THE MORAL JUDGE

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We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice. I do not call that religion or prophesy. I call it law.¹

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I. INTRODUCTION

This Article contains the preliminary criteria of the moral adjudicator. It outlines their importance first by critiquing the pervasive "morals versus merits" dichotomy in judicial selection and second by explicating the virtue of open-mindedness in ethics generally and judges specifically. This sketch works by adapting and applying approximately four critical perspectives: (1) a broad conception of justice; (2) moral pluralism; (3) ethical contextualism; and (4) the rules and norms of judicial ethics. When justice, legal-context morality, and the nature of ethical adjudication are properly understood and defined, the confluence of these four perspectives counsels that morals equal merits and vice versa. This Article makes the related, but surely distinct, claim of a prime directive for the judiciary—to guarantee an escape valve function to the (otherwise inevitable) unfair application of law. It claims further that this directive implicates the prime virtue of the judiciary, which is stubborn open-mindedness. The judicial selector, then, should be concerned primarily with whether the judge and her judicial philosophy meet these criteria. Through the use of a hypothetical nominee opining on the


4. See generally WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998) (promulgating a contextualist approach to attorneys' ethics). Similarly, moral contextualism is a school of thought in ethical philosophy, and this Article addresses it briefly. See infra Part IV.B.

5. See, e.g., Ronald D. Rotunda, The Role of Ideology in Confirming Federal Court Judges, 15 GEO. J. LEGAL ETHICS 127, 133 (2001) ("It is wrong for a nominee to promise to vote a certain way, to promise (or appear to promise) to vote to overrule or to not overrule a particular precedent, or promise to approach a legal problem with a particular mind set.").

6. To say certain morals equal legal merit is an overstatement, but by the end of this Article it should be reasonably clear that (a) it is not much of one, and (b) in any event, the traditional dichotomy is misplaced in judicial selection. In short, judges who possess and apply certain ethical principles make meritorious decisions, and those who lack or fail to apply them often make dubious, or at least suboptimal, decisions. Under this understanding, it makes little sense to separate, or focus on, morals v. merits.

7. In other words, selectors (namely, the President and senators) should refrain from nominating or confirming judges whose morals would preclude meritorious opinions (or whose opinions would be immoral—or callously amoral—in
ubiquitous abortion issue, the Article also illustrates this inquiry.8

II. ADJUDICATORY JUSTICE

Most debates on selection begin by arguing over the political qualities of judicial nominees. We should try something slightly different. Let us begin instead by discerning adjudicatory justice—what those nominees will (or should) be asked to do. In doing so, we should keep in mind a persistent distinction (held firmly by some and only loosely by others) in judicial selection rhetoric: morals v. merits.

A. A Vision of Adjudicatory Justice9

The relevant morality of adjudication—and perhaps even the law generally—is what we call "justice."10 Standing naked, however, the term is so amorphous that we cannot expect significant agreement with the preceding sentence, much less with the meaning of the term. Justice is legal-context morality.11 In adjudication, it is generally the consideration of all of the relevant legal norms, coupled with a concern for a fair result in the legal context). This Article deals primarily with nominees' adjudicatory qualities; other beneficial judicial qualities (e.g., collegiality) are not addressed. See, e.g., Vicki C. Jackson, Packages of Judicial Independence: The Selection and Tenure of Article III Judges, 95 GEO. L.J. 965, 979 (2007) (noting desired qualities such as "personal integrity; high intelligence; good professional training and experience; the capacity to think and write clearly about legal issues; and 'judicial temperament'").


9. This vision of adjudicatory justice flows both to and from the judicial qualities developed infra in Parts III and IV. The Parts must be read and understood together. The part divisions are more for organizational purposes than analytical clarity.

10. See generally JOHN RAWLS, A THEORY OF JUSTICE 3 (rev. ed. 1999) ("Justice is the first virtue of social institutions, as truth is of systems of thought."); SIMON, supra note 4, at 9–10 ("I follow the Preambles to the ABA codes in taking justice to represent a basic normative premise of the legal system."); cf. MODEL CODE OF JUDICIAL CONDUCT pmbl. (2007) ("An independent, fair and impartial judiciary is indispensable to our system of justice."); LON L. FULLER, THE MORALITY OF LAW 6 n.4 (rev. ed. 1969) ("There is plainly . . . a close affinity between the notion of justice and that of moral duty, though the duty of dealing justly with others probably covers a narrower area than that embraced by moral duties generally.").

11. Cf., e.g., SIMON, supra note 4, at 9–10 (discussing justice in the context of ethical lawyering); see also id. at 138 ("'Justice' . . . connotes the basic values of the legal system and subsumes many layers of more concrete norms.").
the case sub judice. The second prong—the disposition toward a fair result in context—is crucial. This is so in part because it provides a compass to navigate and interpret the vast body of doctrine and norms. Disagreements can and often do arise over the meaning of both of the operable terms, “legal norms” and “fair results.” Disagreements also can and do arise over which of the preceding elements trumps the other; the law offers—and commentators argue—points for either conclusion.

For present purposes, however, we need not settle these disagreements, nor could we. We can assume disagreements over the breadth of the relevant legal norms, over the meaning of a fair result in a case, and over the relative weight of these two elements. We need

12. See, e.g., Swisher, supra note 2, at 578–79. This view alienates itself somewhat from strict positivism. See Simon, supra note 4, at 82 (noting that substantive conceptions of law “interpret[] specific legal norms as expressions of more general principles that are indissolubly legal and moral”); see also id. at 103 (citing Ronald Dworkin, Law’s Empire 109–10 (1986)) (noting that a substantive conception of law “insists that at least some dimensions of justice be incorporated into law (and does so precisely in order to make law binding”).

13. It bears noting that my definition of adjudicatory justice assumes judicial competence, both to locate and shift through the relevant legal norms and to discern a fair result in context. I deal primarily with the latter competence in Parts II and III below. For purposes of this Article, I assume technical competence, not because it is unimportant, but because it is only indirectly related to the Article’s theses.

14. It is crucial for a more fundamental reason as well. In an example of a strong view, unlike strict role-ethicists, “Aristotle holds all human beings responsible for any evil they have, in fact, the power to prevent,” irrespective of their role. Daniel R. Coquillette, Lawyers and Fundamental Moral Responsibility 36 (1995). The beauty of the judicial position is not its limitations or passivity, but its unique ability to prevent evil. See infra Part III (discussing the judiciary’s prime directive).

15. The traditional conclusion is that when the two elements conflict, legal norms trump what the judge considers a fair result. I partially disagree with that conclusion, but I am content in the Article to leave that debate for another day. Cf., e.g., Rawls, supra note 10, at 51–52 (“[I]t might be still better in particular cases to alleviate the plight of those unfairly treated by departures from the existing norms. How far we are justified in doing this, especially at the expense of expectations founded in good faith on current institutions, is one of the tangled questions of political justice.”). Similarly, depending on one’s jurisprudential view, the relation of the two elements may fall anywhere on a spectrum of entirely distinct to entirely inseparable.

16. Cf. Ronald Dworkin, Justice in Robes 1 (2006) (“Unfortunately the English word ‘law’ and parallel words in other languages are used in so many different ways, we have so many distinct concepts that we use those words to deploy, and the interrelationships among these concepts are so problematic and controversial, that different theories about the connections between law and justice are often answers to very different kinds of questions.”).
substantial agreement only on this general definition of adjudicatory justice and that justice is, fully incorporates, or is fully incorporated by, legal-context morality in adjudication.

Professor Bill Simon has defined justice as synonymous with legal merit. To make that claim, he had to define justice and legal merit broadly in order to capture the various notions of fairness inherent in the common understanding of justice. His maneuver is remarkably useful as context and academic marketing—it ties justice in a case to the law (broadly defined), and it thereby alleviates the anxiety of uncontrollable subjectiveness and lawlessness arguably inherent in a concept of justice that does not confine it within existing legal limits. As he persuasively puts the point, “[d]ecisions about justice are not assertions of personal preference, nor are they applications of ordinary morality. They are legal judgments grounded in the methods and sources of authority of the professional culture.”

My primary cause for adopting and applying a similar approach to adjudication is that applicable positive law sometimes—indeed often—leads to unfair results in cases. This problem is so serious that it creates

17. See SIMON, supra note 4, at 9–10, 138. Simon’s goal was the promulgation of a contextual view of attorneys’ ethics, the “basic maxim” of which “is that the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice.” Id. at 9.


19. SIMON, supra note 4, at 138; cf. Ronald Dworkin, Reply, 29 ARIZ. ST. L.J. 431, 456 (1997) (“In my view, judges who appeal to moral or political theory are subject to the institutional discipline of integrity, because they must reach their opinions through interpretation rather than invention.”).

20. See, e.g., Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685, 1701 (1976) (“It is also often possible . . . that the reason for the ‘corruption’ of what was supposed to be a formal regime was that the judges were simply unwilling to bite the bullet, shoot the hostages, break the eggs to make the omelette and leave the passengers on the platform.”); William H. Simon, The Ethics of Criminal Defense, 91 MICH. L. REV. 1703, 1722–23 (1993) (discussing the common and “insanely” disproportionate criminal sentences and the consequently large and growing United States prison population).
the exigency for the judiciary’s prime directive. Absent this approach, particular laws, however well intended, would inevitably lead to unfair results in application. With respect to attorneys’ ethical judgments, Simon cleverly avoids that intolerable situation by defining law expansively to include basic norms such as fairness and equality, and even more controversial concepts such as statutory and jury nullification. With respect to adjudication as well, this conception is mostly correct. For example, judges ordinarily will not interpret statutes in a way that leads to absurd results; an unfair result is certainly an absurd one. In a sense, then, Simon’s definition incorporates mine; that is, his version of justice as legal merit includes the element of reaching a fair result in context.

We thus are left with a definition of justice that certainly includes—indeed, is virtually inseparable from—legal merit. And in light of the fact that legal-context morality is (or includes) justice, we are left with the

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21. See infra Part III.
22. Take, for example, the “McMissile” case, which is recounted in Theresa Vargas, Judge Cuts Sentence in the Case of the Flying Cup, WASH. POST, Feb. 22, 2007, at B1. In that case, a mother faced two years of prison after she threw a McDonald’s fountain drink at a stopped car. Id. She threw the drink in a fit of anger because the driver of the car had cut her off twice on the freeway. Id. The criminal statute prohibited launching “missiles”—which arguably included within its broad definition the throwing of a fountain drink—into an occupied vehicle. See VA. CODE ANN. § 18.2-154 (Supp. 2006). Thankfully, the judge relieved the harsh effect of the statute (the purpose of which obviously targeted more serious crimes) and sentenced the defendant-mother only to probation. Vargas, supra. The crucial function that the judge performed—that is, relieving the seemingly applicable law of its unfair application—is the judiciary’s prime directive. See infra Part III.
23. See SIMON, supra note 4, at 83–90 (discussing various forms of nullification).
24. For a classic example, see Riggs v. Palmer, 22 N.E. 188, 191 (N.Y. 1889) (holding that grandson who murdered his grandfather could not inherit the grandfather’s fortune even though the will statute did not list an exception for murderers).
25. See, e.g., Dworkin, supra note 19, at 452–53 (“For someone who takes constitutional rights seriously . . . , every occasion on which a constitutional right has been denied, and people’s lives ruined because it has, counts as a distinct case of great and inextinguishable moral harm.”); cf. SIMON, supra note 4, at 139 (noting that the judiciary is “the one sector of the legal culture in which contextual judgments about legal merit and justice are routinely viewed as possible and appropriate”).
26. There are several conceptual approaches that might make for a more accurate comparison. For example, Simon’s definition alone might not include a contextually fair result; rather, he might have made the unstated assumption that the choice and application of broad legal norms will be driven by the desire to reach a fair result in context. For the most part, however, the gist is clear.
rhetorical proposition with which this Article began: morals equal merits. It is therefore an imperfect mindset for the judicial selector to treat "morals versus merits" because they are inextricable in adjudication; indeed, treating them as the frivolous plaintiff versus the privileged defendant risks stripping the judiciary of its prime directive and virtue, which are explained below. To be sure, the mindset has relevance in the limited sense that the selector should seek a nominee who possesses the requisite legal—not personal—morality, a point to which we now turn.

B. Justice’s Limitations

Notwithstanding our broad concept of legal morality as justice as merit, we can rule out certain claims, including religious convictions, personal policies, and unreasonable moral opinions.

1. The Role of Religion

In order to apply morals in adjudication, those morals must be based in law (broadly defined). Purely personal policies and religious doctrines, then, would not qualify. Conveniently, we do not need to garner agreement in one jurisprudential view to justify this claim—they fail under virtually any conception of jurisprudence. They lack an official mooring—a birth from a recognized source of law. No rule of recognition

27. This partial thesis should be left in context—that is, as a preliminary test for moral nominees, not as an exhaustive exposition of moral adjudication. See infra Part VIII (noting that much substantive work remains).

28. See infra Parts III-IV.

29. Fortunately or unfortunately, personal policy selection, to the extent consistent with "partisan affiliation or particular ideologies," has been at work for a long time. See Jackson, supra note 7, at 977–78. For an analysis of Immanuel Kant’s moral beliefs on the use of personal policies in legal morality, see infra Part II.B.2.

30. Cf., e.g., United States v. Bakker, 925 F.2d 728, 740 (4th Cir. 1991) (vacating and remanding criminal sentence of famous televangelist Jim Bakker, stating "[c]ourts . . . cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it. Whether or not the trial judge has a religion is irrelevant for purposes of sentencing."). Obviously, religious doctrines have "official" moorings, but not legally official ones. Cf. JOSEPH RAZ, THE AUTHORITY OF LAW 37–52 (1979) (answering that law must come from authoritative social sources). Indeed, in many ways, religion is banned explicitly from consideration. See, e.g., U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."); U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."); County of Allegheny v. ACLU, 492 U.S. 573, 590–91
recognizes them; they likewise are not adopted through duly recognized state procedures; and they are no longer (or rarely) backed by state sanctions. Nor, to the reasonable observer, do they provide a justification for a particular adjudication.

(1989) (noting that government action cannot endorse, or be perceived as endorsing, religion); Torcaso v. Watkins, 367 U.S. 488, 495–96 (1961) (holding that state constitutional provision mandating that public office holders declare a belief in God violates the First Amendment’s Free Exercise Clause); cf. Sherbert v. Verner, 374 U.S. 398, 407 (1963) (holding that judges cannot “inquir[e] into the truth or falsity of religious beliefs”); DWORKIN, supra note 12, at 87–88 (noting the significant force of precedent and professional norms on interpretation). Perhaps a more eloquent expression can be found in Rawls’s work. He argues (in essence) that only “public reasons” should be deployed—ones that can be understood and shared by every rational citizen. See JOHN RAWLS, POLITICAL LIBERALISM 215–16, 231–40 (1993). Religion would not qualify, even under the assumption that the relevant perspective is the public, not the judiciary or the legal profession as a whole. See id. at 220–22. I do not wish to rely too heavily on the public reason distinction, however, because it sweeps away too many categories along with religion.

31. See H. L. A. HART, THE CONCEPT OF LAW 100–03 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994). This subsection admittedly conflates the nature of law with less abstract and more specific inquiries, even adjudication itself, but it does so in recognition of the interrelation between these understandings of law and adjudication. If any understanding were to legitimize religion legally, which none does, more careful distinctions might need to be drawn.


34. For example, judges themselves tend not to view religious sources as legal precedent. See, e.g., Bakker, 925 F.2d at 740; Wikoski v. Wikoski, 513 A.2d 986, 989 n.7 (Pa. Super. Ct. 1986) (“It is not intended that the above quote from scripture be a legally binding precedent of this Court.”); Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary, 109th Cong. 227 (2005) (statement of John Roberts) (“[M]y faith and my religious beliefs do not play a role in judging. When it comes to judging, I look to the law books and always have. I don’t look to the Bible or any other religious source.”); Paul Horwitz, Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations, 15 WM. & MARY BILL RTS. J. 75, 89 (2006) (noting that “any nominee who rose to the level of consideration for the Supreme Court surely would deny holding the view that his religion would take precedence over conventional secular sources of law”). Prevalent commentators as
Thus, for example, let us assume—as has happened in the past—that a judicial nominee proclaims that abortion is wrong.\(^3\) While that nominee undoubtedly would say that she is making a moral claim, we do not know on its face whether it is a legally cognizable moral claim. If the claim is based solely in religious convictions, it is not.\(^3\)

There are at least three types of judges who rightly would block or suppress a claim to the contrary:

(1) the strict legal positivist, who believes that all disputes should be, and can be, resolved by conventional legal sources; (2) the judge who believes that reference to his religious values would violate the First Amendment Establishment Clause; and (3) the judge who believes that reference to her religious values would violate her own religious dictates insofar as such reference could transgress the religious voluntarism of others.\(^3\)

well have indicated that religious sources are not necessarily part of the law. See, e.g., FULLER, supra note 10 (requiring various criteria of procedural justice).

35. “In every judicial confirmation hearing since Robert Bork (the first nominee to outright deny the legitimacy of Griswold), the Senate has grilled judicial nominees about their views on privacy and abortion.” Mary Helen Wimberly, Note, Rethinking the Substantive Due Process Right to Privacy: Grounding Privacy in the Fourth Amendment, 60 VAND. L. REV. 283, 305 (2007) (footnote omitted). We thus have strong reasons to address abortion in our discussion. See infra Part VII (discussing a Bork-like, White-inspired hypothetical nominee).

36. As we will see in a moment, the claim also is not legally moral—that is, ethical or just—for another reason: it is categorical. See infra Parts III–IV (arguing that categorical rulings generally are close-minded, naïve, and contrary to the fundamental virtues of the moral judge); see also Rebekah L. Osborn, Current Developments 2005–2006, Beliefs on the Bench: Recusal for Religious Reasons and the Model Code of Judicial Conduct, 19 GEO. J. LEGAL ETHICS 895, 900 (2006) (citing Scott C. Idleman, Note, The Role of Religious Values in Judicial Decision Making, 68 IND. L.J. 433, 443–54 (1993)) (noting “the closed-mindedness of religious adherents” and “the anti-intellectual nature of religion”). It also should be noted that I used the words religious convictions, not religious values. As discussed below, there is significant value in certain religious values.

37. Scott C. Idleman, The Limits of Religious Values in Judicial Decisionmaking, 81 MARQ. L. REV. 537, 544 n.23 (1998) (citing Daniel O. Conkle, Religiously Devout Judges: Issues of Personal Integrity and Public Benefit, 81 MARQ. L. REV. 523, 525–28 (1998)). Somewhat ironically, this Article relies primarily on category (1) for the preclusion or suppression of religious convictions in adjudication. That is, judges should retreat only to the sources of the law, broadly defined. That concept, of course, was designed in part as a retreat away from “strict legal positivist” judges. This Article also relies on category (2), particularly because (2) is primarily a specific example of category (1) (i.e., First Amendment doctrines and principles are
If those reasons were not enough, a contrarian would have to overcome the potential risk to due process and related values, such as “(1) whether decisionmaking grounded in religious values or authority can be said to exhibit a rational basis or a legitimate government purpose, (2) whether such decisionmaking provides adequate notice to affected parties, and (3) whether such decisionmaking deprives the parties of an impartial or unbiased adjudicative forum.” The contrarian would face at least one more practical obstacle: use of religion is disciplinable, because it strains impartiality, and it risks trumping positive law.

Empirically, it is most likely false that religious doctrines do not play a role at the deliberative stage, but the most plausible theories of adjudication maintain that they should have no role in either the deliberative stage or the explanatory-justificatory stage, or at least, no role in the latter. In short, the legal sources from which to adjudicate are

See supra note 30 (citing several constitutional sources arguably banning religious considerations). Finally, category (3) alludes to moral pluralism, but because it gets there by appealing to religious doctrine, it is problematic for the reasons given. See infra Part II.B.3.

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38. Idleman, supra note 37, at 556-57.
40. See, e.g., Mark Modak-Truran, The Religious Dimension of Judicial Decision Making and the De Facto Disestablishment, 81 MARQ. L. REV. 255, 258-61 (1998) (discussing disestablishment, religionist, disestablishment-religionist, and religionist-disestablishment models of the role of religious belief in decisionmaking and concluding that only the first—no religion—and fourth—religious beliefs in the deliberative, but not justificatory, stage—are plausible); cf. DWORFIN, supra note 16, at 254 (“Judges may not appeal to religious convictions ... because such convictions cannot figure in an overall comprehensive justification of the legal structure of a liberal and tolerant pluralistic community.”).
broad, but not that broad. With that said, once we begin to define religion more broadly—to include, for example, “secular humanism”—the “tenets” (to the extent they are universalizable and reasoned) may be not only part of right adjudication, but its justification. It makes little sense, however, to treat the recognized judicial virtue of open-mindedness as religion. Although the virtue of open-mindedness, like religion, may be a belief system, (albeit a weak and oddly shaped one) it is a stretch to say that the resulting open-minded-based decisions are necessarily pre-ordained, faith-based, unreasoned, or to the extent applicable, categorical. Indeed, the motivating point is to move away from those qualities.

All of this is not to imply that the underlying principles of the religious doctrines are absent from the law, but a religious doctrine, in and of itself, is not a basis for a just decision. One of the many examples of

of government, and to the need for pluralistic inclusion,” but noting disagreement over the same).

41. Cf. Idleman, supra note 37, at 539–41, 548 (listing broad legal definitions of religion, but noting that, “if one embraces an extremely broad definition of religion—e.g., an individual’s set of indelible first principles, or ‘a comprehensive way of perceiving and understanding life and the world . . . [that] affects everything’—then religious values may turn out to be unavoidable referents for virtually all individuals and, as a consequence, particular denominational stances may become considerably less significant” (quoting in part Steven D. Smith, Legal Discourse and the De Facto Disestablishment, 81 MARQ. L. REV. 203, 215 (1998)) (alteration in original); Modak-Truran, supra note 40, at 263, 274 (defining religion broadly as a “‘comprehensive claim or conviction about human authenticity’” and therefore concluding that, “in hard cases, judges’ comprehensive convictions are the ultimate criterions of validity (rules of recognition) even though judges should keep these comprehensive convictions implicit in the process of justification to prevent the establishment of a comprehensive conviction”). These broad definitions do not comport with ordinary usage. More importantly, they lump together analytically distinct beliefs or belief systems. For one example, see Modak-Truran, supra note 40, at 263 (noting that author’s broad definition of religion “not only includes the recognized world religions of Christianity, Judaism, Islam, Hinduism, and Buddhism, but it also includes humanism, capitalism (when proposed as a normative rather than as a positive theory), communism, and other so-called secular answers to the existential question”).

42. For some of the virtues of open-mindedness, see infra Part IV.

43. See generally infra Parts III–IV (discussing some drawbacks to such qualities in adjudication).

44. I note in positive recognition that values often are instilled by religion. When those values are, independently, morally good, and universal (which is often, but not always, the case), they almost invariably can and should be found in the legal materials. Cf. Horwitz, supra note 34, at 128 n.330 (noting that, even though secular sources of law are demanded, religion still might be the best practical assurance that nominees possess important judicial values, such as “public probity, fairness, equal
overlap is the ban on murder. It embraces all three of the current
categories (personal policy, religious conviction, and legal source): (1)
individuals, hopefully, resolve with themselves not to commit murder; (2)
the ban is found in religion ("thou shalt not kill"); and (3) it is incorporated
into federal and state law in innumerable places. Only the last of these
categories suffices for the moral judge. Until this point, we essentially have
assumed the same limited fate for purely personal policies as religious
convictions. They do end in the same (or nearly the same) limited place,
and the following use of Immanuel Kant's views is one way to explicate this
limited place for purely personal policies.

2. Kant's Contribution: The Preclusion of Personal Policies and the
Aspiration of Universalizability

On the type of morals judicially sanctionable, one lens through which
to view the problem is the spectrum of personal preference, personal
policy, and universal policy, which can be partially attributed to Immanuel
Kant's (largely unsuccessful) attempts of creating a Categorical
Imperative.\textsuperscript{45} One of the exercise's successes is its exclusion of most
personal policies from moral laws, and another is its appreciation of
universalizability, which is embodied in the law in many places (not the
least of which is the Equal Protection Clause).

a. Maxims: Personal Policies. Maxims should be quite familiar—they are personal policies.\textsuperscript{46} We may distinguish maxims from targeted
intentions, which involve the same subject and the same action, but not the
resolution to repeat the action every time a particular circumstance arises.
A person, for example, would form a targeted intention by deciding to play
tennis tomorrow at 10:00 a.m.\textsuperscript{47} A maxim would generalize that targeted
intention by requiring the actor to perform that action each time the
regard for persons, and perhaps compassion and mercy"); Idleman, supra note 37, at 550 ("Many of the religious traditions in this country are, after all, repositories for
centuries of deep reflection upon human nature, society, and ethics . . .").\textsuperscript{45}

I thank J.L.A. Garcia, Professor of Philosophy, Boston College, for
instructing part of my Kant analysis.\textsuperscript{46}

See, e.g., IMMANUEL KANT, THE METAPHYSICS OF MORALS 51 (Mary
Gregor trans., Cambridge Univ. Press 1991) (1797) (concluding that "[a] rule that the
agent himself makes his principle on subjective grounds is called his maxim"); Marcia
Baron, Kantian Ethics, in THREE METHODS OF ETHICS 35 (Marcia W. Baron et al. eds.,
1997) ("A maxim is subjective in the sense that it is the principle of action of a
particular agent at a particular time.").\textsuperscript{47}

See Baron, supra note 46, at 72.
chosen circumstance (here, the time of 10:00 a.m.) presents itself. The maxim, then, would be the tennis player's resolution to play tennis every day at 10:00 a.m.\textsuperscript{48} Another would be created by a person resolving never to help another person drowning in an ocean.

b. \textit{The Two Imperatives}. In Kant's sense, maxims and targeted intentions are ordinarily hypothetical imperatives. They are imperatives in that they are self-imposed obligations or commands;\textsuperscript{49} they are hypothetical in the sense that they are conditional (on some empirical circumstance).\textsuperscript{50} Unlike David Hume, however, Kant determined that morality should not be subservient to circumstance or passion, a premise that Kant (analytically) achieved in part through the Categorical Imperative.\textsuperscript{51} "The principles of justice are also analogous to categorical

\textsuperscript{48} \textit{Id.} (noting that this "presumably innocuous maxim" is not universalizable as stated because everyone could not play tennis at the same time).

\textsuperscript{49} \textit{E.g., IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS} 24 (James W. Ellington trans., Hackett Pub. Co. 1981) (1785) (referring to an imperative as "a command (of reason)" that is "expressed by an \textit{ought}").

\textsuperscript{50} \textit{E.g., KANT, supra} note 46, at 49 (noting that a hypothetical "imperative is a rule the representation of which \textit{makes} necessary an action that is subjectively contingent and thus represents the subject as one that must be \textit{constrained} (necessitated) to conform with the rule" (footnote omitted)); \textit{KANT, supra} note 49, at 25 (noting that "if the action would be good merely as a means to something else, so is the imperative hypothetical"). Thus, in Kant's view, hypothetical imperatives are not merely empirically conditioned, but they are also good only as a means to another (presumably good) end. For further interpretation, see \textit{RAWLS, supra} note 10, at 223 ("Whereas a hypothetical imperative \ldots directs us to take certain steps as effective means to achieve a specific end. Whether the desire is for a particular thing, or whether it is for something more general, such as certain kinds of agreeable feelings and pleasures, the corresponding imperative is hypothetical. Its applicability depends upon one's having an aim which one need not have as a condition of being a rational human individual."). Categorical imperatives, on the other hand, are good in and of themselves. \textit{KANT, supra} note 49, at 25.

\textsuperscript{51} \textit{See, e.g., KANT, supra} note 46, at 43. ("Indeed, concepts and judgments about ourselves and our deeds and omissions signify nothing moral if what they contain can be learned merely from experience."); \textit{see also RAWLS, supra} note 10, at 222–23 (interpreting the imperatives). The proper imperative seemingly would be crucial on Kant's view because "all imperatives are formulas for determining an action which is necessary according to \ldots a will that is good in some way." \textit{KANT, supra} note 49, at 25. It also should be noted that, regardless of Kant's aversion to empirical contingencies, these personal policies would not suffice for adjudication for further, but related, reasons. Not only are the policies agent-relative and not universal, but they likewise may fail rationality, rule of law, even-handedness, and a host of other well-accepted legal values.
imperatives.”52

The Categorical Imperative53 has several formulations (or one formulation and several “clues” to guide its application). Kant’s first formulation is “[a]ct as if the maxim of your action were to become through your will a universal law of nature.”54 A perhaps even more famous formulation is “[a]ct in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means.”55 He then moves on to principles of autonomy inherent in “[t]he concept of every rational being as one who must regard himself as legislating universal law” and “a kingdom of ends . . . inasmuch as these laws have in view the very relation of such beings to one another as ends and means.”56

At least with respect to the first formulation, Kant famously runs several proposed actions through the Categorical Imperative. First, he states that it bars suicide out of self-love when misfortune strikes because that would “destroy life” if universalized.57 Second, he states that it bars false promising when in financial need because to do so ultimately would lead to the worthlessness of promises (as no one would believe them and therefore would not make payments in return for the worthless gestures).58 Third, in his controversial “South Sea Islanders” comparison, he determines that one cannot fail to develop her talents because to do so (albeit possible) would be contrary to the will of rational beings (because

52. RAWLS, supra note 10, at 222; see also id. at 222–23 (“For by a categorical imperative Kant understands a principle of conduct that applies to a person in virtue of his nature as a free and equal rational being. . . . To act from the principles of justice is to act from categorical imperatives in the sense that they apply to us whatever in particular our aims are.”).

53. I distinguish between the Categorical Imperative as such (which is capitalized) “from [the] more specific principles, categorical imperatives, that are based on it” (which are not capitalized). Baron, supra note 46, at 35.

54. KANT, supra note 49, at 30. A categorical imperative is described elsewhere as “one that represents an action as objectively necessary and makes it necessary not indirectly, through the representation of some end that can be attained by the action, but through the mere representation of this action itself (its form), and hence directly.” KANT, supra note 46, at 49.

55. KANT, supra note 49, at 36.

56. Id. at 39–40.

57. Id. at 30–31.

58. Id. at 31. These first two examples involve perfect duties, according to Kant, and they fail the contradiction-in-conception test.
one's talents serve "all sorts of possible purposes"). Fourth, one cannot conclude that he will abstain from helping others because (again, albeit possible) it would be contrary to the will of rational beings, because he undoubtedly will need help from others, yet such a maxim would preclude it. Therefore, in all four examples, the Categorical Imperative has barred such maxims or personal policies from becoming moral laws.

c. Laws. The Categorical Imperative is designed to discern moral laws. To Kant, of course, laws could not be hypothetical imperatives; instead, they have to be universalizable, and they have to impart duty for duty's sake. The Categorical Imperative, then, promises a litmus test to discern whether personal policies can be moral laws; it ostensibly is designed to exclude personal policies that rely on hypothetical imperatives. Laws must be universalizable, and therefore objective and not arbitrary in a sense, in the subject place—laws would require everyone to do (or not to do) the action in a given circumstance. Their existence (supposedly) does not depend on hypothetical circumstances.

d. The Relation of Maxims, Imperatives, and Laws. As suggested earlier, the framework for determining maxims and laws involves the following: maxims involve a particular subject, while laws involve every subject (performing the same action in a particular circumstance). Reason enables the actor to generate laws from maxims and prevents inappropriate maxims from becoming moral laws. As noted above and discussed below,

59. Id.
60. Id. at 32. These second two examples involve imperfect duties, according to Kant, and they fail the contradiction-in-will test (discussed more below).
61. I use the term "moral laws" to alleviate any potential confusion with Kant's distinction between "laws" and "duties" to follow them. According to Kant, only God could succeed under laws, while humans have to resort to duties (because humans have inclinations that pull them away from laws' requirements). See, e.g., id. at 23–24.
62. There is, of course, a difference between legislative and moral laws. E.g., KANT, supra note 46, at 46–47 (distinguishing "juridical" legislation from ethical legislation, and noting that the latter must involve "mak[ing] an action a duty and also mak[ing] this duty the incentive"). The distinction becomes less pronounced, however, when we recognize that we are dealing primarily with the act of adjudication, not the body of doctrine. See infra Part V.
63. As shown below, only an extremely limited set of universal laws survive all contextual challenges. Thus, the Kantian analysis provides us with a starting point by ruling out clearly unacceptable maxims, but beyond those few instances of clarity, it must yield to contextualism in adjudication. See generally infra Parts III–IV.
64. In a somewhat helpful passage, Kant describes the process in the
the Categorical Imperative assists the process by providing a categorical
test to determine whether our law candidates—i.e., maxims—can be
properly universalized.

e. The Merit of Kant's Categorical Imperative in Discerning Moral
Laws. From the above formulations, it is fairly clear that the imperative
seeks to limit moral laws to those that could be enacted by a rational,
universalizing self-legislator. That point should not be wholly foreign to us.
We often ask, in a common sense way, what would happen if everyone
does what I do or propose to do (such as parking in a metered spot without
paying)? Judges must ask similar questions: "I propose not to consult the
law today because I prefer not to do so, but what if every judge does the
same?" The universalizability of a principle also accords with our sense of
fairness. We believe, generally, that everyone deserves equal (or
substantially similar) treatment unless there is a rational basis for treating
them differently. Legally speaking, that conception is embodied in the
Equal Protection Clause as well. It also is analogous to the Golden Rule—
treat others as you wish to be treated.

All of that notwithstanding, it is unclear whether the categorical
imperative helps us—beyond the simple notions noted above—to
determine morally suitable laws and morally suitable adjudications. Kant
(and subsequent commentators) used two tests to determine contradictions
when proposing maxims as laws—contradiction in conception and

following way:

You must therefore first consider your actions in terms of their subjective
principles [i.e., your maxims]; but you can know whether this principle also
holds objectively only in this way: That when your reason subjects it to the test
of conceiving yourself as also giving universal law through it, it qualifies for
such a giving of universal law.

KANT, supra note 46, at 51. The use of reason also is analogous to Kant's view of
reason generally—i.e., it is a structural concept that organizes our sensory data.

65. Unless otherwise noted, I no longer distinguish the Categorical
Imperative "from more specific principles, categorical imperatives, that are based on
it." Baron, supra note 46, at 35.

66. This distinction obviously holds more true for state action than private
action. There are, for example, large private inequalities that arguably would not be
acceptable if done by the state. For present purposes, we can ignore, as beyond our
scope, the arguable circuitousness in this argument—namely, that the state creates and
enforces private inequalities and therefore the public-private distinction is illusory.
contradiction in will.67 These tests, however, still allow for "false negatives" and "false positives."68 They also seem to place too much weight on the empirical world and the rational actor.69 With respect to the empirical world, the contradiction-in-conception test presumes that we can predict the consequence of the proposed action to discern a clear impossibility.70 That is not clear in many circumstances, and it seems contrary to Kant's emphasis on the rational and not the empirical.

With respect to the rational actor, the contradiction-in-will test seems to assume too much homogeneity among individuals. Thus, even granting Kant's general description of the rational person, it is unclear that these rational persons would reach all of Kant's conclusions using the imperative.71 Nevertheless, the test is helpful because it embodies a concept that we invariably apply to laws of all kinds: reasonableness. In other words, we commonly do not make or apply laws that are unreasonable or arbitrary under the circumstances.72 That, basically, is the judiciary's prime directive.73

In sum, the imperative contains certain basic assumptions that seem unobjectionable (and perhaps necessary) in determining moral laws and barring purely personal policies—such as universalizability, the Golden Rule, the emphasis on autonomous individual legislators, and

67. Baron, supra note 46, at 70–71 (discussing and applying the two tests). The two tests are applied above, with the contradiction-in-conception test applying to the first two examples and the contradiction-in-will test applying to the final two. See supra Part II.B.2.b.

68. Baron, supra note 46, at 71–75 (discussing problem and offering several solutions, such as clarifying the proposed maxim, e.g., with the tennis example, to play tennis whenever no one else is using the court or whenever the actor wants). False positives and negatives are instances in which innocuous maxims fail (as in the tennis example) and immoral maxims pass, respectively. Id. at 71.

69. That is, under Kant's theory, they seem to present these problems. I do not mean to suggest that they necessarily would be problematic under another theory.

70. The nature of impossibility is also a little vague. It clearly does not mean physically impossible because actions that fail the test are physically possible. Everyone could, for instance, commit suicide when the going gets really tough or use false promises in the same circumstances. It thus appears to be an impossibility in universalizing the proposed action and maintaining the value that the action contravenes. When viewed as such, however, one might wonder why the Golden Rule would not have been sufficient to make the point.

71. See infra Part II.B.3 (discussing moral pluralism).

72. Admittedly, Kant seems to be more concerned with mere consistency in the will than with today's reasonableness test, but consistency is part of it.

73. See infra Part III.
Beyond those worthwhile assumptions, however, the imperative suffers from significant difficulties in its application. Those difficulties in application arise from the ubiquity of the need for contextual and open-minded analysis; categorical rules (including categorical rules designed to discern categorical rules) too often fail. Moreover, the renowned failure of this aspect of Kant’s project is some evidence of the superiority of ethical contextualism, which justifies open-mindedness.

3. **The (Limited) Space for Moral Pluralism**

More controversial than the exclusion of purely personal policies is the following claim: only basic or fundamental moral concepts should qualify as obligatory, rather than merely permissive, in legal morality. From a negative perspective, the law does not concern itself with trifles. From a positive one, the law allows for moral pluralism while recognizing certain general values or principles. There is play, then, in just adjudication, provided that the above condition—legally cognizable morality—is not forgotten once we reach the breathing space for moral pluralism.

Moral pluralism is not necessarily a bad thing; indeed, it may be celebrated as democracy and autonomy, or a host of other cherished ideals. Moreover, moral pluralism is inherently more plausible and

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74. In other words, it does prove, somewhat crudely, that personal policies and the like, in and of themselves, do not warrant the title of legal morality.

75. To the extent Kant meant it only as a starting point, it becomes more understandable. See Rawls, supra note 10, at 221–22 ("That moral principles are general and universal is hardly new with [Kant]; and as we have seen these conditions do not in any case take us very far. . . . The real force of his view lies elsewhere." namely, in his notion of autonomy.); see also Baron, supra note 46, at 74 (suggesting that some of the imperative’s implications were not worked out in the *Groundwork*).

76. See infra Parts III–IV.

77. The most important of these general principles is the somewhat counterintuitive one that no general principle can be truly general or universal and still render justice in every case. See infra Parts III–IV. For good examples of the different challenges of moral pluralism, see Dworkin, supra note 16, at 25–26, 105–16; Kruse, supra note 3, at 402–07 (discussing moral pluralism and its implications for ethical lawyering).

78. That is, the morality must still be based in law—in other words, cited approvingly by legal sources—in order to qualify; purely personal policies and religious convictions do not count.

79. Kruse, supra note 3, at 394–402 (explaining some of the sources of moral pluralism and offering some cause for its celebration). Professor Kruse’s work stresses moral divergence, which is undoubtedly true on both deep and surface levels, but
acceptable than moral relativism—the former allows for moral truths, while recognizing the inevitability of reasonable disagreements concerning the weight and application of those truths. To take a relatively easy example, moral pluralism would not include the repugnant assertion that torture for the sake of torture could be ethical, or at least not provably unethical.\textsuperscript{80} It may include, however, the somewhat questionable but not unreasonable argument that torture for the proven salvation of twenty lives may be right to some and wrong to others. In a society that ostensibly cherishes the values of others to a benign extent, we can demand no more;\textsuperscript{81} indeed, sometimes when we have demanded more, we have been palpably wrong.\textsuperscript{82} These concessions, of course, impact judicial selection: we should understand and accept nominees’ reasonable moral disagreements.

Moral pluralism has its limits, and where it ends stand basic values to which just adjudication must account.\textsuperscript{83} For example, everyone would agree with a rule that prohibited knowingly killing another without reason. Obviously, by using such an uncontroversial rule, I am avoiding the tough—often impossibly tough—questions that would attend the drafting or adjudication of a more controversial or specific rule.\textsuperscript{84} The pertinent point, however, is that moral pluralism has been refuted to a certain extent; there is no plurality of reasonable moral viewpoints here.\textsuperscript{85} That is, there is now wish to stress moral convergence, i.e., that some values are commonly and reasonably shared. In short, moral pluralism has its limits.

\textsuperscript{80} This is a strong view of moral relativism. See, e.g., Ronald Dworkin, \textit{In Praise of Theory}, 29 ARIZ. ST. L.J. 353, 361-63 (1997) (describing and rejecting a similar moral viewpoint). By listing it, I do not mean to imply that every moral relativist would be comfortable with the above conclusion, for one reason or another (the exposition of which is beyond the scope of this Article).

\textsuperscript{81} That is, we can demand agreement only on moral circumstances that permit no reasonable disagreement because they implicate basic values.

\textsuperscript{82} See, e.g., Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding criminalization of intimate homosexual activity), \textit{overruled by} Lawrence v. Texas, 539 U.S. 558, 578 (2003); Buck v. Bell, 274 U.S. 200 (1927) (upholding forced sterilization law on the basis of its perceived—but now debunked—societal good). It is very difficult to explain such holdings as a healthy showing of moral pluralism.

\textsuperscript{83} Speaking in basic values sounds Dworkinian, but in application it is only partially so. These values are akin to fundamental principles, to be sure, but arguably contrary to Dworkin, they need not be categorically applied.

\textsuperscript{84} Indeed, even this “uncontroversial” rule would result in disagreement over the appropriate sanction for its violation, as the death penalty debate illustrates.

\textsuperscript{85} Indeed, perhaps even some of the initial conflicts are attributable to misconceptions of the underlying values. Cf. Dworkin, \textit{supra} note 16, at 116 ("Perhaps, after all, the most attractive conceptions of the leading liberal values do hang together in the right way. We haven’t yet been given reason to abandon that
a core set of values from which the moral judge cannot deviate. This conclusion is salutary as well because injustice necessarily cannot be labeled, addressed, and avoided when it persuasively cannot be distinguished from justice. In sum, moral adjudicators may apply different weights to values, even basic values, so long as they (1) value those values and (2) accord a reasonable amount of weight to them in circumstances in which they are implicated.

III. THE PRIME DIRECTIVE

Above, I have sketched my brand of adjudicatory justice—what judges should do. Below, I sketch the fundamental virtue of judges—what they need to have in order to do what they should do. Here, I sketch my belief of the judiciary’s prime function, which occupies a bit of a middle ground. It incorporates both what judges should do—their desired role—and a particular quality they necessarily should have—a persistent dedication to this fundamental aspect of their role. The judiciary’s prime hope.”

86. These two qualifications to ethical adjudication—what one might call the legally cognizable limitation and the de minimus exception—are not exhaustive, but they do seem particularly important in discussions of judicial selection. The former mandates secularization and universalizability in adjudication, while the latter affords room for the inevitable difference in reasonable opinion. The latter does not, however, permit immoral (and perhaps even amoral) adjudications; rather, it merely recognizes and tolerates that reasonable disagreements can, and often do, occur in ethics.

87. See, e.g., DWORKIN, supra note 16, at 106 (noting that “moral crimes have been justified by appeal to the . . . idea[] that important political values necessarily conflict, that no choice among these can be defended as the only right choice, and that sacrifices in some of the things we care about are therefore inevitable”). The necessity of distinguishing justice from injustice is more than a semantic point, of course, because it threatens to gut claims of right and wrong, and good and bad. Stated dramatically, it risks compromising the whole worth of the judiciary: if there is never a right or wrong adjudication—no matter the value or values at stake—opinions approach arbitrariness. The judiciary could be replaced by more efficient coin-flippers. As a sensational but related aside, judicial coin-flipping has actually happened, but it appropriately warrants discipline for abdication of the adjudicatory function. See JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 2.02, at 39–40 (3d ed. 2000) (discussing discipline cases in which “judges [made] a decision by flipping a coin in open court, or by throwing a dart at a dart board”).

88. The judiciary’s prime directive falls more heavily within Part II, adjudicatory justice. It is a more specific argument concerning what judges should do. Arguably, however, it is also a subcategory of open-mindedness addressed in Part IV, which is why, as noted above, the part divisions of Parts II through IV risk misleading the reader. Together these parts form a theory of adjudicatory justice and the moral judge.
directive is, essentially, an escape valve function that prevents or relieves the potentially unfair application of rules. The prime directive is inextricably related to the judiciary's prime virtue, open-mindedness, which is discussed in Part IV. The two characteristics combine to form the preliminary criteria of the moral adjudicator, and their justifications buttress, as well as profit from, the vision of adjudicatory justice developed above.

At the most basic level, the directive arises primarily from the role of the judiciary vis-à-vis the legislature. The need for the judge, in large part, owes to the various failures of rules—if rules unambiguously and justly disposed of every scenario of conduct, there would be little need for a judiciary; the executive would have its appropriate marching orders.89

This cause for the directive is exemplified by the rules versus standards debate.90 I believe that the prime directive is, in one sense, the tempering insertion of standards into rules—even when the rule ex ante falls within the basic values we defended in Part II. In other words, if a rule essentially said “thou shalt not kill,” the ethical judge could not enforce that rule, as written, in every case.91 She would be turning her back

89. Obviously, private law in its current form would need some judicial-like assistance, but I think the point is clear notwithstanding.

90. See generally Kennedy, supra note 20, at 1752 (giving an in-depth treatment to the debate). The ideas in this article generally counsel that judges should embrace standards, not rules. See, e.g., id. (noting that in “[a] regime of standards . . . every case would require a detailed, open-ended factual investigation and a direct appeal to values or purposes.”); see also id. at 1771 (“The direct application of moral norms through judicial standards is therefore far preferable to a regime of rules based on moral agnosticism.”). For a classic example of the clash, compare Baltimore & Ohio R.R. Co. v. Goodman, 275 U.S. 66 (1927) (Holmes, J.) (announcing rigid “stop, look, and listen” rule in railroad negligence cases), with Pokora v. Wabash Ry. Co., 292 U.S. 98 (1934) (Cardozo, J.) (rejecting the rule in favor of a standard of reason because the rule caused unfairness in a variety of circumstances).

91. There are no such things as categorically moral rules. See, e.g., Cass R. Sunstein, Moral Heuristics, 28 BEHAV. & BRAIN SCI. 531, 531 (2005) (“It is wrong to lie or steal, but if a lie or a theft would save a human life, lying or stealing is probably obligatory. Not all promises should be kept. It is wrong to try to get out of a longstanding professional commitment at the last minute, but if your child is in the hospital, you may be morally required to do exactly that.”). But see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 172 (1977) (“Kant thought that it was wrong to tell a lie no matter how beneficial the consequences, not because having this practice promoted some goal, but just because it was wrong.”). This Article permits—and in many ways requires—that certain values remain universal. But in general—and certainly for the judge—these values do not authorize categorical rules—the values can be applied accurately only in a discrete factual circumstance. See infra Part IV
on the parties sub judice—the battered wife, the police officer, or the insane, just to name a few. The rule, as applied, would fail the norms of self-defense, necessity, and culpability (among others), which are universal values. Likewise, the rule would be unfair.

Obviously many other distinctions exist between judges and legislators, but one of particular pertinence is the retrospective-prospective viewpoint. With several exceptions, judges work with past events, such as murders or breaches of contract, while legislators draft for future governance, such as deterring crime or rules of contracting. It is this element of planning for future events that crucially, but by no means exclusively, distinguishes these two lawmakers. Given human limitations, it is necessary to create rules of broad application to plan for future events that may concern the citizenry. Given those same limitations, these rules may have errors on their face, but certainly will have errors in the countless, largely unforeseen applications to which they will be put. These points are not revolutionary; they are timeless. These constitutive shortcomings illuminate the judiciary’s greatest check: to interpret these laws in accordance with justice—laws that otherwise would have misfired.

(discussing contextualism and open-mindedness).

To the extent this theory requires consequentialism, it need only require the weakest of its iterations by granting, for example, “intrinsic importance to rights (but . . . not giving them complete priority irrespective of other consequences).” Sunstein, supra, at 534 (quoting Amartya Sen, Fertility and Coercion, 63 U. Chi. L. Rev. 1035, 1038 (1996)). Moreover, as Sunstein notes of Rawls, “during the search for reflective equilibrium, all beliefs are revisable in principle.” Id. at 542. It should come as no surprise that “some of our beliefs, about particular cases and more generally, seem to us especially fixed, and it will take a great deal to uproot them.” Id. (citing RAWLS, supra note 10). Some values—should require strong justification to uproot them, but the moral judge will consider those strong justifications when they arise. It is noteworthy that not even Dworkin is completely a-consequential. See Dworkin, supra note 80, at 364 (noting that parts of his theory are consequential in “overall aim” and “in detail”).

92. On necessity, which is a defense to torts and may be an excuse or even a justification for otherwise criminal acts, see, for example, MODEL PENAL CODE § 3.02 (1962); George C. Christie, The Defense of Necessity Considered from the Legal and Moral Points of View, 48 DUKE L.J. 975 (1999).

93. Of course, legislatures also frequently deal with past events, and past events frequently give rise to legislation, but few would argue that broad and prospective policy is not the legislature’s prerogative (or at least, more the prerogative of the judiciary than the legislature).

94. Defendant Jessica Hall’s “McMissile” case is a perfect example—were it not for the rule-correcting function of the judiciary, the mother of three would have received two years in prison for throwing a fountain drink at a stopped car. See supra
Cass Sunstein's work on moral heuristics can also inform our discussion of both the prime directive and open-mindedness. Everyone, including legislators, relies on moral heuristics, i.e., "simple, highly intuitive rules that generally make sense, but that fail [or misfire] in certain cases." In my view, legislators are immersed in the world of moral and political heuristics. That is not a criticism, but as noted above, a necessity. Judges, however, do not (or ought not) share these limitations of legislators. Judges need to refuse a given heuristic's "generalization in contexts in which its rationale is absent."

The judiciary's prime directive—the anti-heuristic, escape valve function—has rhetorical and historical support. It is a check on the legislature's balance, and a separation of the law-enacting and law-applying powers. And if maintained, it serves us well.

Note 22. One would be hard-pressed to conjure up a more vital function for the judiciary.

95. Sunstein, supra note 91, at 531; see also infra Part IV.B.

96. Sunstein, supra note 91, at 531.

97. To be sure, everyone (including judges) operates on some level of heuristics.

98. Sunstein, supra note 91, at 531.

99. E.g., THE FEDERALIST No. 78, at 393, 398 (Alexander Hamilton) (Buccaneer Books 1992) (noting that the judiciary was to serve as a "barrier to the encroachments and oppressions of the representative body," prevent "injury of the private rights of particular classes of citizens, by unjust and partial laws," "mitigate[e] the severity, and confin[e] the operation of such laws," "moderate the immediate mischiefs of those [unjust laws] which may have been passed," and "operate[] as a check upon the legislative body in passing them").

100. See, e.g., Jackson, supra note 7, at 968 (citing THE FEDERALIST Nos. 78–79 (Alexander Hamilton) (Roy P. Fairfield ed., 1981)) (noting that Article III judges were to have independence for several plausible reasons: "they were to be independent to judge according to law; they were to have the independence to interpret the law in order to render judgment; they were to protect minorities from popular passions that would violate their legal rights; and they were to check the other branches of government when they departed from the fundamental commitments set forth in the Constitution."); see also supra note 99.

101. See, e.g., Republican Party of Minn. v. White, 536 U.S. 765, 803–04 (2002) (Ginsburg, J., dissenting) ("Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide 'individual cases and controversies' on individual records, neutrally applying legal principles, and, when necessary, 'stand[ing] up to what is generally supreme in a democracy: the popular will."") (citations omitted) (alteration in original) (quoting Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175, 1180 (1989)). There are certainly individuals who would disagree with my choice of the
If the reader has come this far in agreement, the rest is not hard to infer from these points. It would be a grave mistake to map this legislative ethic onto judges. Judges who craft categorical rules are simply bench legislators, who apply a prospective, heuristic-laden viewpoint. They lack the softening and corrective function of case-by-case analysis. It is largely for this reason as well that open-mindedness to the circumstances should remain the prime virtue in adjudication.

Senators may object to the moral judge; she is, by definition, a check on their power to govern actions. An ethical selector, however, should rest assured: he can continue to craft ex ante and general rules knowing that their tendency to cause actual injustice will be avoided or alleviated by the moral judge.

But object (or ignore) they will. From a negative perspective, the "morals v. merits" dichotomy may be just another attempt to preclude ethical adjudication. The meritorious judge, under this view, is an amoral judge—she acts merely as a mouthpiece or conduit for legislative morality, which most often is embodied in rigid rules. In this context as well, there is no true separation of morals and merits—it is simply a choice of one set of morals over another. The judge can make the judicial choice or the legislative choice, the latter of which dooms the judge in a certain number of cases to rule unethically. The former choice not only promotes ethical prime directive. They may say, for example, that the more important aspect of adjudication is the settlement of disputes regardless of the winner. I fail to see how that suggestion is better or calls for more than a coin-flipper in a robe. See also supra note 87.

102. For a recent and explicit example, see Bingue v. Prunchak, 512 F.3d 1169, 1170–71 (9th Cir. 2008) (citing County of Sacramento v. Lewis, 523 U.S. 833 (1998)) (adopting a "categorical rule" that law enforcement officers involved in car chases are immune from suit absent an intent to cause harm, even when their actions cause physical injury to innocent bystanders). While in that case it was arguable that the officer acted reasonably in joining and pursuing the police chase—and indeed it was unclear what physical injury he actually caused to the bystander-plaintiff—the rule will work an injustice in future cases. One example will materialize when an inebriated officer runs into a school bus while in hot pursuit. When it does, the judiciary's directive will be to fashion, in accordance with justice, an exception to the Ninth Circuit's categorical rule. And the specific judge's virtue of open-mindedness will ensure the necessary conditions by which the directive is implicated and enforced.

103. To be accurate, the judge under this philosophy is not amoral, but moral or immoral, depending on the moral merits of the legislative choice. To the extent discernable, the judge wholesale adopts and follows the legislative choice when adjudicating.

104. My use of the term "choice" could be misleading—it is not necessarily one
results, but it coheres with the proper, and institutionally superior, role of the judge.105

In an important way, then, the morals versus merits debate shifts the focus from the judge's morals to the nominator's morals; in other words, whether the prospective judge either possesses the nominator's personal morals (or those of her constituents) or at least agrees to implement the legislative morality generally.106 The right morals (or the lack of them) should be the focus—not whether the judge agrees with the nominator's own morals or the future codification of those morals. The first of these "right" morals is the fidelity to the prime directive, and as discussed below, the second is a broader version of the open-mindedness inherent in this ever-vigilant correction of failing rules.

IV. THE PRIME VIRTUE

Here I attempt to explicate further a prime virtue for judges—open-mindedness.107 There is much that is not new about that idea. For instance, open-mindedness has been demanded, in spirit if not in name, by the prevailing ethics codes since their inception.108 There are many or the other. Most judges presumably balance the two with varying weights.

105. See, e.g., Swisher, supra note 2, at 590 (noting, with respect to "the institutional role of courts vis-à-vis the legislature," "[t]he legislature undisputedly makes broad rules of general applicability in a setting conducive to such an ambitious (but inevitably crude) endeavor; the judiciary's undisputed role is case-by-case adjudication according to the facts, law, and justice. To defer blindly to the legislature's one-size-fits-all rules abdicates perhaps the most important function of the judiciary—to tailor the law to the facts before it in the pursuit of justice."); cf. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 472 (1982) (expressing value, in standing context, that "legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action").

106. To clarify, the judge who finds and applies the morality within the law through contextual concern and balancing—and reaches an arguably just result—is the moral judge; a judge who merely adopts the legislative morality embedded in a particular positive law is not.

107. Open-mindedness has at least two sides: foreswearance of categorical rules and a searching concern for fairness in the legal and factual circumstances of the case. These characteristics are virtually the same, but not identical. An example of the difference is that the former can be merely a rule of decision—a categorical rule barring categorical rules in decisionmaking. Open-mindedness has an ethical justification, contextualism, as discussed below, see infra Part IV.B, and the related support of the judiciary's crucial role, as discussed above. See supra Part III.

108. See infra Part IV.C.
analytical routes to reach the centrality of this judicial virtue. Here I employ three persuasive ones: Rawls, contextualism, and the wisdom embodied in successive ethics codes.

A. Rawls and the Original Position

One way to illustrate the strong desirability of open-mindedness is to devise a role-specific, Rawlsian inquiry by deciding the judicial program on which we would agree in the original position, behind the veil of ignorance. Under one interpretation, the principles derived from the original position "are indeed those defining the moral law, or more exactly, the principles of justice for institutions and individuals." Several (mostly) uncontroversial qualities will come quickly to mind.

The judge could not show favoritism; she would have to be impartial. Relatedly, the judge would have to be open-minded; she

109. One analogous route to reach this conclusion would be as follows: In light of a healthy concern for moral pluralism, the judicial role should not be concerned with extinguishing differences of reasonable moral opinion. In other words, if there are reasonable opposing outcomes in a given fact-specific case, the ruling that adopts one (or a balance) of those outcomes typically will be meritorious and not unethical. See supra Part II.B.3 (discussing moral pluralism's implications); see also infra Part VII (discussing a hypothetical nominee's controversial views).

110. See RAWLS, supra note 10, at 118–30 (describing those in the original position); DWORKIN, supra note 91, at 150–51 ("They are men and women with ordinary tastes, talents, ambitions, and convictions, but each is temporarily ignorant of these features of his own personality, and must agree upon a contract before his self-awareness returns.").

111. RAWLS, supra note 10, at 225 (defending Kant); see also supra Part II.B.2 (explaining some of Kant's moral philosophy).

112. Even utilitarians seemingly would agree with this principle. Unlike many of his predecessors, who wished to use the state to maximize their own pleasures, Jeremy Bentham (a founder of utilitarianism) argued that the state should maximize everyone's pleasures. See Jeremy Bentham, Principles of Morals and Legislation, in THE CLASSICAL UTILITARIANS: BENTHAM AND MILL 67 n.7 (John Troyer ed., 2003) (1789) (discussing and dismissing various then-contemporary theories, such as moral sense and law of nature). Thus, I venture, it has an implicit equality principle. Bentham presumably would have called such a solution naïve in a world of limited resources. It is at least clear, however, that Bentham's greatest pleasure for the "greatest number" thesis meant a number greater or more sweeping than the relevant majority. Jeremy Bentham, The Greatest Good for the Greatest Number, in THE CLASSICAL UTILITARIANS: BENTHAM AND MILL 92–93 (John Troyer ed., 2003).

113. See Republican Party of Minn. v. White, 536 U.S. 765, 775–78 (2002) (defining impartiality as either "lack of bias for or against either party" or "lack of preconception in favor of or against a particular legal view" or "as openmindedness.
must be willing to empathize with and listen to the parties, and consult the law.\textsuperscript{114} The judge must also employ reason in decisionmaking; arbitrariness or superstition—even faith—could not drive the rulings.\textsuperscript{115} Relatedly, the judge’s rulings must be universalizable in like circumstances; the same ruling should apply at least to cases that differ only by name.\textsuperscript{116}

In sum, we are left with a very open-minded judge, one whom we can defend on the following basis as well.

B. A Case for Contextualism

What ex ante universal policy or rule is meritorious? The answer is simple—none.\textsuperscript{117} A few simple, and incredibly plausible, examples should illustrate the point:

\textsuperscript{114} For a strict determinist, this duty presumably would be obvious. For everyone else, it is undisputed that causes and effects beyond our control play a large role in our predicament. Therefore, the prospective judicial candidate must be willing to take this (among other considerations) into account in fastening rulings.

\textsuperscript{115} Obviously, the veil of ignorance is not absolute: we know that others will differ, in such varied conditions as size, religion, power, and so on. It seems to me that no reasonable person in the original position would agree to be judged by another’s idiosyncratic religious tenets. For another possible explanation, they would not be “reasons” that would achieve “reflective success” in our agreement on the role of our adjudicatory officials. See Christine M. Korsgaard, The Sources of Normativity 93–94 (Onora O’Neill ed., 1996) (noting that our “reasons” for action imply that they have withstood reflection). As noted above, however, to the extent we define religion (extremely) broadly, universal tenets may be the basis of agreement. See supra note 40.

\textsuperscript{116} This feature—acceptable in theory but elusive in practice—also is related to agent-neutral and agent-relative values. See generally W. Bradley Wendell, Personal Integrity and the Conflict Between Ordinary and Institutional Values, in LEGAL ETHICS: PROFESSIONAL ETHICS AND PERSONAL INTEGRITY (Tim Dare & W. Bradley Wendell eds., forthcoming 2008) (explaining the difference). The only values that would be acceptable in the original position presumably would be agent-neutral ones. See, e.g., Philip Pettit, The Consequentialist Perspective, in BARON ET AL., supra note 46, at 130–32, 146–47 (arguing, among other reasons, that the former would make “ethical evaluation indistinguishable from evaluation in terms of prudence”).

\textsuperscript{117} Using contextualism, an exception can be made. If we fill in the Y field with all of the details of a case, we could create a meritorious universal policy. Of course, such a policy would not be ex ante (because we have filled in all of the specific case facts) and it would apply “categorically” only to the exact same facts (i.e., to the case that differs only by name).
It is wrong to lie or steal, but if a lie or a theft would save a human life, lying or stealing is probably obligatory. Not all promises should be kept. It is wrong to try to get out of a longstanding professional commitment at last minute, but if your child is in the hospital, you may be morally required to do exactly that.\textsuperscript{118}

Universal policies—the categorical imperatives of the world—are categorical rulings.\textsuperscript{119} To rule categorically means to treat one specific fact (or law) as a necessary and sufficient condition to rule a certain way.\textsuperscript{120} That ethic is untenable—it is both close-minded and naïve.\textsuperscript{121}

What is necessary in ethics—particularly judicial ethics—is contextualism.\textsuperscript{122} I do not argue in this Article for the strongest version of moral contextualism. Thus, we can assume that some principles can be identified and defended independently of the discrete circumstances in which they might arise. Under this weaker view, we can assume, almost universally, that “first principles single out relevant features of moral situations such that the exemplification of these features lends support to,
provides a reason for making, a certain ethical judgment." What is critical, however, is that, without the discrete circumstances, a principle is exactly that and little more: "A principle taken alone does not express a universal statement which always suffices to establish how we should act when the conditions of the antecedent are fulfilled." The accurate adjudicatory application of these principles depends on the thorough inquiry into and assessment of the circumstances—contextualism defined.

Moreover, other legal concepts support the adoption of ethical contextualism. First, I would argue that, in essence, anti-contextualism amounts to discredited deduction; it promotes adjudication independent of the case circumstances, relying solely on concepts supposedly immanent in the law. Second, the standing requirements and the historic ban on advisory opinions also favor, and to a limited extent require, contextualism. Rhetorically, it has not been within the American judiciary's role to render advisory opinions. Substantively, the ban forces

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123. Rawls, supra note 10, at 300. By quoting Rawls, I do not mean to mislabel him a moral contextualist in the present sense—I am quoting his famous work merely for these background principles of values. I do think these principles would be adopted in the original position and therefore Rawls might accept them as justice. Cf. id. at 307 (separating "the rule of promising and the principle of fidelity" and holding only the latter as a feature of justice because it would be chosen in the original position).

124. Id. at 300; see also Cass R. Sunstein, From Theory to Practice, 29 Ariz. St. L.J. 389, 393 (1997) ("In moral thinking, everything (concrete and abstract) is subject to potential revision as we deliberate, and in both morality and law, theories have no special priority simply because they are general and abstract."); see also supra note 91 (explaining these features).

125. Open-mindedness does not stop with the facts, but includes open-mindedness regarding the law as well. This aspect supports the view of justice set forth in Part II.

126. See generally Karl N. Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222 (1931) (putting forth the realist critique); cf. Dworkin, supra note 80, at 375–76 ("The alternative [to using moral theory] is not avoiding moral theory but keeping its use dark, cloaked under all the familiar legal phlogistons like the mysterious craft of lawyer-like analogical reasoning."). Moreover, even assuming the initial presence of these concepts in laws that make little or no mention of them, a categorical application pronounced today will result in misapplications of those concepts tomorrow.

127. Cf. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 472 (1982) (expressing value, in standing context, that "legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action").
actual and specific circumstances on the decision.\textsuperscript{128} By doing so, it illuminates and solidifies the specific consequences of an otherwise arm-chair decision to inflict state action.

Like the prime directive, contextualism requires thorough open-mindedness—a skepticism of moral heuristics and an ever-vigilant consideration and reconsideration of the impact of rules in the cases at hand. Only when we have the full set of circumstances can we accurately discern the applicability and weight of implicated values, legal or otherwise. The prime directive is a recognition that the judiciary, unlike the legislature, has the luxury of considering the full set of circumstances; open-mindedness is the quality that ensures that consideration. Finally, the broad conception of justice detailed in Part II assumes an open-minded judge who will survey the vast legal materials and navigate them toward a fair result.

C. The Codification of Open-Mindedness

With slight modifications, the Model Code of Judicial Conduct has been adopted by forty-nine states and the federal judiciary.\textsuperscript{129} From many angles, it requires open-mindedness. This requirement has been both an aspiration and a rule of conduct since 1924, if not before.\textsuperscript{130}

Per Canon 5A, a candidate for judicial office "shall not[,] with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office ... ."\textsuperscript{131} The

\begin{itemize}
\item \textsuperscript{128} See, e.g., Pub. Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 244 (1952) ("The disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.").
\item \textsuperscript{129} See, e.g., Cynthia Gray, The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability, 32 Hofstra L. Rev. 1245, 1246 n.4 (2004).
\item \textsuperscript{131} Model Code of Judicial Conduct Canon 4, R. 4.1(A)(13) (2007); Model Code of Judicial Conduct Canon 5A(3)(d) (2004). In February 2007, the ABA House of Delegates adopted a new Code (whose drafting was chaired by Mark I. Harrison). Because the states and the federal judiciary have yet to adopt it, however, I list both citations.
\end{itemize}
same duty applies to sitting judges.\footnote{132}{\textit{Model Code of Judicial Conduct} Canon 2, R. 2.10(B) (2007); \textit{Model Code of Judicial Conduct} Canon 3B(10) (2004) (same). At the least, there is a problem with the phrasing of the likely-to-come-before-the-court condition. See Bopp & Woudenberg, \textit{supra} note 130, at 332 ("Due process mandates that, even for those who raise a novel or an 'unlikely' issue before a judge, a fair and impartial consideration of that issue must be afforded. . . . Consequently, the focus for judicial candidates and in the canons should be on whether judicial candidates are pledging or promising certain results in particular cases, regardless of whether the issue is likely to come before them.").} It should be clarified before going further that, "[w]hile the White Court was clear in its disapproval of the 'announce clause,' it specifically declined to address the constitutionality of the 'pledges-and-promises clause' of the Minnesota Judicial Code or the ABA Model Code on which most state codes are based."\footnote{133}{Keith Rollin Eakins & Karen Swenson, \textit{An Analysis of the States' Responses to Republican Party of Minnesota v. White}, 28 Just. Sys. J. 371, 372–73 (2007); see also Republican Party of Minn. v. White, 536 U.S. 765, 770 (2002); Bopp & Woudenberg, \textit{supra} note 130, at 330.} Thus, citing the latter clause (and related clauses) is not an unconstitutional exercise in futility.

Open-mindedness is required elsewhere as well. For instance, a judge must "accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law."\footnote{134}{\textit{Model Code of Judicial Conduct} R. 2.6(A) (2007); \textit{Model Code of Judicial Conduct} Canon 3B(7) (2004).} Most importantly, the Code repeatedly requires impartiality.\footnote{135}{\textit{E.g.}, \textit{Model Code of Judicial Conduct} Canon 2, R. 2.2 (2007) ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."); \textit{Model Code of Judicial Conduct} Canon 3 (2004); see also Keith Swisher, \textit{The Modern Movement of Vindicating Violations of Criminal Defendants' Rights Through Judicial Discipline}, 14 Wash. & Lee J. C.R. & Soc. Just. (forthcoming 2008) (discussing discipline involving these Canons).} A salutary development flowed from \textit{Republican Party of Minnesota v. White}\footnote{136}{Republican Party of Minn. v. White, 536 U.S. 765 (2002).}—the ethical codification of open-mindedness. Impartiality is now defined as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, \textit{as well as maintenance of an open mind in considering issues that may come before a judge.}"\footnote{137}{\textit{Model Code of Judicial Conduct} Terminology (2007) (emphasis added); \textit{see also} \textit{Model Code of Judicial Conduct} Terminology (2004) (using substantively identical language).} The mandate of open-mindedness now has teeth; and more importantly, increased legitimacy and
The rules do have at least one strong counterforce that potentially aligns with the morals v. merits dichotomy. The new Code, adopted last year, requires that judges "uphold and apply the law."\textsuperscript{139} In light of our broad definition of law, this prescription does not seem problematic. The comment to rule 2.2, however, could lead to ethical problems: judges must "apply the law without regard to whether the judge approves or disapproves of the law in question."\textsuperscript{140} We could attempt to revolt against the comment, which of course carries less weight than the general rule, but that fight may be unnecessary.\textsuperscript{141} The Code—for the first time in its history—now explicitly ties the duty to "apply" the law to requirements of "fair[ness] and impartial[ity]."\textsuperscript{142} The prime virtue revived.

V. OVERRULING OSTENSIBLE OBJECTIONS: A FEW PRELIMINARY CLARIFICATIONS

All of the foregoing is not simply a restatement that law equals morality. The amount that law is, or must be, based in morality is a somewhat different and ubiquitous question. Here, instead, we are...
discussing the act of adjudication (most often, hard cases), which I submit is (or should be) a subset of moral judgment.

It may be objected that hard cases—in which precedent, statute, or other law are not exactly on point—represent too small of a percentage of adjudication to provide a foundation for its practice. To state the contrary claim—that adjudication is controlled by cases in which precedent, statute, or other law is exactly on point—is to refute it. Both judges and attorneys know it not to be the case. Most jurists would note, however, that sometimes the law is on point, or at least “determinate.” And if that is the case—and if the law does not coincide with a just result in the case—one might object that law as justice, adjudication as legal-context morality, has nothing to tell us.

To the contrary, herein waits a chief advantage of the above (refined) view. The law is defined so broadly that it incorporates basic principles, including equitable and constitutional principles—the legal materials are so broad that it enables the judge to craft a fair result legally. Thus, it is only in the rarest of situations in which a fair result is not possible.

Indeed, those situations are so rare that they may not constitute adjudication, at least not in any meaningful sense. They may arise only in situations akin to a higher court ruling in the same, or a factually indistinct, case. We can use an extreme example: the Roy Moore case. He was ordered to comply with a specific rule; by the end of the saga (if not before), there was no ambiguity and no other law left to which to turn: remove the Ten Commandments in that courtroom or face discipline. Had he complied, he would not have been adjudicating—he would not have been considering all of the legal norms and navigating them to reach a fair result. Instead, he would have been merely enforcing the order of the higher court, which he could (and probably should) have done with a

143. Similarly, legislatures often react by crafting a law designed to address a specific past case. Occasionally they succeed, and the new law will dispose of the exact same case in the future. Even then there may be other obstacles, such as a constitutional principle that limits or even nullifies the law.

144. See Glassroth v. Moore, 335 F.3d 1282, 1284 (11th Cir. 2003) (detailing the factual history and affirming the district court’s order requiring the monument to be removed from the public courthouse); Glassroth v. Moore, 275 F. Supp. 2d 1347, 1349–50 (M.D. Ala. 2003) (entering final judgment and injunction). For his clear and continued defiance, the Alabama Court of the Judiciary removed Moore from the office of Chief Justice of the Supreme Court of Alabama. In re Moore, No. 33 (Ala. Ct. Jud. Nov. 13, 2003).
mindless, judgment-free action.145 Such rare examples aside, when justice is law, there is much law to be found and applied, and open-mindedness and contextualism become key to sparking and guiding the search and application.

A closing objection might be the incompleteness of the prime directive and virtue—there is more to adjudication. As disclaimed with respect to the morals-equal-merits thesis, however, this thesis (inferring the judiciary's prime directive and prime virtue) is preliminary. It is partially a substantive selection device establishing a criterion for moral nominees while recognizing the limits of what we can expect from nominees at this preliminary stage. But it is primarily a procedural judicial device; it ensures at this preliminary stage that everyone will have the opportunity to be accorded their due, in the words of Aristotle.146 That aspiration—giving each her due—is hopelessly hollow at any further stage. But at this preliminary stage, it is essential; it accords every prospective party with an adjudicator who is not predisposed against that result.147 In the original position as well, we would demand no less of our judges.

VI. THE WHITE REVOLUTION

White148 got it right—just not for the reason given in the opinion.149

145. To be sure, there is still something here. For instance, he would have considered the rule that lower courts must follow the orders of higher courts, at least when and to what extent those orders are clearly applicable. Had he reasonably done so, he would have concluded that, absent some constitutional safety net (which he had resorted to and failed), the order must be followed.

146. See generally ARISTOTLE, THE NICOMACHEAN ETHICS bk. V (J. E. C. Welldon trans., Prometheus Books 1987) (discussing justice); cf. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(7) (2003) (requiring that judges "accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law"); see also MODEL CODE OF JUDICIAL CONDUCT R. 2.6(A) (2007).

147. Indeed, it can be stated more positively: we are requiring a mindset under which the judge is predisposed to give each her due.

148. Republican Party of Minn. v. White, 536 U.S. 765 (2002). Before I go on to praise the White decision, it should be disclaimed that I do not think it is sheer coincidence that the Republican Justices invalidated a rule that blocked a Republican judicial candidate from announcing his conservative views during the election. Furthermore, judicial elections tend to be inferior to merit selection, but the issue was raised only indirectly in the case. See Mark I. Harrison et al., On the Validity and Vitality of Arizona's Judicial Merit Selection System: Past, Present, and Future, 34 FORDHAM URB. L.J. 239 (2007) (justifying merit selection).

149. The procedural posture of White is disorderly, at best, and therefore I
We want nominees to speak on important issues so that they will expose their judicial immorality. The rule before White, albeit well-intended, hid certain nominees’ categorical or extra-legal opinions from us.\textsuperscript{150} In other words, the rule’s goal was to foster the legal morality listed above, but its effect was merely to hide unethical nominees, which allowed them to take the bench without proper opposition. The outcome is ironic: nominees wanted their First Amendment rights to announce their viewpoints in order to be nominated; now that they have their First Amendment rights to tout their viewpoints, they should not be nominated because their viewpoints are judicially unethical.

The traditional stance—"don’t ask, don’t tell"—is fatally flawed.\textsuperscript{151} As White alluded, the approach is absurd.\textsuperscript{152} The hope, apparently, is that by refraining from asking the problematic questions, it ensures that we somehow select judges who would not give problematic answers. At best, that is an ostrich-with-its-head-in-the-sand approach to this important inquiry. The questioning, or desired questioning, by senators and others often does seek categorical answers.\textsuperscript{153} But all of the heat has been directed at the questions, not the prospective answers. The evil is not the questioning—nominees are questioned uncontroversially all of the time—it is the problematic answers.

The answers are supremely important. Perhaps, however, the answers—or the act of answering—will cause injury to our judiciary or the public. There are at least two concerns: (1) judges will prejudge the merits and thereby pre-commit themselves to one side;\textsuperscript{154} and (2) the public will

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\item[150.] See, e.g., Bopp & Woudenberg, supra note 130, at 330 ("In particular, the [White] Court, interpreting ‘impartiality’ to prevent ‘bias for or against parties’ and possibly to preserve the ‘open-mindedness’ of a judge, found that preventing judicial candidates from merely announcing their views on various legal, political, and social issues did not address those concerns at all and, consequently, could not justify the restriction of an express constitutional right to free speech.").
\item[151.] See, e.g., Rotunda, supra note 5, at 129 ("Senators have not normally asked such questions of judicial nominees. In fact, . . . until 1955 there was no tradition of judicial nominees appearing at the confirmation hearing to answer any questions.").
\item[152.] White, 536 U.S. at 780 (noting that the no announce rule was “woefully underinclusive”).
\item[153.] Rotunda, supra note 5, at 128–29 (reciting some examples of questions arguably designed to seek categorical, or at least pre-committed, answers to legal issues).
\item[154.] I agree with the White opinion to the extent it rejected this concern. See White, 536 U.S. at 780–81.
\end{enumerate}
\end{footnotesize}
view judges with less impartiality. In the main, the first concern is solved—not created—by questioning. Questioning would reveal, as it arguably did with Robert Bork, the nominee's precommitment. Conversely, it would tend to show an absence of that concern in nominees who answer the questions in a way that evidences they have not categorically prejudged the merits or precommitted themselves to a side. Questioning for no precommitments is not likely to result in commitments, save a commitment not to precommit.

To the extent the concern is essentially psychological—namely, that initial consideration precludes fair consideration and reconsideration of the issue—it is rather absurd. As White pointed out, nominees have done this countless times before nomination; the only difference at nomination is that now someone is paying more attention to these so-called prejudgments in the context of nominees' fitness for the bench. If the retort is that such a public prejudgment is more likely to commit the nominee to that view than the countless less-public prejudgments, the

155. This assumes, of course, that nominees will answer the questions in an honest and forthcoming way. That may be more likely at the official hearing, but it is a problematic assumption. See, e.g., Horwitz, supra note 34, at 89 (noting the cynical view that "any nominee who rose to the level of consideration for the Supreme Court surely would deny holding the view that his religion would take precedence over conventional secular sources of law").

156. Moreover, responding judges should remind their audience that "they will keep an open mind and carry out their adjudicative duties faithfully and impartially if elected." Cynthia Gray, The 2007 Model Code: Taking Judicial Ethics Standards to the Next Level, 90 JUDICATURE 284, 292 (2007) (quoting MODEL CODE OF JUDICIAL CONDUCT Canon 4, Rule 4.1, cmt. 15 (2007)).

157. Professor Rotunda has noted the remarkable example involving Judge Henry Friendly:

In one case, when one of the parties cited to him one of his own articles indicating how an issue should be decided, Judge Friendly decided that he disagreed with what he himself had earlier written; the genius of the common law system, he recognized, is that judges must make the decisions in the context of concrete cases, not in the context of law review articles. Rotunda, supra note 5, at 137 & n.43 (noting that the case ultimately resulted in a Supreme Court opinion, Adams v. Williams, 407 U.S. 143 (1972)).

158. White, 536 U.S. at 777–78 ("For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. . . . And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest either."); see also id. at 778–79 (implying that previous legal consideration does not preclude an open-minded judge).
answer must be that a moral judge would not fall so fast.  

She will give at least a good answer—one that evidences that, while she may have this or that value, the values she applies will be legally relevant and subject to balancing, or even reconsideration, in light of the justice of the case. Indeed, the “right” answer is antithetical to precommitment. As shown above, it conveys non-categorical judgment, respect for moral pluralism, and appreciation of the prime directive of the American judiciary.

The second concern is more problematic, at least in the sense that I do not have a comprehensive answer for it. The weight of the concern turns heavily on an unsettled empirical question—namely, whether the public indeed will view judges with less impartiality. It would seem, however, that the public’s view of impartiality would be favorably increased, not decreased, by questioning for answers in favor of the above values, which revolve around open-mindedness.

There is a substantial difference between ferreting out categoricalness or closed-mindedness and seeking specific commitments.

159. Id. at 780–81 (noting that the contrary conclusion “is not self-evidently true” and distinguishing between announcements and “pledges or promises”); see also id. at 779 (“The problem is, however, that statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible.”).

160. Cf. Viet D. Dinh, Threats to Judicial Independence, Real and Imagined, 95 Geo. L.J. 929, 937 (2007) (“It certainly is proper for Senators to inquire about nominees’ general judicial philosophies and interpretive methodologies.”); Jackson, supra note 7, at 977 n.45 (“Inquiries as to interpretive methodology, though sometimes used as a proxy for substantive ideology, may pose fewer risks of creating the appearance of seeking, or giving, ‘assurances’ or precommitments, because its application may be uncertain in particular cases.”). Here, as well, the contextualist judge’s application would be uncertain.

161. Cf., e.g., White, 536 U.S. at 813 (Ginsburg, J., dissenting) (“This judicial obligation to avoid prejudgment corresponds to the litigant’s right, protected by the Due Process Clause of the Fourteenth Amendment, to ‘an impartial and disinterested tribunal in both civil and criminal cases.’” (quoting Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980))).

162. I recognize that, in practice, this point is naïve; not everyone (particularly many presidents and senators) shares these views of open-mindedness. Questioning, then, might lead to a quiz for categorical zealots, in this absence of rough consensus with respect to the purpose of questioning. See also infra note 166.

163. Professor Rotunda has alluded to the distinction:

It is permissible for Senators to ask nominees if they have made any promises—other than “the faithful and impartial performance of the duties of
Another point against this concern regarding the public's view of the judge is that it actually may be motivated by judges' self-image, which I have argued is a weak value in the attorney context. The real concern could be that judges want to think of themselves as impartial judges (accuracy aside) and likewise want the public to see them as such. I do as well, but only to the extent that image is accurate. Impartiality—particularly open-mindedness—is the prime virtue, but it should not be mindlessly imputed to anyone donning a robe. It is something that must be attained and protected. I, for one, would like to know whether the nominee—in descending order of desirability—(a) has attained it, (b) makes a good faith effort to do so, (c) devalues it, or (d) has never valued it in the first place.

the office"—to the President or to any Senator. If the nominee has made other promises, then the Senate should know what they are. But neither the Senate nor the President should seek such promises.

Rotundasupra note 5, at 133.


165. The concealment is replete in the Code. See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.10(A) (2007) (barring judges from commenting on pending proceedings); MODEL CODE OF JUDICIAL CONDUCT Canon 3B(9) (2004) (same); see also MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007) (explaining in commentary that the rule bars even the “appearance of impropriety”); MODEL CODE OF JUDICIAL CONDUCT Canon 2A (2004) (same); MODEL CODE OF JUDICIAL CONDUCT Canon 4, R. 4.1 (2007) (barring various interactions and affiliations with political organizations); MODEL CODE OF JUDICIAL CONDUCT Canon 5A(1) (2004) (same). To the extent Canon 3B(9) tends to prevent jury bias, it has at least one point in its favor. Generally, however, shallow appearances should not be the focus in adjudication. See, e.g., White, 536 U.S. at 777-78 (“For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law.... And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest either.”); cf. id. at 778-79 (implying that previous legal consideration does not preclude an open-minded judge).

166. The desirability of this result (i.e., that selectors will inquire into the nominee's ethical mindset) may well turn on another empirical question: whether the Senate and other selecting bodies would follow the above recommendations. The actions of the Senate may be to the contrary, that is, it would abuse the recommendations and seek specific commitments on hot-button issues, such as abortion and affirmative action. See, e.g., Dinh, supra note 160, at 936 (noting the prevalence of Senate “questions about the nominee's personal views on controversial issues of the day: abortion, affirmative action, the death penalty, the rights of criminal defendants, and other topics”); see also Edwin Meese III, The Double Standard in Judicial Selection, 41 U. RICH. L. REV. 369, 373 (2007) (expressing concern that, in
We also can glean much from previous decisions. Indeed, the nominee's decisions are the best evidence of the nominee's categoricalness or closed-mindedness (or the opposite virtues). The relevance and accuracy of this approach depends in part on (a) the recency of the decision and (b) the degree of similarity of the circumstances in which the decision was rendered and the judicial office in which she is seeking to serve. Recent trial or appellate adjudication is right on point, which is one advantage of the current and growing practice of requiring previous judicial experience of federal nominees. If done with the proper motives, questioning can and should supplement decisional evidence (or serve as a substitute when little exists).

VII. A TEST NOMINEE

We should conduct at least one test run in which we deploy the foregoing principles before we send the selector to work. For a good example, we can devise a not-so-hypothetical nominee inspired by Robert Bork and the platform of the state judicial candidate in White. This nominee proclaims that "abortion is wrong" or, more likely, "Roe was wrongly decided." Like Robert Bork's testimony concerning Roe v. Wade, the nominee's anti-abortion stance is seemingly immoral and unmeritorious, but not necessarily for its conclusion. Instead, it is immoral and unmeritorious in light of its seemingly categorical and closed-minded nature. Roe has been decided; thus, the nominee could have read the modern judicial selection, "[i]t does not matter whether a nominee will be a good and disinterested judge settling cases and controversies fairly; what matters is how the judge will vote on the hot button issues such as abortion, homosexual rights, and references to God in the public square").

I leave as an aside the fact that the Senate's predictions often are wrong. See, e.g., Rotunda, supra note 5, at 135-39. If that is the case, it may be that the silent treatment is preferable by, for example, confirming more judges who possess and follow the prime virtue and directive. We should not forget, however, that nominees' honest responses to hot-button questions may offer a critical glimpse into their judicial morality.

It has its disadvantages as well. See, e.g., Lee Epstein et al., The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court, 91 CAL. L. REV. 903 (2003).

See White, 536 U.S. at 771 (listing some of the candidate's public announcements). For example, he appears to have been anti-abortion, and at least in the case of welfare benefits, deferential to the legislature. See id.; see also Deters v. Judicial Ret. & Removal Comm'n, 873 S.W.2d 200, 201 (Ky. 1994) (affirming discipline for the following commitment: "Jed Deters is a Pro-Life Candidate").

complete record and come to a judicially moral conclusion, assuming he
gave some deference to the fact that he had not observed the parties and
other hindsight concerns. In other words, he has (most of) the requisite
context to decide.

But he did not use it—hardly the model of an open-minded judge.
The first short answer—abortion is wrong—surely implies categorical
thinking. It implies a precommitment to rule against abortion no matter
the factual circumstances in which the issue arises. The second—Roe was
wrongly decided—hardly conveys more information. Neither answer gives
the selector an understanding that the putative judge is willing to consider
and reconsider the justice of the cause as hardened by the circumstances.
Moreover, there is no intimation that the nominee will navigate the sea of
legal materials toward a contextually fair result.

There are many more ethically responsible answers out there.170 Had
the nominee instead said, for instance, that he did not support the ruling
because the interests that the law recognizes in life outweigh the mother’s
weighty interests in light of the circumstances of the case, he would have
given both a meritorious and judicially moral response. More specifically,
he could have said that the abortion would terminate a form of life that, at
x number of weeks, was significantly
devolved,
7
the risk to the mother,
who voluntarily became pregnant, was low,
2
and after due consideration
of the right of privacy line of cases and the principles they implicate,
3
he

170. Because the White opinion does not list the candidate’s views in explicit
detail, we can assume that he could put aside his categorical thinking and engage in a
form of the following analysis. If he cannot, he should recuse himself. Furthermore,
we also might wonder whether he is capable (or likely) to engage in moral
adjudication. See also infra note 175 (expressing these and further concerns).

171. Cf., e.g., Dworkin, supra note 1, at 515–16 (“If unborn infants are people,
whose interests may properly be counted by a legislature, then this . . . justification is
sound and passes the test of equal representation. But the Court must decide that deep
and undemonstrable issue for itself.”).

172. I purposely chose not to count “state” interests explicitly, but they are not
worthless, just problematic. See Swisher, supra note 2, at 577–78 (describing and
cautioning against instrumental reasoning in the theory and practice of adjudication).
With respect to the factors dealing with risk to the mother and the so-called voluntary
nature of the pregnancy, a moral judge would have to consider separately the material
differences between the two named plaintiffs and their circumstances. See Roe, 410
U.S. at 120–21 (describing the Roe and Doe plaintiffs, but with only minimal detail).
Significant health risks or rape, for instance, should affect the determination.
Ultimately, neither concern was present in the cases.

173. E.g., Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) (examining the
right of privacy line of cases and holding that a statute forbidding use of contraceptives
had concluded that the law did not compel a contrary result.\textsuperscript{174} An alternative course would have been for the nominee to state that he will recuse himself from abortion cases because he is incapable of exercising the requisite open-mindedness when confronted with the issue.\textsuperscript{175}

And so the questions go. The abortion exam, albeit tough, is only a sliver of the potential inquiry; a passing score does not alone qualify the moral adjudicator. Because the contextualism and open-mindedness we deserve is pervasive, it should show itself in other contexts.

\section*{VIII. Conclusion}

We have sketched the moral judge at selection. She has a prime virtue—open-mindedness—and an interrelated prime directive—the retrospective, anti-heuristic, anti-rigid-rule, escape-valve function of the judiciary. Conversely, she has a strong aversion to categoricalness, closed-mindedness, and adjudicating injustice. But while she navigates the vast legal materials toward just results, she is mostly hollow. Much of her work will come from discerning and enabling substantively fair results in nearly never-ending contexts. Because universal principles are elusive, and their application difficult, there is much work to be done in specifying just results both in general and in context.

\textsuperscript{174} Two disclaimers are in order. First, the preceding conclusion is not meant to garner universal agreement, but merely to exemplify a legally meritorious and ethical judicial response in light of conflicting laws and moral pluralism. Second, the conclusion should not be attributed to the author’s personal views of abortion. The example, in short, is one strong way to test the strength of my first thesis, which essentially is the conflation of judicial morals and merits.

\textsuperscript{175} See, e.g., 28 U.S.C. § 455 (2000) (requiring recusal when “impartiality might reasonably be questioned”). This alternative is problematic for various reasons that I cannot fully develop in this Article. One example is its potential naivety—it rests on the shaky assumption that the nominee could turn off his categorical mindset for other cases or be aware of the cases in which he could not. Disqualification also is disfavored for other reasons, both ethical and practical. See \textsc{Model Code of Judicial Conduct} Canon 2, R. 2.7 & cmt. (2007) (“The dignity of the court, the judge’s respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge’s colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.”).