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REASON AND REASONABLENESS: THE NECESSARY DIVERSITY OF THE COMMON LAW

Frédéric G. Sourgens

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REASON AND REASONABLENESS: THE NECESSARY DIVERSITY OF THE COMMON LAW

Frédéric G. Sourgens*

ABSTRACT

This Article addresses the central concept of “reasonableness” in the common law and constitutional jurisprudence. On the basis of three examples, the common law of torts, the common law of contracts, and Fourth Amendment jurisprudence, the Article notes that different areas of the law follow fundamentally inconsistent utilitarian, pragmatic, and formalist reasonableness paradigms. The significance of this diversity of reasonableness paradigms remains largely under-theorized. This Article submits that the diversity of reasonableness paradigms is a necessary feature of the common law. It theorizes that the utilitarian, pragmatic and formalist paradigms are structural elements driving the common law norm-generation process. This theory permits a new, more precise definition of hard cases as cases in which these paradigms lead to different results in a specific legal dispute. It further provides a legal criterion to determine whether hard cases have been correctly resolved as a legal matter rather than as a matter of policy. On the basis of this new understanding of hard cases, it is possible to explain a question left unresolved by Frederick Schauer’s article *The Limited Domain of the Law* namely *how* the common law develops as a limited domain while remaining responsive to changes in community standards and policy preferences. By means of this theory, this article analyzes an important, and potentially dispositive, conceptual confusion underlying the recent Supreme Court affirmative action decision *Fisher v. University of Texas* and its treatment of good faith, and explains how that confusion can be overcome by future courts applying the decision.

[U]nd die findigen Tieremerkenesschon,
dass wir nicht sehr verlässlich zu Haus sind
in der gedeuteten Welt.
Rainer Maria Rilke¹

I. INTRODUCTION

Reasonableness is the keystone of the common law. The edifice of the common law would collapse but for the balance struck between diverse and competing ends and interests by “reasonableness.” For instance, reasonableness governs liability in negligence cases,² determines what performance a contract

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1. Rainer Maria Rilke, *Die Erste Elegie*, in *DUINER ELEGIEN* 7 (InselVerlag, 1923) (translated: “and the animals shrewdly noticed already, [¶] that we fail to be safely at home, [¶] in the interpreted world.”).

2. See, e.g., Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323 (2012).

requires,³ sets the scope of permissible police intrusion in people's private affairs,⁴ defines the limit of criminal liability,⁵ and administers the diversity of the student body at state universities.⁶ It informs corporate law,⁷ banking law,⁸ commercial law,⁹ bankruptcy law,¹⁰ and civil procedure.¹¹

In all of these settings, "reasonableness" recognizes that there is not one absolute rule of conduct premised upon moral or religious command. Instead, law depends upon the reciprocal regard for the interests of others—even and particularly those others holding different moral, religious, and political points of view.¹² What this reciprocal regard legally requires of us is determined by a balancing test governed by the reasonableness standard.

This "reasonableness" standard is deceptively intuitive: every person believes to know what is or is not "reasonable."¹³ On its face, when people disagree with

3. See, e.g., Alan D. Miller & Ronen Perry, *Good Faith Performance*, 98 IOWA L. REV. 689 passim (2013) (discussing reasonableness standards as part of good faith in contract law); Alan Schwartz & Robert E. Scott, *Rethinking the Laws of Good Faith Purchase*, 111 COLUM. L. REV. 1332, 1359-1363 (2011) (contrasting fault in contracts to fault in negligence by reference to reasonableness standards).

4. See, e.g., Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1093 (2011).

5. See, e.g., Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611 passim (2011).

6. See, e.g., Paul Horwitz, *Fisher, Academic Freedom, and Distrust*, 59 LOY. L. REV. 489, 505 (2013) (noting the role of reasonableness in university decisions to choose allocation of resources).

7. See, e.g., Robert J. Rhee, *The Tort Foundation of Duty of Care and Business Judgment*, 88 NOTRE DAME L. REV. 1139, 1171 (2013) ("The inquiry in corporation law focuses on the demonstrable effort and the quality of decisionmaking as the measure of reasonableness, and thus an error in judgment is not a wrong. The answer to the question—what would a reasonable director do?—does not lie in a review of the substance of the business decisions, but instead on the substance of good faith and effort made by the custodians toward the care of the corporation."); Leo Strine, Jr. et al, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 671 (2010) ("The Delaware Supreme Court then made plain that the enhanced burden it was imposing on directors to show that they had a good faith, reasonable basis to believe that the corporation faced a threat was designed 'to ensure that a defensive measure to thwart or impede a takeover is indeed motivated by a good faith concern for the welfare of the corporation and its stockholders.'" (citations omitted).

8. See, e.g., Diane Lourdes Dick, *Confronting the Certainty Imperative in Corporate Finance Jurisprudence*, 2011 UTAH L. REV. 1461, 1524 (2011) ("As a final step, the court might test the reasonableness of any outcome by comparing the end result to what would occur in the absence of judicial intervention. Essentially, this final step assures that the court's intervention does not substantially deviate from the course that is most likely to be taken in the absence of judicial involvement. It merely removes the rent-seeking, contractual arbitrage and other inefficiencies that derive from the disparity between present-day economic realities and strict contractual rights.").

9. See, e.g., Steven L. Harris & Charles W. Mooney, Jr., *The Unfortunate Life and Merciful Death of the Avoidance Powers Under Section 103 of the Durbin-Delahunt Bill: What Were They Thinking?*, 25 CARDOZO L. REV. 1829, 1841 (2004).

10. See, e.g., Jessica D. Gabel, *Midnight in the Garden of Good Faith: Using Clawback Actions to Harvest the Equitable Roots of Bankrupt Ponzi Schemes*, 62 CASE W. RES. L. REV. 19 passim (2012).

11. See, e.g., Richard D. Freer, *The Continuing Gloom About Federal Judicial Rule Making*, 107 NW. L. REV. 447, 467 n.135 (2013) (discussing the role of good faith in discovery).

12. Cf. MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 79-84 (2d ed. 2001) (making a similar point about Greek political theory in the context of a discussion of Sophocles' *Antigone*).

13. See, e.g., Jeffrey J. Rachlinski, *Misunderstanding Ability, Misallocating Responsibility*, 68 BROOK. L. REV. 1055, 1064 (2003) ("The reasonable person test converts the esoteric and intractable distinction between reasonable and unreasonable risks into a comprehensible, intuitive inquiry.").

one another whether specific conduct was reasonable, as they may do in jury deliberations, they discuss specific facts of a case and not their abstract moral commitments. This impression is deceptive because reasonableness continues to draw on the very moral and political commitments, which it would seek to circumvent. In difficult cases, these commitments can in fact be outcome determinative.¹⁴

What then, is the content of the reasonableness standard upon which the common law relies? Doctrine exhaustively discusses this question within each area of the common law.¹⁵ What so far has escaped scholarly attention is that different areas of law rely upon inconsistent utilitarian, pragmatic, and formalist paradigms of reasonableness.¹⁶ Thus, as discussed in part I.A, the law of negligence relies upon a utilitarian reasonableness paradigm, the so-called “Hand formula.”¹⁷ According to the “Hand formula,” a person is liable for negligence if the cost of adequate precautions is smaller than the multiple of the probability of injury times its gravity.¹⁸ As discussed in part I.B, this conception of reasonableness classically has been rejected by the law of contracts.¹⁹ The law of contracts instead relies upon a pragmatic reasonableness paradigm.²⁰ According to this paradigm, reasonableness depends upon whether other like-situated people would deem that there is a rational basis for the actions of the contracting parties, given their

14. See, e.g., Neil S. Siegel, *The Virtue of Judicial Stewardship*, 86 TEX. L. REV. 959, 976 (2008) (“Of course, what qualifies as ‘reasonable’ disagreement, as opposed to ‘unreasonable’ or ‘the most extreme,’ can be . . . based in contestable social values.”).

15. For recent contributions to this scholarship, see *supra* notes 2-11.

16. One might say that reasonableness in this sense is a “cryptotype” of American common law. Rodolfo Sacco defines such as “cryptotypes” as follows:

Man continually follows rules of which he is not aware or which he would not be able to formulate well. Few would be able to formulate the linguistic rule we follow when we say “three dark suits” and not “three suits dark” whereas in special context we might speak of “the meadows green.” . . . Linguists are now defining this phenomenon. We are subject to specific rules without perceiving them. Our visible, superficial language is the result of identifiable transformations of latent linguistic patterns that are more permanent than the visible ones.

Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law II*, 39 AM. J. COMP. L. 343, 384-85 (1991).

17. See, e.g., *Miller & Perry Torts*, *supra* note 2, at 330-31 (“[T]he Restatement may be said to adopt an almost unconstrained, reductionist, utilitarian-economic test for negligence”).

18. *Id.* at 328.

19. See, e.g., *In re Gary Aircraft Corp.*, 681 F.2d 365, 375 (5th Cir. 1982) (“Texas courts have repeatedly stated that the test of good faith is not negligence or diligence and that it is immaterial that the buyer was aware of facts that would put a reasonably prudent person on inquiry.”); R. Wilson Freyermuth, *Enforcement of Acceleration Provisions and the Rhetoric of Good Faith*, 1998 B.Y.U. L. REV. 1035, 1056 (1998) (“As Professor Summers has noted in his work on good faith performance and enforcement of sales contracts, the subjective standard should rule out claims that a party acted in bad faith due to her negligence . . .”). For further discussion of a recent rapprochement between negligence and the law of contracts following the revisions to the U.C.C., see *infra* Part III.B.

20. On the influence of pragmatism on the development of U.S. common law, see Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought – A Synthesis and Critique of Our Dominant General Theory About Law and its Use*, 66 CORNELL L. REV. 861 (1981).

contractual undertaking.²¹ As discussed in part I.C, reasonableness in the context of the Fourth Amendment rejects this paradigm and instead applies a formalist reasonableness paradigm.²² What is reasonable is determined by applying the original constitutionally mandated equilibrium between the values of privacy and security to current technological circumstances.²³

The consequence of this clash of paradigms is significantly under-theorized.²⁴ As discussed in Part III.A, the existence of competing utilitarian, pragmatic, or formalist reasonableness paradigms is significant because it gives rise to hard cases that arise whenever these paradigms require inconsistent results in a given dispute. But as discussed in Part III.B, the existence of multiple reasonableness paradigms also permits the law to develop by switching from one reasonableness paradigm to another, and thus address a perceived normative failure in a specific area of law, without losing the internal coherence of the law as whole.²⁵ As discussed in Part III.C, on the basis of the recent Supreme Court decision, *Fisher v. University of Texas* on affirmative action, legal error can occur when courts fail to understand that there are multiple conceptions of reasonableness within the common law.²⁶ As further discussed in Part III.C, this error can be avoided once the paradigm of reasonableness adopted by the Court is appropriately understood.

Perhaps counterintuitively, this Article will conclude that the diversity of reasonableness paradigms is a necessary, structural quality of the common law. As discussed in Part IV.A, the presence of pragmatic, utilitarian, and formalist reasonableness paradigms cannot be resolved by reference to some higher order principle because each paradigm is axiomatic in its own right.²⁷ Thus, the diversity cannot be resolved through further doctrinal refinement because each paradigm

21. See, e.g., MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 73-74 (1988) (tracking the relationship between rule establishment and relevant community norms in the common law in the context of the example of *McPherson v. Buick Motor Co.*).

22. See Orin S. Kerr, *An Equilibrium Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476 (2011).

23. *Id.*

24. Some current scholarship discusses the limitations of any of the currently available theories to understand the phenomenon of law. See Frederick Schauer, *The Limited Domain of Law*, 90 VA. L. REV. 1909 (2004). It proposes that “[t]o understand what the members of this group hold in common with each other but not with the members of most other social institutions is to try to understand not the meaning of the word ‘law,’ and perhaps not even the concept of law, but the practice (in the Wittgensteinian sense) of law as we know it and the institutions of the law as we know them.” See *id.* at 1955-56. This article submits that the diversity of reasonableness paradigms within the common law provides the grammar (in the Wittgensteinian sense) to understand the practice in question.

25. This phenomenon has frequently been noted but mischaracterized as principally rhetorical to make palatable a policy shift. See, e.g., Eisenberg, *supra* note 21, at 74; but see, e.g., Lawrence A. Cunningham, *Traditional Versus Economic Analysis: Evidence from Cardozo and Posner Torts Opinions*, 62 FLA. L. REV. 667, 669 (2010) (“Cardozo’s distinctiveness is a grand rhetorical style exemplifying traditional method. During a twenty-four-year career, he displayed pragmatic sensibilities blending intuitions of substantive justice with thick doctrine incorporating economic, moral, and social factors. In Isaiah Berlin’s terms, Cardozo was a fox who knew many things. Cardozo frequently shifted among doctrines, rendering complex opinions that demonstrate the capacity, power, and limits of traditional legal analysis”). The rhetoric in question reflects a structural necessity rather than persuasive flourish.

26. See *Fisher v. Univ. of Texas*, 133 S. Ct. 2411 (2013).

27. See John Finnis, *Response*, 57 VILL. L. REV. 925, 930 (2012).

represents a different legal first principle embedded within the common law.²⁸ As discussed in Part IV.B, this heterogeneity of first principles within the common law confirms its structure as an inductive normative system rather than a deductive one.²⁹ Rules are generated from judicial problem solutions for specific cases; general rules are not judicially applied to each specific problem.³⁰

Although scholarship has long noticed the inductive structure of the common law, it incorrectly assumed that the common law followed the inductive logic of scientific inquiry, which typically uses a single paradigm at a time.³¹ As Part IV.B explains, this assumption fails to account for two essential qualities of the inductive process in the common law. First, unlike scientific inquiry, which theorizes from the observation of an outside world through inductive reasoning, the common law uses inductive reasoning to theorize *about itself*. Second, unlike scientific inquiry, the common law uses inductive reasoning normatively, not descriptively. Inductive reasoning explains why people *ought to act* in a certain way rather than why the world already, of necessity, observes certain basic natural laws of its own accord. The establishment of a “formal” paradigm of the law consequently must lag behind the actual resolution of cases within the common law. The common law itself cannot apply the paradigm as a matter of formal constraint without ceasing to be an inductive system and becoming a deductive one instead. Consequently, if the common law is an inductive system, it must at the same time rely upon multiple paradigms to function. As an inductive system it would include formal paradigms representing the currently theorized explanation of the law. And an inductive system would also include pragmatic and utilitarian paradigms providing the basis for further development of future formal paradigms.

Understanding that the common law at the same time relies upon inconsistent pragmatic, formalist, and utilitarian reasonableness paradigms explains why the common law appears at the same time to be both an independent “limited domain” and an open system responding to social and political policy preferences. It thus helps to resolve the ongoing debate among legal theorists whether law is a closed domain by demonstrating that this debate focuses on an inapposite question. The question is not whether the common law is an open or closed domain, but how it can be both at the same time. This Article takes a first step towards providing that answer.

II. DIVERGING THEORIES OF REASONABLENESS

Different areas of law apply markedly different reasonableness paradigms.

28. *See id.*

29. *See, e.g.*, Mark D. Rosen, *The Structural Constitutional Principle of Republican Legitimacy*, 54 WM. & MARY L. REV. 371, 425 (2012); Dennis J. Sweeney, *The Common Law Process: A New Look at an Ancient Value Delivery System*, 79 WASH. L. REV. 251, 264-9 (2004). *See also* BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 22-23 (1921) (the common law’s “method is inductive, and it draws its generalizations from particulars”); OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881) [hereinafter *Holmes Common Law*] (“[t]he life of the law has not been logic: it has been experience”); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460-1 (1897) [hereinafter *Holmes Path*].

30. *See, e.g.*, EISENBURG, *supra* note 21; Cunningham, *supra* note 25.

31. THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 81, 96-105, 108 (2012).

Depending upon the area of law, the common law relies upon utilitarian, pragmatic, and formalist reasonableness paradigms. This Part provides an example for the use of each of these reasonableness paradigms: negligence (applying utilitarianism),³² the common law of contracts (applying pragmatism),³³ and Fourth Amendment jurisprudence (applying formalism).³⁴

All three paradigms have in common that reasonableness takes account of the diversity of ethical, moral, religious, and political commitments held by the members of the society that it governs.³⁵ Reasonableness is not a vehicle to disguise the imposition of a comprehensive value system on society at large.³⁶ Instead, each paradigm seeks to address this plurality of substantive moral allegiances of the members of civic society by engaging in a balancing exercise premised upon a different “basic unit” of judgment.

Importantly, as this Article will discuss, each of these attempts is ultimately inconsistent with the others because it relies upon a different “basic unit” of judgment. Utilitarianism looks to wealth maximization, pragmatism to community standards, and formalism to values inherent in our constitutional tradition. This in itself suggests that there is no universal common denominator of reasonableness, no basic unit of judgment that could govern the entirety of human interaction.³⁷ Reasonableness can only be understood across the law if one looks for something other than a common substantive definition and looks for its structural significance, instead.³⁸

It is also not the case that an area of law is “naturally” linked to a certain kind of reasonableness paradigm. In fact, areas of law themselves switch the reasonableness paradigm upon which they rely: famously, the principle of “buyer beware” dominated the law of contracts in the 19th century, premised upon a formalist, *laissez-faire* reasonableness paradigm.³⁹ Later, “[o]ver the course of the twentieth century, the failure to disclose material facts during contract formation increasingly placed parties at risk of violating the growing duty of good faith and fair dealing in contracts” because of the adoption of a different, pragmatic reasonableness paradigm.⁴⁰ This Part’s analysis of reasonableness paradigms within specific areas of law is not monolithic, but itself subject to change and

32. See *infra* Part II.A.

33. See *infra* Part II.B.

34. See *infra* Part II.C.

35. James Madison, *The Federalist No. 10*, DAILY ADVERTISER, Nov. 22, 1787 (explaining the importance of maintaining these differences within a republican society); For a utilitarian take on this diversity, see, for example, HENRY SIDGWICK, *THE METHODS OF ETHICS* 296 (7th ed. 1907) [hereinafter *Sidgwick*]; for a pragmatic one, see Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1554 (1988); for a formalist one, see Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1055, 1063-4 (1975)

36. See Holmes, *Common Law*, *supra* note 30 at 1.

37. See *infra* Part IV.A.

38. See *infra* Part IV.B.

39. Florrie Young Roberts, *Disclosure Duties in Real Estate Sales and Attempts to Reallocate Risk*, 34 CONN. L. REV. 1, 4 (2001). Compare Robert B. Reich, *Toward a New Consumer Protection*, 128 U. PA. L. REV. 1, 5 (1979) (“The American economy has paid lip service for two hundred years to the twin *laissez-faire* principles of vigorous competition and consumer self-reliance, the latter embodied in the maxim *caveat emptor*.”).

40. Michelle Oberman, *Sex, Lies, and the Duty to Disclose*, 47 ARIZ. L. REV. 871, 880 (2005).

challenge.⁴¹

Nevertheless, identifying the reasonableness paradigm at work in a particular area of law is valuable. It lifts the common confusion that reasonableness is amorphous or malleable and thus unpredictable.⁴² Reasonableness appears amorphous or malleable because it is thought of incorrectly as a single principle that is applied inconsistently,⁴³ rather than as a multiplicity of concrete but inconsistent and competing paradigms. As discussed in this Part, once focus is shifted to understanding the theoretical paradigm informing the use of reasonableness, one arrives at a precise and accurate tool to understand jurisprudence and resolve nagging doctrinal problems.

A. Utilitarian Reasonableness: The Abacus of Negligence

Guido Calabresi called tort law “the paradigmatic law of the mixed society.”⁴⁴ It deserves this unique label because of the central place of reasonableness: liability is imposed only upon a weighing of all the “various circumstances involved . . . without engaging in minutiae of control” of future behavior.⁴⁵ It does not engage in the outright prohibitions of risky behavior, on the one hand, and mandated purchase of collective insurance, on the other hand; nor does it require every person to buy insurance for the consequence of permitted behavior and otherwise mandates that loss should lay where it falls.⁴⁶ Instead, it assigns liability on the basis of a balance between risk, its social cost, and individual responsibility.⁴⁷

This Article looks in particular to the classic “Hand formula” and the tort of negligence.⁴⁸ Described as “an objective reasonableness calculus of social costs and benefits,”⁴⁹ the “Hand formula” states that “if probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L

41. See *infra* Part II.

42. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) (“The phrase ‘good faith’ is used in a variety of contexts, and its meaning varies somewhat with the context.”); *Kerr Equilibrium*, *supra* note 22, at 491 (“Skeptics claim that the only guide to what makes an expectation of privacy ‘reasonable’ is that five Justices say so . . .”).

43. See *supra* Part III.C.

44. Guido Calabresi, *Torts – The Law of the Mixed Society*, 56 TEX. L. REV. 519, 521 (1978).

45. *Id.* at 529.

46. *Id.*

47. Cf. Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 661 (2001) (“The reasonableness test in antitrust law, like the negligence test in tort law, rests on a balancing of the social costs and benefits of the defendant’s actions.”).

48. This Article does not claim that the entirety of tort law relies upon a utilitarian reasonableness paradigm. It is quite likely that there are different paradigms of reasonableness at work even within the law of torts. See, e.g., George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) (focusing in particular on the tort rules governing liability for ultra-hazardous activity and observing that there are two paradigms of tort law, one of reciprocity defining tort liability by reference to rights to be free from risk and the paradigm of reasonableness defining tort liability on the basis of a utilitarian calculus). For a current discussion of the paradigm clash in tort theory, see John L. Watts, *Fairness and Utility in Products Liability: Balancing Individual Rights and Social Welfare*, 38 FLA. ST. U. L. REV. 597 (2011).

49. David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210, 250 (1996); see also Eric E. Johnson, *Negligence X Factor*, 2012 CARDOZO L. REV. 318 (2012).

multiplied by P: i.e., whether B [less than] PL.”⁵⁰ This formula is expressed in requiring balancing—and as such is exemplary of the “paradigmatic” nature of tort law.⁵¹ It also provides the most straight-forward metric of determining the balance: efficiency.⁵² As discussed in this Part, this approach adopts a utilitarian perspective that is both gratifyingly mechanistic and soothingly amoral.⁵³ It hands the judge the abacus needed to determine liability for a specific instance without needing to make ultimate judgments on the apparent moral worth of an activity.⁵⁴

I. Utilitarian Reasonableness

The central motto of utilitarian reasonableness is that size matters: utilitarianism prescribes that one must take the action that leads to the greatest net total utility or value.⁵⁵ Thus, “utilitarianism [sic] tells us to help those who will most benefit—those who will gain the most.”⁵⁶ Classic utilitarianism considered that pleasure was the unit of utility.⁵⁷ It further considered that pleasure and pain could be measured on the same scale, i.e., that it is possible to subtract pain done to a person from the pleasure gained by another by simple arithmetic.⁵⁸ Consequently, the conduct that yielded the most net pleasure after all pleasure has been added up and all pain has been subtracted is the reasonable conduct in which to engage.⁵⁹

The core benefit of classic utilitarian analysis is that it is essentially value neutral or amoral.⁶⁰ It does not ascribe any inherent value to certain conduct, as such.⁶¹ Virtuous conduct is not good simply because it is virtuous; it is good

50. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

51. See Calabresi *supra* note 44.

52. See, e.g., Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153, 1154 (2000) (summarizing Judge Posner’s long-standing argument “that cost-benefit analysis in the Kaldor-Hicks sense,” equating efficiency with wealth maximization, “is both a useful method of evaluating the common law and the implicit method (implicit, for example, in the Learned Hand formula for determining negligence) by which common-law cases are in fact decided—and rightly so in my opinion.”).

53. This of course has also been a major basis for its criticism. See, e.g., Robin Paul Malloy, *The Political Economy of Co-Financing America’s Urban Renaissance*, 40 VAND. L. REV. 67, 120 n. 199 (1987) (“Posner’s analysis has become too confined by amoral principles of wealth maximization and utilitarian cost-benefit analysis.”).

54. See Guido Calabresi, *Toward a Unified Theory of Torts*, 1 J. TORT L. 1, 1-2 (2007).

55. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 2 (Hafner Publ’g Co. 1948) (1838); see also SIDGWICK, *supra* note 35, at 23-38 (discussing the concept of reasonableness and its relationship to utilitarianism).

56. Mark S. Stein, *Nussbaum: A Utilitarian Critique*, 50 B.C. L. REV. 489, 490 (2009).

57. See David O. Brink, *Mill’s Ambivalence About Rights*, 90 B.U. L. REV. 1669, 1672 (2010).

58. BENTHAM, *supra* note 55, at 1; JOHN STUART MILL, UTILITARIANISM 11 (1879) (“The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to produce happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness pain, and the privation of pleasure.”).

59. MILL, *supra* note 58, at 11.

60. See C. Edwin Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1041 (1980).

61. See, e.g., BENTHAM *supra* note 55, at 12.

because it makes the larger community happier than the alternative.⁶² Because happiness could be measured on a single scale, there is a common denominator across value systems that would permit a person to make and defend a social choice quite apart from their own moral beliefs by reference to the resulting increase in general utility at large if it were chosen.⁶³ In this sense, utilitarianism is a moral system that inherently lends itself to balancing tests premised upon reasonableness.⁶⁴

The amoral nature of classic utilitarianism also gives rise to one of its frequently cited problems: accounting for the value of torture or economic or majoritarian unfairness.⁶⁵ Assume that society as a whole feels more pleasure (in the form of a greater sense of security) in torturing terror suspects than those few (innocent) suspects feel the pain of torture. Utilitarianism, the problem goes, would consider such torture reasonable.⁶⁶ Alternatively, assume one social group would create greater value by subjugating and exploiting a different social group. A classic example for such conduct is Sparta: the relatively few Spartiates, or members of the Spartan soldier class, subjugated an entire population of helots, or indentured farm laborers, in order to create one of the most powerful, wealthy, stable, and “perfect” city-states in antiquity.⁶⁷ Utilitarianism, problematically, would consider such exploitation reasonable.⁶⁸

This problem could be mitigated, but not entirely avoided, if utilitarian reasonableness is understood not as a casuistic prescription of action, but as a generalizable principle or rule.⁶⁹ Rather than attempting to determine a rule of

62. See, e.g., MILL *supra* note 58, at 25 (“[A]nd if we are told that its end is not happiness, but virtue, which is better than happiness, I ask, would the sacrifice be made if the hero or martyr did not believe that it would earn others immunity from similar sacrifices?”).

63. See Leonard G. Ratner, *The Utilitarian Imperative: Autonomy, Reciprocity, and Evolution*, 12 HOFSTRA L. REV. 723,736-37 (1984) (critiquing non-utilitarians as “disclos[ing] no nonmystical source of . . . rights, which are, in fact, derived from the [utilitarian] search for increased per capita need/want fulfillment.”).

64. It is in part for this reason that the utilitarian paradigm of tort law classically has been dubbed the “reasonableness paradigm.” See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 542 (1972).

65. See, e.g., Nathan B. Oman & Jason M. Solomon, *The Supreme Court’s Theory of Private Law*, 62 DUKE L.J. 1109, 1120-21 (2013).

66. See Susan S. Kuo, *Disaster Tradeoffs: The Doubtful Case for Public Necessity*, 54 B.C. L. REV. 127,169 (2013); see also Robert Bejesky, *The Utilitarian Rational Choice of Interrogation from a Historical Perspective*, 58 WAYNE L. REV. 327, 335-36 (2012).

67. For the historical rise of Sparta, and its dependence upon the helots, see DONALD KAGAN, *THE OUTBREAK OF THE PELOPONNESIAN WAR 9-30* (1969). For the social standing of helots compared to other Greek farmers at the time, see VICTOR DAVIS HANSON, *THE OTHER GREEKS: THE FAMILY FARM AND THE AGRARIAN ROOTS OF WESTERN CIVILIZATION* 104 (1999). For the influence of Sparta on Greek political philosophy, see e.g. SIR ERNEST BARKER, *THE POLITICAL THOUGHT OF PLATO AND ARISTOTLE* 14 (Dover Publ’ns, Inc. 1959). For a discussion of a potential reconciliation of helots with progressive utilitarian thought, see e.g. NADIA URBINATI, *MILL ON DEMOCRACY: FROM THE ATHENIAN POLIS TO REPRESENTATIVE GOVERNMENT* 47-48 (2002).

68. See JOHN RAWLS, *A THEORY OF JUSTICE* 179-83 (1973).

69. This distinction tracks the evolution from act utilitarianism and rule utilitarianism. See Brink, *supra* note 57, at 1671, 1674-80 (“Act Utilitarianism: An act is right insofar as its consequences for the general happiness are at least as good as any alternative available to the agent. Rule Utilitarianism: An act is right insofar as it conforms to a rule whose acceptance value for the general happiness is at least as

decision that fits specific individuals with their specific ability to feel pleasure and pain, utilitarian ethics seeks generalizable rules.⁷⁰ It assumes an *average* human being.⁷¹ By focusing on the average human being, it is possible to minimize exceptional individual sadism and predict in more general terms what conduct is reasonable and efficient.

This turn to generalizable utilitarian rules was brought to its final conclusion by equating the unit of utility not as pleasure but as financial value, or money.⁷² By substituting money for pleasure, it is possible to focus on the average “market price” for types of pleasure.⁷³ It takes out of the equation the person who overpays for a specific good or service out of irrational personal preference for that good or service. Instead, it creates a truly universal measure of what pleasures and pains are empirically worth.

Utilitarianism, unsurprisingly, shares much with economic analysis.⁷⁴ Economic analysis looks for the most financially efficient outcome.⁷⁵ Similarly, economic analysis is not based upon the economics of the exceptional person, but instead insures society against the consequences of being composed of average market participants.⁷⁶

great as any alternative rule available to the agent.”). For the continuing problems of this recasting of utilitarianism, see RAWLS *supra* note 68, at 179-83.

70. SIDGWICK, *supra* note 35, at 18 (“We cannot determine the right conduct for a private individual in a particular case, without first ascertaining the rule which it would be generally expedient to maintain in the society of which he is a member.”); see also Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 993 (2008).

71. See, e.g., Leonard G. Ratner, *The Utilitarian Imperative: Autonomy, Reciprocity, and Evolution*, 12 HOFSTRA L. REV. 723, 736-37 (1984) (“Per capita, or average, fulfillment is a theoretical concept that does not allocate specific fulfillment shares. But it is not a fallacious or meaningless concept that sacrifices individual fulfillment to a fictitious collective happiness. Rather it is a useful hypothesis that identifies the fulfillment goal of the community.”).

72. See Posner, *supra* note 52, at 1154.

73. See Calibresi, *supra* note 54, at 2.

74. Oman & Solomon, *supra* note 65, at 1119 (describing law and economics as utilitarianism’s “main variant”); cf. Catherine Kemp, *The Uses of Abstraction: Remarks on Interdisciplinary Efforts in Law and Philosophy*, 74 DENV. U. L. REV. 877n.42 (1997) (“The normative aspect of traditional Law and Economics theory is a form of rule-utilitarianism familiar to legal scholars, wherein definite norms for adjudication are founded on a principle of ‘wealth-maximization’ similar to the ‘pleasure maximization’ of traditional utilitarian theories.”). Law and Economics scholars have later sought to distance themselves from classic utilitarianism and viewing themselves as improving the utilitarian paradigm. For a discussion of this conception of law and economics scholarship, as well as its problems, see David Campbell, *Welfare Economics for Capitalists: The Economic Consequences of Judge Posner*, 33 CARDOZO L. REV. 2233 (2012).

75. Oman & Solomon, *supra* note 65, at 1119.

76. See *id.* at 1118 (“On this view, tort law should be seen in terms of safety regulation and social insurance. A primary purpose of making tortfeasors liable is to police their conduct by imposing fines on certain undesirable activities. The modern law-and-economics movement has pursued this basic approach with the greatest tenacity and rigor. Money damages, on this view, force actors to fully internalize the cost of their own decisions, pushing them toward optimal levels of investment in precautions and the like. Even those who have not adopted the law-and-economics framework continue to see tort law in terms of shifting losses from plaintiffs to defendants in order to achieve distributionally desirable outcomes by, for example, transforming corporate actors into insurers for those that they harm.”) (citations omitted).

2. Negligence and the Utilitarian Calculus

The link between the academic analysis of the law of negligence and utilitarian reasonableness is firmly established.⁷⁷ The “Hand formula” in particular bears all the traits of utilitarian analysis.⁷⁸ It is premised not upon the inherent value of any conduct but rather upon an economic balancing test.⁷⁹ The aim of this balancing test is social welfare maximization.⁸⁰ Negligence liability is premised upon failure to take efficient precautions, and thus the common law of negligence seeks both to encourage efficient precaution in the future and to enforce efficient compensation for accidents.⁸¹

The “Hand formula” follows rule-utilitarian rather than act-utilitarian logic.⁸² It does not require an examination of which of the parties would be, on the whole, happier upon winning the law suit.⁸³ Rather, the “Hand formula” seeks to establish a *rule*, which if followed would maximize social welfare within the polity adopting over time.⁸⁴

The choice of utilitarianism for evaluating negligence claims makes affirmative sense. Parties asserting negligence claims must establish a tenable rationale for attribution of liability across substantive moral views.⁸⁵ Thus, a negligence claim with regard to an abortion procedure must make sense to both

77. See Miller & Perry Torts, *supra* note 2, at 331 (“the Restatement may be said to adopt an almost unconstrained, reductionist, utilitarian-economic test for negligence.”) (footnote omitted); Ronen Perry, *Re-Torts*, 59 ALA. L. REV. 987, 991-92 (2008) (“It may thus be said that the Restatement adopts an almost unconstrained, reductionist, utilitarian/economic test for negligence.”) (footnote omitted); Watts, *supra* note 48, at 635-37 (noting the utilitarian basis of the law governing design defects).

78. See Kenneth W. Simons, *The Puzzling Doctrine of Contributory Negligence*, 16 CARDOZO L. REV. 1693, 1718 (1995) (“the familiar Learned Hand formula . . . is often interpreted as a utilitarian metric of socially reasonable and unreasonable conduct.”) (footnote omitted); Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 AM. J. JURIS. 143, 177-8 (2002) (“the generally accepted view (among academics) [is] that negligence in tort law is defined by the Hand formula, which, given its embedded impartiality and aggregation principles, is a transparently utilitarian formula.”). *But see, e.g.*, Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 360 (1996) (arguing that “the notion that the economic interpretation of the Hand Formula fits American law better than the social contract conception is seriously overstated, at best.”).

79. See Posner, *supra* note 52, at 1154 (“I have long argued that cost-benefit analysis in the Kaldor-Hicks sense is both a useful method of evaluating the common law and the implicit method (implicit, for example, in the Learned Hand formula for determining negligence) by which common-law cases are in fact decided—and rightly so in my opinion.”).

80. See Miller & Perry, *supra* note 2, at 328-30 (discussing reasonableness as welfare maximization); Watts, *supra* note 48, at 609 (“From a utilitarian and efficiency perspective, it is not reasonable to spend \$30,000 in order to prevent \$20,000 in losses.”).

81. See Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142, 150 (2011) (footnote omitted); see also Miller & Perry, *supra* note 2, at 332. See generally Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

82. See, e.g., Posner *Negligence*, *supra* note 81, at 33 (“When the cost of accidents is less than the cost of prevention, a rational profit-maximizing enterprise will pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability.”).

83. See *supra* Part II.A.1.

84. *Id.*

85. See Calabresi, *supra* note 44, at 521 (“torts has always been present and significant, that it is so today in the so-called “people’s democracies,” are testimonies to the fact that purely “liberal” and purely collective systems exist solely in the minds of theoreticians and ideologues. The world knows better.”).

pro-choice and pro-life advocates.⁸⁶ A utilitarian cost-benefit analysis seeks to take value judgments inherent in other appraisals of the desirability of conduct—and the associated liability rules—out of the equation and instead create a form of intuitive arithmetic of liability that is well-suited to the intricate everyday problems that tort law encounters.

B. Pragmatic Reasonableness: The Common Law of Contracts

Good faith in the common law of contracts expressly leaves behind the utilitarian paradigm of reasonableness and the “Hand formula.”⁸⁷ Reasonableness in the context of the common law of contracts does not prescribe a utilitarian diligence in the performance of a contract, but rather requires a different type of conduct altogether.⁸⁸ The reference to “reasonableness” by the tort of negligence and the common law of contracts thus creates only an apparent common denominator. Rather than evidencing a common denominator between torts and contract, the different applications of the reasonableness standards reveal that there is a diversity of paradigms currently within the common law.⁸⁹

This Article focuses on the implied duty of good faith to establish the paradigm of reasonableness followed by the common law of contracts.⁹⁰ The implied duty of good faith focuses in particular on the obligation to employ reasonable efforts in the performance of the contract and the corresponding duty not to act in a manner that undermines the basis of the parties’ bargain.⁹¹ This Article confirms that this conception of good faith is rooted in modern pragmatism.⁹² According to this paradigm, reasonableness is not measured by reference to utility but by excluding clearly unreasonable behavior.⁹³ That is to say that pragmatic reasonableness requires a party to provide a rational basis for its

86. See generally Lucy E. Hill, *Seeking Liberty’s Refuge: Analyzing Legislative Purpose under Casey’s Undue Burden Standard*, 81 *FORDHAM L. REV.* 365 *passim* (2012) (discussing recent legislative attempts to disturb the value neutrality of tort law in the abortion setting).

87. Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 *HARV. L. REV.* 369, 376, n.35 (1980).

88. See discussion *supra* Part II.A.

89. See discussion *infra* Part II.B.2.

90. RESTATEMENT (SECOND) CONTRACTS § 205 (1981). Although other sections of the Restatement also introduce rules premised upon a good faith obligation—for instance, the rules of interpretation of contract or promissory estoppel—section 205 is the central, most direct application of good faith and reasonableness in the common law of contracts. See, e.g., Leon Trakman, *Pluralism in Contract Law*, 58 *BUFF. L. REV.* 1031, 1082 (2010) (“An interpretative theory of contracting holds that the formation of contracts is determined primarily through a process of interpretation, or more expansively, through contract construction”). It is also the clearest example of the difference between utilitarian reasonableness and pragmatic reasonableness. *Id.* at 1068-75.

91. RESTATEMENT (SECOND) CONTRACTS § 205 cmt. d (1981).

92. See, e.g., Jean Braucher, *Cowboy Contracts: The Arizona Supreme Court’s Grand Tradition of Transactional Fairness*, 50 *ARIZ. L. REV.* 191, 201 (2008) (“Reliance on the Restatement . . . aligns the court with the progressive moderation, realism and pragmatism of the Restatement (Second) of Contracts . . .”).

93. Robert S. Summers, *The General Duty of Good Faith – Its Recognition and Conceptualization*, 67 *CORNELL L. REV.* 810, 818-21 (1982).

actions given the contract.⁹⁴ This rational basis ultimately is measured not by an absolute standard, but by reference to relevant community standards.⁹⁵

As discussed in this Part, the pragmatic reasonableness of the implied duty of good faith enables courts to adopt a perspective that is responsive to commercial needs and adaptive to changes in the environment of the transactions concerned. It hands the judge a tool to dispense commercially relevant decisions that protect the typical risk allocations between business partners in similar transactions. The implied duty of good faith thus creates a space in which parties can form long-term expectations in their bargains based upon their business judgment rather than their intimate knowledge of the law.

I. Reasonableness in Pragmatism

Pragmatism originated as an American school of philosophy in the late-19th and early-20th centuries.⁹⁶ It had an important influence on the development of U.S. jurisprudence.⁹⁷ The chief unifying theme of pragmatism was a deeply held empiricism⁹⁸ that informed the critical study of social structures, including the common law.⁹⁹ Pragmatism has four classical elements. First, “inquiries should be instrumental in that the inquiry should be most concerned with its effects, i.e. what will be the consequence of this decision?”¹⁰⁰ Second, pragmatic inquiry denies the means/end dichotomy in the sense that “the logic of pragmatic inquiry was the means and the end, all at the same time.”¹⁰¹ Third, it similarly denies the validity of a facts/value dualism because “facts” themselves are linguistic representations of social (truth) values.¹⁰² Finally, it is anti-foundational in the sense that hypotheses

94. Corporate law scholarship recently conceptualized of the pragmatic paradigm of reasonableness as requiring a showing of a rational basis. See Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398, 402 (2007); see generally Lori McMillan, *The Business Judgment Rule as an Immunity Doctrine*, 4 WM. & MARY BUS. L. REV. 521 (2013).

95. See, e.g., *Cibran v. BP Prods. N. Am., Inc.*, 375 F.Supp.2d 1355, 1360 (S.D. Fla. 2005) (using pricing decisions by local gas stations to establish standards for good faith actions).

96. Justin Desautels-Stein, *At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis*, 2007 MICH. ST. L. REV. 565, 579 (2007); see also Summers *Pragmatic Instrumentalism*, *supra* note 20, at 865-66.

97. See Summers, *supra* note 20, at 865-66.

98. See *id.*; Victoria Nourse & Gregory Shaffer, *Empiricism, Experimentalism, and Conditional Theory*, 67 SMU L. REV. 141, 178 (2014) (“Philosophical pragmatism allows us to focus on what new governance and legal empiricism offer for a new legal realism while noting the limits they must confront in asking how law is applied and changes. Philosophical pragmatism recognizes that all our choices are conditional; they depend upon the existing conditions in society. Empirically grounded, philosophical pragmatism calls for a new legal realism that explores variation to build conditional legal theory. Problem-centered, such a new legal realism must grapple with comparative analysis of the tradeoffs of institutional choices in light of the empirical evidence, experimentalist trial and error, and the dynamics and potential perversities of participation and collective action. Critically reflexive, such a new legal realism pursues an emergent analytics. Fallibilistic, it encourages experiment stimulated by uncertainty. We elaborate on these ideas below.”). See generally John C. P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640 *passim* (2012).

99. See *supra* notes 96-98.

100. Desautels-Stein, *supra* note 96, at 580.

101. *Id.* at 581.

102. *Id.* at 581-82.

and decisions for pragmatists “are constantly and continually open to question and revision: good decisions will be decisions that are the most useful” in their given context.¹⁰³

The currently leading version of pragmatism is the sociology of communicative action developed by Jürgen Habermas.¹⁰⁴ Reasonableness for Habermas consists of two related elements: first, “[a]n assertion can be called rational only if the speaker satisfies the conditions necessary to achieve the illocutionary goal of reaching an understanding about something in the world with at least one other participant in communication.”¹⁰⁵ Second, a “goal directed action can be rational only if the actor satisfies the conditions necessary for realizing his intention to intervene successfully in the world.”¹⁰⁶

Critically, someone must be able, “when criticized, [to] provide grounds for it by pointing to appropriate evidence” supporting his statement.¹⁰⁷ Moreover, in the context of rule establishment, he or she when criticized must be able “to justify his action by explicating the given situation in light of legitimate expectations.”¹⁰⁸

Communicative action “has a deliberative or transformative dimension.”¹⁰⁹ Its transformative dimension is to create truly common goals through

103. *Id.* at 582-83.

104. *See generally* 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., 1984) [hereinafter *Habermas Theory*]; JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG (1998) [hereinafter *Habermas Law*]; JÜRGEN HABERMAS, KOMMUNIKATIVES HANDELN UND DETRANSCENDENTALISIERTE VERNUNFT (2001) [hereinafter *Habermas Reason*]. For a succinct summary of Jürgen Habermas’ pragmatics and legal theory, see David M. Rasmussen, *Jurisprudence and Validity*, 17 CARDOZO L. REV. 1059 (1996). This version of pragmatism has influenced Cass Sunstein, Bruce Ackerman, Adeno Addis, and Robert Post among others. Jonathan Weinberg, *The Right to be Taken Seriously*, 67 MIAMI L. REV. 149, 171-72 (2012) (“[Habermas’s conception of communicative action] is front-and-center in the work of Cass Sunstein and Bruce Ackerman. It is the basis for Robert Post’s description of democracy as resting on citizens’ being able to participate in those modes of communication.”) (footnotes omitted); *see generally* Cass Sunstein, *Group Judgments: Statistical Means, Deliberation and Information Markets*, 80 N.Y.U. L. REV. 962 (2005) (proposing improvements to Habermas’ deliberative process by using information markets in the deliberative process); Cass Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 109 (2000) (“[I]nstitutions should be designed to ensure that when shifts are occurring, it is not because of arbitrary or illegitimate constraints on the available range of arguments. This is a central task of constitutional design. In this light, a system of checks and balances might be explained, not as an undemocratic check on the will of the people, but as an effort to protect against potentially harmful consequences of group discussion.”); *Sunstein Revival*, *supra* note 35, at 1544; Bruce Ackerman & Ian Ayres, *The Secret Refund Booth*, 73 U. CHI. L. REV. 1107, 1127-28 (2006); Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2347 (1999) (“One citation from Jürgen Habermas or Kenneth Arrow is worth a million cites from Anthony Kennedy’s law clerk.”); Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377 (1996); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 487-89 (2011) (noting the importance of communicative action theory in the context of the First Amendment); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995).

105. *Habermas Theory*, *supra* note 104, at 11; *see also* Rasmussen, *supra* note 104, at 1065-67.

106. *Habermas Theory*, *supra* note 104, at 11; *see also Habermas Reason*, *supra* note 104, at 72-84 (anchoring pragmatism in a Wittgensteinian conception of grammar).

107. *Habermas Theory*, *supra* note 104, at 15; *Habermas Reason*, *supra* note 104, at 32-45; *see also* Rasmussen, *supra* note 104, at 1065-67.

108. *Habermas Theory*, *supra* note 104, at 15; *Habermas Reason*, *supra* note 104, at 32-45.

109. Sunstein, *supra* note 35, at 1545.

communication.¹¹⁰ Communicative action is transformative precisely because it creates a common space in which all participants have a stake despite the fact that their initial acts and statements served the utterer's or actor's selfish point of view.¹¹¹ This common, public space creates normative structures that ultimately reflect the current policy needs of the relevant community.¹¹²

Reasonableness within the communicative action paradigm thus requires two different—yet equally important—things: in the context of a purely illocutionary act, reasonableness speaks to the fact that a speech act is tenable. It is tenable if it can be understood by a member of the relevant language community as addressing a common problem.¹¹³ Thus, for example, “the bus is blue” is not a tenable response to a question whether to expand “marriage” to include same-sex unions; the statements, that marriage is a basic social and religious institution intended exclusively to foster procreation and that marriage is a socially privileged recognition of a relationship between two consenting adults that cannot be rightfully denied to any human being on the basis of sexual orientation without denying them equal protection, are.¹¹⁴ In this sense, determining the relevant audience for the speech act will in many instances determine its reasonableness. In the context of public deliberation, reasonableness requires a public space within which an exchange can occur from a point of relative equality.¹¹⁵ A statement in this public space is “reasonable” if it is (1) made within this public space and (2) can be understood by others in the community as actually addressing the joint problem for debate no matter its substantive content.

Reasonableness is not limited to speech, but also extends to action.¹¹⁶ In this sense, an action is reasonable if it can be effective.¹¹⁷ Effectiveness in communicative action is not measured by reference to the purely selfish intentions of the actor, but by reference to their common space.¹¹⁸ Thus, an action is effective if it achieves a problem solution and does not undermine the public space that led

110. See generally *id.* at 1548-55; cf. *Habermas Reason*, *supra* note 104, at 32-45.

111. Cf. Sunstein, *supra* note 35, at 1550.

112. See *Habermas Law*, *supra* note 104, at 168-70; cf. Arthur Lupia, Yanna Krupnikov & Adam Seth Levine, *Beyond Facts and Norms: How Psychological Transparency Threatens and Restores Deliberation's Legitimizing Potential*, 86 S. CAL. L. REV. 459, 465 (2013) (discussing the development of Habermas's theory on point in detail).

113. See Rasmussen, *supra* note 104, at 1065-66.

114. See generally *United States v. Windsor*, 133 S. Ct. 2675, 2693-96 (2013) (opinion of Kennedy, J.); *id.* at 2706-07 (Scalia, J., dissenting).

115. See Lupia et al., *supra* note 112, at 463-67 (2013) (“This is the circumstance that Habermas examines. He seeks a method for generating legitimacy in the absence of a preexisting universally accepted moral code and in the presence of positive attitudes toward the possibility of progress through change. Habermas's thesis is that this challenge of modernity can be managed through the adoption of a procedural intervention. He argues that ‘democratic procedure should ground the legitimacy of law.’ The procedural intervention is a form of deliberation. Habermas, quoting Frank Michelman, describes the intervention or deliberation as ‘refer[ring] to a certain attitude toward social cooperation, namely, that of openness to persuasion by reasons referring to the claims of others as well as one's own’”); see generally sources cited *supra* note 104.

116. *Habermas Theory*, *supra* note 104, at 50.

117. *Id.* at 54.

118. *Id.* at 48.

to its adoption.¹¹⁹

Reasonableness in communicative action is anchored in the social context of each specific statement or action to assess whether viewed in that context it has a rational basis.¹²⁰ It is a procedural paradigm rather than a substantive reasonableness paradigm. True to its pragmatic roots, it focuses on the structure of inquiry and its effectiveness in the real world rather than supplying it with an independent, value-based content.¹²¹ It is precisely in rejecting such a value-based metric that it distinguishes itself from a utilitarian consequentialist philosophy, which views utility maximization as the end value which any pragmatic structure must ultimately serve.¹²²

2. *Common Law of Contracts and Pragmatic Reasonableness*

Good faith in the common law of contracts is comparatively under-theorized.¹²³ While it is used as a single principle, the Restatement states that the law of contracts in fact relies upon a plurality of conceptions of good faith.¹²⁴ The Restatement directly relied upon an article by Robert Summers, which submitted that good faith in the law of contracts lacked an independent meaning of its own and instead served as an “excluder” of a “wide range of heterogeneous forms of bad faith.”¹²⁵ Steven Burton proposed, alternatively, that the duty of good faith instead should be viewed as a means to recapture foregone opportunities.¹²⁶ Critically, Miller and Perry have argued that under either definition, courts applying the duty of good faith descend into pure descriptivism: good faith no longer is a normative standard of how people ought to perform their contracts but merely a description of how people do.¹²⁷ Using the pragmatic paradigm of reasonableness, it is possible to resolve the confusion in prior doctrinal approaches

119. *Id.* at 52.

120. See generally sources cited *supra* notes 104-105, 111.

121. See, e.g., Desautels-Stein, *supra* note 96, at 580-83.

122. See *id.*

123. See, e.g., Miller & Perry, *supra* note 3, at 694 (“Despite the general acceptance and apparent importance of good-faith performance in the United States, courts and scholars have not been able to agree on the exact meaning of this concept. For many years, no attempt was made to provide clear definitions of good faith, at least in the common law of contracts, and the doctrine was applied somewhat intuitively. But even when courts and scholars have begun to formulate general guidelines, no consensus has crystallized.”).

124. See RESTATEMENT (SECOND) CONTRACTS § 205 cmts. a, d (1981).

125. Summers, *supra* note 93, at 818-21; see also Robert S. Summers, “Good Faith” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968) [hereinafter *Summers General Contract Law*]; see generally RESTATEMENT (SECOND) CONTRACTS § 205 cmt. d (1981).

126. See Burton, *supra* note 87. Doctrine consistently treats Professor Summers’ and Professor Burton’s conceptualizations of good faith as the principal doctrinal works on good faith. See, e.g., Miller & Perry, *supra* note 3, at 693-95; Emily Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?*, 2005 UTAH L. REV. 1, 4 (2005) (stating that the article “explores in some depth the theoretical differences between the Summers/excluder-analysis and Burton/foregone-opportunities approaches to good faith”); Thomas A. Diamond & Howard Fess, *Proposed Standard for Evaluating When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery*, 47 HASTINGS L.J. 585 (1996).

127. See Miller & Perry, *supra* note 3, at 690-95.

and address Miller and Perry's criticism that the current conception of good faith in the law of contracts is deeply flawed.¹²⁸

The duty of good faith, limits the discretion of the contracting parties in performing their contractual bargain.¹²⁹ The doctrine proposes two conceptualizations of the good faith limitation of discretion, Professor Summers' "excluder analysis" and Professor Burton's limitation on recapture of foregone opportunities.¹³⁰ Both approaches ultimately can be reconciled by means of the pragmatic reasonableness paradigm that the performing party must provide a rational basis for its actions in the specific context of the bargain struck by the parties.¹³¹

The Restatement expressly follows the "excluder principle" in limiting abuse of discretion of the contracting parties, rather than providing a positive duty to use discretion in a certain manner.¹³² Drawing on Professor Summers' theory, it lists the following examples of impermissible, unreasonable action: "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance."¹³³ This list is not exclusive, but must be extended by factual analogy to current jurisprudence in future cases.¹³⁴ Consistently with the excluder conceptualization of good faith, the Restatement "did go on to try to articulate the general purposes of the section: that of securing 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party,' and compliance with 'community standards of decency, fairness or reasonableness.'"¹³⁵

This account of good faith ultimately queries the rational basis for actions of the party whose performance is alleged to be in bad faith. The action has a rational basis if it avoids the patent examples of bad faith of the "excluder analysis."¹³⁶ That conduct is in bad faith because it can no longer be reconciled with community standards.¹³⁷ There is bad faith because any justification for one's actions can no longer be understood by other similarly situated persons as a valid solution to a common problem and thus fails as an illocutionary act.¹³⁸ As Professor Summers subscribed to the pragmatic paradigm in contemporaneous writings, this consistency of his account of good faith with pragmatic reasonableness is hardly

128. See *id.* at 727, 740.

129. See, e.g., *Wood v. Lucy, Lady Duff Gordon*, 118 N.E. 214 (N.Y. 1917); see also Houh, *supra* note 126, at 16 (noting that the case "is widely read as one of the earliest American cases to imply a duty" of good faith).

130. See sources cited *supra* note 126.

131. See *supra* Part II.B.1.

132. See RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1981); Miller & Perry, *supra* note 3, at 698-702 (discussing the influence of Professor Summers' excluder analysis); see also Houh, *supra* note 126, at 30.

133. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1981).

134. See *id.*; Summers *General Contract Law*, *supra* note 125, at 207.

135. Summers *Good Faith*, *supra* note 96, at 821 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981)).

136. See, e.g., Miller & Perry, *supra* note 3 at 698-702; Summers *General Contract Law*, *supra* note 125, at 206-07.

137. See, e.g., Miller & Perry, *supra* note 3 at 703-05..

138. See *supra* Part II.B.1.

surprising.¹³⁹

Professor Burton challenged and sought to refine the excluder conceptualization of good faith.¹⁴⁰ At its heart, Professor Burton's argument is that a discretion exercising party violates the duty of good faith when it "refuses to bear the expected cost of performance."¹⁴¹ The parties' justification for its performance becomes subjectively pre-textual because it knows that it has acted inconsistently with the economic assumption of the bargain.¹⁴² Although Professor Burton places an emphasis on subjective intentions to determine what the expected cost of performance was, he admits that as a matter of proof in an actual case, cost of performance is measured by "reasonable businesspersons . . . in the commercial setting."¹⁴³ Professor Burton thus overlays a reasonable reliance lens to provide the general definition of good faith in the law of contracts Professor Summers denied existed.

The justification for the foregone opportunity analysis similarly looks to the rational basis for the performing party's actions. Its principal focus, however, is not on the illocutionary question whether the justification offered for conduct makes sense, but on effectiveness.¹⁴⁴ Conduct lacks a rational basis because it renders the common instrument of the parties' intention ineffective.¹⁴⁵ It destroyed

139. See, e.g., Summers *Pragmatic Instrumentalism*, *supra* note 20, at 863.

140. See Burton, *supra* note 87, at 369-70 ("A majority of American jurisdictions, the Restatement (Second) of Contracts, and the Uniform Commercial Code (U.C.C.) now recognize the duty to perform a contract in good faith as a general principle of contract law. The conduct of virtually any party to any contract accordingly may be vulnerable to claims of breach stemming from this obligation. Yet neither courts nor commentators have articulated an operational standard that distinguishes good faith performance from bad faith performance. The good faith performance doctrine consequently appears as a license for the exercise of judicial or juror intuition, and presumably results in unpredictable and inconsistent applications. Repeated common law adjudication, however, has enriched the concept of good faith performance so that an operational standard now can be articulated and evaluated.") (citations omitted); Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1, passim (1981) [hereinafter *Burton Article 2*]; Houh, *supra* note 126, at 30; Miller & Perry *Contracts*, *supra* note 3, at 706-12.

141. Miller & Perry, *supra* note 3, at 706.

142. See Burton, *supra* note 87, at 371.

The identity of forgone opportunities is determined by an objective standard, focusing on the expectations of reasonable persons in the position of the dependent parties. Whether a particular discretion-exercising party acted to recapture forgone opportunities is a question of subjective intent. The two approaches are consistent. If a discretion-exercising party uses its control to recapture a forgone opportunity, it follows that it is not acting for a purpose within the contemplation of the parties. If such a party acts for a reason contemplated by the parties, it is not recapturing a forgone opportunity. *Supra* text accompanying note 87, at 390-91.

143. *Burton Article 2*, *supra* note 140, at 24; Compare Burton, *supra* note 87, at 390-91; see Miller & Perry, *supra* note 3, at 710-11.

144. See *supra* Part II.B.1. Burton's theory still can be explained by reference to illocutionary reasonableness, as well. The parties express their respective economic expectations in certain contract terms. An expectation is reasonable if other similarly situated persons would have the same expectations upon reviewing these terms due to relevant community standards. It is thus similarly when there is no means of reconciling the justification of a performance with the community understanding of those terms that the economic expectations of the parties are violated and action is in bad faith. Bad faith is thus again reducible to the failure of the justification of performance as an illocutionary act. There is no rational basis for the performance in question.

145. See Miller & Perry, *supra* note 3, at 706.

the equivalent of their public space, namely their shared private space of the bargain by impermissibly undermining their initial economic expectations.¹⁴⁶ When addressing the question of whether a party *acted* in good faith in this broader sense, one must determine whether the action is one that is effective in bringing about the joint bargain of the parties.¹⁴⁷ This again brings to bear community standards but through a different lens: the question is not whether the actions of the parties under the specific terms of the contract can be understood by other like situated actors, but whether other like situated actors would consider that the performance made effective the initial exchange of promises contained in the contract.¹⁴⁸ This is the alternative formulation of a rational basis test inherent in the pragmatic reasonableness paradigm.¹⁴⁹

As recent literature bears out, it ultimately does not matter which approach, Summers', Burton's, or both, a court applies.¹⁵⁰ The result under both is ultimately the same because "all major accounts of good faith share a common denominator": community standards.¹⁵¹

In their recent article on good faith in the performance of contracts, Miller and Perry sought to indict this paradigm of good faith as "deeply flawed."¹⁵² Their article proved that

[A]n action by a contracting party must be determined to be in good faith as long as it is considered so by a single expert (in the case of common practice) or by a single member of the community (in the case of a common view of morality). This must be the case even if all other experts disagree.¹⁵³

They submit that this result "is not particularly desirable: it is an extremely permissive perception of good faith that would permit any behavior considered acceptable by a minority, no matter how small."¹⁵⁴ Essentially, Miller and Perry challenge that this result is undesirable because it does not coincide with any normative theory of law.¹⁵⁵

The research done by Miller and Perry independently confirms that in practice, good faith in the law of contracts uses pragmatic reasonableness. It required that "[a]n assertion can be called rational only if the speaker satisfies the conditions necessary to achieve the illocutionary goal of reaching an understanding about something in the world with at least one other participant in communication."¹⁵⁶ This prescription overlaps completely with Miller and Perry's conclusion.¹⁵⁷ To be justified in their normative criticism, Miller and Perry thus have a mighty obstacle

146. See Burton, *supra* note 87, at 385.

147. See *supra* Part II.B.1.

148. See, e.g., Burton, *supra* note 3, at 385, 390-91.

149. See *supra* Part II.B.1.

150. See, e.g., Miller & Perry, *supra* note 3, at 724; Houh, *supra* note 126, at 33-35.

151. Miller & Perry, *supra* note 3, at 724. See, e.g., Houh, *supra* note 126, at 33-35.

152. Miller & Perry, *supra* note 3, at 727.

153. *Id.*

154. *Id.* at 740.

155. *Id.*

156. Habermas *Theory, vol. I, supra* note 104, at 11; see also Rasmussen, *supra* note 104, at 1065-67.

157. Miller & Perry, *supra* note 3, at 740.

to overcome—the tradition of pragmatic instrumentalism deeply embedded in American law.¹⁵⁸ This tradition is instrumental to the functioning of the common law in creating a space for legal development in accordance with policy needs of society as a whole without swinging wildly at the formation of a simple or supermajority.¹⁵⁹ Rather, consistent with the deliberative roots of pragmatic inquiry, it moves upon the formation of a social consensus and only holds parties to bargains predating its formation to such newly developed norms once it has fully formed.¹⁶⁰

C. Reasonableness as Equilibrium Adjustment: Fourth Amendment Jurisprudence

Constitutional criminal procedure departs from the classic common law reasonableness paradigms discussed in the previous Parts.¹⁶¹ What constitutes a “reasonable” search or seizure, and whether evidence from an unreasonable search should be excluded from evidence at a later criminal trial despite the “good faith” of the police officer, refer to yet another rule of conduct.¹⁶² What reasonableness means in this context consequently must be determined by yet a third paradigm other than the utilitarian calculus of tort law and the pragmatic rational basis inquiry of contract law.¹⁶³

This Article again will focus on a specific issue in constitutional criminal procedure, namely Fourth Amendment jurisprudence.¹⁶⁴ The Fourth Amendment guarantees “the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.”¹⁶⁵ Because the Fourth Amendment is silent on how it must be applied, the consequence of the right to be secure in one’s person, houses, papers and effects therefore had to be judicially created.¹⁶⁶

158. See generally Summers, *supra* note 20 (explaining the deep roots of pragmatic instrumentalism in U.S. law).

159. See *supra* Part IV.B.

160. See *id.*; cf. Eisenberg, *supra* note 21, at 74. One area in which such a consensus crystallizes is unconscionability in form agreements. One recent article notes, “as courts have reinvigorated unconscionability as a policing tool for standardized agreements, they have introduced into the doctrine a ‘sliding scale’ approach that, if properly cultivated, can empower courts, and increasingly, arbitrators, to do what consumers, legislators, and legal scholars have yet been unable to do—control oppression and overreaching in consumer form contracts.” Melissa T. Lonegrass, *Finding Room for Fairness in Formalism – The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 5 (2012).

161. See Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 698 (2011) constitutional criminal procedure were “transformed from a putative descendent of the common law to an unabashedly policy-driven doctrine” from the Burger Court onwards); Kerr, *supra* note 22, at 492 (a principled approach to Fourth Amendment jurisprudence in the form of “equilibrium adjustment differs from general common law in evolution of constitutional law in a significant way”).

162. See sources cited *supra* note 161.

163. See *supra* Part II.C.2.

164. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation and particularly describing the place to be searched, and the persons or things to be seized.”).

165. *Id.*

166. Laurin, *supra* note 161, at 690.

In his recent article, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, Professor Orin Kerr proposes that a rights-based theory does permit one to uncover an underlying coherence and consistency in the apparently jumbled Fourth Amendment jurisprudence.¹⁶⁷ His theory roots reasonableness in Fourth Amendment jurisprudence in a contemporary, sophisticated formalism: American constructivism.¹⁶⁸ Tracing Fourth Amendment jurisprudence historically, Professor Kerr explains that new technology brings about a facial conflict between different constitutional values of privacy and security.¹⁶⁹ The reasonableness of police conduct is determined by bringing these values to a reflective equilibrium established by comparing the current circumstances to the ideal balance between these values in a hypothetical Year Zero.¹⁷⁰ This hypothetical Year Zero assumes that neither police nor criminals have any technological tools at their disposal to commit or investigate crime.¹⁷¹

As discussed in this Part, this approach adopts a perspective that protects fundamental social and political values. It hands the judge a tool to correct even prevalent conduct by reference to legal first principles. It thus creates a strong and dependable normative system that provides a bulwark against unwanted social change.

1. Reasonableness in Constructivist Formalism

Attacking formalism is a favorite stalking horse for legal scholars.¹⁷² Although

167. Kerr, *supra* note 22, *passim*.

168. See *cf.* Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1146 (1999) [hereinafter *Leiter*] (“A sophisticated formalist like Ronald Dworkin, who has a rich theory of legal reasoning, still remains within the formalist camp because he sees the law as rationally determinate and he denies that judges have strong discretion (i.e., he denies that their decisions are not bound by authoritative legal standards).”).

169. Kerr, *supra* note 22, at 485.

170. Although associated with an originalist point of view, Professor Kerr has rightfully defended his position as essentially constructivist. See generally Christopher Slobogin, *An Original Take on Originalism*, 125 HARV. L. REV. F. 14, 14 (2011) (“At bottom, equilibrium-adjustment theory is originalism, and thus suffers from all of the problems associated with that methodology.”); Orin S. Kerr, *Defending Equilibrium-Adjustment*, 125 HARV. L. REV. F. 84, 85 (2011) (“Equilibrium-adjustment is not originalism. It is a theory of maintaining the status quo balance of power, not an effort to restore eighteenth-century rules. That understanding explains why living constitutionalists and pragmatists alike have embraced equilibrium-adjustment, and why the chief attack on it has been launched on originalist grounds.”).

171. Kerr, *supra* note 22, at 485.

172. See, e.g., Glenn S. Koppel, *The Functional and Dysfunctional Role of Formalism in Federalism: Shady Grove Versus Nicastrò*, 16 LEWIS & CLARK L. REV. 905, 930 (2012) (“Formalism is a jurisprudential stepchild of the legal academy, and the term is frequently used as a pejorative.”); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 509-10 (1988) (“With accelerating frequency, legal decisions and theories are condemned as ‘formalist’ or ‘formalistic.’ But what is formalism, and what is so bad about it? Even a cursory look at the literature reveals scant agreement on what it is for decisions in law, or perspectives on law, to be formalistic, except that whatever formalism is, it is not good.”). For a recent example, see, e.g., Nestor M. Davidson, *New Formalism in the Aftermath of the Housing Crisis*, 93 B.U. L. REV. 389, *passim* (2013) (warning of the consequences of a literalist approach to mortgage assignments).

the term has had a revival of sorts, it is still not consistently defined.¹⁷³ For purposes of this Article, the term formalism refers to any legal theory that meets three criteria common to the term's typical usage. First, formalism submits that every legal question is capable of a legal solution.¹⁷⁴ Second, it posits that there is only one right outcome to any legal dispute.¹⁷⁵ Third, it argues that this solution will be revealed by following the internal logic from first principles to their mandated conclusions.¹⁷⁶

Constructivism is one of the most "sophisticated" types of contemporary formalism.¹⁷⁷ It submits that every dispute is equally susceptible to a legal solution.¹⁷⁸ Constructivism argues that there is only one legal solution to any case,¹⁷⁹ and arrives at this conclusion by treating the law as a seamless web premised upon strong first principles.¹⁸⁰

Constructivism is a *soft* and *sophisticated* sort of formalism because it is

173. See, e.g., Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1397 (1999) (defining formalist as "rule-based decision making" but proposing that "[t]he new formalism is instead best viewed as a *pragmatic approach* to judicial foreign relations doctrines") (emphasis added).

174. See, e.g., Schauer *Formalism*, *supra* note 172, at 511-12.

175. See, e.g., Schauer *Formalism*, *supra* note 172, at 511-12 ("We condemn *Lochner* as formalistic not because it involves a choice, but because it attempts to describe this choice as compulsion."); *Summers Pragmatic Instrumentalism*, *supra* note 20, at 867.

176. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1748 (1976) [hereinafter *Kennedy*] ("The rules that governed conduct depended neither on legislative consensus nor on a utopian morality, but on deduction from first principles acceptable to everyone. They were applied without the exercise of discretion by judges who had no power to inject their own politics or morals into the process."); *Summers Pragmatic Instrumentalism*, *supra* note 20, at 867; cf. Schauer *Formalism*, *supra* note 172, at 512, 514. This approach differs from Professor Schauer's definition of formalism by treating decisions made according to legal principles, rather than legal rules, as formalist so long as they hold that there is only one correct manner in which to apply the principle in any given case. I differ from Professor Schauer's account because formalism would have to posit, according to an applicable legal principle, what the "the most locally applicable legal norm" is. Schauer *Formalism*, *supra* note 172, at 522. This precisely will permit the use of one of the escape routes Schauer treats as non-formalist (so long as the principle requires the otherwise applicable rule to be displaced for a different, specific rule). This conception of formalism is on the whole more consistent with the "scientific" nature of the law attacked by Kennedy and, much earlier, Holmes, Cardozo, and Llewellyn. *Kennedy*, *supra* at 1747-49.

177. *Leiter*, *supra* note 168, at 1146-47 ("A sophisticated formalist like Ronald Dworkin, who has a rich theory of legal reasoning, still remains within the formalist camp because he sees the law as rationally determinate and he denies that judges have strong discretion (i.e., he denies that their decisions are not bound by authoritative legal standards). Some have thought that Dworkin denies the 'autonomy' of legal reasoning, but this accusation is patently question-begging: Dworkin's claim is precisely that the moral considerations that ultimately fix a party's legal rights are themselves part of the law. Dworkin simply has a richer picture of the class of legal reasons than other formalists--indeed, too rich for some formalists. Justice Scalia, for example, thinks that for judging to be genuinely mechanical (per the formalist's ideal), the interpretive principles that are part of the class of legal reasons must be austere simple, lest discretion sneak into adjudication under the guise of 'interpretation.'").

178. RONALD DWORKIN, *LAW'S EMPIRE* 333-54 (1986) [hereinafter *Dworkin Empire*]; see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 114-23 (1977) [hereinafter *Dworkin Rights*]; Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 359 (1997) [hereinafter *Dworkin Theory*].

179. See *Dworkin Empire*, *supra* note 178, at 345-54; *Dworkin Rights*, *supra* note 178, at 114-23.

180. See *Dworkin Empire*, *supra* note 178, at 347-49 (explaining that the law operates as a seamless web); *Dworkin Theory*, *supra* note 178, at 359 (same).

premised upon the coherent application of a legal principle—fundamental rights—rather than the mechanical application of “the most locally applicable” legal rule.¹⁸¹ Constructivism further posits the fundamental right that “[e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.”¹⁸²

This principle of justice is codified in a social contract agreed upon from an analytic original position of equality.¹⁸³ The terms of the just social contract are agreed upon from a position of ignorance of one’s future or potential position in society by means of rational choice.¹⁸⁴ In agreeing upon terms, rational choice requires adoption of the most efficient terms.¹⁸⁵ In a situation where there are several equally efficient proposals, the proposal most benefiting the least favored group in society wins.¹⁸⁶

The rational choice of justice is tested against a reflective equilibrium,¹⁸⁷ which is needed “to see if the principles which would be chosen would match our considered convictions of justice or extend them in an acceptable way.”¹⁸⁸ It operates by “working from both ends” our moral intuitions and rational choice from the vantage point of positional ignorance, meaning that if any rule results in a conflict between our moral intuitions and the original position, one or the other must be modified.¹⁸⁹ By altering contractual conditions, withdrawing judgments, and conforming to principle, the rational choice of justice theory proposes that “eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted.”¹⁹⁰

The reflective equilibrium balances the totality of relevant countervailing commitments to create a seamless normative web¹⁹¹ that reflects “existing political rights.”¹⁹² These “[p]olitical rights are creatures of both history and morality: what

181. *Dworkin Rights*, *supra* note 178; (setting out constructivist method in jurisprudence); *accord Rawls Justice*, *supra* note 68, at 7, 63 (explaining constructivist method in U.S. liberal political theory); *see also Schauer Formalism*, *supra* note 172, at 509-10 (discussing same).

182. *Rawls Justice*, *supra* note 68, at 3. Dworkin’s deep theory of rights is “[b]ased on Rawls’ social contract theory.” Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 431-32 (2013). If anything, Ronald Dworkin embraces the method of the reflective equilibrium discussed below more aggressively than Rawls did. RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 262-65 (Harvard Univ. Press, 2011).

183. *Rawls Justice*, *supra* note 68, at 84 (“[S]ociety is interpreted as a cooperative venture for mutual advantage. The basic structure is a public system of rules defining a scheme of activities that leads men to act together so as to produce a greater sum of benefits and assigns to each certain recognized claims to a share in the proceeds.”).

184. *See generally id.* at 95-100, 136-150 (explaining choice from the Rawlsian original position).

185. *See id.* at 67 (“[A] distribution of goods or scheme of production is inefficient when there are ways of doing still better for some individuals without doing any worse for others.”).

186. *See generally id.* at 75-83 (discussing efficiency and choice between equally efficient proposals).

187. *Id.* at 20 (“It is an equilibrium because at last our principles and judgments coincide; and it is reflective since we know to what principles our judgments conform and the premises of their derivation.”).

188. *Id.* at 19.

189. *Id.* at 20.

190. *Id.*

191. *See generally Dworkin Empire*, *supra* note 178, at 333-54 (discussing legal decisionmaking).

192. *Dworkin Hard Cases*, *supra* note 35, at 1063.

an individual is entitled to have, in civil society, depends upon both the practice and the justice of its political institutions.” This means that while “judges must make fresh judgments about the rights of the parties who come before them . . . these political rights reflect, rather than oppose, political decisions of the past.”¹⁹³ Thus, the choice within the reflective equilibrium is to find the decision that best takes account of each political right and is consistent with all of them.¹⁹⁴

Constructivism submits that its rights-based balancing test must be supported by an “overlapping consensus” of “comprehensive” moral and political philosophies and ideologies. Furthermore, this overlapping consensus requires that the reflective equilibrium that results must be consistent with all reasonable moral, religious, or political points of view—be it for different reasons internal to each moral, religious, or political point of view given that these comprehensive moral, religious, and political points of view must coexist in a pluralist society.¹⁹⁵ In short, the balancing test of the reflective equilibrium does not claim to subscribe to a particular ideological point of view but to be broadly consistent with any ideological position.¹⁹⁶

The concept of reasonableness in constructivism is one of civic, reciprocal, and full cooperation. It requires more than the rational basis required by pragmatic reasonableness. Rather than providing an acceptable rational basis for one’s actions, constructivist reasonableness requires individuals to propose and accept “fair terms of cooperation.”¹⁹⁷ A term is only “fair” if it perfectly reflects the cooperative values of the fundamental rights at the center of the formalist legal system.¹⁹⁸ Put differently, while there may be a rational basis to disagree with these values, or the rules premised upon them, such disagreement is relegated to the realm of political choice rather than legal judgment.¹⁹⁹

2. *The Constructivism of Fourth Amendment Jurisprudence*

Professor Kerr’s recent *Equilibrium-Adjustment Theory of the Fourth Amendment* demonstrates that Fourth Amendment jurisprudence adopts a

193. *Id.*

194. *See id.* at 1093-96.

195. *See generally* JOHN RAWLS, *POLITICAL LIBERALISM* 149-80 (Columbia Univ. Press, 2005) [hereinafter *Rawls Liberalism*] (discussing the concept of an overlapping consensus and its importance in changing original Rawlsian political theory from *A Theory of Justice*).

196. *See generally id.* at 149-80 (discussing the relationship between the reflective equilibrium and an overlapping consensus).

197. *Id.* at 86.

198. *See generally Dworkin Empire, supra* note 178, at 333-54.

199. *See Dworkin Hard Cases, supra* note 35, at 1063 (“The rights thesis, that judicial decisions enforce existing political rights, suggests an explanation that is more successful on both counts. If the thesis holds, then institutional history acts not as a constraint on the political judgment of judges but as an ingredient of that judgment, because institutional history is part of the background that any plausible judgment about the rights of an individual must accommodate. Political rights are creatures of both history and morality: what an individual is entitled to have, in civil society, depends upon both the practice and the justice of its political institutions. So the supposed tension between judicial originality and institutional history is dissolved: judges must make fresh judgments about the rights of the parties who come before them, but these political rights reflect, rather than oppose, political decisions of the past.”).

constructivist reasonableness paradigm.²⁰⁰ As Professor Kerr discusses, the constructivist paradigm organizes current jurisprudence to reveal that “[w]hile existing doctrine is complex and fact-specific, it is not at all a ‘mess’”²⁰¹ as previously presumed.

a. Constructivist Reasonableness as Fourth Amendment Paradigm

In keeping with constructivist methodology, Professor Kerr’s theory begins in a hypothetical world of “Year Zero,” which “represents an imaginary time, a sort of beginning of the universe for criminal investigations.”²⁰² This analytical original position displays the countervailing commitments that must be balanced for police to investigate crime and for courts to limit police power and avoid abuses.²⁰³ The original balance permits police to “conduct surveillance in public, and speak with suspects, victims, or eyewitnesses” and to “walk the beat and observe whatever they see in public.”²⁰⁴ Based on this work they can gather probable cause to “detain a person” and “obtain warrants and make arrests.”²⁰⁵ Furthermore, warrants “must only allow the government to search particular places for particular evidence: no ‘general’ warrants are permitted.”²⁰⁶

Thus, “the Fourth Amendment in Year Zero strikes a balance between security and privacy,” if perhaps not perfectly.²⁰⁷ What is important is that “Year Zero strikes a stable balance of power to enforce the law.”²⁰⁸ In constructivist terms, it creates political rights that can be reduced to principle and applied coherently and consistently over time: a principled translation of the balance to new facts and circumstances is possible and does not descend into arbitrary policy-preference.²⁰⁹

Fourth Amendment jurisprudence only appears in disarray because of the effect of constant technological advancement on the balance struck in the hypothetical Year Zero position. Such developments “threaten the privacy/security balance because they enable both cops and robbers to accomplish tasks they couldn’t before, or else to do old tasks more easily or cheaply than before.”²¹⁰

200. See *Kerr Equilibrium*, *supra* note 22, at 481, 490-91 (“Equilibrium-adjustment plays two roles in this framework. The primary role is to guide the transition from the principles layer of doctrine to the application layer of doctrine. Equilibrium-adjustment directs how courts can choose among the various options permitted by the open-ended principles of Fourth Amendment law. In a sense, equilibrium-adjustment is the principle that governs the application of the principles layer: it guides how courts go from the general principles of Fourth Amendment law to the concrete, fact-specific rules that make up Fourth Amendment doctrine more generally. As a result, equilibrium-adjustment is both outside Fourth Amendment doctrine and also a driving force behind it.”).

201. *Id.* at 481.

202. *Id.* at 483.

203. *Id.* at 484.

204. *Id.*

205. *Id.* at 484.

206. *Id.* at 484-85.

207. *Id.* at 485.

208. *Id.*

209. See generally *Dworkin Hard Cases*, *supra* note 35, at 1093-96.

210. *Kerr Equilibrium*, *supra* note 22, at 486-87 (giving use of flashlights by police as one example of technological change that led to Supreme Court Fourth Amendment jurisprudence in *U.S. v. Lee*, 274 U.S. 559, 563 (1927) and *Texas v. Brown*, 460 U.S. 730, 739-40 (1983) and the use of the telephone by

Once the effect of technological change is factored into judicial decision-making, it becomes apparent that courts are simply trying to maintain the Year Zero balance of privacy/security under new circumstances rather than make or change policy.²¹¹

*Kyllo v. United States*²¹² is the paradigmatic case for *Equilibrium Adjustment*.²¹³ The government in *Kyllo* suspected that Danny Kyllo was growing marijuana in his home, a process requiring significant heat from high-intensity lamps.²¹⁴ From the passenger seat of a car parked across the street from the house, two United States agents pointed an Agema Thermovision 210 thermal imager to scan the heat signature of the house and detected that “the roof over the garage and a side wall of [the] petitioner's home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex.”²¹⁵ On the basis of the thermal imaging, as well as tips from informants and utility bills, “a Federal Magistrate Judge issued a warrant authorizing a search of [the] petitioner's home, and the agents found an indoor growing operation involving more than 100 plants.”²¹⁶ Mr. Kyllo entered a guilty plea after losing his efforts to suppress the evidence obtained at his home.²¹⁷ After an initial successful appeal requiring the trial court to hold an evidentiary hearing regarding the intrusiveness of the thermal imaging technology used, the district court again did not suppress the evidence obtained from the initial search and the United States Court of Appeals for the Ninth Circuit confirmed the ruling because the petitioner “had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home. Even if he had . . . there was no objectively reasonable expectation of privacy because the thermal imager did not expose any intimate details of Kyllo's life, only amorphous hot spots on the roof and exterior.”²¹⁸

The United States Supreme Court in a majority decision authored by Justice Scalia disagreed with the Ninth Circuit. Centrally, it reasoned that searching the interior of a home by whatever means is reasonable only if it complies with the “ready criterion, with roots deep in the common law, of the minimal expectation of privacy”²¹⁹ It deduced from this principle that “obtaining by sense-enhancing technology any information regarding the home's interior that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’ constitutes a search—at least where (as here) the technology in question is not in general public use.”²²⁰ It explained that to “withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment” because it would undercut the “degree of

criminals to meet with co-conspirators as another such example in *Olmstead v. U.S.*, 277 U.S. 438 (1928)).

211. *See id.* at 488.

212. 533 U.S. 27 (2001).

213. *Kerr Equilibrium*, *supra* note 22, at 496 (“An easy starting point is Justice Scalia’s majority opinion in *Kyllo v. United States*”).

214. *Kyllo*, 533 U.S. at 29.

215. *Id.* at 29-30.

216. *Id.* at 30.

217. *Id.*

218. *Id.* at 31.

219. *Id.* at 34-35; *Kerr Equilibrium*, *supra* note 22, at 497-98.

220. *Kyllo*, 533 U.S. at 34.

privacy against government that existed when the Fourth Amendment was adopted.²²¹

Professor Kerr uses *Kyllo* as the paradigmatic case for *Equilibrium Adjustment* because it expressly adopted a balancing approach to constitutional interpretation that applies a fundamental principle to novel facts.²²² This application facially departed from the rule announced in prior jurisprudence and faithfully applied by the Ninth Circuit in *Kyllo*.²²³ In constructivist terms, the “original position” reflected in the Court’s prior reasonable-expectation-of-privacy jurisprudence had to be adjusted because it no longer was consistent with existing value judgments of the reflective equilibrium.²²⁴ In other words, because of technological change, prior jurisprudence no longer was consistent with the political right to privacy underlying the constitutional order to be interpreted and thus require a change in jurisprudence.²²⁵ Professor Kerr then traces the same constructivist method through recent Fourth Amendment jurisprudence as a constant thread holding these decisions together.²²⁶

Equilibrium adjustment, like constructivism, is supported by an overlapping consensus of different comprehensive political and moral ideologies.²²⁷ Its adoption by Justice Scalia to defend privacy rights against the traditional reception of the Bill of Rights certainly support that claim: it is precisely the method used by living constitutionalists to defend the Court’s decision to defend privacy rights against the traditional reception of the Fourteenth Amendment in *Roe v. Wade* and its progeny.²²⁸ In other words, the adoption of constructivism by jurists traditionally associated with an originalist position perforce supports the existence of an overlapping consensus—within the narrowly tailored area within which originalists agree to its use.

The consequence of *Equilibrium Adjustment* is that through a “reasonable expectation of privacy” and other “reasonableness” tests, reasonableness can be expressed in terms of civic, reciprocal and full cooperation. Like the Rawlsian observation that “it is by the reasonable that we enter as equals the public world of others and stand ready to propose, or to accept, as the case may be, fair terms of cooperation with them,”²²⁹ Professor Kerr proposes that equilibrium adjustment “facilitates the coherence of group decisionmaking.”²³⁰ Using constructivist theory, it is possible to define what “reasonable” means: the case-by-case rule that can be expressed as substantively fair terms of cooperation between the government’s exercise of its police powers and the general population’s privacy

221. *Id.*

222. See *Kerr Equilibrium*, *supra* note 22, at 498.

223. See, e.g., Heather K. McShain, *Not Quite Bradbury’s Fahrenheit 451: The Uncertain Future of Sense-Enhancing Technology in the Aftermath of United States v. Kyllo*, 105 W. VA. L. REV. 1, 3, 51 (2002).

224. See *Rawls Justice*, *supra* note 68, at 20; see generally discussion *supra* Part II.C.1.

225. See *Dworkin Empire*, *supra* note 178, at 333-54; see generally discussion *supra* Part II.C.1.

226. See generally *Kerr Equilibrium*, *supra* note 22, at 499-525.

227. See *id.* at 488.

228. For a full historical discussion, see William N. Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002).

229. *Rawls Liberalism*, *supra* note 195, at 86.

230. *Kerr Equilibrium*, *supra* note 22, at 533-35.

rights. The “exercise of political power is proper only when we sincerely believe that the reasons we offer for our political actions may reasonably be accepted by other citizens as justification for those actions”²³¹ because they would agree that the balance between privacy and security is appropriately struck. We would agree that it is appropriately struck when the resulting rule seems fair to a disinterested rational person considering its fairness both from the point of view of the (potentially erroneously) accused as well as the victim.

Constructivist reasonableness further differs starkly from its utilitarian and pragmatic cousins. As Professor Kerr explains, constructivist reasonableness aims “to restore the status quo ante, not serve as an instrument of change.”²³² This is diametrically opposed to paradigms of reasonableness that seek to “ensure that the law reflects the ‘felt necessities of the time, the prevalent moral and political theories, [and] intuitions of public policy, avowed or unconscious.’”²³³ Rather than seeking to be an instrument of change to adapt the law to new circumstances, constructivist reasonableness “is a kind of ‘command theory’—a theory of interpretation seeking guidance from prior historical moment—rather than a theory of legal evolution. This is different from most concepts of common law reasoning in constitutional law.”²³⁴

b. Constructivist Reasonableness and the Good Faith Exception

The constructivist reasonableness paradigm also underpins the meaning of “good faith” in Fourth Amendment jurisprudence.²³⁵ “Good faith” is relevant to Fourth Amendment jurisprudence when a court finds there to have been an illegal search and must determine whether the evidence gathered in the illegal search can nevertheless be admitted into evidence during a criminal trial.²³⁶ The Supreme Court introduced the good faith exception in 1986 in *United States v. Leon*²³⁷ to answer “whether the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and

231. *Rawls Liberalism*, *supra* note 195, at 35.

232. *Kerr Equilibrium*, *supra* note 22, at 493.

233. *Kerr Equilibrium*, *supra* note 22, at 492 (quoting *Holmes Common Law*, *supra* note 30, at 1).

234. *Kerr Equilibrium*, *supra* note 22, at 493.

235. *Kerr Equilibrium*, *supra* note 22, at 494-95. Interestingly, Professor Kerr also notes to the contrary that “the remedies for Fourth Amendment violations have fluctuated significantly over time and have not reflected equilibrium-adjustment.” *Kerr Equilibrium*, *supra* note 22, at 495. In those cases, Professor Kerr proposes that a further split of “reasonableness” within Fourth Amendment jurisprudence is necessary: equilibrium reasonableness for the question whether a search has occurred and application of “a reasonableness [that] reflects a contemporary policy judgment rather than an effort to reach some prior equilibrium” for remedies. *Kerr Equilibrium*, *supra* note 22, at 495-96. With regard to the good faith exception to the exclusionary rule, this is not a compelled conclusion. The logic of the court in establishing this exception and later expanding it follows largely the same reasoning as the one laid bare in *Equilibrium*. See *Kerr Equilibrium*, *supra* note 4; Caleb Mason, *New Police Surveillance Technologies and the Good Faith Exception: Warrantless GPS Tracker Evidence After United States v. Jones*, 13 NEV. L.J. 60, 68-72 (2012) (discussing the link between equilibrium adjustment and the good faith exception to the exclusionary rule).

236. See Mason, *supra* note 235, at 68-72.

237. 468 U.S. 897 (1984).

neutral magistrate but ultimately found to be unsupported by probable cause.”²³⁸

The Court premised its conclusion on the observation that “[w]hether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is ‘an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.’”²³⁹ This separate question “must be resolved by weighing the costs and benefits of preventing the use in the prosecution’s case in chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective.”²⁴⁰ When police officers act “in objective good faith” (i.e., objectively reasonably), the Court noted, “the magnitude of the benefit conferred on such guilty defendants [by permitting application of the exclusionary rule] offends basic concepts of the criminal justice system.”²⁴¹

The development of the good faith exception since *Leon* is only consistent with the constructivist paradigm of reasonableness and inconsistent with utilitarianism or pragmatism. In *Illinois v. Krull*,²⁴² the Supreme Court extended the good faith exception to reasonable reliance by police officers upon a state statute permitting warrantless administrative searches.²⁴³ In *Arizona v. Evans*,²⁴⁴ the Supreme Court extended the good faith exception to clerical errors by the court in the logging of an arrest warrant that had in fact been quashed unbeknownst to an arresting police officer relying upon the computer record.²⁴⁵ In *Herring v. United States*,²⁴⁶ the exception was extended again to innocent police clerical errors.²⁴⁷ Finally, in *Davis v. United States*,²⁴⁸ the exception was extended to a situation where police had relied, “to the letter,” upon binding appellate precedent that was later overturned by the Supreme Court.²⁴⁹

All of these cases are consistent with constructivist reasonableness. The original privacy/security equilibrium has to be adjusted for the complex modern apparatus for the administration of criminal justice. The clerical errors at issue in *Arizona v. Evans* and *Herring v. United States* have the most direct link to technological change: computer record keeping error.²⁵⁰ *Illinois v. Krull* concerned

238. *Id.* at 900.

239. *Id.* at 906.

240. *Id.* at 906-07.

241. *Id.* at 908.

242. 480 U.S. 340 (1987).

243. *Id.*

244. 514 U.S. 1 (1995).

245. *Id.*

246. 555 U.S. 135 (2009).

247. *Id.*

248. 131 S. Ct. 2419, 2428 (2011).

249. *Id.* at 2428 (“At the time of the search at issue here, we had not yet decided *Arizona v. Gant*, and the Eleventh Circuit had interpreted our decision in *New York v. Belton*, to establish a bright-line rule authorizing the search of a vehicle’s passenger compartment incident to a recent occupant’s arrest. The search incident to Davis’s arrest in this case followed the Eleventh Circuit’s *Gonzalez* precedent to the letter. Although the search turned out to be unconstitutional under *Gant*, all agree that the officers’ conduct was in strict compliance with then-binding Circuit law and was not culpable in any way.”(citations omitted)).

250. *Evans*, 514 U.S. at 4; *Herring*, 555 U.S. at 137.

the balance of administrative searches, a development that responded to commercial and technological change in its own right.²⁵¹ *Davis v. United States* was brought about because of the need for appellate courts to interpret, and police to apply, Supreme Court jurisprudence on automobile searches – an independent change to the Year Zero balance.²⁵² The good faith exception in all these cases captures a necessary condition for the administration of justice according to the original privacy/security balance to function in current practice. Without it, technological change in the administration of justice (rather than investigation of crime) and inefficiencies in judicial reaction to technological change would of necessity skew the balance in favor of privacy and against security. Law enforcement officers would have to become data management experts and Supreme Court justices swami because they could not rely upon the tools and departmental guidance with which they were provided to do their jobs.

This classification of good faith explains how the Court can insist how the exception can both rest upon *objective* good faith and apply a culpability of conduct test to determine it.²⁵³ If an officer were to act dishonestly, the action would not be in good faith because the person in the hypothetical original position would not accept the purported justification of the officer for his actions. The conduct would be “culpable.”²⁵⁴ However, a law enforcement officer could not objectively rely upon an executive order suspending the Fourth Amendment entirely even if the officer honestly believed he or she had to act within its confines.²⁵⁵ The conduct would be culpable in the sense the term is used in jurisprudence because it is “grossly negligent” or no longer reconcilable with a reasonable good faith belief by the law enforcement officer that his or her conduct is lawful.²⁵⁶ The analysis is objective because it looks to the reasonable police officer from the position of the ideal balance of security/privacy as applied to an imperfect world and is justified by its terms.

The development of the good faith exception is notably *inconsistent* with other reasonableness paradigms. For instance, a utilitarian analysis would have focused on the police officer’s diligence. Adapting the Hand formula, the question would have been what the cost of remedying the mistake would have been compared to the cost of the harm times the probability of its occurrence.²⁵⁷ This analysis could have yielded the same results in all but one of the extensions of the good faith exception: *Herring v. United States*.²⁵⁸

251. *Krull*, 480 U.S. at 356-57.

252. *See generally Davis*, 131 S. Ct. 2419. *Kerr Equilibrium*, *supra* note 22, at 493.

253. *See id.* at 2427-28.

254. *See id.*

255. *Krull*, 480 U.S. at 349-50 (“Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law.”).

256. *See Davis*, 131 S. Ct. at 2427-28.

257. *See supra* Part II.A.2.

258. 555 U.S. 135, 138 (2009) (“But when Morgan went to the files to retrieve the actual warrant to fax to Pope, Morgan was unable to find it. She called a court clerk and learned that the warrant had been recalled five months earlier. Normally when a warrant is recalled the court clerk’s office or a judge’s chambers calls Morgan, who enters the information in the sheriff’s computer database and disposes of the physical copy. For whatever reason, the information about the recall of the warrant for Herring did not appear in the database. Morgan immediately called Pope to alert her to the mixup, and Pope

In *Herring*, a utilitarian analysis would have come to a different conclusion because the arresting officer acted on the basis of a computer entry before his office received a fax confirmation of the warrant it had expressly requested.²⁵⁹ In *Herring*, the police officer in question learned that a person who was “no stranger to law enforcement” sought to retrieve an item from an impounded truck and requested his warrant clerk to check whether there were outstanding warrants for the man’s arrest.²⁶⁰ Finding no such warrants in his own county, the investigator again asked his warrant clerk to check for warrants in the adjacent county.²⁶¹ Computer records incorrectly showed there to be an outstanding warrant, leading the investigator to arrest the man and search him for contraband (successfully) before receiving a fax confirmation for the warrant.²⁶² Problematically, the investigator’s own warrant clerk had immediately requested such fax confirmation and received confirmation of the computer error within “10 to 15 minutes.”²⁶³ Given that the warrant clerk, apparently as a matter of routine, sought to check the accuracy of the computer record and the short time frame to confirm it, a cost benefit analysis in *Herring* would favor the defendant.²⁶⁴ Differently put, had a similar fact scenario of failed diligence been pled in the context of negligence (rather than civil rights) it is probable that the defendant would have been found liable.²⁶⁵ Consequently, the good faith exception is not consistent with utilitarian reasonableness.

The good faith exception development is similarly inconsistent with a pragmatic analysis. Such an analysis would have focused on the rational basis of the police officer conducting a search.²⁶⁶ This rational basis inquiry is inconsistent with *Davis*.²⁶⁷ *Davis* applied the good faith exception because police officers followed applicable precedent “to the letter.”²⁶⁸ The *Davis* court considered this conduct reasonable because an appellate court had “specifically authorize[d] a particular police practice.”²⁶⁹ A police officer could claim a rational basis to act beyond the letter of an appellate decision in order to engage in a practice that while not specifically authorized would be considered similar to it by some police officers. This cannot be the test: the police officers in *Kyllo* certainly would think that their practice was reasonably within the scope of prior precedent.²⁷⁰ Their thinking was later supported by the United States Court of Appeals for the Ninth

contacted Anderson over a secure radio. This all unfolded in 10 to 15 minutes, but Herring had already been arrested and found with the gun and drugs, just a few hundred yards from the sheriff’s office.”).

259. *Id.*

260. *Id.* at 137.

261. *Id.*

262. *Id.* 137-38.

263. *Id.*

264. *Id.*

265. See Michael Avery, *Unreasonable Seizures of Unreasonable People*, 34 COLUM. HUM. RTS. L. REV. 261, 289 (2003) (“[A]n officer’s failure to follow procedures consistent with training is often passed off as mere negligence, an insufficient basis for a civil rights claim.”).

266. See *supra* Part II.B.1.

267. *Davis v. United States*, 131 S. Ct. 2419, 2428 (2011).

268. *Id.*

269. *Id.* at 2429 (emphasis in original).

270. See *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

Circuit.²⁷¹ The determination admitting the fruits of their search into evidence was nevertheless reversed, no matter their honest and rationally based beliefs.²⁷² Under a pragmatic reasonableness paradigm, they would not have been.²⁷³

III. REASONABLENESS AND THE RESOLUTION OF HARD CASES

Part II has established that American jurisprudence has adopted diverse paradigms of reasonableness to resolve key problems in different areas of law. It focused on a predominant reasonableness paradigm within each area of law. Part III will probe further why paradigms of reasonableness matter to legal development *within* each area of law.

Legal development means that the law adopts a conclusion to a problem distinct and apart from the one which the previously applicable legal rule, or principle, would have required.²⁷⁴ When such a development occurs, Frederick Schauer surmised “the judge would justify this conclusion by reference to general principles that lurk in various corners of the legal system,” or “ground the new principle in some already existing principle.”²⁷⁵ As this Part shows, the premise for this kind of legal change is not an obscure principle from some “corner of the legal system,” but a central change in the reasonableness paradigm.²⁷⁶

Part III.A will show that a hard case arises when the formalist, pragmatic and utilitarian reasonableness paradigms require different solutions to the same legal dispute.²⁷⁷ Using the classic Cardozo decision *Wood v. Lucy Lady Duff Gordon*,²⁷⁸ Part III.A will show the anatomy of such a case.²⁷⁹ Hard cases thus provide the common law with the opportunity for legal development, whether welcome or not.²⁸⁰

As discussed in Part II.B, this development occurs within the confines of the multiple reasonableness paradigms. Using the example of a recent dispute between an oil major and a Latin American national oil company, Part III.B discusses how the utilitarian concept of efficient breach is bringing about a paradigm realignment in contract law.²⁸¹ The efficient breach example shows how hard cases lead to

271. *Id.*

272. *Id.* at 40-41.

273. *See* Part II.A.1.

274. *See Schauer Formalism*, *supra* note 172, at 519; *Eisenberg*, *supra* note 21, at 74.

275. *Schauer Formalism*, *supra* note 172, at 518-19.

276. *Id.*

277. *See* KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 25 (1960) [hereinafter *Llewellyn Appeals*] (defining hard cases as those involving the “inquiry into which of the known permissible possibilities seem the probable best, and why.”).

278. 118 N.E. 214 (N.Y. 1917).

279. *See infra* Part III.A.

280. *Compare* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 415-16 (1985) [hereinafter *Schauer Easy Cases*] (“Finally, and perhaps most importantly, there may be only one relevant rule, it may be quite straightforwardly applicable, and its application would be consistent with its purpose. Yet it may still be morally, socially, or politically hard, however, in the sense of hard to swallow.”), *with* *Northern Securities Co. v. U.S.*, 193 U.S. 197, 400 (1904) (Holmes J., dissenting) (“Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.”).

281. *See generally* Case No. 15416/JRF/CA, Award, (ICC Int’l Ct. Arb. Dec. 23, 2011).

legal development. In Karl Llewellyn's terms, in these instances, "principle" is consulted to check up on precedent."²⁸² This check up is possible not because of a "grand style" or prudent practice of the judging, as Professor Llewellyn supposed, but is necessitated by the diversity of reasonableness paradigms in the common law.²⁸³ It is this availability of multiple paradigms of reasonableness *within* the common law which permits practicing lawyers and judges to probe precedent for principle in the first place.²⁸⁴

As discussed in Part II.C, the failure to understand and properly to account for the multiple paradigms of reasonableness can lead to significant confusion and error. Using the recent Supreme Court decision *Fisher v. University of Texas* on affirmative action, Part III.C will show that *Fisher's* facial rejection of the good faith standard to determine the constitutionality of admissions programs, literally construed, leads to self-contradiction.²⁸⁵ Instead, Part III.C will explain that *Fisher* intended to reject a definition of good faith according to the pragmatic reasonableness paradigm and adopted a constructivist reasonableness paradigm in its stead. It is this paradigm shift which makes the decision intelligible and can give guidance to courts in the future to determine the constitutionality of other admissions programs.

A. *What's a Hard Case?* Wood v. Lucy, Lady Duff Gordon

Scholarship typically treats the first case, *Wood v. Lucy Lady Duff Gordon*, as a "great" case rather than a "hard" case.²⁸⁶ In fact, it displays none of the characteristics typically associated with a hard case: there was a "formal" rule which could have been straightforwardly applied (but was not),²⁸⁷ there was no linguistic ambiguity in the applicable rule itself or indeterminacy in applying that rule to facts,²⁸⁸ and one would feel no moral outrage irrespective who won the case as both parties are equally unsympathetic.²⁸⁹ Despite all this, the case is not treated

282. *Llewellyn Appeals*, *supra* note 277, at 36 ("The *type*-thinking of the time is to view precedent as welcome and *very* persuasive, but it is to test a precedent almost always against three types of reason before it is accepted. The reputation of the opinion-writing judge counts heavily (and it is right reason to listen carefully to the wise). Secondly, 'principle' is consulted to check up on precedent, and this period and in this way of work 'principle' means no mere verbal tool for bringing large-scale order into the rules, it means broad generalizations which must yield patent sense as well as order if it is to be 'principle.' Finally, 'policy,' in terms of prospective consequences of the rule under consideration comes in for explicit examination by reason in a further test of both the rule and its application.")

283. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About how Statutes are to be Construed*, 3 VAND. L. REV. 395, 398 (1950) [hereinafter *Llewellyn Theory*].

284. See *Llewellyn Appeals*, *supra* note 277, at 36.

285. See *infra* Part III.C.

286. As of December 17, 2007, the "case has been cited 1,219 times," making it "one of the most enduring and influential cases in the contracts pantheon." James J. Fishman, *The Enduring Legacy of Wood v. Lucy, Lady Duff Gordon*, 28 PACE L. REV. 162, 162&n.2 (2008) [hereinafter *Fishman*].

287. See *Wood v. Lucy, Lady Duff Gordon*, 118 N.E. 214, 214 (N.Y. 1917); cf. *Dworkin Hard Cases*, *supra* note 35, at 1060 (adopting no settled-rule definition for hard cases); *Schauer Easy Cases*, *supra* note 280, at 415.

288. See *Wood*, 118 N.E. at 214; cf. *Schauer Easy Cases*, *supra* note 280, at 415.

289. See *Wood*, 118 N.E. at 214; cf. *Schauer Easy Cases*, *supra* note 280, at 415-16; *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes J., dissenting).

as a gross lapse in judgment and affront to *stare decisis* by an otherwise brilliant jurist.²⁹⁰ In other words, the case must be a hard case, in which the ultimate outcome must genuinely have been in doubt.²⁹¹ It thus reveals something new about hard cases: they arise not *because* of any of the typical symptoms of a hard case, but have a different cause altogether, namely the clash of reasonableness paradigms.²⁹²

The facts of *Wood* appear straightforward. A socialite and self-styled “creator of fashions” Lucy, Lady Duff Gordon (think perhaps of a forerunner to Paris Hilton) enters into a contract with an advertisement agency for “the exclusive right, subject always to her approval, to place her indorsements on the designs of others.”²⁹³ For the grant of the exclusive right, “she was to have one-half of ‘all profits and revenues’ derived from any contracts [her agent] might make.”²⁹⁴ The socialite, apparently cash-starved, broke the contract by placing her endorsement on fashion without the agent’s knowledge and withheld profits.²⁹⁵ Famously, the case notes that “[i]t is true that [the agent] does not promise in so many words that he will use reasonable efforts to place the defendant’s indorsements and market her designs,” but concludes that “such a promise is fairly to be implied.”²⁹⁶

What makes the facts anything other than straightforward for a judge is that each paradigmatic conception of reasonableness requires a different result. Classic formalism, from which *Wood* famously departed, would have deemed there to be no contract and would have sided with Lady Lucy.²⁹⁷ Pragmatic reasonableness reached the diametrically opposite result by implying a best efforts clause of which the agent did not run afoul.²⁹⁸ Utilitarianism similarly would have found a contract by implying a duty of good faith, but in any event would have found Wood insufficiently diligent and thus in breach.²⁹⁹

1. The Classical Formalist Solution

Wood departs from a classical formalist solution, which would have resolved the case in favor of Lady Lucy because Wood’s promise would have been deemed illusory.³⁰⁰ That is to say, Wood’s agreement with Lady Lucy did not require

290. See citations *supra* note 277.

291. See Frederick Liu, Comment, *The Supreme Court Appointments Process and the Real Divide Between Liberals and Conservatives*, 117 YALE L.J. 1947 (2008) (adopting genuine doubt definition).

292. *Llewellyn Appeals*, *supra* note 277, at 25. Compare Jeffrey M. Lipshaw, *Metaphors, Models, and Meaning in Contract*, 116 PENN ST. L. REV. 987, 1035 (2012) (“We frame differently, and thus two of us can look at the same facts and apply differing framing metaphors, long before we ever get to the point of propositional analysis. That is what makes a hard case hard.”) (footnote omitted), with Karl N. Llewellyn, *A Lecture on Appellate Advocacy*, 7 J. APP. PRAC. & PROCESS 173, 186-8 (2005) (framing *Wood* in different metaphors).

293. *Wood*, 118 N.E. at 214.

294. *Id.*

295. *Id.*

296. *Id.*

297. See discussion *infra* Part III.A.1.

298. See discussion *infra* Part III.A.2.

299. See discussion *infra* Part III.A.3.

300. *Wood*, 118 N.E. at 214.

Wood to do anything or forbear to do anything at all.³⁰¹ Because the agreement did not require anything of Wood, it did not impose detriment on him. A “detriment to the promise is a universal test for the sufficiency of consideration.”³⁰² There was no consideration given for Lady Lucy’s grant of an exclusive right and no contract would have been formed.³⁰³

Classical formalism, like its constructivist cousin, rests upon a legal first principle from which the rest of the law can be derived. The first principle of classical formalism is individual autonomy.³⁰⁴ This individual autonomy required a different rule of reasonableness than constructivism, namely one that maximally empowered parties to a contract to structure their bargain without judicial interference.³⁰⁵ The reasonable solution therefore was the one that most literally enforced what the parties objectively agreed to by the plain terms of their undertaking.³⁰⁶ In the case at bar, this was to find that there was no contract.

Given the role of Wood as a professional agent to a lay person, this result would hardly seem unfair.³⁰⁷ In fact, it is highly likely that Wood omitted a best efforts clause from the contract on purpose to achieve his own commercial ends.³⁰⁸ The brunt of legal form would have accrued to the detriment of the person best positioned to account for and to prevent it. Adding that Wood hardly was very diligent in finding marketing opportunities for Lady Lucy, it also would not leave an undeserving defendant unjustly enriched.³⁰⁹ Whatever the reason to abandon the classical formalist paradigm of reasonableness as autonomy, it was not casuistic justice and its “immediate interests exercis[ing] a kind of hydraulic pressure.”³¹⁰

301. *Id.*

302. CHRISTOPHER C LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 82 (Boston, Little, Brown, and Company 1880).

303. *Id.*

304. Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1234 (1999).

305. *Id.*; see also *Summers Pragmatic Instrumentalism*, *supra* note 20, at 865-66; *Kennedy*, *supra* note 176, at 1746-49.

306. See sources cited *supra* note 305.

307. *Wood*, 118 N.E. at 214.

308. Gerald Caplan, *Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*, 73 ALB. L. REV. 1, 40-1 (2009) (“What Cardozo didn’t know, and what generations of contracts professors did not know before Professor Victor Goldberg published his research, is that Wood knew well how to draft a best efforts clause, having done so in other contracts. His omission of a best efforts clause in the contract that he drafted was likely deliberate and not the innocent oversight that Cardozo attributed to him.”) (footnote omitted).

309. See discussion *infra* Part IV.B.3.

310. *N. Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes J., dissenting). Although constructivist formalism was not available to Justice Cardozo, it would not have removed the formalist disagreement with pragmatism and utilitarianism. A constructivist formalist would agree that a duty of good faith would have to be implied in the circumstances. See Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 417-18(1992)(explaining importance of good faith exercise of discretion for the integrity of the legal system governed by the constructivist paradigm). But the scope of the implied duty of good faith would favor Lady Lucy over Wood as Wood was highly inefficient in exploiting available commercial opportunities and thus himself a bad faith actor. See discussion *supra* Part III.A.2. Other than the pragmatic and utilitarian paradigms, constructivist reasonableness likely would have required the parties to continue performing their contract, be it at different terms to reflect changed conditions because of the principled premium placed on cooperation. See discussion in Part IV.B.3.; see also James Gordley, *Impossibility and Changed and*

2. *The Pragmatic Solution*

The pragmatic solution to the *Wood* dispute is familiar. Justice Cardozo immediately announces that the agreement can be saved by implying a promise of reasonable best efforts on the part of Wood.³¹¹ This implied promise forms part of a duty of reciprocal, objective good faith.³¹² Consistent with pragmatic reasonableness, the reason to imply such a duty is to protect the effectiveness of the parties' bargain.³¹³ In Professor Burton's terms, Lady Lucy clearly tried to recapture the foregone opportunity to market her endorsements herself and thus acted in bad faith.³¹⁴ In Professor Summers' terms, Lady Lucy manifestly evaded the spirit of the bargain.³¹⁵ Premised upon this analysis of the contract, there is a total breach on the part of Lady Lucy, given her own failure to act in good faith, entitling Wood to the damages he claimed.³¹⁶

Omitted from the discussion in *Wood*, but equally as important as the implication of the duty of good faith, is the question what efforts, precisely, must Wood undertake to act reasonably under the newly constituted contract? The question is important because the facts show that Wood failed to take advantage of readily available profitable opportunities to sell Lady Lucy's endorsements.³¹⁷ Troublingly, the opportunities must have been profitable and economical for Wood to discover, or else Wood could not have sued for damages. It must be implied in the decision that Wood's efforts were reasonable despite the existence of additional commercial opportunities he failed to exploit.

The reason that such an implication is fair is that Wood only needed to show a rational basis for his efforts. To do so, he would have needed to offer only one person who would testify that he did not fall below minimum industry practice.³¹⁸ As he did in fact create some opportunities,³¹⁹ he is likely to have found such a

Unforeseen Circumstances, 52 AM. J. COMP. L. 513, 524-25 (2004) (discussing equilibrium adjustment in the context of the UNIDROIT principles); see generally Keith A. Rowley, *A Brief History of Anticipatory Repudiation in American Contract Law*, 69 U. CIN. L. REV. 565, 629-637 (2001) (discussing preference for continued cooperation in non-common law jurisdictions).

311. *Wood*, 118 N.E. at 214.

312. See David A. Hoffman & Tess Wilkinson-Ryan, *The Psychology of Contract Precautions*, 80 U. CHI. L. REV. 395, 429 n.110 (2013) ("[T]here are of course strands of good faith doctrine written into the negotiation process. For example, courts will routinely 'fix' illusory contracts by implying some reasonable set of reciprocal obligations into the parties' terms") (citations omitted); see also *Lipshaw*, *supra* note 292, at 1020 ("From the facts recited in the opinion, we know nothing about the before-the-fact subjective understandings of Lady Duff-Gordon, the 'creator of fashions,' or Wood, who was to sell her valuable endorsements to manufacturers of dresses, millinery, and like articles.").

313. *Wood*, 118 N.E. at 214-5 ("Without an implied promise, the transaction cannot have such business 'efficacy, as both parties must have intended that at all events it should have."); see also discussion *supra* II.B.1.

314. See discussion *supra* Part II.B.2.

315. See *id.*

316. Wood never claimed for specific performance of the contract and instead treated it as a case of total breach: the *Wood* majority apparently agreed. *Wood*, 118 N.E. at 214.

317. See *id.* ("The plaintiff says that he kept the contract on his part, and that the defendant broke it. She placed her indorsement on fabrics, dresses, and millinery without his knowledge, and withheld the profits. He sues her for the damages")

318. See *supra* Part II.B.2.

319. *Wood*, 118 N.E. at 214.

person. It does not matter to this inquiry whether in this specific instance more effort on the part of the promoter could have uncovered more lucrative opportunities. This cost-benefit analysis is not immediately within the scope of good faith.

Finally, the pragmatic reasonableness paradigm was not invented by Justice Cardozo for purposes of the *Wood* decision. Pragmatist legal theory was already well represented for example in the publication of Oliver Wendell Holmes pre-dating the *Wood* decision by decades.³²⁰ In fact, the common law of contracts changed in scope to meet commercial needs and practice and thus displayed a deeply pragmatic modality almost from its very inception.³²¹ The use of pragmatic reasonableness to fashion an implied duty of good faith under the circumstances was not original in the sense of being invented out of whole cloth—it was a clever and careful adaptation of an existing paradigm of pragmatic reasonableness to new facts.³²²

3. *The Utilitarian Solution*

Utilitarian reasonableness likely would imply a duty of good faith and thus give effect to the agreement in *Wood*.³²³ But the scope of the duty of good faith would differ in an outcome determinative manner for the case: Lady Lucy can keep the profits of her own marketing efforts and potentially receives additional damages from Wood for his breach of the implied duty of good faith. The utilitarian reasonableness paradigm was recognized in nineteenth century jurisprudence and thus would have been available to Justice Cardozo.³²⁴

Wood seeks damages rather than an injunction.³²⁵ For Wood to seek damages from Lady Lucy, he would have to prove that it would have been economical for him to find the same opportunities, *i.e.*, that cost of the plaintiff's own performance would have been less than the sum secured by Lady Lucy.³²⁶ The opportunities were in fact significant—one involving clothing for Sears, another an advertisement for a motor company.³²⁷ This fact in its own right is problematic for

320. See *Summers Pragmatic Instrumentalism*, *supra* note 20, at 872.

321. See, e.g., E. ALLAN FARNSWORTH, *CONTRACTS* 11-19 (3d ed. 1999) (discussing the early development of the enforcement of promises at common law); ANTONIO GAMBARO & RODOLFO SACCO, *SISTEMI GIURIDICI COMPARATI* 132-33, 256 (2d ed., 2002).

322. See Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379, 1397-99 (1995); Larry A. DiMatteo, *Cardozo, Anti-Formalism, and the Fiction of Noninterventionism*, 28 PACE L. REV. 315 (2008).

323. See generally Sidgwick, *supra* note 35, at 17, 302-04.

324. Cf., James F. Moseley, *General Overview of the Nature and Origin of Damages, Including a General Historical and Philosophical Review of Damages under the Tort System*, 72 TUL. L. REV. 383, 410-11 (1997).

325. *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (1917). In fact, Wood is unlikely to receive an injunction under a utilitarian reasonableness paradigm. See discussion *infra* III.B.

326. Leaving aside incidental and consequential damages, he would have to prove that the loss in value to him by Lady Lucy's failure to perform exceeded the cost avoided by not having to perform. See RESTATEMENT (SECOND) CONTRACTS § 347 (1981); see also *id.* § 347 cmt. e ("The injured party is limited to damages based on his actual loss caused by the breach."); RESTATEMENT (FIRST) CONTRACTS § 329 cmt. b (1932) (same rule).

327. Fishman, *supra* note 286, at 162-63.

Wood: it tends to show that he profitably could have been more diligent in marketing Lady Lucy's brand than he actually was.³²⁸ He should have found those opportunities for the purely selfish reason to make more money himself. In other words, it shows that Wood's own performance of the contract was inefficient.³²⁹ Applying a utilitarian calculus to the transaction therefore reveals that Wood would have breached his obligation of reasonable efforts first thus entitling Lady Lucy to act to mitigate her own damages caused by Wood's failure to perform his bargain in good faith.³³⁰

Utilitarian reasonableness thus reaches a result that is even more in favor of Lady Lucy than classic formalism. She loses the legal argument that there was no contract. This legal loss inures to her financial benefit: not only does she get to keep the money she has made from finding her own marketing opportunities as mitigation of damages for Wood's breach, it is possible that her agent owes her more money for want of good faith. In any event, it is likely that the court would side with her that there was total breach by Wood on account of his bad faith.³³¹

4. Re-Defining Hard Cases

Examination of available reasonableness paradigms reveals the problem faced by Justice Cardozo when writing *Wood*. There was no true disagreement that as a matter of mechanical application of precedent, the rule premised upon the formalist paradigm had the best pedigree—the decision in fact concedes as much.³³² Instead, the disagreement was whether the apparently most locally applicable legal rule was still “reasonable.” Problematically, the available reasonableness paradigms disagreed as to the appropriate outcome for the case, creating genuine ambiguity on this point. No undue “hydraulic pressure” of a disproportionately sympathetic party simplified the choice between them.³³³ The case thus was truly hard to decide.

The case more importantly demonstrates that other definitions of hard cases ultimately can be reduced to the same problem. Hard cases typically cite the absence of a directly applicable rule or a linguistic ambiguity in its potential application as a symptom of a hard case.³³⁴ This symptom upon closer analysis is not helpful, as most any fact situation will be “new” in some way and thus run into one of these problems. In most instances, it is simply that this potential gap or ambiguity is irrelevant as existing law consistently can be extended to new facts no matter which reasonableness paradigm is applied. A hard case does not reveal that there is no rule that is perfectly applicable to the problem—this is true for almost any case.³³⁵ It reveals that there is an indeterminacy in the legal decisionmaking process itself because multiple results are legally conceivable or would appear

328. Cf. Megan Richardson & David Tan, *Wood v. Duff Gordon and the Modernist Cult of Personality*, 28 PACE L. REV. 379, 382 (2008).

329. See generally *supra* Part II.A.I.

330. See generally *supra* Part II.A.I.

331. See generally Caplan, *supra* note 308, at 40-41; Richardson & Tan, *supra* note 328, at 383.

332. See *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (1917).

333. See *N. Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes J., dissenting).

334. *Schauer Easy Cases*, *supra* note 280, at 415; Cf. *Dworkin Hard Cases*, *supra* note 35, at 1060.

335. *Llewellyn Appeals*, *supra* note 277, at 24-25.

reasonable to a well-trained lawyer.³³⁶

It is also in this sense that hard cases arise when results are “hard to swallow.”³³⁷ When the result is compared to different reasonableness paradigms, it becomes clear that the decision is either out of synch with the basic values of the legal system (and thus inconsistent with formalism), out of touch with actual practice and moral common sense (and thus inconsistent with pragmatism), or imposes a cost-prohibitive burden on society compared to other possible solutions (and thus inconsistent with utilitarianism). The decision again is difficult because any resolution of the problem is unreasonable in a different way.

The discussion so far has led to a different, simpler, and thus better definition of hard cases and what happens when they are resolved. It also demonstrates that what resolves a hard case “incorrectly” is to choose a result that is ultimately inconsistent with any of the reasonableness paradigms available to the lawyer.³³⁸ Such a decision would cause “even well settled principles of law [to] bend.”³³⁹ But, as *Wood* has shown, hard cases do not have to do so.³⁴⁰ In fact, most hard cases do not do so and simply pass unnoticed precisely because they remain consistent with one or two reasonableness paradigms already inherent within the law.³⁴¹

B. How Does Law Develop? The Theory of Efficient Breach

The second hard case showcases that the law develops harmoniously when rule application is questioned within the scope of the pragmatic, utilitarian, and formalist paradigms in the context of efficient breach. The case is adapted from the arbitration between *Mobil Cerro Negro Ltd. v. Petroleos de Venezuela, S.A.*³⁴² It provides a good example of how utilitarian reasonableness would come to the conclusion that there should be an efficient breach when pragmatic and formalist reasonableness would strongly disagree.³⁴³

The facts of the arbitration, as modified, again appear straightforward. *Petroleos de Venezuela (PDVSA*)*,³⁴⁴ the Venezuelan national oil company, entered into a joint venture agreement with a subsidiary of Exxon Mobil, *Mobil Cerro Negro (MCN*)* in October 1997, known as the “Association Agreement.”³⁴⁵ The Association Agreement was concluded at a time of significantly lower oil

336. *See id.*

337. *Schauer Easy Cases*, *supra* note 280, at 415.

338. *See Llewellyn Appeals*, *supra* note 277, at 23-26.

339. *See N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes J., dissenting).

340. *See supra* Part III.A.2.

341. *See Schauer Formalism*, *supra* note 172, at 518-19 (noting that the choice of an escape route to avoid a formal rule would not seem odd to the common lawyer in the right circumstances).

342. *See generally Mobil Cerro Negro Ltd. v. Petroleos de Venezuela, S.A.*, (ICC Int’l Ct. Arb. 2011). The agreement was governed by the law of Venezuela. *Id.* at 62 (providing a fact scenario that, with slight modifications, is an excellent example for the theory of efficient breach in the common law of contracts, and how it differs from the dominant pragmatic approach discussed in Part II).

343. *See infra* Part II.

344. Because of the modifications to the fact scenario to better illustrate the differences between the efficient breach and the traditional contract law approach, the names of the companies involved have been marked with an asterisk.

345. *Mobil Cerro Negro Ltd., S.A.* at 29.

prices.³⁴⁶ After a change in government in Venezuela, and a significant increase in oil prices, PDVSA* sought to renegotiate the terms of the joint venture agreements with MCN* and other agreements like it, threatening to expropriate all venture partners who resisted the terms offered.³⁴⁷ MCN* did not agree to a renegotiation; its assets were in fact expropriated and arbitration commenced.³⁴⁸ The crude oil to be produced from the oil fields in question has a unique makeup to which the majority of U.S. refining capacity is calibrated.³⁴⁹ The ostensible reason for the expropriation was for PDVSA* to take for itself a larger share of the profits of the joint venture generated by larger oil prices.³⁵⁰ For purposes of this hard case, let us assume that the new partner would be able to produce more crude oil from the wells in question.

The facts of the case again reveal a deeper legal tension. They show that the theory of efficient breach is a legitimate answer to the hard case precisely because it stays within the confines of existing reasonableness paradigms and in fact actively claims historical pedigree to receive recognition.³⁵¹ It is thus beside the point to argue that efficient breach is not a legitimate resolution to a contract law problem because it does not adhere to the pragmatic reasonableness paradigm.³⁵² Resolving this deeper legal challenge to the pragmatic paradigm requires something else entirely: a realignment of the pragmatic and formalist reasonableness paradigms to address and justify the inefficiency revealed by the efficient breach hypothesis or an adoption of the utilitarian paradigm if no such justification is possible.³⁵³

1. Probing Pragmatic Reasonableness

Pragmatic reasonableness supports the traditional common law resolution to the PDVSA* dispute. PDVSA*'s attempt to find another joint venture partner is a classic example of seeking to recapture a foregone opportunity.³⁵⁴ It thus runs afoul of pragmatic reasonableness and would be treated as a bad faith act.³⁵⁵ Under the circumstances, a court would likely enjoin the attempt by PDVSA* to switch

346. *Id.* at 18-22.

347. *Id.* at 18-20.

348. *Id.* at 19.

349. See Emily A. Witten, *Arbitration of Venezuelan Oil Contracts: A Losing Strategy?*, 4 TEX. J. OIL GAS & ENERGY L. 55, 79 (2008-2009). Cf. Jim Landers, *Crumbling Venezuelan Oil Sector Expected to Remain Hostile to U.S. Investment*, DALLAS MORNING NEWS, (Mar. 6, 2013, 8:35 PM), <http://www.dallasnews.com/business/energy/20130306-crumbling-venezuelan-oil-sector-expected-to-remain-hostile-to-u.s.-investment.ece>; Thomas C. Hayes, *Market Place; Southland's Venezuela Deal*, N.Y. TIMES (Feb. 24, 1986) <http://www.nytimes.com/1986/02/14/business/market-place-southland-s-venezuela-deal.html> (noting calibration of U.S. refining).

350. Mobil Cerro Negro Ltd., S.A. at 18-20.

351. See *infra* Part III.B.2

352. See, e.g., Melvin A. Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559, 576 (2006) [hereinafter *Eisenberg Disgorgement*] (demonstrating that under the pragmatic paradigm of reasonableness, recapturing the ability to locate an over-bidder over a price that was already contractually agreed upon is using a termination provision in a contract in bad faith).

353. See *infra* Part III.B.2

354. See *Burton*, *supra* note 3, at 390-91.

355. See *supra* Part II.B.2

joint venture partners.³⁵⁶ Its remedial premise for doing so is that MCN* would suffer a harm that is not adequately compensable with money damages.³⁵⁷

Utilitarian reasonableness fundamentally departs from this premise. A classic utilitarian excuse against keeping one's word is that fulfillment is "more harmful to oneself than beneficial" to one's counterparty.³⁵⁸ A premise for this excuse is that the respective harm and benefit of fulfillment as a matter of principle is measurable in terms of money. This principle may be undercut as a matter of proof if there is no ready market for the object of the contract.³⁵⁹ This question of valuation would not arise in the context of the PDVSA*-MCN* transaction, as there is a list price for the commodity in question (Venezuelan heavy crude), as well as reasonable certainty as to the projected production volume for which compensation would be due.³⁶⁰ These two factors permit a ready calculation of the buy-out value which PDVSA* would have to pay to substitute a different joint venture partner. It presumably would pay only if it would be significantly more efficient to do so.

Formalist-constructivist reasonableness takes a middle position between the pragmatic and the utilitarian reasonableness paradigm in this kind of a fact pattern.³⁶¹ Breach under the circumstances is inconsistent with a duty of full and reciprocal cooperation.³⁶² It is even more so as it is propagated by coercive means.³⁶³ At the same time, formalist-constructivist reasonableness would not permit MCN* to keep unanticipated windfall profits.³⁶⁴ Its exclusivity would permit it to take advantage of PDVSA*'s resources at a price that would have been negotiated differently had current market conditions been anticipated.³⁶⁵ Consequently, a court would order the contract to be performed, but restore the economic balance at the outset of the agreement by adapting the pricing formula to

356. See *Eisenberg Disgorgement*, *supra* note 352, at 576-77 (discussing good faith in the U.S. law of contracts).

357. See RESTATEMENT (SECOND) OF CONTRACTS §§ 359 cmt. a, 360(c), 364(2) (1981) (discussing injunctions and adequacy of damages in the common law of contracts).

358. *Sidgwick*, *supra* note 35, at 17.

359. *Walgreen Co. v. Sara Creek Property Co.*, B.V., 966 F.2d 273, 278 (7th Cir. 1992). See also Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CALIF. L. REV. 975, 1001 (2005) [hereinafter *Eisenberg Efficient Breach*] (discussing the decision in *Walgreen*).

360. It is of course true that the value of oil fluctuates. Using the appropriate list price is nevertheless the appropriate value because the breaching party is exercising an option to buy out its partner at current value and assumes the risk of downward fluctuations. The breaching party was not forced to buy out its partner, i.e., it cannot honestly complain that the price does not reflect the value of the commodity. The non-breaching party may legitimately believe that the value of the commodity would increase further and could submit valuations to that effect. Absent convincing proof however, the market price would be just that—the fair value of the commodity that a willing buyer would pay a willing seller at the time of the transaction in question.

361. See Maud Piers, *Good Faith in English Law – Could a Rule Become a Principle?*, 26 TUL. EUR. & CIV. L.F. 123, 131 (2011) (discussing how "the idea of cooperativism . . . is said to undergird the general notion of good faith in European (continental) contract law").

362. See *supra* Part II.C.1; see also *Rowley*, *supra* note 310, at 629-37.

363. See *supra* Part II.C.1

364. Cf. Int'l Inst. for the Unification of Private Law [UNIDROIT], *Principles of Int'l Commercial Contracts*, art. 6.2.2 (2004).

365. See, e.g., *Gordley*, *supra* note 310, at 524-25.

the new market circumstances through equilibrium adjustment.³⁶⁶

PDVSA* is another instance in which there appears to be a basic inconsistency between the common law's core reasonableness paradigms. All three paradigms reach fundamentally inconsistent results. Again the choice of the appropriate paradigm is not likely to be moved significantly by an irresistible swell of sympathy for any of the litigating parties. In short, it is a situation of legal equipoise much in the same way as *Wood* was.

2. *The Source of the Efficient Breach Logic*

The theory of efficient breach addresses this clash of reasonableness paradigms. Its proponents argue that "if the promisor's gain from breach, after payment of expectation damages, will exceed the promisee's loss from breach," breach of contract is desirable.³⁶⁷ Proponents of the efficient breach do not simply state a policy preference, but instead argue for the adoption of utilitarian reasonableness from the realm of torts to govern part of the law of contract, as well.³⁶⁸ Their point is thus not to criticize the law from the outside, but to change it from the inside. It is a legitimate(d) argument within the common law.

Proponents of efficient breach also give historical reasons for favoring efficient breach over its pragmatic competitor. Richard Posner, the leading proponent of efficient breaches, in a recent article expressly relies upon Oliver Wendell Holmes' theory of contract law to formulate his own theory of good faith in contract law.³⁶⁹ Drawing on Holmes' view that contract law provided a faultless regime of liability, Judge Posner submits that good faith, consistent with efficient breach theory, "is just a duty to avoid exploiting the temporary monopoly position that a contracting party will sometimes obtain during the course of performance" created by the fact that "one party may unavoidably deliver himself into the power of the other party for a time during the performance of the contract."³⁷⁰ This historical reasoning again underscores that efficient breach in fact stands for continuity in the law as a whole—rather than changing it—despite the radically different results reached by it in hard cases.

Opponents of efficient breach frequently argue that efficient breach is inconsistent with the predominant, pragmatic reasonableness paradigm of the common law of contracts.³⁷¹ This criticism of efficient breach meets Judge Posner's attempts to provide a pragmatic proof for the principle of efficient

366. See Gordley, *supra* note 310, at 524-25.

367. Eisenberg *Efficient Breach*, *supra* note 359, at 997. See also Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1350 (2009) [hereinafter *Posner Contract Breaker*].

368. See, e.g., Marco Jimenez, *Finding the Good in Holmes's Bad Man*, 79 FORDHAM L. REV. 2069, 2092 (2011).

369. See *Posner Contract Breaker*, *supra* note 367, at 1350.

370. *Id.* at 1358.

371. See, e.g., Eisenberg *Disgorgement*, *supra* note 355, at 576 (arguing from pragmatic reasonableness); see also Andrew Kull, *Disgorgement for Breach, the 'Restitution Interest,' and the Restatement of Contracts*, 79 TEX. L. REV. 2021, 2044-53 (2001) (arguing from both pragmatic reasonableness and policy); Daniel Markovits & Alan Schwarz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939, 1944-45 (2011) (arguing as a matter of policy).

breach.³⁷² This line of argument does not address the underlying problem that the theory of efficient breach reveals: in the factual circumstances to which efficient breach applies, there is a clash of the pragmatic, utilitarian, and formalist reasonableness paradigms.³⁷³

Remarkably, opponents of efficient breach have also responded in a different way to the challenge: they re-examine the “principle” or paradigm requiring the rejection of efficient breach.³⁷⁴ This re-examination may yet reveal that community standards have shifted sufficiently to warrant changing the rules of remedies within the pragmatic reasonableness paradigm—i.e., it may no longer be true that an efficient breach would be considered an attempt to recapture foregone opportunities within the relevant community.³⁷⁵ Additionally, it may be necessary to defend the inefficiency of the community standards upon the basis of legal value, as some authors have done.³⁷⁶ The rule would no longer be defended because it reflects community standards;³⁷⁷ common practice would be defended as reflecting a deeper political value in its own right and thus subsumed within the constructivist framework.³⁷⁸ If either route fails, the logical conclusion is that the cost imposed by the current rule is too high. In this case, the utilitarian paradigm would prevail and govern this particular area of the common law of contracts.

Put differently, legal development occurs not because of outside policy pressures but because the different paradigms of reasonableness create a stress field *within* the common law. Hard cases make this stress field visible. When a critical mass of similar hard cases arises and continuously probes the inconsistency between different reasonableness paradigms, these hard cases can eventually force a paradigm shift.³⁷⁹ Alternatively, the hard cases can cause a change within either the pragmatic or constructivist paradigms better to reflect actual community standards or the fundamental value upon which the legal system is formally based.³⁸⁰ In this sense, Karl Llewellyn’s ‘grand style’ correctly predicted the symptoms of change in the common law as the need to check up on precedent by reference to principle.³⁸¹ But different from what he had surmised, this return to principle is brought about by an entirely internal structural element of the common law rather than an external force acting upon it.³⁸²

372. See Posner *Contract Breaker*, *supra* note 367, at 1352.

373. See *supra* Part III.B.1.

374. See Kull, *supra* note 371, at 2044-53 (critiquing efficient breach); Markovits & Schwartz, *supra* note 371, at 1944-45 (same); Eisenberg *Efficient Breach*, *supra* note 359, passim (same); cf. Llewellyn *Appeals*, *supra* note 277, at 36.

375. See *supra* Part II.B.2.

376. See *supra* citations in note 374.

377. See *supra* Part II.B.2.

378. See *supra* Part II.B.2.

379. For the concept of critical mass, see generally Adeno Addis, *The Concept of Critical Mass in Legal Discourse*, 29 CARDOZO L. REV. 97 (2007); see also Llewellyn *Appeals*, *supra* note 277, at 25.

380. Because of its focus on efficiency, the utilitarian paradigm is unique in its constancy and acts as a check on the other two. See *supra* Parts II.A, II.B.1, and II.C.1.

381. Llewellyn *Appeals*, *supra* note 277, at 36.

382. Llewellyn *Theory*, *supra* note 283, at 396 (“‘Precedent’ guided, but ‘principle’ controlled; and nothing was good ‘Principle’ which did not look like wisdom-in-result for the welfare of All-of-us.”). For a detailed discussion of this process, see discussion in Part 0.

C. *The Reasonableness Problem in Fisher v. University of Texas*

The final hard case showcases the significant danger of misunderstanding this relationship between reasonableness paradigms: *Fisher v. University of Texas*.³⁸³ The Court's majority opinion facially rejects "good faith" as the appropriate standard for determining whether or not a state university's admission policy considering race violates the Equal Protection Clause.³⁸⁴ This holding is both confusing and confused. As discussed in this Part, the *Fisher* majority only *rejected* a good faith standard premised upon pragmatic reasonableness.³⁸⁵ The *Fisher* majority in fact *adopted* a good faith standard premised upon the constructive reasonableness paradigm.³⁸⁶ A mechanical application of the decision therefore is ultimately unworkable. The decision only makes sense if, rather than rejecting "reasonableness" as a relevant factor, it changed the meaning of what is "reasonable" in the context of an Equal Protection analysis.

1. *How to Solve a Problem Like Ms. Fisher*

Ms. Fisher, a Caucasian Texas resident, unsuccessfully applied for admission to the University of Texas and thereupon sued.³⁸⁷ The University of Texas admits Texas residents automatically if they are in the top ten percent of their high school class.³⁸⁸ Automatic admission accounts for the assignment of more than eighty percent of available places for Texas residents.³⁸⁹ The admission decision for the remaining applicants relies upon a graph drawn on the basis of an Academic Index (AI), compiling GPA, test scores etc., on one axis and a Personal Achievement Index (PAI), set on the other axis, which "measures a student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances"³⁹⁰ Following the Supreme Court decision in *Grutter v. Bollinger*, the PAI took race into account but did not assign race an independent numerical value.³⁹¹

The Supreme Court granted certiorari upon confirmation of a summary judgment for the university by the United States Court of Appeals for the Fifth Circuit.³⁹² The Court recounted that the appellate decision affirming the summary judgment held that the "petitioner could challenge only 'whether [the University's] decision to reintroduce race as a factor in admissions was made in good faith.'"³⁹³ It noted that "in considering such a challenge, the [Fifth Circuit] would 'presume the University acted in good faith' and place on petitioner the burden of rebutting

383. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

384. *Id.* at 2421.

385. See Cass Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 78(1996) [hereinafter *Sunstein Undecided*] ("[R]ational basis' review is rooted in a presumption of good faith, rebutted only in rare instances."); cf. definition of pragmatic reasonableness, *supra* Part II.B.1.

386. See *supra* Part III.C.2.

387. *Fisher*, 133 S. Ct. at 2417.

388. *Id.* at 2416.

389. *Fisher v. Univ. of Tex.*, 631 F.3d 213, 229 (5th Cir. 2011).

390. *Fisher*, 133 S. Ct. at 2415.

391. *Id.* at 2416.

392. *Id.* at 2417.

393. *Id.* at 2420.

that presumption.”³⁹⁴ The Court highlighted that the Fifth Circuit had “attempt[ed] only to ‘ensure that [the University’s] decision to adopt a race-conscious admissions policy followed from [a process of] good faith consideration’” concluding that “[b]ecause ‘the efforts of the [u]niversity have been studied, serious, and of high purpose’ . . . the use of race in the admissions program fell within ‘a constitutionally protected zone of discretion.’”³⁹⁵

The Supreme Court vacated the judgment in favor of the University of Texas and remanded the case for further proceedings consistent with its decision.³⁹⁶ The Court rejected the Fifth Circuit’s good faith analysis because “the mere recitation of a ‘benign’ or legitimate purpose for a racial classification is entitled to little or no weight.”³⁹⁷ Rather, “[s]trict scrutiny does not permit a court to accept a school’s assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.”³⁹⁸ The Court concluded that “[t]he District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University’s good faith in its use of racial classifications and affirming the grant of summary judgment on that basis.”³⁹⁹

The Court explained that instead, “it remains at all times the University’s obligation to demonstrate, and the Judiciary’s obligation to determine, that admissions processes ‘ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application,’” and that the “reviewing court verify that it is ‘necessary’ for a university to use race to achieve the educational benefits of diversity.”⁴⁰⁰ This standard requires that the “reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.”⁴⁰¹

2. Constructivist Reasonableness of Affirmative Action

Whatever its facial criticism of the Fifth Circuit decision, the *Fisher* Court itself adopted a good faith test to determine whether an affirmative action program is compatible with the Equal Protection Clause. This test balances an individual right (non-discrimination in the Equal Protection context vs. privacy in the Fourth Amendment context) against a compelling state interest (making available high quality public education in the Equal Protection context vs. security in the Fourth Amendment context). This balance is struck on the basis of constructivist reasonableness.

The Court anchors its discussion of affirmative action in a fundamental individual right. “‘Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people,’ and therefore ‘are contrary to our

394. *Id.*

395. *Id.*

396. *Id.* at 2422.

397. *Id.* at 2421 (internal quotation marks omitted).

398. *Id.*

399. *Id.*

400. *Id.* at 2420.

401. *Id.*

traditions and hence constitutionally suspect.”⁴⁰² This fundamental individual right is applied to the educational setting centrally by requiring that a university applicant must be “evaluated as an individual.”⁴⁰³ To be evaluated as an individual, the applicant cannot be treated as a means to the end of achieving racial diversity in the university: “[t]hat would amount to outright racial balancing, which is patently unconstitutional.” ‘Racial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’”⁴⁰⁴ Instead, to treat an applicant “as an individual,” the university must treat the applicant as an end in him or herself.⁴⁰⁵

This analysis follows the same logic as the critical paragraph in the exemplary decision for constructive reasonableness, *Kyllo*.⁴⁰⁶ *Kyllo* anchors its discussion in a criterion “with roots deep in the common law, of the minimal expectation of privacy.”⁴⁰⁷ *Fisher* also anchors its discussion in a criterion rooted in the American public’s traditions as a free people.⁴⁰⁸ It then applies this axiomatic principle to a new situation: in *Kyllo*, the use of a new technology by law enforcement not yet tested by the Supreme Court; in *Fisher*, the use of a yet untested state university admissions program considering race as a factor.⁴⁰⁹

Like *Kyllo*, the *Fisher* majority further protects a compelling state interest. In *Kyllo*, this interest was the use of police power consistent with original balance of privacy and security in Year Zero.⁴¹⁰ In *Fisher*, the interest is to make available to state residents a high quality public education consistent with state educational policy.⁴¹¹ *Fisher* quotes *Grutter* that “a university’s ‘educational judgment that [. . .] diversity is essential to its educational mission is one to which we defer.’”⁴¹² To achieve this goal, a university does not need to exhaust “every conceivable race-neutral alternative,” but the university must have considered “workable race-neutral alternatives,”⁴¹³ which must come “at a tolerable administrative expense.”⁴¹⁴ Further, “a court can take account of a university’s experience and expertise in adopting or rejecting certain admissions processes,” even if such taking account is by no means dispositive.⁴¹⁵

402. *Id.* at 2418 (citations omitted).

403. *Id.*

404. *Id.* at 2419.

405. *See id.* at 2420.

406. *Kyllo v. United States*, 533 U.S. 27 (2001). *See also* discussion *supra* Part II.C.2.

407. *Kyllo*, 533 U.S. at 34 (2001); accord *Kerr Equilibrium*, *supra* note 22, at 498 (“On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.”).

408. *Fisher*, 133 S. Ct. at 2418-19.

409. Compare *Kyllo*, 533 U.S. at 34-35 (discussing change in law enforcement technology), with *Fisher*, 133 S. Ct. at 2417 (discussing new form of university admissions program considering race as a factor).

410. *See Kyllo*, 533 U.S. at 34-35 (discussing the original privacy/security balance struck by the constitution); *see also Kerr Equilibrium*, *supra* note 22, at 497-98 (discussing balancing in light of a hypothetical Year Zero position).

411. *See Fisher*, 133 S. Ct. at 2419 (discussing educational judgment and racial diversity).

412. *See id.*

413. *Id.* at 2420 (citation omitted).

414. *Id.*

415. *Id.* (“True, a court can take account of a university’s experience and expertise in adopting or rejecting certain admissions processes. But, as the Court said in *Grutter*, it remains at all times the

The *Fisher* interest, like *Kyllo*, can be reformulated in terms of a hypothetical original position in Year Zero.⁴¹⁶ In this original position, people writing the original social contract would have to decide upon the value of a public education system in the abstract. In the specific context of the U.S. Constitution, contemporaneous documents noted that “[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”⁴¹⁷ The balance, thus is one of allowing the state to provide the kind of education it deems conducive to good government in a free society while at the same time protecting the individual rights of those seeking admittance to state educational institutions.⁴¹⁸ The *Fisher* Court applied this balance to the admissions program at issue in a specific affirmative action case.

Fisher results in a reasonable college admission program when the reviewing court is ultimately “satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.”⁴¹⁹ Under *Fisher*, courts apply the constructivist criterion of reasonableness to balancing tests more generally. Analytically, a court would evaluate an admissions program from the point of view of an original position⁴²⁰ that assumes a scarcity of openings at the most desirable university programs.⁴²¹ Further, one does not know which race, socio-economic background etc. he or she will be born into.⁴²² Because of the scarcity of places at the most desirable universities, it would not be possible to admit everyone—i.e., there will be rejected applicants.⁴²³ Thus, one has to choose the admissions program that most benefits even the inevitably rejected applicant.⁴²⁴ The race-neutral alternative would thus have to be worse from the point of view of the original position than the program adopted by the university.

The *Fisher* court thus applies its own constructivist good faith test. Treating an applicant not as an individual but as a demographic specimen is not to deal with him or her in good faith. This good faith test is applied not to the creation of the admissions program, but is applied to the specific admissions decision to which it leads.

University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes ‘ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.’”) (citations omitted).

416. See *Kerr Equilibrium*, *supra* note 22, at 497-98 (discussing how *Kyllo* sets out a constructivist balance by reference to a Year-Zero original position).

417. The Confederate Congress Ordinance of 1787: The Northwest Territorial Government, Art. III (1787) (current version at 1 U.S.C. at LV (2006)). See generally Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. ST. L.J. 409 (2013) (discussing the importance of the ordinance); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92 (2013) (discussing the value of education in the constitutional setting).

418. See *Kerr Equilibrium*, *supra* note 22, at 497-98 (setting out a similar balancing analysis in the context of Fourth Amendment jurisprudence).

419. *Fisher*, 133 S. Ct. at 2420.

420. See discussion *supra* Part II.C.1.

421. See discussion *supra* Part II.C.1.

422. See *supra* Part II.C.1.

423. See *supra* Part II.C.1.

424. See *supra* Part II.C.1.

3. *The Source of the Fisher Confusion*

The *Fisher* decision is confusing because it appears to reject a good faith standard established in *Grutter*⁴²⁵ without replacing it with a clear alternative standard of its own. As the previous Part showed, this initial impression is misleading on both counts. The decision does in fact rely upon a standard of good faith that is consistent with the *Grutter* decision.⁴²⁶ It requires a constructivist good faith analysis of the application decisions taken by a university.⁴²⁷ It moves away from an analysis of the good faith in adopting the admissions program in question.

What makes *Fisher* confusing is its indiscriminate treatment of “good faith” when it intends to reject only a certain kind of good faith. The good faith rejected by *Fisher* concerns the assertion of reasons by the school as to why its program complies with the requirements of equal protection.⁴²⁸ The appellate court used the good faith analysis in order to determine whether the program fell within a “constitutionally protected zone of discretion.”⁴²⁹ This type of good faith is borrowed from the law of contracts, which deals similarly with the question of whether a party exercised discretion in good faith in the context of best efforts clauses, for example.⁴³⁰ The question, therefore, is whether other similarly situated actors would understand the reasons proposed by the university to support its program, i.e., whether the program had a rational basis.⁴³¹ It is this type of good faith that is the target of rebuke by the Supreme Court.

The failure to discriminate between different forms of good faith will very likely lead to future misapplication of *Fisher*. *Fisher*’s rejection of a good faith analysis will likely hide from view that the decision still engages in a good faith balancing test. This balancing test still intends to take seriously both the resources of the university and its educational goals.⁴³² The problem of rejecting good faith is that the legitimate interests of the university are likely not going to be sufficiently considered in future decisions because of the confusing statement in *Fisher* that “the [u]niversity receives no deference” with regard to the tailoring of its admissions program to meet legitimate diversity goals.⁴³³ This overbroad statement specifically hides from view that the university need only consider “workable” solutions that impose “tolerable administrative expense”—with “workable” and “tolerable” both introducing a deference standard that would be precluded by the overbroad statement upon an initial reading of the decision.⁴³⁴

Greater precision in the treatment of good faith would avoid precisely this

425. See generally *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

426. See *supra* Part III.C.2.

427. See *supra* Part III.C.2.

428. See *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2421 (2013) (“It must be remembered that ‘the mere recitation of a benign or legitimate purpose for a racial classification is entitled to little or no weight.’ Strict scrutiny does not permit a court to accept a school’s assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.”) (citation omitted) (internal quotation marks omitted).

429. See *Fisher v. Univ. of Tex.*, 631 F.3d 213, 231 (5th Cir. 2011).

430. See *Miller & Perry Contracts*, *supra* note 3, at 727.

431. Compare *supra* Part II.B.2, with *Sunstein Undecided*, *supra* note 385, at 78.

432. See *Fisher*, 133 S. Ct. at 2420.

433. See *id.*

434. See *id.*

problem. An understanding of the diversity of reasonableness paradigms, and thus good faith, is a necessary condition for such greater precision. The Court's affirmative action jurisprudence, therefore, will improve only once it admits to the necessary diversity of the law which it is tasked to apply.

IV. THE NECESSITY OF DIVERSITY

Parts I and II established the fact that the common law relies upon diverse reasonableness paradigms. Part I set out that these paradigms are premised upon fundamentally different theoretical starting points. Part II theorized that hard cases arise when specific cases cause these paradigms to conflict with each other. It explained how the paradigm clash in hard cases causes the law to develop. It finally showcased that failure to understand the inherent diversity of reasonableness in the common law can lead to significant confusion and misunderstanding. The question remains whether the diversity of reasonableness paradigms is an accident or a necessary feature of the common law. This Part submits that the diversity of the common law is both necessary and desirable.

A. *The Axiomatic Nature of Reasonableness*

Diversity within the common law is narrowly “necessary” because reasonableness is an axiomatic principle.⁴³⁵ Reasonableness is an axiomatic principle in the logical sense. An axiom in logic is “an indemonstrable first principle, rule, or maxim that has found general acceptance or is thought worthy of common acceptance whether by virtue of a claim to intrinsic merit or on the basis of an appeal to self-evidence.”⁴³⁶ Consequently, the legal command that people ought to act “reasonably” cannot be reduced to some other principle.⁴³⁷ It relies precisely on the intuitive appeal that it is self-evident that people ought to treat each other reasonably.⁴³⁸

The diversity of reasonableness paradigms within the common law does not permit one to “split the difference” between the various conceptions of reasonableness and arrive at a single, overarching principle.⁴³⁹ A disagreement between first principles cannot be bridged.⁴⁴⁰ Any attempt at reconciliation of the common law along the lines of some higher order first principle, therefore, must fail.

Further doctrinal refinement also would fail to reduce the common law to a single overarching principle. Such refinement would be fruitful only if no coherent conception of reasonableness had emerged.⁴⁴¹ This is not the case—several

435. See, e.g., Finnis, *supra* note 27, at 930.

436. *Axiom*, Encyclopedia Britannica, <http://www.britannica.com/EBchecked/topic/46193/axiom> (last visited Aug. 1, 2013); see, e.g., John Stick, *Can Nihilism be Pragmatic?* 100 HARV. L. REV. 332, 346 (1986).

437. *Id.*

438. *Id.*

439. If this were not the case, reasonableness would not be “axiomatic.”

440. Cf. Rawls *Justice*, *supra* note 68, at 62-63.

441. See generally Kuhn, *supra* note 31, at 81, 96-105, 108 (discussing paradigm development in the scientific context).

coherent conceptions of reasonableness have emerged.⁴⁴² These conceptions require fundamentally inconsistent results in hard cases.⁴⁴³ Further doctrinal research, therefore, will confirm rather than refute the necessary multiplicity of reasonableness paradigms in the common law.⁴⁴⁴

The only way to overcome the diversity of reasonableness paradigms within the common law is to choose one set of first principles and reject the others. Doing so would require a significant change in current jurisprudence. Choice of a pragmatist paradigm would upend, for example, tort law, constitutional criminal procedure, and equal protection jurisprudence.⁴⁴⁵ Choice of a utilitarian conception would also upend the common law of contracts and first amendment jurisprudence.⁴⁴⁶ Choice of a constructivist prism would undercut the strong value of responsiveness to community standards, which still underpins much of U.S. commercial law.⁴⁴⁷

Such a choice could not be made “within” the law. There is no legal criterion which would permit the choice of any one conception of reasonableness over the others.⁴⁴⁸ The legal means to choose between outcomes in hard cases is precisely by reference to a criterion of reasonableness.⁴⁴⁹ The multiplicity of reasonableness paradigms renders such an attempt either circular or futile.⁴⁵⁰ The choice of a single reasonableness paradigm thus is political and political only.

Consequently, formalism, including constructivism is not a tenable general theory of law. The existence of multiple conceptions of reasonableness deprives formalism of the fixed point within the law according to which one could engage in the Herculean task of the consistent reorganization of the common law as a whole.⁴⁵¹ Formalism rejects that the choice of the first principle is a purely political one in which the law would become complicit.⁴⁵² As this is precisely what is needed to overcome the diversity of reasonableness, formalism fails as a universal theory of law.

B. The Function of Reasonableness in the Common Law

The reason that formalism ultimately fails also defeats pragmatism as a tenable general theory of law. Formalism failed not because there was no first principle from which the law could be logically reconstructed, as pragmatism would submit;⁴⁵³ it failed because there were too many inconsistent first principles

442. See generally *supra* Part II

443. See *supra* Part III.A.

444. See, e.g., *supra* Part II.B.

445. See generally *supra* Part II

446. See generally *supra* Part II

447. See generally *supra* Part III.A.

448. See *supra* Part III.B.

449. See *supra* Part III.B.

450. See *supra* Part III.B.

451. See *supra* Part II.C.1.

452. See *supra* Part II.C.1.

453. *Holmes Common Law*, *supra* note 29, at 3, 36 (“[t]he law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”); see generally *Holmes Path*, *supra* note 29.

embedded in the law.⁴⁵⁴ If this diversity itself is a structural quality of the common law, then law is precisely the kind of self-sustaining and self-sufficient limited domain pragmatists argue not to exist.⁴⁵⁵ That is to say that the pragmatic position is incorrect “that the success of a use of law should be judged by its effects.”⁴⁵⁶ It can and should be measured by reference to internal legal criteria.

As discussed in this Part, the structure of the common law shows that pragmatic, constructivist, and utilitarian reasonableness are archetypical for the common law rule-making process. This common law process is distinctively inductive rather than deductive. The inductive generation of rules operates upon the basis of an oscillation between the paradigmatic command of the formalist, constructivist reasonableness paradigms. This oscillation is *structurally* necessary rather than accidental.

1. *The Grammar of Law*

The common law, like any other legal system has structure. Pragmatists go along with this basic premise in supposing that understanding what law is, really means to predict what courts will do in the future.⁴⁵⁷ Such an undertaking presupposes at least the assignment of adjudicative power to the courts (why else fear them?).⁴⁵⁸ But, the determination of the successful legal argument is also embedded in this structure (i.e., the one that will bring about the predicted result).⁴⁵⁹

More basically, this structure must determine what constitutes *permissible* legal argument.⁴⁶⁰ There are many statements that make sense as philosophical, theoretical or political statements—a state will survive only if it is defended by a constantly armed citizen army.⁴⁶¹ These statements do not yet make legal sense because they are not yet linked up to the legal structure.⁴⁶² One can thus predict with relative ease that they would not be understood by any court as a legal argument addressing a legal problem.

The resulting structure of the law resembles the grammar of a language. A grammar is commonly defined as “rules of a language governing [its] sounds, words, sentences, and other elements, as well as their combination and interpretation.”⁴⁶³ This grammar maps the scope of possible statements and

454. See *supra* Part IV.A.

455. See *Schauer Domain*, *supra* note 24, at 1927.

456. *Summers Pragmatic Instrumentalism*, *supra* note 20, at 872.

457. See, e.g., *Holmes Common Law*, *supra* note 29, at 79 (discussing the predictive force of precedent in tort law); *Holmes Path*, *supra* note 29, at 457-58; *Llewellyn Appeals*, *supra* note 277, at 26; see also *Summers Pragmatic Instrumentalism*, *supra* note 20, at 904-05.

458. See, e.g., *Holmes Path*, *supra* note 29, at 457.

459. See, e.g., *Llewellyn Appeals*, *supra* note 277, at 26.

460. See *id.* at 29-31.

461. See, e.g., NICCOLÒ MACHIAVELLI, *THE WORKS NICCOLÒ MACHIAVELLI 756* (Golgotha Press, 2010) (“although I have already said on another occasion that a good militia is the foundation of all States, and where that is wanting there can neither be good laws, nor aught else that is good.”).

462. See, e.g., *Llewellyn Appeals*, *supra* note 277, at 23-24.

463. *Grammar*, ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com/EBchecked/topic/240915/grammar> (last visited Aug. 1, 2013).

permissible relationships between objects and concepts within a language.⁴⁶⁴ The structure of law is a “grammar” because it similarly provides the rules of law governing its basic elements, i.e., identification of legal propositions, as well as their permissible combination and interpretation.⁴⁶⁵

The structure of law, like grammar, can be identified on the basis of markers. Linguistically, these markers are morphemes identifying the grammatical function of a word.⁴⁶⁶ For example, “am,” “will,” and “would” are grammatical markers indicating the tense and mood of the word “to be.”⁴⁶⁷ On the basis of a study of these markers one can theorize the structure of the language and write its grammar.⁴⁶⁸ To theorize about law, one thus needs to find significant markers identifying its fundamental structure.

Like a grammar, these structures are not permanent but transient and subject to change.⁴⁶⁹ But unlike grammar, they are completely self-contained and exhaustive of the entire conceptual world of that language at any given point in time.⁴⁷⁰ Like grammar, each law has a structure that in a way is entirely unique to it.⁴⁷¹ For instance, a statement makes sense in French because it is consistent with French grammar, not because it is consistent with Latin or Italian grammar. But like grammar, structures have historical and analytical points of overlap that further the development of the conceptual language through time.

2. *The Conceptions of Reasonableness as Markers of the Common Law*

The pragmatic, utilitarian and formalist reasonableness paradigms are common law “markers” in this grammatical sense. They function like the “-s” ending of the word “smoke” in the sentence “Raleigh smokes.”⁴⁷² That ending identifies that “smoke” is the action “to smoke” (not an object, “the smoke”) and identifies Raleigh as the particular actor. The marker “-s” assigns “smoke” its place (and meaning) in the English sentence “Raleigh smokes.”⁴⁷³

Reasonableness paradigms modify rules in the same way to make them intelligible as a legal proposition. For instance, pragmatic reasonableness modifies the rule “contracts must be performed” by adding the implicit “in good faith,” and explicating what conduct a court would consider sufficient performance of a

464. See, e.g., LUDWIG WITTGENSTEIN, WERKAUSGABE BAND 1,253 (1997) [hereinafter WITTGENSTEIN]; P. F. STRAWSON, INDIVIDUALS 140 (1959) [hereinafter STRAWSON].

465. I use the term “proposition” here to mean “assertion.” See *Strawson, supra* note 464, at 150. See, e.g., *Llewellyn Appeals, supra* note 277 (discussing this understanding of law in pragmatic thought).

466. See generally Mary Whisner, *Alphabetical Order and Other “Simple” Systems*, 96 LAW LIBR. J. 757 (2004).

467. *Id.*

468. WILLARD VAN ORMANQUINE, WORD & OBJECT 89 (Leo L. Beranek, Roman Jakobson, & William N. Locke eds., 1960).

469. WITTGENSTEIN, *supra* note 464, at 253.

470. *Id.* at 250.

471. See QUINE, *supra* note 468, at 73-79.

472. Cf. STRAWSON, *supra* note 464, at 143-166 (using the same example); WITTGENSTEIN, *supra* note 464, at 241.

473. *Strawson, supra* note 459, at 139-179.

contract (conduct for which there is a rational basis).⁴⁷⁴

More basically still, without reasonableness, the rule “contracts must be performed” could not be placed in the appropriate context to understand its meaning, just like “Raleigh smoke,” without the “-s” ending could refer to an incorrectly formed sentence or a kind of fume found in North Carolina. This quality means that the reasonableness paradigms are significant grammatical markers because they determine the process of norm generation in the same way that predicates determine the process of proposition generation.⁴⁷⁵

The reasonableness paradigms are not just grammatical but make up the “deep grammar” of the common law.⁴⁷⁶ As discussed above, the reasonableness paradigms are in an oppositional relationship.⁴⁷⁷ They present inconsistent first principles according to which any legal statement makes sense.⁴⁷⁸ This oppositional relationship creates a stress field within the common law that develops whenever an actual dispute reveals an outcome determinative inconsistency between the reasonableness paradigms.⁴⁷⁹ If a sufficient number of hard cases arise, the stress field causes a realignment: it forces an examination of the relevant paradigms to determine (a) whether the legal norm still actually conforms to community standards (pragmatic paradigm), (b) whether the legal norm should be modified to give effect to a fundamental right (formalist paradigm), or (c) whether the legal norm is too costly or inefficient (utilitarian paradigm).⁴⁸⁰ This examination, in turn, can lead to a switch of paradigms or to internal readjustment of the paradigms to respond to the tension.⁴⁸¹ No matter the choice, the law would have changed in a substantive way but remained internally coherent in a grammatical sense.

This grammar of the common law is precisely inconsistent with the pragmatic argument that law is not a limited domain.⁴⁸² The stress field created by the oppositional forces of the reasonableness paradigms defines *internally* what the

474. See *supra* Part III.A.

475. See Wittgenstein, *supra* note 464, at 252 (to name something “could be called the preparation of a word for use. But to what end is it a preparation?”) (Frédéric G. Sourgens trans.). Here, the reasonableness paradigms precisely identify the end of the legal rule.

476. *Id.* at 478 (contrasting deep grammar as a structural element distinct from the superficial grammar how words are used in syntax).

477. See *supra* Part II

478. Wittgenstein, *supra* note 464, at 256 (“Think someone points at a vase and says ‘look what marvelous blue! Its shape does not matter.’ Or ‘look what a marvelous shape! The color is irrelevant.’ Without a doubt you will do different things when you follow each instruction.”) (Frédéric G. Sourgens trans.).

479. See HERACLITUS, FRAGMENTS 32 (Brooks Haxton trans., 2001); NUSSBAUM, *supra* note 12, at 81 (“We are asked to see that a conflict-free life would be lacking in value and beauty next to a life in which it is possible for conflict to arise; that part of the value of each claim derives from a special separateness and distinctness that would be eclipsed by harmonization. That, as Heraclitus put it, justice really is strife: that is, that the tensions permit this sort of strife to arise are also, at the same time, partly constitutive of the values themselves. Without the possibility of strife it would all fall apart, be itself no longer.”).

480. See *supra* Part III.B.

481. See *supra* Part III.B.

482. See *supra* citations in notes 453-456.

common law can admit and what remains outside of its borders.⁴⁸³ It determines the (limited) potential legal solutions to any hard case.⁴⁸⁴ It is this stress field that defines the force of the law in the sense of its actuality and its potentiality—what it currently is and what it can become.⁴⁸⁵ It precisely shows that law is indeed a limited domain because it is analytically self-sustaining and self-sufficient.⁴⁸⁶ But, the diversity of paradigms means that it is a kind of inductive, not a deductive domain.

3. *The Common Law as Inductive Normativity*

The deep structure which generates this force is an inductive normativity. The inductive structure of the common law is intuitive. Rather than being the result of comprehensive legislation by legal scientists, the common law is a creature of case law.⁴⁸⁷ This case law responds to specific fact patterns and legal arguments to resolve these fact patterns. By addressing a sufficient number of fact patterns, it is then possible to establish a rule which appears common to each problem's solution. This rule is then applied in future cases to fact patterns sharing a sufficiently common factual bond—until the time that a hard case points out the exception to the rule and thus leads to further refinement of jurisprudence and doctrine.⁴⁸⁸

It is similarly intuitive that an inductive legal system could rely upon inconsistent first principles in different areas of law. The common law establishes rules for a case rather than engaging in doctrinal interpretation.⁴⁸⁹ This rule establishment depends upon factual similarities of each of the cases relied upon by the parties to the case at bar.⁴⁹⁰ In relating the facts at bar to their resemblance of facts in prior decisions, it is possible both to derive the principle applicable to the resolution of the dispute at bar and to confirm and adapt its validity in light of additional factual problems not previously encountered in other cases.⁴⁹¹ The application of inconsistent first principles, as such, is not a problem so long as these

483. Cf. *Schauer Domain*, *supra* note 24, at 1932 (“[W]e might imagine a system characterized by procedural differentiation, in which law is differentiated from other decisionmaking venues not by the sources it uses but by how it uses them.”).

484. See *supra* Part III.B.

485. See *Wittgenstein*, *supra* note 464, at 420 (“in language, expectation grazes realization”) (Frédéric G. Sourgens trans.).

486. See *Schauer Domain*, *supra* note 24, at 1914-15.

487. *Sacco*, *supra* note 321, at 132-33, 256 (noting that the common law was by its nature incomplete and grew through resolution of disputes); cf. E. ALLAN FARNSWORTH, *CONTRACTS* 11-19 (3d ed. 1999) (discussing the early development of the enforcement of promises at common law).

488. For an extreme position, see Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD J. LEGAL STUD. 215, 257 (1987) (arguing that “‘the common law’ is best regarded as the institutionalized process of adjudication itself, rather than as the body of relatively stable (but nonetheless constantly changing) dispute-settling standards which emerge from that process.”). A similar position is espoused by Melvin Eisenberg in the context of finding morally necessary exceptions to announced and otherwise coherent common law rules. See *Eisenberg*, *supra* note 21, at 66-68.

489. See Michael S. Moore, *Precedent, Induction, and Ethical Generalization*, in *PRECEDENT IN LAW* 183-216 (1988) (“[C]ommon law reasoning, like that in science and ethics, is non-hermeneutic in nature.”); *Eisenberg*, *supra* note 21, at 52.

490. See *Eisenberg*, *supra* note 21, at 54-55, 61; see also S.L. Hurley, *Coherence, Hypothetical Cases, and Precedent*, 10 OXFORD J. LEGAL STUD. 221, 223-24 (1990).

491. See *Eisenberg*, *supra* note 21, at 74; cf. *Perry*, *supra* note 488, at 251.

principles are applied to factually unrelated legal problems.

The inductive normativity of the common law is not only consistent with the diversity of reasonableness paradigms, but necessitates it. Inductive systems are typically premised upon the observation of the outside world;⁴⁹² they are descriptive systems. In this sense, science engages in inductive reasoning.⁴⁹³ Observation of the world leads to the formulation of scientific paradigms which in turn are refined by further observation.⁴⁹⁴ When a sufficient number of significant experiments contradict the current theory, the prevalent paradigm is abandoned once a new paradigm has been formulated that reinterprets the accumulated data in a more effective way.⁴⁹⁵ In such inductive systems, there is a typically a single structural paradigm at work at a single point in time.⁴⁹⁶

Although the common law resembles such descriptive systems, it differs in an important respect from them. The inductive process is not applied to *observe* the outside world, but to *govern* it.⁴⁹⁷ This means that at the level of theory, the inductive process in the common law does not theorize the outside world, it theorizes itself.⁴⁹⁸

This important difference creates a structural necessity for diverse reasonableness paradigms to operate alongside each other. First, the existence of an inductively formed formal legal paradigm of necessity must be a consciously theorized result from various data points.⁴⁹⁹ If the formal legal paradigm were always “applied” by common law courts by means of interpretation, the system would cease to be inductive and would become deductive.⁵⁰⁰ A formal legal paradigm cannot operate “in real time” and instead must lag. Logically, this means that there must be something other than the formal paradigm at work in everyday adjudication.

But similarly, the law is more than a catalogue of policy preferences and current community standards.⁵⁰¹ The common law is a normative system that seeks to *order* rather than describe the world to which it applies. It seeks to impose certain centrally held values of prior generations on the current generations in order to provide both continuity and justice.⁵⁰² Logically, there must also be a formal

492. See *Kuhn*, *supra* note 31, at 104 (“The scientist must, for example, be concerned to understand the world and to extend the precision and scope with which it has been ordered.”).

493. *Id.* at 73.

494. The initial formulation of a paradigm requires theoretical, even metaphysical, creativity. *Id.* at 74. Once a paradigm has proved effective at explaining current problems, the object of science is to refine the paradigm inductively through experimentation. *Id.* at 96-105.

495. *Id.* at 166 (while paradigm change is sudden and revolutionary, “scientific revolutions are inaugurated by a growing sense, again often restricted to a narrow subdivision of the scientific community, that an existing paradigm has ceased to function adequately.”).

496. *Id.* at 96-105.

497. This is not to say that observation is not value-dependent. It is. See *id.* at 106-115. But a limited legal domain lacks an outside world to “observe” in order to be limited. See *Schauer Domain*, *supra* note 24, at 1914-15.

498. See *Schauer Domain*, *supra* note 24, at 1914-15.

499. See *supra* citations in notes 487-489.

500. See *Eisenberg*, *supra* note 21, at 52 (discussing the inductive nature of the common law); see generally *Moore*, *supra* note 489 at 183-216 (same).

501. See *Holmes Common Law*, *supra* note 29, at 3.

502. *Id.*

paradigm at work in everyday adjudication.

The different reasonableness paradigms thus fulfill a structural function without which a system of inductive normativity would cease to function. On the one hand, the imposition of a single paradigm of formalist reasonableness (as in the case of constructivism) would transform the common law into a deductive system of normativity, applying norms exclusively because of the intrinsic value of the law irrespective of what the law outside requires. On the other hand, the imposition of a single pragmatic conception of reasonableness would deprive the law of independent normativity. The law would be an empty shell or conduit for describing the state of current practices. Such a state would be particularly dangerous, as it would not enable long term expectations to form: as practice can change unconstrained by law, there is no guarantee that future practices will not run counter to current needs. Practice, therefore, needs to be contained by value.

Therefore, the diversity of conceptions of reasonableness is a structural necessity for an inductive system of normativity to exist. It is not only a historical accident or necessary stage in the dialectic on the way to some future utopia, it is a central feature to, and sign of health of, the common law.

V. CONCLUSION

The common law rests upon a diverse set of three reasonableness paradigms: a pragmatic, a utilitarian, and a formalist one. It is because of the diversity of reasonableness paradigms that the common law has to resolve such a thing as “hard cases,” which only arise when the reasonableness paradigms clash. It is through an internal realignment of these paradigms that doctrine and jurisprudence resolves these hard cases over time. Because hard cases have to be resolved within the confines of the three reasonableness paradigms, the legal correctness of any proposed solution can always be established as a matter of legal reasoning rather than by debating the moral consequences of its result. It is because of the possibility to resolve hard cases in a simultaneously principled and pragmatic manner that the common law has proved uniquely adaptive to new social and commercial circumstances without losing its inner cohesion.

The conclusion that the law rests upon diverse reasonableness paradigms confirms the hypothesis, raised a few years ago by Professor Schauer, that the common law indeed represents a limited domain.⁵⁰³ Picking up where that article left off, this article has shown that the “Wittgensteinian practice” of the common law creates a limited domain because of procedural differentiation.⁵⁰⁴ The process of legal decisionmaking differs from other decisional models because the law produces outcomes according to its own distinctive decisional grammar. This grammar relies upon the three different reasonableness paradigms to generate norms inductively through constant adjudication of new and novel legal disputes.

Despite the conclusion that law indeed has its own internal and formal logic, this Article shares much with critical pragmatism. Most of all, this article confirms that the common law is not a consequentialist enterprise, that no dialectic, no matter how enticing, could pave the way to some utopian republic. In other words,

503. *Schauer Domain*, *supra* note 24, at 1955-56.

504. *Id.* at 1933 n.71.

it considers that most grand theories of law or political theory have something to sell and that, if experience serves anything, it ain't worth buying.

Instead, the Article ultimately places its faith in finding the balance of balances. It does so not by trying to find a midpoint between them. Instead, it finds the value of the common law in its form of inquiry and its constant deliberative movement. Accordingly, this deliberative movement is not moving *towards* something. It moves to maintain what it has—diversity.