGAN, *supra* note 53, at 74, 82.
71. GILLIGAN, *supra* note 53, at 74, 82.
72. GILLIGAN, *supra* note 53, at 74.
73. GILLIGAN, *supra* note 53, at 82-103.
74. Both Kohlberg and Gilligan owe part of the philosophical foundations of their work to Jean Piaget, the eminent child psychologist. Piaget first recognized that children's concepts of justice progress through various stages as the child matures. JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD 315-17 (1965). He posited that moral development was related to the process of socialization. *Id.* at 198. Thus, he claimed that children developed ideas of justice largely through interaction with other children. *Id.*
75. Kohlberg rejected Gilligan's work, suggesting that both men and women use the same types of moral reasoning. LAWRENCE KOHLBERG, THE PSYCHOLOGY OF MORAL DEVELOPMENT 338-70 (1984). Gilligan's work clearly rejects Kohlberg's contention that his model of development is universal. *See supra* notes 54-56 and accompanying text (criticizing Kohlberg for inaccurately depicting women's moral development and providing alternative theory).
76. *See infra* notes 93-120 and accompanying text (contrasting majority and dissenting opinions' use of moral structure in DeShaney v. Winnebago Dep't of Social Servs., 489 U.S. 189 (1989)); *infra* notes 150-71 and accompanying text (explaining U.S. Supreme Court's use of Kohlberg's fourth-stage moral reasoning in Roe v. Wade, 410 U.S. 113 (1973)); *infra* notes 172-88 and accompanying text (discussing Kohlbergian analysis in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992)).
77. *See supra* notes 16-18 and accompanying text (discussing judges' use of moral reasoning to legitimize their decisions).

II. MORAL REASONING AND JUDICIAL OPINIONS

The legal reasoning in judicial opinions almost invariably makes use of moral reasoning. No judge can escape the fabric of moral structure in which he or she, perhaps even subconsciously, couches the act of legal decisionmaking. That fabric often holds together an opinion. When a judge chooses to speak, he or she does so within the confines of this moral development. As a result, the moral language a judge uses may shape, and ultimately limit, the explanation given for any particular decision.

An examination of *DeShaney v. Winnebago Department of Social Services*[78] provides a good illustration of how moral reasoning shapes explanations of judicial decisionmaking. In 1982, when Joshua DeShaney was three years old, the Winnebago County Department of Social Services (DSS) began to receive reports that he was the subject of severe child abuse.[79] The following year, after Joshua was admitted to a local hospital with bruises and abrasions, DSS took Joshua into protective custody for three days, after which they returned the boy to his father.[80] During the next six months, DSS continued to find evidence that Joshua was being abused.[81] Several hospitals reported treating Joshua for suspicious injuries.[82] On other occasions, a DSS caseworker visiting Joshua's home noted unusual injuries.[83] The caseworker later testified that she "knew the phone would ring some day and Joshua would be dead."[84]

Despite these repeated warnings, the state failed to act to protect Joshua.[85] In March 1984, Joshua's father beat the boy so severely that Joshua sustained permanent brain damage, which left him profoundly retarded.[86] Joshua and his mother sued the county under 42 U.S.C. § 1983,[87] claiming that DSS had violated Joshua's due process right to liberty by failing to intervene to prevent the abuse.[88] The U.S. Supreme Court emphatically rejected these claims.[89] The Court concluded that the state had no affirmative

78. 489 U.S. 189 (1989).
79. DeShaney v. Winnebago Dep't of Social Servs., 489 U.S. 189, 192 (1989).
80. *Id.*
81. *Id.* at 192-93.
82. *Id.*
83. *Id.*
84. *Id.* at 209 (Brennan, J., dissenting).
85. *Id.* at 193.
86. *Id.*
87. Section 1983 provides for civil actions against state actors who deprive individuals of their civil rights.
88. *DeShaney*, 489 U.S. at 193.
89. *Id.* at 198-203.

obligation under the Due Process Clause of the Fourteenth Amendment to protect its citizens unless the state itself had so constrained the individual as to render that person unable to care for himself or herself.[90] If anyone had deprived Joshua of liberty, the majority reasoned, it was his father.[91]

What is clearly missing from the majority opinion is any semblance of Carol Gilligan's feminine moral reasoning. The majority ignored Gilligan's "injunction to care" and her "responsibility to discern and alleviate the 'real and recognizable' trouble of the world."[92] Despite DSS' mission of protecting children from abuse, and despite the repeated warnings DSS had received, the majority saw no connection between DSS and Joshua.[93] According to the majority, "The most that can be said of the state functionaries . . . is that they stood by and did nothing when suspicious circumstances dictated a more active role for them."[94] In fact, the majority dismissed the state's action in taking custody of Joshua as a temporary and therefore irrelevant relationship.[95] The fact that the state returned Joshua to danger created no causal connection between DSS and Joshua and thus no responsibility on the state's part.[96] The majority reasoned that DSS merely "placed [Joshua] in no worse position than that in which he

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90. *Id.* at 199-201. In other cases as well, the Court has taken the position that the state has no duties unless it erects affirmative obstacles to a person's liberty. *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490, 507-09 (1989) (holding that state may prohibit public employees at state hospitals from performing abortions because state has no affirmative duty to maintain hospitals); Harris v. McRae, 448 U.S. 297, 317-18 (1980) (holding that state has no obligation to fund medically necessary abortions for poor women).

91. *DeShaney*, 489 U.S. at 203. As one commentator has pointed out, by placing the responsibility for Joshua's well-being solely with his father, the majority takes a position inconsistent with the Court's reasoning in Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990). Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 58-62 (1992). In *Cruzan*, the parents of an adult woman in a persistent vegetative state sought court approval to remove her from life support systems. *Cruzan*, 497 U.S. at 265-66. The Court upheld a Missouri statute that required Cruzan's parents to demonstrate by clear and convincing evidence Cruzan's prior intent to have her life support discontinued. *Id.* at 282-83. As Rutherford notes, such a high standard essentially provides the state with veto power over the parents' decision. Rutherford, *supra*, at 58. Thus, the Court "snatched decisionmaking power away from loving parents in *Cruzan*." *Id.* at 62. In *DeShaney*, however, the Court refused to interpose the state between Joshua and his father. *DeShaney*, 489 U.S. at 199-201. Thus, it vested the power to decide Joshua's fate in the hands of a brutal parent. *Id.* at 201.

For an interesting discussion of the interaction between language, law, and domestic violence, including an analysis of *DeShaney*, see Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1665-87 (1990).

92. GILLIGAN, *supra* note 53, at 100.

93. *See DeShaney*, 489 U.S. at 201-02 (disavowing state responsibility to protect Joshua actively); *supra* notes 90-91 (elaborating on majority's view of relation between DSS and Joshua).

94. *DeShaney*, 489 U.S. at 203.

95. *See id.* at 201 (finding that DSS' temporary custody of Joshua did not make state "permanent guarantor" of Joshua's safety).

96. *Id.*

would have been had it not acted at all."[97]

The majority could not even begin, therefore, to ask whether DSS could have used its relationship to prevent the harm to Joshua because it did not recognize that any relationship existed. In fact, the majority expressed the dilemma in *DeShaney* in utterly abstract terms. It cautioned against "yielding to that impulse" of natural sympathy in this case.[98] Instead, the majority immediately depersonalized the situation, referring to Joshua in the opening paragraphs as "petitioner."[99] It then approached the decision as if it were answering the purely abstract question of whether the Due Process Clause imposes an affirmative duty on the state to protect some citizens from harm.[100] It discerned the answer to that question not from the relationship between the parties in the case nor from any sense of state responsibility but rather from abstract principles, like the intent of the framers and the limits of prior precedent.[101]

The dissent, on the other hand, recognized the causal connection between DSS and Joshua, focusing on the actions Wisconsin took with respect to the child.[102] It noted that the state, by establishing a monopolistic system of dealing with child abuse, a system that funnelled all complaints and warnings through DSS, essentially created a relationship between itself and Joshua.[103] Because that relationship may have preempted the formation of other protective relationships, the dissent concluded that Wisconsin's relationship with Joshua created responsibility for the state.[104]

In a demonstration of reasoning reminiscent of Gilligan's third stage, the dissent accepted the fact that the state may also need to protect itself and should not face liability for mere errors in profes-

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97. *Id.*

98. *Id.* at 203.

99. *Id.* at 191.

100. *See id.* at 194-97 (discussing cases interpreting relationship between government and citizens under Due Process Clause).

101. *See id.* at 195-97 (finding nothing in language, history, or case law of Due Process Clause to support petitioner's claim).

102. *See id.* at 205, 208-10, 212 (Brennan, J., dissenting) (beginning analysis with positive state actions rather than state's omissions, and finding that state law preempted other forms of aid from reaching Joshua). Both Justice Brennan and Justice Blackmun wrote dissents in *DeShaney*. Because Justice Blackmun both signed Justice Brennan's dissent and structured his own dissent to read as an addendum to Justice Brennan's, this Article treats the two opinions as one dissent.

Like the dissent, some academics have recognized that empathy and caring have a place in legal decisionmaking. *See* Judith Areen, *A Need for Caring*, 86 MICH. L. REV. 1067, 1078-82 (1988) (reviewing AIDS AND THE LAW (Harlon L. Dalton et al. eds., 1987)) (transposing care perspective on AIDS crisis and suggesting that government could facilitate caring about AIDS); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1593-1649 (1987) (providing examples of empathic analyses in case law).

103. *DeShaney*, 489 U.S. at 209-10 (Brennan, J., dissenting).

104. *See id.* at 212.

sional judgment.[105] The dissent balanced this self-interest, however, against Joshua's need for protection and concluded that, at a minimum, the state had a responsibility to avoid arbitrary indifference in its attempt to protect Joshua.[106] Moreover, this decision occurred in a context clearly shaped by the "real world" facts of the situation. "Poor Joshua!"[107] Justice Blackmun wrote at one point, describing him as the "[v]ictim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by [the DSS] . . . ."[108] In thus couching his decision to recognize state responsibility in personal rather than abstract terms, Justice Blackmun noted that "compassion need not be exiled from the province of judging."[109]

The dissent, unlike the majority, was capable of exploring the relationship between Joshua and DSS because it had a moral framework for recognizing, explaining, and legitimizing that relationship. The majority had no such framework. Thus, it had no tools with which it could confer legitimacy on Joshua's claims. But while the majority ignored Gilligan's moral reasoning and the concepts of care and connection that form its foundation, it did not operate outside the fabric of moral reasoning as a whole. Instead, it approached the dilemma with a classical Kohlberg moral analysis. It is this Kohlbergian approach that helped legitimize the majority's decision not to impose liability on the state.

In fact, the moral tools the majority used are undeniably masculine—the majority couched its analysis in terms of abstract rights and values.[110] Like individuals in Kohlberg's fourth stage of moral

105. *Id.* at 211.

106. *Id.* at 211-12. In another context, Gilligan observed that her research suggested two ways of understanding the concept of responsibility. The first way, traditionally masculine, is to define responsibility as personal commitment or contractual obligation. Ellen C. Dubois et al., *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 44 (1985). The second, more feminine, concept of responsibility requires an actor to "tak[e] the initiative to respond to [the] perception of [her] own" need and the needs of others. *Id.*

107. *DeShaney*, 489 U.S. at 213 (Blackmun, J., dissenting).

108. *Id.*

109. *Id.*

110. *See supra* notes 99-101 and accompanying text (discussing majority's impersonal and abstract analysis in *DeShaney*). Aviam Soifer calls the majority approach described here "machismo conceptualism." Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of* DeShaney, 57 GEO. WASH. L. REV. 1513, 1515 (1989). Professor Soifer criticizes the decision as "a terrible example of the familiar judicial quest for safe-houses designed by drawing rigid lines. Judges strive for some mythical locus of certainty where they, at least, can escape the more complicated relationships of common humanity." *Id.* That criticism could be leveled not just at the majority opinion but at the entire structure of fourth-stage moral reasoning, which emphasizes unbending rules emanating from social contracts. *See supra* notes 34-40 and accompanying text (discussing rule-oriented nature of Kohlberg's fourth stage).

reasoning,[111] the majority recognized due process as a necessary ingredient of fairness, but it viewed due process and fairness as values flowing not from universal, presocietal principles, but rather from shared social values or norms.[112] The tools the majority used to legitimize this view of due process are all tools designed only to link the notions of justice to these shared social values. Thus, the majority argued that the language of the Constitution, the original majoritarian social contract and the source of shared values, cannot support liability for the state.[113] It also suggested that the Framers, in striking the original deal by which American society organized itself, intended only "to protect the people from the State, not to ensure that the State protected them from each other."[114] Finally, it argued that precedent, something akin to past performance on a social contract, created an affirmative duty for the state only in very limited circumstances.[115]

Just as significant, and perhaps more reminiscent of Kohlberg's fourth stage of moral reasoning, the majority conceived of due process as a fundamentally static concept.[116] It viewed its role as one of upholding and enforcing existing law; the Court was unwilling to "thrust [change] upon [society] by [the] Court's expansion of the Due Process Clause of the Fourteenth Amendment."[117] In its opinion, it sought only an interpretation of the Due Process Clause that was consistent with its previous interpretations.[118] The majority

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111. *See supra* notes 34-40 and accompanying text (discussing Kohlberg's fourth stage of moral reasoning).

112. *See DeShaney*, 489 U.S. at 198-200 (grounding argument for absence of state responsibility for Joshua in widely accepted constitutional principles rather than higher values).

113. *Id.* As Professor Soifer points out, the strict textualist reading of the Due Process Clause that *DeShaney* adopts would, if applied in all circumstances, undermine the Court's process of selectively incorporating the Bill of Rights under the Clause and applying those rights against the states. Soifer, *supra* note 110, at 1518 n.17. That process has been going on for most of this century. *Id.*

114. *DeShaney*, 489 U.S. at 196.

115. *See id.* at 196-97, 198-99 (finding affirmative state action required only in cases where individuals are in state custody).

116. *See id.* at 202-03 (transferring responsibility for expansion of state's duties under Due Process Clause to state legislatures).

117. *Id.* at 203.

118. *Id.* at 198-200. The majority's effort, however, does not necessarily mean that it achieved such consistency. In Schall v. Martin, 467 U.S. 253, 265 (1984), for example, Justice Rehnquist argued that "juveniles, unlike adults, are always in some form of custody." This reasoning appears to conflict with *DeShaney*. Perhaps more significant, several scholars have argued that *DeShaney*'s negative rights view of the Due Process Clause, a view that posits that the state has no affirmative duty to its citizens but simply must not infringe on their liberties, is inconsistent with the history and purpose of the Clause. *See, e.g.*, Michael J. Gerhardt, *The Ripple Effects of Slaughter-House*, 43 VAND. L. REV. 407, 414-37 (1990) (stating that Supreme Court has improperly narrowed Fourteenth Amendment due process to scope of Fifth Amendment due process); Soifer, *supra* note 110, at 1521-26 (arguing that post-Civil War Amendments mandated

thus analyzed a significant number of the Court's opinions to demonstrate that the prior case law did not create any due process duty for the state in *DeShaney*.[119] According to the majority, those cases "stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety."[120] The answer to Joshua's tragic situation thus lay in a normative principle distilled from prior cases; no exception for Joshua exists, no matter how tragic his case may be. Like an individual in Kohlberg's fourth stage of moral reasoning, the majority sought maintenance of the current social system not because it was right or just, but simply because it already existed. Its opinion did not recognize the potential to revise law for the benefit of society.

III. LESSONS FROM THE *DESHANEY* ANALYSIS

A. *The Shaping of Judicial Opinions and the Interpretive Community*

The preceding Section's analysis of the *DeShaney* opinion illustrated how moral reasoning both informs and confines the way judges seek to legitimize their decisions. Because the *DeShaney* majority chose to express itself with moral reasoning analogous to Kohlberg's fourth stage, it necessarily placed greater emphasis on the use of judicial tools that would uncover and give effect to a static and abstract concept of shared social values.[121] It used the intent of the Framers, unchanging constitutional language, and precedent to create a vision of a shared social norm of due process that could be applied simply to the facts before it.[122] But just as this framework of moral reasoning provided the majority with one vision of the *DeShaney* problem, it also deprived them of an alternative vision. Gilligan's values of care and connection never entered into the majority's explanation of its decision.[123] Nor did the majority question the allegedly shared

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federal intervention to prevent inaction by states that could deprive individuals of rights and privileges guaranteed by Constitution and law).

119. *See DeShaney*, 489 U.S. at 196-97, 198-201.

120. *Id.* at 199-200.

121. *See id.* at 195 (explaining importance of Due Process Clause in Court's analysis).

122. *See id.* (noting that history does not support expansive reading of Constitution).

123. The majority of judicial opinions probably resort to only one type of moral reasoning because the opinion's author begins to think about the decision in a certain way. This Article, however, does not argue that different types of moral reasoning can never appear in the same opinion. At least at the appellate level, opinions quite frequently represent the voice of more than one judge. It is quite possible that different judges could desire the same result but view the decision through different lenses of moral reasoning. It is also possible that they could simply negotiate one opinion rather than write separate concurrences. The process of drafting opinions through judicial coalition could result, therefore, in an opinion that employed various

social norm of due process that it decided to enforce; it never asked whether that social norm adequately addressed the relationship between the government and its citizens.[124]

On some level, it is not surprising that the *DeShaney* majority opinion employed Kohlberg's fourth stage of moral reasoning. Because law, like so many other aspects of social organization, has been created, perpetuated, and dominated by males over the last several hundred years, one would expect the legal tools that have evolved to be more masculine than feminine.[125] Centuries of development have woven a legal wholecloth from the fabric of abstract rights and principles. Masculine moral concepts of individual rights and social contracts, rather than feminine concepts of care and connection, are indeed the fibers of that fabric.[126] Even today, most lawyers, judges, and legislators are male.[127] Furthermore, many

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types of moral reasoning. For an analogous argument about the use of plain meaning in statutory interpretation, see Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 231-32, which postulates that the Supreme Court is increasingly turning to plain meaning in statutory interpretation.

124. *See DeShaney*, 489 U.S. at 195-97 (performing mechanical due process analysis and concluding that Due Process Clause does not impose duty on state to protect individual against private violence).

125. Prior to this century, the law did not treat women and men equally. *See, e.g.*, Milliken v. Pratt, 125 Mass. 374, 377 (1878) (struggling with question of whether married woman had capacity to enter into contract); Bangs v. Inhabitants of Brewster, 111 Mass. 382, 385 (1873) (discussing fact that domicile of married woman was determined by domicile of her husband). This Article does not imply, however, that the law treats men and women equally at present. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 78-79 (1981) (upholding statute requiring men but not women to register for draft); Dothard v. Rawlinson, 433 U.S. 321, 336 (1977) (upholding Alabama prison regulation preventing women from serving as prison guards in maximum security male prisons). Professor Catharine MacKinnon has asserted that some concepts of equality perpetuate a male standard and thus are not the appropriate goal for women to seek. *See* CATHERINE MACKINNON, FEMINISM UNMODIFIED 22-23 (1987) (arguing that instead of seeking same treatment for women as for men, feminists should attempt to end male domination over women).

126. *See* Dubois et al., *supra* note 106, at 46 (discussing predominance of masculine analysis in jurisprudence). In the Dubois article, Professors Carol Gilligan and Carrie Menkel-Meadow discuss some of the possible foundations of a system of jurisprudence built on Gilligan's moral reasoning. *Id.* at 36-60. They conclude that such a system might be more likely to facilitate contextual decisionmaking. *Id.* at 51. It might also be more attuned to compromise than to forcing polar (win/loss) choices. Alternatively, it might create entirely new solutions through nonadversarial dialogue between parties and by allowing the parties to understand and satisfy each other's needs. *Id.* at 51-54; *see also* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 50-51 (1985) (discussing advantages to creating alternative jurisprudential system). Menkel-Meadow argues that the adversarial system, based on "hierarchy, competition, and binary results," is essentially masculine. *Id.*; *see also* Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 618-22 (1986) (discussing concept of "interdependent rights," which, based on Gilligan's moral reasoning, incorporates both male and female concerns about rights and responsibilities).

127. A 1991 survey of 14,000 lawyers in California found that 93% of all attorneys in practice for more than 20 years were white males, but only 49% of those in practice less than five years were white males. Philip Hager, *Minority Mix Expanding in Legal Profession*, L.A. TIMES, Sept. 14,

scholars argue that legal education remains steeped in the male dialogue.[128]

Moreover, fourth-stage moral reasoning may better serve to legitimize the coercive power of the law than would other stages of Kohlberg's moral reasoning. After all, fourth-stage moral reasoning places significant emphasis on the maintenance of social order because that order constitutes the will of the majority, not because it reflects any inherently just universal ethical principles that may or may not be accepted by the general population.[129] And those that create the law clearly have a vested interest in maintaining the social order that it projects.

But even on a less philosophical level, fourth-stage moral reasoning may simply be a more effective tool of persuasion than other types of moral reasoning at this time in the legal community. When a judge writes an opinion, she usually speaks to a fairly select audience.[130] Although a few opinions seem aimed at the public at large,[131] most opinions are directed primarily toward the legal community, which must interpret them. The judge thus writes not for the average person but for other judges, legislators, and lawyers who will argue future cases. This audience, it seems, overwhelmingly employs fourth-

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1991, at A21; *see also Project: Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1209 (1988) (stating that 41% of law students, but only 16% of practicing attorneys, were women).

128. *See* Paul T. Wangerin, *Objectivistic, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education*, 62 TUL. L. REV. 1237, 1282 n.171, 1296-98 (1988) (discussing male philosophical foundations of traditional legal education); K.C. Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 AM. U. L. REV. 1141, 1142 (1985) (discussing how legal education demands that women engage in masculine structures of thought and behavior). Kohlbergian notions of morality based on the freedom from interference by others and other abstract rights and principles fit comfortably into the male dialogue.

129. *See supra* notes 34-40 and accompanying text (discussing fourth stage's focus on shared values and norms rather than on inherently just principles).

130. *See supra* note 8 and accompanying text (explaining that judges write opinions with "interpretive community" in mind).

131. There are times when law does not keep pace with changing social values. Interestingly, in such circumstances, a dissenting opinion may adopt a position accepted by society (or widely advocated by some segments of society) but not yet accepted in the legal community. Dissenting opinions, then, may be more frequently directed toward the public at large than are majority opinions. When the audience changes, so should notions of persuasiveness. Judges may realize intuitively that the general public is not as persuaded by stage-four morality as is the interpretive community. If they do, one would expect the spectrum of dissenting opinions to show wider variation in moral reasoning than would the spectrum of majority opinions. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 422 (1989) (Rehnquist, C.J., dissenting) (describing uniqueness of flag and evoking emotion through quotation of patriotic poetry); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528 (1989) (Marshall, J., dissenting) (praising action by former capital of confederacy to alleviate racial discrimination). Both exemplify dissents which are addressed to the general pubic and which seem to have abandoned fourth-stage moral reasoning.

stage Kohlberg moral reasoning in its approach to the law.[132] One recent study found that ninety percent of a random sampling of attorneys operated with stage-four morality.[133] Although many male adults in the general population also employ stage-four reasoning, the study found that the concentration at stage four in the general population was not nearly as strong as it was in the legal community.[134] In fact, as many as thirty-five percent of adults seemed to employ stage-five or stage-six moral reasoning.[135] Another fifteen or twenty-five percent seemed to employ stage-two or stage-three moral reasoning.[136]

Whether attorneys employ stage-four moral reasoning because of their education or whether the law attracts individuals who already exhibit stage-four moral reasoning is a question beyond the scope of this Article. The point, however, remains clear: attorneys, as a community, exhibit unusual degrees of stage-four moral reasoning.[137] As a result, one would expect judicial opinions that employ this level of reasoning to be more persuasive among attorneys than opinions that use another type of moral reasoning.

The suggestion that stage four is more persuasive in the interpretive community than are other types of moral reasoning, however, does not lead to a normative view of law. It merely describes the current status of the process of legitimation and the effects of moral reasoning on that process. When a judge makes a decision, stage-four moral reasoning accelerates the process of legitimation for that decision because most members of the interpretive community are more receptive to stage-four moral reasoning. This result, however, could easily change if the interpretive community changes.[138] As more

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132. *See, e.g.*, Landwehr, *supra* note 34, at 44-45 (finding that overwhelming majority of attorneys use stage-four reasoning); June L. Tapp & Felice J. Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 STAN. L. REV. 1, 25-26 (1974) (concluding that law students rarely reason at levels higher than stage four); Thomas E. Willging & Thomas G. Dunn, *The Moral Development of the Law Student: Theory and Data on Legal Education*, 31 J. LEGAL EDUC. 306, 355 (1981) (finding that law students did not move beyond stage four even after course in legal ethics).

133. Landwehr, *supra* note 34, at 44-45.

134. Landwehr, *supra* note 34, at 44-45.

135. Landwehr, *supra* note 34, at 44-45.

136. Landwehr, *supra* note 34, at 44.

137. *See supra* notes 132-34 and accompanying text (discussing prevalence of stage-four thinking in legal community).

138. In fact, stage four's current pervasiveness may simply reflect how the process of persuasion operates in a historically male legal structure. *See* Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 486 (noting that U.S. Constitution "designed a framework for governing society as it was perceived by men and run by men"). Professor Karst suggests that constitutional interpretation based on Gilligan's concept of justice might produce the following nonexhaustive list of changes in substantive constitutional law: elimination of the threshold showing of discriminatory purpose in discrimination suits against the government, renunciation

women assume greater roles in shaping law and legal education,[139] one might expect the interpretive community to respond more positively to Gilligan's feminine structures of moral reasoning.[140] But considering the institutional masculinity of the law for the past several hundred years,[141] this change will probably occur slowly. Today, one can still posit that subconscious judicial use of fourth-stage Kohlberg moral reasoning helps legitimize judicial decisions because that type of moral reasoning is frequently employed by the interpretive community itself.

B. Moral Reasoning and Legal Acceptance

Because many adults and most attorneys employ stage-four legal reasoning,[142] one would expect legal opinions that employ such reasoning to be accepted readily into the legal fabric that justifies government coercion. As a corollary, one would expect opinions based on other types of moral reasoning to be less persuasive and thus less likely to be accepted quickly into what the interpretive community designates as the jurisprudential body of "good law."[143] Although the sampling of cases required to verify these hypotheses is

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of state action limitations on discrimination, and recognition that some forms of poverty are stigmatizing and prevent full participation in society. *Id.* at 493.

139. *See* Ruth Piller, *Women Change the Face of Local Legal Scene; Get Leadership Positions in Lawyers' Groups*, HOUS. CHRON., July 13, 1992, at A13 (noting shift in gender composition of legal associations); Rosalind Resnick, *Women Take the Bar Group Helm; Gains Continue at State and Local Levels*, NAT'L L.J., Apr. 27, 1992, at 10, 10 (documenting rapid increase in women's participation in legal community). In fact, President Clinton appointed Janet Reno to the position of Attorney General of the United States, *see* David Johnson, *Reno Completes Lineup at Justice Dept.*, N.Y. TIMES, Apr. 30, 1993, at B16, and nominated Judge Ruth Bader Ginsberg to the U.S. Supreme Court, Joan Biskupic, *Judge Ruth Ginsberg Named to High Court: Nominee's Philosophy Seen as Strengthening Center*, WASH. POST, June 15, 1993, at A1. The Senate confirmed Judge Ginsberg's nomination by a 96-3 vote on August 3, 1993. Judge Ginsberg was sworn in as the 107th Justice of the Supreme Court on August 10. For the proposition that the impact of this gender shift cannot be measured by numbers alone, see Judith Resnick, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1913 (1988) (stating that "[r]ather than simply being men in skirts, women have begun to think that they can still be women in roles that were, in the past, the sole province of men").

140. Indeed, much of the criticism of *DeShaney* has come from feminist legal writers. *See, e.g.*, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2275 (1990) (arguing that Justice Rehnquist's opinion in *DeShaney* explains and reaffirms conventional thinking about governmental duty to provide competent services); Minow, *supra* note 91, at 1667-68 (postulating that judicial inaction in *DeShaney* reflects judicial attitude toward family violence that is improperly based on assumptions that "violence is private" and that "government has to act to invade someone's rights").

141. *See* Karst, *supra* note 138, at 486 (discussing historical dominance of male vision in jurisprudence).

142. *See supra* notes 132-34 and accompanying text (discussing prevalence of stage-four reasoning).

143. There are, of course, other factors that determine whether an opinion becomes "good law," including the reaction of the general public to what they hear of the decision and the changing political and social climate of the country.

beyond the scope of this Article, the history of a few landmark decisions indicates that there may be some basis for these conclusions.

Take, for example, *Roe v. Wade*,[144] in which the U.S. Supreme Court affirmed a woman's right to choose to have an abortion.[145] That decision remains today one of the most controversial decisions in the Court's history.[146] It has inspired massive numbers of citizens to hold marches, demonstrations, and protests to express their opinions about the decision.[147] Personal views of the *Roe* decision sometimes play a role in judicial confirmation hearings.[148] To say simply that *Roe* has not yet become a pillar of accepted American jurisprudence understates the controversial status of the decision.

The Court's reasoning in *Roe* transcends traditional Kohlberg fourth-stage moral reasoning.[149] In fact, the Court could not rely on majoritarian practice as a foundation for *Roe* precisely because, at the time of the decision, that practice would not have supported its holding.[150] The Court indeed recognized that "[t]he Constitution

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144. 410 U.S. 113 (1973).

145. Roe v. Wade, 410 U.S. 113, 154 (1973) (holding that right to personal privacy includes right to choose to terminate pregnancy).

146. Until recently, the Supreme Court has consistently chipped away at the impact of *Roe*. *See, e.g.*, Rust v. Sullivan, 111 S. Ct. 1759, 1772 (1991) (upholding statutes that prevented publicly funded health centers from providing abortion counseling); Webster v. Reproductive Health Servs., 492 U.S. 490, 509 (1989) (upholding state refusal to allow public employees or public hospitals to participate in abortions); Harris v. McRae, 448 U.S. 297, 309-27 (1980) (upholding restrictions on use of federal funds to reimburse abortion costs).

147. *See, e.g.*, Anna Quindlen, *Going Nowhere*, N.Y. TIMES, June 23, 1993, at A23 (discussing demonstrations in years since *Roe* decision).

148. In his confirmation hearings, for example, then-Judge Clarence Thomas told the Senate that he had never debated the contents of *Roe v. Wade*. *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 102d Cong., 1st Sess. pt. 1, 222 (1991). Because there seems to be some controversy about Justice Thomas' remarks, the following exchange bears examination:

> Senator Leahy: "Have you ever had a discussion of Roe v. Wade other than in this room? In the 17 or 18 years it's been there?"
>
> Judge Thomas: "Only, I guess, senator, in the fact that, in the most general sense, that other individuals express concerns one way or the other, and you listen and you try to be thoughtful. If you're asking me whether or not I've ever debated the contents of it, the answer to that is no, senator . . . ."

Id. Justice Thomas recognized that *Roe* was an extremely sensitive political issue, and he realized that taking a strong public stance on the decision might impair both the success of his nomination and his ability to function as a neutral decisionmaker once he became a Justice. Mark Tushnet has called Justice Thomas' statement about *Roe* a "political lie"—a false statement made to gain political advantage and tolerated because no one takes it seriously. Mark Tushnet, Colloquy: *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 292 (1992) (noting that political lies dealing with past events often involve highly charged matters). The point remains, however, that Justice Thomas' answer demonstrates just how controversial the *Roe* decision is.

149. *See supra* notes 34-40 and accompanying text (describing Kohlberg's fourth-stage moral reasoning).

150. *The New York Times* reported that, before *Roe*, the American public was divided over the question of whether abortion during the first trimester of pregnancy should be legal. Among those responding to a Gallup Poll taken before *Roe* was decided, 46% favored legalizing abortion

does not explicitly mention any right of privacy."[151] Moreover, the Court noted that the majority of states enforced laws severely restricting abortions, if not banning them entirely.[152] Many of those laws had been in effect for over 100 years.[153] It would have been difficult, therefore, for the Court to argue that the laws did not accurately reflect a fairly established limitation on reproductive freedom in American society, at least at that time.

Instead, the Court embarked on a search for a universal ethical principle, one that manifested itself in the organization of other societies over time and by which the Court could judge and revise the American social contract. In pursuit of this goal, the Court surveyed the attitudes of ancient Persians, Greeks, and Romans toward abortion.[154] For example, the Court concluded that "[m]ost Greek thinkers . . . commended abortion, at least prior to viability."[155]

The Court next turned its attention to the common law as if to test whether the universal principle condoning some abortions found a voice in Anglo-American jurisprudence. After examining the common law, the Court concluded that "[i]t is undisputed that at common law, abortion performed *before* 'quickening'—the first recognizable movement of the fetus in utero . . .—was not an indictable offense."[156] This general acceptance of some abortions, according to the Court, stemmed from the adoption of philosophical and theological concepts of when life begins rather than from any notion of majority will.[157] Before the nineteenth century, the Court noted, Christian theology took the position that life did not begin until forty

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in the first three months; 45% were opposed; and 9% were undecided. *Gallup Poll Finds Public Divided on Abortions in First Three Months*, N.Y. TIMES, Jan. 28, 1973, at 45. In the days after *Roe* came out, the *Times* ran articles both praising and criticizing the decision. *Compare* Lawrence Van Gelder, *Cardinals Shocked—Reactions Mixed*, N.Y. TIMES, Jan. 23, 1973, at 1 (writing that Catholic church leaders called decision "'shocking' and 'horrifying'") *with* Editorial, *Respect for Privacy*, N.Y. TIMES, Jan. 24, 1973, at 40 (hailing decision as reasonable resolution of "a debate that has divided America"). Moreover, the paper noted that *Roe* invalidated the laws of 31 states and required 15 additional states to amend their statutes substantially. Warren Weaver Jr., *National Guidelines Set by 7-to-2 Vote*, N.Y. TIMES, Jan. 23, 1973, at 1, 20.

151. *Roe*, 410 U.S. at 152.

152. *Id.* at 129.

153. *See, e.g.*, 1860 Conn. Pub. Acts 65 (criminalizing abortions before quickening) (cited in *Roe*, 410 U.S. at 138 n.30); 4 N.Y. REV. STAT., pt. 4, ch. I, tit. 2 at 661, & tit. 6, at 694 (1829) (imposing criminal penalties for both quickened and unquickened fetuses) (cited in *Roe*, 410 U.S. at 138 n.31); *see also* James A. Knecht, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*, 1972 U. ILL. L. REV. 177, 178 (surveying abortion laws and their origins just before *Roe* took effect and noting that although abortion laws remained static for centuries, they changed profoundly beginning in 1967).

154. *Roe*, 410 U.S. at 130-32.

155. *Id.* at 131 (citing Plato and Aristotle).

156. *Id.* at 132.

157. *Id.* at 133.

days after conception for males and eighty days after conception for females.[158] The Court then surveyed English law in an attempt to demonstrate that the English generally held fast to the basic principle that women could obtain abortions before the fetus became viable.[159]

Finally, the Court confirmed that the universal principle it sought, one that recognized a limited right to an abortion, found some voice within American society.[160] The Court expressly noted the views of the American Medical Association, the American Public Health Association, and the American Bar Association, all of which urged that abortions be made available to women on a limited basis.[161]

Having found its universal ethical principle, the Court then sought to make that principle part of the social contract governing American society. Thus, it concluded that the Constitution's *implied* right of privacy casts a "penumbra" large enough to accommodate the limited right to obtain an abortion.[162] Significantly, the Court did not argue that the right of privacy created a woman's right to decide to terminate a pregnancy; rather, it concluded that the "right of privacy . . . is broad enough to *encompass*" that decision.[163] The limited right to an abortion, a universal principle, stemmed, therefore, not from the majoritarian social contract, as it would in fourth-stage moral reasoning. Instead, employing classic fifth-stage moral reasoning,[164] the Court found that such a right preceded the social contract. Under this line of reasoning, the Court felt obligated to expand the social contract to include this preexisting right.

After employing fifth-stage Kohlberg moral reasoning, the Court, in delineating the scope of a woman's right to terminate her pregnancy, balanced interests in a way that closely resembled Gilligan's third stage of moral reasoning;[165] the Court meticulously defined the concerns of the mother, the fetus, and the state in this dilemma.[166]

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158. *See id.* at 133 n.22, 134 (stating that writings of St. Augustine reflected theological debate).

159. *Id.* at 135-37.

160. *Id.* at 140-41.

161. *Id.* at 141-47.

162. *Id.* at 152-53; *see also* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (stating for first time that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance").

163. *Roe*, 410 U.S. at 153 (emphasis added).

164. *See supra* notes 41-46 and accompanying text (explaining Kohlberg's fifth-stage moral reasoning).

165. *See supra* notes 71-73 and accompanying text (describing Gilligan's third stage of moral reasoning as stage in which woman rejects logic of pure self-sacrifice and begins to include own needs within concept of care).

166. *Roe*, 410 U.S. at 153.

The Court noted that "[m]aternity, or additional offspring, may force upon the woman a distressful life and future" and that "[p]sychological harm may be imminent."[167] At the same time, the Court pointed out that the state may "properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."[168] Finally, the Court noted that citizens may be swayed by varying philosophical concepts of life that may alter each individual's perception of the problem.[169]

It is thus clear that in creating the trimester framework, *Roe* sought a balance between the state's interests and the mother's interests. The Court turned its attention not to abstract rights and principles, but to the individual needs and concerns of the actors. It recognized the connection and the conflict between the interests of the state and those of the mother, and, like some of Gilligan's own subjects,[170] it sought to minimize that conflict by giving effect, as much as possible, to the needs of each actor.

Although *Roe* might encompass more than one type of moral reasoning, this fact does not necessarily disprove the hypotheses of this Article. In fact, one might expect opinions that are the result of analysis by a coalition of judges to reflect different types of moral reasoning. Each judge may view the case in a different framework, and each may want to voice different concerns. Despite the variety of viewpoints that might have been incorporated in the *Roe* opinion, it is clear that *Roe* did not employ Kohlberg's fourth-stage moral reasoning. The absence of that reasoning might, at least partially, explain why *Roe* has had difficulty gaining acceptance within the interpretive community.[171]

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167. *Id.*

168. *Id.* at 154.

169. *Id.* at 160 (stating that "[i]t should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question").

170. *See* GILLIGAN, *supra* note 53, at 73 (discussing struggle of Gilligan's subjects to reconcile personal needs with desire not to hurt others).

171. Again, many other factors may also explain why *Roe* remains controversial, including the religious undertones to the debate over when life begins and the long history of controversy surrounding abortion policy. *See Roe*, 410 U.S. at 160 (noting religious aspects of debate); *see also supra* notes 146-48 and accompanying text (discussing controversy surrounding legalization of abortion). Professor Anita Allen suggests that the right to privacy may be unpopular for two basic reasons. Anita L. Allen, *Autonomy's Magic Wand: Abortion and Constitutional Interpretation*, 72 B.U. L. REV. 683, 694 (1992). First, it protects or could be used to protect unpopular and often controversial behavior. *Id.* Second, the right conflicts with the "backward-looking positivist ground[s]" in that the right is not "textually based or enumerated" and is "undemocratic." *Id.* Professor Allen's argument is consistent with this Article's hypothesis that *Roe* relies on fifth-stage moral reasoning rather than fourth-stage reasoning, which would place greater emphasis on text and majoritarian principles.

Interestingly, the Supreme Court's recent decision in *Planned Parenthood v. Casey*[172] upholds and attempts to legitimize the *Roe* framework by employing fourth-stage Kohlberg moral reasoning. In *Casey*, the Supreme Court reaffirmed *Roe*, thereby indicating that some privacy right to an abortion still exists.[173] Nonetheless, the Court rejected the constitutional basis of *Roe*'s trimester framework and indicated that statutes limiting abortions would be valid unless they imposed an undue burden on a woman's liberty interest.[174]

Casey obviously restricts the right to an abortion accorded women under *Roe*'s trimester framework.[175] Because the Court did not overrule *Roe*, however, it again had to explain the source of a woman's right to terminate a pregnancy.[176] Instead of reiterating *Roe*'s conclusion that the due process right of privacy was broad enough to encompass a preexisting universal principle guaranteeing a woman's limited freedom to terminate a pregnancy,[177] the Court in *Casey* reversed that reasoning. It held that the Fourteenth Amendment was the *source* of the rights *Roe* granted.[178] The Court stated that "[c]onstitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment."[179] By making the Constitution, an accepted social contract, the source of the right, the Court thereby invoked the fourth-stage concept that rights and principles flow not from independent preexisting ethical principles, but rather from a social contract based on majority will.[180]

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172. 112 S. Ct. 2791 (1992).

173. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2816 (1992) (stating that "[f]rom what we have said so far it follows that it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy").

174. *Id.* at 2818-20. According to the Court, *Roe*'s trimester framework "undervalues the State's interest in the potential life within the woman." *Id.* at 2820. Thus, "the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty." *Id.*

175. *See id.* (placing greater emphasis on state's interests in life of unborn child than did Court in *Roe*). There is no question that this holding limits the privacy right accorded women under *Roe*'s trimester framework. Because the Court explicitly endorsed that privacy right, however, it could not simply overrule *Roe*.

176. *See id.* at 2816 (discussing constitutional origins of woman's right to terminate pregnancy).

177. *See Roe*, 410 U.S. at 154 (concluding that right to decide to have abortion, though not unlimited, does fall within right to privacy).

178. *Casey*, 112 S. Ct. at 2804.

179. *Id.*

180. *See supra* notes 34-40 and accompanying text (describing Kohlberg's fourth-stage of moral reasoning). To conclude its opinion, the Court stated, "Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. . . . We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents." *Casey*, 112 S. Ct. at 2833. This statement crystallizes the idea of a social contract that produces rights and values.

Continuing with its fourth-stage moral reasoning analysis, the Court provided further support for *Roe* by relying on precedent and on the Court's own mandate within the constitutional framework to justify upholding its decision in *Roe*.[181] The Court stated that decisions granting couples the right to use contraception, decisions the majority accepted as part of the current social contract, lend support to *Roe*.[182] The Court also argued that *Roe* had gained precedential value in its own right and concluded that it too had become part of the existing social contract, supported, if not created, by majority will.[183] According to the Court, "An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions . . . ."[184] The Court in *Casey* thus revived a fairly static vision of law and values to strengthen *Roe*, a vision that mirrors the static concept of morality in Kohlberg's fourth stage.

Finally, the Court turned to its own role within the constitutional framework, a role premised not on universal ethical principles, but rather on, as the Court stated, "the people's acceptance of the Judiciary."[185] Here, the Court echoed a fundamental tenet of fourth-stage morality, that law and order must be preserved as a moral good in its own right.[186] The Court concluded that the need to preserve its own legitimacy within the constitutional framework prohibited a reversal of *Roe*, not so much because the Court was inherently just, but because the "rule of law" is intrinsically worthy of preservation.[187] "If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals."[188]

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181. *Casey*, 112 S. Ct. at 2806 (noting that Court must exercise its traditional capacity in adjudicating substantive due process claims). Professor Anita Allen characterized the decision as "a paradigm of neutral principalism, upward-looking to right reason, but justified by appeal to the backward-looking norm of legal tradition . . . ." Allen, *supra* note 171, at 695.

182. *Casey*, 112 S. Ct. at 2807 (holding that abortion decision is afforded same constitutional protection as decision to use contraception); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) (finding that regulations on distribution of nonprescription contraceptives must be narrowly drawn to prevent burdening right of privacy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (declaring that right of privacy concerning use of contraceptives extends to both married and unmarried individuals); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (stating that statute prohibiting use of contraception by married couples is unconstitutional).

183. *Casey*, 112 S. Ct. at 2808 (noting that obligation to follow precedent begins with necessity).

184. *Id.* at 2812.

185. *Id.* at 2814.

186. *See supra* notes 34-40 and accompanying text (describing Kohlberg's fourth stage of moral reasoning as "law and order" stage in which individual identifies primarily with need to preserve whole sociomoral system).

187. *Casey*, 112 S. Ct. at 2815-16.

188. *Id.* at 2816.

It is too early to discern whether *Casey*, by resorting to fourth-stage moral reasoning, will speed the acceptance of the *Roe* decision within society. Although the abortion controversy may cool in the next several years, one suspects that it will not die entirely. Still, the structure of *Casey* lends strong support to the thesis of this Article. In an effort to place *Roe* on firm legal ground, the Supreme Court abandoned the moral structure of the initial decision and reverted to fourth-stage Kohlberg moral reasoning.[189]

C. *Criminal Law Jurisprudence*

In an effort to prove that *Roe* is not an isolated case study, this Article now turns to a few landmark decisions in criminal law. *Gideon v. Wainwright*[190] is perhaps a good example of a landmark decision that has gained widespread acceptance within the American legal community. Despite the fact that few states historically provided counsel for indigent defendants,[191] the Supreme Court in *Gideon* concluded that the Sixth Amendment guarantee that the accused receive the effective assistance of counsel applied in prosecutions for state crimes as well as those for federal crimes.[192] In reaching that result, the Court in *Gideon* overturned its prior ruling in *Betts v. Brady*,[193] but it did so by relying on typical fourth-stage Kohlberg moral reasoning.[194]

The Court first looked to the text of the Constitution as the source of the fundamental rights and principles at issue in the case.[195] It noted that the Sixth Amendment requires that "'[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.'"[196] The Court also stated that the Fourteenth Amendment creates the authority to apply

189. *See supra* notes 144-69 and accompanying text (discussing reliance by Court in *Roe* on preexisting right to abortion).

190. 372 U.S. 335 (1963).

191. *See* ANTHONY LEWIS, GIDEON'S TRUMPET 107-110 (1964) (discussing historical reasons behind decision of most states not to provide counsel for indigent defendants).

192. Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963) (holding that effective assistance of counsel is fundamental right).

193. 316 U.S. 455, 472 (1942) (asserting that whether due process has been denied in state court by denying defendant free legal counsel depends on totality of facts), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

194. *See supra* notes 34-37 and accompanying text (discussing importance of social contract and majority rule in fourth stage).

195. *Gideon*, 372 U.S. at 341 (noting that Bill of Rights provides safeguards for liberty interests at federal level, while Due Process Clause of Fourteenth Amendment guarantees protection from state invasion).

196. *Id.* at 339 (quoting U.S. CONST. amend. VI).

fundamental constitutional rights against the states.[197] The initial authority for *Gideon*'s extension of the right to counsel to state trials therefore lay in the social contract itself. The Court could rely on that contract to reach its result; any consideration of fundamental ethical principles lying outside the contract did not enter into the decision.

The Court in *Gideon*, however, still faced one obstacle. Previously, in *Betts*, it had specifically held that the right to counsel was not a fundamental right and, consequently, was not incorporated into the Fourteenth Amendment.[198] The Court in *Gideon* surmounted this obstacle and remained within the framework of fourth-stage moral reasoning: it simply stated that *Betts* had misinterpreted the *constitutional* understanding of fundamental rights.[199] It noted that prior decisions, themselves interpretations of the social contract, had concluded that the right to counsel was a fundamental right.[200] For example, the Court cited *Grosjean v. American Press Co.*,[201] a 1936 case in which the Court had emphasized the fundamental nature of the right to counsel.[202] *Betts*, then, not *Gideon*, could rightly be interpreted as an unwarranted deviation from the constant principles of the Constitution.

Finally, to complete its fourth-stage arguments, the Court recognized the need for procedural uniformity and procedural fairness, classic fourth-stage concerns,[203] stating "From the very beginning our . . . laws have laid great emphasis on procedural . . . safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."[204] The government and wealthy defendants, it concluded, routinely used lawyers in criminal trials; therefore, "[t]he 'noble ideal' of procedural fairness could not be realized unless poor defendants received the same opportunity to use counsel during the criminal process."[205]

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197. *Id.* at 341 (acknowledging that guarantees protected from federal abridgment by Bill of Rights are equally protected against state abridgment by Fourteenth Amendment).

198. Betts v. Brady, 316 U.S. 444, 471-72 (1942) (asserting that majority of states have not considered right to counsel fundamental).

199. *Gideon*, 372 U.S. at 342 (stating that Court in *Betts* was wrong in concluding that Sixth Amendment guarantee of counsel is not fundamental).

200. *Id.* at 342-44 (citing cases that held right to counsel fundamental).

201. 297 U.S. 233 (1936).

202. Grosjean v. American Press Co., 297 U.S. 233, 243-44 (1936) (asserting that right to counsel in criminal proceeding is fundamental right that is protected against federal and state encroachment).

203. *See supra* notes 34-40 and accompanying text (characterizing Kohlberg's fourth stage of moral reasoning as concern for preservation of social contract).

204. *Gideon*, 372 U.S. at 344.

205. *Id.*

The Court in *Gideon* thus employed fourth-stage moral reasoning to reach its result. It derived its authority not from universal ethical principles that precede any social contract, but rather from the language of the Constitution, the existing social contract that presumably enjoys the support of the majority of Americans.[206] Likewise, the Court created an image of law as consistent and unchanging, and it espoused classic fourth-stage concerns about the need for procedural uniformity.[207]

In contrast to *Gideon*, *Weeks v. United States*[208] has continued to be the center of a storm of legal controversy.[209] In *Weeks*, the Supreme Court ruled that evidence obtained by federal officials in violation of the Fourth Amendment could not be used against a defendant in federal criminal proceedings.[210] After a few false starts,[211] the Supreme Court in *Mapp v. Ohio*[212] extended the exclusionary rule in *Weeks* to state court proceedings and implied that the rule would have broad effect as a necessary method of protecting Fourth Amendment rights.[213] Although *Weeks* and its progeny, like *Mapp v. Ohio*, still survive today, the Court has limited their effect and has attempted to narrow the principles on which they rest.[214] In

206. *See id.* at 341-45 (describing constitutional justifications for decision).

207. *See id.* at 344 (discussing importance of precedent).

208. 232 U.S. 383 (1914).

209. *See, e.g.*, Joseph D. Grano, *Introduction—The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, 22 U. MICH. J.L. REF. 395, 395 n.3 (1989) (stating that exclusionary rule "helped to precipitate the now dominant public perception . . . that the criminal justice system releases defendants on 'technicalities,' . . . and converted search and seizure law into an arcane subject . . . ."); *Office of Legal Policy, Report to the Attorney General on the Search and Seizure Exclusionary Rule*, 22 U. MICH. J.L. REF. 575, 581 (1989) (recommending "a program of legislative, litigative, and administrative initiatives to abolish the exclusionary rule").

210. Weeks v. United States, 232 U.S. 383, 398 (1914).

211. In Wolf v. Colorado, 338 U.S. 25, 31-33 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 642 (1961), the Court initially concluded that the exclusionary rule did not apply to state court proceedings. Elkins v. United States, 364 U.S. 206 (1960), however, signaled a change in direction. There, the Court overruled the "silver platter" doctrine by holding that evidence obtained illegally by state agents could not be used in federal criminal trials. *Id.* at 223-24.

212. 367 U.S. 643 (1961).

213. Mapp v. Ohio, 367 U.S. 643, 657-60 (1961).

214. *See* New York v. Harris, 495 U.S. 14, 21 (1990) (holding that exclusionary rule does not prevent state from using defendant's statement made outside home after defendant was illegally arrested inside home, if police have probable cause); United States v. Leon, 468 U.S. 897, 922 (1984) (holding that exclusionary rule does not apply if officers acted in good faith). In fact, at various times, certain Justices have sought to limit the scope of the rule. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 255 (1983) (White, J., concurring) (arguing that exclusionary rule should be modified to permit introduction of evidence obtained in good faith); California v. Minajares, 443 U.S. 916, 917 (1979) (Rehnquist, J., concurring) (advocating grant of certiorari to allow reevaluation of exclusionary rule); Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring) (asserting that exclusionary rule should be modified and retained for only limited category of cases); Schneckloth v. Bustamonte, 412 U.S. 218, 262-71 (1973) (Powell, J., concurring) (noting costs to society of collateral attack based on claim of illegally secured

addition, scores of legal commentators have explored alternatives to the exclusionary rule.[215] Thus the rule can hardly be said, even after all these years, to be firmly established as "good law." In *United States v. Leon*,[216] for example, the Court ruled that the exclusionary rule did not apply when police officers acted in good-faith reliance on a warrant that later turned out to be defective.[217] Likewise, in *United States v. Janis*,[218] the Court announced that the exclusionary rule did not bar the introduction in tax court proceedings of evidence illegally seized by state officers acting in good faith.[219]

Interestingly, *Weeks* employed Kohlberg's fifth stage of legal reasoning.[220] The Court did not ground the exclusionary rule in the Fourth Amendment itself. Instead, it noted that the rule was part of the fundamental concept of rights and protections, or universal ethical principles, that the Fourth Amendment sought to embody.[221] The Court concluded that the exclusionary rule was part of a "principle . . . enacted into the fundamental law in the Fourth Amendment."[222] That fundamental principle, which the Court characterized as "[t]he maxim that 'every man's house is his castle,'"

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evidence).

215. These alternatives include increased use of police review boards, subjecting police to criminal penalties in extreme circumstances, and instituting civil suits for damages against the government. *See Office of Legal Policy, Report to the Attorney General, supra* note 209, at 579-80 (arguing that no other common law country has adopted American-style exclusionary rule and discussing alternative criminal and administrative sanctions); *see also* Yale Kamisar, *Does, (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 618-21 (1983) (finding that although alternatives exist, exclusionary rule is best able to prevent unreasonable searches and seizures); William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1385-1412 (1981) (exploring civil damages actions, criminal penalties, nonjudicial external controls, internal controls, injunctions, and warrants as possible alternatives to exclusionary rule).

Some of the proposals for alternative remedies for Fourth Amendment violations are quite old. *See* Virgil W. Peterson, *Restrictions in the Law of Search and Seizure*, 52 NW. U. L. REV. 46, 62 (1957) (noting that preservation of rights guaranteed by Fourth Amendment should be accomplished through direct action, not indirectly through rule of evidence); William T. Plumb, Jr., *Illegal Enforcement of the Law*, 24 CORNELL L. REV. 337, 386-88 (1939) (examining direct remedies to prevent and punish illegal law enforcement). For an argument that any alternative to the exclusionary rule would provide insufficient Fourth Amendment protection, see Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REF. 537, 560-68 (1990) [hereinafter Kamisar, *"Old World"*].

216. 468 U.S. 897 (1984).

217. United States v. Leon, 468 U.S. 897, 922 (1984) (finding that marginal benefits produced by suppression of evidence obtained in reliance on subsequently invalidated search warrant were outweighed by costs of exclusion).

218. 428 U.S. 433 (1975).

219. United States v. Janis, 428 U.S. 433, 459-60 (1975).

220. *See supra* notes 41-46 and accompanying text (describing characteristics of Kohlberg's fifth stage of moral reasoning).

221. *Weeks*, 232 U.S. at 391 (stating that Fourth Amendment was meant to perpetuate principles of humanity and civil liberty).

222. *Id.* at 390.

existed before and outside the social contract found in the Constitution.[223] The Court determined that because the Constitution simply embodied this fundamental principle, the Fourth Amendment was broad enough to encompass all of that principle, including the exclusionary rule.[224] "The efforts of the court . . . to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles . . . which have resulted in their embodiment in the fundamental law of the land." [225]

The problem with *Weeks*, however, is that the exclusionary rule itself offends other values inherent in fourth-stage moral reasoning. By excluding potentially incriminating evidence, the rule allows some guilty defendants to escape conviction.[226] Consequently, the rule seems to create an almost arbitrary exception to the law—an exception that, in some circumstances, may frustrate the very purpose of the law. For example, two defendants might have committed the same crime. If the police conducted a lawful search in the first case and an unlawful search in the second, the first defendant might be convicted while the second defendant might go free.[227] Because the exclusionary rule itself seems to undermine substantive uniformity in the law by allowing some guilty persons to go free, this result may provide a basis for a fourth-stage argument for the elimination of the rule.[228]

More recent Supreme Court opinions limiting the scope of the exclusionary rule have, to a certain extent, adopted this argument and transformed the rule from one that rests on fundamental universal principles to one that ensures that the government adheres to a fourth-stage-type social contract.[229] In *United States v. Calandra*,[230] for example, the Court refused to apply the exclusionary rule in grand jury proceedings.[231] The Court noted that the rule was not

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223. *Id.*

224. *Id.* at 390-93.

225. *Id.* at 393.

226. *See* Grano, *supra* note 209, at 395-96 n.3 (criticizing rule for impeding criminal justice system's truthfinding process). *But see* Kamisar, *"Old World," supra* note 215, at 542-44 (arguing that truth is not only goal of criminal process).

227. *See Janis*, 428 U.S. at 448-54 (discussing social costs of exclusionary rule).

228. *See supra* notes 34-40 and accompanying text (describing importance of uniform application of laws to fourth-stage moral reasoning).

229. *See* Kamisar, *"Old World," supra* note 215, at 560-61 (recognizing that exclusionary rule was originally based on "principled basis" of avoiding judicial ratification of police misconduct rather than empirical need to deter law enforcement misbehavior upon which rule now rests).

230. 414 U.S. 338 (1974).

231. United States v. Calandra, 414 U.S. 338, 354 (1974) (finding that questions based on illegally obtained evidence constitute derivative use of product of past unlawful search and seizure rather than new Fourth Amendment wrong).

mandated either by fundamental principle or by the Constitution itself;[232] rather, the rule was merely a "judicially created remedy" designed to protect Fourth Amendment rights.[233] Furthermore, the rule was not, as implied in *Weeks*, necessary to protect an individual's constitutional rights:[234] "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim."[235] Instead, the Court viewed the rule simply as a deterrent to future government abuse of constitutional rights.[236] The Court, therefore, centered the rule's validity simply on the rule's prophylactic ability to ensure future government compliance with the social contract expressed in the Constitution.[237]

Having thus sprung the exclusionary rule free from its foundation in fifth-stage moral reasoning,[238] the Court has been able to pick the situations in which it will give effect to the principle of deterrence.[239] In *Leon*, for example, the Court refused to apply the exclusionary rule where the police relied, in good faith, on a warrant that later turned out to be deficient.[240] In so doing, the Court determined that application of the rule would not further the principle of deterrence.[241] Using coherent fourth-stage moral reasoning, the Court concluded that the rule could not possibly encourage the government to live up to the "bargain," namely, the Constitution, when government officers acting in good faith had already made every effort to do so.[242] This coherent fourth-stage reasoning perhaps helped justify the Court's attack on the exclusionary rule.

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232. *Id.* at 348 (stating that rule is not "a personal constitutional right of the party aggrieved").

233. *Id.*

234. *Id.* at 354 (noting that use of illegally seized evidence in grand jury proceedings does not violate defendant's constitutional rights).

235. *Id.* at 347.

236. *Id.*

237. *See id.* (quoting Elkins v. United States, 364 U.S. 206, 217 (1960), for proposition that exclusionary rule's purpose is to deter future breaches of "constitutional guaranty . . . .").

238. *See supra* notes 220-25 and accompanying text (explaining that analysis in *Weeks* is rooted in Kohlberg's fifth stage of moral reasoning).

239. At least one study has actually indicated that the exclusionary rule is not an effective deterrent to police misconduct. *See* William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REF. 311, 358-59 (1991) (determining that data make clear that exclusion of illegally obtained evidence offers only weak deterrent to police). Heffernan and Lovely also argue that *Leon*'s good faith exception discourages rigorous training of the police in Fourth Amendment law. *Id.* at 368.

240. *Leon*, 468 U.S. at 897.

241. *Id.* at 916-17 (noting that there was no basis to believe that exclusionary rule deterred judges or magistrates from issuing deficient warrants).

242. *See id.* at 916-18 (noting importance of good faith in Court's determination of scope of exclusionary rule).

The reason for discussing these cases is simply to demonstrate that the Court initially grounded its application of the exclusionary rule on fifth-stage Kohlberg reasoning.[243] Because the rule itself produced results that conflicted with other fourth-stage values, such as the need for uniformity of results and procedural fairness,[244] the rule may have been vulnerable to attack. In later decisions limiting the rule, the Court used fourth-stage moral reasoning in an attempt to limit its application.[245] In so doing, the Court may have increased the legitimacy of its attack, thus increasing the likelihood that the legal community would accept limitations on the rule.

CONCLUSION

Law is a violent business. Every decision masks a deed, and those deeds are ultimately coercive. At its best, law is about imposing shared values and norms on society for the benefit of its members. At its worst, it is simple tyranny. Law, however, is always coercive.

One way law may legitimize its violence is through the adoption of a fabric of morality. Law may not ordain particular moral choices in all circumstances, but it certainly employs moral reasoning in its quest for legitimacy. When judges speak, they often do so in ways that mirror the moral systems delineated by Lawrence Kohlberg and Carol Gilligan. Which moral system a judge employs usually shapes the way that judge will explain his or her decision. Each moral system gives weight to different societal concerns; each approaches the world in a different way. Thus, each shapes and confines the text of a judicial opinion. Judges who employ Kohlberg's masculine moral reasoning may give little weight in their opinions to the connections and responsibilities inherent in societal relationships. Judges who adopt Gilligan's feminine moral reasoning may tinge the masculine fabric of law's abstract rights with a concrete concern for caring, for "alleviating the real and recognizable trouble of the world."[246]

What, then, is the effect of the use of different moral systems? If one views law's quest for legitimacy as a process of interaction between those who make the law, those who interpret it, and those who live under it, then the dialogue between judges and the

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243. *See supra* notes 220-25 and accompanying text (describing Court's reliance on fifth-stage moral reasoning).

244. *See supra* notes 226-28 and accompanying text (noting that *Weeks* offends fourth-stage moral reasoning).

245. *See supra* notes 229-42 and accompanying text (describing Court's attempt to limit exclusionary rule).

246. GILLIGAN, *supra* note 53, at 100; *see also supra* notes 102-09 and accompanying text (discussing *DeShaney* dissent's use of Gilligan's moral reasoning).

interpretive community can aid in the creation of that legitimacy. Judges need to persuade lawyers, legislators, other judges, and even the public at times that they have reached the right result. Moral reasoning may provide judges with a tool to aid in that persuasion.

In fact, some types of moral reasoning may be more persuasive than others. Given the composition of the current interpretive community and the inherently masculine fabric of the law, this Article argues that Kohlbergian fourth-stage moral reasoning may aid judges in their task of persuasion more successfully than other types of moral reasoning. Although a much more scientific sampling of cases is necessary to prove this hypothesis, a close reading of a few landmark decisions seems to support this view. Decisions that employ Kohlberg's fourth stage of moral reasoning may, in fact, gain wider acceptance than decisions using fifth-stage reasoning or Gilligan's moral reasoning.

At this point, one must be careful of overstating the hypothesis. Clearly, the type of moral reasoning a judge uses in an opinion is not the only factor that may affect the legitimacy of that opinion. Other rhetorical tools of persuasion, changes in the values and needs of society, changes in the ways we perceive each other, and even advances in science or technology, to name just a few factors, may also affect the legitimacy of law. *Brown v. Board of Education*,[247] for example, may be part of today's legal canon not because it used a certain type of moral reasoning, but because our assumptions about race and society have changed fundamentally.[248] The argument advanced here is not that moral reasoning always governs legal legitimacy. It is simply that moral reasoning may be a factor in creating that legitimacy.

Moreover, this Article advances a descriptive, not a normative, view of the interaction between moral reasoning and the legitimacy of judicial opinions. As more women enter the legal profession and assume positions of power, as the composition of the interpretive community changes, it is quite possible that other types of moral reasoning may become increasingly persuasive.[249] Nonetheless, the

247. 347 U.S. 483 (1954).

248. This statement should not be read to suggest that the United States has now achieved racial equality. The only point here is that moral reasoning is not the only factor that may affect the ultimate legitimacy of a judicial opinion. Certainly, many would argue that *Brown* itself did not go far enough. *See* Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education?, 91 COLUM. L. REV. 1867, 1883-85 (1991) (noting that some scholars now argue that *Brown* decision was too cautious).

249. Opinions such as *Roe* or *Weeks* that do not employ fourth-stage moral reasoning are not necessarily bad decisions. Any legal system that does not ultimately make some attempt to evaluate itself against universal ethical principles may eventually be incapable of responding to the changing needs of society. A system that cannot respond to those needs over a long period

contrast between *Roe* and *Casey* and between *Gideon* and *Weeks* provides at least anecdotal evidence of the interaction between moral reasoning and legitimacy within the interpretive community. Our canon today appears to be based on fourth-stage moral reasoning.[250] Such a state of affairs may not be surprising considering our system's majoritarian structure and the institutional fabric of the law. It does provide insight, however, into the value of various types of arguments judges may marshall to persuade the rest of us that they exercise their power in a just and moral manner.

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of time may lose legitimacy in the eyes of its citizens. What *Roe* and *Weeks* do point out, however, is that fourth-stage moral reasoning, at least at this time, may initially be a more persuasive tool in the judicial quest for legitimacy than other types of moral reasoning.

250. *See supra* notes 132-34 and accompanying text (discussing preponderance of fourth-stage moral reasoning in legal community).