

# Values

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Justice, goodness, rightness, truth, fairness, efficiency, order, progress, freedom, equality, security, tolerance, neutrality, community, honesty, loyalty, convenience, clarity, precision, comprehensiveness, consistency, rationality, elegance, rigor. These are just some of the key political, ethical, and aesthetic values of contemporary American law.

Much of American legal thought is dedicated to the identification and classification of these values in terms of rank, intensity, scope, compatibility, and commensurability. These values are analyzed, clarified, systematized, reconciled, balanced, sacrificed, overcome, and overwhelmed. Their implications are traced. They are deployed to support or attack sundry agendas. They are used to justify, redeem, uplift, motivate, command, and defeat. They feature at all stages in legal arguments: in their origins, their frames, their development, and their terminus.

Throughout all these various uses of values, there is one thing that is not much talked about: the action of valuation, the generative history of values. What is missing is any historical recollection of how these particular values came to be values for us, individually and collectively. Instead, values stand as an autonomous realm: values are *severed* from their generative history and their generative history is *effaced*. Indeed, ironically, values become values for us precisely through this process of severance and effacement. In American law, we can see this ongoing process of severance and effacement at work in two pervasive rhetorics, which I will call the *presentist rhetoric* and the *rhetoric of the romanticized past*.

In the presentist rhetoric, legal thinkers depict and deploy values as the unquestionable rhetorical origins, the ultimate animating agencies, and the discursive limits of legal conversations. "Justice requires . . ." they say. "Equality requires . . ." they say. In this kind of rhetoric, values become the self-evident starting points and grounds of legal conversations. In this jurisprudential world, it is at once impossible and beside the point to ask about the generative history of value or values. It is impossible because

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values are taken to be self-evidently self-grounding and it is presumed that participants in the legal conversation already take values to be the primary source of authority.

In the rhetoric of the romanticized past, the generative history of values is supplanted by a mythic and highly idealized rendition of the authorial moment—the moment at which values become accepted as values. In this rhetoric, generative history is reduced to discrete authorial moments. For instance, the authoring of values in American law is ascribed to mystical foundational moments (e.g., “1789”), to venerated authoritative texts (e.g., “The Constitution”), to politically revered authors (e.g., “The Framers”), or to the sophisticated constructions of moral and political philosophy (e.g., John Rawls’s “original position”).<sup>1</sup> These accounts of how values have become values for us are not histories. They are, rather, “reconstructions” wishfully projected back on a temporal or philosophical past to create the origins we presently desire our values to have. Typically the authors represented in these “reconstructions” are very much like the idealized representations we have of ourselves. They give “reasons.” They engage in “dialogue” and “conversation.” They are “deliberative.” These “reconstructed” authors are, in short, instantiations of the rational, coherent, relatively autonomous subject of liberal thought.<sup>2</sup>

Both the presentist rhetoric and the rhetoric of the romanticized past succeed in severing values from their generative history and effacing that history. This ahistoricism is not a remediable conceptual defect in what we take to be values. Rather, it is constitutive of the aesthetic frame within which “values” emerge as values for us. It is through the severance and effacement of values from the valuing action and the valuing agencies that values become what they are for us: *abstract idealizations* cast as *context-transcendent, regulative grounds*.

Values are *grounds* to the extent that they are shared within a community and to the extent that they establish the shared identities and self-definitions that make dialogue and deliberation possible. Abstraction enables members of a community to bracket non-essential differences. The idealized character of values serves as a rhetorical medium to command at least minimal consensus and minimal reciprocal recognition among members of the community.

Values are *context-transcendent* to the extent that they enable judgment or evaluation in a variety of different situations and circumstances. The abstract character of values establishes the possibility of context-transcen-

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1. See JOHN RAWLS, A THEORY OF JUSTICE (1971).

2. This liberal subject is such a pervasive aesthetic prefiguration of American legal thought that its role in the formation of various schools of American legal thought has gone virtually unnoticed. See Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991).

dence, while the idealized character of values legitimates abstraction from the concrete specifics of particular contexts.

Values are *regulative* to the extent that they control or at least influence outcomes. As regulative grounds, values serve to identify and circumscribe the possible rhetorical resources that can be used and the decisions that can be reached by a community or its members.

To describe values as context-transcendent, regulative grounds in this way is to give a fairly conventional account of values.<sup>3</sup> Indeed, it is a flattering account inasmuch as it accords a powerful and normatively pleasing place to values and value-talk. This account is consonant with many of the goods often associated with values and value-talk. It is consonant, for instance, with Martha Nussbaum's account of values.<sup>4</sup> Hence, when Nussbaum writes that the abstraction of values means "there is something very important that binds us, whether we feel like it or not," she is referring to the *regulative* character of values.<sup>5</sup> When she says that the appeal to abstract values "is a way of stopping debate by saying that there is something unchanging out there," she is referring to the fact that values are *grounds*.<sup>6</sup> When she writes "that there are ethical standards that are independent of the norms and traditions of a particular culture," she is appealing to the *context-transcendent* character of values.<sup>7</sup> And when Martha Nussbaum writes that the appeal to abstract values "can help us to systematize our beliefs and preferences," she is recognizing that values play a very significant role in organizing our normative universe.<sup>8</sup>

Indeed, one may trace many of the good and valuable uses conventionally ascribed to values and value-talk to the character of values as context-transcendent, regulative grounds. What is more difficult and possibly more important to recognize is that the constitution of values as context-transcendent, regulative grounds also harbors danger. This danger is traceable to precisely the same constitutive characteristics that make values seem appealing, important, and powerful in the first place.

The danger is that one might be led to ascribe a rhetorically foundational status to values and value-talk. Given that values are context-transcendent, regulative grounds, one might easily come to believe that value-talk or value advocacy is, *a priori*, morally or politically significant. This seems reasonable, but it is a non sequitur. Simply because values are, in and of themselves, constructed so as to have moral or political consequences does

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3. Much of this account tracks CHAIM PERELMAN, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 74-80 (1971).

4. Martha Nussbaum, *Valuing Values: A Case for Reasoned Commitment*, 6 *YALE J.L. & HUMAN.* 197 (1994).

5. *Id.* at 211.

6. *Id.* at 210.

7. *Id.* at 214.

8. *Id.* at 215.

not mean that they necessarily or even usually have those moral or political consequences. The recognition that values are constructed as context-transcendent, regulative grounds might seem to establish a relation between "values" and their contexts, but it does not. To understand the relations between "values" and the contexts in which they are invoked, one cannot look merely at how "values" are constructed. It is also necessary to examine the contexts in which the "values" are invoked. To understand this point is crucial. It is crucial because the context within which a value is invoked may well be constructed in such a way as to deny, diffuse, exhaust, or even reverse the moral or political charge of that value.

For example, Martha Nussbaum ascribes all sorts of virtuous uses to values and value-talk. She says:

values are binding on us  
 values limit and stop debate  
 values are transcultural and enduring  
 values enable systematization of our preferences and commitments.<sup>9</sup>

Now one can certainly imagine contexts in which the effective presence of cultural resources (i.e., "values") that are binding, that help limit and stop debate, that transcend cultures, and that enable systematization of preferences would be helpful or desirable. But one can also easily imagine contexts in which the effective presence of such cultural resources (i.e., "values") would be extremely unhelpful and undesirable.

If the binding, debate-stopping, culture-transcendent, and preference-systematizing characteristics of "values" are considered virtues, it is only because their context has been prefigured to render them virtues. Indeed, in some contexts, these virtues quickly become vices:

values are binding on us	values are authoritarian
values limit and stop debate	values are silencing
values are transcultural	values are totalizing
values enable systematization	values enable reductionism

The point here is that regardless of the particular constitutive characteristics of a value, one cannot tell whether its use is salutary without understanding how that value is used and in what context. The moral or aesthetic consequences of the invocation of a value cannot be discerned merely from an examination of the constitutive characteristics of that value. Nor is this point merely "academic." On the contrary: ours is a world where compassion for AIDS victims can be used just as easily to sell clothing as to elicit funding for medical research, a world where the value of freedom implies at once the downfall of the Berlin wall and the imbibing of Pepsi.<sup>10</sup>

9. *Id.* at 211, 210, 214, 215.

10. Ronald K.L. Collins & David M. Skover, *Commerce and Communication*, 71 TEX. L. REV. 697, 708-16 (1993).

In order to conclude that the invocation of values or value-talk has significant moral or aesthetic consequences, one would have to know something about the *ontological status* of "values" in any given context. Specifically, one would have to know whether, in any given context, the values exist in the mode of illusion, fantasy, image, idea, cognitive determination, linguistic inscription, cultural formation, biological given, objective reality, some other modality, or some combination of the above.<sup>11</sup> Similarly, in order to conclude that the invocation of values or value-talk has moral or aesthetic consequences, one would have to know something about the *performative role* values play in any given context: persuasive, disciplinary, coercive, rationalizing, justifying, shaming, organizing, some other role, or some combination of the above.

Nor does it do any good to restrict the object of inquiry, in the manner of some analytical moral philosophy and much American jurisprudence, to "proper" or "authentic" or "normal" uses of "values," leaving non-conforming uses to the disciplinary oblivion of some devalued site labelled "improper" or "inauthentic" or "aberrant." Such devices are familiar enough in American intellectual life. They are used over and over again to delimit the object of inquiry and to define intellectual jurisdiction in a way that will allow formalization of the field of investigation.<sup>12</sup> We know these devices by various names, including:

proper/improper  
 authentic/inauthentic  
 normal/aberrant  
 internal/external perspective  
 essential/contingent  
 pure/corrupt  
 serious/non-serious  
 langue/parole  
 structure/performance  
 theory/practice

That the intellectual jurisdiction and aesthetic configuration of many of our disciplines (including much analytical moral philosophy and American jurisprudence) is grounded on and delimited by such devices is not cause for confidence. Rather, it is reason to doubt the intellectual integrity of those disciplines.

Indeed, to say that a discipline will speak only about the "proper" uses of values, leaving "improper" uses to some degraded and unexamined

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11. One would also have to know what hold any of these modalities have within the particular culture in which the values are invoked.

12. For a critical discussion of the rhetorical effects of this kind of device (the internal/external perspective) in American legal thought, see Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 916-29 (1991).

realm, is to say that a discipline will only study the values it has defined into existence for itself. It is no doubt a fine thing for a discipline to devote itself to the study of its own posited creations (here, values), but this procedure is not without certain risks—risks of disciplinary solipsism. Once a discipline (like much analytical moral philosophy or American jurisprudence) dedicates itself to the study of its own posited creations, two questions become critically important. First, it becomes necessary to ask: What is the ontological status of the posited creations (here values) studied by the discipline? Second, one needs to ask whether there are any interesting relations at all (and if so, which ones) between what those within the discipline call the posited creations (here values) and human life generally.

So the questions remain: What is the ontological status of values in any given context? What is the performative role of values in any given context? In one sense, one would think that these questions would be of interest to those who are concerned with the moral efficacy of their own value-talk. Similarly, one would think that these questions would be of interest to those who are interested in what lawyers do.<sup>13</sup>

But value-talk—whether in analytical moral philosophy or American jurisprudence—does not and cannot answer these questions. It cannot answer these questions because the very practice, the very plausibility, of value-talk already presupposes an answer to these questions. What value-talk presupposes is that it is already constituted as an intellectually serious and morally efficacious enterprise (and so too, therefore, are its posited creations—values). Before one can indulge in such optimistic and self-congratulatory presuppositions, however, it is necessary to understand what values and value-talk are and how they are related in any given instance to social and legal practices.

### I. THE ONTOLOGICAL STATUS OF VALUES

To describe values as *context-transcending, regulative grounds* does not establish or specify their ontological status; that is, this description does not establish or specify the manner or the modalities of being in which values are. Hence, as previously suggested, it does not establish whether values are in the mode of illusion, fantasy, image, idea, cognitive determination, linguistic inscription, cultural formation, biological given, objective reality, some other modality, or almost any combination of the above to varying degrees.

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13. As Robert Cover put it, "To live in a legal world requires that one know not only the precepts but also their connections to possible and plausible states of affairs." Robert Cover, *The Supreme Court, 1982 Term Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 10 (1983).

To say, as has been said here, that values are idealized abstractions or that they are context-transcending, regulative grounds does not answer the ontological question. One must remember that God too once was (and in some senses, still is) an idealized abstraction. He too once was (and in some senses, still is) regulative and context-transcending, indeed, the all-time ground for evaluation. But, of course, these attributions of essential traits to "God" do not, indeed cannot, establish in what manner of being he was (or is). In this respect, values are his pantheistic successors in interest. Values are like little divinities.<sup>14</sup> Like God, they serve as grounds or unquestioned origins. Like God, their invocation demands worship, reverence, and self-abnegation. Like God, they provide comfort and compensation for an otherwise degraded reality. Like God, they enable the widespread belief in a hopeful, eschatological trajectory for law, politics, and human existence. In short, "values" are the secular equivalent of God—they are the continuation of theology by other means.

What then is the ontological status of these divinities in any given context? It is important to answer this question because the ontological status of these divinities will affect what one thinks of them and what can be done with them. It is important to be able to discern in any given context to what extent values are *ontologically deep* and to what extent they are *ontologically superficial*. Values are ontologically deep to the extent that they constitute the dominant forms of being of an individual or a group. Conversely, values are ontologically superficial to the extent that they are relegated to subordinate or derivative forms of being of an individual or a group.<sup>15</sup> If in a given context, values and value-talk are ontologically superficial—for instance, if they are a kind of epiphenomenal, normatively pleasing illusion akin to magical thinking—then participating in value-talk on its own terms is probably not intellectually interesting. If, by contrast, in a given context, values are ontologically deep—for instance, if they are sedimented cultural formations that constitute the very way in which our social and intellectual lives are fashioned—then engaging in value-talk might well be not only intellectually interesting, but even morally or politically important.

The identification of the ontological status of values in any given instance will help fashion an appropriate orientation towards the invocation of "values": committed participation, pious reverence, sustained skepticism, intellectual disengagement, strategic use, or still some other orientation. Now, making determinations about the ontological depth or superficiality

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14. See KENNETH BURKE, *A GRAMMAR OF MOTIVES* 298-301 (1969). "The Romans knew that you could get a god merely by taking an adjective and transforming it into an abstract noun. . . . And particularly, they would detach some attribute from another god, and set it up as a separate divine abstraction. Fides, Libertas, Victoria, Virtus, Felicitas . . ." *Id.* at 301.

15. This is a very rough cut at the conceptualization of relations that are much more complicated and interesting than can be fully described here.

of values may seem complicated (and very often it is), presenting difficult questions of philosophy, social theory, and aesthetics. Instead of dealing with these difficult questions, consider first as an easy, illustrative case the difference between the ontology of values in Sophocles's *Antigone* and the ontology of values in a Mobil Oil advertisement.

In Sophocles's play, the value of loyalty to family so pervades the being of Antigone that she deliberately brings disaster not only upon herself, but upon her father and upon the state. We do not doubt the depth of Antigone's valuation of loyalty to family precisely because we see the extreme pain that she is willing to create in vindicating this loyalty to family. By contrast, the professed commitment to values contained in Mobil ads is designed to achieve strategic advantages largely (if not entirely) unrelated to the observance or realization of those professed values.<sup>16</sup> We understand this point implicitly—indeed, without effort—because we understand implicitly the character of corporate advertising. What gives the Mobil ad away, of course, is not some flaw in the moral “substance” of its arrangement of normatively pleasing “value” signs, but rather in the recognition that Mobil is an oil company and that its text occupies the aesthetic space of a corporate advertisement. Few of us are likely to confuse the ontological status of Antigone's values with those of a Mobil Oil ad.

But this is an easy case. It has been framed that way—precisely to illustrate a difference between values that are ontologically deep and values that are ontologically superficial. Although the case, as framed here, is easy, applying the distinction remains problematic. In other contexts, such as law review articles or legal scholarship generally, the ontological status of values and value-talk is more controversial.

For instance, many American legal thinkers still seem to believe (at some level) that the value-talk and the normative prescriptions of their legal scholarship have some significant *normative effect* on the decisions of courts or other official actors. As I have argued elsewhere, however, this *a priori* belief in the normative efficacy of value-talk is a kind of *deformation professionnelle*.<sup>17</sup> Indeed, the *normative effect* of value-talk in American legal thought does not go much further than organizing the

16. Consider this Mobil Oil ad appearing in the *New York Times*:

Imagine yourself and your family swept away from your past life, your job, your home, even your homeland. What you imagine is a reality for millions of people . . . .

The task of resettling the world's dispossessed threatens to overwhelm the international community. Squeezed by financial and political constraints, governments and relief agencies are seeing their resources drained by the scale and complexity of the problem. What can we do as American citizens and corporations?

One answer is to . . . .

MOBIL

N.Y. TIMES, May 19, 1988, at A31.

17. See Schlag, *supra* note 12.



arrangement of normatively pleasing signs in a way that fashions normatively self-flattering modes of self-presentation for its authors and readers. In short, *the normative effect* of value-talk in the academy does not go much further than sustaining a mode of discourse that enables those who transact in "law" to do so while representing themselves as engaged in a morally or politically admirable enterprise. In turn, this professional self-representation does not have much more ontological depth than the self-representations of Mobil Oil in its advertisements.

It would be useful, then, to begin understanding value-talk in American legal thought as a mode of advertising—advertising for the institutions, devices, and techniques of "law." One would then understand that "values" are related to these institutions, devices, and techniques of law in the same ambiguous ways as in any other kind of commercial advertising. From this perspective, the project of participating in legal thought to advance moral or political "values" would be on the same order (and just as promising) as trying to advance moral or political values by securing employment with an advertising firm. In short, it would be a category mistake—a particularly profound category mistake.

From the perspective of value-talk, these points are, of course, very difficult to grasp. In part, that is because value-talk presupposes its own ontological depth. And ironically, it is precisely because value-talk presupposes its own ontological depth that it can easily become an ontologically superficial enterprise—one where values are professed, refined, exchanged, ranked, reconceptualized, and recycled in a carnival of PR images. This is, of course, precisely what the Mobil ad illustrates: the appropriation of moral and political value signs for ends of self-promotion.

## II. THE PERFORMATIVE ROLES OF VALUES

Closely associated with the ontological status of values and value-talk is a question about their performative roles. It is one thing to deal with values as rigorously defined *concepts*—the sort of brittle artifacts one encounters in the most arid analytical philosophy. It is another thing to deal with values as *totems* of social institutions. And it is still another thing to deal with values as *motivational orientations* in guilt and shame complexes.

To say that values can be concepts, motivational orientations, or totems is to recognize that, in any given context, "values," or any given "value," can have a different ontological status. And, of course, "values" do not in and of themselves reveal their own ontological status. The value sign "justice," for instance, can play the role of concept, image, ideal, motivation, totem, icon, affect, coercive device (and so on).

Precisely because "justice" may have a different ontological status in different contexts, its performative roles might well differ. It might be, for

instance, that the concept "justice" is used to persuade or justify, that the totem "justice" is used to identify or organize a political grouping, and that the motivational orientation "justice" is used to shame certain parties into performing or not performing certain actions. But it would be a serious mistake to conflate or confuse the various performative roles played by "justice," the concept, "justice," the totem, and "justice," the motivational orientation. And indeed, there is no particular reason to believe that justice as a concept means or is organized or operates in exactly the same way as "justice" as a motivational affective orientation or in the same way as "justice" as a totem. There is no reason to suppose transitivity among these ontological modal forms. Thus, it remains a question what relations hold among "justice" as a concept, "justice" as a totem, and "justice" as motivational orientation.

It is important to ask these questions about the performative role of values and value-talk because the identity of their roles cannot be determined *a priori*. And merely because values as artifacts are constituted as context-transcending, regulative grounds does not mean that they necessarily or usually or even often play those roles. Indeed, there is no *a priori* reason to believe that representations (say, fairness or God) govern in a self-determining way the practices in which their names are regularly invoked (court proceedings or holy war, respectively).

Like God, values feature in many roles. Values can serve as the mediations in conversations. Values can also be media for the advancement of interests unrelated to the moral, political, or aesthetic charge of the values. They can be a form of compensation for and escapism from a degraded reality.<sup>18</sup> Values and value-talk can operate as a form of collective denial, a way of not taking into account the social or historical situation.<sup>19</sup> Values and value-talk can operate as vehicles of coercion, guilt, or shame. Values and value-talk can be a way of arresting troubling and disturbing inquiries. And in turn, all of these performative roles can, depending on the situation and the perspective, themselves be (however problematic such a determination might be) morally appealing, morally unappealing, or some combination of the two.

Viewed from the perspective of value-talk, values are typically seen as extremely valuable. They tend to play very good roles. I do not want to

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18. See Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933 (1991); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).

19. I have suggested elsewhere that the value-talk of the legal academy accomplishes very little in the way of realizing its prescriptions. That is not to say that the value-talk of the legal academy is without effect. On the contrary, some of its effects are to idealize and legitimate the activities of courts (whatever they may be doing) and to rehearse an intellectually impoverished and deadening social aesthetic built around the relatively autonomous subject, and other aesthetic presuppositions associated with rationalist forms of thought. See generally Schlag, *supra* note 12; Schlag, *supra* note 18.

dispute that values can indeed play those roles some of the time. But the characteristic presupposition of value-talk (both in analytical moral philosophy and American jurisprudence) is that these valued roles are somehow fundamental, primary, or essential to values—while the less seemly uses of value-talk are a kind of “abuse.”<sup>20</sup> This kind of aesthetic frame—this normatively loaded aesthetic frame—is not a prerequisite for thinking about values or how they are used. It is, however, a prerequisite for engaging in value-talk.

In and of itself, there is nothing wrong with this sort of disciplinary freeze framing of identities; nothing wrong, of course, so long as we remember not to equate the world established in value-talk with our own. Before we do make such an equation, it would be necessary to ask the ontological and the performative questions.

### III. VALUE SECTION 2.1

In order to ascertain the ontological status and the performative role of “values” in any given context, it is necessary to examine the relations between values on the one hand, and the practices and discourses in which they are invoked on the other.<sup>21</sup> Now, of course, to the extent that one begins from a position committed to the sanctity of values as values, this examination will not go too far. The point is obvious: one cannot inquire into the ontological status or the performative role of God simply by asking him what he (or his representatives) think about the matter.

It is important to ask these questions about the ontological status and the performative role of values. As an example, consider some prescriptions from the recent McRate Report, *The Statement of Fundamental Lawyering Skills and Professional Values of the ABA Task Force on Law Schools and the Profession*:

**Value Section 2: Striving to Promote Justice, Fairness, and Morality.**

**As a member of a profession that bears special responsibility for the quality of justice, a lawyer should be committed to the values of:**

**2.1 Promoting Justice, Fairness and Morality in One’s Own Daily Practice<sup>22</sup>**

In one sense, this section seems really quite moral. It has lots of moral value signs packed in, and they all sound good. But bracket, for one moment, the normative allure of Section 2.1 and consider a matter of

20. Nussbaum, *supra* note 4, at 216.

21. *Id.* at 217.

22. AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM 140 (1992).

aesthetics. Consider for one moment the mediations deployed between “lawyers” on the one hand, and “justice,” “fairness,” and “morality” on the other. Notice that according to section 2.1, a lawyer need not actually do anything to promote justice, fairness, or morality. He or she need only be *committed*. What is more, the lawyer need not be committed to justice, fairness, or morality. He or she need only be committed to the *values* of promoting justice, etc. Finally, he or she need not be committed to the values of justice, fairness, or morality in themselves, but must only be committed to the values of *promoting* justice, fairness, and morality.

When we get to the ABA’s actual discussion of this section, we find not only discussion, but further limitations on this commitment to promoting certain selected values. I am referring specifically to subsections 2.1(a), 2.1(b), and 2.1(c), which read as follows:

**As a member of a profession that bears special responsibilities for the quality of justice [citations omitted], a lawyer should be committed to the values of:**

**2.1. Promoting Justice, Fairness and Morality in One’s Own Daily Practice, including:**

- (a) To the extent required or permitted by the ethical rules of the profession, acting in conformance with considerations of justice, fairness and morality when making decisions or acting on behalf of a client (see Skill Section 6.1(a)(iii)(B) *supra*);
- (b) To the extent required or permitted by the ethical rules of the profession, counseling clients to take considerations of justice, fairness and morality into account when the client makes decisions or engages in conduct that may have an adverse effect on other individuals or on society (see Skill Section 6.1(a)(iii)(A) *supra*);
- (c) Treating other people (including clients, other attorneys, and support personnel) with dignity and respect.<sup>23</sup>

While it is tempting to explore further this excruciatingly objectivist representation of values, such an exercise is not necessary. It is not necessary because the ontological superficiality of this representation of values is obvious. Indeed, in the context of actual legal practice—a practice that is almost always success-oriented, invariably strategic, and relentlessly coercive—it does not seem that this recommendation is likely to accomplish very much in the way of actually promoting justice, morality, or fairness. So what are these values doing here? And why recommend these values?

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23. *Id.* at 213.

Here they are—subsectioned, limited by exceptions and cross-references, sliced and diced, cut and pasted—a complex formulaic schedule of objectivist labels and formulae reminiscent of a statutory code. Of course, one could give a traditional normative argument criticizing this particular kind of value-talk, presenting normative reasons why this form of objectivist representation of values is ethically or morally deficient. But that would miss the point. The point is not to render a moral or ethical judgment on our ways of talking about values, but rather to achieve an appreciation of the aesthetic inadequacy of the way in which this talk of “values” is conducted. The point is not to formulate a “reason,” an “objection,” or an “argument,” but to develop an aesthetic capacity, an intellectual competency, a quality of mind,<sup>24</sup> to appreciate the utterly degraded form of life exemplified in the McRate report’s re-presentation of values.

We have returned to the observation with which this essay began: values are constituted by being severed from their generative history. In Section 2.1, “values” are a technocratic aggregation of feel-good signs linked together in a happy-talk jurisprudence that is almost completely removed from any act of valuation or any generative history. Having been stripped of any generative history, these “values” in Section 2.1 mean virtually nothing at all. They are simply the simulation of moral concern or ethical commitment.

Once emancipated from their generative history, values tend to become the ethical equivalent of currency—endlessly recyclable, ready for appropriation by any force, ready to underwrite any end. The identities of values become uncertain, their roles indiscriminate. But this is. . .

#### IV. POETIC JUSTICE

And it should not surprise. What else is to be expected of an enterprise that seeks to sever itself from its own history and forget that history? Value-talk, as it is practiced in so much analytical moral philosophy and American jurisprudence, is very much that project. Now that values have become radically emancipated from their generative history, it surely cannot surprise that values should be ontologically insecure, prone to identity crises and indiscriminate use.

Some thinkers apparently believe that we must shrink from such realizations, for they put our whole normative universe and our political projects in question. But it is only a frightened or weary perspective that confuses putting something at risk—life, values, anything—with its

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24. For elaboration, see Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195 (1989).

devaluation.<sup>25</sup> That frightened and weary perspective—call it “nihilism” or, at this point, call it “law”—is the one that knows how to question its gods, its values, but dares not do so for fear of confronting a loss it knows, on some level, has already occurred.

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25. See *ironically* JOHN STUART MILL, ON LIBERTY (1974). In striking contrast to many of his late-twentieth-century academic descendants, this great liberal was keenly aware of the dire results of failing to challenge comfortably held ideas:

[E]ven if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but . . . the meaning of the doctrine itself will be in danger of being lost or enfeebled, and deprived of its vital effect on the character and conduct; the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground and preventing the growth of any real and heartfelt conviction . . . .

*Id.* at 116.