

Ethics in Negotiation

BY PROFESSOR CARRIE MENKEL-MEADOW

As reported in the Faculty Notes section of this magazine, a book entitled What's Fair: Ethics for Negotiators, co-edited by Law Center Professor Carrie Menkel-Meadow and Harvard Business School Professor Michael Wheeler, was published by Jossey-Bass Press, an imprint of Wiley, in March 2004. The book includes an introductory chapter, "What's Fair in Negotiation? What is Ethics in Negotiation?" by Professor Menkel-Meadow. The following essay, drawn from that chapter, is published here by permission.

What do we owe other human beings when we negotiate for something that we or our clients want? How should we behave toward our "adversaries"—opponents, partners, clients, friends, family members, strangers, third parties, and future generations—when we know what we do affects them, beneficially, adversely or unpredictably? How do we think about other people we interact with in negotiations? Are they just means to our ends or people like us, deserving of respect or aid (depending on whether they are our "equals" or more or less enabled than ourselves)? How do we conceive of our goals when we approach others to help us accomplish what we cannot do alone?

This book explores a number of the key issues confronting all negotiators, most often presented by several different treatments of those issues. We begin with an overview of several different statements of what some core values might be in conducting fair negotiations. Some of the key negotiation theory founders of the modern generation—Roger Fisher, Howard Raiffa, David Lax, and James Sebenius—suggest that every negotiation presents the negotiator's dilemma: whether to act as you would want others to act toward you (with candor, in search of a good joint solution for both parties) or as you might expect them to act in a world of assumed scarce resources and competition (with lack of full disclosure and with the intention of taking advantage of you). Whether termed an issue of what candor is required or expected or what misrepresentations might be permissible in custom, or actionable at law, or simply whether to approach the other side with trust or suspicion, this is what Howard Raiffa has labeled the "social dilemma game"—only it is not a game. In virtually every negotiation, the initial ethical

orientation to oneself and to the Other can be quite serious, with iterative consequences for all players. Whether termed a behavioral question of cooperate or defect, claiming or creating value, or being open and trusting or skeptical and closed, this behavioral choice is really a proxy for a much bigger question of what one hopes to accomplish in a negotiation for the self (or client), for the Other, and for the long-term consequences of both the negotiated agreement and the relationships of all affected parties. Although in "the long run, we will all be dead," said John Maynard Keynes, the long run in negotiation is often longer than the short run of a particular deal. Thus, most modern treatments of negotiation ethics ask us to consider from the outset not just this deal or this lawsuit settlement, but also the possible long-term effects of the agreement itself and the reputation of the negotiators.

Instrumental ethics (making a good, enforceable, and lasting deal) here can be coextensive with aspirational ethics. In Howard Raiffa's terms, "All of us are engaged in a grandiose, many-person, social dilemma game where each of us has to decide how much we should act to benefit others. . . . We have to calculate, at least informally, the dynamic linkages between our actions now and the later actions of others. If we are more ethical, it makes it easier for others to be more ethical."

Deciding whether to behave ethically toward others implicates at least five common issues: (1) what duty we owe to others to tell the truth, or something like the truth, in our negotiated dealings with them; (2) what tactics and behaviors we choose when interacting with others; (3) what the duties and responsibilities are with respect to our relationships with clients and principals in negotiation (agent-principal issues); (4) what relationships we seek to create with the Others in our negotiation activity; (5) the social influences and distributional fairness of outcomes and of negotiated agreements on the parties themselves; and the social impact of negotiation

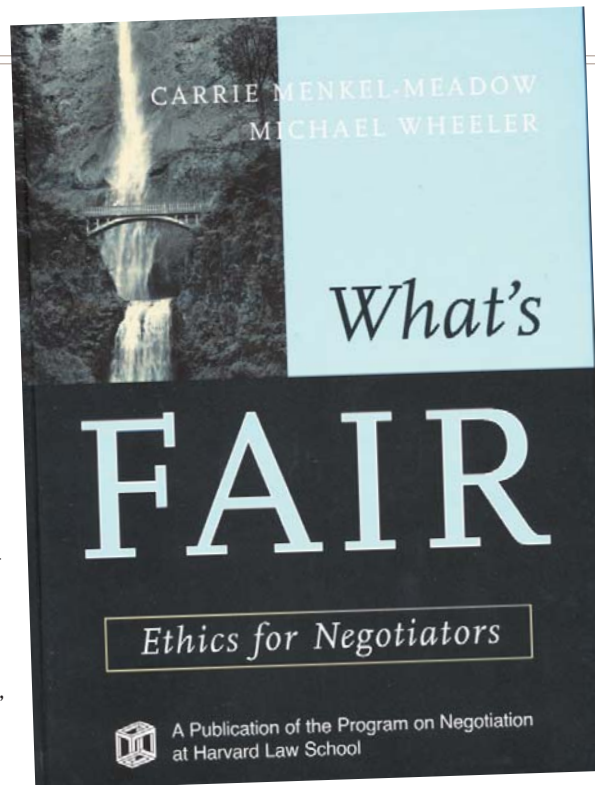


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agreements on others who are, or might be, affected by the negotiation result.

What can be said for those who enter into negotiations without knowing the culture or unwritten rules or norms? Should there be an obligation on the part of more knowledgeable negotiators to socialize, instruct, or serve those on the other side of the table? The cultures of American business and law seem to deny such obligations with their expectations of adversarial practice in which each side is master of his or her own fate or negotiation agent. There is little formal duty to take care of the other side, either informationally or substantively.

If changed norms or improved skills do not level the ethical playing field, then at least in the realm of commercial and legal negotiations, there are some limits. Regulation of negotiation occurs at several different legal levels, and no negotiator should leave home without some knowledge of how formal rules, regulations, and sanctions may affect them. The law of fraud and misrepresentation in the state law of contracts and fraud may make some negotiation conduct actionable in several ways. Negotiated agreements may be declared void for such reasons as intentional, reckless, or negligent misrepresentation, and misrepresentation (as defined by



not only to voiding of a negotiated agreement but also to punitive and restitutionary damages. Modern corporate law also regulates what negotiators can say to each other when selling stock, whole companies, or even negotiating employment contracts and other deals in publicly traded companies. Recent corporate scandals involving misrepresentations of company value in both public and private settings are beginning to spawn another generation of corporate and professional laws, regulations, and legal common law decisions, calling for not only greater candor in internal and public

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state law) may encompass not only false statements but misstatements, failures to correct misunderstandings, and even, in some cases, silences and omissions. Mistakes, whether mutual or bilateral, may also be grounds for voiding a contract (the result of most negotiations).

Contracts procured by outright fraud, coercion, and unconscionability can lead

dealings but greater sanctions when candor and public trust norms are violated.

Although the law provides some outside limits on what negotiators can do, legal philosophers have long noted the line of separation between positive law and morality, and negotiation is no exception. What Oliver Wendell Holmes's "bad man" can get away with under the law does not

hold a candle to what a "bad" or immoral negotiator can still do without fear of legal sanction, in large measure because so much of what negotiators do, they do in private, where no one can see them. Efforts to peer into and assess, whether by common morality or more formal legal sanction, the negotiation behaviors and outcomes consummated in private have been controversial and are continuing. For some negotiators, professional regulations attempt some minimal control of particular tactics and obligations for candor and fairness. The lawyer's Model Rules of Professional Conduct, for example, provides, "A

Lawyer shall not, in the course of representing a client, make a false statement of material fact or law to a third person; or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client (unless disclosure is prohibited by Model Rule 1.6, the client confidentiality rule)." However, commentary to this rule makes it clear that certain statements in negotiation, which are merely "opinions" (such as of value) and are not "fact," are not subject to this rule. According to the Comment, there are "generally accepted conventions in negotiation" in which no one really expects the truth will be told, and several specific kinds of statements made in negotiation are exempt from the rule. Lawyer negotiators need not tell the truth about "estimates of price or value placed on the subject of a transaction," a party's intention as to an acceptable settlement of a claim or value, and the existence of an undisclosed principal (say, Donald Trump or Harvard University in real estate negotiations). Thus, what the professional rule seems to "give" or require, the Comment to the rule taketh away. The Comment further recognizes that negotiators may "puff" or exaggerate about value, and this too is within the tolerable limits of the law. Efforts made twice in recent years to

Stronger ethical mandates might themselves be a marketable advantage in the competition for getting and keeping clients.

toughen up the lawyers' rules of ethics to require candor and fairness to other parties have been defeated in formal recognition of a professional culture that deals in expected deception.

Although some other professionals have internal ethics rules (real estate brokers, accountants, doctors), there are vast numbers of professional negotiators, including most daily business negotiators, who are entirely unregulated. Although professional discipline for violating a lawyer's duty of candor in negotiation is virtually nil, there is still some regulation through voiding of contracts and some legal scrutiny of a small class of legally settled cases, such as class actions. In other professions, scrutiny of negotiation behavior is virtually nonexistent (with the exception of some specialized consumer protection laws and similar specialized areas of regulation, such as residential real estate and securities sales). While lawyers may be heard to complain that subjecting them to overly "restrictive" ethical mandates (such as candor and fair dealing) will cause them to lose business in the multidisciplinary professional tournament of business-getting, there is barely a whisper that perhaps stronger ethical mandates might themselves be a marketable advantage in the competition for getting and keeping clients.

Related to the issue of the private location of most negotiations is the more recent development of privacy and confidentiality agreements negotiated for in lawsuit settlements. If an assessment of the fairness and justness of a particular outcome is part of the ethics of negotiation, then failure to make public or disclose settlements of publicly filed lawsuits impedes such inquiries and has recently drawn the attention of legal commentators who suggest that it is morally unacceptable for settlement

agreements to be privatized, especially when public issues such as health, safety, and social welfare are at stake.

Such concerns about the privatization of negotiated agreements are relatively new since for most of our social, economic, and legal history, most negotiations, both litigational and transactional, have been conducted in private. There is some evidence that more legal cases are settled (less than 3 percent of all civil cases filed in federal courts are currently completed with a public trial), but settlements of lawsuits have long accounted for a great majority of publicly filed lawsuits. With the advent of sunshine laws and the Freedom of Information Act at federal and state levels, at least governmental negotiations probably have more transparency than ever before. With new negotiation processes involving multiple parties, such

product liability, consumer rights, securities fraud, and civil rights has caused those who care about outcome measures of justice to be concerned about the social impact of increasingly private negotiations.

Like the general public, clients of lawyers, brokers, and other agents may also not know all that has been done (or not done) on their behalf. The use of agents to negotiate on behalf of principals has long been justified on grounds of efficiency, superior knowledge, and stress reduction for the principals. However, with different incentive structures (in payment, negotiation reputation, repeat player possibilities), agents may not always be working in the best interest of their clients, and this has led to serious questioning of the separate ethics duties and responsibilities that agents (some as formal fiduciaries) may have to their clients. Where principals may not even be present at negotiations, assessment of the behavior of lawyer negotiators on behalf of their client-principals may be difficult to view for both process and outcome assessment.

The claim that specified roles allow for role-specific morality has also been

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as negotiated rule-making and consensus-building forums in which multiple stakeholders meet together to negotiate governmental allocations, environmental issues, and complex federal and state regulations, there is probably more public access to those kinds of negotiations.

There are, however, complex legal issues about the conflicts presented when assurances of confidentiality are made in mediated settings that may conflict with public accessibility laws. However, where so much is decided by common law lawsuits, the increased private settlement of class actions and individual lawsuits about

claimed for professionals engaged in work on behalf of others. Whether as lawyers, brokers, or business negotiators, the claim has been long articulated that agents may do for others what they might not be able to do for themselves. If soldiers can kill in war, which other humans cannot do without impunity under most conditions, then lawyers and business agents are permitted, in common understandings of role morality, to be slightly more rapacious, aggressive, or deceptive in trying to extract gain for their clients.

If role morality or the quality of performance in role is to be a measure of

what is good or well done as a negotiator, then perhaps the person for whom the work is performed should be its judge. The work of agents raises questions about whether client satisfaction is enough of a moral standard by which negotiators should evaluate what they do and whether the rest of us can be satisfied with the role-morality justification.

Role-morality neglects consideration of a category of ethical concerns. Client satisfaction and efficient and effective role performance assess the ethics of negotiation from one side only. Modern considerations of ethics in negotiation go beyond the achievement of client goals and the behavioral choices of individual negotiators. We are interested in evaluating whether outcomes have been good for the parties—fair in a distributional sense and often fair in a procedural sense as well. Some empirical work suggests that the norm of reciprocity is not only a procedural one, of alternating and more or less equal concession patterns, but that negotiators do move toward a reciprocal sense of what is fair in distributions of surplus, though not in all situations and not with perfect equity. Determining whether an outcome of a negotiation is fair or good for the parties includes evaluations of prior and postnegotiation endowments, whether the negotiation has made the parties better or worse off than they would have been without the negotiation, and whether all relevant issues between them have been considered.

Beyond considerations of fairness are issues of implementation, follow-through, and commitment to any agreements and, where relevant, continuing relationships of the parties. Should we judge a negotiator by how well he behaves as a promise keeper and trustworthy implementer of what has been agreed to? Reputations for following through on commitments and promises may be as significant as what negotiators do in the process of reaching agreement. Often implementation and resolution of post-agreement disputes or issues may be even more visible than the actual negotiations themselves, and thus they may be subject

to scrutiny of others besides the principal actors or beneficiaries to the negotiation.

Beyond the immediate parties, many now believe that in considering the morality of a negotiation, concerns for those outside the negotiation (future generations, others affected, especially those who could not participate) require us to consider the effects on third parties—whether intentional, as when negotiators make representations of value that are relied on by others, such as investors who are not the negotiator's

and defendants or buyers and sellers, so many negotiations now implicate or affect other parties that questions of inclusion at the process level and fairness at the justice level are woven into many disputes and transactions we negotiate about. How should we take account of the externalities, or effects of negotiated outcomes on those who are not present? What are the social effects of individually arrived-at negotiated solutions to commercial sales, property deals, settled lawsuits, and negotiated rule-making?

When is it appropriate to negotiate or settle matters between the parties (with their consent), and when should matters be ruled on publicly, by an authoritative agent or government official, where the stakes are significant for the larger public outside the dispute?

immediate client, or nonintentional, as in environmental decisions affecting the nonpresent or future generations.

Negotiated outcomes, whether public or private, have social effects on the parties immediately present in the negotiation, of course, but others are affected as well, such as employees, other customers, other claimants, and other family members. To what extent negotiators should feel morally responsible for those affected by their work is at present a difficult question that has not been much studied. Political and social movements seek to make international organizations (like the World Bank, the International Monetary Fund, the United Nations) morally responsible for investment and debt negotiations and social and relief action that affect huge populations; environmentalists seek to make developers responsible to whole communities when they are negotiating with single sellers of land or with governmental agencies. Mediators seek to involve insurers in simple two-party negotiations about liability. Modern negotiation theory has begun to take account of the multilateral nature of most negotiations. Whether structured as dyadic negotiations between plaintiffs

Some would go even further and claim that negotiation itself, as a process, should be considered on moral grounds. When is it appropriate to negotiate or settle matters between the parties (with their consent), and when should matters be ruled on publicly, by an authoritative agent or government official, where the stakes are significant for the larger public outside the dispute? Does negotiation suggest an ideology or ethics of compromise with lack of principled outcomes? Philosophers and others have argued that compromise is not necessarily unethical, especially when compromise itself is a moral commitment to peace, continued relations with others, or achievement of a more “precise justice” or presents an opportunity to attempt to satisfy the good of the greatest number, the utilitarian defense of negotiation. Here we offer no definitive answers to these questions. The questions are raised because they present issues of systematic ethics or macroethics and justice in the negotiation process, and we think they deserve further study and elaboration.

Re-Imagining Justice

BY PROFESSOR ROBIN L. WEST

The following essay was adapted from the introduction to Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law, by Robin West, published by Ashgate in December 2003. Further news about the book's publication appears in the Faculty Notes section of this magazine. The essay is published here by permission.

What is the content of the “legal justice” to which we urge our students to dedicate themselves? What does “legal justice”—as distinct from “distributive justice,” “social justice,” or “retributive justice”—demand of the American legal professional? The American ideal of “legal justice” seemingly consists of at least three distinct, although interrelated, commitments, each of which is in some way central to a lawyer’s professional-moral identity. First, “legal justice” requires of lawyers a commitment to the “Rule of Law,” or a “government of laws rather than men.” Second, at least in the United States, it is widely agreed among most lawyers that “legal justice” requires adherence to some recognizable regime of individual rights. Rights are the means by which justice is secured in law; they are the metaphorical bridge from the moral ought, demanded by justice, to the legal imperative, demanded by law. In this culture, we achieve justice, if we achieve it, through recognizing and then enforcing our rights. Third, most lawyers agree that “legal justice” requires a commitment to what is variously called “horizontal equity,” “legal equality,” or “formal equality”: legal justice just *is* the moral mandate to “treat like cases alike.” These three commitments seem to be sufficiently recurrent in professional incantations of the ideal of justice, that it makes sense to regard them as parts, whether or not the whole, of the ideal of legal justice that informs the professional identity of lawyers.

Over the last 30 years or so, one particular conception of the meaning of these three ideals has achieved a remarkable degree of dominance in American law schools, both in scholarship, and in the major assumptions of our pedagogy. Those reigning interpretations, in turn, have come to constitute the dominant understanding of the virtue of legal justice to which the legal profession is committed. I call this conception of these three ideals, the “dominant interpretation,” or the “reigning interpretation,” of “legal justice.” That dominant interpretation has both an internal logic and an external vision. It “hangs together” as a set of ideas, and rests comfortably within a larger political vision regarding the role of the state in community life. It also has considerable power, particularly in law schools, all the more so for so rarely being explicitly defended as such.

My critical thesis is that this dominant interpretation of legal justice is not a very good interpretation of that virtue. Our

increasingly conventional conception of Legal Justice, which structures so much of what we teach and a good deal of what we write, is just not a very good one. More specifically, the dominant conception is flawed in a way that has a consistently conservative and libertarian tilt. As such, the concept of legal justice that predominates in American law schools, despite the often proclaimed “liberalism” of those faculties, nevertheless stands as a real impediment to progressive law reform.

Just as central, however, as the work of criticism, is the work of reconstruction: we need to take up the task of crafting alternative interpretations of these three ideals, and the conception of legal justice they jointly constitute. For various reasons, the progressive, liberal, and left wing of the legal professoriate has badly neglected that work of reconstruction. Rather than rethink or reconstruct the concepts that constitute our dominant conception of legal justice, critical thinkers have instead inferred from their various critiques that the ideals themselves are incoherent. This inference is unwarranted. That a particular interpretation of the Rule of Law, or of Formal Equality, or of Rights, might be incoherent, or regressive, or infantilizing, does not imply that the ideal itself is incoherent or worse. It implies, rather, the need to articulate a stronger conception. But the work of reconstruction has been neglected, and that neglect has proven consequential: in the absence of viable alternatives, the dominant conception becomes the only game in town, and wins by default the struggle for definition of an entire profession’s ideals. The reconstructive aim of this book is to sketch the contours of a different, more progressive interpretation of these three legalistic ideals.

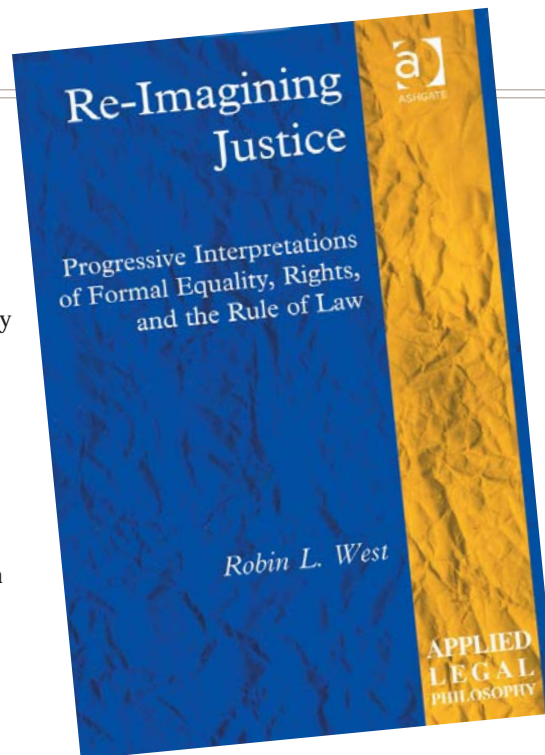
What does it mean to live in a society governed by the Rule of Law? Why do those who live in one take such pride in it? According to the dominant interpretation, the point of the “Rule of Law” is to protect both the individual and the community from the brunt of overly personal, tyrannical, whimsical, or brutal politics. It is the “Rule of Law,” on this vision, which



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distinguishes legality from tyranny; that distinguishes the orderly and benign control of the social behavior of free men by rules from the whimsical command over individuals by unchecked and unduly personal authority. Legalism shields us, in effect, from the excesses of unadorned political power. Law is power's antidote. Law is the antithesis of politics; law constrains and counters politics. What we *ask* of law, on this accounting, what we turn to it to do, is to protect us from the ambitions of an over-weaning, zealous, at best unduly paternalistic, and at worst sadistic and perhaps mad, but always freedom-sapping, state. We organize authority in lawful forms so as to emasculate particular power holders or seekers; we establish law to frustrate the will to power. By so doing we free individuals to act, and to act in ways that are unpolluted by power.

The prominence of this understanding of law's essence unites and perhaps partly explains a good deal of contemporary constitutional law: it provides the unstated major premise of particular interpretations of quite general constitutional phrases. It is a view of law as the antithesis of power, for example, that has driven the modern Court to interpret the Fourteenth Amendment's guarantee of "equal protection of the law" as severely constraining the political power of states from taking even modest affirmative steps toward eradicating the effects of racism, rather than as virtually requiring it to do so. A state acting in such an overtly political way, the Court has reasoned, is a far greater danger to individual freedom than the private racial stratification that a state so acting might thereby seek to ameliorate. If the "Rule of Law" exists so as to limit, mute, or muzzle politics, then surely the point of the Fourteenth Amendment is to limit, mute, and muzzle political voice. Similarly, it is this view of the Rule of Law that underlies the view that the remedial portions of the 1994 Congressional "Violence Against Women Act (VAWA)," which sought to give a private cause of action to victims of gendered assault, is unconstitutional. That Act, on this view, is itself a greater threat to freedom than is the



actual, unchecked violence against women that the law sought to remedy. It is, in short, this understanding of law's essence that drives so many—including the current Supreme Court—to regard the idea of law itself, and hence the Constitution and the rights that law guarantees, as inexorably *limiting* rather than enabling, guiding, justifying or requiring congressional political

It is also this view of the Rule of Law that constitutes at this point in our history a serious threat to progressive, egalitarian, and identity-based politics. The "politics" contemplated and paranoically feared by Rule of Law zealotry is demonized, precisely because it is regarded, on this account, as thoroughly meaningless—inevitably and essentially so. Politics is Dionysian, undisciplined, furious, and vengeful—in short, female; and law, by contrast, is Appollonian, orderly, rule-like, rational, merciful, and male. The Rule of Law embodies the latter so as to constrain the former. A Rule of Law that fears politics, and that crafts a Constitution so as to disable politics, does so, because of the latter's essential, irredeemable irrationality. Power, hence politics, is the utterly meaningless thirst to dominate. This impassioned, irrational, political urge, perhaps, cannot be vanquished, but its expression and force can be, and it is the role of *Law*—general, abstract, pure and apolitical—to do so. Rule of Law idolatry threatens the development

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action. It is this view of the point of the Rule of Law that posits a Constitution ever sensitive to the threat to freedom posed by an overzealous state, and ever blind to the threats posed by private fratricide, intimidation or subordination, and by a quiet state that blithely acquiesces to private spheres of humiliation and fear. It is this view of the Rule of Law that makes this understanding of the Constitution seem natural, inevitable, and desirable, not just to the political right, but to a generation now of "apolitical" law students and lawyers as well.

of progressive politics, because it poses politics itself as the threat with which law must reckon.

Central to our now dominant understanding of the virtue of legal justice is a particular conception of rights, or rather, a particular conception of the aspects of human nature protected, through rights, against unwise state encroachment. On this view, what we do and should protect, through rights, is the individual's heroic *will*: it is the individual's freedom to assert his will in whatever ways that he individu-

ally or idiosyncratically desires, unimpeded by noxious community and communitarian constraints, that is protected by rights. Thus, what is protected is my right to think, act, contract, express myself, own property, maintain privacy, amass wealth, and enjoy my possessions against malign, meddling, or irrational state infringement. The individual is protected, constitutionally, against such infringements of his rights, and he is so protected because of a particular understanding of, *who we are*: we are individuals whose essential being is best realized through unencumbered acts of individualistic will. It is, then, that individual—that heroically willful individual—who is protected through a regime of rights.

This conception of rights is clearly hostile to efforts to address, through politics, private sphere subordination, whether that subordination occurs along race, gender, or class lines. More subtly however, this particular view of rights is hostile to efforts to use rights to protect aspects of our being that do not fit the heroically willful mold. Thus, the problem posed to progressive politics by the now dominant libertarian understanding of rights, and the individual protected through them, is not just the occasional

vulnerabilities they sustain, when engaged in caregiving labor, in the private sphere. Rights of care, if we had them or if they were recognized, might, like all rights, work as either a sword or a shield. They might constitute a legal bulwark that would protect caregivers against unwise state action, such as the Personal Responsibility and Work Opportunity Reconciliation Act. Such rights might also be understood to entitle caregivers to state support, such as through a more ambitious Family and Medical Leave Act. Obviously, we do not presently have such rights, and even imagining such rights will no doubt prove to be arduous labor. One reason (among others) for the difficulty, is squarely ideological: the “rights of care” that are needed by caregivers are not needed for the reasons familiar to the dominant conception—to protect individualistic, heroic, independent acts of will. Rather, they are needed to protect vulnerabilities brought on by our relationality, our mutual dependency, and our interdependency. And they are desirable, in turn, not because of the liberation of industry, genius, invention, or artistry facilitated by the unencumbered individual heroic will, but rather, by the nurtured, healthful, maturation and care of dependents that

blazing—acts that defy, not cement, our essential connections with others.

Our dominant understanding of legal justice is constituted by a particular understanding of the moral mandate of formal equality: the imperative that presses upon judges to “treat likes alike,” or to follow precedent, or to comply with *stare decisis*. What is behind this mandate? The dominant conception has embraced two of the salient possibilities:

First, we might insist on legal justice—on treating like cases alike—because we view such a mandate as an important bridge to the past: as a way of maintaining faith with ancestral wisdom, as a way of preserving traditions, as a way of forging a commonality between who we are as a community and who we have been as a community. Second, we might insist on formal equality because such consistency is essential to maximizing human liberty: knowing with some certainty how and when the legal leviathan will impose itself upon me, I can more freely order my own affairs, and the insistence that judges decide according to rule furthers that certainty. Thus, legal justice, as we presently understand it, serves the ends of traditionalism and libertarianism quite nicely. But this conventional understanding of formal equality, as serving the ends of social or economic conservatism, is also an obstacle to specifically progressive visions of politics. To combat subordination in the private sphere, there must be a breach, not relentless continuity, with our bonds to the past, at which time subordination was entrenched, and entrenched in the very traditions that formal equality so vigorously promotes. And to either combat subordination or protect the work of care-giving, we must from time to time interfere with rather than relentlessly honor the liberty that comes from our certainty regarding the legal leviathan.

These ideas—ideas centering on the meaning of the Rule of Law, the content and purpose of our rights, and the moral mandate of formal equality—constitute the dominant conception of the virtue of legal justice. They or something like them dominate law day speeches and commencement addresses. But they are more than ornamental. They also undergird large chunks of constitutional argument—the Constitution is our highest Law, and if the point of Law is to constrain and

The problem posed to progressive politics by the now dominant libertarian understanding of rights, and the individual protected through them, is not just the occasional head-to-head conflict between individual rights so understood, and the political needs of subordinated groups. The further damage is the neglect of other aspects of our natures that might be in need of rights.

head-to-head conflict between individual rights so understood, and the political needs of subordinated groups. The further damage is the neglect of other aspects of our natures that might be in need of rights.

For example, the dominant conception of rights stands as a serious obstacle to nascent feminist efforts to construct meaningful and enforceable “rights of care,” by which I mean rights that might protect female or male caregivers against the

such labor ensures. But these hypothesized rights, needless to say, ill fit our liberal understandings. We have rights, on the dominant view, when we do, to be free of obligation, of duty, and of dependency. We have those rights because we are independent creatures whose essence is best expressed not through relational acts of care that nurture and protect others, but rather, through robust acts of independence, defiance, and individualistic trail-

tame politics, and if politics is what sovereigns produce, then the point of the Constitution is to forbid certain outcomes by the political branches. The Constitution exists so as to frustrate rather than facilitate political solutions to social problems. These ideas are also full of contradictions. This ideological tripod—an interpretation of the Rule of Law, an understanding of Rights, and an explanation of the moral mandate of formal equality—constitutes an understanding of Legal Justice, which is both facially apolitical but which also renders natural, legal conclusions that are inimical to progressive politics.

What to do about it? There are three options. One is to demonstrate the politics behind the claim of political neutrality. This has been the *idee fixe* of the critical legal studies movement now for over 30 years, and to make a long story short, not much has come of it. The second possibility is to point out the arguably central contradictions behind each leg of the tripod. The dominant understanding of the Rule of Law rests on an illogical leap of faith: from a written word to the dream of a government of laws rather than persons. The idea of a right as essentially a negative protection against state intervention into the private is belied by the existence of the criminal law itself. The mandate to “treat likes alike” is so thoroughly riddled with exceptions that it is problematized by virtually *all* serious doctrinal as well as theoretical legal scholarship. There is, though, a third possible critical response, and that is to re-imagine.

We need, I think, a progressive jurisprudence—one that embraces rather than resists, and then reinterprets, our liberal commitment to the “rule of law,” the content of our individual rights, and the dream of formal equality. More inclusive interpretations could then undergird, in a principled way, particular constitutional arguments. Rather than relentlessly deconstruct the seeming “naturalness” of legal arguments based on moral premises, we ought to be providing such premises and natural arguments of our own. But first we need to re-imagine.

Let me suggest some possible contrasts, starting with the Rule of Law. Contrast the understanding of the Rule of Law suggested above—in which the point of law is to frustrate, mute, muffle, politics—with a second and quite different understanding of both

Put positively, the utopian alternative to fratricide, which we attempt to construct, through law, is not so much the unleashing of free individual choice unfettered by an oppressive state, but the necessary conditions of cooperative community life. Law, and the point of the Rule of Law, on this view, is not to frustrate politics, but to enable it. And politics, then, is not a totalitarian nightmare, but rather the means by which communities and individuals create meaning.

law’s promise, and the evil at which it is directed. On this alternative conception, the point or essence of law is to *construct*, rather than frustrate, the realm of politics. It is to nurture rather than stifle a public sphere within which our political natures find expression. The fear we counter with the hope of law, on this view, is not our fear of an overly powerful state, but rather, our fear of an impotent or neglectful state, and the internecine warfare to which the absence of political authority would give rise. Put positively, the utopian alternative to fratricide, which we attempt to construct, through law, is not so much the unleashing of free individual choice unfettered by an oppressive state, but the necessary conditions of cooperative community life. Law, and the point of the Rule of Law, on this view, is not to frustrate politics, but to enable it. And politics, then, is not a totalitarian nightmare, but rather the means by which communities and individuals create meaning.

Rather than abandoning rights, we need to rethink the understanding of who we are and what we are that underlies the dominant understanding of rights. We are not only beings whose essence is realized through heroic acts of independent will. We are also parents and grandparents and children whose essence is realized through acts of care which protect those dependent upon us, and give meaning to our lives by virtue of so doing. Perhaps we do need rights to protect our individuality. No less vitally, however, we need rights that protect our ability and will to care for the weak among us, to care for the young, and to comfort and care for the elderly. We

need such rights of care not only to protect those activities against an overweening state. We need those rights to honor this fundamental aspect of our being. We need such rights to goad to action community and state support for those essential and interdependent spheres of social life.

Finally, we need to re-imagine the point of the mandate of formal equality. The “moral point” of the mandate to treat likes alike, much authority to the contrary notwithstanding, may be neither to protect tradition or liberty. The point of treating likes alike may rather be rooted in a universalist and humanistic inclination to define the human community broadly—to envision a community that includes all, and includes all because of a recognition of shared humanity. This Kantian and cosmopolitan vision of the mandate of formal equality as well, of course, has difficulties, both conceptual and moral, but it is nevertheless one that would not be at heart hostile to progressive aspirations. It would strive for and stress inclusiveness and respect for difference. It would seek a large rather than constrained community; its impulse is toward a global as well as local acknowledgment of duty and responsibility. If accepted, it would align law, the idea of law, and the idea of legal equality, not with the traditions of the past or the economic liberty of individual and corporations, but rather, with the hopes for a community of world citizens. It would align law, legal justice, lawyers, and lawyering, professionally, with a recognition of universal human rights, grounded in a shared humanity, shared vulnerabilities, and ultimately a shared fate.