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Banality of Legal Reasoning

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SYMPOSIUM
PREMISES AND CONCLUSIONS: SYMBOLIC LOGIC FOR LEGAL ANALYSIS

THE BANALITY OF LEGAL REASONING

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Law schools give pride of place to teaching students "to think like lawyers." And despite the deflationary cast of my title, I am not going to debunk that part of law schools' mission. Indeed, I personally give that task the same or greater importance than law schools generally give it. My intention is rather to clear away the mysticism and mumbo jumbo that is usually associated with "thinking like a lawyer" and to claim that thinking like a lawyer is just ordinary forms of thinking clearly and well. More precisely, thinking like a lawyer boils down to moral reasoning, empirical reasoning, and deductive reasoning, and lawyers reason in these ways exactly as everyone else does. There is no additional form of reasoning, special to them, in which lawyers engage. Law schools are well-equipped to teach students how to think like lawyers; but because moral, empirical, and deductive reasoning are taught or refined in other venues, law schools have no monopoly.

I shall attempt to make my point by examining three different reasoning environments that lawyers must confront. The first is that of the uncontrolled case, where no canonical legal norm or precedent governs. In that environment, lawyers employ moral or policy arguments, and these rest on ordinary moral and empirical forms of reasoning. The second reasoning environment is that of the controlling legal norm, and in that environment lawyers employ empirical and deductive reasoning, though moral reasoning can also be relevant in certain ways.

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The third reasoning environment is that requiring the application of precedent. Here again, I argue, lawyers will employ some combination of ordinary moral reasoning, ordinary empirical reasoning, and ordinary deductive reasoning. There is no additional kind of reasoning—for example, "analogical reasoning"—that lawyers employ. Nor do lawyers have access through special reasoning to norms that might anchor analogical reasoning but that are neither posited, canonical norms nor moral principles.

I. THE UNCONTROLLED CASE

How do lawyers think about the uncontrolled case, the case of first impression that is governed neither by precedents nor by rules posited constitutionally, statutorily, or administratively? In such a case, a lawyer will ask what outcome moral principles dictate and, where moral principles are goal dependent, what policies will achieve the morally sanctioned goals.

A. Reasoning About Moral Principles

When lawyers reason about moral principles, they reason in the same way as moral philosophers and ordinary moral agents do. They may begin with a strong judgment about how the case at hand should be resolved as a moral matter. They will then try to formulate a general moral principle that would support that judgment. That principle will be tested in turn by the outcomes it produces in other, perhaps hypothetical, cases. If the outcomes are at odds with strong judgments about what the outcomes should be, then the principle will be reformulated. Sometimes, however, the principle will be so well supported by theories of human nature and society, and will display such theoretical desiderata as elegance and simplicity, that the disconfirming judgments about particular cases will be reassessed and perhaps dislodged in favor of the judgments warranted by the principle. This is especially likely if the aberrance of the disconfirming judgments can plausibly be explained by such factors as biases, irrelevant considerations, or other sources of judgmental error.

This method of reasoning from particular moral judgments to general moral principles and back to particular moral judgments, with both principles and particular judgments being adjusted in light of each other, is, of course, the method of "reflective equilibrium," first so-called by John Rawls.[1] Notice that when reduced to its essentials, it consists of the following building blocks: (1) moral judgments about

1 JOHN RAWLS, A THEORY OF JUSTICE 46–53 (1971).

outcomes in particular situations; (2) abductive reasoning from those judgments to tentative principles that would support the judgments; (3) deductive reasoning from the principles to outcomes in other situations; and (4) empirical reasoning leading to conclusions about the nature of man and society and about the likely influence of various factors on moral judgments. None of these forms of judgment and reasoning are the particular province of lawyers, which is surely a good thing, given that every moral agent must engage in similar moral reasoning.

To be good moral reasoners about uncontrolled cases, therefore, lawyers must be good reasoners in a variety of ways, but none of them special to lawyers or legal education. One need not be legally trained to think productively about moral questions, even in legal contexts.

B. Policy Considerations

Sometimes the application of moral principles relevant to an uncontrolled case turns on matters of policy. For example, the moral principles that govern an accident might lead the lawyer to ask about the costs and benefits of particular intermediate rules, such as "stop, look, and listen at railway crossings," through which the moral principles might be implemented.

Lawyers indeed make policy arguments all the time. And when they do, they support them with ordinary empirical reasoning, reasoning employing data gathering, hypothesis construction, experimental design, and experimental results. Law schools have historically paid little attention to students' skills as empiricists. Perhaps that is changing, but in no event are lawyers our best-trained empiricists.

II. The Case Controlled by a Canonical Posited Norm

Perhaps the largest number of cases the lawyer confronts—although traditional legal education would mislead on this point—consists of cases requiring the application of a controlling posited norm, whether the norm be constitutional, statutory, administrative, or judge-made. There are two basic steps here. First, the lawyer must interpret the canonical norm. Second, the lawyer must apply the norm as interpreted. Neither step involves reasoning that is unique to lawyers or the legally trained.

A. Interpreting Posited Norms

How lawyers should interpret posited legal norms is, of course, a theoretical battleground. There are all sorts of theories of legal inter-

pretation to choose among. And although I have my own preferences, I need not make a case for them here. My task is the much more limited and manageable one of showing that no coherent theory of interpretation will require any special kinds of reasoning by lawyers.

Most theories of interpretation of posited legal norms point either to a straightforward empirical inquiry or to some combination of empirical inquiry and moral evaluation. In the former category are those theories that make either conventional understandings of texts or authorial intentions determinative of the meaning of posited norms. Discovering conventional understandings usually requires no more of an empirical inquiry than consulting a dictionary and a grammar of the era whose conventional understandings are in question.

Discovering authorial intentions, on the other hand, can be a quite difficult matter, particularly when the norm was authored in the distant past or when there are multiple authors. And although discovering authorial intentions, like discovering any other fact about the past, is a strictly empirical matter, moral judgments can play an evidentiary role. Thus, if possible intention A would be quite unjust or immoral, and possible intention B would be quite the opposite, then if we know the authors to have been morally well-intentioned, we have some evidence that they acted with intention B. Of course, many other things besides morality are relevant to discovering the authors' intentions, most notably the conventional understandings of the words they used. But on the theory that bases interpretation on authorial intent, all of these moral and factual matters other than the intentions themselves are relevant only, not material.

There are theories of interpretation that combine empirical inquiry and moral evaluation. For example, one might argue that the authoritative meaning of a posited legal norm is given by the authors' intended meaning (or by the conventional understanding of the words), unless the intended meaning (or conventional understanding) would be seriously unjust.[2] On such a theory of interpretation, both empirical inquiry and moral evaluation are required, the latter placing limits on what the former produces.

(There can, of course, be empirical combination approaches to interpretation similar to the just described approach of combining an empirical inquiry and a moral evaluation. For example, one can make authorial intentions the touchstone of authoritative meanings so long

2 *See* Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions, in* LAW AND INTERPRETATION 357, 381–91 (Andrei Marmor ed., 1995).

as those meanings are not inconsistent with conventional understandings of the words.[3])

So far, none of the unitary or combination approaches to legal interpretation requires any form of reasoning other than ordinary empirical reasoning or ordinary moral reasoning. And although legal issues provide abundant opportunities to engage in interpretation of posited rules and thus to engage in those forms of reasoning, neither form of reasoning requires a legal education.

There are some theories of interpretation that not only require a combination of different empirical inquiries or of empirical and moral inquiries, but also require that the results of those different inquiries be "blended" to arrive at the authoritative meaning of the legal norm. For example, some theorists argue that the meaning of a statute is a product of its text, its authorial intentions, its past judicial interpretations, and what is good and just.[4] Moreover, these different factors are not arranged in some clear lexical order—with text constraining intentions and both constrained by justice, for example—but rather are factors to be mixed together in some interpretive stew.

How is the legal interpreter to ascertain the meaning rendered up by such a nonstructured combination of different inquiries and types of reasoning? It is here that some special faculty, the ability to engage in what some call "practical reason," enters the picture. We grasp the meaning of a posited legal norm through practical reasoning in light of text, authorial intentions, history, and morality.[5] And legal education is the training through which we acquire the ability to employ such practical reasoning.

I have written elsewhere on why I think the claims on behalf of such practical reason are hogwash.[6] No one—not even lawyers—can meaningfully "combine" fact and value, or facts of different types, except lexically in the manner I described above. Any non-lexical "combining" of text and intentions, text and justice, and so forth is just incoherent, like combining *pi*, green, and the Civil War. There is no process of reasoning that can derive meaning from such combinations.

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3 *See id.* at 385.

4 *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 351–52 (Jan. 1990) (arguing that statutory interpretation is a dynamic process involving the text, history, purpose, and current values).

5 *See id.*

6 *See* Larry Alexander, *Practical Reason and Statutory Interpretation*, 12 LAW & PHIL. 319 (1993).

The conclusion must be that interpreting legal norms is a nonmysterious process employing ordinary empirical and perhaps moral reasoning. Lawyers employ such forms of reasoning, but they do so along with many others and in the same way. There is no special lawyers' way of thinking when it comes to legal interpetation.

B. Applying Posited Norms

Lawyers, of course, do not only interpret legal norms. After they have decided what those norms mean, they then must apply those norms to the facts.

There is surely nothing special about this process, however, for what it requires is nothing more than ordinary deductive logic. By saying this, I do not mean to minimize deductive logic or the skill necessary to employ it well. Indeed, I would locate the heart of what it means to think like a lawyer here, in the domain of deductive logic. For I think that what a really well-trained lawyer is particularly good at—or at least what a particularly well-trained law student is particularly good at—is precisely the ability to reason deductively, especially from complex norms. That is why I believe Rodes and Pospesel are right on the mark in their emphasis on deductive reasoning.[7] That is why I frequently give my students problems in propositional logic from Raymond Smullyan's delightful *What Is the Name of This Book?*[8] and tell them that honing their deductive skills is perhaps the most important thing they will do in law school.

Deductive skill in applying norms to facts is both central to the lawyers' enterprise and not highly developed in most spheres of life. And law schools have historically been known for drilling students in applied as opposed to formal deductive logic, though it is my impression that we are easing up on that front and replacing the emphasis on logical precision with more information and training in other skills. In any event, if "thinking like a lawyer" is thinking logically, then the non-legally-trained can also think like lawyers. There is no special trick that lawyers know here.

7 ROBERT E. RODES, JR. & HOWARD POSPESEL, PREMISES AND CONCLUSIONS (1997).

8 RAYMOND N. SMULLYAN, WHAT IS THE NAME OF THIS BOOK? (1978).

III. Of Precedent, Analogy, and Principle

A. The Search for a Special Form of Legal Reasoning

1. The Problem

Thus far I have discussed uncontrolled cases and cases controlled by posited canonical norms. In neither must the lawyer employ forms of reasoning that are unique to law. There is a third category of cases, however, and it is in this category that proponents of lawyers' special know-how are likely to argue we should look. After all, the classic works on legal reasoning, such as Edward Levi's,[9] used examples, not of cases of first impression, nor of application of established rules, but of deriving and then applying norms from precedent cases. Although applying the norms once derived is merely a matter of deduction, deriving the norms is presented as something different from any of the processes of reasoning described above. Perhaps, then, it is in deriving norms from precedent cases that lawyers employ some special form of reasoning.

As a preliminary matter, it is clear that for reasoning from precedent cases to be special, the precedent cases must not be regarded as having laid down canonical rules to govern future cases. For if constraint by precedent is no more than following canonical rules posited by precedent courts, there are no norms to "derive" from the precedent cases. There are merely posited rules to be interpreted through the empirical or lexically-ordered empirical/moral techniques described in Part II.

Nor would precedential reasoning be special if present courts merely must take account of the existence of the precedent decisions in deciding what is morally best to do, all things considered. In other words, a court reasoning in a purely moral manner will have to take into account the state of the world in which it operates, and precedent cases—like other past events—will have left their traces in the world of the present cases, most notably in the form of reliance.[10]

Not only will a court reasoning in a purely moral manner take into account the present traces of precedent decisions, such as reliance, but it will also take into account (1) the extant rules that it has no authority to overturn, (2) the moral wisdom potentially embodied in precedent decisions, and (3) its own limitations of time, foresight, and wisdom. These three considerations will ordinarily produce

9 Edward Levi, An Introduction to Legal Reasoning (1963).

10 *See* Larry Alexander & Ken Kress, *Against Legal Principles, in* Law and Interpretation 279, 299-300 (Andrei Marmor, ed., 1995).

norms that are fairly specific and limited in their domain, and that cohere well with most of the corpus juris. Such norms may appear to be derived from precedent, but of course they are not.

Thus, under a theory of precedential constraint in which what is binding in a precedent is a rule posited by the precedent court, the subsequent courts merely interpret and apply the posited rule. And under a theory of precedential constraint in which precedents are merely facts to be taken account of by subsequent courts seeking the morally best outcomes, the courts employ ordinary moral reasoning. Under neither theory of precedent could the subsequent courts be said to be "deriving" a norm from the precedent cases, much less reasoning in any novel manner.

The theory of precedential constraint that promises a unique way of reasoning is one that goes as follows: The present court looks at the facts and the results of various precedent cases and then asks which of the cases is most "like"—analogous to—the case at hand. The court "grasps" the proper analogy—"This case is more like case x than case y"—and then tries to draft a norm that would cover and "justify" the past and present outcomes. That norm, however, can be ignored by a subsequent court. Only the present result is binding on it, just as only the past results were binding on the present court.[11]

2. The Possibility for Error

Notice that as this process of so-called analogical reasoning from precedent is described, courts' articulated rationales are viewed as corrigible, but their ability to grasp proper analogies is viewed as incorrigible. Therefore, we are asked not only to accept a judicial ability to grasp what is "like" and "unlike" what, but also to accept that this ability is infallible.

I believe we should reject both propositions. Courts *reason* about rather than grasp intuitively to which precedent cases the cases before them should be assimilated. Or at least they purport to reason about this, which is why they write opinions that purport to describe their reasoning. Moreover, we must assume that if they are reasoning, then they may be reasoning incorrectly, which would explain, among other things, such phenomena as dissents, overrulings of precedent, and interstate differences in common law doctrine.

We must assume, therefore, that the environment in which courts are to employ analogical reason—or what I shall now call ARIL, an

11 *See* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 3, 28–34 (1989).

acronym for analogical reasoning in law[12]—is one in which part of the corpus juris is infected by error. That is, some of the materials with which ARIL must work are unjustified.

It is important to note that the problem of moral error embedded in past judicial decisions, statutes, and other legal materials does not affect the other methodologies I have described: ordinary moral reasoning to determine the morally best decision in a case (the method of reflective equilibrium) and ordinary empirical methodology to discover the meaning of a legal rule *qua* legislative intent (or public understanding). Ordinary moral reasoning will take account of all the present effects of past decisions, including morally erroneous ones. Because we operate morally in the world as we find it—a world in which many of its features are the residue of past moral mistakes—we must take account of those mistakes in order to act morally. For example, we surely must take into account present reliance on past decisions, even if those decisions were morally mistaken. And we must take into account present institutional features when we reason morally about what to do, even if those institutional features are not morally optimal.

Although moral reasoning must take account of past moral error in the ways just described, it need not abandon correct moral principles in doing so. In other words, it need not resort to any norms other than the correct moral norms it discovers through proper moral reasoning. Those norms dictate what to do in light of past moral mistakes. Thus, past moral mistakes do not alter the norms themselves, or the methodology for discovering them.

The same relation or lack of relation holds between past moral error and the discovery of legislative intent. To the extent we can explain past moral mistakes, we can be more confident that we have correctly ascertained what some legislative body intended by its text if our tentative conclusion is that the intent embraces the moral error. Our method is always abductive and inductive in the ordinary manner of empirical inquiry. We are still looking for the legally significant fact—intent or understanding—and moral mistakes are just part of the evidentiary stew. We do not seek principles to justify them, but rather facts to explain them. And, of course, once we have interpreted the rule, deduction is the only reasoning we need, for deduction operates just as well from morally mistaken rules as from morally correct ones.

12 I introduced the acronym in Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57 (1996).

To summarize, past moral mistakes can be handled by ordinary empirical and normative methods. Past moral mistakes are, of course, problems for those adversely affected by them. They are not, however, problems for the methodologies.

B. A Description of ARIL

ARIL purports to be a methodology by which the courts—and anyone legally trained—can, through the process of reasoning it prescribes, "justify" a decision as being more "like" some precedent decisions than it is "like" others, where some of those precedent decisions may be mistaken. For ARIL to be a reasoning process as opposed to an intuitive grasping of likeness and difference, it will require postulating a norm or set of norms that "justify" the precedents and prescribe an outcome in the case at hand. It will be in terms of such a norm or norms that statements of likeness and difference will be supported. Obviously, cases are both like and different from other cases in an indefinite number of ways. The relevance of likenesses and differences must be determined by norms that supply the criteria of relevance. This much seems obvious.

Therefore, we need norms that justify precedent decisions, some of which may be mistaken. ARIL is supposed to be the method of reasoning by which such norms are discovered. Following Scott Brewer, let us call the norms that provide the criteria for supporting claims of likeness and difference "analogy warranting rules" (AWRs), and let us call the background principles that justify the AWRs "analogy warranting rationales" (AWRas).[13] Under ARIL, we survey the facts and outcomes (but not the stated rationales for) the precedent cases, abduce possible covering AWRs, test each AWR against AWRas by asking whether the decisions the AWR authorizes comport with the AWRas, and finally select the best of the eligible AWRs. That AWR supplies the criteria for determining the outcome in the case at hand, which outcome in turn determines to which precedents it is relevantly analogous.

C. ARIL and Reflective Equilibrium Compared and Contrasted

Now ARIL looks deceptively like the method of reflective equilibrium used in moral reasoning that I described earlier. That method requires working holistically with and making adjustments among particular judgments, formulations of moral principles, and background

13 *See* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 962–65 (1996).

theories of human nature and society. ARIL works the same way with AWRs, AWRas, and particular judgments. But consider these distinctions between reflective equilibrium and ARIL.

First, the reasoner employing reflective equilibrium ultimately tests the moral principles she is considering against *her own moral judgments* about particular examples. Yet ARIL gives prominence to *others' judgments* about particular examples, namely, the judgments of the precedent courts and the legislators. To be sure, the court deciding the instant case must itself decide what the moral principles are to which those judgments of others point. But it must accept these moral judgments of others about particular examples as fixed points in its own reasoning.

I do not mean to imply that the moral judgments of others have no role in reflective equilibrium. Quite the contrary is true. Nonetheless, those judgments of others are evidentiary for the reasoner; they bear on the confidence she has in her own particular judgments. The judgments of others are never canonical for her. Moreover, she takes good evidence where she finds it. For her, the particular moral judgments of the Harvard Philosophy Department might carry significantly more weight than the judgments of the Pennsylvania Court of Common Pleas or the Pennsylvania legislature. Yet ARIL subordinates the former to the latter. ARIL precludes her from deciding that the particular judgments of the courts or the legislature are incorrect, even if the inconsistent judgments of the Harvard Philosophy Department, as incorporated into her own moral judgments, would so declare. ARIL gives the particular judgments of others—indeed, the particular judgments of particular others, namely, courts and legislatures—a different status from the status they would have under reflective equilibrium.

A second difference between ARIL and reflective equilibrium lies in the rigidity or fixity of the particular judgments with which the reasoner must deal. If the reasoner were employing the method of reflective equilibrium to determine the morally best decision in the case before her, she might adjust not only her abduced moral principles to fit with her particular judgments, but also her particular judgments to fit with her moral principles. Whether she would adjust her principles or her judgments would depend on the relative degree of confidence she had in each. As Brewer correctly notes, the adjustments that occur in the method of reflective equilibrium are holistic and at least potentially bidirectional.[14]

14 *See id.* at 939, 1023.

ARIL, however, does not permit adjustment of the particular judgments that serve as precedents. The particular judgments about carriages, saws, urns, lamps, and so forth that the *MacPherson v. Buick Motor Co.*[15] court had to deal with were fixed for it. Those judgments could not be revised to fit the court's moral principles. Nor could they be disregarded. The same holds true, of course, for the particular judgments of legislatures embodied in statutes that a court wishes to treat like precedents in reasoning, per ARIL, to a result in a case not covered by the statute. This fixity or rigidity of the particular judgments of others that ARIL must work with distinguishes ARIL quite clearly from reflective equilibrium.

The third difference between ARIL and reflective equilibrium lies in the rationale-filtered manner in which a court has access to precedent cases. Precedent cases do not present themselves in all their particularity to the court employing ARIL. Rather, the particularity with which a present court can perceive a precedent case is entirely dependent on the precedent court's opinion and the detail about the case contained therein. The amount and the selection of that detail in the opinion will be a function of the precedent court's rationale for deciding the case. The precedent court may have favored a standard under which a large number of adjudicative facts in the case were deemed material and worth mentioning in the opinion. On the other hand, the precedent court may have favored a broad, blunt rule that rendered most adjudicative facts in the case entirely immaterial.

Now as I have said, ARIL dispenses with the rationales of precedent cases. The reason again is that ARIL is supposed to be something other than deductive reasoning from rationales already established. Nonetheless, ARIL cannot capture past cases in their full particularity, but rather must confront them as stylized, rationale-encrusted judgments of other courts.

Reflective equilibrium, on the other hand, allows and encourages the moral reasoner to add facts to and subtract facts from imaginary situations in order to discern how her moral judgments are affected and to identify the governing moral principles. The cases that the moral reasoner considers can be as detailed and as customized as she wishes because they are products of her moral imagination, not actual past events whose description has been forever fixed by others.

These three ways in which ARIL differs from the method of reflective equilibrium are, of course, related. The fact that ARIL depends on judgments of others explains why those judgments are fixed and why they are rationale-encrusted. The bottom line is that ARIL

15 111 N.E. 1050 (N.Y. 1916).

cannot be the method of reflective equilibrium, even though the latter, like the former, relies on examples.

I do not wish to be misunderstood to be saying that a court cannot take account of precedent cases and statutes while employing reflective equilibrium to reach the morally best decision in the case before it. If reflective equilibrium is the proper method for determining the morally correct course of action to take, then reflective equilibrium will have to take account of facts about the world, including past court decisions and their stated rationales and existing statutes. These facts matter morally, but they do not matter in the way ARIL describes. When we reason morally, we take account of those facts.[16] When we employ ARIL, we are supposed to be anchored to them.

D. ARIL and Legal Principles

Thus far, I have attempted to show that ARIL cannot be ordinary moral reasoning that takes into account past legal decisions, and that ARIL cannot be ordinary empirical inquiry into legislative intent (or public understanding) that takes into account examples in legal texts. If we look for ARIL in those precincts, we shall not find it.

There is an alternative location where I believe ARIL can be found: ARIL is the method of divining legal principles immanent in the case decisions and in the decisions of legislative bodies. ARIL is not the method for understanding canonical legal texts, as I have explained. Nor is it the method for applying canonical texts, which is merely deductive. Rather, ARIL functions when a case is not controlled by a canonical text, as when no extant text covers the case, or when the text that covers it is not canonical and can be disregarded, such as some accounts of judicial texts. What ARIL directs a court to do in such situations is to find the legal principles immanent in the legal materials and apply those principles to the case at hand.

Now, what are these immanent legal principles? I am going to give the best account of them I can, but because I am quite skeptical about the normative status of immanent legal principles, my account should be viewed warily.

Immanent legal principles are legal norms that are not posited by a legal decisionmaker. As I said, if they were posited norms, they would be subjects not for ARIL but for interpretation—empirical inquiry—and deduction. Rather than being posited norms, immanent legal principles arise from the posited legal materials, and justify

16 *See* Alexander & Kress, *supra* note 10, at 299–300; Alexander, *supra* note 11, at 15; Larry Alexander, *Striking Back At the Empire: A Brief Survey of Problems in Dworkin's Theory of Law*, 6 LAW & PHIL. 419, 433 (1987).

them. For example, the court in *MacPherson* could be described as having found in the array of past cases—though not in their stated rationales—the legal principle that it announced regarding negligence and privity, which principle justified the decisions both in *MacPherson* and in the precedent cases.

Just as immanent legal principles are not posited norms, neither are they moral norms. Although they "justify" past legal decisions, they do not do so morally, at least not straightforwardly. If they were moral norms, then, as I have argued, they would be discovered through the method of reflective equilibrium, not through ARIL.

ARIL as the method for discovering immanent legal principles squares rather well with Brewer's account of ARIL. A court faced with an array of past decisions, shorn of their nonauthoritative rationales, abduces a principle (the AWR) that would fit with those past decisions. It tests that principle for plausibility against background moral considerations (the AWRas). If the principle both fits the decisions and is morally attractive, the principle is the principle immanent in those decisions and is the gauge of relevant "likeness" and "unlikeness" in analogical reasoning from the cases.

I think that this story about immanent legal principles is the best account that can be given of ARIL. Notice that on this account ARIL appears to be, as many of its advocates contend, not some mystical, intuitive grasping of "likeness" and "unlikeness," but a form of practical reasoning. Notice also that on this account ARIL explains how past cases can constrain future decisions—as the principle of *stare decisis* requires—even though the past cases are shorn of their rationales. Notice finally that on this account ARIL truly is a distinctive methodology of practical reasoning, one that can support the autonomy of law.

Even as I have presented this account of ARIL so far, it has problems. For example, because ARIL is supposed to operate on judicial decisions and not the rationales for those decisions—else it would be merely interpretation and deduction—we need some way to overcome the problem to which I earlier adverted: judicial decisions are accessible to later courts only through their rationales. Nevertheless, I wish to assume that ARIL can overcome this problem. A far greater problem confronts it—past judicial and legislative mistakes.

1. The Problem of Bad Beginnings

We have concluded that the most plausible account of ARIL is one in which ARIL is neither ordinary moral reasoning nor ordinary empirical reasoning. Rather, it is one in which ARIL seeks legal principles immanent in past legal decisions, that is, principles that justify

those decisions. Those principles are what give us the criteria of likeness and unlikeness required for analogical reasoning.

Our path has also shown us that, almost surely, many of the legal materials in which the justifying legal principles are supposedly immanent will turn out to be morally mistaken. The situation of a judge or lawyer seeking the legal principles immanent in the legal materials is therefore similar to that of a zoologist asked to continue a project of sorting animals into "fish" and "mammals." The previous zoologist who had begun the project had classified the animals she had studied in the following manner:

FISH
Flounder
Mackerel
Whale Shark
Whale
Porpoise
MAMMALS
Elephant
Pig
Kangaroo
Bat

The new zoologist now must classify a seal, *and he must accept his predecessor's classifications as authoritative.* The question for him thus becomes whether—given the predecessor's classifications—a seal is more "like" a porpoise (fish) or more "like" a bat (mammal), or, put differently, how the principles of mammaldom and fishdom "immanent" in and "justificatory" of his predecessor's classifications work in the case of seals.

It should be obvious that if the zoologist must treat his predecessor's list as authoritative, he will find it impossible to classify seals nonarbitrarily. He will, of course, be able to point to ways in which seals are like and unlike both porpoises and bats, as he will when he moves on to sea otters, river otters, beavers, raccoons, and bears. (Note how the direction of progression through these examples will affect his answers, which should not, but likely will be, path-dependent.) All things are like and unlike all other things in myriad ways. The zoologist needs the correct principles for classifying fish and mammals, for only those principles will establish the relevant bases for judgments of likeness and unlikeness. Yet the predecessor's mistakes have made that impossible. Does not the same hold true for a judge or lawyer employing ARIL in the real-world context of past legal error?

2. Dworkin and Justifying the Unjustified

ARIL requires that we justify the unjustified. Ronald Dworkin has, of course, put forward a jurisprudential theory in which legal principles immanent in the legal materials play the major role.[17] Those principles must "fit" the legal materials (shorn of their rationales)—as the AWRs must fit with the past cases—and must be the most morally acceptable of the principles that satisfy the criterion of "fit," with moral acceptability gauged by reference to correct moral principles (the AWRas).

Because of moral mistakes embedded in the legal materials, however, the legal principles immanent in the legal materials—those that score highest on the fit and acceptability axes—will differ from correct moral principles. (In Brewer's terms, the *legal* AWRs will not cohere completely with the *moral* AWRas.) Legal principles for Dworkin can be characterized counterfactually as those principles that would be correct moral principles in a world in which the morally incorrect past decisions were morally correct.[18] To illustrate the claim graphically, for a judge confronting, say, *Plessy v. Ferguson*[19] and similar decisions, the legal principles immanent in those decisions are those principles that would be morally correct in a world in which "separate but equal" were morally correct.

I have argued in several other works that Dworkin's account of legal principles, even if coherent—compare it with "What would seals be in a world in which porpoises were fish?"—renders legal principles normatively unattractive and ontologically queer.[20] Legal principles do not have the virtue of bright-line rules, which, even if not morally optimal, provide clear guidance. Nor do legal principles have the virtue of correct moral principles, because they are not necessarily morally correct. Moreover, the best answer to the counterfactual question that describes legal principles—what would be morally correct in a world in which moral errors were not errors—is "act on correct moral principles except in past cases of moral error." That injunction is no different in any practical sense from an injunction to follow correct

17 *See* RONALD DWORKIN, LAW'S EMPIRE 238–50 (1986) (explaining the process that judges use to discover immanent legal principles); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22–39 (1977) (arguing that judges use principles, not just rules, to decide cases).

18 *See* Alexander & Kress, *supra* note 10, at 288 n.47 (arguing that such a counterfactual approach describes the dominant methodology for dealing with precedential constraint).

19 163 U.S. 537 (1896).

20 *See* Alexander & Kress, *supra* note 10, at 299–300; Alexander, *supra* note 12, at 15; Alexander, *supra* note 16.

moral principles, which requires the method of reflective equilibrium, not ARIL.

Correct moral principles will never dictate their own abandonment. They might dictate that we follow bright-line rules, even at some moral cost in particular cases, in return for greater moral benefits generally (moral costs and benefits calculated by reference to the correct moral principles). Correct moral principles, however, will reject all other purported justificatory principles as counterfeit.

IV. The Banality of Legal Reasoning

ARIL would definitely be a distinctive type of reasoning about legal matters, one unique to law and lawyers and capable of making law schools' mission of teaching students "to think like lawyers" something different from teaching them to think well but in ordinary, undistinctive ways. But ARIL is a chimera. We lawyers, if we are thinking properly—and teaching our students to do the same—do nothing more than engage in ordinary empirical reasoning, ordinary moral reasoning, and ordinary deductive reasoning.

Of course, doing those three well and teaching our students to do so are not to be sneezed at. Indeed, we probably do only a fair job teaching what we are best equipped to teach—deductive reasoning—do much less well in teaching our students to think carefully and well about moral issues, and probably make no progress at all in improving our students' empirical skills. So even if the ways lawyers reason are not special, there is a lot of room for improving lawyers' reasoning abilities. And achieving excellence in these reasoning abilities, however nonspecial they are, is surely to be prized.

Thus, when I say that legal reasoning is banal, I am not minimizing its importance or its difficulty. I am merely stripping it of mystique and countering obscurantist claims on its behalf. Law requires reasoning, but of perfectly ordinary kinds. And for that we as citizens should be thankful, even if we as lawyers and law teachers lose a bit of our special priesthood aura in the eyes of others.