

A Practical Jurisprudence of Values: Re-Writing *Lechmere, Inc. v. NLRB*

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This is a project in reconstruction. The goal of this Note is to demonstrate a method of adjudication that responds to the critiques of law posed by the legal realists and the critical legal studies theorists, as well as to the critiques of liberalism posed by communitarians and pragmatists. Specifically, this Note addresses how we should adjudicate cases and deliberate about the law if we accept that the law is not a neutral, determinate arbiter of conflicts and that the law cannot deduce answers from general principles. In other words, how can we adjudicate cases when there is no framework for society that is neutral between conceptions of the good or among contested social values?

To frame this question positively: what does an adjudication based on essentially contested and conflicting values look like? How can it work in a way that is both true to our rule of law ideals and also contributes to the end of law—that is, the flourishing of human life?

I hope to show how judicial opinions can be cognizant of the social values at stake in the legal rules that they create or apply, recognize that such values may be in insoluble conflict with each other, and still decide cases. I intend for this to be a practical demonstration that responds to the calls for value-cognizant adjudication from legal theorists of different generations, such as Felix Cohen and Joseph Singer.¹

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¹ As Felix Cohen has written:

When we recognize that legal rules are simply formulae describing uniformities of judicial decision, that legal concepts likewise are patterns or functions of judicial decisions, that decisions themselves are not products of logical parthenogenesis born of pre-existing legal principles but are social events with social causes and consequences, then we are ready for the serious business of appraising law and legal institutions in terms of some standard of human values.

Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 847 (1935). See also JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 12 (2000) (“What we need is a way to address value choices directly and honestly.”).

There is a lot of theory in this Note, both before and after this practical demonstration. In Part I, I briefly summarize the legal and philosophical critiques to which I am responding. In particular, I discuss the implications of legal realism and critical legal studies, as well as communitarian thought and pragmatism, for an ideal theory of adjudication. In Part II, I describe the notion of values that drives my analysis by contrasting the idea of values that I employ with the familiar notions of policies, interests, preferences, and principles. In doing so, I try to offer a positive explanation (apart from the negative justification that the critiques supply) for why such a jurisprudence is desirable. I then attempt a practical demonstration in Part III, crafting an alternative decision for *Lechmere, Inc. v. NLRB*,² in which the Supreme Court held that employers' property rights implied that union organizers could not solicit employees at their workplace except in extremely limited circumstances. The goal of this demonstration is not to show that the Supreme Court reached the wrong decision, but rather to illustrate that it could have more honestly embraced the conflicting social values at stake in deciding the case. In Part IV, I respond to some objections that can be raised in response to this type of adjudication, including concerns regarding relativism and the rule of law.

The central argument of this Note is that we can escape the dilemma posed by these critiques by making values the focus of legal discussion and adjudication, rather than consigning "value talk" to the peripheral place that it currently occupies. In doing so, we should reconceive law as a conversation about the things that matter most to us, rather than a scientific pursuit. The practical demonstration of value talk presented in this Note shows that a better way of doing law—one that is responsive to our ideals for a just society and increases political accountability—is both practical and possible.

An early disclaimer: because I have framed this discussion in terms of adjudication and the critiques of law, one could read this Note as an indictment of the way judges currently adjudicate cases and deliberate about the law. On these grounds, the Note necessarily fails. Not all judges write and think about the law in the same formalist mold that the legal realists unraveled long ago and not all judges are unaware of the social values at stake in their decisions. I do not intend to make any empirical claims about the way adjudication actually happens. Instead, the subject of this Note is the *tone* which judges and lawyers generally use in legal writing and deliberating about the law. Likewise, I do not mean to suggest that judges' personal values should trump the will and intent of legislatures. This is not a call for a pernicious new form of judicial activism, but rather a call for doing what we do already in a different way.

While I specifically discuss the ideas here in terms of adjudication, I hope for them to apply more broadly to legal and academic discussion. I

² 502 U.S. 527 (1992).

have chosen adjudication as the focal point of this piece because judicial opinions are the operative documents in all legal conversations—they are what students and professors discuss in law school, and they are what lawyers cite in their court briefs. The goal in so choosing is not to tell judges to do things differently, but to change the focus of the conversations that we have as lawyers.

A parable.³ In the spring of 2002, Israelis and Palestinians were engaged in the most violent period of the second Intifada.⁴ For several reasons, the events in Israel preoccupied me. Israel was what I talked about with the people around me, and when I was not talking about “the situation,” as Israelis refer to it, I was reading and thinking about it.

Looking back, I remember that many of my conversations took the following form: when a friend to my right made a comment about Israel’s right to self defense, I immediately pointed out the ways that Israel had contributed to “the situation” through the economic subjugation of the Palestinians and horrific human rights abuses. When a friend to my left argued that Israel should immediately pull out of the territories, I reminded my friend of Israel’s need to secure its existence. I read every article, studied every opinion on the subject, and knew how to deploy all of the arguments. Yet I agreed with no one.

When I made these arguments, I did not feel *smart* for knowing how to employ them. Instead, I felt *torn*. I made each of these arguments because I believed them. I argued with my friends because I felt that everything I was saying was true, yet contradictory. There were big things at stake that my friends and I cared about; we struggled with our disparate visions for a non-oppressive, yet safe, Middle East. In voicing a particular argument—for example, in defending a particular operation of the Israeli Defense Forces—I always felt the tug of the other side—such as the human cost of the Israeli response. As I argued, I was open to the responses of my peers, in a way that I was not, say, in my approach to the 2004 presidential campaign. As much as I knew about the Israeli situation, I wanted to find people who knew more. I was asking for help.

This is my vision for value talk in adjudication. We should experience the sensation of being torn. In choosing among competing visions of social life, we should feel pulled by each. The goal should not be to act smart, or to pretend to find the things that “everybody knows” so that decision-making becomes easy. Instead, we should strive to describe the

³ Apologies to Joseph Singer. See Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 38 (1984).

⁴ In March of that year, a Palestinian suicide bomber attacked a hotel full of Israelis taking part in a Passover Seder. Israel responded with a devastatingly large retaliatory attack. See *Al-Aqsa Intifada Timeline*, Sept. 29, 2004, http://news.bbc.co.uk/1/hi/world/middle_east/3677206.stm; *Israel Fires Missiles into Jenin Refugee Camp*, Apr. 8, 2002, <http://archives.cnn.com/2002/WORLD/meast/04/08/mideast.violence/index.html>; “*Passover Massacre*” at *Israeli Hotel Kills 19*, Mar. 27, 2002, <http://archives.cnn.com/2002/WORLD/meast/03/27/mideast/index.html>.

complexities of a situation and the multiple choices that it presents as best we can. We should be humble, yet not afraid of having naïve hopes.⁵ We must acknowledge the feebleness of our faculties, our predilection for mistakes and bias, and the enormity of the task before us—fashioning the shape of the world! Then, feeling torn and small, yet hopeful, we should decide the case before us.

I. THE CRITIQUE

I present here a brief summary of the critiques of formalist adjudication and liberalism that have been the subject of legal and philosophical debate over the past century.⁶ While this review is neither historical nor comprehensive, I engage in it to highlight the features of the critique most salient to this project. The critiques each relate to the possibility, or rather impossibility, of creating social institutions and adjudicating conflicts on the basis of neutral concepts and ideals.

A. *The Legal Theory Critiques of Formalism*

The legal theory critiques tell a story that begins: we used to understand law in a different way than we do today. At the turn of the last century,⁷ legal doctrine was understood as implicitly true, entirely knowable, and intrinsically just. We understood rules, and their application to particular cases was to follow deductively from abstract categories such as contract, property, and tort.⁸ A judge's role in deciding a case was to engage in an "objective, quasi-scientific" technique of applying legal doctrine to the facts of a case and rule on the case accordingly, regardless of what justice may

⁵ Jedediah Purdy has argued that:

We practice a form of irony insistently doubtful of the qualities that would make us take another person seriously: the integrity of personality, sincere motivation, the idea that opinions are more than symptoms of fear or desire. We are wary of hope, because we see little that can support it. Believing in nothing much, especially not in people, is a point of vague pride, and conviction can seem embarrassingly naive.

JEDEDIAH PURDY, FOR COMMON THINGS: IRONY, TRUST & COMMITMENT IN AMERICA TODAY 6 (1999).

⁶ See, e.g., MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, THE CRISIS OF LEGAL ORTHODOXY (1992); Cohen, *supra* note 1; Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Frank I. Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, in NOMOS XXVIII: JUSTIFICATION 71 (J. Roland Pennock et al. eds., 1986); Singer, *supra* note 3; Duncan Kennedy, *The Rise and Fall of Classical Legal Thought*, at V-8 (reformatted 1998) (1975) (unpublished manuscript, available at http://www.duncankennedy.net/legal_history/essays.html).

⁷ Duncan Kennedy identifies 1850 to 1940 as the period of "Classical legal thought." See Kennedy, *supra* note 6, at 7, 34.

⁸ *Id.* at 31.

otherwise seem to require.⁹ Duncan Kennedy named this mode of thinking “classical legal thought,” and it is commonly known as “formalism.” Legal realism and the critical legal studies movement both attack different aspects of this mode of legal reasoning.

1. *The Legal Realist Critique of Formalism*

The legal realists made the first assault on formalism by demonstrating that neutral, abstract legal concepts cannot explain adjudication. They showed that determinative deduction from abstract categories to the application of rules in particular cases is not possible. As a result, they argued, judges are not mere instruments who apply legal concepts, but rather are actors who fashion legal rules on the basis of “justice and policy.”¹⁰ The idea of judges as neutral arbitrators of disputes broke down, and instead realists viewed judges as constructing the rules of society.¹¹ The realists nonetheless, true to their era, continued to believe that a type of scientific objectivity was possible with regard to which policies were “best” for society. For example, Felix Cohen argued vehemently against the “transcendental nonsense” of formalism and predicted that “creative legal thought” would “appraise in ethical terms the social values at stake in any choice between two precedents.”¹² He tried in *Ethical Systems and Legal Ideals* to delineate the “ethical science” that should be used to make sense of the “world of value” that informs legal rules.¹³

2. *The Critical Legal Studies Critique of Social Policy*

The critical legal studies movement (“CLS”) shared the realists’ belief in the nondeterministic nature of formalism. However, CLS further demonstrated that a theory of scientifically objective social policy is not

⁹ *Id.* at 12.

¹⁰ Hohfeld, *supra* note 6, at 59.

¹¹ As Felix Cohen wrote:

The circularity of legal reasoning in the whole field of unfair competition is veiled by the “thingification” of *property*. Legal language portrays courts as examining commercial words and finding, somewhere inhering in them, *property rights* According to the recognized authorities on the law of unfair competition, courts are not *creating* property, but are merely *recognizing* a pre-existent something What courts are actually doing, of course . . . is to create and distribute a new source of economic wealth or power.

Cohen, *supra* note 1, at 815–16.

¹² *Id.* at 833.

¹³ After trying to develop this science, Cohen conceded the failure of his project, but nonetheless believed that ethical science was possible. “We can reconcile ourselves to failure by the reflection that ‘uncertainty is the lot of every branch of thought and knowledge when verging on the ultimate.’” FELIX S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* 227 (1933) (quoting Justice Cardozo) (citation omitted).

possible because fundamentally contradictory values lie at the center of human experience.¹⁴ The result is a view of the law as a series of political choices, cloaked in the illusion of neutrality, with “no rational, objective criteria that can govern how we describe that system, or how we choose governmental institutions, or how we make legal decisions.”¹⁵

We can explain these legal theory critiques of formalism by tracing the different relationships between law and politics that legal realism and CLS envision. Formalism sees law as apolitical and self-defining; it is something that is true in and of itself, and it is something that can give rise to neutral deductive applications of rules by judges without acknowledging the messy political struggles that the rules may mediate. If a rule happens to favor one group over another, the judge applying the rule is blameless. The realists believe that such deduction is not possible and that the law cannot be apolitical. Law is not simply deduced, but socially created. In turn, law creates the social world around us. Nonetheless, a “best” politics, or a “best” theory of legal process, is possible, and the law should conform to these objectively, scientifically determinable ideals. Law is politics, but politics can be scientific. The conclusion of the legal realists is that judges simply need to be better legal scientists.

In contrast, the critical legal scholars deny the possibility of legal science. Law is politics, and politics is a self-contradictory mess that cannot be resolved with scientific, or pseudo-scientific, means. Furthermore, rather than worry about nihilism, we should embrace the different possibilities for communal life that law as politics provides.¹⁶ For better or worse, judges sit, without many constraints, at the nexus between people with messy lives

¹⁴ See ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 8–14 (2d ed. 1986); Michelman, *supra* note 6, at 74 (noting that Kennedy describes the fundamental contradiction that legalism responds to as “our sense that ‘relations with others are both necessary to and incompatible with our freedom’”). The CLS claim is that there is no objective method, through legal process, legal theory, or ethical theory, capable of resolving this or other fundamental contradictions that are constitutive of the human self. *Id.* at 77.

¹⁵ Singer, *supra* note 3, at 5.

¹⁶ Joseph Singer has written:

We should no longer view the project of giving a “rational foundation” for law as a worthwhile endeavor. If morality and law are matters of conviction rather than logic, we have no reason to be ashamed that our deeply felt beliefs have no “basis” that can be demonstrated through a rational decision procedure or that we cannot prove them to be “true” or “right.”

Id. at 57. Gerald Frug has noted:

It may be hard for readers to think it worthwhile to give up the search for a foundation that would render human relationships unthreatening. They may, for example, believe that we risk tyranny without such a foundation . . . but foundations have never protected us against tyranny either; there are no such things.

Gerald Frug, *The Ideology of Bureaucracy in American Law*, in *CRITICAL LEGAL STUDIES* 181, 193–94 (Allan C. Hutchinson ed., 1989).

and fundamentally contradictory aspirations for what the world should look like, and “the law,” which structures our world and hopefully keeps us a few steps removed from the Hobbesian state of nature.

Given this critique, what should adjudication look like? How should we decide cases?

B. Philosophical Critiques of Liberalism

The communitarian and pragmatic critiques of liberalism in philosophical thought parallel the critiques of formalism posed by the legal theories discussed above. As with the legal theory critiques, I outline these ideas with the goal of tracing their implications for this project.

Inherent in liberalism is a way out of the problems posed by the legal theory critiques: even if we do not have a clear method of how to construct legal rules, and even if we are not able to create a science capable of constructing those legal rules for us, we might be able to determine how to do adjudication if we have a good sense, philosophically, of what we think the laws and social institutions that order our lives should look like. Even if there is no single philosophical account of just society in which all members of society believe, we could perhaps extract some guiding principles from abstract, commonly held beliefs. This is the promise of liberalism. However, the communitarian and pragmatic critiques of liberalism and foundationalism suggest that, in fact, we cannot find the neutral, common beliefs that we seek.

1. The Communitarian Critique of Liberalism

The communitarian critique of liberalism targets liberalism’s yearning for the official neutrality of persons and institutions. We can conceive of liberalism as the belief that it is possible and just to create a framework for society, embodied in the state, social institutions, and the law, that enables private individuals to freely pursue their own conceptions of the good life free from the undue interference of other people and the state itself. The state is supposed to be neutral between the ends of private individuals. It is to use its coercive powers to enable private activity by preventing the undue interference with some individuals’ pursuit of the good by other individuals. It should also have constraints that prevent it from becoming a source of interference itself.¹⁷ Liberalism, then, provides a

¹⁷ See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999). This description is meant to capture what is common to both Rawls’s egalitarian and Nozick’s libertarian accounts of liberalism. By modulating what is meant by “interference” or “enabling,” we could describe their particular versions of liberalism. See also Martha Minow & Elizabeth V. Spelman, *In Context*, in *PRAGMATISM IN LAW & SOCIETY* 247, 248 (Michael Brint et al. eds., 1991) (describing the background assumptions of liberal theory as treating “principles as universal and the individual self as the proper unit of analysis”).

seemingly clear picture of what a state and its laws should look like, and creates the possibility of legal argument on the basis of liberal ideals. A law or decision thus is good or bad to the extent that it fosters or discourages these ideals.

The communitarian critique of liberalism attacks the notion that the best framework for society is one formed simply in reference to what is universally true about people, without regard to any particular beliefs or conceptions of the good life.¹⁸ Communitarians argue that this type of society does not reflect our experiences as individuals with particular conceptions of the good life that are at least as self-constituting as what is universally true about all of us.¹⁹ To prioritize the universal over the particular ignores important considerations in creating the framework for society. In other words, state neutrality among private ends is not possible if we want a just society. The problem with this critique is much like that created by the CLS critique: if we cannot appeal to a neutral, objective framework to figure out how to order our society, and if we cannot avoid contemplating the good life while ordering society—even if we know that what constitutes the good life is contested—then how are we to proceed?

The difficulty is that liberalism, in its search for neutrality among the disparate values held by individuals in a political community, accurately reflects a fear of oppression that must be addressed in any ideal theory of society and adjudication. Liberalism responds to the worry that, without restraint in the form of official neutrality, dominant groups could oppress the marginalized under the banner of “shared values” and the common good.²⁰ The critique of liberalism poses the challenge that politics and adjudication must somehow avoid this type of oppression while recognizing that neutrality is not possible. We often expect law, especially through adjudication, to be the protective barrier between individuals and the oppressive will of the majority. I hope to show that by explicitly bringing the subjective values that necessarily inform adjudication into the discussion of the application of legal rules, such oppression may be avoided or minimized.

We can relate the communitarian critique of liberalism to this project by stating its implications for the “law is politics” equation. If CLS shows that law is politics, the communitarian critique of liberalism shows that politics is not a process structured by certain universal truths that neces-

¹⁸ MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE*, at x (2d ed. 1998) (“At issue is . . . whether the principles of justice that govern the basic structure of society can be neutral with respect to the competing moral and religious convictions its citizens espouse.”).

¹⁹ *Id.* at 178–83; see also ALASDAIR MACINTYRE, *AFTER VIRTUE* 204–25 (2d ed. 1984).

²⁰ Roberto M. Unger, *Liberal Political Theory*, in *CRITICAL LEGAL STUDIES*, *supra* note 16, at 35 (“It is the experience of the precariousness and contingency of all shared values in society. This experience arises from the sense that shared values reflect the prejudices and interests of dominant groups rather than a common perception of the good.”).

sarily imply certain conclusions for how we can best create a society.²¹ Instead, politics is the messy process by which we fight to create a society true to our particular values and particular ideals. There is no “apolitical out” that provides the rational abstraction necessary to avoid the political fights that we seem doomed to have.

In addition to providing a critique, some communitarians also provide an answer. They recommend Aristotelian deliberation, specifically the type of deliberation about the relationship between the city and its inhabitants that Aristotle practices in *The Politics*, as a model of situated deliberation about justice and values.²² In the context of presenting his theory of justice, Rawls offers a good account of this type of deliberation, designating it “reflective equilibrium.”²³ This type of deliberation is the familiar process of weighing different principles to reach a judgment, and sometimes revising the principles in light of one’s intuitions and conflicting considerations.

It is notable that this account of moral reasoning aptly describes what courts do in adjudicating disputes and fashioning the common law. Indeed, communitarians such as Sandel often look to Supreme Court decisions and other judicial decisions as the products of this type of process.²⁴ The difficulty with this account vis-à-vis adjudication, however, is that it does not provide a set of moral reasons outside of adjudication to which judges can look for the moral basis of their decisions. Instead of judges looking to philosophers to learn about justice, philosophers look to judges. Thus, the idea that moral philosophy can provide guidance to legal reasoning breaks down.

²¹ See Frank I. Michelman, *The Subject of Liberalism*, 46 STAN. L. REV. 1807, 1810 (1994) (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993)).

²² ARISTOTLE, *THE POLITICS* 156–58 (Steven Everson ed., Cambridge University Press 1988); see also MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 10 (2d ed. 2001) (describing Aristotelian deliberation as “ethical theorizing . . . by way of a reflective dialogue between the intuitions and beliefs of the interlocutor, or reader, and a series of complex ethical conceptions, presented for exploration”); SANDEL, *supra* note 18, at xi.

²³ Rawls described “reflective equilibrium” in this way:

When a person is presented with an intuitively appealing account of his sense of justice (one, say which embodies various reasonable and natural presumptions), he may well revise his judgments to conform to its principles even though the theory does not fit his existing judgments exactly [T]he best account of a person’s sense of justice is not the one which fits his judgments prior to his examining any conception of justice, but rather the one which matches his judgments in reflective equilibrium [T]his state is one reached after a person has weighed various proposed conceptions and he has either revised his judgments to accord with one of them or held fast to his initial convictions (and the corresponding conception).

RAWLS, *supra* note 17, at 42–43.

²⁴ See, e.g., SANDEL, *supra* note 18, at xii–xiii (referring to Supreme Court decisions in defining the right to religious liberty).

Moreover, while communitarian philosophers see judges as engaged in moral reasoning, judges do not necessarily see themselves in that role. Judges, as expressed in their written opinions, instead perceive themselves as engaged in “neutral” legal analysis, not ethical deliberation. If, according to communitarians, judicial opinions are meant to be artifacts of moral reasoning, they should be approached differently by lawyers and judges. We are left with our original question: if judicial deliberation aims at the moral ends of society, and if there are no theories or neutral liberal ideals outside of their cases to which judges can compare their judgments, how are they to judge?

2. *The Pragmatic Critique of Foundationalism*

In a similar but distinctly different vein, neo-pragmatism critiques liberalism’s yearning for metaphysical, foundational truths to structure society.²⁵ Neo-pragmatism is not anti-liberal, per se, but it is anti-foundationalist;²⁶ it denies that absolute moral truths exist and thus denies that such truths can serve as the basis for political and legal theory. Neo-pragmatists argue that rather than *discover* the world in which we live, we *create* it—we invent the truths, laws, and social institutions under which we live, and we can foster them and destroy them according to how well they serve our needs and dreams for the future.²⁷ There is no “right” answer to the

²⁵ Richard A. Posner, *What Has Pragmatism to Offer Law?*, in PRAGMATISM IN LAW & SOCIETY, *supra* note 17, at 29, 30–31 (contrasting pragmatism with science through an historical explanation). The pragmatists found that “[h]uman beings had not only eyes but hands as well.” *Id.* at 31.

²⁶ See Cornel West, *The Limits of Neopragmatism*, in PRAGMATISM IN LAW & SOCIETY, *supra* note 17, at 121, 121 (“[V]alidation of knowledge-claims rests on practical judgments constituted by, and constructed in, dynamic social practices.”); Joan C. Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, in PRAGMATISM IN LAW & SOCIETY, *supra* note 17, at 151, 151 (“[T]here exists no absolute truth, no privileged text, no God’s-eye point of view.”) (quoting HILARY PUTNAM, REASON, TRUTH AND HISTORY 49 (1981)).

²⁷ See Posner, *supra* note 25, at 31 (“The pragmatist’s real interest is not in truth at all, but in belief justified by social need.”). Richard Rorty, describing John Dewey’s conception of pragmatism, states:

[D]o not charge a current social practice or a currently spoken language with being unfaithful to reality, with getting things wrong. Do not criticize it as a result of ideology or prejudice, where there are tacitly contrasted with your own employment of a truth-tracking faculty called “reason” or a neutral method called “disinterested observation.” Do not even criticize it as “unjust” if “unjust” is supposed to mean more than “sometimes incoherent even on its own terms.” Instead of appealing from the transitory current appearances to the permanent reality, appeal to a still only dimly imagined future practice. Drop the appeal to neutral criteria, and the claim that something large like Nature or Reason or History or the Moral Law is on the side of the oppressed. Instead, just make invidious comparisons between the actual present and a possible, if inchoate, future.

Richard Rorty, *Feminism and Pragmatism*, in THE TANNER LECTURES ON HUMAN VALUES 22–23 (1990), available at <http://www.tannerlectures.utah.edu/lectures/rorty92.pdf>.

difficult questions posed by our situation; there are only the answers that we choose to live with and accept.²⁸ Neo-pragmatism, while disclaiming essentialism, views the world as essentially constituted by difference.²⁹

Thus, the legal theory critiques, and the philosophical critiques, leave us in much the same place. We must find a way to do law and practice adjudication that is informed by the notions that the law is necessarily political,³⁰ there is no legal process by which we can achieve neutrality, and there are no first principles or structures to which we can appeal that allow us to avoid political argument. Rather, there is just the political community and all of the disparate and contradictory things (i.e., values) that its members hold dear. The challenge is to find a way to create a world, through law, that is true to both our deeply held beliefs about what is at stake and our ideals for the rule of law.³¹ The proposal here is that we should participate in and encourage conversation about these contested, important values and give the discussion a place in our judicial and legal reasoning to ensure that the important values at stake, and not the superficial structures that conceal them, are the subject of legal discourse.

II. VALUES DEFINED

Before addressing the role of value talk in adjudication, I want to clarify the meaning of “values” as it is used here. The definition is meant

²⁸ Ronald Dworkin argues that judges are to decide cases on the basis of “principle rather than policy,” emulating, to the best of their ability, a Hercules, who is a “lawyer of superhuman skill, learning, patience and acumen,” whose superior insight enables him to decide hard cases correctly given all competing considerations. This is often understood as the “right answer” thesis. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 84, 105–30 (1977).

²⁹ Stanley Fish, *Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin*, in *PRAGMATISM IN LAW & SOCIETY*, *supra* note 17, at 47, 54. Fish argues:

In a heterogeneous world, a world in which persons are situated—occupying particular places with particular purposes pursued in relation to particular purposes pursued in relation to particular goals, visions, and hopes as they follow from holding (or being held by) particular beliefs—no one will be in a situation that is universal or general (that is, no situation at all), and therefore no one’s perspective (a word that gives the game away) can lay claim to privilege. In that kind of world, a world of difference . . . the stipulation both of what is (of the facts) and of what ought to be will always be a politically angled one, and in the (certain) event of a clash of stipulations, the mechanisms of adjudication, whether in the personal or institutional realms, will be equally political.

Id.

³⁰ See Duncan Kennedy, *The Political Stakes in “Merely Technical” Issues of Contract Law*, 1 *EUR. REV. PRIVATE L.* 7 (2001).

³¹ Frank I. Michelman, *Law’s Republic*, 97 *YALE L.J.* 1493, 1500 (1988). Michelman argues that American constitutionalism rests in part on the premise that “the American people are politically free inasmuch as they are governed by laws and not men.” *Id. But cf.* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 *MINN. L. REV.* 365, 388 (1978) (arguing that the rule of law ideal contributes to an alienating form of legal practice and should be abolished).

to be specific without trying to discern any “one, true” concept of values that would frame this discussion in an overly myopic way. Accordingly, I offer a vague definition that I then contrast with other similar concepts that have played a similar role in legal thought: policies, preferences, principles, and interests. Through this process, I hope to clarify the concept of values and reveal how they are plural, incommensurable, irreducible, non-uniform, and essentially contested.

Values are the things that we care about when we shape our “vision of social life.”³² Philipp Heck defines interests, which he treats as synonymous with values, as “all things that man holds dear, and all ideals which guide man’s life.”³³ Some examples of values are equality, autonomy, dignity, honoring your mother and your father, self-reliance, honesty, security, being content with your lot, ownership, freedom, solidarity, personal responsibility, not placing a stepping stone before the blind, and self-preservation. Values are often what separate liberals and conservatives, what we learn from stories, and what tug at us when we are asked to make difficult decisions. In short, values are what are *at stake*.

A. *Values vs. Policies and Objectives*

One view of adjudication, designated by Richard Posner as the functional approach, sees legal reasoning as instrumentalist reasoning.³⁴ According to this perspective, legal rules are tools that further objectives determined by legislatures or elsewhere in society. Thus, judges are merely administrators who choose and enforce rules in the way that most efficiently furthers the objectives of society. In discussing the role of economists, Posner explains:

To advise a person or, for that matter, an entire society about the consequences of alternative paths to the goal that the person or society has chosen is not to commit oneself to a moral view [T]he expert, the scholar, does not choose the goal, but is confined to studying the paths to the goal and so avoids moral issues. If, as is sometimes the case, the goals of the society are contested—some people want prosperity while others would sacrifice prosperity to equality—then all the expert can do is show how particular policies advance or retard each goal. He cannot arbitrate

³² SINGER, *supra* note 1, at 11.

³³ Philipp Heck, *The Jurisprudence of Interests: An Outline*, in THE JURISPRUDENCE OF INTERESTS: SELECTED WRITINGS OF MAX RÜMELIN, PHILIPP HECK, PAUL OERTMANN, HEINRICH STOLL, JULIUS BINDER AND HERMANN ISAY 29, 33 (M. Magdalena Schoch ed. & trans., 1948).

³⁴ See RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 45 (1999).

between the goals unless they are intermediate goals—way stations to a goal that commands a consensus.³⁵

Under this view, laws are means to independently set ends. Generally, those ends are easily discernible and largely uncontested. If they are contested, they will not be for long—consensus can and will develop. The legal rules themselves are value-neutral; they are only more or less efficient in furthering independently set objectives.

Values are not the same as objectives. Legal rules are not related to values as mere means to independent ends. Laws can be constitutive of values, and thus are not neutral in the way that Posner's description suggests. We cannot hold our values as separate from the law in the same way we can hold the goal of reaching a destination as separate from the route we choose to drive. For example, it is difficult for us to separate our ideals about equality from the treatment of equality in the law. Nor can we hold ourselves separate from the conceptions of self and community that have been given structure through the law. Legal rules do not simply *serve* values but help define them and bring values into our lives.

Moreover, values are not as easily discernible, nor as uncontested, as Posner believes policies to be. They are "essentially contested."³⁶ They are contradictory. We are prone to misdescribe them, to misunderstand them, and to leave them out of discussions in which they belong.³⁷ Values require more than the "of course" treatment that they often receive in judicial opinions.³⁸ Posner's perspective leads to a type of complacency which suggests that even if we cannot pinpoint where the "objectives" of our political community have been identified, we can easily guess what those objectives are, or we can argue briefly for something like wealth maximization, and assume that we have stated the case well enough. This complacency is inap-

³⁵ *Id.* at 46. While Posner specifically discusses economists in this passage, the overall project of his book is to show that moral theories have no place in adjudication because judges serve the same instrumentalist role as social scientists.

³⁶ See Joseph W. Singer, *Should Lawyers Care About Philosophy?*, 1989 DUKE L.J. 1752, 1763 (1990) (citing WILLIAM CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* (2d ed. 1983)).

³⁷ *Id.* at 1769.

³⁸ As James B. Atleson has written:

The courts' reliance upon certain explicit or implicit values is often premised upon the belief that a cultural harmony of values exists, thereby ignoring the presence of a quite different working-class value structure. For instance . . . the nature and meaning of time, especially the differences between employee time and employer or working time, varies by the interests and norms of the perceiver. In certain cases, a clash of cultural values clearly exists and legal decisions, although seemingly oblivious to the fact, choose one cultural value over another. This realization is not discussed in order to suggest that cultural choices can be avoided, but to recognize that the 'of course' statements by decision makers reflect not only underlying values, but often a particular set of cultural values.

propriate.³⁹ Our definition of values must acknowledge that we do not know ourselves very well at all, and that we are still learning to articulate the things that matter to us in world-creating ways.

B. Values vs. Preferences

Legal economists, a group in which Posner includes himself, often discuss values in terms of individual preferences.⁴⁰ Posner's complacency regarding the contestability of values, and his confidence in his ability to approximate the "objectives" of society, is due in part to his particular belief that values are commensurable preferences. As such, the objectives of society are relatively easy to deduce: fulfill as many individual preferences as possible in as efficient a manner as possible. When we understand values as preferences, they are necessarily commensurable. In theory, we are indifferent to which preferences are fulfilled, and thus preferences can be the subject of trade-offs in the name of efficiency.⁴¹ If we can find a common

³⁹ See Singer, *supra* note 36, at 1769.

⁴⁰ As Louis Kaplow and Steven Shavell have written:

The notion of well-being used in welfare economics is comprehensive in nature. It incorporates in a positive way everything that an individual might value—goods and services that the individual can consume, social and environmental amenities, personally held notions of fulfillment, sympathetic feelings for others, and so forth. . . . We further note a particular source of well-being . . . namely, the possibility that individuals have a taste for a notion of fairness, just as they may have a taste for art, nature, or fine wine.

LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 18–21 (2002). Posner more often than other legal economists notes the limits of economics as an ethical theory:

Economists . . . have tried to make of economics a source of moral guidance by proposing, often under the influence of utilitarianism, that the goal of a society should be to maximize average utility, or total utility, or wealth, or freedom, or equality . . . or some combination of these things. These are doomed efforts . . . [Economists] could not tell policymakers how much weight to give costs and benefits as a matter of social justice.

POSNER, *supra* note 34, at 46–47. Nonetheless, Posner argues that "law should strive to support competitive markets and to simulate their results in situations in which market-transaction costs are prohibitive . . . because of the empirical relation between free markets and human welfare" as well as "what we know about . . . the values of the American people." Posner, *supra* note 25, at 42. Kaplow and Shavell, in examining Posner's numerous writings, note that despite Posner's renunciation of economics as a normative theory, he does endorse consequentialism and often adopts many of the assumptions of the welfare economics paradigm, such as wealth maximization, in his theories of legal analysis. See KAPLOW & SHAVELL, *supra*, at Chapter 2 nn.41 & 87.

⁴¹ In this sense, I distinguish the "commensurability" of values from the "reducibility" of values. Commensurability is the idea that values can be the subject of trade-offs, or that we can imagine a currency of generalized "value" that allows us to trade in particular values. Reducibility is the idea that particular values can all be described as substantiations of some other, greater, more complete, and primary value. I argue that values are neither commensurable nor reducible.

language that allows us to articulate the degree to which we value particular preferences, then so much the better. For some, that common language is money; if we then allow markets to function freely, we will most efficiently maximize value and thus human welfare.⁴² Any other consideration that might be deemed important will carry the burden of persuading us that its benefits, or fulfillment of preferences, justify its costs.

The problem with seeing values as preferences is that it misdescribes values as we experience them. Values are incommensurable.⁴³ We do not experience the things that we care about, such as equality, dignity, or security, as having a price stated in terms of generalized “value.” We care about them for what they are in themselves, not for their “worth” in terms of preference satisfaction.⁴⁴ Value trade-offs will occur as values necessarily conflict. However, these conflicts cannot be resolved simply by measuring the “magnitude” of the value or the “amount” we care about it. Money cannot serve as a currency for discussing values. We lose too much in the translation of values into monetary terms to make the discussion meaningful.⁴⁵ Worse, the translation can harm the things we care about.

Stated in these terms, the argument for the incommensurability of values is empirical—it is simply not the case that values can be traded off on the basis of costs and benefits. This empirical fact refutes the notion that values are a type of personal, subjective preference. Values have an objective meaning in that they are shared and substantiated in our social lives. We can tell our neighbors what we mean when we talk about equality.⁴⁶ We can share stories about inequality and empathize with the narratives. We

⁴² See *supra* note 40.

⁴³ For a more complete elaboration on the incommensurability of values, see Joseph Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103 (2002).

⁴⁴ Singer asks:

How much is democracy worth, for example? Are we willing to pay what it costs to hold elections? What are the benefits of electing leaders rather than using heredity or some other selection criterion? Just asking the question seems inappropriate. This is not the way we judge the appropriateness of democracy.

SINGER, *supra* note 1, at 129.

⁴⁵ *Id.* (“Even if we try to use market measures, there is no market for social norms; selecting a figure would involve a moral judgment.”); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 97 (1983) (“[O]ften enough money fails to represent value; the translations are made, but as with good poetry, something is lost in the process.”).

⁴⁶ Duncan Kennedy, in describing the altruist motivation in law, writes that altruists deny the arbitrariness and subjectivity of values:

We do not control our own moral development in the sense that the mechanic controls his machine or legal rules control the citizen, but we do participate in it rather than simply undergoing it. It follows that we can speak meaningfully about values, perhaps even that this is the highest form of discourse.

Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1772 (1976).

can pass laws to achieve equality, and we can argue whether those laws actually further the type of equality that we care about. We can agree, and we can agree to disagree about the meaning of equality and its relation to other values. The objective existence of this value shapes the social relations in our society. Our shared, and often unspoken, understandings shape our particular social world.⁴⁷ As Robert Cover beautifully wrote, “we inhabit a *nomos*—a normative universe.”⁴⁸ We do not relate to the *nomos* around us as we relate to different flavors of ice cream. Values are not a matter of preference.

This view of values as objective is not inconsistent with the account of pragmatism described in the previous section. We can recognize that there is not one theory, or one method, or one “right” way of organizing our social world. At the same time, we can argue about how our social world should be put together and advocate for a certain vision because we believe it is the right one. We can appeal to the understandings that we share and to the aspirations that our values entail.⁴⁹ Anti-foundationalism does not imply indifference to the construction of the world around us, and it should not be understood as anti-theoreticism, or “crude practicalism.”⁵⁰ It does not imply relativism, or nihilism, in the sense that all possible social worlds are equally attractive to us because we have no basis for comparison.

Anti-foundationalism merely denies the possibility of The One Underlying Thing, or ahistorical truth, or unified theory; it does not deny that persuasion is possible, or that immorality exists, or that dignity, love, and freedom are real things that we experience in our lives.⁵¹

I understand the objectivity, or “public-ness,” of values to be the space between the relativist perspective that “everything is equally valid” and the anti-relativist response that “there must be some external order to it all.”⁵² The fact that different individuals within our society have different

⁴⁷ See SINGER, *supra* note 1, at 10–11.

⁴⁸ Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

⁴⁹ Sandel is careful to distinguish his account of communitarianism, which holds that a just society cannot be created without consideration of what constitutes the good life, from the crude majoritarian view that the “values or preferences that prevail in any given community at any time” should be the basis for rights. Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1767 (1994) (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993)).

⁵⁰ Cornel West, *supra* note 26, at 122.

⁵¹ Rorty understands these aspirations as the prophetic, or visionary, aspect of pragmatism.

[I]n American intellectual life, “pragmatism” has stood for more than just a set of controversial arguments about truth, knowledge, and theory. It has also stood for a visionary tradition to which . . . some judges, lawyers, and law professors still make important contributions. These are the ones who, in their opinions, or briefs, or articles, enter into . . . “open-ended disputes about the basic terms of social life.”

Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, in *PRAGMATISM IN LAW & SOCIETY*, *supra* note 17, at 89, 95 (citation omitted).

⁵² See Clifford Geertz, *Anti Anti-Relativism*, 86 AM. ANTHROPOLOGIST 263, 276 (1984). Geertz asserts:

values and different visions of the ideal social life does not imply that we can treat these visions as subjective and mediate between them from a neutral place, or talk until rational consensus can be reached. As long as we plan to go about creating laws that coerce others and structure our lives, we must confront and discuss the conflicting, yet public, values that shape our social world.

C. Values vs. Principles

In using the term principles, I refer to the Rawlsian idea of abstractions, in the form of maxims or categories, which ostensibly provide the structure and priority of legal rules.⁵³ Principles provide reasons (i.e., a legal rule conforms to a principle or it does not), and thus provide a calculus for legal reasoning. Even if we do not believe that principles have a metaphysical basis, we may accord them a basis in politics and treat the principles that we agree to through politics as foundations for legal reasoning.⁵⁴

Values are not foundationalist in this way. They are not necessarily reductive.⁵⁵ Our worries about oppression, protection of private property, and concerns for dignity in employment contracts are not all explainable by reference to rationality, autonomy, pleasure, wealth creation, or other considerations that have been treated as priorities by different theories.⁵⁶ Bernard Williams explains that the pull that philosophers feel towards reductivism is based on a “rationalistic conception of rationality” that tries to find “one currency of comparison” to explain all considerations and decision.⁵⁷

The objection to anti-relativism is not that it rejects an it's all-how-you-look-at-it approach to knowledge or a when-in-Rome approach to morality, but that it imagines that they can only be defeated by placing morality beyond culture and knowledge beyond both. This, speaking of things which must needs be so, is no longer possible.

Id.

⁵³ See, e.g., RAWLS, *supra* note 17, at 52–56 (identifying two principles of justice). These principles are meant to be “operative” in the sense articulated by Kennedy. See Kennedy, *supra* note 6, at 34 (“Operativeness is a property of some rules and principles. It is the ability to generate subrules, more concrete prescriptions that are felt to be inescapable once the abstraction is assented to.”).

⁵⁴ The move from metaphysics to politics is the project of Rawls in JOHN RAWLS, *POLITICAL LIBERALISM* 90–95 (1993).

⁵⁵ See the distinction between commensurability and reducibility, *supra* note 41; see also NUSSBAUM, *supra* note 22, at xxix (“Given that the valuable things are plural, and are not reducible to some one valuable thing of which all other goods are mere functions . . . there may be contingent conflicts of value that make it difficult . . . for [moral agents] to pursue all the things to which they have committed themselves.”).

⁵⁶ See, e.g., Richard Epstein, *Volume Introduction*, in *LIBERTY, PROPERTY, AND THE LAW: PRIVATE AND COMMON PROPERTY* vii (Richard Epstein ed., 2000) (“The classical liberal system, then, can be defended . . . but what are its central rules? The first principle is individual autonomy.”).

⁵⁷ BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 17–18 (1985).

Williams empirically argues that this motive is baseless, given individuals' actual experiences with ethical considerations. As he explains:

Politicians know that political considerations are not all made out of the same material as considerations against which they are weighed; even different political considerations can be made out of different material. If one compares one job, holiday, or companion with another, judgment does not need a particular set of weights.⁵⁸

Values connote pluralism and difference in a way that principles cannot. Principles are meant to be limited in number and consistent with each other. They are supposed to be hierarchical or symmetrical in form to inform systems of thought in congruent ways.⁵⁹ In contrast, values are not like this. Values are haphazard, incongruent, and numerous. Autonomy and equality may resemble each other in ways that the protection of innocence, the belief that persons are created in the image of God, and the idea that work can be an alienating experience, do not. Our world contains many different social goods which are distributed on the basis of different values that mean different things in different contexts.⁶⁰ As stated in Williams' discussion of reductivism, this belief in the pluralism of values is grounded in our actual experiences. A non-empirical explanation may also lie in the "fundamental contradictions" that critical legal scholars have highlighted.⁶¹

Moreover, values, unlike principles, allow "freedom from theory-guilt" to the extent that theory implies a need for abstract elegance or symmetry of ideas.⁶² Values allow us to move from the scientific to the literary, finding meaning in stories that cannot be categorized in systems and in relationships with people and the divine.⁶³ Principles must be articulated if they are to be operative, whereas values may be most accurately demonstrated as the inarticulable truth contained in a story—we do not know how to explain what the story means, but the meaning is there. Values are open to literary and religious truths in a way that principles are not.

D. Values vs. Interests

Interest talk abounds in law school. Students and professors explain case holdings and legal rules in terms of balancing competing interests,

⁵⁸ *Id.* at 17.

⁵⁹ See, e.g., RAWLS, *supra* note 17, at 52–56.

⁶⁰ See WALZER, *supra* note 45, at 4–5.

⁶¹ See *supra* note 14.

⁶² Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1569 (1990).

⁶³ See generally Robert Cover, *supra* note 48; Kim Lane Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989).

giving life to Heck's geometric vision of legal rules that are the "resultant" between conflicting forces.⁶⁴ Speaking in terms of interests moves us beyond classical formalism.⁶⁵ Interest talk allows us to speak about important, controversial ideas in ostensibly value-neutral ways. We need not voice our opinion that because people depend on income from work for sustenance and self-respect, employees deserve a modicum of job security. Instead, we can say that an employee has an interest in job security, for whatever reason (it could be a yearning for self-actualization or it could be a tendency towards laziness—we do not care), and an employer has a property interest in running her enterprise however she sees fit. The resultant is employment-at-will with a few public policy exceptions. The rule appears to balance the interests that are involved, and we can explain why this particular balance is struck by referencing the strength of the relative interests.

We *own* interests. Interests are always stated in relation to a person or an institution. They imply certain maximizing behaviors—the unstated assumption is that any person or any institution wants (this dispositionism is assumed by the framework) as many of her interests fulfilled to the greatest extent possible. The interest framework may help explain why Felix Cohen found utilitarian thinking so unavoidable despite his misgivings about it.⁶⁶ Interest talk also suggests its own method of adjudication: as much as possible, avoid conflicts so as to maximize the greatest number of interests. When conflict exists, the more worthy interest should prevail.

Unlike preferences, interests are transparent—we are able to identify and discuss the interests of others and judge their relative "strengths." Unlike preferences, interests do not only represent individual desires, and thus are not necessarily commensurable. Because we do not assume that all interests are equally worthy, interests are more analytically useful than preferences. However, like preferences, interests give the appearance that the values that may inform them are held subjectively. We need not inquire into your reasons for holding a particular interest; we just need to know that it has been asserted so that we can judge it against other interests. By framing legal analysis in reference to particular parties or institutions, and by giving us tools through which we can create the appearance of fairness and balance, interest talk allows us to make decisions that have social implications without confronting what those implications actually are.

⁶⁴ Heck, *supra* note 33, at 35 ("The fundamental truth from which we must proceed is that each command of the law determines a conflict of interests; it originates from a struggle between opposing interests, and represents as it were the resultant of these opposing forces.")

⁶⁵ *Id.* at 39 (criticizing formalism, in contrast to interest-based adjudication, because it "fails completely to insure results which are just and reasonable in terms of practical usefulness, since such considerations play no part in the process of deriving rules from concepts").

⁶⁶ COHEN, *supra* note 13, at 228 ("It is a conclusion to which we have been forced in our survey of possible ethical systems that the standard of the good life has been most adequately formulated by the theory of hedonism, if any absolute formulation of this standard is possible.")

While we *own* interests, we *share* values. They are aspirations that we have for the world around us. They need not be self-regarding or institution-regarding. Not all values are equal, and not all need to be equally attended to in our social life. They are constitutive rather than merely instrumental. Interests are not capable of being redefined; they are only capable of being better understood. In contrast, values are more dynamic, capable of transformation and conversion.⁶⁷ Values *define* our interests—I cannot say that I have an interest in “liberty” without some understanding of what liberty is. Value talk is capable of addressing a situation at deeper levels than interest talk may allow.

E. The Positive Case for Value Talk

The comparisons above draw out some of the substantive features of values and their implications for value talk in judicial decision-making. Before turning to the question of how value talk should figure into adjudication, we must discuss the positive case for explicitly discussing values in judicial decisions and “on the record” discussions of the law.⁶⁸ The critique above provides the negative justification: our traditional methods of thinking about the law and the ordering of social institutions fail on their own terms, and thus we must start with the disparate values with which we are left. This argument might be persuasive. However, we might think that our traditional methods, and the “hodge-podge” methods of judicial reasoning that they have spawned,⁶⁹ serve us well enough despite their flaws.⁷⁰ Why advocate change?

⁶⁷ Stanley Fish has written:

Conversion can follow upon anything—reading at random a verse from the Bible, falling off one’s horse on the road to Damascus, suddenly seeing the first gray hair—for anything, given the right history, psychology, pressuring circumstances, etc., can jar people out of their accustomed ways of thinking.

Fish, *supra* note 29, at 54 (internal quotation omitted).

⁶⁸ By “on the record” I mean judicial decisions, law school classrooms, legal memos, and other places where “legal reasoning” is practiced and learned. I do not think that law review articles are necessarily “on the record,” but sometimes they are.

⁶⁹ Karl Klare notes:

I believe that all of modern legal consciousness partakes of this hodge-podge character. It is a consciousness in which contrasting styles of legal reasoning are simultaneously and unreflectively employed by the same court or even the same judge The formalist and realist traditions are continued sub silentio in judicial decisions, but in a manner consistent with neither legal vision.

Klare, *supra* note 31, at 334–35.

⁷⁰ Fish, *supra* note 29, at 80 (“All I have to recommend is the game, which, since it doesn’t need my recommendations, will proceed on its way undeterred and unimproved by anything I have to say.”).

The first reason is honesty for its own sake.⁷¹ Jon Hanson and David Yosifon describe this intuition in their anti-dispositionalist critique of law and economics: “Social scientists should be committed to examining the implications of what we know to be true, no matter how much we want to deny it, and rejecting what we know to be false no matter how much we want to embrace it.”⁷² This argument, which treats honesty in legal reasoning as a value in and of itself, is not universally accepted. For example, Posner, while acknowledging the political nature of judicial decision-making, believes that decisions should be cloaked as specimens of legal reasoning so as to be politically acceptable.⁷³ Posner values political acceptability above honesty for its own sake, and assumes that judicial decisions must be written from an all-knowing and politically neutral place in order to be acceptable. I disagree.

A second argument for the explicit discussion of values in judicial opinions is that values are contested and the law, especially adjudication, is the hashing out of contested issues with big consequences. As noted above,⁷⁴ a certain type of complacency often attends discussions of values,⁷⁵ in which we assume that there is, or can be, a cultural consensus regarding important values. This complacency carries over to judicial decisions in the form of the “of course” or “everybody knows” statements that judges often use to signal the normative assumptions they use in their analysis.⁷⁶

The assumption that our values are already agreed upon is a form of oppression.⁷⁷ It silences voices that should be heard, or forces them to speak foreign languages that mute their messages. This complacency might be forgivable if all that was at stake was the disposition of a particular dispute, or the formulation of a particular legal rule. However, more stands to

⁷¹ See SINGER, *supra* note 1, at 12.

⁷² Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 188 (2003).

⁷³ Discussing the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), Posner writes:

An opinion in *Brown v. Board of Education* that was determined to go down the moral path would have lost its way in a maze of arguments, counterarguments, and factual claims. Better to say either what the Court said, though it was incomplete and indeed disingenuous . . . or simply that “everybody knows” that segregation by law in school and other public places was meant to keep black people “in their place,” that it was an ugly practice . . . and that the equal protection clause was in some sense intended, or should be used, to prevent it. An opinion so drafted would not have been an impressive specimen of “legal reasoning,” but it would have been honest. The Court’s opinion was less honest but politically adroit.

POSNER, *supra* note 34, at 138–39.

⁷⁴ See *supra* Part II.A.

⁷⁵ See Singer, *supra* note 36, at 1754 (criticizing Rorty as reinforcing “existing structures of domination” through his rhetoric).

⁷⁶ ATLESON, *supra* note 38, at 10.

⁷⁷ Singer, *supra* note 36, at 1766.

be decided. “We inhabit a nomos—a normative universe.”⁷⁸ Our laws and our judicial decisions play an important and specialized role in our social world-creating activity.⁷⁹ Given the weight of this role, we need to proceed responsibly. As values are contested, they should be discussed explicitly, not because we can reach a consensus, but because discussion makes accountability possible. This is what is unique about adjudication as a source of authority: unlike other decision makers, when judges exercise power, they must explain their reasoning.⁸⁰ Instead of pretending to decide cases on the basis of things that “everybody knows,” we should admit the particular value choices that we make, defend them as much as possible, and recognize that they will be assailed by others. Doing so may increase the political acceptability of judicial decisions by enhancing accountability.⁸¹ Rather than discourage the rule of law, value talk may actually enhance it.

Finally, we should explicitly talk about value choices in adjudication because doing so will lead to the flourishing of human life. As Cohen explains, law is part of the ethical project of constructing a social world according to the good life, and “the instrumental value of law is simply its value in promoting the good life of those whom it affects.”⁸² This is an Aristotelian perspective, and it is shared by other authors who promote confronting moral questions from a situated place.⁸³ The trouble is that we do not know what the good life is; nevertheless, we must legislate and adjudicate according to our best understanding of it.⁸⁴ Accordingly, we should become as skilled as possible in conversing about values and their consequences in the law.⁸⁵ I submit that this is something that we presently are

⁷⁸ Cover, *supra* note 48, at 4.

⁷⁹ *Id.* at 5 (“[L]aw becomes not merely a system of rules to be observed, but a world in which we live.”). Also observe how communitarians such as Sandel treat judicial decisions as communitarian artifacts. *See supra* note 24 and accompanying text.

⁸⁰ *See infra* Part IV.B. This reason-giving makes judicial decisions an acceptable form of authority that accords with our rule of law values.

⁸¹ SINGER, *supra* note 1, at 12.

⁸² *See* COHEN, *supra* note 13, at 42; Singer, *supra* note 3, at 60 (“The proper question is . . . ‘how should we live?’”).

⁸³ *See supra* note 22.

⁸⁴ *See* COHEN, *supra* note 13, at 19 (“The inadequacy of human knowledge, we may fairly assume, does not destroy the usefulness of our fundamental principle of legal criticism.”).

⁸⁵ As Cohen has written:

Shunned alike by scientists and philosophers, most social-ethical questions are left today in a No Man’s Land where only those with strong practical and emotional interests will make a stand. This arbitrary and inadequate division of intellectual labor would be pitiable enough if the limitations it imposes upon social thought were regularly recognized. But the moral philosopher who disdains the data sheets of social science as irrelevant to questions of value continues to assume human desires and human abilities which those data refute; and the social scientist (not least of all the jurist) continues to assume ethical norms which have not withstood the test of philosophical analysis.

not very good at doing. We may find that when we explicitly address liberty, freedom, dignity, and responsibility in our jurisprudence that we will refine some ideas, discard others, and better understand our aspirations for the shape of our social world. If we could discuss what was at stake, we might make vastly different choices.

We live in a world constituted by, or through, values. These values are numerous and contradictory. They defy systemization. We create them, define them, and refine them to express what is important to us. We give meaning to them through law, which, in turn, structures our understanding of them. There is no neutral place from which we can judge these values and the way we order society; we are inescapably situated in this world, in our lives. Given this background, we turn to our central question: what does a jurisprudence of values look like?

III. VALUE TALK IN JUDICIAL DECISIONS

A. *Previous Treatment of Values*

There are many examples of judicial opinions that openly acknowledge a confrontation between conflicting social values. The prototypical example may be *State v. Shack*, in which the New Jersey Supreme Court found that migrant farmworkers had the right to receive visits from social workers on the property of their employers.⁸⁶ In *Shack*, a farmer filed suit under a trespass statute against a legal services attorney and a field worker from an anti-poverty organization for visiting farmworkers in their residences on the farmer's property.⁸⁷ The defendants challenged the constitutionality of the trespass statute.⁸⁸ The *Shack* court explicitly chose not to frame its decision in constitutional terms, finding that "a decision in nonconstitutional terms is more satisfactory, because the interests of migrant workers are more expansively served in that way than they would be if they had no more freedom than these constitutional concepts could be found to mandate if indeed they apply at all."⁸⁹ The court then discussed the farmer's right to exclude in relation to the needs of the farmworkers. Hinging its analysis on the values served by the laws of property, the court observed that "[t]itle to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises."⁹⁰ Thus, the court seriously confronted the conflict between the particular needs of

Id. at 3.

⁸⁶ 277 A.2d 369 (N.J. 1971).

⁸⁷ *Id.* at 370–71.

⁸⁸ *Id.* at 371.

⁸⁹ *Id.* at 372.

⁹⁰ *Id.* ("Property rights serve human values. They are recognized to that end, and are limited by it.")

the farmworkers and the traditional interests of the farmer involved in the right to exclude.

The district court in *United States v. Progressive, Inc.* confronted the similarly difficult intersection between national security concerns and First Amendment rights.⁹¹ In *Progressive*, the federal government sought to enjoin a magazine from publishing an article about how to build a hydrogen bomb.⁹² The government argued that it was permitted to censor the article despite the magazine's First Amendment rights because of the government's national security interest.⁹³ The Supreme Court had confronted a similar issue several years earlier in *New York Times Co. v. United States* (the *Pentagon Papers* case), where it found that the government had not met its heavy burden of justifying a prior restraint.⁹⁴ Several of the nine separate opinions found that prior restraints were almost never justified, even by national security interests.⁹⁵

The district court in *Progressive* found that *Pentagon Papers* did not compel a conclusion, and therefore addressed the "basic confrontation between the First Amendment right to freedom of the press and national security."⁹⁶ In doing so, the court not only discussed the particular interests that had been asserted by the parties, but tried to make sense of the relationship between national security interests and the freedom of the press in the "hierarchy of values" that is attached to our "panoply of basic rights."⁹⁷ Finding that this case presented the rare situation in which a prior restraint was justified, the court grappled with the significant nature of the competing values at stake and seriously considered the magnitude of the conflict presented by the case.

Although these cases are examples of value talk in judicial opinions, I would contend that they are anomalous. Rather than explicitly confronting difficult choices, or acknowledging the values at stake in a particular decision, opinions often dismiss value decisions or gloss over their implications. For example, in *Village of Belle Terre v. Boraas*, the Supreme Court denied a constitutional challenge to a zoning ordinance that restricted land use to one-family dwellings and prevented non-related people from living together.⁹⁸ The Court found that the ordinance did not implicate any fundamental rights and was not driven by "an animosity to unmarried couples

⁹¹ 467 F. Supp. 990 (W.D. Wis. 1979).

⁹² *Id.* at 999.

⁹³ *Id.* at 991.

⁹⁴ 403 U.S. 713, 715 (1971).

⁹⁵ *See, e.g., id.* (Black, J., concurring) ("In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment."). *See also id.* at 725 (Brennan, J., concurring) ("[T]he First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases.>").

⁹⁶ *United States v. Progressive*, 467 F. Supp. 990, 995 (W.D. Wis. 1979).

⁹⁷ *Id.*

⁹⁸ 416 U.S. 1 (1974).

who live together.”⁹⁹ Instead, the Court found that the ordinance was a legitimate use of the police power based on the simple observation that:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.¹⁰⁰

This decision asserted an idyllic description of suburbia as obviously true. No competing views on the implications for democracy and equality of setting aside a “sanctuary” for only *some* people were discussed or confronted in the majority opinion. Justice Douglas’s description of the police power is not necessarily wrong; however, his glib treatment of the values implicated by the decision erroneously removes these values from our discussion.

B. *Lechmere, Inc. v. NLRB*

Justice Thomas’s opinion in *Lechmere, Inc. v. NLRB* also does not confront the complicated nature of the conflicting values at stake, and instead relies on superficial doctrinal structures to support its conclusion.

Lechmere, Inc. v. NLRB addressed the circumstances under which union organizers had the right to enter an employer’s property to handbill and solicit employees about unionization.¹⁰¹ Union organizing is governed generally by the National Labor Relations Act (NLRA) as administered by the National Labor Relations Board (NLRB). The NLRA explicitly grants employees the “right to self-organization,” but it does not confer any rights on nonemployee union organizers.¹⁰² In *NLRB v. Babcock & Wilcox Co.*,¹⁰³ the Supreme Court held that although the NLRA only conferred the right to form labor organizations on employees, “[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others,” and thus, in certain circumstances, the NLRA restricts an employer’s right to exclude nonemployee union organizers from his property.¹⁰⁴ The Court in *Babcock & Wilcox, Co.* held that the balance between the property rights of owners and the labor rights of workers “must be obtained with as little destruc-

⁹⁹ *Id.* at 8.

¹⁰⁰ *Id.* at 9.

¹⁰¹ 502 U.S. 527 (1992).

¹⁰² 29 U.S.C. § 157 (2000).

¹⁰³ 351 U.S. 105 (1956).

¹⁰⁴ *Id.* at 113.

tion of one as is consistent with the maintenance of the other,” and noted that “the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.”¹⁰⁵

The NLRB subsequently interpreted *Babcock & Wilcox Co.* to require a multi-factor, fact-intensive balancing test to determine whether nonemployee union organizers had a right to enter a particular employer’s property for the purpose of soliciting employees. In *Jean Country*, the NLRB balancing case immediately prior to *Lechmere*, the NLRB stated the test as such:

[I]n all access cases our essential concern will be the degree of impairment of the [employees’ right to organize], as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process.¹⁰⁶

In *Lechmere*, the Court found that the NLRB misinterpreted *Babcock & Wilcox, Co.* by treating the conflicting rights in this manner.¹⁰⁷ The *Lechmere* opinion framed the discussion as a clarification of “the relationship between the rights of employees under [the NLRA] and the property rights of their employers.”¹⁰⁸ Despite so framing, the opinion did not discuss the nature or the implications of employer or employee rights. The Court did not discuss the source or contours of the property right that was at issue, or its relation to the right to organize. In addition, the Court did not examine the ways in which the right to exclude had been limited by other legislative enactments.

Instead, the thrust of the opinion is a discussion of the NLRB’s treatment of *Babcock & Wilcox, Co.* The Court concluded that *Babcock & Wilcox, Co.* did not envision the type of balancing undertaken by the NLRB to decide when the “inaccessibility exception” would apply. Rather, the Court found that union organizers could access employer property only in unique circumstances where more than reasonable efforts were required to reach employees.¹⁰⁹ It cited cases of logging camps, mining camps, and mountain resort hotels as classic examples of unique circumstances.¹¹⁰ The Court described this exception as narrow and found that the union

¹⁰⁵ *Id.* at 112.

¹⁰⁶ 291 N.L.R.B. 11, 14 (1988).

¹⁰⁷ 502 U.S. 527, 536 (1992). *See, e.g.*, *Fairmont Hotel Co.*, 282 N.L.R.B. 139 (1986); *Jean Country*, 291 N.L.R.B. 11 (1988).

¹⁰⁸ 502 U.S. at 529.

¹⁰⁹ *Id.* at 539.

¹¹⁰ *Id.*

had a heavy burden to meet it;¹¹¹ however, it did not explain how or why it reached this conclusion. Presumably, it believed that private property rights of owners were paramount to the organizing rights of employees, at least in most cases.

The Court found that the union organizers in *Lechmere*, who placed handbills on employees' cars in a parking lot at a suburban strip mall, did not face any unique obstacles in reaching the employees and thus had no right to enter the employer's property.¹¹² It concluded that the union had reasonably effective means of communication available, finding that "signs (displayed, for example, from the public grassy strip adjoining Lechmere's parking lot) would have informed employees about the union's organizational efforts."¹¹³ The Court noted that "[a]ccess to employees, not success in winning them over, is the critical issue . . ."¹¹⁴ By relying on a concept of property rights that it did not explore, *Lechmere* made it practically impossible for union organizers to reach employees at work.

Critics have faulted *Lechmere* for relying on a doctrinally inaccurate idea of property, an improper notion of union organizers' derivative rights, and an erroneous definition of what constitutes communication aimed at informed choice-making. It has also been criticized for its curious treatment of property rights as a federal concern and subversion of the *Chevron* administrative law doctrine.¹¹⁵ While some critiques have a critical bite consistent with this Note, many take the form aptly described by Atleson, exposing "the failure of adjudicators either to justify coherently the decisions reached or to rationally place the decisions within the received wisdom" and attempting "to fashion a new and more rational analysis which tries to accommodate the 'irrational' results with the received wisdom as well as possible."¹¹⁶ What follows is my attempt to demonstrate an analysis that puts this "received wisdom" itself into the spotlight.

¹¹¹ *Id.* at 539–40.

¹¹² *Id.* at 541.

¹¹³ *Id.* at 540.

¹¹⁴ *Id.*

¹¹⁵ See Michael I. Bernstein & David M. Safon, *Can Unions Find a Place to Live in Jean Country? An Analysis of Lechmere and Its Progeny*, 470 PLI/LIT 111 (1993); R. Wayne Estes & Adam M. Porter, *Babcock/Lechmere Revisited: Derivative Nature of Union Organizers' Right of Access to Employers' Property Should Impact Judicial Evaluation of Alternatives*, 48 SMU L. REV. 349 (1995); Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305 (1994); Robert A. Gorman, *Union Access to Private Property: A Critical Assessment of Lechmere, Inc. v. NLRB*, 9 HOFTSTRA LAB. & EMP. L.J. 1 (1991); Cynthia Lynne Pike, *Lechmere, Inc. v. NLRB: Its History and Its Ramifications*, 1993 DETROIT C.L. REV. 1103 (1993); Alan L. Zmija, *Union Organizing After Lechmere, Inc. v. NLRB—A Time to Reexamine the Rule of Babcock & Wilcox*, 12 HOFTSTRA LAB. & EMP. L.J. 65 (1994).

¹¹⁶ ATLESON, *supra* note 38, at 2–3.

C. Lechmere Re-written

This case involves conflicting claims arising out of a union organizing campaign directed at a strip mall retailer; its resolution requires us to examine the role that values concerning work, ownership, property, and equality play in structuring our social life.

In the summer of 1987, Local 919 of the United Food and Commercial Workers (UFCW), an organization that represents the interests of 1.4 million workers in the food and retail industries,¹¹⁷ launched an organizing campaign directed at the employees of Lechmere, an electronics and hard goods “big box” retailer in Newington, Connecticut.¹¹⁸ At the time, Lechmere employed around two hundred people, many of whom were in high school, and none of whom were unionized.

Lechmere is located in a strip mall along the Berlin Turnpike in Newington, where it shares a parking lot and common entrances with thirteen other stores.¹¹⁹ The Berlin Turnpike is a four-lane road divided by a meridian barrier; the posted speed limit is fifty miles per hour.¹²⁰ The parking lot is separated from the Berlin Turnpike by a forty-six-foot-wide grassy strip, which is broken only by the entrances to the strip mall.¹²¹ A forty-two-foot width of the grassy strip along the highway is public property; the rest belongs to Lechmere.¹²² The parking lot is owned jointly by Lechmere and the developer of the satellite stores.¹²³ Lechmere posted signs on its doors that informed the public of its no-solicitation policy, which it had previously and consistently enforced against Burger King, the Salvation Army, and two Girl Scouts.¹²⁴

On the morning of June 18, 1987, several union organizers arrived at Lechmere before the store opened and placed handbills on the cars assumed to belong to store employees.¹²⁵ One union organizer also handed a leaflet to an employee walking towards the store. The leaflet was taken from the employee by a Lechmere security guard.¹²⁶ The manager and assistant manager of Lechmere directed the security guards to remove the leaflets from the cars in the parking lot and asked the union representatives to vacate the property.¹²⁷

¹¹⁷ United Food and Commercial Workers, *About UFCW*, http://www.ufcw.org/about_ufcw/ (last visited Oct. 24, 2005).

¹¹⁸ *Lechmere, Inc.*, 295 N.L.R.B. 92, 94–95 (1989).

¹¹⁹ *Id.* at 95.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 95, 97.

¹²⁵ *Id.* at 95–96.

¹²⁶ *Id.* at 96.

¹²⁷ *Id.*

On June 20, 1987, union organizers returned to the publicly owned grassy strip along the highway.¹²⁸ They attempted to give handbills to drivers, presumably employees, who were entering the parking lot from the highway.¹²⁹ The manager and assistant manager of the store and several security guards confronted the organizers soon after they arrived.¹³⁰ The manager told the organizers that they were trespassing on Lechmere's property and that he would call the police if they did not leave.¹³¹ Although the organizers responded that they thought they were on public property, the manager proceeded to call the police.¹³² Upon their arrival, the police questioned the union representatives about their purpose, informed both sides that the strip was indeed public land, and spoke privately with the manager.¹³³ After this incident, the union organizers picketed the grassy area between August 7 and September 5, during which time they were often videotaped by Lechmere security personnel via a camera on the store's roof.¹³⁴

In addition to their efforts to reach the Lechmere employees at their workplace, the Local 919 organizers tried to contact them through newspaper advertisements, mailings, phone calls, and house calls.¹³⁵ One hundred seventy-nine of the two hundred Lechmere employees resided within fifteen miles of each other in three different communities.¹³⁶ Local 919 obtained the names and addresses of forty-one employees by recording the license plate numbers of their cars and obtaining information from the Connecticut Department of Motor Vehicles.¹³⁷ An organizer testified that the efforts to reach employees by phone or at their homes were largely unsuccessful because many of the employees were high school students, and generally the parents would not allow the union representatives to talk to their children, the employees.¹³⁸

This appeal stems from a union petition that claims that Lechmere violated the rights of its employees under the NLRA when it prohibited the employees from receiving handbills from union organizers in the parking lot of the retail store where the employees work. In response, Lechmere

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 96.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *See id.* at 96–97.

¹³⁴ *See id.* at 98.

¹³⁵ *See id.* at 97.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* Justice Thomas's version of the facts end: "These mailings and visits resulted in one signed union authorization card." *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 530 (1992). The sentence is brilliantly rendered—at once a statement of statistical fact, seemingly impervious to the suggestion that it is political, and at the same time delivering the implicit punch line of Thomas's narrative: "And no one wanted the union there anyway." I am trying to change the ending of the same story.

claims that its actions were privileged because of its ownership of the parking lot. Our task is to clarify the relationship between these conflicting claims of entitlement.¹³⁹

There are other ways of framing the question in this case. This case requires us to think about how we structure work, and how the activity of a worker, namely her labor, may transform the entitlements and obligations that stem from her employer's ownership of property. We can characterize the employee right as federal, and the employer right as merely state-bestowed, or we can characterize the employee right as merely statutory, and the employer right as a property right. Adopting either of these interpretations shifts the burden of persuasion from one party to the other.¹⁴⁰ We can treat employees and employers as competitors and strive not to favor one group over the other, lest we appear to be unfair. Or, we can step back farther and acknowledge that the competition between employers and employees, and the bargains that they strike, have been created and structured by the laws of property, contract, and labor—the very laws that we are construing, interpreting, and inventing today.

I do not mean to suggest the framing is not important, or that some of these frames are not more appropriate than others, because some clearly are. Instead, I mean to acknowledge that a frame exists, and that the choice we make in framing will affect the way that we answer the ultimate question posed by this case: which version of social life do we choose to enact—one in which union organizers can reach employees at work, or one in which they cannot?

We do not approach this question from a blank slate. We begin by examining the federal statutory scheme that structures workplace relations. The NLRA grants workers the “right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”¹⁴¹ Although the NLRA does not directly confer rights on nonemployees, we have previously held that workers' rights under the NLRA include the right to receive information concerning the right to organize.¹⁴² By its own terms, the NLRA encourages worker self-organization for the purposes of promoting industrial peace, protecting workers' free choice, and redressing the unequal bargaining power that employees experience in the modern workplace.¹⁴³ The values that motivated the passage of the NLRA should inform our understanding of the relationship between work and property.

¹³⁹ Justice Thomas frames the question of the case: “This case requires us to clarify the relationship between the rights of employees under § 7 of the National Labor Relations Act (NLRA or Act) . . . and the property rights of their employers.” *Lechmere*, 502 U.S. at 529.

¹⁴⁰ *Cf. SINGER*, *supra* note 1, at 62.

¹⁴¹ 29 U.S.C. § 157 (2000).

¹⁴² *See NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956) (“The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others.”); *Estes & Porter*, *supra* note 115.

¹⁴³ *See* 29 U.S.C. § 151 (2000); *Klare*, *supra* note 31, at 281–83.

“The history of labor law has been, in large measure, the history of property rights.”¹⁴⁴ Like our laws concerning public accommodation, occupational health and safety, the environment, the disabled, and zoning, our labor laws structure the meaning of property relationships between owners or between owners and non-owners. We have held previously that in forming labor contracts with employers, employees are selling their labor, which is a form of property in itself.¹⁴⁵ Thus the situation presented by the conflicting claims in this case can be described as a conflict between two owners: one holds the title to land, and the other owns the title to his labor that is situated on the other owner’s land. Framing the conflict in this way, we cannot appeal to ideals of ownership alone in order to resolve this case.¹⁴⁶ Instead, we need to examine the legitimate interests of the parties involved and the social values at stake in order to determine how to allocate the entitlements of controlling access to, and exclusion from, the property at issue here.

Lechmere asserts that it possesses the right to exclude the nonemployee union organizers from its property simply by virtue of its ownership status, and that it need not state any reasons for the exercise of this right—it can exclude for good, bad, or no reason at all. We have said that the right to exclude is one of the fundamental rights of property ownership.¹⁴⁷ This may be true, but we must examine the reasons why we value property and why we attach the right to exclude before we can decide whether this right should exist in the instant case. Such an analysis is necessary because as often as we protect the right to exclude, we create exceptions and limitations to it. Exclusion is perhaps best thought of not as a right of property, but one common way to treat property. The inside of a house differs in many ways from a strip mall parking lot, and calling them both “property” should not rush us to any conclusions. We protect the house and the strip mall in different ways and for different reasons.

Property serves human liberty.¹⁴⁸ One way that it does so is by giving property owners room for security, autonomy, and the realization of their own world-creating needs and desires. For this sense of liberty, the liberty to do anything one wants, the right to exclude is clearly attendant to prop-

¹⁴⁴ Estlund, *supra* note 115, at 306.

¹⁴⁵ *Lochner v. New York*, 198 U.S. 45, 53 (1905) (discussing “the right to purchase or to sell labor”). *See also* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392–93 (1937) (repudiating *Lochner*’s holding that the freedom of contract is an absolute right without questioning whether contract and property are the correct paradigms for the employment contract).

¹⁴⁶ *See* SINGER, *supra* note 1, at 115 (“To say that the owner wins is circular because the meaning of ownership is exactly what is at question here.”).

¹⁴⁷ *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (stating that the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property” (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))).

¹⁴⁸ JOSEPH W. SINGER, *THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP* 27 (2000).

erty.¹⁴⁹ It is not clear, however, that this particular meaning of liberty is implicated here. This case is not about a house, but about a place of business. As our zoning laws demonstrate, commercial property is often subject to a multitude of restrictions intended to promote the common good. When Lechmere opened its land to customers and struck bargains with employees, it changed the entitlements and obligations that came with ownership. A store is a place to create and fulfill bargains between employee and employer, customer and merchant. It provides the space necessary for the relationship of work. It is not a home but a workplace. Lechmere cannot exist without this physical place. Liberty is implicated in this space, but not through exclusion. We value commercial property because we think it contributes to a better life for all by ensuring that resources are used productively.¹⁵⁰ This liberty aims to ensure the broadest possible variety of human opportunities. It is part of our quest for the flourishing of human life. When property serves liberty in this way, we do not automatically attach to it the right of exclusion. We do not agree that Lechmere may exclude union organizers from its parking lot simply by virtue of its holding title to the land. Therefore, we turn to the other interests Lechmere asserts for its right to exclude in order to determine their legitimacy.

Lechmere, as owner and employer, may worry reasonably that granting union organizers access to its property for union organizing purposes will seriously disrupt its business and inconvenience its customers. It is axiomatic in the NLRA that “working time is for work,” a notion that seems to weigh as heavily on this case as the idea that “property includes the right to exclude.”¹⁵¹ Our cases have held that employees may not solicit other employees about union organizing while “on the clock” but may do so during non-working time while on the employer’s premises.¹⁵² Our labor laws are meant to serve industrial peace and promote productivity, not threaten them. Unlike employee union organizers, nonemployee organizers have no duty to the employer, and thus pose an even greater threat of disruptive behavior.

¹⁴⁹ See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1353 (1993) (“Compared to other resources, land remains a particularly potent safeguard of individual liberty. Like no other resource, land can provide a physical haven to which a beleaguered individual can retreat. A land sanctuary directly serves a variety of so-called ‘negative’ liberties.”).

¹⁵⁰ See Thomas S. Ulen, *Property Law and Efficient Resource Use*, in THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY 261 (Nicholas Mercuro & Warren J. Samuels eds., 1999) (“The ultimate social benefit of [a private property system] is that the ownership of valuable resources, combined with a regime of secure, enforceable contract law, encourages the movement of resources to their highest-valued use.”). *But see* Frank Michelman & Duncan Kennedy, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 712–17 (1980) (arguing that private property does not necessarily best promote efficient use).

¹⁵¹ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945).

¹⁵² *Id.*

At the same time, however, we allow employers to use their employees' working time to hold meetings devoted to airing anti-union views.¹⁵³ This indicates one of two things about the meaning of work. "Working time is for work" either means that "work" includes bargaining, such that employers and employees are able to spend "work" time learning about the bargain that they wish to strike with their counterpart, or it means that the working time of an employee is another type of property that an employer owns and may dispose of at will.

Today, we choose the former understanding of work. Union organizing should not be an extracurricular activity for employees; just as employers, they are entitled to use their working time to learn about collective bargaining and to decide how to bargain with their employers. We find support for this understanding of work in the NLRA itself and in our own belief that employees relate to their employers as people, not as a form of property. To hold otherwise would disaffirm the idea that employees and employers are equal, morally and in status, and affirm instead that employees are servants to their employer masters.¹⁵⁴ This notion does not conform to our American ideals concerning equality and freedom of contract.¹⁵⁵ Although disruption to an employer's business is a legitimate concern, we trust that the NLRB will be able to minimize such disruption through their application of the *Babcock & Wilcox Co.* and *Jean Country* framework. In the present case, it is clear that the leaflets left by the union on employees' cars did not pose a serious disruption. We should also note that while an employer may have legitimate reasons for wishing to avoid disruptions posed by union organizers, he or she cannot avoid the disruptions posed by an employee-organizing campaign itself, as such campaigns are directly protected by the Act.

Stating a related concern, Lechmere argues that all possible disruption and conflict can be avoided because the union can reasonably communicate with employees away from the workplace. In this case, the union made efforts to reach employees through newspaper advertisements, phone calls,

¹⁵³ NLRB v. United Steelworkers of America, 357 U.S. 357, 357 (1958).

¹⁵⁴ James B. Atleson has argued:

The requirement of deference to employers and their property would have been clearly understandable to early nineteenth-century employers. Members of the managerial class in early America clearly expressed the desire and intention to maintain a quasi-status relationship with employees . . . such assumptions of junior status are still reflected in American law.

ATLESON, *supra* note 38, at 96; *see also id.* at 84–96.

¹⁵⁵ *See, e.g.*, ABRAHAM LINCOLN, 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 463 (Roy P. Basler ed., 1953) ("As Labor is the common *burthen* of our race, so the efforts of *some* to shift their share of the burthen onto the shoulders of *others* is the great, durable, curse of the race." (emphasis in original)); *see also* ABRAHAM LINCOLN, 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 532 (Roy P. Basler ed., 1953) ("As I would not be a *slave*, so I would not be a *master*. This expresses my idea of democracy. Whatever differs from this, to the extent of the difference, is no democracy." (emphasis in original)).

and home visits, as well as the visible picket they maintained outside of the store. If employees can learn about their rights and the benefits of union membership through these alternative methods, then it might seem unnecessary to allow union organizers onto workplace property.

However, our analysis of equality in the workplace, and our NLRA and freedom of contract ideals, suggest that such means may not be sufficient, regardless of their success.¹⁵⁶ Moreover, we are struck by the image of union organizers standing by the side of the road on the grassy strip abutting the Berlin Turnpike. Standing in this familiar “No Man’s Land,” writing down license plate numbers as cars turned off the highway, the organizers could not have appeared legitimate. It is no surprise then that their campaign was not successful. What danger must they pose to society if they could not enter a shopping center parking lot without explanation? The organizers were not miscreants. They were trying to reach the Lechmere employees at work, to talk about work. The law, through property, should not marginalize people who perform a legitimate role—one that has been deemed to deserve the law’s protection. If we interpret our property laws to place union organizers on the side of the road, when virtually anyone else can enter the parking lot unperturbed, we imply certain consequences for their place in our society. This is not a social world that we wish to create here today.

Underlying these various asserted interests is an idea about the type of control that employers legitimately may exercise over their employees at work. There are many types of legitimate employer control in a typical employment contract: for example, over work assignments and strategic decisions for the enterprise. We cannot deny the allure of the view that ownership is a type of dominion in the workplace. However, our labor laws hold that employers may not exercise their power to control their employees’ ability to understand and order their workplace relationships. Property does not exist apart from these laws but through and with them.

We do not believe that the rights of organizers to enter an employer’s property are absolute, but only that they exist in this instance. The NLRB decision ordering the employer to allow organizer access to the parking lot is hereby AFFIRMED.

D. Caveats, Deconstruction, and Vision

The above is probably best described as a caricature of a value-based judicial decision. It does not include treatment of the precedent directly implicated in this case and it is perhaps more free flowing than most judicial opinions. However, we still can trace differences between this opinion and

¹⁵⁶ See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540–41 (“Access to employees, not success in winning them over, is the critical issue—although success, or lack thereof, may be relevant in determining whether reasonable access exists.”).

the judicial opinions to which we are accustomed—in form, not in outcome. One important caveat is that this method need not compel this particular outcome. That is to say, if we imagine that Justice Thomas sat down to rewrite *Lechmere* in this manner, he would likely reach the same conclusion as he did in the real case, but through a different lens of what property is and with a different balancing of the value choices involved.

One difference is what is treated as being in dispute. The “real” decision considers whether the National Labor Relations Board has been deciding disputes under a “correct” interpretation of *Babcock & Wilcox Co.* Given the structure of our legal system, the framing of the question in this way is inescapable, but it obscures the burden of discussing the value choices inherent in the treatment and understanding of precedent and the acceptance of legal analogies.¹⁵⁷ In contrast, my opinion addresses the issues that must be resolved: namely, the choice between the ideas of liberty, property, and work that we either affirm or deny in creating a legal rule. If I have succeeded, we can imagine a different dissent in this case. It would argue not that “the majority failed to understand the Court’s carefully chosen language in *Babcock & Wilcox Co.*,” but instead: “the Court fatally misdescribed the relationships between liberty and property, and between property and work.” This framing would place these values at the forefront of discussion and refinement in further cases, legal treatises, classrooms, and articles.

Another difference is that my opinion treats values as contested, conflicting things. The goal of this exercise was to dispel the illusion that cultural harmony exists and dispense with the notion that courts have special insight regarding the way that our world works that authorizes them to pronounce the values that “everybody knows.” The goal was to show what makes these decisions difficult. I perhaps did not state the conflict as strongly as I could have. The difficulty was that ultimately, a decision was necessary. The decision was not arbitrary.¹⁵⁸ It was based on a weighing of the values and my understanding of the situation.¹⁵⁹ The opinion was also meant to persuade others that this was a correct, but not neutral, decision. I have in mind Walzer’s method of making philosophical argument—“to interpret to one’s fellow citizens of the world of meanings that we

¹⁵⁷ See *infra* note 182 and accompanying text.

¹⁵⁸ See Singer, *supra* note 3, at 20.

¹⁵⁹ As Singer explains:

Everyone has had the experience of making important, difficult moral decisions. . . . Everyone knows how to do this. Some people do it better than others, because they know more facts, or because they are not afraid of asking their friends for advice, or because they consider what to do more carefully than others. But it is in any event an experience that everyone has had. Legal decisions—deciding a case, voting on a statute, electing a president—are no different: Judging, in whatever context it appears, is just decisionmaking.

share”—hoping that, if my interpretation is apt, then my decision will be accepted.¹⁶⁰

Finally, I meant for the opinion to be written as an act of future world creation, the product of a conversation about what we want our world to look like.¹⁶¹ In Rorty's words, the method is to “make invidious comparisons between the actual present and a possible, if inchoate, future.”¹⁶² The difficulty here is to engage the imagination and be open to literary truth, and yet return to the world of law and social interaction in order to make a decision. It is important to keep in mind that this type of conversation does not deny the practical use of the type of reasoning skills that lawyers are especially equipped to employ. Michelman, in listing what remains of the lawyer's role when a theory of this type is accepted, explains that lawyers and judges are still “rightly expected to ‘think’ as well as ‘look’—to deal with cases cognitively, by argument, persuasion, rational reflection, and public explanation.”¹⁶³ The difference is that judges would be understood as non-neutral; thus, lawyers' arguments would not aim at the manipulation of formal doctrines, but at the world of value choices underlying those doctrines.¹⁶⁴ I do not want to formalize the process by describing it. Ultimately, it is the particular facts and values attendant to an individual case that will shape this type of deliberation.¹⁶⁵ This demonstration is meant to show that such deliberation is both practically possible and potentially world-transforming. In answering some objections that present themselves, I hope to elucidate this idea.

IV. OBJECTIONS

This is not an exhaustive list of objections. Instead, I will focus on the objections involving relativism and the rule of law that may shed further light on the meaning of value jurisprudence.

¹⁶⁰ WALZER, *supra* note 45, at xiv.

¹⁶¹ See Singer, *supra* note 3, at 51 (“Legal reasoning, as I understand it, consists of conversation.”).

¹⁶² Rorty, *supra* note 27, at 23.

¹⁶³ Michelman, *supra* note 6, at 85.

¹⁶⁴ To head off a possible legal realist-type objection, the belief in the non-objectivity of value choices saves this theory from being charged with the crime of substituting a new type of abstraction for an old one. Values are abstractions, but there is no claim here that they are determinate, politics-cleansing ones. Instead, they represent the part of legal reasoning and Aristotelian deliberation that involves “the talk of the general and the particular informing one another.” NUSSBAUM, *supra* note 22, at 316. We need not conceive of values as operative categories in the formalist sense. See *supra* note 53.

¹⁶⁵ See NUSSBAUM, *supra* note 22, at 317 (describing the deliberation of Hecuba in Euripidean poetry as an example of Aristotelian deliberation that “is itself fragile, easily influenced and swayed by external happenings”).

A. The Problem of Relativism

Relativism raises two different arguments against this theory from opposing directions. The first relativist objection is that “a judge should not impose her personal preferences on the rest of us,” or, stated differently, “who is the judge to say what is right and wrong? That is for everyone to decide for themselves.” This argument reveals a concern that some people’s values will dominate over others. The second objection is that “this theory reduces all values to equal footing—a judge will have to consider and take seriously the idea that murder and slavery are not evil or wrong.” This argument addresses the opposite concern that some values will not dominate enough.

1. The Domination Objection

In response to the domination worry, we should recognize that this “who am I, or a judge, to say what’s right” relativism is itself a particular normative view. Minow and Spelman elucidate what this view entails and illustrate why it need not be persuasive.¹⁶⁶ They distinguish the view that “it is wrong to form judgments in the absence of knowledge of [other people’s] context[s]” from the view that “no one *ever* has the right to judge another.”¹⁶⁷ The former view is a type of “epistemological humility” that entails the conclusion that judgment could be possible if we knew enough about another’s context. The latter view is a normative argument that “has a very non-relativist cast to it” as it “insists that we ought to judge those who judge others as wrong.”¹⁶⁸

The latter view is insupportable. If we take the objectivity of values seriously, the argument leaves the formation of the nomos in which we live to chance or to the power of those who actively seek to manipulate it.¹⁶⁹ It is perhaps premised on a belief, fostered by liberalism and by legal thinkers such as Oliver Wendell Holmes, that law can be neutral and separate from values, which are only “personal” things.¹⁷⁰ Some values are personal and are not appropriate for legislation—for example, religious beliefs, or most aspects of how I wish to raise my children. However, the “personal” nature of these values reflects the character of these particular values themselves. While the notion that “judges ought not to write their personal values into the law” is true for some values, this does not imply that judges ought not to acknowledge that their decisions rest on conflicting value choices which are often unaddressed in adjudication.

¹⁶⁶ See Minow & Spelman, *supra* note 17, at 264.

¹⁶⁷ *Id.* at 264–65.

¹⁶⁸ *Id.* at 265.

¹⁶⁹ See discussion of objectivity of values, *supra* note 52 and accompanying text.

¹⁷⁰ See ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 132–80 (2000).

The former view raises an important question: why are judges in particular able to overcome this “epistemological humility” and render judgment? First, judges have no choice but to make judgments. Cases must be decided, and decisions will be based on underlying value choices that structure our world whether we like it or not.¹⁷¹ We can understand legal procedural rules as our chosen method of giving context to the value decisions that judges must make.¹⁷² We should also acknowledge that we already live in a world of judge-made common law that is not value neutral. We may be afraid of the domination of bad values or bad judges, but we cannot avoid that fear by denying this reality. Instead, we must counteract this fear by using conversation and discussion to foster good judgment and accountability.

We may worry that judges are not in a position to judge because while they may be well-versed in legal doctrines, they are not in a better position than anyone else to adjudicate value choices and moral dilemmas.¹⁷³ Although this worry may be true, it is inescapable. As Cohen explains:

[T]he state ought to do good, anywhere and everywhere and under all circumstances,—even though nobody knows what that good is. And now to the question of who is to be judge of the state’s ability to do good, we can give an answer no more indefinite than the question, namely, that whoever is best able to see the effects of law upon the good life will make the most accurate judge. Of course if legislators, judges, and jurists fall prey to the easy hallucination of ethical omniscience and political omnipotence they will be emboldened to interfere with men’s activities in ways productive of real evil, hoping to bring about the good life. . . . And in any case the evil uses to which a true theory may be put by the ignorant or malicious do not afford an argument against the truth of the doctrine.¹⁷⁴

We can take solace in the fact that, in selecting judges, we worry a lot about their character and the value choices that we expect from them. The political nature of the federal judicial nomination process is appropriate given the significance of the choices that we rely on federal judges to make. If we feel that the contemporary process is somehow broken, we should direct our ire not at the influence of politics per se, but at the poisonous atmosphere of contemporary politics.¹⁷⁵

¹⁷¹ This reality distinguishes judicial reasoning from philosophic argument.

¹⁷² See Catharine Wells, *Situated Decision Making*, in *PRAGMATISM IN LAW & SOCIETY*, *supra* note 17, at 275, 279–81.

¹⁷³ See *supra* note 159.

¹⁷⁴ COHEN, *supra* note 13, at 91.

¹⁷⁵ Cf. Jack M. Balkin, *The Passionate Intensity of the Confirmation Process*, *JURIST*, Apr. 15, 2004, <http://jurist.law.pitt.edu/forum/symposium-jc/balkin.php>.

2. *The Anti-Domination Objection*

In response to the second concern, we need not let this method of adjudication reduce all values to equal footing, if we take our values seriously. Understanding that our conflicting values sometimes necessitate difficult choices does not imply that we need to treat all values, or prejudices parading as values, as “equal.” Indeed, we should not. The consequence of the critiques is not that all manners of organizing social life are equally valid, but that we have a choice in the way we organize social life, and in light of this, we need to become better at discussing and choosing.¹⁷⁶ In accepting that contradictory ideas exist, we need not accept all ideas as equally valid. Instead, we can make judgments as to value choices and argue about them.

B. *The Rule of Law*

Even if we accept the critique, and even if we feel that our current judicial methods are inadequate, we might well fear the result of judges feeling unconstrained in the judgments they make. The fear is that if we embrace this method of adjudication, we will endanger our rule of law ideals. Michelman describes our rule of law ideal as the belief that “the American people are politically free inasmuch as they are governed by laws and not men.”¹⁷⁷ According to Robin West, the rule of law is often married to the formalist idea of law: the rule of law is the “culture in which courts are required to resolve cases by reference to agreed upon, determinate rules, in neutral fashion, and in a manner which is reasoned, passionless, and above all else non-political.”¹⁷⁸ These beliefs express an important component of legal justice. We look to law to avoid the oppression that stems from being subject to the arbitrary rule of men. Is it possible to relinquish the culture of neutrality but maintain the freedom that comes from living under the rule of law?

This fear becomes obsolete if we believe that judges will understand the rule of law concerns as values that must be considered seriously in any adjudication. West confronts this question in *Re-Imagining Justice*, in which she translates our desire for legal justice into “legalistic values” that can inform progressive views of the law.¹⁷⁹ If these values are considered in

¹⁷⁶ See Geertz, *supra* note 52 and accompanying text.

¹⁷⁷ Michelman, *supra* note 31, at 1500 (footnote omitted).

¹⁷⁸ ROBIN L. WEST, *RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS AND THE RULE OF LAW* 54 (2003).

¹⁷⁹ West describes well the intuition underlying the desire for legal justice:

I always invite the students . . . to think back on their lives and to report . . . any experiences they have had of a failure of “legal justice” What I hear back, overwhelmingly, are stories about breaches of formal equality These events are felt as unjust, and the feeling in virtually all cases traces back to a belief that

adjudication, we do not need to fear that judges will destroy society through arbitrary authority. As West explains well: “Lawyers might, after all, be sensibly assumed to have a distinctive appreciation of the ways in which lawfulness—the principle of legality, rather than private rule—and representative democracy—widespread political participation, rather than elitism—sustain and improve upon social life.”¹⁸⁰

When understood as values in themselves, seemingly formalist and classical ideas such as individual rights and formal equality (i.e., treating like cases alike) can exist within progressive theories of the law.¹⁸¹ A judge who takes these values seriously, and who considers the rule of law as a value in itself, will feel constrained in her use of judicial authority. The call for value talk is not a call for new judicial activism. The goal is not to authorize judges to do whatever they want, but to allow them to more fully embrace and confront the value choices that they are making already. This experienced constraint need not mask the recognition that such values have non-neutral implications for our world. Reliance on precedent, and judicial deference to the value choices made by legislatures, may be ideals consistent with our rule of law values, and we may have good reason for these values to weigh heavily in all legal deliberation, but they are values and ethical decisions nonetheless.¹⁸² Judges who take rule of law values seriously in adjudication will probably often feel that they are making decisions that, given all of the considerations, they personally would rather not make. Developing a theory of value jurisprudence does not exalt judges to a role that they do not have now, but rather recognizes their existing role for what it is.

someone is being treated by an authority in some way that wrongly differentiates her from a larger class to which she rightly belongs. . . . It is also . . . a wrong that is largely wrought by law, and those responsible for its administration: we charge judges, and derivatively lawyers, with the task of safeguarding this value, and legitimately expect their expertise in dispensing the legal justice that depends upon them understanding that.

Id. at 132–33.

¹⁸⁰ *Id.* at 58.

¹⁸¹ *See id.* at 8–9.

¹⁸² As Felix Cohen has written:

[T]he ethical value of certainty and predictability in law may outweigh more immediate ethical values, but this is no denial of the ethical nature of the problem. *Consistency*, like *truth*, is relevant to such a problem only as an indication of the interest in legal certainty, and its value and significance are ethical rather than logical. The question, then, of how far one ought to consider precedent and statute in coming to a legal decision is purely ethical.

COHEN, *supra* note 13, at 33.

CONCLUSION

A jurisprudence of values that answers the critiques is possible. Even if we accept that the law is not a neutral arbiter of social conflicts, but a value-laden tool with which we shape our social world, judgment and decision still are achievable. Additionally, we can see that these types of decisions can be at least as politically acceptable as the ostensibly “neutral” decisions commonly written today.

The next step is to imagine not one decision, but all decisions,¹⁸³ being written this way. Some of these decisions already exist.¹⁸⁴ If all decisions honestly addressed the value choices that they represent, and if judges and legislators understood the law as shaping our social life instead of merely regulating it, then we would do and teach law much differently. Lawyers would learn how to converse well about the meaning(s) of equality, in addition to the structure of our federal system and the parole evidence rule, which, of course, are not separate from equality but reflect our ideas about it. We would no longer feel the need to translate our ideals and social justice movements into ostensibly neutral doctrinal arguments compelled by legal precedent. If this still seems frightening and if it still seems as though we are giving too much power and authority to lawyers and judges, we need to remind ourselves that the law already exercises this power over our lives. The plea here is to make the value choices underlying the law explicit so that we can approach them responsibly and perhaps make better choices.

¹⁸³ I do not mean that all decisions should be treated as questions of first impression, but only that all decisions should acknowledge that they are the product of value choices.

¹⁸⁴ See discussion of *State v. Shack*, 58 N.J. 297 (N.J. 1971) and *United States v. Progressive*, 467 F.Supp. 990 (W.D. Wis. 1979), *supra* Part III.A.

