

## Essay

# Teaching “Is This Case Rightly Decided?”

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### INTRODUCTION

“Is this case rightly decided?” From the first week of law school, every law student must grapple with this question. Typically, a law professor will pose it during Socratic cold call, after the student rehearses the case’s facts, procedural history, reasoning, and holding. At first blush, this gives the student an opportunity to provide a deeper, more considered view of a given case.

And yet, the professor never provides the student with criteria for answering. Should she answer based on the blackletter law she just learned? Or should she give an answer rooted in her political viewpoints? Or perhaps some lived experience or interdisciplinary perspective should inform her response? Confused and often unsure, a student will quickly, intuitively respond by choosing one or more of these options.

This Essay argues that this question—“is this case rightly decided?”—is problematically under-specified. Law professors should thus present students with a three-part framework: whether a case is rightly decided legally, morally, or sociologically.<sup>1</sup> Armed with this framework, students can better

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1. These three criteria are inspired by the writings of Richard Fallon on Constitutional legitimacy before the Supreme Court. *See* Richard H. Fallon, Jr.,

differentiate caselaw critiques throughout a semester. This Essay also argues that this framework begins to remedy deeper deficiencies in legal education and, perhaps, both legal scholarship and popular discourse.

Part I identifies the typical law school scenario and the problem of under-specification regarding the question, "is this case rightly decided?" Part II explains how students can legally, morally, and sociologically answer the question. Part III reviews the benefits and drawbacks of such a framework. Part IV considers implications for law school education, legal scholarship, and popular discourse. Finally, an attached Appendix serves as a class handout for students to help them differentiate their answers.

Before doing so, I wish to clarify three things. First, some professors do not ask students "is this case rightly decided?" But most professors ask normative questions in the classroom to test students' critical thinking about a court's legal reasoning. In doing so, the most common form is "is this case rightly decided?" Second, some professors opt not to ask the question for cases they deem particularly sensitive or harmful to student well-being. For purposes of this Essay, I assume that the cases discussed are within the zone of whatever set of cases a given professor has deemed appropriate. Third, the relationship between law, morality, and sociology is complex and contested—and thus the

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*Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) [hereinafter *Legitimacy and the Constitution*]; RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018). This Essay differs from Fallon's conceptualization in two regards. First, Fallon is primarily concerned with the impact that the Supreme Court, Executive branch, and Congress have on the Constitution's moral, sociological, and legal legitimacy. *Legitimacy and the Constitution*, *supra*, at 1852. In contrast, this Essay uses Fallon's categories to help law students understand and argue whether a case was rightly or wrongly decided. Second, Fallon conceptualizes legal, moral, and sociological theories slightly differently than this Essay does. Whereas this Essay delineates between legal, moral, and sociological reasoning, Fallon's focus on Constitutional legitimacy means that his evaluation of legal legitimacy is more influenced by enforcement power, societal norms, and political considerations than blackletter precedent. *Id.* at 1794. Fallon describes the Constitution as imparting a minimal standard of moral legitimacy and argues decisions we disagree with remain morally legitimate so long as they "[fall] inside a range within which reasonable people understandably disagree." *Id.* at 1834. Finally, in light of his concern with Constitutional legitimacy, Fallon's sociological legitimacy is explicitly based on Weber's arguments that certain institutions deserve authority and acquiescence, even where we disagree with their actions. *Id.* at 1795.

scholarship on such connections is vast.<sup>2</sup> I thus present a more pared-down version of all three concepts, recognizing that each one is relevant to “law” writ large. My goal in writing this Essay is pedagogical improvement, not jurisprudential defense.

## I. THE PROBLEM WITH “IS THIS CASE RIGHTLY DECIDED?”

Judges do not always get it right. It is thus essential for students to hone a critical eye on caselaw and, more generally, on the nature of law itself. Asking students for their opinions about cases fosters students’ critical eye and sense of agency. Unfortunately, law professors often fail to concretely guide students in developing such legal discrimination. This Part will explore the typical law student experience regarding “is this case rightly decided?” It will then identify and explain the problem of this question’s under-specification.

### A. THE TYPICAL SCENARIO

For new law students, the first weeks of law school are dizzying. After an undergraduate education in subjects like history, economics, or international relations, students enter law school open to learning “law”—seemingly some combination of precedent and legislation. Often, new 1L students lack a concrete career goal, but they want to “do justice.” Quickly, however, professors tell them to shed such lofty views.<sup>3</sup> Instead, they must learn to “think like a lawyer.” The building blocks for such

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2. See, e.g., Scott J. Shapiro & Arthur Ripstein, *The “Hart–Dworkin” Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 22–55 (2007) (setting out the basic subject matter of the Hart–Dworkin debate on the merits of legal positivism); Lawrence M. Friedman, Essay, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986) (reviewing the law and society movement’s history and nature, its strengths and weaknesses, and its place in the law schools). Scholars also have varying views on the function of the law school curriculum and its broader societal effect. See, e.g., Alice Ristroph, Essay, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1635–1636 (2020) (arguing that there are pro-carceral implications of the conceptual model used to teach criminal law in United States law schools). For example, critical legal scholars are skeptical of legal formalism arising outside of the law school classroom. Meanwhile, exclusive legal positivists reject a moral account of law beyond that based on social facts; they may thus similarly be averse to a moral account of law other than for purposes of law school debate.

3. Additionally, many law students enter law school with graduate study and/or prior professional experience.

thinking include close reading and analysis of a case: a precise recitation of the facts, procedural history, legal reasoning, and holding. The law professor, often using the Socratic method, will rigorously engage in argumentative back-and-forth with the student in such recitation, ensuring precision in the student’s understanding of such fundamentals.

Professors may then switch to normative inquiry, asking: “is this case rightly decided?” For the new law student, this question presents both opportunity and dread. On one hand, the opportunity lies in slightly loosening the straitjacket of rote common law recitation. The student may offer personal opinion. On the other hand, the dread lies in the criteria for such opinion: how should the student answer? Based on the blackletter law he just learned? His political viewpoints? Or perhaps some lived experience, personal anecdote, or undergraduate disciplinary perspective? The path is unclear. To make matters worse, the student is in the Socratic “hot seat,” rapidly thinking while both the professor and classroom peers look on, eager to judge whatever comes out of the student’s mouth. Wholly unsure, the student quickly responds based on some intuitive mix of the above.

Even worse, by the end of the semester, the new 1L student is unsure why the professor even poses the question. Despite many classroom hours debating the rightness or wrongness of cases based on unstated criteria, the final exam is almost exclusively a fact-driven “issue spotter,” requiring mechanical application of blackletter legal rules to facts.<sup>4</sup> At an end-of-semester review session, the professor may vaguely suggest that students can “pick up a few points here and there if mentioning policy considerations.” At most, the final exam has a short policy question, again graded based on unstated criteria.

These problems are heightened for students from under-represented backgrounds. Students of color or from other historically marginalized communities are often unsure how to answer authentically from their lived experience and/or formal studies informing such experiences. They experience a false choice: either answer in a rote “blackletter” way or invoke their “personal perspective.” As Kimberlé Crenshaw has argued,

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4. Sometimes, professors will also include a multiple-choice section that, similarly, centers mostly on blackletter law.

“perspectivelessness” is the dominant view of objectivity in legal discourse.<sup>5</sup> Thus, more normative inquiry in law school classrooms can cause a minority student’s “values, beliefs, and experiences” to clash with their professor or peers.<sup>6</sup> In order “to play the game right,” students must constrain themselves in the doctrinal sphere and adopt an “apparently objective stance” that denies them their identity.<sup>7</sup> Furthermore, Asad Rahim has identified how students of color may be branded “unintellectual” in predominantly white law school classrooms when talking about their lived experience, thus defeating racial integration’s benefit: underrepresented racial minorities have unique perspectives necessary for higher education, warranting integration into campus communities.<sup>8</sup>

Students outside of the mainstream political perspective—either to the left or right wings—may also feel such friction. Anecdotal, many law students report being mindful of the classroom consensus and a fear of speaking out publicly about their views out of risk of social stigma. Furthermore, law students who self-categorize as introverted may have more difficulty quickly articulating their arguments in the law school classroom.<sup>9</sup>

Personally, when I was a 1L, the above-described scenario puzzled me. In Constitutional Law, for example, classroom analysis of *Grutter v. Bollinger*<sup>10</sup> quickly devolved into polarized policy debate about affirmative action. It was as if the Constitution—both the text of the due process clause and the related Supreme Court substantive due process precedents—had disappeared, and we were merely expressing our moral/political views about affirmative action as if we were in the law school cafeteria. I had assumed that, in law school, debate would more specifically

5. Kimberlé W. Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L. J. 1, 2–5 (1988).

6. *Id.* at 2.

7. *Id.* at 5; see also Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483, 508 (2007) (“In most of the classrooms of the study, we found that female law students spoke less frequently than did male students, and we found an even clearer silencing of minority students.”).

8. Asad Rahim, *Race as Unintellectual*, 68 UCLA L. REV. 632, 636 (2021).

9. See generally HEIDI K. BROWN, *THE INTROVERTED LAWYER* 25 (2017) (arguing that introverted, shy, or socially anxious law students confront more challenges in traditional legal education models and, ultimately, in law practice).

10. 539 U.S. 306 (2003).

center on the positive law—which would include legislation in addition to caselaw—as well as deeper theories of justice, morality, and culture that inform legal reasoning. Instead, to my surprise, much of law school was reading and discussing cases, followed by brief, imprecise, abstract debates that invariably broke down into the left/right political binary before we moved on to the next case.

To some degree, my surprise flowed from prior graduate studies.<sup>11</sup> The year before attending law school, I earned an MPhil in Social and Developmental Psychology at the University of Cambridge, England. There, we asked fundamental, epistemological questions about the study of cultural psychology as a prelude to the DPhil degree. From which theoretical frameworks do we draw when analyzing mind in society? What constitutes valid quantitative and qualitative methodology, and what are the limits of such methodology? Required readings situated our research questions in the broader intellectual tradition of philosophy and social theory—for example, the limits of Cartesian dualism, the nature of hermeneutics, or the “cultural turn” in the social sciences. Just as Ph.D. candidates in History learn historiography—and thus avoid the methodological pitfalls of making imprecise, presentist conclusions about historical events in another era—we were learning the subtleties of researching the mind. The following year, my law school studies seemed comparatively unrooted in any concrete methodology or theory. The lesson I internalized from law school classroom discourse was that “anything goes”—if I disagreed with the political/moral valence of the case, I was simply free to say that the case was “wrongly decided.”

Furthermore, as a law student of color, I noticed that the voices of students of color and other historically marginalized groups were rarely raised or integrated into the classroom discourse. Frankly, I was not even sure how the views of my communities were relevant to legal reasoning, if at all. Few professors addressed intersectional questions, and none provided any real structure for how to talk about cases normatively. By the end of my 1L year, I had to dismiss such reflections, simply

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11. As I have written about previously, my own artistic background also partially compounded this response. Steven Arrigg Koh, *Reconciling Art and Law: Poetic Pursuits vs Prosaic Profession*, B.C. L. SCH. MAG. (Winter 2022) <https://lawmagazine.bc.edu/2022/01/reconciling-art-and-law> [<https://perma.cc/J2B8-AFT3>].

because they were rendered moot. My classmates and I realized that virtually all non-doctrinal discussion was irrelevant on the final exam. All that *really* mattered was applying blackletter law to issue-spotter hypotheticals. Was this “thinking like a lawyer”?

#### B. THE PROBLEM

Such classroom dynamics reveal the problem with “is this case rightly decided?”: professors never specify how students should break down their in-class answer to the question.<sup>12</sup> I call this the *under-specification problem*.

Due to the under-specification problem, students are forced to crudely blend or suppress their various, overlapping perspectives—personal/anecdotal, moral, philosophical, political, sociological, intersectional, historical, economic, etc.—with their “blackletter” legal reasoning in the classroom. Students may have one view regarding the internal perspective—the case’s legality from a more straightforward blackletter analysis—but may have another view from the external perspective.<sup>13</sup> When these two collide, a student may often “go with their gut,” sometimes out of risk of being called out by other students for believing a case with problematic moral outcomes is “right.” Or a student may stick with a formalist answer, at risk of being seen as not “thinking like a lawyer.” Subsequent debate in the classroom may thus easily break down into some messy hodgepodge of presentist political fighting, doctrinal debate, and/or the occasional, unfortunate *ad hominem* accusations between students.

To illustrate the under-specification problem, take a classic issue from 1L Criminal Law: domestic violence and self-defense

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12. Some students have benefited in the past from limited scholarship on the intersection of legal reasoning and legal theory. *See, e.g.*, David L. Shapiro, *Foreword: The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium*, 112 HARV. L. REV. 1834, 1834 (1999) (“When I was a student in law school, my two favorite law review articles were Henry Hart’s famous dialogue and Lon Fuller’s presentation of the case of the speluncean explorers. They still are.”) (citing Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949) (resolving a fictional legal case by providing five differing judicial opinions offering varying notions of statutory interpretation, separation of powers, and legal theory)).

13. Throughout this Essay, I draw on the distinction between internal and external perspectives on law introduced by H.L.A. Hart. *See* H.L.A. HART, *THE CONCEPT OF LAW* (Oxford Univ. Press 3d ed. 2012).

doctrine.<sup>14</sup> In *State v. Norman*, defendant Judy Norman was charged with the first-degree murder of her husband, John Norman—who she shot in the back of the head as he was sleeping—after decades of suffering from extreme physical and emotional abuse at his hand.<sup>15</sup> Before the killing, Ms. Norman tried to seek help by going to the mental health center to discuss charging her husband and visiting social services to seek welfare benefits.<sup>16</sup> Additionally, Norman’s husband constantly made death threats, leading Ms. Norman to sincerely believe that her husband would kill her if given the opportunity.<sup>17</sup> Applying orthodox common law self-defense doctrine, however, the *Norman* court found that the defendant did not “establish that she reasonably believed at the time of the killing she otherwise would have immediately suffered death or great bodily harm.”<sup>18</sup> In other words, from the court’s perspective, her husband did not pose an “imminent threat” when she killed him.<sup>19</sup> Ms. Norman could not invoke the self-defense doctrine.

How should students answer if this case was “rightly decided?” *Norman* is a quintessential law school case because of the collision between blackletter doctrine and the serious suffering of a domestic violence survivor. On one hand, traditional common law self-defense is likely not met because imminence is defined in terms of acute moments of deadly force and the husband was asleep when the wife killed him. On the other hand, the equities fall in favor of the wife, who suffered tremendous, long-term physical and mental abuse at the hands of the husband, not to mention a variety of state failures that left her few options to escape. Because of the under-specification problem, students are forced in class into a crude binary between the two.

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14. Although the case referenced the phrase “battered wife’s syndrome,” this term is now less often used than terms such as post-traumatic stress disorder and survivors of domestic violence. *State v. Norman*, 378 S.E.2d 8, 16 (N.C. 1989). See generally John R. Barner & Michelle M. Carnry, *Interventions for Intimate Partner Violence: A Historical Review*, 26 J. FAM. VIOLENCE 235, 235–38 (2011) (detailing the historical development away from using gendered descriptors of intimate partner violence in legal precedent, national crime reporting, and therapeutic interventions). Such terms apply to all genders. *Id.* at 238.

15. *Norman*, S.E.2d at 9.

16. *Id.* at 10.

17. *Id.* at 10–11.

18. *Id.* at 9–13.

19. *Id.* at 14.



Some students take the path of reluctantly saying “yes, it is rightly decided because the imminence requirement is narrow under common law.” Stephen Wizner has identified this as a problematic form of “thinking like a lawyer,” which many law students learn to believe “means adopting a kind of moral neutrality” vis-à-vis their clients, leading them to conclude that “it really makes no moral difference what work one does as a lawyer, or for whom.”<sup>20</sup> As Karl Llewellyn once stated:

The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice—to knock these out of you along with woozy thinking, along with ideas all fuzzed along their edges. You are to acquire ability to think precisely, to analyze coldly, to work within a body of materials that is given, to see, and see only, and manipulate, the machinery of the law.<sup>21</sup>

This formulaic blackletter response may exemplify an amoral tendency that undermines student well-being. Every law student feels anxiety and self-doubt, particularly during the first year. As Robin West has noted:

It is hardly surprising . . . that law students often experience their own law school careers as depressingly amoral, and that outsiders worry that law students are trained to become nothing but legalistic guns for hire. The schools have taken off the table understanding, debate, and discussion of the moral value that should be the lifeblood of the entire curriculum. Students are explicitly discouraged from mentioning “justice” in the classroom, and are never rewarded for discussion of its requirements on exams. Following Holmes, it would be regarded as verbiage, as a sure sign that the man has quit talking about law, and likely has nothing to say. This does not leave students without intuitions regarding the demands of justice. It does leave them with the distinct impression that those intuitions are of no relevance to their education, and hence to their work as lawyers.<sup>22</sup>

Alternatively, some students will embrace their moral disquietude, answering: “no, the court should have somehow applied the test differently because of Ms. Norman’s plight.” Such students reject the narrow doctrine, on the ground that they would compromise their moral view that the domestic violence survivor should not be held criminally responsible.

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20. Stephen Wizner, *Is Learning To “Think Like a Lawyer” Enough?*, 1 YALE L. & POL’Y REV. 583, 588 (1998).

21. KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 116 (1960).

22. ROBIN L. WEST, TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM 89 (2014).

Unfortunately, such students are not given any concrete guidance on how to articulate a moral critique in law school, nor how to translate that moral critique into legal amendment or remedy. Domestic violence is obviously a critical social problem, disproportionately affecting women. But how does that relate to the doctrine at hand? Students are often denied the opportunity to address deeper legal questions. When—and based on what criteria—does a lawyer recognize that a court correctly applied a legal test, even though the outcome differs from what such lawyers believe to be morally or politically desirable? How large of a gap must exist before a lawyer must argue that a case is wrongly decided? And what is the proper positive legal means of redressing that gap? Should judges simply apply a test differently? Are there limits to judicial discretion? Instead, should legal advocates pursue legislative reform or Constitutional amendment? The student could argue for some combination of expanding the requirement through judicial action, or introducing a new requirement, such as the “immediately necessary” element from the Model Penal Code (MPC) (adopted by a handful of states).

In sum, *Norman* presents a “lose-lose” scenario for law students. Without more granular guidance on answering the question, the Criminal Law professor easily pivots into a Socratic dialogue that attacks the student on his weaker flank. Either the professor brands the student a heartless doctrinalist with no sympathy for the defendant or a “soft” lawyer who disregards precedent in favor of vague intuition. The student emerges from Criminal Law feeling diminished or, worse, defeated.

## II. DIFFERENTIATING THE LEGAL, MORAL, AND SOCIOLOGICAL

This Part will argue for resolving the under-specification problem by disaggregating student responses into a three-part framework: legal, moral, and sociological reasoning.

At the beginning of the semester, a professor may introduce the three-part framework in a few ways. First, she may explain that she will ask students “is this case rightly decided?” generally, and students should always disaggregate their answers legally, morally, and sociologically. Second, the professor may explain that she will ask the general question and students are free to answer in any of the three ways. Finally, throughout the semester, the professor may ask a student one of the three species

of the question, such as “morally, do you think this case is rightly decided?” Then the student would need to respond in that particular form of reasoning. To aid a professor in explaining this approach and help students formulate their answers, this Essay concludes with an Appendix for in-class distribution to students.<sup>23</sup>

#### A. LEGAL

First, the professor should ask if a case is rightly decided based on blackletter doctrine. This is a “strict” version of legality: a student should apply law to fact just as she would on a final exam, in first-year research-and-writing class, or on the bar exam. The student should invoke relevant rules and caselaw learned during the semester.

The criteria for a case being rightly decided are well known, though not always clearly stated in the law school classroom. In the context of his writing on legitimacy, Fallon has articulated three criteria: a court (1) had lawful power to decide the case; (2) rested its decision only on considerations that it had or reasonably believed it had lawful power to take into account; and (3) reached an outcome within the bounds of reasonable legal judgment.<sup>24</sup> The third criterion may be further disaggregated to: (4) the court correctly stated the law and facts, (5) applied the law to facts in a way that reasonably accords with precedent or other positive sources of law, and (6) correctly invoked and applied other standards/procedures (e.g., standard of review).

Such blackletter legal reasoning is essential, particularly in the first year of law school, when students learn to apply law to facts. They hone their ability to spot when facts are clearly inside or outside of a particular ruleset and identify any factual ambiguities or omissions. This also helps them understand the subtleties of legal application before the end-of-semester final exam. This skill set is, of course, not only helpful for law school: the bar exam tests such blackletter reasoning almost exclusively. In legal practice, “good lawyering” begins with just such a task. In my years of practice before entering the academy, such reasoning constituted the starting point for my thinking through any investigation or litigation.

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23. See Appendix, *infra*.

24. *Legitimacy and the Constitution*, *supra* note 1, at 1819.

Sometimes, the blackletter legal answer is straightforward. In such cases, courts consider broadening or narrowing a legal doctrine, but reject doing so in a way that makes intuitive sense to students. Consider the parallel to hypotheticals offered in a law school classroom. Some percentage of such law school "hypos" offered in class are designed to test students' understanding of the doctrine using relatively straightforward facts. For example, a Criminal Law professor may quickly provide an example of a highly planned homicide, hoping a student will quickly recognize it as first-degree premeditated murder (as opposed to a spontaneous second-degree murder). Certain cases in a given law school textbook will have the same function.

But blackletter application is not always clear. Often, courts are trying to resolve two competing interests or precedents. Students rarely read district court opinions, which are either right or wrong because they correctly or incorrectly apply binding precedent. More often, they read appellate decisions, which are essentially clarifying or making new law, thus rendering ambiguous what "legally right" may even mean in that context. Students' views may vary on whether a court is applying, overruling, or distinguishing prior precedent. In this space, students may also talk about binding versus persuasive precedent, or, for example, notions of federalism (*Erie* doctrine).<sup>25</sup>

Let us apply this "strict" legal reasoning to *Norman*. As should be clear by now, doctrinal application in the *Norman* example would probably emphasize the case being rightly decided on this "strict" version of legality. As students learn by this point in the semester, criminal law prohibits killing with the requisite culpable mental state—encompassing everything from first-degree premeditated murder to negligent homicide.<sup>26</sup> In limited circumstances, lawful defenses to homicide offenses exist—such as self-defense or insanity—while others—such as duress or necessity—do not apply.<sup>27</sup> Regarding self-defense doctrine specifically, defendants may only legally avail themselves of self-defense in a narrow circumstance: when the defendant faced an

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25. Theories of interpretation (textualism, purposivism, etc.) may also fit into this first legal category. While more abstract than the typical blackletter application, such theories are very much internal to the America common law tradition—certainly more so than moral, political, or sociological theories.

26. See generally JENS D. OHLIN, CRIMINAL LAW: DOCTRINE, APPLICATION, AND PRACTICE (3d ed. 2022).

27. *Id.*

unprovoked attack and threat of injury or death was imminent, the responsive deadly force was objectively reasonable, and no duty to retreat applied.<sup>28</sup> A student may provide such rules if a professor asks a student “based only on the traditional common law definition of imminence in self-defense doctrine, is this case rightly decided?” The student can say that he understands that imminence is historically viewed narrowly, and thus the court applied the doctrine consistently with prior precedent. Then, he can move on to the question of morality.

#### B. MORAL

Next, the professor should invite the student to engage her moral viewpoint regarding the rightness or wrongness of a judicial decision. Moral reasoning should consider the equities of the case for the individual litigants or related parties.<sup>29</sup> When answering in this way, students should consciously abandon the details of case law, statutory language, or Constitutional provisions in favor of deeper values regarding their notions of right or wrong, good or bad. Students may draw on their lived experiences or bring in perspectives from undergraduate study.

Explicitly engaging in this mode of reasoning recognizes, engages, and validates student views on moral questions. It assures that professors do not problematically “create the conditions that lead to the objectification of minority students by narrowly framing classroom discussions as simple exercises in rule application,” thus denying students the opportunity “to step outside the doctrinal boundaries to comment on or critique the rules.”<sup>30</sup> Students may actively embrace their own views on what

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28. *Id.* at 687–90.

29. Anecdotally, I have both seen and heard that some politically left-wing students may resist the word “morality,” believing it to be a proxy for conservative and/or religious viewpoints. *See, e.g., Moral Majority*, ENCYC. BRITANNICA (last updated Feb. 12, 2018), <https://www.britannica.com/topic/Moral-Majority> [<https://perma.cc/R728-TCGG>] (describing Jerry Falwell’s political organization). The professor may simply remind students that the word “morality” may be removed from the valence of contemporary American political discourse. Every student across the political spectrum has moral viewpoints regarding good or bad, right or wrong. *See generally* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 427 (2011) (“[T]he problem with [the anti-canon is] that they were poorly reasoned in the service of ends that society has come to recognize as immoral: the perpetuation of slavery, of Jim Crow, of labor exploitation, and of race-based detention.”).

30. Crenshaw, *supra* note 5, at 3.

seems proper to them. From this moral standpoint, a student may then critique the court or, alternatively, provide additional reasons for supporting the court's decision.

Let us return to *Norman*. When switching to moral reasoning, a student is not bound by the strictures of self-defense doctrine. The moral question is thus clearly teed up: when, if ever, may a domestic violence victim kill their abuser? On this moral question, views will differ. A student is free to say: "it is morally right for a domestic violence victim to kill, but only after a long history of abuse, trauma, and state failure to redress such domestic violence." Alternatively, a student could also say: "no matter what, killing is wrong." These are moral answers that tug at students' deepest notions of ethics and justice. Depending on their views, they may then articulate why, if at all, self-defense doctrine should or should not be expanded.

What are the criteria for moral evaluation? What is the role of law school in fostering students' deeper moral convictions regarding morality and justice? Unfortunately, law school rarely equips students with rigorous foundations for developing morals, ethics, or a sense of justice.<sup>31</sup> Robin West has noted the conspicuous absence of such theory in law schools:

[T]he law is itself a normative enterprise, and students are engaged in moral discourse about law on a daily basis. . . . But what they do not receive is either a vocabulary or a method of reasoning by which to articulate their own or others' intuitions regarding the substantive justice of the law they are studying, or challenges to its injustice. They do not engage in debates about justice, or partake in any other fashion in a shared inquiry into its requirements. They are not required to read major theorists, either classical or contemporary, and have no sense of the canonical literature from other disciplines regarding what justice might mean.

Relatedly, Crenshaw has emphasized here the false "dichotomy between rational, objective commentary and mere emotional denunciation . . . maintained by the belief that when minority students step outside the bounds of rote rule application to express their criticisms or concerns, they are violating classroom norms by being racially biased."<sup>32</sup>

The better approach is for a professor to provide criteria for students to engage their analysis beyond blackletter doctrine. In

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31. Most law schools offer only a few seminars regarding deeper theories of justice. Often, such classes are taught by more interdisciplinary scholars.

32. Crenshaw, *supra* note 5, at 6.

my Law, Justice, and Culture Seminar, I spend the first few weeks walking students through theories of law, justice, and culture. We survey positivism, natural law, legal realism, critical theories, and law and economics.<sup>33</sup> Furthermore, we review theories of justice, including corrective, distributive/consequentialist, political, procedural, or deontological/retributive.<sup>34</sup> Finally, I consider the interrelationship between law and culture, drawing on Savigny and the German Historical School, Catherine MacKinnon, Clifford Geertz, and Pierre Bourdieu.<sup>35</sup> In my 1L Criminal Law and Criminal Procedure courses, I gradually introduce such theories over the semester, supplementing the deontological, consequentialist, and expressivist theories of punishment already mentioned in the casebook with discussion of natural law, legal realism, feminist legal theory, and other theories. The cumulative effect of such study is that students can better articulate their critiques. For example, some students may invoke deontological frameworks to bolster their argument that killing is always wrong or consequentialist reasoning to argue for the defendant given the benefits/burdens in a domestic violence scenario. A student may also invoke natural law, saying that law and morality are intertwined, or alternatively assert that positivism divorces law from “external” moral principles. A student may also invoke critical theories to show how legal realism, power, and subordination lead to unjust outcomes for domestic violence survivors. The student may also apply such theories, next, to sociological critiques.

Finally, such direct moral engagement opens students to discussing their deepest value commitments to law. All too often, morality in legal discourse is rooted in the left-right political binary: student views fall in the political valence of the Democratic and Republican parties at a particular moment in the twenty-

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33. I draw much of the materials from one compilation of twenty-three essays on the central themes and issues of the philosophy of law today. THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY (Martin P. Golding & William A. Edmundson eds., 1st ed. 2005).

34. I draw on individual law review articles for such readings, such as Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004).

35. I draw on a helpful review essay on the topic by Menachem Mautner. Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839 (2011).

first century.<sup>36</sup> Although helpful, this is a tertiary policy analysis. On a deeper level, students can consider the moral force of law for all within the United States. And at the most fundamental level, students may ask how they think of law advancing the deepest human values. For example, when teaching International Law, I argue that values like peace, security, and human dignity have a universal moral force that inspire me personally to work to preserve and improve the international legal system. I often talk about how my late grandfather—Professor Kwang Lim Koh—was forced to live in the United States in political exile after a military coup toppled the democratic government in which he worked in South Korea.<sup>37</sup> I also discuss how my perspectives on human rights, transitional justice, and international criminal law are informed by my immigrant family heritage from South Korea and Lebanon. This sort of visceral engagement can be appealing for students, who often look to professors for some sort of deeper orientation for their future legal careers.

### C. SOCIOLOGICAL

Finally, the professor should ask a student to answer whether a case is rightly decided sociologically. This moves students away from thinking about blackletter doctrine or moral equities. They can now address the interrelationship between law and society.

Sociological reasoning may take three forms. Preliminarily, students should ask about structural considerations regarding the parties, the courts, and the specific holding of the case. Three specific questions should be addressed. First, how has the structure of society influenced the conduct of the parties in this case? Second, how might the court's ruling have been influenced by

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36. Of course, not all cases—and thus not all classroom conversation—neatly break into the left-right political binary. For example, when teaching Criminal Procedure (Investigations), I have noticed that student participation varies when teaching Fourth Amendment cases like *Kyllo v. United States*, 533 U.S. 27 (2001), in which Justice Scalia was joined in the majority not only by Justice Thomas, but also Justices Breyer, Ginsburg, and Souter (Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Stevens dissented). In such moments, it can be helpful for students to draw on varied theories of law, justice, and culture.

37. Ben Seal, *A Family in Law*, BOSTON UNIV.: THE RECORD (May 9, 2023) <https://www.bu.edu/law/record/articles/2023/koh-family-in-law/> [<https://perma.cc/56MR-VHYQ>].



structural factors, and how might the court's ruling affect society's perceptions of the court? And third, how does this ruling have broader repercussions for society?

Next, students may engage in other forms of law-and-society discussion beyond the parties, courts, and case. Students can think broadly and freely about the knock-on ramifications of a court's ruling. They may consider impact on social justice movements in the United States, economic implications, political/electoral ramifications for Democrats and Republicans, or international implications. Students may again draw on the law, justice, and culture theories discussed in Part II.B above. For example, they may invoke law and economics to argue that the distributional consequences of a rule are desirable or undesirable. Or they could invoke theories of law and culture, arguing that such a rule is necessary to change American culture in a particular direction.<sup>38</sup>

Finally, students may address questions that track the history of sociological theory itself. The universe of sociological theory is vast, asking questions about modern society and the experience of everyday social life. Take, for example, social cohesion or institutional legitimacy, concerns of founding sociological thinkers like Émile Durkheim and Max Weber.<sup>39</sup> Regarding the former, students may consider how a case may undermine solidarity within a society or foster alienation for a given community.<sup>40</sup> For example, a student may say that a Supreme Court decision establishing or expanding police "stop and frisk"

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38. For example, Catharine MacKinnon's creation of the term "sexual harassment" identified a widespread phenomenon that then influenced the way American culture addressed this societal problem. See Michal Buchhandler-Raphael, *Criminalizing Coerced Submission in the Workplace and in the Academy*, 19 COLUM. J. GENDER & L. 409, 410 (2010).

39. These are just two of many sociological concepts that students could invoke. See, e.g., MICHELE DILLON, INTRODUCTION TO SOCIOLOGICAL THEORY: THEORISTS, CONCEPTS, AND THEIR APPLICABILITY TO THE TWENTY-FIRST CENTURY (3d ed. 2020) (reviewing theories of capitalism, mass culture, symbolic interactionism, sexuality, race, postmodernity, and globalization).

40. Criminal law scholars have recently highlighted the interplay between solidarity and alienation in various contexts. See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017); Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1486 (2016); Steven Arrigg Koh, *How Do Prosecutors "Send a Message"?*, 57 U.C. DAVIS L. REV. 353 [hereinafter *How Do Prosecutors "Send a Message"?*]; Steven Arrigg Koh, *Prosecution and Polarization*, 50 FORDHAM URB. L.J. 1117 (2023).

authority is wrongly decided because it alienates communities of color.<sup>41</sup> Students may also argue that a case is good or bad for the legitimacy of courts or other legal institutions. Should a court be deciding such matters? Are these questions better left to the political branches? Students may opine on whether judges should have some discretion (i.e., rules versus standards). A way to tease out these moral intuitions is to ask a student: "if you were a state supreme court justice and could either vote to adopt or reject this doctrine, which would you do?" That places normative discretion in an institutional context. For example, a student could argue that *Bush v. Gore* was wrongly decided because the Court usurped a core electoral and democratic function, thus undermining its legitimacy.<sup>42</sup> In some instances, students may ultimately opine on the nature of judicial review itself.<sup>43</sup>

Let us return to *Norman* for a final time. Having mooted the doctrinal and moral aspects, students could focus on questions of law and society. Students could comment on the broader societal effects of the case, opining on how Ms. Norman's conduct resulted from state failure: state agencies had not effectively intervened, nor had the police. Students may also opine on the desirable or undesirable effects on society should domestic violence victims be legally permitted to kill in such circumstances. Some students may argue that sociocultural theory identifies how a patriarchal culture leads to deficiencies in judgments amongst judges and within courts. Ultimately, students could argue that the court's ruling disproportionately harms women, leading to greater alienation for particular communities or undermining faith in legal institutions' legitimacy.

#### D. EXAMPLE OF APPLICATION

To illustrate this three-part framework of legal, moral, and sociological reasoning, let us consider how students might

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41. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968); Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 55 (2015) (examining how officers form and apply suspicion under the conditions that expanded the *Terry* design).

42. *Bush v. Gore*, 531 U.S. 98 (2000). See generally Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1111 (2001) (arguing that *Bush v. Gore* was nonjusticiable and that the Supreme Court should have dismissed the case on several grounds).

43. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1406 (2006).

answer “is this case rightly decided?” regarding *Dobbs v. Jackson Women’s Health Organization*.<sup>44</sup> Legally, students may find the case wrongly decided as a clear violation of substantive due process doctrine, or criticize the court’s use of *stare decisis*, including its conceptualization of reliance interests. Alternatively, the student may agree legally with the *Dobbs* majority that *Roe v. Wade* and *Planned Parenthood v. Casey* erred because the Constitution does not confer an individual right to abortion. Morally, a pro-choice student may find the case problematic because she believes in a woman’s right to choose, while a pro-life student may find the case morally positive because of a belief that abortion is itself immoral. Such perspectives may overlap with intersectional perspectives on disproportionate impact on historically marginalized communities, though also mix in deeper theories of law, justice, and culture. Finally, students may take a broader sociological lens on the decision, which has more implications for the court and society. Regarding social cohesion, a student may alternatively argue that the decision undermines social cohesion by sowing divisiveness, or restores cohesion by removing a long-standing obstacle of judicial overreach. Regarding legitimacy, she may invoke varied views on the breadth of judicial review and the role of courts, contrasting it with the role of legislation and regulation. Or a student may comment on the broader societal effect on abortion access across state lines, again possibly invoking an intersectional angle.<sup>45</sup>

Let us consider an example of how a student might combine these elements:

Morally, I’m pro-choice and I find the case deeply problematic. And sociologically, I think the case is bad for the court because it undermines legitimacy in the eyes of millions of Americans, particularly the majority of Americans who are pro-abortion. Also, both morally and sociologically, this has the undesirable effect of restricting abortion access for millions of women around the country, which disproportionately affects women with less financial ability to travel and/or women from historically marginalized communities. Legally, I find the case wrongly decided, because of *stare decisis* and the limits of the *Glucksberg* test.

Furthermore, while I agree morally with the outcomes that substantive due process doctrine has created, I realize there is risk to recognizing an unenumerated right (abortion) on top of another unenumerated right (privacy) based on a clause of the Constitution that arguably

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44. 597 U.S. 215 (2022).

45. Khiara M. Bridges, *The Supreme Court, 2021 Term Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 45–56 (2022).

doesn't even guarantee individual rights (due process). I think we put too much pressure on the courts to decide such weighty matters because judicial review is too unstable to ground rights. This is particularly the case given the insights of legal realism and critical theories, which emphasize the nature of judicial discretion and its intersectional components. The better approach is to amend federal or state constitutions, or pass federal or state legislation.

In other words, a student here will be more precise in disaggregating various viewpoints. The student can self-consciously switch between internal and external perspectives, more clearly delineating blackletter legal application, moral viewpoints, and sociological consequences. Furthermore, this also allows the student to clarify the type of answer better suited to the bar exam (i.e., the nature of substantive due process). It also provides clearer terrain for debate in the classroom, given that students will go from viewing each other as dichotomously pro- or anti-*Dobbs* and instead have a debate regarding all of the stakes. A student may also invoke legal theories such as legal realism or critical theories to bolster her answer or, for instance, call for a broader argument in favor of limiting judicial review.

### III. BENEFITS AND DRAWBACKS OF DISAGGREGATION

Having established the three ways to answer "is this case rightly decided?," let us move to a normative assessment of this three-part framework.

#### A. BENEFITS

Disaggregation's central benefit is nuance and precision in legal critique. Giving students a space for disaggregation equips them with multiple analytical perspectives on a case. On one hand, students can focus on formalist, blackletter reasoning when called upon to do so. On the other hand, they can reflexively shift to moral and sociological perspectives on a case. Students can hold both formalist and realist views on cases, thinking more deeply about the ramifications of ruling one way or another. And all viewpoints are affirmed as valid in the deeper discourse of legal analysis.

Over time, students become trained in self-consciously picking apart their own answers, thus obviating the crude binaries and false choices arising from the under-specification problem. At the beginning of the semester, I have noticed that students may mix perspectives when discussing cases. For example, in my

1L Criminal Law class, sometimes when I ask a student if a case is legally rightly decided from the internal perspective, he will answer with an external perspective. When I emphasize the legal/moral/sociological distinction, a student can reset and say “ok, from the blackletter perspective this is the proper application of the test as it exists today, but I have a different moral problem with the case.” By the end of the semester, students feel comfortable making these critiques.

Another advantage to this approach is that it hones students’ views on legal prescriptions. A typical scenario is a student believing both that a case is rightly decided based on the existing blackletter doctrine but that the rule has undesirable moral and sociological implications. They imagine the normative merit of the rule being applied, writ large. What might the effects be at the local, state, and federal levels? Should a legal rule be amended to include an exception for this sort of case? What would the effects of such an amendment be? When considering these various dimensions, students will have more precise views on what the textual change (legal), the rationales for such a change for litigants (moral), whether they think it best that a new judicial test develops or statutory/regulatory change is preferable (sociological), and the broader effects of such a change on society (sociological).

Finally, this approach provides a foundation for students to differentiate their views with less fear of social cost in participation. Anecdotally, I have heard that at some schools, students are afraid to comment on anything other than doctrine, for fear that expressing any “personal views” might endanger their reputation at the school or in their future careers. Alternatively, other students of various backgrounds have told me they fear the reproach of others in the 1L classroom *unless* they offer a powerful moral critique of cases. Such backgrounds include students of color who lack any space to bring in their viewpoints, or students with political views (both to the left and right) that notably differ from the mainstream of the class.

## B. DRAWBACKS

Four central drawbacks to the three-part framework may exist. First, this pedagogical tool risks contradicting contemporary American legal thought and practice, which encompasses blackletter doctrine, moral reasoning, and societal considerations. Indeed, today, the overarching posture of American legal

discourse flows from legal realism: law is epiphenomenal, lacking formalist meaning and thus open to interdisciplinary analysis through economics, history, critical theory, etc.<sup>46</sup> In our post-legal-realism era, we know that judicial reasoning is informed by more than mere "blackletter" doctrine; personal notions of morality inform judicial decision-making, such that the two are in some ways indistinguishable. Scholars such as Ronald Dworkin, for example, have argued that deeper principles should inform judicial reasoning in hard cases, furthering a conceptualization of law as integrity that transcends Hartian positivism.<sup>47</sup> And in U.S. courts, we are comfortable with a Brandeis brief that encompasses a broad range of policy reasoning, often emphasizing societal effect—to do otherwise is problematic. As Stephen Wizner has noted, when professors separate law and morality too much in the law school classroom, they risk communicating to law students "the implicit message that as lawyers they should not be concerned with the moral implications of their choices and actions as lawyers."<sup>48</sup>

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46. THE CANON OF AMERICAN LEGAL THOUGHT, for example, begins with Oliver Wendell Holmes's *The Path of the Law*. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1896–97), reprinted in THE CANON OF AMERICAN LEGAL THOUGHT 19–44 (David Kennedy & William W. Fisher III eds., 2006). Many civil law jurisdictions, by contrast, theorize law more independently as a field unto itself. See generally Vivian G. Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63 (2001) (denoting the different cultural traditions of civil law and common law, such as a French judge's reliance on *la doctrine* to decide cases as compared to a U.S. judge's reliance on prior case law); Frances T. Freeman Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations – A Study*, 10 UCLA L. REV. 1041, 1057–58, 1060 (1963) (contrasting Kelsen's civil law conception that "it [is] logically impossible that there can be no applicable law" with Cardozo's common law view that "the Court must have the power to apply principles to fill the gaps in positive law"); James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321 (1991) (contrasting the development of European law as increasingly detached from local custom and focused on internal "reason" with the development of U.S. law as a vague combination of custom, the Constitution, common law, procedure, and natural law).

47. See, e.g., Ronald M. Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); Andrew Coan, *What is the Matter with Dobbs?*, ARIZ. LEGAL STUD. DISCUSSION PAPER NO. 22–24, Dec. 2022, at 1, 4 ("For decades, liberals and progressives have correctly insisted that constitutional law unavoidably implicates moral judgments.").

48. Wizner, *supra* note 20, at 588.

My response is to distinguish jurisprudential validity from pedagogical utility. Of course, strict legal formalism underestimates the realism in American law and judicial decision-making. Professors thus need to underscore that doctrinal, moral, and sociological critiques are all ultimately relevant to the overarching question of whether a case is rightly decided. In fact, by disaggregating student answers into the three-part framework, professors affirm that moral or sociological thinking is not “wishy-washy” or “unintellectual.” Rote rule application alone is incomplete. To think about law more richly and rigorously, students must immediately and reflexively distinguish between the three modes, then integrate them into an overarching legal opinion.

Second, even assuming we should disaggregate “law” into legal, moral, and sociological reasoning, a drawback is that each one overlaps with the other. For example, moral and sociological reasoning are clearly interrelated—litigant equities in a given case may overlap with notions of social cohesion and institutional legitimacy. My response is that this is an inevitable problem with categorization. Categorization is, by definition, an under- and over-inclusive exercise. But by creating categories we gain analytical rigor; some conceptual differentiation is necessary to analyze anything. Conceptual archetypes foster analytical separation, and later the archetypes can be complicated and recombined. For example, most lawyers know that a fundamental law-fact distinction exists, even though, in some instances, the two overlap; separating law from fact conceptually is useful to make sense of legal process. I thus “narrow” the law category, make the moral category more individualistic, and make the sociological category center social cohesion and legitimacy.

Third, some might argue that the three categories are not the best way to disaggregate a student answer and thus solve the under-specification problem. One might imagine, for example, using a formalist/realist frame when asking whether a case is rightly decided, or another could add more granularity to the internal/external perspective. On that critique, I am decidedly open. Although each approach is likely inferior to the legal/moral/sociological disaggregation suggested above,<sup>49</sup>

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49. The formalist/realist frame focuses more on judicial reasoning itself. Given most law students quickly default to legal realism when talking about cases, separating formalism from realism provides little analytical benefit to students. The internal/external frame provides a better framework for students, though it provides just two modes of reasoning as opposed to three. As noted in

professors of various viewpoints could emphasize different styles of disaggregation to draw out various aspects of legal thinking. The essential goal is to redress the under-specification problem in classroom discussion.

Finally, some might levy more practical concerns. We professors have limited time in each classroom session to teach the necessary caselaw, and many of us are not firmly rooted in deeper theoretical accounts of morality or social theory. In response, I would say that we as teachers have already crossed the pedagogical Rubicon. Some percentage of every class session is devoted to some form of opinion and debate about morality and society. Given we are already doing this, at a minimum we should encourage students to precisely disaggregate their reasoning between doctrine, morals, and societal consequences.

#### IV. BROADER IMPLICATIONS: LEGAL EDUCATION, SCHOLARSHIP, AND PUBLIC DISCOURSE

Disaggregation not only benefits law students; it may also expose deeper deficiencies in how we discuss law in our education system, scholarship, and public sphere.

First, disaggregation highlights broader deficiencies in legal education. As noted above, during my 1L year, the imprecision of law school classroom debate surprised me. Years later, I am still struck by how rarely we law professors articulate the architecture of legal reasoning and learning objectives in our classes. This is due, in part, to the inductive nature of the case method. Most professors start their courses on the ground floor: the facts, reasoning, and holding of one or more cases. Slowly, the cumulative effect of the learning of cases in the law school classroom allows for larger statements about bodies of law and, perhaps, trends in the caselaw. Deduction is rarer—professors are much less inclined to introduce a topic by articulating broad *a priori* principles of law or theory. Rarely are students asked to learn or conjecture about the broader nature of cases, doctrine, or theories of legal analysis.

By underscoring various perspectives on law, professors will fortify students' legal argumentation in the classroom. As Jack Balkin has noted, academic law and legal education exhibit a curious duality: as a skills-oriented discipline, law lacks the

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the proposed framework above, the internal is legal whereas the external may be divided into moral and sociological reasoning.



internal disciplinary heft to protect itself from interdisciplinary “colonization” by other fields.<sup>50</sup> At the same time, the professional orientation of law schools assures law’s impregnability from total interdisciplinary attack:

Legal knowledge is professional knowledge. The study of law is part of a professional practice, a set of professional skills that are taught to new professionals in professional schools. Law is, moreover, a deceptively strong professional practice, and its modes of reproduction are amazingly resilient. Thus, even though law professors continually absorb ever new and exotic forms of theory from without, they continue to teach their students the same basic skills using the same basic methods. They say one thing in their law review articles, but do another in their classrooms. They teach their students to parse cases and statutes [and] teach them to argue about what rules would best promote sound social policy. In short, they prepare them rhetorically to be lawyers. Spending three years doing this . . . produces the sort of mind that can accept new invasions from the academy, but continually turns them to old habits and transmutes them into familiar rhetorical forms.<sup>51</sup>

We must render explicit to students what Balkin articulates here. In the law school classroom, students should learn how to think about law using a variety of practical and interdisciplinary tools. They should then translate such insights into “familiar rhetorical forms” of orthodox legal reasoning.

Why? Because students already, inevitably internalize the theoretical paradigm of their era. When I was a law student from in the mid-2000s, for example, law and economics seemed like the intellectually dominant idiom. Students sensed that the best way to “sound smart” in the classroom was to demonstrate knowledge of economic terms such as externalities, distribution, and efficiency. At that time, other normative postures seemed inferior. Today, the dominant idiom is critical. Students invoke not distributional language, but instead terms like power, subordination, and oppression. But—as one critical race theorist law professor once told me—without much formal instruction about critical legal studies or foundational critical race theory (CRT) texts, most students only crudely approximate core CRT concepts in a sincere attempt to center race when talking about law. More generally, although both law and economics and critical approaches are fruitful postures of legal analysis, a risk exists

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50. See Jack M. Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949, 964 (1996).

51. *Id.* at 966.

that students will reify such thinking as exclusive legal analytical tools in the classroom.

The better approach is for law schools to equip students to be fluent in neo-pragmatic thinking about law. Students should have some rudimentary foundation regarding not just law and economics and critical theory, but also legal realism, positivism and natural law, theories of justice, or other interdisciplinary approaches that draw on their own undergraduate studies and/or the professor's background. Some law schools introduce such concepts in a Legal Foundations course at the beginning of 1L year. Other professors do so in their classes, often emphasizing their own expertise in perspectives like legal pluralism or legal consciousness.<sup>52</sup> Other professors may also mix in their scholarly interests to create alternative views on the subject matter.<sup>53</sup>

Cultivating this approach is desirable for us as teachers. Law is such a complex phenomenon that professors rarely even ask in law school the basic question—either of our students or in our own scholarship—"what is law?" As a result, many of us law professors neither ask the question of our students, nor are equipped to deeply answer the question ourselves.<sup>54</sup> As a

52. See BRIAN Z. TAMANAHA, *A REALISTIC THEORY OF LAW* (2017) (explaining why the classic question 'what is law?' has never been resolved and casting doubt on theorists' claims about necessary and universal truths about law); PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* (1st ed. 1998) (using accounts from four hundred people of diverse backgrounds about their use and experience of the law in order to identify three common narratives).

53. In my Criminal Law and Criminal Procedure courses, I have found opportunities to bring in my interests in transnational and international criminal law. See Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340 (2019); Steven Arrigg Koh, *Core Criminal Procedure*, 105 MINN. L. REV. 251 (2020); Steven Arrigg Koh, *The Criminalization of Foreign Relations*, 90 FORDHAM L. REV. 737 (2021); Steven Arrigg Koh, *Othering Across Borders*, 70 DUKE L.J. ONLINE 171 (2021); Steven Arrigg Koh, *Marbury Moments*, 54 COLUM. J. TRANSNAT'L L. 116 (2015); Steven Arrigg Koh, *Geography and Justice: Why Prison Location Matters in U.S. and International Theories of Criminal Punishment*, 47 VAND. J. TRANSNAT'L L. 1267 (2013); Steven Arrigg Koh and Hirad Abtahi, *The Emerging Enforcement Practice of the International Criminal Court*, 45 CORNELL J. INT'L L. 1 (2012). Students have also been engaged by more theoretical discussions of "cancel culture" as a normative system and the challenges of physical restraint in policing. See Steven Arrigg Koh, *"Cancel Culture" and Criminal Justice*, 74 HASTINGS L.J. 79 (2022); Steven Arrigg Koh, *Policing & The Problem of Physical Restraint*, 64 B.C. L. REV. 309 (2023).

54. As Scott Shapiro notes, a deeper grounded jurisprudence may be useful and relevant to the issues and disputes arising for lawyers and legal scholars. SCOTT J. SHAPIRO, *LEGALITY* 119 (2011).

newcomer to the legal academy who entered law teaching from both practice and graduate studies, I have appreciated the opportunity to develop a richer account of legal theory over time. I have read and taught from helpful collections like *The Canon of American Legal Thought* and looked beyond the American tradition to include sociological theory and moral/political philosophy. Many of my students have similarly expressed appreciation for having a more solid foundation for thinking critically about the law, allowing them to transcend the left/right political binary that dominates much of our popular discourse today. When I think through the three categories of law, morality, and sociology, I force myself to make sure I have something to say about all three.

Otherwise, a vague mix of intuition, case law, philosophy, and policy argumentation reins. As George Fletcher noted in 2000, when discussing the state of criminal law scholarship:

As things stand now, our methods of argument are a hodgepodge of intuition, citations to case law, philosophical references (sometimes laced with misreading), and, of course, policy arguments about the behavior we seek to encourage and discourage. There has been and presumably always will be attention paid to the classic debate between retribution and deterrence as the rationale for punishment and, in general, between deontological and utilitarian approaches to moral problems. Yet there has not been enough attention paid to the difference between moral, political, and other kinds of arguments about the proper approach to criminal law.<sup>55</sup>

Indeed, even we academics—particularly younger academics—could benefit from some review of both internal and external perspectives on law. As Larry Solum has noted, “[n]ewbie legal theorists need to know this distinction in order to avoid” the mistake of unconsciously sliding between internal and external points of view.<sup>56</sup> He explains:

This mistake is actually quite easy to make. The theorist is working within the internal point of view—describing a particular legal doctrine from the point of view of lawyers and judges who work within the constraints of the doctrine. Then, the theorist slides into an explanation as to how the law came to be the way it is—describing the operation of political or economic pressures—and then slides back to the doctrinal

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55. George P. Fletcher, *The Nature and Function of Criminal Theory*, 88 CAL. L. REV. 687, 697 (2000).

56. Lawrence B. Solum, *Legal Theory Lexicon 038: The Internal Point of View*, LEGAL THEORY LEXICON (Oct. 31, 2021), [https://lsolum.typepad.com/legal\\_theory\\_lexicon/2004/05/legal\\_theory\\_le.html](https://lsolum.typepad.com/legal_theory_lexicon/2004/05/legal_theory_le.html) [<https://perma.cc/4E6P-GUWT>].

level—drawing the conclusion that the law should be interpreted differently in light of the causal explanation.<sup>57</sup>

Similarly, Robin West has argued that this affects not just new law professors:

There are simply no theories of justice that come from the academy and that are of use within it. . . . And our normative legal scholarship is the worse for it, as is the state of the larger academy's political philosophy. We do not have a body of moral principles regarding the demands of justice to use as a yardstick against which to measure the value of the law we teach, study, and debate. We measure law by reference to efficiency, wealth, costs, benefits, or public policy, but we have no sense of even what it might mean to take the measure of a law by reference to whether it promotes or retards defensible conceptions of justice. We simply do not have a disciplined debate within the law schools concerning the development of such principles. . . . Discussion of the fit of particular legal doctrines with an articulated conception of justice is notable for its absence.<sup>58</sup>

Finally, more rigorous differentiation in legal analysis may beneficially contribute to popular discourse. Regrettably, much popular discourse regarding caselaw is highly ends-oriented: if a criminal case results in dismissal of charges, acquittal or conviction, for example, mass media coverage of it being "rightly" or "wrongly" decided turns on the individual and community notions of right or wrong given the underlying issue.<sup>59</sup> And yet every law student knows that, sometimes, legal outcomes depend not on the moral or sociological desirability of the outcome, but sometimes due to the blackletter positive law. To take a concrete example, sometimes a factually culpable defendant is acquitted because police failed to secure a search warrant in violation of the Fourth Amendment, thus leading to suppression of evidence and thus dismissal of the indictment. Armed with better tools to differentiate the legal, moral, and sociological, law school graduates will be better equipped to inform the broader population with due subtlety and precision.

## CONCLUSION

Law school professors problematically under-specify the law school classroom question "is this case rightly decided?" This under-specification fosters student imprecision in thinking about

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57. *Id.*

58. WEST, *supra* note 22, at 87.

59. See *How Do Prosecutors "Send a Message"?*, *supra* note 40; Steven Arrigg Koh, *Indictment and Polarization*, 50 *FORDHAM URB. L.J.* 1117.

law. A better approach is for students to differentiate between legal, moral, and sociological reasoning. This practice will foster precision to student viewpoints and enrich classroom discussion. More generally, it may enrich law school education and, perhaps, positively influence both academic and popular legal discourse.

## APPENDIX: HANDOUT FOR STUDENTS

*During every class meeting, we will discuss the assigned cases. After asking about the case itself (e.g., facts, procedural history, holding, dicta), I will sometimes ask, "do you think this case is rightly decided?" I will encourage you to differentiate your answer along three variables below—legally, morally, and sociologically.*

*Legal:* consider application of blackletter doctrine. Answer the way you would on an issue-spotter final exam question, on the bar exam, or inside a courtroom.

Did the court have lawful power to decide the case? Did the court rest its decision only on considerations that it had or reasonably believed it had lawful power to take into account?

Did the court reach an outcome within the bounds of reasonable legal judgment? In other words, did the court correctly state the law and facts? Apply the law to facts in a way that reasonably accords with precedent or other positive sources of law? Correctly invoke and apply other standards/procedures (e.g., standard of review)?

*Moral:* regardless of the positive sources of law, consider now the equities of decision for the parties themselves.

Do you think "justice was done" in this case? Based on what criteria do you judge good/bad, or right/wrong?

To help you develop such moral viewpoints, I may introduce some theories of law, justice, and culture as the semester progresses. You may consider:

Legal Theory (e.g., natural law, legal realism, critical theories, law and economics)<sup>60</sup>

Theories of Justice (e.g., corrective, distributive, political, procedural, retributive)<sup>61</sup>

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60. If you are interested in reading more about theories of law, there are many sources that cover basic legal theories. *See, e.g.*, BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 13–89 (Martin P. Golding William A. Edmundson eds., 1st ed. 2004). It may also be helpful to consult this blog post by Professor Larry Solum: Lawrence B. Solum, *Legal Theory Lexicon 065: The Nature of Law*, LEGAL THEORY LEXICON (Apr. 24, 2022), [https://lsolum.typepad.com/legal\\_theory\\_lexicon/2008/05/legal-theory-le.html](https://lsolum.typepad.com/legal_theory_lexicon/2008/05/legal-theory-le.html) [<https://perma.cc/Z5PU-4XAN>].

61. If you are interested in reading more about theories of justice, there are many sources that cover the basic theories. *See, e.g.*, MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? (2010). It may also be helpful to consult this blog post by Professor Larry Solum: Lawrence B. Solum, *Legal Theory*

Theories of Law and Culture (e.g., how culture generates law, how law affects culture, and how law may constitute a distinct culture unto itself)<sup>62</sup>

*Sociological:* regardless of the positive sources of law or the equities for the parties themselves, consider the decision within the broader context of society.

How has the structure of society influenced the conduct of the parties in this case? How might the court's ruling have been influenced by structural factors, and how might the court's ruling affect society's perceptions of the court? And how does this ruling have knock-on effects for society?

What are the broader effects of this decision on society? Consider, for example, social justice movements in the United States, economic implications, political/electoral ramifications for Democrats and Republicans, or international affairs dynamics.

You may also invoke questions arising in sociological theory (e.g., social cohesion or legitimacy) as well as theories of law, justice, and culture mentioned above.

*Remember that all three of the above forms ultimately constitute valid legal reasoning. More than in many other countries, American litigation may encompass notions of equity and societal effects. A good lawyer can discriminate between these modes of thinking and then channel them into more formal legal arguments.*

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*Lexicon: Justice*, LEGAL THEORY LEXICON (June 13, 2021), <https://solum.typepad.com/legaltheory/2021/06/legal-theory-lexicon-justice.html> [<https://perma.cc/AT74-APPX>].

62. If you are interested in reading more about the relationship between law and culture, there are many law review articles on the topic. *See e.g.*, Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839 (2011).