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Recommended Citation

Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, (2016).

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NORMS AND NORMAL SCIENCE: TOWARD A CRITIQUE OF NORMATIVITY IN LEGAL THOUGHT

RICHARD DELGADO†

INTRODUCTION

For the past few decades, at least, legal scholars and many judges have treated the normative orientation of law as a given.¹ We have approached such problems as the character of legal reasoning, the nature of rights, and the definition of the legitimate judicial function as though these were reducible to fundamental questions of normative judgment. Much of the debate has been cast in terms of conflicts among normative conceptions of justice, efficiency, rights, morality, order, self-determination, community, and so on.² Today, the normative orientation remains the unspoken dominant mode of legal analysis and scholarship.

Yet, recently, a small group of scholars have *named* and begun to question this normative approach,³ asking, for example: How

† Charles Inglis Thomson Professor of Law, University of Colorado. J.D. 1974, University of California, Berkeley (Boalt Hall). I benefited enormously from discussions with Pierre Schlag in the preparation of this article. Jean Stefancic and Mari Matsuda both pushed me to think harder than I otherwise would have about normativity and social change.

¹ My informal survey disclosed that every recent volume of the top law reviews contained articles addressing such issues as: Is this or that legal doctrine fair? Does the law promote or impede the search for community? Is a particular case correctly or incorrectly decided (and not just in a technical sense)?

² See, e.g., M. BALL, *LYING DOWN TOGETHER* (1985) (concerning community and calling for law to serve as a medium for international cooperation); M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 93, 93-97 (1982) (embracing noninterpretive review in human rights cases; including "the definition, elaboration, and enforcement of values beyond merely those constitutionalized by the framers"); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1-2 (2d ed. 1988) (describing assorted defenses of judicial review, including review as prophecy for correct answers and as a vehicle for integrity); *id.* at 2-7 (describing constitutional theories of implied limitations on government that presupposed "an objective judicial method for defining the limitations of state power"); *id.* at 8 (setting forth the constitutional model of preferred rights that should be immune from government intrusion); *id.* at 12-15 (concerning judicial legitimacy); cf. Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 808 (1991) [hereinafter Schlag, *Politics of Form*] ("The key verb dominating contemporary legal thought is [invariably] some version of 'should.'").

³ See Letter from Richard Delgado and Pierre Schlag to various scholars and law reviews (Apr. 20, 1990) [hereinafter Letter] (on file with authors). Naming or conceptualizing a new object of inquiry is the necessary first step in dealing with it. For example, before the term "battery" was invented, abused women suffered in silence, thinking they were isolated victims of a brutal male. Once the term "spousal

much do we actually accomplish by promulgating grand normative theory and elaborating public values?⁴ Can normative analysis, fine as it sounds, mask injustice and oppression or contribute to the maintenance of an unfair status quo?⁵ Members of the critical legal studies movement (cls) have suggested that some forms of normative legal thought may simply be types of legitimation.⁶ Adherents

battery" came into use, it was possible to organize around it and to demand new police protection, community programs and laws. It became possible to obtain grants, write articles, and teach courses on the subject. Regarding the near-impossibility of dealing with a problem that has no name, see Delgado & Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207 (1989) (discussing the inhibitions classification systems impose on innovative legal scholarship).

⁴ See Letter *supra* note 3, at 2; see also Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990) [hereinafter Schlag, *Normative and Nowhere to Go*] (suggesting that the answer is "nothing"); Schlag, *Politics of Form*, *supra* note 2, at 834-43, 874-84. For earlier critiques of normativity, either in law or in general, see H. KELSEN, *THE PURE THEORY OF LAW* 68-69 (1967) (noting that the thesis "that law is moral by nature . . . is rejected by the Pure Theory of Law . . . because . . . this thesis amounts to an uncritical justification of the national, coercive order that constitutes this community"); F. NIETZSCHE, *ON THE GENEALOGY OF MORALS* (W. Kaufmann & R. Hollingdale trans. 1969) [hereinafter F. NIETZSCHE, *GENEALOGY OF MORALS*]; F. NIETZSCHE, *THUS SPAKE ZARATHUSTRA* 79-80 (A. Tille trans. 1958) [hereinafter F. NIETZSCHE, *ZARATHUSTRA*]; Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229; Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1894 (1988) (describing a process of arriving at validity through a contest of alternative views rather than through definite discovery of objective truth); Schauer, *Constitutional Conventions* (Book Review), 87 MICH. L. REV. 1407, 1416 (1989) (discussing normative arguments in L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1989)).

⁵ See Letter, *supra* note 3; see also Schlag, *Normative and Nowhere to Go*, *supra* note 4, at 173-77 (finding the discourse oppressive and authoritarian); *infra* notes 48-79 & 93-109 and accompanying text.

⁶ See Schlag, *"Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631, 1664 (1990) [hereinafter Schlag, *"Le Hors de Texte"*] (asserting that Dworkin's theory of law as integrity is, from a cls perspective, "probably the most highly refined, most highly sophisticated trans-ideological legitimation package to come out of the legal academy in recent memory"). For a review of cls thought, including the *legitimation* theme, see *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1982); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 444 (1981) (arguing that efficiency calculations in rule-making permit manipulation of cost-benefit analysis to legitimate pre-determined entitlement allocations). Critical Race Studies, a school with which I have been closely associated, is intensely interested in law's role in legitimating racial discrimination. See, e.g., Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 573 (1984) [hereinafter Delgado, *The Imperial Scholar*] (noting the "studied indifference" in mainstream legal scholarship toward minority writing on issues of race); Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872, 1872-76 (1990) [hereinafter Delgado, *Mindset and Metaphor*] (questioning Randall Kennedy's justification of the exclusion of minority scholars

of certain law-and-economics schools have expressed dissatisfaction with normative ideologies as a kind of rationalization.⁷ They have challenged the dominant strand of normative analysis, arguing that Holmes's bad man is ubiquitous and must be taken seriously in formulating and constructing legal rules.⁸

At the same time that some legal scholars have begun questioning the premises of normativity, scholars who study professionalism and professional ethics have raised questions about the role of ethical codification and the rush to promulgate ethical norms.⁹ Some of these writers have raised issues of monopolization and have seen the movement to impose ethical standards as itself unethical.¹⁰

The critique of normativity thus lies at the intersection of several strands of emerging scholarship. The normative edifice is, today, increasingly stressed. Just as legal realism and *cls* demonstrated the weaknesses of deductive legal formalism, and just as Thomas Kuhn and law and society scholarship shook the foundations of empiricism, the critique of normativity promises a third fundamental shift in the way we think about law. Normative legal thought stands now in the same place as legal formalism did just before the realists came on the scene. Its shortcomings, vulnerabilities, and self-referential quality are becoming increasingly evident to discerning readers. Not only has an examination of normative

from legal academia in Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989)); Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 109 (1990) (maintaining that members of marginalized groups can offer refreshing perspectives in legal scholarship).

⁷ See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 15-17, 20-23, 25-26, 182-85 (3d ed. 1986) (noting that economic principles explain much of law's underlying structure and that other approaches are sometimes helpful, but rarely the whole story). *But see* Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661 (1989) (exploring problems at the intersection of law and economics).

⁸ See R. POSNER, *supra* note 7, at 7, 20 n.2, 43-45, 137-43, 183 (applying law and economics analysis to criminal and family law).

⁹ See, e.g., R. ABEL, *AMERICAN LAWYERS* 143 (1989) (noting that "[t]he suspicion that professional associations promulgate ethical rules more to legitimate themselves in the eyes of the public than to engage in effective regulation is strengthened by the inadequacy of enforcement mechanisms"); Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 667 (1981) (noting that "the principal symbolic function of rules of professional conduct, clearly, is legitimation"). For a discussion of the uses of ethical codes in various fields see *infra* notes 51-72 and accompanying text.

¹⁰ See R. ABEL, *supra* note 9, at 247 (stating that lawyers "will never increase public respect through conspicuous acts of altruism or sporadic crackdowns on ambulance chasing"); Abel, *supra* note 9, at 688 (noting that "the legal profession has deliberately sought to foster [client] dependence by monopolizing expertise").

legal thought become a crucial intellectual imperative at this point, but the critique of normativity may help bring about a recognition of the way in which complacent and self-satisfied normative reasoning obscures important political and social issues.

We cannot, and probably would not, wish to do away with normativity entirely, any more than we could do away with deductive case analysis, or deny that law has an empirical dimension. Yet the notion that law is normative thought turns out, upon reflection, to be just as simplistic and misleading as those other conceptions of law exposed by earlier generations of critics. The issue, then, is what role is left for normativity? To this point, the critique has focused on normativity's nature and inner structure.¹¹ Scholars writing in this vein systematically have been showing the circularity, solipsism, and self-referential quality of normative thought and discourse. My purpose is to focus on a different dimension—normativity's uses. For I believe that, despite the shortcomings other scholars have brought to light, we will not rein in normative discourse until we understand how we use it and what hold it exerts on us. Just as sociologists of knowledge made empirical science its own object of study,¹² we need to put normativity under the glass.

I begin this task in Part I, which explores the uses of normativity in legal discourse, ordinary life, and in the professions. My method is empirical and discursive. Much of what I have to say may seem strange to ears accustomed to the sonorous phrases that have been our stock in trade. Scientists said much the same about Kuhn.¹³ Yet, if normative discourse is at times reflexive, disempowering, or the servant of little-understood impulses, then it is essential that we

¹¹ See, e.g., Schlag, "Le Hors de Texte," *supra* note 6, at 1659 (arguing that the pragmatic tradition of American legal thought has found it better to go outside text and to rely on "the good judgment of the pragmatist" to solve difficulties); Schlag, *Normative and Nowhere to Go*, *supra* note 4, at 180-81 (criticizing the authoritarian and self-actualizing effects of the form of normative discourse); Letter, *supra* note 3, at 2 (noting that the critique of normative discourse lies at the intersection of several areas of emerging scholarship).

¹² See, e.g., T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 7 (2d ed. 1970) (outlining how new theories are assimilated into scientific fields).

¹³ See W. BROAD & N. WADE, *BETRAYERS OF THE TRUTH* 134-42 (1982) (tracing historical resistance to new thought in science); Francione, *Experimentation and the Marketplace Theory of the First Amendment*, 136 U. PA. L. REV. 417, 503 (1987) (noting, "as Professor Kuhn and others have shown, the primary source of opposition to fundamental changes in scientific thinking has been from *scientists* who have defended the prevailing paradigms"); Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE* 91, 93 (I. Lakatos & A. Musgrave eds. 1970) (resisting "Kuhnian" thought).

begin to understand how this is so. By its nature, any critique of "normal science"¹⁴ will seem disconcerting. Yet, once the paradigm changes, the critique's observations come to seem commonplace and true.¹⁵ Part I traces the uses of normative analysis in three related areas of life.

Part II then addresses the questions: What would replace normative legal thought? Would not law without normativity lose its aspirational quality, perhaps decline into positivism? And what about normativity's role in facilitating social reform? What would we do if we could not condemn, kindle conscience, exhort, and rally behind such normative banners as freedom, justice, and equal rights? Part II concludes that the critique of normativity places the reformer in no worse position than he or she occupied before, and is no more threatening to the cause of social transformation than earlier critiques of law-as-logic or law-as-empirical-science.

I. THE FUNCTIONS OF NORMATIVE DISCOURSE

Normative discourse serves many functions, including a number which many of us would be less than quick to acknowledge. There are functions associated with: (1) the *indeterminacy* of normative discourse; (2) the *performative* quality of much normative talk; (3) the *framing* or *construction* of certain problems; and (4) the *emotional* quality of normative speech. There are, of course, infinitely many ways normative discourse may be categorized. My categories are not hermetic; many of them overlap. Finally, each of the functions I identify imposes a cost, an unacknowledged downside. Part II addresses the question of whether there is a proper or "good" role for normativity that avoids these costs, namely a role in promoting social reform.

¹⁴ The term is Kuhn's, who defined "normal science" as research based on "achievements that some particular scientific community acknowledges for a time as supplying the foundation for its further practice." T. KUHN, *supra* note 12, at 10. Kuhn was concerned with the way in which this common understanding changed, hence the title of his book, *The Structure of Scientific Revolutions*.

¹⁵ Kuhn defines paradigms as works that qualify as normal science and yet are sufficiently open-ended to permit further research; they "provide models from which spring particular coherent traditions of scientific research." *Id.*

A. *Functions Associated with the Indeterminacy of Normative Discourse*

The first set of functions I shall describe stems from normativity's open-textured nature, or indeterminacy. It is almost commonplace that questions about fairness, rightness, and justice rarely have a single answer. We are said to have a "mixed" ethical system, one in which different approaches to normative analysis are all legitimate.¹⁶ Thus, a decision to terminate life-saving medical treatment for an aged patient may be defensible under act utility, questionable under rule utility, and arguably wrong under deontological principles,¹⁷ such as respect for life. In law, every first-year student learns about the many "policy" arguments that can be made for or against a particular result. (Students are familiar with reasoning such as: Jones is the best cost-avoider, so liability should be placed on him; Smith should not be allowed to get away with X because this would constitute unjust enrichment; Tidwiddle must not be allowed to do Y since this would violate Z's vested rights, and so on.)

Even within a single ethical principle or context, it is often possible to argue for two or more outcomes. Smokers argue that they have a right to smoke; nonsmokers that they have a right to a smoke-free environment.¹⁸ Similarly, conservatives argue that affirmative action violates the principle of equal treatment and is unfair to innocent whites.¹⁹ Liberals reply that it is a reasonable response to past injustice and necessary to assure future broad democratic participation.²⁰ By altering the time frame or number

¹⁶ See, e.g., M. SHAPIRO & R. SPECE, CASES, MATERIALS AND PROBLEMS ON BIOETHICS AND LAW 72-92 (1981) (outlining various ethical theories and their application to bioethics).

¹⁷ See *id.* at 83-92 (differentiating among these approaches and detailing further variations within each ethical theory).

¹⁸ Delegates from 22 countries recently called for the U.N. to recognize a human right to smoke. See *Smokers Light Fight for Rights*, Denver Post, Oct. 27, 1990, at 2-A, col. 1 (reporting the argument that "[s]moking is a human right and should be respected according to the Declaration of Human Rights of the United Nations").

¹⁹ See, e.g., L. GRAGLIA, DISASTER BY DECREE 17 (1976) (arguing that the Supreme Court, rather than the Constitution, imposed compulsory integration, and did so improperly); Steele, *Blacks Deserve 'Complete Fairness,' Not 'Special Entitlements Based on Color'*, Chron. Higher Educ., Nov. 7, 1990, at B-2, col. 1 (asserting that entitlements are implemented to appease white guilt and serve only to prolong "hurt" to the black community).

²⁰ See, e.g., Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 622 (1977) (arguing that affirmative action programs are not unfair to white males and that they rest on the "view that it is unfair to continue the present set of unjust . . . institutions that comprise social reality").

of factors deemed relevant, one can change the outcome of virtually every ethical inquiry.

The effectiveness of school vouchers is just one example of such an inquiry. School voucher programs are intended to provide parents and their children with a choice as to what kind of school the children may attend, public or private. Thus, if certain parents wish to send their child to a private school, but do not have the means to do so themselves, the school voucher program extends to these parents some form of government assistance (such as tax credits or direct grants) to enable them to pay the private school tuition. By creating competition among schools for students, the advocates of the vouchers program argue, all schools, especially public schools, would be forced to upgrade the quality of instruction in order to retain and attract students in this new "marketplace." Proponents contend that the competitive aspect of the voucher system would therefore benefit all students, whether they attend public or private schools. While school vouchers, on their face, provide everyone with the same benefit and may make the market in schools more competitive,²¹ vouchers have greater marginal utility for middle- and upper-income families and are thus unfair. Furthermore, they may increase racial isolation in inner-city schools.²²

Normative reasoning, then seems just as manipulable and indeterminate as the other types of reasoning which have drawn fire from earlier critics. This quality permits normativity to serve a variety of functions, including striking a deal with the future, rationalizing what one has already done, and self-deception.

1. Striking a Deal with the Future

As Søren Kierkegaard has pointed out, we are doomed to lead life forward but to understand it only in reverse.²³ We act today

²¹ Conservatives and some liberals favor school vouchers for this reason. On the voucher debate generally, see Olivas, *Information Access Inequities: A Fatal Flaw in Educational Voucher Plans*, 10 J.L. & EDUC. 441 (1981).

²² Middle- or upper-income families can send their children to private schools by simply writing a check for the difference, something that low-income parents cannot do. See *id.* at 448 (noting that information differentials heighten this effect).

²³ See 1 SÖREN KIERKEGAARD'S JOURNALS AND PAPERS 450 (H. Hong & E. Hong eds. 1967). The quotation entered the English language earlier and in a slightly different form. In 1905, Höfding wrote: "But, as a Danish thinker, Søren Kierkegaard, has said, we live forward, but we understand backward . . . Only when life is closed can it be thoroughly understood. This is our tragico-comical situation."

because we must. Yet we are always afflicted with doubt. We know judgment can only come later. Will it be kind or harsh? We cannot be sure: Even famous judges have cases that mar their reputations. Holmes wrote *Buck v. Bell*²⁴ and Taney wrote *Dred Scott v. Sandford*.²⁵ Recently retired Justice Lewis Powell declared that *Bowers v. Hardwick*²⁶ was his greatest mistake.²⁷

The scroll of history turns slowly. All of us have only a thin space on which to write. Frequently, we fill that space with anxious writing aimed at our biographer or obituarist. The writing says: "Do not condemn me; *this* is what I thought I was doing; this is the way you must see me." This writing, highly normative in form, is our attempt to influence those who will judge us in the future, to tell them how we saw our act, how we saw our life. It is our attempt to do the impossible, to bind judgment before it can be made. It is our effort to strike a deal with the future, to say: "Do not blame me; I was a good person."

Imagine two examples taken from ordinary life and law. In the first, a creative artist is thinking of abandoning his wife and family in order to pursue his art. He finds family life suffocating; he believes his talent will flourish only if he strikes out on his own. Yet, if he leaves, his family will suffer. Furthermore, even if the

Höfdding, *A Philosophical Confession*, 2 J. PHIL. PSYCHOLOGY & SCI. METHODS 85, 86 (1905). William James learned of the Kierkegaard observation from Höfdding. James said: "In Professor Höfdding's . . . article . . . he quotes a saying of Kirkegaard's to the effect that we live forwards, but we understand backwards Radical empiricism alone insists on understanding forwards also, and refuses to substitute static concepts of the understanding for transitions in our moving life." W. JAMES, *ESSAYS IN RADICAL EMPIRICISM* 238 (1922).

²⁴ 274 U.S. 200 (1927). In *Buck*, the Court upheld an order sterilizing Carrie Buck, a moderately retarded woman whose mother was apparently also retarded. The opinion devotes scant attention to the woman's interest in procreational autonomy and is devoid of discussion of less restrictive alternatives (such as contraception, education, or careful surveillance). It also makes over-drawn analogies to the military draft and the state power to order vaccinations in time of epidemic. *See id.* at 207. The opinion has been much criticized. *See, e.g.*, S. GOULD, *THE MISMEASURE OF MAN* 335-36 (1981) (relating Carrie Buck's personal realization that she had been sterilized).

²⁵ 60 U.S. 393 (1856). The Court in *Dred Scott* held that a runaway slave's temporary residence in Illinois, a free state, did not render him a free man. Unlike Native Americans, Taney wrote, blacks were considered, at the time the Constitution was written, "a subordinate and inferior class of beings" who had no rights or privileges except those whites chose to give them. *Id.* at 404-05.

²⁶ 478 U.S. 186 (1986).

²⁷ *See* Agneshwar, *Ex-Justice Says He May Have Been Wrong*, Nat'l L.J., Nov. 5, 1990, at 3, col. 1; Marcus, *Powell Regrets Backing Sodomy Law*, Wash. Post, Oct. 26, 1990, at A3, col. 1.

artist does strike out on his own, his art may turn out to be banal. It is a gamble. He may not win the forgiveness we afford great artists who lived unconventionally, who took from others without giving in return—all for the sake of their art. His children may hate him, may refuse to speak with him again. Imagine the internal dialogue of the artist on the day he decides to leave, the conversation he might have with a close friend, or imagine what he would enter into his diary. Is there any doubt it would be liberally sprinkled with terms like “higher calling,” “duty to my art,” “responsibility to myself and to society,” and the like? It is not simply that the artist is trying to find the right thing to do (although he may be doing that as well).²⁸ Rather, he is trying to dictate to the future what it must think of his action. He is begging it to see his abandonment as he sees it today. But of course he cannot bind the future—it will make its own judgment.

Imagine a second example. An eminent nineteenth century judge is writing an opinion.²⁹ The case concerns a runaway slave. The judge must either find for the slave, or for the master. There is precedent for either course of action. Nothing in the current legal understanding makes clear what the judge’s decision must be. But that may change. In a hundred years, history may denounce the judge as a monster.³⁰ The judge has little way of knowing. He must guess. Can anyone doubt that the judge’s opinion will be lengthy and full of detail, full of pleas to the future: “You must understand me, this is how I viewed myself as acting. I wish the law were otherwise, I wish the legislature would . . . but there is nothing I can do.”³¹

²⁸ Compare Hamlet’s soliloquy, see W. SHAKESPEARE, *HAMLET, PRINCE OF DENMARK* act III, sc. 1 (1602), with the internal struggles of James Joyce’s protagonist over whether to pray for his dying mother, see J. JOYCE, *PORTRAIT OF THE ARTIST AS A YOUNG MAN* (Penguin ed. 1977); J. JOYCE, *ULYSSES* (Random corrected ed. 1986). The artist had rejected religion and conventional values in order to lead the life of a serious artist. Yet refusal of his mother’s request troubled him deeply.

²⁹ See *supra* note 25 and accompanying text (discussing *Dred Scott v. Sandford*); see also Delgado & Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?* (forthcoming 69 TEX. L. REV. (1991)).

³⁰ See R. COVER, *JUSTICE ACCUSED* 238-56 (1975) (describing conflicts between moral and formal demands on judges during the slavery era and citing four such judges who struggled with their moral beliefs in their role as judges, constrained by precedent and the status of the law); Delgado & Stefancic, *supra* note 29 (discussing cases in which history has turned against the judge).

³¹ Both *Dred Scott* and *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (upholding separate-but-equal doctrine), show some of these signs of the author’s internal strain. Both are lengthy and overwrought. Both opinions contain normative pleas and

In each of these examples, the individual has an inkling that history may not be kind, and so composes a message for posterity: "I was not callous, a hedonist, a moral coward. Rather, I was following this or that *other* principle. Please ignore that my children were reduced to poverty, that I condoned slavery. Please understand me in this other light: I was a modest, lawful, obedient, noble, etc., man or woman."

Normative talk, then, is often an attempt to do the impossible: to impose an interpretation, a narrative, on something the full understanding of which can only come later. We are like the entombed Pharaohs who had their scribes bury them with pieces of parchment with the pathetic words, "Here lies a good man."³²

2. Rationalizing for Today's Audience What One Has Just Done

As many have remarked, religion and other normative activities increase during times of social stress. Persons who fear history's judgment increase the normativity of their discourse. The same is also true of those who fear today's judgment. *Their* response may take the form of rationalization, either to others or to themselves.

Judges write on a field of pain and death.³³ So do many others who have power over other human beings. This reality is itself painful. We do not like to confront that we are, in fact, hurting others, and that the pain we inflict is a matter of choice; it could have been otherwise.³⁴ And so we make our action seem compelled, as though we could have done no other. Normative discourse is perfect for this function. Consider, for example, the "balancing" test that the Supreme Court applies when the rights of *A* conflict with the rights of *B*, or with various sorts of state interest. In *Sherbert v. Verner*,³⁵ for example, the Supreme Court was confronted with a Seventh Day Adventist who had been fired as a

reminders that "we-could-have-done-no-other." See, e.g., *Plessy*, 163 U.S. at 549 (demonstrating *a fortiori* reasoning); *id.* at 551 (discussing legislation as "powerless to eradicate . . . instincts"); *Dred Scott*, 60 U.S. at 401, 403-15, 419, 427, 431, 451-53.

³² See also *infra* notes 40-47 and accompanying text (concerning the performative quality of normative discourse).

³³ See Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) [hereinafter Cover, *Violence*].

³⁴ See Delgado & Stefancic, *supra* note 29.

³⁵ 374 U.S. 398 (1963). *Verner* is often given as an example of first amendment "balancing." See L. TRIBE, *supra* note 2, at 789-94, 977-86, 1037-39, 1251-55 (describing balancing in other areas of constitutional analysis).

result of her refusal to work on Sunday. At issue was whether that refusal disqualified her from receiving unemployment insurance. The Court purported to balance her interest in practicing her religion against the state's interest in compelling work and avoiding fraud in the operation of its unemployment insurance scheme. Finding that South Carolina's refusal to accommodate Ms. Verner's religion imposed a serious burden without any compelling counter-vailing state interest, the Court declared South Carolina's action unconstitutional.³⁶

The deployment of such mechanical metaphors as balancing shows what is at stake in decisions such as *Verner*. Either decision will injure someone; the judge must *choose*.³⁷ The notion that our action is compelled, because we have placed both values in a balance and read the result on a scale, is simply a convenient post-hoc rationalization, a way of avoiding responsibility. This is not to say that our choices are not real: What we do makes a great deal of difference. It is the edifice of normativity that is unreal, that obscures the nature of our actions. Imagine a child asked to choose between two toys. The child looks first at one, then the other. Then he looks back again. He examines each, talks to himself. Finally, he chooses one of the toys. Is it true to say that the child has *balanced* one toy against the other? Of course not. Balancing is only the term we apply after the fact to describe what has been done.³⁸ We assign the things their weights, and then pretend that it is the scale that gives us the information.

3. Self-deception

Sometimes legal (and other) actors experience personal anxiety over what they are about to do. Normativity is a perfect vehicle for stilling this anxiety. It hides the person of the judge, who can reason that the decision was compelled by some principle outside

³⁶ *Verner*, 374 U.S. at 403-04.

³⁷ See Delgado, *supra* note 29 (describing inevitability of choice).

³⁸ I owe this example and that of the "hidden judge," *infra* text accompanying note 39, to a conversation with my colleague Pierre Schlag. Many others have pointed out that judges are less neutral and objective than we like to pretend. See, e.g., C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) (arguing that judges are not neutral but are shaped by gender, race, and class); Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982) (same); see also Delgado, *Campus Anti-Racism Rules: Constitutional Narratives in Collision*, 85 NW. U.L. REV. 343 (1991) (describing inevitability of choice in resolving controversies that sit astride fault lines in our moral-ethical systems).

himself or herself. "I deeply regret that I cannot help the noble civil disobedient, but this other universal principle (The Rule of Law, etc.) must govern." Normativity arises *out* of our experiences, not the other way around. But we must preserve the fiction that normative principles are neutral authorities we consult, humbly and objectively. If anyone doubts that normativity arises out of one's experiences, rather than the other way around, ask: How many times do you see someone change their mind on a fundamental question of "normative" judgment—for example, abortion?³⁹ Yet, if normativity were a matter of argument, of making simple deductions from various principles, this ought to happen fairly frequently.

B. *Functions Associated with the Performative Quality
of Normative Discourse*

The ability of normative assertion to change the way we perceive reality was demonstrated by Stanley Milgram in an experiment now considered a classic.⁴⁰ Milgram, a psychologist at Yale University, told volunteers that they would be participating in an experiment on learning. In fact, the purpose of the experiment was to see whether the subjects could be induced to violate their ethical norms and inhibitions. Each subject was seated in front of a console with a calibrated dial, and told that by turning the dial they would administer electric shocks to a "learner" seated in another room. The subjects were told in no circumstances to turn this dial beyond a point marked with red—doing so could administer a fatal dose of electricity to the other subject. After the rules were explained, a second investigator, wearing a white coat and an authoritative demeanor, entered the room and directed the subjects to turn the dials to particular settings. Each time, a trained actor in the other room emitted a realistic groan or exclamation of pain. The investigator directed the subjects to turn the dial to higher and higher settings and eventually to exceed the point marked in red.

³⁹ The cases of public figures who change their minds or position on this issue are so rare that, when such a change does occur, it is reported in the news. See, e.g., Gunnison & Roberts, *Wilson Picks Senate Successor*, San Francisco Chron., Jan. 3, 1991, at A-1, col. 1 (describing public reaction to the selection of John Seymour, a man who switched his position from anti-abortion to pro-choice, to fill the U.S. Senate spot opened by Pete Wilson's move to the governor's post in California); *In Shift, Nunn Backs Right to Abortion in Most Cases*, N.Y. Times, Sept. 5, 1990, at A20, col. 1 (highlighting the softening of Senator Nunn's stand on abortion from totally illegal to illegal only after the fetus has attained viability).

⁴⁰ See S. MILGRAM, *OBEDIENCE TO AUTHORITY* (1974).

A high percentage of the subjects cooperated with the experiment, even administering what they thought might be a lethal dose of electricity. Afterward, many subjects confessed to doubts about what they were doing, but said they went along with the experiment because, "If he (meaning the high-authority doctor in charge) said it was all right, then it must be so." Apparently, the investigator's assurances that administering pain was permissible and part of the experiment actually changed the way they saw their behavior.⁴¹

Ordinary life is full of similar examples in which the mere pronouncement of something as normatively good or bad changes our perception of it. The decision in *Brown v. Board of Education*⁴² changed the way we thought about minorities. Reagan and Reaganomics changed things back again.⁴³ During war, we demonize our enemies, and thereafter actually see them as grotesque, evil and crafty monsters deserving of their fate on the battlefield.⁴⁴ Later, during peacetime, they may become our staunch allies once again.

Derrick Bell and other Critical Race theorists have been pointing out the way in which standard, liberal-coined civil rights law injures the chances of people of color and solidifies racism.⁴⁵ According to these writers, one function of our broad system of race-remedies law is to free society of guilt. Although the remedies are ineffective, they enable members of the majority group to point to the array of civil rights statutes and case law which ostensibly assure fair and equal treatment in schools, housing, jobs, and many other areas of life. With all these elaborate antidiscrimination laws on the books, if black people are still poor and unhappy—well, what can be done?

⁴¹ See *id.* at 65-66 (documenting a subject's continued participation in the Milgram experiments when instructed to do so by an authoritative figure, despite the subject's desire to stop); see also Milgram, *Some Conditions of Obedience to Authority*, 18 HUM. REL. 57, 67 (1965) (same).

⁴² 347 U.S. 483 (1954).

⁴³ Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135 n.12 (1982) (noting that a "black dean at Harvard University attributed the recent upsurge in racist slurs and acts to a change in national mood which has made such acts 'once and again respectable'"). For a discussion of Reagan's program and its effect on the racial climate, see Delgado, *Inequality "From the Top,"* 32 UCLA L. REV. 100 (1984).

⁴⁴ See, e.g., P. IRONS, JUSTICE AT WAR 5-9 (1983) (describing the reaction by the U.S. to the Japanese bombing of Pearl Harbor and the subsequent call to place Japanese-Americans in "relocation centers").

⁴⁵ See D. BELL, AND WE ARE NOT SAVED 51-74 (1987); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

The law's condemnation of racism thus enables us to blame the victim, praise ourselves for our liberality, and thereby deepen the dilemma of people of color.⁴⁶

Repeated assertion has also proved able to change our notions of the proper role of the judiciary. In previous times, courts, such as the Warren Court, undertook to remedy poverty and injustice. This came to be seen as a proper role for judges and lawyers. Recently, conservatives have been asserting the "quieter" virtues of judicial restraint and strict construction.⁴⁷ They have prevailed not so much because the argument for judicial quietism is so compelling, but because they have stated it so often, with so much authority and with the power to make it so. Today, most of us see the rare case of an activist judge as quaint, or aberrational, and nod (approvingly?) when we see judicial abstention.

Professional societies engage in behavior of this performative sort in an effort to get the public to accept the profession's view of what responsible behavior is, or to see another profession (e.g., lawyers) as responsible for the problems associated with the first profession (e.g., medical malpractice). More instances of this sort are discussed in the next section.

C. *Functions Associated with Normative Framing*

Although issues associated with the indeterminacy and performative quality of normative discourse should give pause, an even more striking set of features arises in connection with *issue-framing*.

⁴⁶ See D. BELL, *supra* note 45, at 52-53; Freeman, *supra* note 45, at 1050-57; see also Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923, 924 (1988) (arguing that the law creates apparent and occasional victories for minorities which rarely result in minorities' actually obtaining much benefit). Liberals are not the only ones to deploy deflection strategies. Reaganomics effected a huge transfer of wealth from the working and middle class to the rich. As a result, many families had to send wives to work and children to day-care centers. When this predictably caused an increase in divorce, juvenile delinquency, and school dropout, conservatives *blamed* those affected as immoral, neatly taking our eye off causation.

⁴⁷ See, e.g., R. BORK, *THE TEMPTING OF AMERICA* 11 (1990) (criticizing activist judges for their tendency to "legislate policy from the bench"); R. BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW* 11 (1984) (stating that "the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge").

1. Narrowing the Range of What is Considered

Normative discourse, as I have pointed out, is notably open-ended or indeterminate.⁴⁸ One source of this indeterminacy is the high degree of dependence normative arguments and conclusions have on *context*.⁴⁹ Add or subtract one fact, broaden or narrow the time frame slightly and one's normative intuition will often swing to the opposite conclusion. Imagine, for example, a youth charged with a serious crime; the issue is how serious the punishment we should impose. The case may be close—we have no strong intuition one way or the other. Add one fact, however—the youth went disco dancing moments after the crime. Our intuition changes in favor of severe punishment. Add a different fact—the youth was abused as a child, or is mentally retarded. We now begin to think leniency may be in order.⁵⁰

a. *The Preemptive Strike.*

A prime function of ethical discourse is to confine intuition by either broadening or narrowing the range of what may be considered. Sometimes this takes the form of preemptive strikes. For example, in the early 1970s, the public became increasingly concerned over developments in the field of molecular biology.⁵¹ Columnists and commentators were warning that recombinant DNA techniques being pioneered in the nation's research laboratories could be used to create new life forms previously unknown in nature. Critics were beginning to raise fears that harmful microorganisms might escape and multiply rapidly.⁵² Others were

⁴⁸ See *supra* notes 16-22 and accompanying text.

⁴⁹ See Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1, 10-12 (1991).

⁵⁰ The "call to context"—to pay attention to the particularized fashion in which experience comes to us—is associated with various modernist theories, including cls and feminist legal thought. See generally Delgado, *Mindset and Metaphor*, *supra* note 6, at 1873 (urging close attention to be paid to context); Minow & Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990); *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (providing a variety of viewpoints on the contribution of story-telling methods to legal literature).

⁵¹ For discussion of the controversy over recombinant DNA, see *Biotechnology and the Law: Recombinant DNA and the Control of Scientific Research*, 51 S. CAL. L. REV. 969 (1978).

⁵² See, e.g., SENATE SUBCOMM. ON HEALTH & SCIENTIFIC RESEARCH, 95TH CONG., 1ST SESS., BIOMEDICAL RESEARCH AND THE PUBLIC (Comm. Print 1977) (discussing the DNA issue); Bennet & Gurin, *Science that Frightens Scientists: The Great Debate over DNA*, ATLANTIC MONTHLY, Feb. 1977, at 43, 45 (describing one scientist's concern

questioning the reconstitutive nature of recombinant engineering, asking whether society was ready to permit scientists to alter genetic codes—some used the term “playing God.”⁵³

The molecular biologists responded by holding a summit meeting in Asilomar, California. On the heels of this meeting, the group of scientists declared a moratorium on recombinant DNA research until ethical standards could be promulgated.⁵⁴ The debate about the ethics of DNA research quickly died down. Few of the more searching questions the critics had been raising were addressed by the new standards, which mainly concerned the physical safety of the laboratories where the research was to be carried out.⁵⁵ But the meeting and new standards enabled scientists to communicate to the public that the profession cared about their well-being; it had taken responsibility and was in charge.⁵⁶ Moreover, the new code *defined* what was meant by scientific responsibility in this area. Thereafter, any accusation of unethical research could be met with the reply, “But I am complying with my profession’s code: That’s what we *mean* by being ethical.”

Ethical codes and mechanisms need not be promulgated in times of crisis to serve this context-narrowing function admirably. Many legal and ethical rules routinely atomize disputes and relationships, taking our eyes off broader issues of power and social relations. For example, new reproductive technologies, such as surrogate motherhood, in vitro fertilization, and egg transfer, if seen in a narrow frame, may appear innocuous, or indeed, helpful to women. After all, these technologies do provide the means by which persons desiring a particular type of parenthood may achieve it. Moreover, these technologies enable infertile couples to have children when they otherwise would have to adopt or resort to artificial insemination.⁵⁷ Seen in this light, the technologies

with “*E. coli* [bacteria], containing SV40 genes, as a kind of biological time bomb”).

⁵³ See SENATE SUBCOMM. ON HEALTH & SCIENTIFIC RESEARCH, *supra* note 52, at 44-45 (remarks of Robert Sinsheimer); *id.* at 89 (remarks of Jonathan King); Gumpert, *Progress or Peril? Gene Transplants Stir Communities’ Fears; Scientists Are Split*, Wall St. J., Sept. 28, 1976, at 24, col. 1.

⁵⁴ See Miller, *Lessons from Asilomar*, SCI. NEWS, Feb. 23, 1985, at 122.

⁵⁵ The development of the guidelines, a version of which were adopted by the federal government, is described in M. SHAPIRO & R. SPECE, *supra* note 16, at 105-12.

⁵⁶ See *Biotechnology: Public Confidence Emphasized as Key to any Changes in APHIS’ Authority*, BNA Environment Daily, Oct. 3, 1990, available in WESTLAW, BNA-end database (showing concern among scientists for public well-being 20 years later).

⁵⁷ For development of this argument, see Ikemoto, *Providing Protection for Collaborative Noncoital Reproduction: Surrogate Motherhood and Other New Procreative*

simply extend personal liberty and choice. The only challenge is to assure informed consent on all parts, to make sure the doctor is not forcing an expensive, dangerous, or unwanted procedure on the contracting woman, and to assure that reproductive donors or sellers enjoy freedom of contract.⁵⁸ This micro-analytical approach in which consent or freedom of contract are the only issues to be considered neatly deflects our attention from broader questions of power-shifting. New technologies are almost always captured by those in power; they invariably sharpen the differences in resources and control between the "haves" and the "have-nots."⁵⁹ Reproductive technologies are likely to do so even more than other types of technology, since they are developed and distributed by a group (the medical profession) that is already empowered and has high prestige, and then distributed mainly to patients (a vulnerable group) who are largely female and infertile.⁶⁰ Based on past experience, then, reproductive technologies are likely to be used further to oppress and disadvantage women. Framing the issue in terms of micro-ethics—*informed consent and freedom of contract*—deflects our attention away from these other issues entirely.⁶¹

Preemptive strikes and issue-framing are everywhere. Human subject protection committees on university campuses operate under federal guidelines that define "risk" narrowly; most committees consider their work done when they are satisfied that the investigator's consent form is complete.⁶² Federal animal-protection guidelines, enacted in response to animal-rights supporters' charges of mass, wanton cruelty in research facilities,⁶³ are con-

Technologies, and the Right of Intimate Association, 40 RUTGERS L. REV. 1273 (1988).

⁵⁸ See *id.* at 1289-90, 1304-07.

⁵⁹ See Wikler, *Society's Response to the New Reproductive Technologies: The Feminist Perspectives*, 59 S. CAL. L. REV. 1043 (1986); see also Weisbard, *The Role of Philosophers in the Public Policy Process: A View from the President's Commission*, 97 ETHICS 776, 780-81 (1987) (noting that normative expertise mystified analysis of social problems by introducing masses of detail and technical arguments; notably, the Commission included few women or minorities).

⁶⁰ See Wikler, *supra* note 59, at 1054-55.

⁶¹ See Weisbard, *supra* note 59, at 780-81 (discussing the atomization of conflicts); Wikler, *supra* note 59, at 1050-53 (same).

⁶² For a discussion of the current federal approach to human experimentation and its deficiencies, see Delgado & Leskovic, *Informed Consent in Human Experimentation: Bridging the Gap Between Ethical Thought and Current Practice*, 34 UCLA L. REV. 67, 70-80, 92-96 (1986).

⁶³ See Francione, *supra* note 13, at 428-29; Metz, *Suffer the Little Animals: When Does Scientific Research Become Oppression?*, STUDENT LAW., Oct. 1986, at 12. For the

cerned almost exclusively with the use of anesthetics, the size of cages, and frequency of cleaning.⁶⁴ Practically every group engaged in questionable activity has adopted, and scrupulously follows, an ethical code.⁶⁵ Casinos and take-over artists have their codes of ethics.⁶⁶ Military academies teach the ethics of war.⁶⁷ There is currently a boom in business ethics;⁶⁸ one defense contractor was recently reported to have thirty-nine ethicists on its payroll.⁶⁹ There are ethics of pollution.⁷⁰ Beer and alcohol

seminal work on the subject, see P. SINGER, *ANIMAL LIBERATION* (1975). See also Chase, *Animal Rights: An Interdisciplinary, Selective Bibliography*, 82 LAW LIBR. J. 359 (1990) (providing list of sources relating to animal rights).

⁶⁴ See Animal Welfare Act, 7 U.S.C. §§ 2131-2157 (1988).

⁶⁵ As medicine, for example, has moved into ethically troubling areas, the field of bioethics has boomed. Academic philosophers, theologians, and others who profess normative expertise have testified as expert witnesses in trials (e.g., concerning organ transplants for dying patients). They have also appeared on panels and commissions having to do with human experimentation, the ethics of gene transfer and the like. Developments in these areas have virtually constituted a public jobs program for philosophers and other normative specialists. See, e.g., Delgado & McAllen, *The Moralists as Expert Witness*, 62 B.U.L. REV. 869 (1982) (exploring the role of the moral philosopher in the courtroom); Weisbard, *supra* note 59, at 779-81 (discussing philosophers as witnesses and advice-givers to other arms of government). For other areas where something similar has happened, see, for example, Brand, *Editor, Heal Thyself*, TIME, Dec. 11, 1983, at 89 (reporting the adoption of ethical codes among tabloid editors in the United Kingdom); *Morality for the Medical-Industrial Complex: A Code of Ethics for the Mass Marketing of Health Care*, 319 NEW ENG. J. MED. 1086 (1988) (discussing public relations code of ethics); *Stay Home, Deer Huggers*, Wis. St. J., Nov. 11, 1990, at 15-A, col. 2 (criticizing animal activists who trail hunters as being unethical because they violate anti-harassment norms); Movshovitz, *Bang! Slash! Crunch! Movie Audiences Love It*, Denver Post, Mar. 11, 1990, at D-1, col. 3 (reporting on movie industry ethics); Mahoney, *'PR' Pros Seek to Upgrade Their Image*, Denver Post, Feb. 15, 1990, at D-1, col. 2 (discussing public relations code of ethics); Zantow, *State's Stake in Trapping Provides Jobs, Pride*, Wis. St. J., Mar. 21, 1989, at 9-A, col. 1 (discussing trappers' educational courses); *Hunting Course on Target*, Wis. St. J., Sept. 26, 1988, at 5-A, col. 2 (reporting on hunters' ethics course a newspaper reader had recently completed).

⁶⁶ See, e.g., *Report Offers Ethical Values for Inclusion in Dealmaking*, PENSIONS & INVESTMENT AGE, Mar. 19, 1990, at 37 (commenting on Georgetown University report, *Ethical Considerations in Corporate Takeover*); *Traders to Get Ethics Class*, N.Y. Times, Apr. 11, 1990, at D-3, col. 1 (reporting that the Chicago Mercantile Exchange ordered its 2,500 members to take ethics class and that it had "been formulating this ethics program all along").

⁶⁷ See Weiss, *Biological Warfare Facility Debated*, SCI. NEWS, Feb. 13, 1988, at 100; Telephone interview with official at the Office of the Registrar, U.S. Air Force Academy, Colorado Springs, Colo. (Nov. 20, 1990).

⁶⁸ See, e.g., Koepp, *Fraud, Fraud, Fraud: The White-Collar Crime Wave Is Spurring a Determined Cleanup Operation*, TIME, Aug. 15, 1988, at 28; *Ethics Group Creates "Pulitzer" for Business*, Denver Post, Feb. 19, 1990, at C-1, col. 5; Magner, *Rash of Ethical Lapses Spurs Colleges to Study Their Moral Responsibilities*, Chron. Higher Educ., Feb. 1, 1989, at A-11, col. 5.

⁶⁹ See *Harper's Index*, HARPER'S MAG., June 1990, at 15.

manufacturers tout "responsible drinking."⁷¹ Even horoscopists and astrologers are said to have their codes of ethics. Recently, when it came to light that a President's wife consulted an astrologer in making up the President's schedule, the press was unable to obtain information on this approach to statecraft: The astrologer declined to be interviewed on the ground that it would violate her client's confidentiality and her own professional ethics.⁷²

b. *Co-opting and Redefining Others' Outrage*

A second way in which normative framing maintains current power relations is through co-opting and redefining others' outrage. Most social reform movements begin with a small group. The group needs support from wider society in order to flourish. Unless the group can persuade others that its cause is just—or in the larger group's self-interest—it will fail.⁷³ Normative discourse offers a potent weapon for resisting social reformers' claims. Ethics is always majoritarian. No powerful group ever declared its own habits and practices immoral, no conqueror ever examined the defeated peoples' science, art, physical appearance, etc., and pronounced them superior to its own.⁷⁴ Normative orderings always reflect the views of the powerful.⁷⁵ But this devaluation

⁷⁰ A complex of federal and state laws and rules govern the extent, type, and timing of discharges into the air or water. See W. ROGERS, ENVIRONMENTAL LAW: AIR AND WATER 1, 2 (1986).

⁷¹ See *Roll Out the Barrel—with Restraint*, Wis. St. J., Mar. 17, 1989, at 1-D, col. 2.

⁷² See Stein & Roberts, *Nancy's Astrologer Talks: S.F. Adviser Has Been Paid Since 1981*, San Francisco Chron., May 14, 1988, at 1, col. 3. Recently, a congressional pay-raise measure was termed the Ethics Reform Act of 1989. Saunders, *Now for the Pay Raise . . . uh, Ethics Bill*, Denver Post, Oct. 17, 1990, at 7B, col. 2.

⁷³ See Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-28 (1980) (recognizing that whites will act for black justice only when self-interest of former coincides with claims of latter group); Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 GEO. L.J. 1929, 1930-33 (1990) (noting the need for coalition).

⁷⁴ See, e.g., C. WEST, PROPHECY DELIVERANCE! 47, 55-60 (1988) (describing the persistence of white supremacy in modern discourse as a means of perpetuating racism); Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L.J. 1711, 1728-29 (1990).

⁷⁵ See sources cited *supra* notes 46-47 & 73; see also F. NIETZSCHE, GENEALOGY OF MORALS, *supra* note 4; F. NIETZSCHE, ZARATHUSTRA, *supra* note 4. If the powerful are really powerful, they will teach everyone that the rules are "objective," that is, do not emanate from them, but are in the nature of things. See West, *Relativism, Objectivity, and Law*, 99 YALE L.J. 1473, 1473 (1990) (discussing the argument in B. SMITH, CONTINGENCIES OF VALUE (1988) that "all objectivist theories of value . . . are irretrievably authoritarian").

need not be blatant—revolutionaries are bad, feminists and blacks are evil. Generalizations that broad would not be believed; they would be refuted too easily by daily experience. Instead, we narrow the frame of what may be considered a moral claim. Once we authoritatively decide that the only ethical issues are *A*, *B*, and *C*, someone who persists in demanding or condemning *D* can be portrayed as unprincipled—an extremist. In higher education, for example, departments and professional schools are assigned “targets”—numbers of women and minorities they should strive to have on the faculty. The numbers are based on percentages of degree holders in the applicant pool. For many administrators, these numbers come to define racial fairness. Someone who demands that the school hire beyond the target or use a different measure (such as the proportion of blacks in the state population), is seen as uneducated or utopian.⁷⁶ For an environmentalist, a factory that is polluting a river is an abomination. To the factory, however, the only thing that matters is following the rules related to the type, quantity, and time of the permitted discharge.⁷⁷ If the factory is in compliance with the relevant code of conduct, it is apt to see the environmentalist as an impossible person, someone who is never satisfied, a Luddite who hates technology and cares nothing about jobs and economic development.⁷⁸

Since ethical codification teaches excuses and narrow framing, it is often counter-ethical, at least compared to the alternative of strict liability—never do evil.⁷⁹ This leads to a final “framing” issue associated with normativity.

⁷⁶ Interview with Martha West, Affirmative Action Officer at the University of California at Davis (Mar. 1987).

⁷⁷ See Schlag, *Normative and Nowhere to Go*, *supra* note 4, at 188-89; *supra* notes 51-72 and accompanying text.

⁷⁸ See Schlag, *Normative and Nowhere to Go*, *supra* note 4, at 185; *supra* notes 54-55 and accompanying text; see also Delgado, *Our Better Natures: A Revisionist View of Joe Sax's Public-Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform* (forthcoming 45 VAND. L. REV. 1991) (concerning bureaucratization of environmental protection law).

⁷⁹ See Leff, *supra* note 4, at 1249 (noting that normativity is never on safe ground; nevertheless, we know certain things are evil).

4. The "Ratcheting Down" Effect

Not only do many professional codes frame ethicality narrowly, leaving out what might be thought to be most important, they often function affirmatively to encourage a sort of minimal-ethicality, according to which actors are rewarded for being as "minimally ethical" as possible. Students preparing to take the MPRE (Multi-state Professional Responsibility Exam) often conclude that the correct answer is almost always the third least ethical one.⁸⁰ The first answer is almost always wrong since it requires the lawyer to act like a saint. The fourth suffers a similar fate, but this time because it allows unbridled, self-seeking dishonesty or the exploitation of others. The correct answer is the third least ethical one, the one that neither requires the lawyer to act like a saint, nor a sinner, but something in between. This "ratcheting down" carries over into the real world, and into the setting of unspoken rules. Whenever ethics is reduced to a system of rules, one need not make choices, but may merely mechanically follow the rules. Rules also benefit the savvy and opportunistic. They will operate as close as possible to the rules' border, while the inexperienced or morally motivated will remain well inside.

D. *Functions Associated with the Affective Quality of Normative Discourse*

Normative speech feels good. In our society, the function of the priest is an exalted one.⁸¹ We feel virtuous and holy when we praise justice, exhort judges to be fair, encourage society to embrace community, fairness, and other virtues. It is *nice* to be nice—and it feels nice, too, to say so—over and over and over again.

But what is the cash value of all this priest-talk in the law reviews, in the classrooms of at least the "better" schools, and in the opinions of at least some judges? Are *normativos* better than other people? Are we better off for engaging in normative talk, either as speakers or listeners? Pierre Schlag, for example, has described normativity as a *zero*—as a vacuous, self-referential system of talk, all

⁸⁰ Telephone interview with an ex-student who is now clerking for a state Supreme Court (Sept. 1990).

⁸¹ Polls ranking "public confidence" in various professions often place priests and social workers near the top, lawyers and politicians near the bottom. See Kaplan, *What America Really Thinks About Lawyers and What Lawyers Can Do About It*, Nat'l L.J., Aug. 18, 1986, at S-2.

form and no substance, meaning nothing, and about itself.⁸² This description may be too generous. Normativity may be more than a harmless tic prevalent only in certain circles.

1. Permission to Ignore Suffering

The history of organized religion shows that intense immersion in at least certain types of normative system is no guarantee against cruelty, intolerance or superstition.⁸³ In modern times, social scientists have tried to find a correlation between religious belief and altruistic behavior. In most studies, the correlation is nonexistent or negative. In one study, seminary students were observed as they walked past a well-dressed man lying moaning on the sidewalk.⁸⁴ Most ignored the man, even though they had just heard a sermon about the Good Samaritan. The proportion who stopped to offer aid was lower than that of passersby in general. The researchers, commenting on this and other studies of religion and helping behavior, hypothesized that religious people feel less need to act because of a sense that they are "chosen" people.⁸⁵ I believe this anesthetizing effect extends beyond religion. We confront a starving beggar and immediately translate the concrete duty we feel into a normative (i.e., abstract) question. And once we see the beggar's demand in general, systemic terms, it is easy for us to pass him by without rendering aid.⁸⁶ Someone else, perhaps society (with my tax dollars), will take care of that problem.

Normativity thus enables us to ignore and smooth over the rough edges of our world, to tune out or redefine what would otherwise make a claim on us. In the legal system, the clearest

⁸² See Schlag, *Normative and Nowhere to Go*, *supra* note 4, at 183-91 (arguing that normativity is a self-referential closed system, devoid of content—except itself); Schlag, "Le Hors de Texte," *supra* note 6, at 1654-55 (observing that language and concepts can be manipulated to fit any form).

⁸³ See, e.g., H. KAMEN, *INQUISITION AND SOCIETY IN SPAIN IN THE SIXTEENTH AND SEVENTEENTH CENTURIES* (1985); A. MILLER, *The Crucible*, in *COLLECTED PLAYS* (1957) (demonstrating, throughout the play, that God was a source of justification for the Salem witch hunts).

⁸⁴ See Kohn, *Between God and Good, Research Shows Believers No More Likely to Love Their Neighbor Than Nonbelievers*, *San Francisco Chron. & Examiner*, July 8, 1990, *This World*, at 15 (summarizing various studies of rescue/helping behavior).

⁸⁵ See *id.*

⁸⁶ Compare sources cited *supra* notes 83-84 with Leff, *supra* note 4, at 1249 (discussing casualties inflicted in the Vietnam War, such as those attendant to the napalming of babies, notwithstanding the evil of such actions).

examples of this are found in cases where the Supreme Court has been faced with subsistence claims.

For example, in *Lindsey v. Normet*,⁸⁷ the Supreme Court considered a claim that housing is such a basic necessity that it could only be denied or subordinated when a state is able to show a "compelling interest." The Court summarily upheld Oregon's streamlined eviction procedure, rejecting in emphatic tones the idea that there is a constitutional right to shelter or that "the Constitution . . . provide[s] judicial remedies for every social and economic ill."⁸⁸ In *San Antonio Independent School District v. Rodriguez*,⁸⁹ the Court followed *Lindsey* in holding that Texas's unequal school finance scheme did not deny children in tax-poor districts the right to an education. Again, the Court responded by *shaming* the attorneys and litigants who had brought the novel claim. It declined to apply strict scrutiny, ridiculed the idea that money can be equated with a good education and held that the plaintiffs were complaining, at most, of a relative deprivation.⁹⁰ In *Dandridge v. Williams*,⁹¹ the Court also rejected, even more emphatically than it had before, the idea that subsistence—here, welfare—is a constitutional right. In *Dandridge*, a number of families challenged a state rule that provided a decreasing schedule of welfare support for each person beyond the initial beneficiary and a fixed increment for families larger than ten. The welfare recipients challenged these provisions as a violation of equal protection. A district court agreed with them, but the Supreme Court reversed, holding that the state's fee schedule, although it discriminated against large families, was a legitimate exercise of economic/social legislation and had to be sustained if it had any reasonable basis.⁹²

These cases are telling because they forced the judiciary to confront the harsh reality that our competitive free-market system creates losers as well as winners. What obligation do the winners have to the losers? The answer, so far has been "none." We owe the poor no legal obligation because the legislature did not think so; the poor are unreasonable; they are not poor enough; and money might not solve their problem anyway (you know how *they* are).

⁸⁷ 405 U.S. 56 (1972).

⁸⁸ *Id.* at 74.

⁸⁹ 411 U.S. 1 (1973).

⁹⁰ *See id.* at 19, 23-27, 28-32, 37.

⁹¹ 397 U.S. 471 (1970).

⁹² *See id.* at 484-87.

2. Justifying Cruelty Toward Others

Not only does normativity help us justify indifference to others' needs, but we sometimes use it to rationalize treatment of others that would otherwise be seen as injurious, if not downright cruel. As I pointed out earlier, those in a position to dictate norms rarely, if ever, see their own favorite forms of behavior as immoral.⁹³ Rather, we stigmatize the conduct of our enemies, people who are unlike us or do things we do not like, for example, drug-taking or congregating on street corners. Then, when we punish offenders from the other ("criminal") (sub-)culture, we are able to tell ourselves that imposing punishment is not only good for society, but good for the offender.⁹⁴ Judges write with blood,⁹⁵ but normativity is the filter that prevents us from seeing this. It focuses our attention on abstraction, when it is particularity and real-world detail that alone move us.⁹⁶

Even when we do not pronounce outgroups' behavior positively vicious, we may declare it lazy and indolent, so as to justify our own aggressive behavior. Warfaring nations, for example, often gain ascendancy over more peaceloving nations (e.g., Native Americans). The conquerors then decide it was their own spiritual, aesthetic, and ethical superiority that enabled them to prevail, not their superior weapons, numbers, or bloodthirst.⁹⁷ Often, they declare the conquered guilty of *waste*, of failure to use their own resources to the best advantage (e.g., by not clear-cutting the land), so that the takeover was a moral duty.⁹⁸

⁹³ See *supra* notes 73-79 and accompanying text.

⁹⁴ See, e.g., Morris, *Persons and Punishment*, 52 *MONIST* 475, 476 (1968) (arguing that retributivism is the only rationale for punishment that respects offenders, since it alone treats them as persons rather than as means to some further end).

⁹⁵ See Cover, *Violence*, *supra* note 33, at 1609-18 (presenting judges as "dealers" of pain and death).

⁹⁶ See Delgado, *supra* note 49, at 10-12; *supra* notes 38-39 and accompanying text.

⁹⁷ See Williams, *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 *ARIZ. L. REV.* 237, 243-44 (1989) (noting that legal discourse, in opposition to tribal sovereignty, maintained that "tribal Indians, by virtue of their radical divergence from the norms and values of white society regarding use of and entitlement to lands, could make no claims to possession or sovereignty over territories which they had not cultivated and which whites coveted").

⁹⁸ See *id.* at 244-47.

3. Setting Up the Listener: The Doe in the Headlights

Normativity not only anesthetizes powerful actors, making it easier for them to do their work, it can paralyze the rest of us, leading us to cooperate passively in our own mistreatment. The principal danger to human autonomy and worth today is large bureaucracies—corporations, Health Maintenance Organizations, mega-universities, and the like. Because of their own internal structures and needs, these organizations function best if they can treat the rest of us like numbers, according to routine.⁹⁹ Yet this must not appear to be so—we would revolt, would demand more personalized treatment, which would disrupt the routine. Bureaucracies thus adopt the discourse of normativity to make us think we are being treated with care and consideration when we are not. And they employ a host of smiling agents—publicists, insurance adjusters, account clerks, claims agents, and other “front” persons to talk soothing normativese with us. “We want, of course, to do what is *fair*. You must, however, acknowledge *your* responsibility in this situation. Surely you don’t think our HMO should grant every claim—we must *think of our other patients*.” Yet the script always ends up having been written by the Home Office. The insurance adjuster, it turns out, does not really care for us as persons.¹⁰⁰

If we enter into this numbing, but vaguely reassuring formal discourse, we will cause little trouble. But we will, from time to time, get a small jolt—end up blind-sided by the inexorable weight of the bureaucracy behind the adjuster. We are like the doe in the headlights, transfixed at the approaching automobile. Like the doe, we sometimes think we have been spared. The automobile swerves, the kind driver slows. The adjuster turns out to have a little discretion, which he or she exercises in our favor: The doctor will see us next month, after all. But the doe’s problem is not the car—it is the road. Another car will come along. Staring at the headlights prevents the doe from seeing that problem, just as entering into platitudinous, scripted discourse with the various insurance

⁹⁹ See Schlag, *Normative and Nowhere to Go*, *supra* note 4, at 185-86.

¹⁰⁰ See *id.* at 189. Examples are legion. See, e.g., UNIVERSITY OF COLORADO, CU BENEFITS 1991: WEAVING A PARTNERSHIP 4 (1991) (describing “case management”—a “service provided by an outside consultant in which your health benefits are monitored *to ensure proper utilization and to provide assistance to you*” (emphasis added)); *id.* at 5 (describing operation of the “deductible”—i.e., portion of bill the consumer *cannot* deduct and must pay herself).

adjusters of the world prevents us from appreciating our own dilemma.

4. The Special Role of the Good Law Schools: How to be in Cahoots

Have you ever wondered why normativity flourishes at the good law schools, why classroom discussion, endowed lectures, and faculty writing are full of high-sounding phrases: "social values," "balancing," "the conscience of the lawyer," "the pressing issues of our day," etc., etc., etc., while the *other* law schools cheerfully and unapologetically go about their business of turning out insurance adjusters, writers of wills, and performers of other more routine functions?¹⁰¹

In another setting, French criticalist Yves Dezalay offers a provocative reason.¹⁰² The good law schools are the conscience, the alter egos, of the big law firms which in turn are in league with *both* their clients *and* the government. Large, powerful law firms need government, need regulation—the more complex, the better. Without such regulation, their clients would have no need of their services. Consequently the good firms are intensely "public minded." They help draft legislation, lend their partners for tours of duty as governmental regulators, and engage in much lobbying—all in an effort to assure that social engineering and the "wise regulation of our economy" are carried out well—that is, legalistically and with mind-numbing detail.¹⁰³

At the same time, regulation must not be too effective. There must be loopholes, things for lawyers to do. The big-firm lawyer is

¹⁰¹ Compare, for example, the list of courses and seminars offered by one of the "top ten" law schools with those offered by one further down. The former will contain many courses dealing with law and literature, law and community, and with various aspects of broad social policy; the latter will have fewer such courses and more with a practical orientation. To be sure, both schools will teach many of the same courses, e.g., evidence or corporations. But the way these courses are taught will differ. The top schools will give them a much more normative cast; the others, a more down-to-earth, roll-up-our-sleeves one.

The same line of demarcation is found in the law reviews. The top reviews publish many articles and comments of a broad public-policy nature; the other reviews, pieces expounding, commenting on, or discussing current law. See *supra* note 1 and accompanying text; see also Schlag, *Politics of Form*, *supra* note 2, at 835-36 (providing a content analysis of recent articles in the *Harvard Law Review*).

¹⁰² Address by Yves Dezalay, Institute for Legal Studies, University of Wisconsin Law School, Madison, Wis. (Nov. 1989).

¹⁰³ See *id.*

thus a double-agent, now doing the bidding of government, now that of his or her clients. This role, however, is intensely anxiety-producing. And so, the big firms rely on the top law schools to serve as the profession's conscience. We need not worry about all the things that occasionally trouble double agents; the law schools, Monroe Freeman, Geoffrey Hazard, and company will think about *that*. By going along with the game, according to Dezalay, the top tier law schools are in cahoots with the double agents. We train insurance adjusters, the B or C students who will get jobs in mid-level government and medium-size law firms. And we train and grant absolution for the A students who will go on to even richer and more exhilarating careers as double agents.

II. BREAKING THE NORMATIVE HABIT: WHAT SHOULD WE DO?

Well, then, what should we do? A normative question, naturally—but normativity is deeply ingrained. Must we abjure the grand phrases, look for other employment? What would replace priest-talk among the legal priesthood, if we did? And what about those earnest reformers, imbued with passion and zeal, anxious to move our society toward greater and greater reaches of . . . (fill in the blank with your favorite normative notion). Surely you are not accusing them, the heroes of our age, of being insurance adjusters too? And what would replace normativity? What would we do? A small step from the first sentence of this paragraph: What should we do?

A. *What Would Replace Normativity? (What We Should Do)*

What would replace normative legal thought is legal thought. One does not seek to replace a disease with another disease, but with *health*; a crutch not with another crutch, but with *walking*. We could look at and study law, actually observing and describing it for example. Law might become, almost, a branch of *hematology*.¹⁰⁴ We might begin to notice things like beggars¹⁰⁵ or the countless other wounded that our system throws up. We might focus for the first time on subsistence claims,¹⁰⁶ appreciate the dance between

¹⁰⁴ See Cover, *Violence*, *supra* note 33, at 1601 (noting that the legal profession writes in blood—but we rarely notice this).

¹⁰⁵ See *supra* notes 84-86 and accompanying text.

¹⁰⁶ See *supra* notes 87-92 and accompanying text.

huge bureaucracies and those they serv(ic)e.¹⁰⁷ We might descend from the abstractions of ethical discourse and its emphasis on deductive reasoning—this case is an example of *that* (a general rule, so I now know how to handle it)—and focus on *this*.¹⁰⁸

This raises the problem of all those *normativos* with finely honed rhetorical skills, and all those nearly finished normative manuscripts about love, compassion, equity, fairness, and so on, nearly ready to be mailed out, with the usual, predictable normative letter explaining why, dear editor, this article is the most normative of all and worthy of your esteemed pages. Only three answers occur to me: (1) we can hold a garage sale; (2) we can export our excess normative expertise to Third World countries, many of whom seem anxious to develop bureaucracies like ours; or (3) we can try retraining programs, like those set up in the wake of the earlier two revolutions in legal thought. Law professors are smart; they will pick up on the new skills soon enough. Look what happened when the Critics and Realists came. The time between a new critique and its successor is becoming shorter and shorter, the adjustment easier.¹⁰⁹ We can offer summer seminars, perhaps sponsored by the National Endowment for the Humanities.

B. *What About the Cause of Social Reform?*

What about Martin Luther King, Jr., I Have a Dream, the law and theology movement, and the host of passionate reformers who dedicate their lives to humanizing the law and making the world a better place? Where will normativity's demise leave them?

Exactly where they were before. Or, possibly, a little better off. Most of the features I have already identified in connection with normativity reveal that the reformer's faith in it is often misplaced. Normative discourse is indeterminate; for every social reformer's plea, an equally plausible argument can be found against it.¹¹⁰ Normative analysis is always framed by those who have the upper hand so as either to rule out or discredit oppositional claims, which are portrayed as irresponsible and extreme.¹¹¹ Normative talk is deadening—it points us off into abstraction when it is particularity

¹⁰⁷ See *supra* notes 97-100 and accompanying text.

¹⁰⁸ See *supra* notes 57-72 & 83-86 and accompanying text (noting that particularity and detail, not abstract rules, prompt ethical reflection).

¹⁰⁹ See Schlag, *Normative and Nowhere to Go*, *supra* note 4, at 167.

¹¹⁰ See *supra* notes 16-22 and accompanying text.

¹¹¹ See *supra* notes 73-78 & 93-98 and accompanying text.

and detail that kindle conscience.¹¹² Normativity is a kind of oil that lubricates the shifting plates of our experience, helping us ignore our inconsistency and others' pain.¹¹³ It sets us up to be taken in and blind-sided by impersonal bureaucracies.¹¹⁴ It enables us to act according to lower ethical standards than the ones we might otherwise adopt.¹¹⁵ It does all this while enabling us to be comfortable with our roles; normativity feels good.¹¹⁶

Yet, normative appeals sometimes *do* move an audience, do cause a listener—if not to change his or her position for another—to *act* on a principle he or she already subscribes to.¹¹⁷ There is nothing wrong with employing normative arguments on behalf of one's cause. Sometimes a kind driver will actually stop for the helpless doe. But one needs to be prepared to deal with the road as well, and if one has the ability to do that, one can probably dispense with the normative appeal. Accustomed to using normativity as it universally is used, that is, in its "normal science" fashion to validate and praise the status quo, most audiences will generally react to the reformer's message with either anger or puzzlement. Members of the control group will be angry: How dare they use that argument against us? And persons not members of either the insurgent or the control group will respond with puzzlement: I thought they meant the other thing by justice. At best, academicians make law more moral in the manner of a sanitation department—we are the sanitizers of a decaying world. For example, the women's movement did *not* gain the success that it did because it appealed to men's better natures.

Cannot dead discourse nevertheless be useful? Of course. But we must be on guard against over-confidence. The game is rigged against us—one cannot use categories like justice, equality, etc., to overturn the very system of justice and equality that talks, redefines, and promotes justice and equality endlessly, believes itself to be the

¹¹² See *supra* notes 48-72 and accompanying text.

¹¹³ See *supra* notes 73-98 and accompanying text.

¹¹⁴ See *supra* note 100 and accompanying text.

¹¹⁵ See *supra* text following note 79.

¹¹⁶ See *supra* notes 81-82 and accompanying text.

¹¹⁷ See, e.g., Delgado, *The Imperial Scholar*, *supra* note 6, at 577 (arguing for diversification in legal knowledge through the incorporation of outsiders' visions into established legal scholarship); Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 2 (1988) (same); see also Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989) (discussing the use of "counterstories" to displace self-serving majoritarian myths).

paragon, the living embodiment of those virtues (with a few modest blemishes here and there; nobody's perfect). We must above all avoid the "category" mistake of speaking to the insurance adjuster when we should be addressing the Home Office.

But, dear folks and friends, the Home Office, when you get there, you will find, does not speak normativese at all, but a sharper, brusquer, unfamiliar language full of consonants and commands. This language will not pretend that we are all equal, precious creatures before God. It will have passionate commitments of quite different types. But if we talk endlessly, futilely, in the other language, we will never learn what they are.