



**TOURO UNIVERSITY**  
**JACOB D. FUCHSBERG LAW CENTER**  
*Where Knowledge and Values Meet*

**Touro Law Review**

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Volume 6 | Number 2

Article 4

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1990

## Retrospective Justification

Jeffrey Malkan

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### Recommended Citation

Malkan, Jeffrey (1990) "Retrospective Justification," *Touro Law Review*. Vol. 6: No. 2, Article 4.  
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## RETROSPECTIVE JUSTIFICATION

Jeffrey Malkan\*

So convenient a thing it is to be a *reasonable Creature*, since it enables one to find or make a Reason for every thing one has a mind to do.

Benjamin Franklin<sup>1</sup>

[P]romises for apparently impossible contingencies are not given. But if one achieves the impossible, the promises appear later retrospectively precisely where one had looked in vain for them before.

Franz Kafka<sup>2</sup>

Retrospection means looking back or a meditation on past events. Because judgments rendered in legal cases look back at events that have already occurred, they are inherently retrospective. In the context of legal reasoning, however, the concept of retrospection entails more than merely looking back at the acts of the parties who have brought their conflict before the court. The judging process also requires courts to look at their own previous acts and to reflect upon the significance of those prior acts of judgment in order to determine the outcome of the present case. This first retrospective aspect of legal reasoning gives rise to the doctrine of precedent.

The judging process, moreover, requires judges to give reasons for their decisions—to engage in the practice of justification—and this means looking back at the newly made decision itself and explaining what the court has just done so that independent observers will understand and accept the judgment. But what does it really mean to retrospectively provide reasons

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\* Associate, Cahn Wishod Wishod & Lamb, Melville, N.Y.; A.B. Columbia College 1976; M.A., Ph. D. State University of New York at Stony Brook, 1979, 1982; J.D. CUNY Law School at Queens College, 1988.

1. THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 35 (J. Lemay & P. Zall ed. 1981).

2. F. KAFKA, *A Report to an Academy*, in THE COMPLETE STORIES 255 (Centennial ed. 1st printing 1983).

for one's acts of judgment, and how do we decide what should count as an acceptable reason in a judicial justification? Ideally, the reasons one gives for one's prior actions should be the reasons that actually caused the actions (not excuses or rationalizations), and, thus, the ideal judicial justification would be retrospective in the sense that any true narrative is retrospective. That is, the judicial justification should be an accurate and truthful account of the legal rules or principles that the court earlier applied to reach its decision. Furthermore, if the account is accurate, it should enable another judge reading the opinion to duplicate the decisionmaking procedure in a later, relevant case.

Critics of legal reasoning, however, do not agree about what a "true" narrative description of the decision process—if such were possible or desirable—would look like. Is the judicial opinion a true history of the actual thoughts entertained by the judge in reaching her decision, or is it the fictional account most likely to be accepted as persuasive and convincing by the reader of the case report? Perhaps it is unnecessary to make this choice between true history and fictional narrative if we recognize that the acts of judgment and justification, while related, are not identical. Justification, when considered as a separate, belated stage in the decision process, might be considered a retrospective reflection upon judgment in both the literal and figurative senses of the word "reflection." Literally, justification is a mental activity that meditates upon a past act of judgment. Figuratively, justification repeats, "reflects," and, thus, mirrors back the act of judgment, both to the judge herself and to those affected by her action.

I am focusing, thus far, upon the time-sensitivity inherent in the judging process—the difficulties entailed by the present's obligation to reconstruct the past—because I want to bring together, in this discussion, two discrete themes in current legal philosophy that converge in the concept of retrospection. The first theme is the relationship between the roles of discovery and justification in legal decisionmaking. The second theme is the temporal aspect of the doctrine of precedent. In both areas, the legitimating purpose of the judicial practice of justification requires that legal reasoning present a formal simulacrum of

unity, self-identity, and coherence, even when the temporal dimension of the judging process means that its finished product, the judicial opinion, might be based upon the substitution of one set of reasons for another.

Specifically, in the realm of precedent, the later judge always purports to mirror the decisions of earlier judges because the later judge is institutionally obligated to accurately report, reflect, and, as nearly as possible, reproduce the outcome of the precedent case in the present case. Yet, borrowing a term from the study of fiction, the mimetic copy is never the same as the original. The judge's decision can only indirectly represent the earlier case, since she cannot literally duplicate the precedent case without repeating it. Note that, in law, as in language generally, the articulation of semantic differences, as well as the repetition of cognate linguistic features, is necessary to create meaning. Moreover, to some extent, each new case is always a modification, and, sometimes, a direct break in the line of cases that purports to transmit an unbroken tradition whose prestige and authority depend upon the authenticity of its genealogy. In this respect, the judge's representation of past law may actually displace rather than merely supplement the earlier cases in the line of doctrine, especially from the perspective of future judges looking back on the newly enlarged doctrinal field that includes today's case.

Similarly, the justification later offered by the judge will often, perhaps always, displace the "real" reasons for the judgment. This might happen because the result was reached through a non-rational "intuitive" process, which leaves the "real" reasons for the decision inaccessible to later recall. Alternatively, the doctrinal reasons offered by the court may not truly be retrospective because "[t]he true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and general propositions of law which nobody disputes."<sup>3</sup> In such circumstances, the judge must "invent" doctrinal reasons to justify her decision. She asserts these retrospectively in-

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3. *Vegeahn v. Guntner*, 167 Mass. 92, 106, 44 N.E. 1077, 1080 (1896) (Holmes, J., dissenting).

vented reasons to be a description of the law. The judge's standpoint of decision in this situation is balanced between the internal value preferences that determined her choice and the external (doctrinal) reasons through which she must justify that choice to the outside world.<sup>4</sup>

Even if judges ordinarily do make a good faith effort to follow precedent (or, generally, to deduce correct results from preexisting legal standards) and later report, as faithfully as possible, upon their "reasons" for decision, there is still the problem that judgments based on legal knowledge acquired retrospectively might be tainted by retroactivity. Retroactivity would infect the decision process where the meaning of a preexisting legal precedent is uncertain because this meaning has not yet been articulated by a later judge. The law preexists the case being judged, but it is unknown to the parties affected by it until it is applied. In the doctrine of precedent, the gap between the law's creation and its enunciation parallels the temporal gap between the individual judge's discovery and justification of her decision. The retrospective quality of legal reasoning in both cases implies retroactivity because today's decision to act (or the present moment's intuitive flash of understanding) will be judged (or explained) according to standards that are knowable only from the perspective of a future day of judgment (or justification).

This critique of retrospective judgment can be stated as an accusation, challenging the law's legitimacy, or as an epistemological problem, describing a limitation on the human capacity to know and portray the external world. In either version, the problem exists on two levels, which will be discussed separately in the next two sections of this essay. First, there exists what we might call the "intuition thesis." This is the micro-level of the problem and proposes that the intuitive reasons that moti-

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4. While I call doctrinal reasons "external" in the present context, I realize that "external" and "internal" are relative terms. The following description might clarify my later use of these terms: goal-oriented or value-laden reasons are "internal" with respect to the individual judge's choices and "external" with respect to the law itself (conceived as a closed set of rules or a self-referential body of texts). Conversely, doctrinal reasons are "internal" to the law and "external" with respect to the individual judge.

vate a judicial decision are imbedded so deeply in the practice of judging that they cannot be recovered and described to non-judges, but only can be translated into an external language, the language of legal doctrine, which itself is part of the practice from which non-judges are situationally excluded. Second, there exists what we might call the "institutional critique." This is the macro-level of the problem and proposes that legal reasoning, even when "properly" applied to a body of authoritative precedent, is incapable of constraining judicial discretion by preventing retroactive application of newly "discovered" (or, possibly, "invented") rules. Both the intuition thesis and institutional critique have this common theme: the problem of legitimizing judicial authority if the constraint imposed upon individual judges by prior decisional law turns out to be the product of retrospective justification by those very same judges.

## I. THE INTUITION THESIS

It is highly probable that the need of justifying to others conclusions reached and decisions made has been the chief cause of the origin and development of logical operations in the precise sense; of abstraction, generalization, regard for consistency of implications. It is quite conceivable that if no one had ever had to account to others for his decisions, logical operations would never have developed, but men would use exclusively methods of inarticulate intuition and impression, feeling; so that only after considerable experience in accounting for their decisions to others who demanded a reason, or exculpation, and were not satisfied till they got it, did men begin to give an account to themselves of the process of reaching a conclusion in a justified way.

John Dewey<sup>5</sup>

### A. *Discovery and Justification*

The intuition thesis, as it will be called here, is based on the notion that value judgments disguised as policy decisions are, as Justice Holmes said, "[i]n the early stages of law, at least . . . generally . . . acted on rather as inarticulate instincts than as definite ideas, for which a rational defense is ready."<sup>6</sup>

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5. Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 24 (1924).

6. *Vegeahn v. Guntner*, 167 Mass. 92, 105-06, 44 N.E. 1077, 1080 (1896) (Holmes, J., dissenting). In *Vegeahn*, Holmes asserted that policy questions "require a special training to enable anyone even to form an intelligent opinion about

The notion that judging's intuitive dimension results from the inescapability of value judgments was later elaborated by realist critics (and judges) Joseph Hutcheson and Jerome Frank, who claimed firmly that, because subjective (i.e., value-based) factors predominate over rational (i.e., doctrinally based) factors, most judgments are products of hunches, biases, and personal preferences. As Hutcheson wrote: "The judge really decides by feeling, and not by judgment; by 'hunching' and not by ratiocination, and that the ratiocination appears only in the opinion . . . ."<sup>7</sup>

The troubling discontinuity between intuitive judgments and rational justifications inevitably led to a divisive "polarity of assessment" among analysts of judicial reasoning who believed

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them." *Id.* Even then, "[p]ropositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof." *Id.*

Nevertheless, one legacy of legal realism is the training of lawyers to make policy arguments as well as doctrinal arguments. The issue is whether such "special training" amounts to a mode of discourse capable of elevating policy-based justifications above the level of mere personal value choices expressed by untrained non-lawyers.

A recent ambitious attempt to formulate such a discourse was undertaken by Robert Summers, who offered a typology of what he called "substantive reasons" for the express purpose of elevating the level of policy discussions in judicial opinions. See Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707 (1978). It can be argued that the types of justifications recommended by Summers fail to change the nature of the value choices that underlie policy rationales but, rather, enable judges to put these same value choices in a more persuasive form. This is because adequate substantive reasons are usually available, as Critical theorists have often noted, to support either side of the same case.

Moreover, to the extent that Summers separated "authority reasons" (arguments based on binding or persuasive precedent), see *id.* at 724, from "substantive reasons" (arguments based on social "goals" or socio-moral norms of "rightness"), see *id.* at 716, he overestimated the extent to which judges have the institutional authority to assert substantive reasons as independent justificatory grounds. Rather, substantive reasons will usually be embedded in doctrinal arguments, which in turn are subsumed under authority reasons. That is, the judge will start from authoritative sources of doctrine that contain, embedded in the preexisting doctrine, certain social goals and equitable norms. The judge's application of "substantive reasons" will then be stated in the form of an internal, doctrinal argument rather than the assertion of an independent and external policy proposition.

7. Hutcheson, *The Judgment Intuitive: The Function of the Hunch in Judicial Decision*, 14 CORNELL L.Q. 274, 285 (1929) (construing M. Radin, *Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357 (1925)); see also J. FRANK, *LAW AND THE MODERN MIND* 103-04 (1930).

either that “a judge reasons forward from principles or backward from a result.”<sup>8</sup> This legacy of realism continues to shadow discussions of the nature of judicial decisionmaking to the present day. In 1961, when Richard Wasserstrom wrote about judicial decisionmaking, he described the post-realist debate sparked by the intuition thesis as less a genuine disagreement between irreconcilable views than an artificial difference between critics who choose to focus on different stages in the decision process. According to Wasserstrom:

There are two quite distinctive procedures that might be followed before any . . . decision is made or accepted. . . . One kind of question asks about the manner in which a decision or conclusion was reached; the other inquires whether a given decision or conclusion is justifiable. That is to say, a person who examines a decision process may want to know about the factors that led to or produced the conclusion; he may also be interested in the manner in which the conclusion was to be justified.<sup>9</sup>

By separating the “process of discovery” from the “process of justification,” Wasserstrom seemed to defuse the controversy. Although the two stages are related, he stressed that “it is one thing to read a judicial opinion as a report of why or how the judge ‘hit upon’ the decision and quite another thing to read the opinion as an account of the procedure he employed in ‘testing’ it.”<sup>10</sup> To avoid fruitless debates, Wasserstrom suggested that “questions pertaining to justification can usefully be kept distinct from questions about discovery.”<sup>11</sup> Otherwise, “[t]o insist—as many legal philosophers appear to have done—that a judicial opinion is an accurate description of the decision process there employed if and only if it faithfully describes the procedure of discovery is to help to *guarantee* that the opinion will be found wanting.”<sup>12</sup>

More recently, Martin Golding endorsed Wasserstrom’s approach to the problem. “The claim that a judge’s explicitly

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8. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CALIF. L. REV. 200, 203 (1984).

9. R. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 25 (1961).

10. *Id.* at 28.

11. *Id.* at 31.

12. *Id.* at 28.



given reasons are no more than rationalizations for a decision rests, in part, on a conflation of the process of discovery and the process of justification."<sup>13</sup> Golding readily admitted the role of non-rational intuition, hunches, and insights in decision-making, but claims:

what characterizes the process as *science* is not the hunch or its source but rather the attempt to subject the hunch, formulated as a hypothesis, to verification by carefully controlled experiment. The fact that the collection of evidence comes after the formulation of the hypothesis does not impugn the validity of the experiment.<sup>14</sup>

He went on to show, by describing the difference between explanatory and justifying reasons, why the gap between discovery and justification does not detract from the rationality of the decision process.

Sometimes one wishes to explain why a certain event has occurred or why a certain general state of affairs exists. In these cases one seeks the causal conditions for the event or circumstance, and it is natural to call these conditions the reason (or reasons) for its occurrence. However, reasons of this sort, explanatory reasons, are not the only kind of reason. One also seeks the reasons for asserting a given judgment or statement to be true or correct. In this case one wants to know what the justifying reasons are. Because of the ambiguity of the expression "a reason for," it is easy to be misled into thinking that one kind of reason can be substituted for the other. Each type serves a function, has a use, that cannot be provided by the other.<sup>15</sup>

Causal explanations, or "explanatory reasons," are connected to the process of discovery because they state the "real" reasons for the decision. "Justifying reasons," in contrast, describe "acceptable" reasons for the decision. Golding illustrated this distinction with the example of a teacher who gives a student a failing grade. The "real" reason for the teacher's judgment might be personal animosity toward the student. We can ask whether the student would have received the same low grade if this unavowed factor were not present. "In asking such questions, one is seeking to *explain* the assignment of the grade in much the same way as when one seeks to explain the occur-

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13. M. GOLDING, *LEGAL REASONING* 3 (1984).

14. *Id.* at 2.

15. *Id.* at 3-4.

rence of an event such as the collapse of a bridge. . . . One is looking for a causal explanation of a particular event.”<sup>16</sup>

Of course, a mere causal explanation will not justify the failing grade. In Golding’s example, the causal explanation has to be concealed. To support his judgment, the teacher will be compelled to adduce adequate justifying reasons, such as the paper’s poor organization, false statements, and unsupported conclusions. Basing an “appellate review” on such legitimate factors, other professors can assess “[t]he cogency of the professor’s argument . . . in a manner that is independent of whether or not the explicit criticisms were only rationalizations for a decision that he reached on other grounds.”<sup>17</sup>

This analysis, however, misses the point that when we examine legal explanations, we *are* seeking a causal explanation of the decision (one that actually links doctrinal rules and principles to the judgment), not just the suitable approximation of one. The parties to a case can no more be consciously satisfied with a rationalized substitute for the “real” reason than can an engineer be satisfied with a plausible but incorrect explanation for the bridge collapse that he is investigating. Although *post hoc* rationalizations seem to have an organic connection with the decision, they do not reveal the actual ground for decision because they float on a plane of reasoning that only appears to cause the result but lacks any necessary connection to reality.<sup>18</sup>

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16. *Id.* at 4.

17. *Id.* at 6.

18. See Golding, *A Note on Discovery and Justification in Science and Law*, in 28 NOMOS: JUSTIFICATION 124, 137-38 (1986). Golding suggested that, even if policy arguments are ultimately based on judicial value judgments, this “does not have the extreme relativistic consequences that it may have in other justification situations,” *id.* at 138, because the fact “that a value is personal does not mean that it is also not widely held by others.” *Id.* at 137. In other words, “[i]f values enter into a judicial justification, they do not do so as personal predilections. The values must have some purchase on the community to which they are addressed.” *Id.* at 138 (footnote omitted).

It is true that values asserted by a judge are probably shared with others in the society, and, if a judge’s values are too eccentric, decisions based on them will be reversed. More likely, the judge will never be elected or appointed if she is, for example, an avowed Marxist. Nevertheless, the judge’s values in controversial areas undoubtedly will be opposed by a major segment of the community. Hence, if there are a variety of controversial but “acceptable” options for value judgments floating

The situation of a lawyer seeking an explanation for a judge's decision differs in an important way from that of an engineer seeking an explanation for a bridge's collapse. In the lawyer's case, the rationalized substitute that finds its way into the judicial opinion is capable of *becoming* the "real" reason for the decision if it meets the institutional criteria for justification. Justifying reasons do not merely "test" the validity of a judicial decision based on unavowed grounds, but, once stated, they legitimate the decision by *displacing* any explanatory reasons that would account for the "real" manner of discovery. Thus, lawyers may never ask the question of whether the justifying reasons proffered by the judge "caused" her decision or merely rationalize her decision because her underlying explanatory reasons become, to some extent, within the context of legal practice, irrelevant.<sup>19</sup>

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in the community, the judge's non-doctrinal choice of one value rather than another is still arbitrary and unjustified.

19. The extent to which rationalizations are acceptable as substitutes for "real" reasons sometimes becomes a question of how much effort we are willing to expend challenging the proffered reasons. The law may require a defendant to give the "real" reasons for his actions, but how can it prevent the substitution of *post hoc* rationalizations invented to avoid liability?

Two different approaches to this problem have been invented in the area of civil rights. In Title VII employment discrimination cases, under the "disparate treatment" theory, the defendant is required only "to articulate some legitimate, non-discriminatory reason" for the employment decision. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The burden then shifts to the plaintiff to rebut the defendant's reason by showing that it is "pretextual." *Id.* at 802, 807. Does this mean that the defendant is licensed to freely "invent" his rationalizations as long as he can get away with them? The majority in *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978), seemed to approve this use of rationalizations, while a minority, led by Justice Stevens, vigorously rejected the contention that there is any difference between "articulating" and "proving" a nondiscriminatory motivation.

When an employer shows that a legitimate nondiscriminatory reason accounts for his action, he is simultaneously demonstrating that the action was not motivated by an illegitimate factor such as race. . . . Whether the issue is phrased in the affirmative or in the negative, the ultimate question involves an identification of the real reason for the employment decision.

*Id.* at 29 (Stevens, J., dissenting).

In civil rights claims raised under the equal protection clause, in contrast, courts employ the device of "strict scrutiny" to examine the validity of the defendant's justifications. While strict scrutiny analysis does not directly raise the question of whether the justification is "real" or a "rationalization," it has the effect of "flushing out" unconstitutional motivations. As John Hart Ely has explained:

Charles Yablon offered a useful explanation for why this is so by delineating the nature of causation in judicial reasoning. He noted:

the problem of explanation with respect to complex historical events is that they are “over determined”: there are a multitude of events and conditions which jointly constitute the necessary and sufficient conditions for the occurrence of that event, and no identifiable principle exists for selecting one or more of those conditions as a more valid “explanation” of the event than any other.<sup>20</sup>

Because “a potentially infinite number of background conditions [or reasons] can be cited—all of which are necessary for the judge to have taken precisely the action that she did,”<sup>21</sup> Yablon observes that doctrinal reasons do not have any special explanatory power as opposed to non-doctrinal causes that also contributed to the decision. Nevertheless, in the context of legal reasoning, only doctrinal explanations are selected from the set of innumerable background conditions for inclusion in the opinion because lawyers have a reason to be interested in doctrinal arguments that work, and “the questioner’s own assumptions play a large role in determining the adequacy of any explanatory response.”<sup>22</sup>

Thus, explanatory reasons and justifying reasons, as Golding calls them, are both subsumed in the larger set of background conditions. Justifying reasons, in turn, are not simply false—because they do support the decision—but neither are they truly determinative.

None of these proffered reasons are “false” in the sense that they had nothing to do with the judge’s decision. They may even be the “reasons” that floated to the surface of her mind as she wrote the opinion. But to the Critical theorists, they are no more adequate than the explanation that the fire started because of the presence of oxygen in the

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The “special scrutiny” that is afforded suspect classifications . . . insists that the classification in issue fit the goal invoked in its defense more closely than any alternative classification would. There is only one goal the classification is likely to fit *that* closely, however, and that is the goal the legislators actually had in mind.

J.H. ELY, *DEMOCRACY AND DISTRUST* 146 (1980).

20. Yablon, *The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation*, 6 *CARDOZO L. REV.* 917, 926 (1985) (footnote omitted).

21. *Id.* at 929.

22. *Id.*

air. Just as the investigator of a fire knows that he will find oxygen at the site, the investigator of judicial decisions knows that he will find doctrinal justifications. In neither case does that fact illuminate why this particular judicial event occurred and not some other.<sup>23</sup>

Critical theorists, whose position is described by Yablon, differ from more traditional critics like Golding in their attitude toward the manipulability of doctrine. Golding and Wasserstrom assume that the ability to produce doctrinal justifications "tests" the adequacy of decisions; hence, the justification process serves to constrain judicial discretion even if the justifying reasons offered by judges are "fictional" with respect to the "real" causes for their decisions. Critical theorists, in contrast, assume that constraints imposed by the need to justify are illusory because doctrinal justifications are readily available to support almost any decision.

This disagreement is most controversial where we assume the case of a biased judge trying to conceal her real motivations behind a doctrinal smokescreen. The more interesting case, though, is the one in which the judge perceives herself to be neutral and seeks to be guided by legal doctrine to the correct decision. If her decision is as yet unknown to herself, the judge's problem is not how to rationalize a judicial event that has already occurred but, rather, how to reach a rational decision in the first place.<sup>24</sup>

The mysterious chasm between the insider's experience of the decision process and the story told to outsiders of how the decision was reached deepens even further when we try to un-

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23. *Id.* at 930.

24. Placing this problem in the context of the realist tradition, Anthony D'Amato claimed that a judge might attempt to discover the law by making a "retrospective prediction" of what an independent observer would expect her to do. *See* D'Amato, *The Limits of Legal Realism*, 87 YALE L.J. 468, 496-98 (1978). This appears to be just the opposite of a retrospective justification. Instead of the judge predicting what an independent observer would accept as a plausible explanation of an already-made decision, the judge tries to predict that same person's expectation, so that her decision may conform to it. *Id.* at 496-97. This is somewhat like an actor envisioning her audience to ensure that she is remaining "in character." Of course, if the Critical theorists are correct, the range of possible legitimate judicial actions is so wide that a "retrospective prediction" will provide no doctrinal guidance, though it may provide some non-doctrinal guidance if, for example, the judge has known character traits or works under known institutional constraints.

derstand how outsiders are initiated into the practice in the first place, that is, how they cross over to become insiders capable of making institutionally acceptable judgments. One conventional purpose of the judicial opinion is to provide instructions for later judges on how to act in similar circumstances. For the same reason, appellate judicial opinions are the subject of the case study method employed by almost all American law schools because the study of judicial explanations is supposed to train students how to reach legal conclusions themselves. However, Stanley Fish recently offered a non-legal example of how the “techniques of presentation” used by insiders to make their practice comprehensible to outsiders always misrepresent and distort the experience of discovery itself.<sup>25</sup> This critique, if correct, undercuts the conventional rationale for judicial justification.

According to Fish, an industrial research and development team was engaged (with little success) in the project of creating a paintbrush made with synthetic bristles. After failing in their initial attempts to make the synthetic bristles deliver a smooth flow of paint, one member of the team had an intuitive insight: “You know, a paintbrush is a kind of a pump.”<sup>26</sup> Afterwards, the engineers were able to apply the principles of hydraulic engineering to the problem of paint flow and a new paintbrush, dubbed a “pumpoid,” was invented.<sup>27</sup> Fish commented:

It would be [a mistake] to confuse a retrospective account of what [the engineers] had done—an account in which the characteristics and capabilities of pumps and paintbrushes are matched up so as to illustrate their membership in a single category—with an account of how they had done it. Insofar as there is now something in the world called the “theory of pumpoids” it would be a mistake to think of that theory as guiding the process by which pumpoids emerged as a solution to the problem the researchers originally faced. The solution—provoked by the intuitive, non-theoretical suggestion that we try thinking of paintbrushes as pumps—came first and the theory fol-

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25. See Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987); see also *infra* notes 26-29 and accompanying text.

26. Fish, *supra* note 25, at 1775 (quoting Schön, *Generative Metaphor: A Perspective on Problem-Setting in Social Policy*, in METAPHOR AND THOUGHT 254, 257 (A. Ortony ed. 1979) (footnote omitted)).

27. *Id.* at 1776 (quoting Schön, *supra* note 26, at 260) (footnote omitted).

lowed in response to whatever pressures prompted them to present their achievement in terms more orderly and rule-governed than their actual experience of it.<sup>28</sup>

The lesson Fish draws from this example is that it is impossible to "use" prior existing rules in order to generate a practice.

There are some baseball players who can talk about their craft in an analytic fashion, but that does not make them better baseball players than they would be if they couldn't; and there are some researchers who are good at thinking up *ex post facto* accounts of their accomplishment, but those accounts are not to be understood as recipes for that accomplishment. . . . They do not use their account of what they are doing (assuming that they have one) in order to do it. They can, however, use their account of what they are doing to do something else, to perform as a play-by-play analyst or apply for a grant.<sup>29</sup>

In other words, the process of discovery differs from that of justification, not only because the judge's decision may be based on unavowed political or personal prejudices, but because the decision may be based on intuitions that arise from experiences in the practice that cannot be represented in logical form. As James Murray confirms: "the logic of discovery roughly corresponds to that part of the legal decision-making process that can include judicial hunches, emotions, and personalities, as well as judicial knowledge of the law."<sup>30</sup> For this reason, "true initial thought rarely, if ever, appears in legal opinions."<sup>31</sup> Yet, this is not because the discovery and justification are unrelated.

A superhuman judge, when faced with a legal dispute, would accumulate all the relevant precedents, principles, and rules of law (not to mention all those *obiter dicta*). Then he or she would proceed methodically to a conclusion in a manner not unlike the solving of a problem in symbolic logic. Indeed, this "super-judge" would not "know" the conclusion until the entire justificatory process was complete. Discovery and justification would occur simultaneously.<sup>32</sup>

Murray's comment is particularly suggestive because of the way he described the discovery/justification distinction as a

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28. *Id.* at 1776-77.

29. *Id.* at 1778.

30. Murray, *Analogy in Legal Reasoning*, 29 UCLA L. REV. 833, 839 (1982).

31. *Id.* at 843.

32. *Id.* at 841-42 (footnotes omitted).

temporal space between the intuitive perception of an answer and the production of reasons to support the answer. Ideally, if the two stages of the decision process could occur simultaneously, they would be identical. However, “the clear articulation of reasons does not occur simultaneously with the action or the decision to act.”<sup>33</sup> Answers may sometimes appear instantaneously and intuitively, but justifications must always be sought retrospectively.

Returning to Golding’s teacher example, we might speculate that, for the teacher who gave his student the failing grade (obviously a martinet), intuitive dislike seemed an adequate ground for decision; but, because the teacher must eventually explain himself to others, he will cite poor organization, false statements, and so on, in order to keep his decision from being reversed. As Golding noted: “A justification is offered in order to *justify* to someone the decision or conclusion; a justification is directed to an audience.”<sup>34</sup>

Despite the “persuasive” function emphasized by this rationale, Wasserstrom and Golding maintained that the “testing” function served by the practice of justification gives judicial reasons a valid purpose, even if they are mere rationalizations with respect to the underlying causes for decision.

These reasons, therefore, operate as *controls* on the process of deliberation. Since judges are aware that they will have to supply a public justification of their rulings, any hunch, flash of insight, or “gut feeling” they initially had about a case before the court will be tested against the kinds of reasons that are likely to be appealing to their audience.<sup>35</sup>

But, even if the “testing” function of justification is a real check on judicial discretion—which it would not be if the Critical theorists’ view of doctrine is correct—Wasserstrom’s and Golding’s theses seem to relegate the actual discontinuity between what happens in the mind of the judge, and what the judge tells the public, to the realm of unexplained but inconsequential phenomena.

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33. *Id.* at 842.

34. M. GOLDING, *supra* note 13, at 8.

35. *Id.* at 9.



Unfortunately, the actual discontinuity between legal reasoning and the decision process cannot be so easily finessed. As Warren Lehman recently noted, the natural consequence of the realist position is that "[t]here is no obvious reason why attainment of policy ends should be made difficult, or even be frustrated, by requiring that arguments in cases be composed of useless-seeming legal building blocks."<sup>36</sup> Therefore, even though the realist attack on formalism was intellectually successful as a negative project, it failed as a positive one. Lehman pointed out that "[t]he failure of the realists to offer a plausible insider's account, an account in which rules can be taken as a proper object of an insider's commitment, is probably the most important reason why formalism as a theory has not been swept from the field."<sup>37</sup> Lehman noted that "[i]t is hard for those who have adopted the outsider's view to find a basis for action."<sup>38</sup>

The problem of finding an excuse for persisting in the judicial practice of offering doctrinal explanations is the essential problem that follows from the intuition thesis. When judicial opinions are conceived to be persuasive devices for lending authority to non-doctrinally motivated (if well-meaning) choices rather than to reports on the internal logical sequence that actually caused the decision, legal reasoning is demoted to a conventional form for expressing judgments reached by intuition or policy-based considerations. "Outsiders" still may be impressed by legal justifications, but lawyers and judges on the inside risk losing faith in the efficacy of their own practice. Moreover, a focus on the persuasive effect of decisions, rather than their necessary form, evades the question of why, if formal reasoning is disconnected from the actual decision process, some reasons are persuasive and others are not.

### *B. Analogical Reasoning and Time-Sensitivity*

An answer to the question of how intuitive judgments are connected to legal explanations might be sought by looking at

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36. Lehman, *Rules in Law*, 72 GEO. L.J. 1571, 1586 (1984).

37. *Id.* at 1587.

38. *Id.* (footnote omitted).

the form taken by legal arguments. Most current accounts of the legal reasoning process distinguish between its two basic logical forms: deductive reasoning and analogical reasoning.<sup>39</sup> Deductive reasoning requires that the lawyer *begin* with the fixed rule, from which a correct legal result should invariably follow. Because the deductive decision procedure is an ordered process, sequentially arranged so that prior knowledge correctly applied should always yield the same correct result, the deductive model offers the attractive possibility of scientific accuracy. The deductive model, however, is singularly ill-suited to account for the imponderable role of intuition in the legal process. Analogical reasoning, in contrast, holds out the promise of explaining why legal rules, which can be discovered only in retrospect, still are legitimately determinative of logical outcomes.

The basic framework for analogical reasoning, according to Edward Levi is:

a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case.<sup>40</sup>

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39. A third form, sometimes offered for legal decisionmaking, is "practical reasoning." See, e.g., Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45 (1985). According to this theory, judges must reason from ends to means; hence, a rule is deemed satisfactory if it helps to achieve generally accepted social goals and purposes in the particular cases that reach the courts. These goals and purposes are analogous to the desires and purposes of an individual. The relevant social goals and purposes are the "premises" with which a judge begins, and "[p]ractical reasoning establishes a plan of action relative to these premises." *Id.* at 96. Thus, courts will adjudge a rule's satisfactoriness according to how well it enables them to reach socially desirable results.

In the present context, I do not consider "practical reasoning" to be a distinct logical form because, unlike deduction and analogy, it is not an internal doctrinal practice. Rather, its underlying premise is the selection of desirable extrinsic or policy goals, which serve as a guide for, or constraint on, the construction of doctrinal arguments. In contrast, both the deductive and analogical models of legal reasoning advance the claim that legal results should be directly ascertainable from legal materials.

40. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-2 (1948).

The place where intuition fits into Levi's picture of analogical reasoning is obvious when he states that "similarity is seen between cases."<sup>41</sup> The way in which the lawyer or judge "sees" similarity is not described; all that Levi can tell us is what happens *after* the similarity has been seen. Levi then draws out some of the implications of intuitive, judicial "seeing." On one hand, law is thought to be a system of rules; on the other, "the rules are discovered in the process of determining similarity or difference."<sup>42</sup> Hence, there is a paradox, implied by Levi, that law is a game where you play by the rules, but the rules are discovered in the process of playing. "If this is really reasoning, then by common standards, thought of in terms of closed systems, it is imperfect unless some overall rule has announced that this common and ascertainable similarity [between precedent case and present case] is to be decisive. But no such *fixed prior rule* exists."<sup>43</sup>

The lack of a fixed prior rule implies that justification must always be retrospective. Steven Burton defended Levi's version of the intuition thesis in a debate with Peter Westen. The debate was revealing, both for the terms in which the two argued their oppositions and for what they assumed was at stake in their arguments.<sup>44</sup> Burton, quoting Levi, noted that, in analogical reasoning, "the classification changes as the classification is made. The rules change as the rules are applied. More important, the rules arise out of a process which, while comparing fact situations, creates the rules and then applies them."<sup>45</sup> Burton continued: "Judges may present the rule in a case as if it has always been what it has come to be, but that is patently an empty fiction."<sup>46</sup>

Westen countered that both Burton and Levi made the same "mistake":

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41. *Id.* at 2.

42. *Id.* at 3.

43. *Id.* (emphasis added).

44. Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136 (1982).

45. *Id.* at 1144 (quoting E. LEVI, *supra* note 40, at 4) (footnotes omitted).

46. *Id.*

[by] assum[ing] that in reasoning by analogy a person *first* identifies legally relevant similarities and *then* formulates a legal rule to explain the similarities. In reality the process of reasoning is precisely the opposite. One can never declare *A* to be legally similar to *B* without first formulating the legal rule of treatment by which they are rendered relevantly identical.<sup>47</sup>

At first glance, Westen's rebuttal seems adequate, until one realizes that the lack of a prior existing "legal rule of treatment by which [two cases] are rendered relevantly identical"<sup>48</sup> is exactly what precipitated Levi's comment about the open-textured quality of analogical reasoning. Burton quoted Levi, who perceptively recognized that the gap between generality in rules and particular facts in real cases makes the process of rule application uncertain<sup>49</sup> and makes the system of legal rules dependent upon values outside the rule system. "The judgment of importance in applying a rule, like the judgment of similarity in using an analogy, depends on unspecified values outside the rule itself, and involves us in analytical problems of moving from 'ought' to 'is' when we apply the rule."<sup>50</sup>

This, however, is hardly a comforting defense of legal reasoning because the identity of legal rules is ultimately determined by the freely willed choice of external values rather than by a formally constrained decision procedure.<sup>51</sup> It is difficult to see how this model of analogical reasoning could serve as an explanation for why rules can be "taken as a proper object of an insider's commitment."<sup>52</sup>

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47. Westen, *On "Confusing Ideas": Reply*, 91 YALE L.J. 1153, 1163 (1982).

48. *Id.*

49. Burton, *supra* note 44, at 1143 (quoting E. LEVI, *supra* note 40, at 3) (footnote omitted).

50. Burton, *supra* note 44, at 1145.

51. Judge Newman ran into this difficulty when he defended the concept of judicial neutrality. He admitted that the use of neutral principles "is not free of value preferences," especially where the case can be framed in terms of two competing principles. Newman, *supra* note 8, at 207.

[Whenever] the judge . . . is obliged to select from among competing principles . . . what is worth considering is not only the process of reasoning from the selected principle, but, more important, the thinking that influenced the initial selection. Values of some sort influenced the judge to believe that one of two competing principles was the more pertinent.

*Id.*

52. Lehman, *supra* note 36, at 1587.

The problem of circularity in rule application, regardless of whether a deductive or analogical model of legal reasoning is employed, has served as the basis of the Critical Legal Studies critique of justification. The issue in the contest between identification of a legal rule and identification of a desirable legal outcome is basically one of priority: law claims to prescribe the social order, but the line between prescription and description cannot be fixed because it is unclear whether society mirrors the law, or whether the law mirrors society. Peter Gabel wrote:

This process of reifying the rule turns the world on its head because it signifies that a norm of inter-subjective action is "caused" by an ideological appearance that has been drawn from it. The process of deducing outcome from rule then becomes the process of signifying the causality of the law, of signifying that the social order is the consequence of a legal order that is immanent to it.<sup>53</sup>

Advocates of "coherence theories" attempt to solve the problem of causal priority in legal justification by embracing, rather than trying to evade, the inevitable circularity that ensues when we recognize that legal justifications tend to modify the rules which they purport to apply. As Ernest Weinrib put it, the law is "immanently rational" to the extent that legal form and content (doctrinal principles and particular outcomes based on those principles) are mutually self-explicating:

Circularity is a consequence of the self-contained nature of intelligibility. Because form is the distinct principle of unity that renders intelligible the content that realizes it, no criterion of understanding can exist outside [the] form's encompassing embrace. Provided that the circle is inclusive enough, circularity is here, as elsewhere in philosophical explanation, a strength and not a weakness. For if the matter at hand were to be non-circularly explained by some point outside it, the matter's intelligibility would hang on something that was not itself intelligible until it was, in its turn, integrated into a wider unity. Criticism on the grounds of circularity implies the superiority of the defec-

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53. Gabel, *Reification in Legal Reasoning*, in 3 RESEARCH IN LAW AND SOCIOLOGY 25, 40 (1980). Charles Yablon made a similar point. "Since doctrinal rules exist to justify any such value choice, explaining such value choices as 'caused' by doctrine, or by principles or policies underlying the doctrine, can never provide an adequate basis for understanding such value choices." Yablon, *supra* note 20, at 939.

tive mode of explanation that leaves outside the range of intelligibility the very starting point upon which the whole enterprise depends.<sup>54</sup>

In a somewhat different vein, Joel Feinberg summed up the coherence theory shared by John Rawls and other coherence theorists.

[Coherence theorists] do not believe it possible to base an ethical system on self-evident moral first principles, or on direct intuitive insight into, or rational apprehension of, a uniquely moral realm of truth. Nor do they think it possible to deduce moral first principles from statements of fact, making no challengeable moral assumptions along the way. On the other hand, these writers are not willing to deprive general principles of their usual role in arguments for relatively specific maxims and judgments. General principles and factual premises do entail specific moral judgments, they admit, but the most suitable general principles, they insist, are those that summarize and are supported by the specific moral judgments in which we have the most confidence. We justify specific moral judgments, on their view, by deriving them from general principles, and the latter are supported in turn by a demonstration that the right moral judgments (*other* moral judgments) follow from them. This may be circular, but it is unavoidably and non-viciously so.<sup>55</sup>

Feinberg's and Weinrib's descriptions of legal justification in a coherence theory both employ essentially the same spatial metaphor for justification. According to Weinrib, legal reasoning is a "circle of thought that feeds upon its own unfolding explicitness."<sup>56</sup> According to Rawls, in reaching a judgment, "‘we work from both ends,’ at one end describing the conditions of our hypothetical initial position, and at the other, shaping those general principles (that we have extracted from our antecedent judgments) which will then be deduced from those conditions."<sup>57</sup>

The coherence theory of justification appears to require the theoretical inference of a detached standpoint of decision, from which the formal structure of the practice is fully explicable. That is, the judge posits a hypothetical "standpoint of judg-

54. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 974-75 (1988) (footnotes omitted).

55. Feinberg, *Justice, Fairness and Rationality* (Book Review), 81 YALE L.J. 1004, 1019 (1972).

56. Weinrib, *supra* note 54, at 974.

57. Feinberg, *supra* note 55, at 1021 (quoting in part J. RAWLS, A THEORY OF JUSTICE 20 (1971)) (footnote omitted).

ment" where she knows the general principle that will justify the "right answer" *before* she perceives the "right answer" in any given case. At the same time, however, the coherence theory admits that, in reality, no such "Archimedean point" exists from which to survey the field of practice. Hence, judicial decisionmaking is an *ad hoc* practice of shuttling back and forth between general rules and particular fact situations. Weinrib still defends the coherence theory of law on the ground that any competing mode of explanation would be subject to the same infirmity—its inability to account for the "superiority" of its own perspective to the practice it purports to criticize.<sup>58</sup> This, however, does not confirm the truth-value of retrospectively justified decisions but only admits the inevitable fiction of *any* formal rationale for intuitive judgments.

In this context, John Dewey's observation should be recalled. Retrospective justifications become necessary only when the decision must be explained to others.<sup>59</sup> Indeed, the self-evidence of intuitive perception—the fact that it needs no external justification—arises precisely from its internal quality, its immediacy to the mind of the perceiver. Similarly, according to Jacques Derrida's theory of language, in speech there is no distance between the thinker and her thoughts. Writing, in contrast, is always belated and externalized in relation to the thoughts it represents.

The voice *is heard* (understood)—that undoubtedly is what is called conscience . . . [and it] does not borrow from outside of itself, in the world or in "reality," any accessory signifier, any substance of expression foreign to its own spontaneity. It is the unique experience of the signified producing itself spontaneously, from within the self, and nevertheless, as signified concept, in the element of ideality or universality.<sup>60</sup>

Derrida would say that the judicial opinion, as a product of writing, is inevitably belated with respect to its origin in thought. The interpretation of judicial rhetoric, in turn, does not recover an original meaning but rather displaces one writ-

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58. See Weinrib, *supra* note 54, at 974-75.

59. See *supra* note 5 and accompanying text.

60. J. Derrida, *Of Grammatology* 20 (1974).

ten sign with another, which in its turn must “be interpreted into another sign, and so on *ad infinitum*.”<sup>61</sup>

The practice of legal reasoning as we know it, however, does not recognize the fictional quality of such retrospective explanations of prior events that are privileged precisely because of their temporal priority. To the contrary, as the temporal distance between the judge’s decision-point and the act of justification widens, readers of judicial opinions demand that the justificatory space between internal and external reasons be closed so that *all* reasons are enclosed within the system of legal doctrine; all reasons are doctrinally internalized.

Put differently, the judge must compensate for the loss of immanent certainty entailed by the independent observer’s distance from her point of decision by situating that decision within a coherent doctrinal structure. This is so, even if she discovers the coherence of that doctrinal structure retrospectively and tailors her account of the “law” to fit her decision, rather than vice versa. The potentially troubling relationship between the judge’s internal certitude about the correctness of her decision and the externally verifiable results she offers to her community takes us to the second stage of the problem, the institutional critique of justification.

## II. THE INSTITUTIONAL CRITIQUE

Who can say that he knows the secret thoughts of a judge, but I’m under the impression that you condone the absurdities as such, understand, love, and ennoble them by your love. These absurdities are nothing but the running zig-zag of dogs, whereas the master walks straight ahead, not right through the middle but precisely where the road leads.

Franz Kafka<sup>62</sup>

### A. *Precedent and Purity*

If an individual judge cannot rely on prior fixed rules to guide her decisions, then the theory of precedent cannot per-

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61. See P. DE MAN, ALLEGORIES OF READING 9 (1979) (commenting on C.S. Pierce’s theory of semiology).

62. F. KAFKA, LETTERS TO MILENA 34 (1953).



form its constraining and legitimating function. Some of the questions raised by what will here be called the institutional critique were named by Frederick Schauer when he asked:

Can decisions really be controlled by the past and responsible to the future, or are appeals to precedent just so much window dressing, masking what is in reality a decision made for today only? And even if precedent *can* constrain decisionmakers, why should a procedure for decisionmaking impose such a constraint? Why should the best decision for now be distorted or thwarted by obeisance to a dead past, or by obligation to an uncertain and dimly perceived future?<sup>63</sup>

Various practical reasons can be suggested for why precedent is allowed to control decisionmaking (if indeed it does), for instance, Schauer's own suggestion that the predictability engendered by following precedent is a virtue in a risk-averse institution,<sup>64</sup> or Martin Shapiro's suggestion that *stare decisis* is the most efficient way of coordinating decisionmakers in a non-hierarchical institution.<sup>65</sup> Such extrinsic reasons for the design of an institutional practice might be sufficient to explain why practitioners pursue a practice since success in the outside world converts to a powerful internal motivation to continue the practice. It should be possible, however, to explain precedent in a non-instrumental, internally self-sufficient manner. In fact, an adequate theory of precedent should also be able to shed light on the meaning of retrospective justification in practices other than that of judging within the institutional setting of Anglo-American law.<sup>66</sup>

One set of arguments in favor of precedent as an institutional practice arises from the pursuit of consistency in adjudication, especially when consistency is thought to facilitate the desirable goals of equality and defense of settled expectations. Since equality requires treating like cases alike over a period of

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63. Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 (1987) (footnote omitted).

64. *See id.* at 604-05.

65. Shapiro, *Toward a Theory of Stare Decisis*, 1 J. LEGAL STUD. 125, 134 (1972).

66. Schauer provided a humorous example from real life (e.g., a male child asking his parents why their decision to allow his sister to wear high heels should not be precedent for allowing him to do the same). *See* Schauer, *supra* note 63, at 577; *Symposium: Law and Literature*, 60 TEXAS L. REV. 373, 527-67 (1982) [hereinafter *Symposium*] (Fish and Dworkin discuss the applicability of precedential reasoning to literary criticism); *see also infra* notes 116-23 and accompanying text.

time and defending settled expectations requires judicial predictability, a trait that adherence to precedent should enhance, the ways in which adherence to precedent furthers these goals is fairly obvious. These arguments are far less instrumental than efficiency-based arguments since they facilitate the legal system's formal coherence rather than its administrative needs.

Nevertheless, the connection between these goals and the doctrine of precedent is indirect: if another means could be found to more efficiently guarantee settled expectations or to ensure that like cases are treated alike, then precedent conceivably could be abandoned. However, as within other forms of practice, there is a deeper imperative within the legal system itself that the doctrine of precedent draws upon for its continuing appeal. That imperative is the concept of purity, the belief that within the law lies a preexisting principle that needs to work itself out over time, but which existed in perfect, if unrealized, form in the very origins of the practice. The belief in purity is coextensive with the belief that we have "a single system of law, somehow linked into unity throughout time."<sup>67</sup> The doctrine of precedent, according to Julius Stone, relies upon the assumption that "judicially developed norms applied in a particular case have always been the law," and that "all present and future developments in common law principles are somehow already implicit in the common law existing hitherto."<sup>68</sup>

Retrospective justifications, therefore, are backward looking in at least two overlapping senses: not only does the decisionmaker justify her own past actions to her community, but she also justifies them in terms of legal practices (judicial precedents) sanctioned in the past by the same community. With respect to her own actions, the relationship between judge and justification is internal, and the judge has the possi-

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67. Stone, *The Ratio of the Ratio Decidendi*, 22 MOD. L. REV. 597, 597 (1959).

68. *Id.* at 598. Stone's view is that the "patriarchal fundamental principles of the common law" not only "unify it by their pristine origins" but also "legitimi[ze] new precepts" that arise as the "offspring" of originary principles. *Id.* at 599. In contrast, it is possible to argue that old law requires the addition of new law because law "works itself pure" over the passage of time. R. DWORKIN, *LAWS EMPIRE* 400 (1987); see *infra* note 79 and accompanying text.

bility of experiencing what Bernard Williams called "agent-regret," the feeling an actor has when assessing acts for which she is causally responsible.<sup>69</sup> In contrast, the judge only will experience external feelings of regret if she finds herself in disagreement with judicial precedents that she must obey. What both cases have in common is that it is too late to change the past, and retrospective justifications, instead, are attempts to bring the past forward into the present so that its original meaning is clarified and even purified.

Despite the paradox that the judge's intuitive feeling of what is permissible within the system might conflict with her intuitive sense of what is morally right or wrong, the judge's duty is to ascribe significance to relevant precedent, even if she personally regards it as "absurd." In fact, perhaps in part because the judge's internal moral sense might vary from the norms of justification made available by precedent, the path the judge will follow may become unpredictable to outsiders who do not have access to her thoughts, although, in retrospect, she should be capable of showing why her direction was the only way she could travel.

More precisely, by analogy to Kafka, it is possible to describe three alternate paths the judge could take toward her destination. If she followed precedents exactly, she would be led in contradictory directions ("the running zig-zag of dogs")<sup>70</sup> while, if she went "right through the middle,"<sup>71</sup> she

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69. See B. WILLIAMS, *Moral Luck*, in *MORAL LUCK* 20, 27 (1982). A judge is free from internal agent-regret even if she decides against her own moral standards if the legal system can be said to have externally compelled the choice.

Martin Golding quoted a letter by Justice Holmes, written to Sir Frederick Pollock in 1910:

Of course I enforce whatever constitutional laws Congress or anybody else sees fit to pass—and do it in good faith to the best of my ability—but I don't disguise my belief that the Sherman Act is a humbug based on economic ignorance and incompetence.

O.W. HOLMES, *I HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932*, 163 (1942); see also Newman, *supra* note 8, at 204: "The ordinary business of judges is to apply the law as they understand it to reach results with which they do not necessarily agree. They do this every day." *Id.*

70. F. KAFKA, *supra* note 62, at 34.

71. *Id.*

would miss the road entirely. The correct approach would be to “walk[] straight ahead”<sup>72</sup> yet to follow “precisely where the road leads.”<sup>73</sup> The gift of knowing where the road leads may vary from judge to judge (at least according to the intuition thesis), but it is also dependent upon the prior assurance that there is a road and that the road is one that leads, predictably, from an origin to a destination. The fact that the road cannot be located by simply following instructions (obeying precedent) or by plunging blindly ahead toward the desired destination suggests that judging is not a mechanical process. However, even if the skill of judging cannot be imparted through a set of rules, there is still the implication that judging is something that can be done well or poorly, properly or improperly, and, hence, that there exists some objective standard against which to measure the quality of a judge’s performance.

The metaphor of the road also suggests the temporal dimension of the judging process. The necessity for change introduced by temporality, however, is difficult to reconcile with the weight accorded to precedent in judging. Why should the reasons given for a judge’s decision be cast in terms of past decisionmaking? The controlling weight given to past decisions accords with the thesis that legal progress is a matter of working toward a state of purity by realizing what the law already is and always has been. The declaratory or discovery theory of law thus states that judges do not invent law but only find it.

The judge merely *finds* preexisting law; he then merely *declares* what he finds. A prior judicial decision is not the law itself but only evidence of what the law is. Thus a later judicial decision which seems to change the law has not really changed it at all but has only discovered the “true” rule which was always the law.<sup>74</sup>

Accordingly, Blackstone dealt with the problem of absurd precedents:

in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is

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72. *Id.*

73. *Id.*

74. Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 2 (1960) (footnote omitted).

declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined.<sup>75</sup>

What this means for the institutional critique is that either the present decision is a repetition of past law or it is not law at all. Even if a precedent has to be overruled, it can be overruled only in the name of an even earlier rule of which the intervening version is found to be a falsification.

In reality, precisely the opposite happens because the law, at any given time, is not what the earliest court, but what the most recent court, has declared it to be. The goal of legal purity, therefore, necessitates not only retrospective justification of present judicial acts but also retroactive application of the most recent legal decisions. In this sense, the "discovery" or "declaratory" theory of judicial decisionmaking worsens rather than alleviates the problem of retroactive lawmaking. Cases that come before the present court must be judged according to rules of law that have always existed, even if these rules had not yet been "discovered" at the time the events at issue in the present case transpired.<sup>76</sup>

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75. Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 908 (1962) (quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 70 (1765)) (footnote omitted).

76. The type of problem that arises from the theory that preexisting law is always "discovered" rather than "invented" by judges is illustrated by the case of *Herndon v. Georgia*, 295 U.S. 441 (1935). In *Herndon*, the plaintiff's appeal of his conviction for attempting to incite an insurrection was denied because he had failed to raise his constitutional objection in his state court appeal. The peculiarity of the case was that the allegedly unconstitutional interpretation of the state statute was not applied by the trial court. Hence, the defendant did not see any reason to raise the issue of the statute's constitutionality in his appeal. Nevertheless, the United States Supreme Court ruled that, despite the trial judge's favorable reading of the law, the defendant should have anticipated a later adverse interpretation because of the direction the Georgia State Supreme Court indicated it might take in the future. *Id.* at 446. In other words, the Supreme Court ruled that *Herndon* was not truly "surprised" by a "change" in the law because the law already was in existence—even though it had not been yet declared.

Justice Cardozo, dissenting, argued that it was unfair to make the defendant chargeable with knowledge that "the statute was destined to be given another meaning." *Id.* at 449 (Cardozo, J., dissenting).

It is novel doctrine that a defendant who has had the benefit of all he asks, and indeed of a good deal more, must place a statement on the record that if some other court at some other time shall read the statute differently, there

The ideal of purity, then, is compromised by the retrospective discovery of lawless intervals whenever a gap is found between the “real” law and the pronounced law because the pronounced law has been retroactively found invalid. If the problem of retroactivity were confined to cases of direct overruling, however, the negative implications of a theory of judging requiring retrospective justification on the institutional level (that is, a theory of precedent) would be limited to those relatively rare instances where overruling occurs.

A far more widespread problem arises under theories of law that recognize a larger role for judicial discretion. According to H.L.A. Hart’s theory of judicial discretion, for example, the law may be underdetermined or indeterminate in hard cases, and, therefore, the judge is licensed to create law to fill the gaps in legal doctrine.<sup>77</sup> Ronald Dworkin has objected to Hart’s view of hard cases on the ground that judicial legislation creates retroactive law, which cannot be justified internally because of the lack of prior existing legal standards to which the justification can refer. Unless the ideal of internal justification is to be surrendered, Dworkin contended a “right answer” thesis is necessary, a thesis claiming that all legal questions can be correctly answered from within existing doctrine.<sup>78</sup>

The promise of a gapless system of law is one that characterizes coherence theories in general, and, in a larger sense, coherence theories are the legitimate heir of the old common law notion that “law works itself pure”<sup>79</sup> over time. It must, therefore, be asked whether, on the institutional level, a coherence theory (of which I take Dworkin’s to be the prime contemporary example) can overcome the temporal paradoxes associated with retrospective justification.

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will be a denial of liberties that at the moment of the protest are unchallenged and intact. Defendants charged with crime are as slow as are men generally to borrow trouble of the future.

*Id.* at 448.

77. H.L.A. HART, *THE CONCEPT OF LAW* 132 (1961).

78. *See* R. DWORKIN, *A MATTER OF PRINCIPLE* 119-145 (1985); *see also* R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 14-80 (1978).

79. R. DWORKIN, *LAW’S EMPIRE* 400 (1987).

### *B. Coherence Theories, Textual Constraints, and Retroactivity*

The time-sensitivity of judgments rendered in a precedential justificatory mode results in a linear ordering problem: the way in which cases are decided will depend in part upon their place in the sequence of decisionmaking. This consequence is unacceptable because it cuts against the principle of equality, which operates both as the methodological basis of analogical reasoning (hence, the basis of precedent)<sup>80</sup> and the policy reason for adhering to precedent (even when it fails to deliver the most efficient possible result).<sup>81</sup> If the purpose of precedent is to prevent these unacceptable consequences, a judicial practice based on precedent should seek to minimize the tension between past, present, and future. This is why the retrospective justifications embodied in judicial opinions must be temporally oriented toward past, present, and future simultaneously.

Justifications based on precedent are directed toward the past in the sense that past institutional practices are the warrant for current acts of judgment. At the same time, these precedent-based justifications are present-oriented in the sense noted by Anthony Kronman<sup>82</sup> because the judge wants to convince the parties presently before her that her decision was legitimate; to the extent that she succeeds, the parties will be able to "live on amicable terms even after a judgment has been rendered that places the prestige and power of the law on one side rather than another."<sup>83</sup> Most importantly, perhaps, justifications are future-oriented in the sense that all lawmaking has a forward-looking aspect.<sup>84</sup> If the strength of a justification is

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80. See Burton, *supra* note 44, at 1142-47 (analogical reasoning is based on decisionmaker's ability to perceive elements requiring equal treatment in otherwise factually different cases).

81. See Schauer, *supra* note 63, at 588-91 (decisionmakers must accept suboptimal results in some cases because forward-looking aspect of precedent means that future assimilable cases will be affected by today's decisions, and judges must minimize unacceptable future results).

82. See Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835 (1987).

83. *Id.* at 865.

84. See also Deutsch, *Precedent and Adjudication*, 83 YALE L.J. 1553 (1974). Deutsch argued that, because "[p]recedent is more importantly prospective rather than retrospective," the Supreme Court's success in "anticipat[ing] the future rele-

measured by the influence it exerts over future judges, its quality might be measured by its ability to constrain irresponsible action by future judges.

Unfortunately, judicial lawmaking on this model sounds more conflictual than cooperative. The vision of a cooperative enterprise, where past and future judges together are engaged in the project of realizing an immanent principle imbedded in the law, is, to some extent, tempered by a competing vision of judging as a battle between generations, characterized not by continuity but by breaks in tradition caused by judges powerful enough to overcome the constraints imposed by their predecessors.<sup>85</sup>

Our current concern, however, is less with the manner in which strong judges break the constraints of tradition than with whether constraints are capable of holding at all. To the extent that constraints are conceptualized as "strong," they are vulnerable to being broken by an even stronger individual. This rigid form of precedent would seem to accord with the positivist model of law, which allows for the possibility of gaps or openings in the law. Whether these gaps are made or found is less significant, in this context, than the possibility, acknowledged by Hart, of their existing at all. The coherence model of law, in contrast, would seem to deny even the possibility of gaps in the law. Precedents presumably exist to cover all contingencies since there is always a right answer to legal questions. The question is whether, if precedents are malleable enough to provide right answers to unforeseen questions, are they too malleable to constrain judges from finding whatever else they want to find?

This question, in turn, raises two sub-issues: first, whether textual constraints are capable of inhibiting the interpretative freedom of a legal text's later readers; second, whether the linear ordering problem that arises from retrospective analysis of

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vance of [their] present decision" will determine "the Court's legitimacy." *Id.* at 1554.

85. For a description of this revisionist model, based on literary theorist Harold Bloom's Freudian account of struggle between strong precursor poets and their literary descendants, see Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 *Yale L.J.* 857 (1986).



prior cases has a determinative effect on the outcome of cases that arise at various stages in the practice's history.

# 1. Textual Constraints

## a. Indeterminacy of Legal Categories

The former question asks whether language is ever capable of constraining its own interpretation. Schauer's defense of precedent spoke directly to this question, and our tolerance for the concept of precedent as a form of linguistic constraint is tested by whether we can accept even his relatively weak version of control by precedent.

He contrasted the rigidly formalistic view of precedent where "rules of relevance track the natural and largely immutable patterns of the world around us, creating, therefore, no real choice among rules of relevance on the part of either the creator or the follower of a precedent,"<sup>86</sup> with the nominalist language theory that gives rise to legal realism:

The nominalist views the world not as naturally subdivided, but rather as demarcated by the artificial labels contingently attached by particular people, particular cultures, or particular languages.

. . . Taken with the wide range of characterizations available to a judge, many Realists saw precedents of the past as invariably susceptible to whatever characterization best fit with the result the judge then wanted to reach.<sup>87</sup>

Schauer rejected both these extremes but nevertheless sought to impose some degree of constraint through linguistic categories. Therefore, even though there are no "immutable categories of the world" that language reflects, there are categories that "in some way resist molding by the decisionmakers who use them."<sup>88</sup>

This relatively modest claim is stated in a manner that is significant for our present discussion. First, Schauer distinguished between long-run and short-run changes in linguistic categories. "That a society may change its collective views about what counts as a 'vehicle,' or what is 'liberal,' 'fair no-

86. Schauer, *supra* note 63, at 582-83 (footnote omitted).

87. *Id.* at 583 (footnote omitted).

88. *Id.* at 584.

tice,' or 'cruel,' does not mean that the power to accomplish any of these changes exists in the short run, or inheres in individual or institutional decisionmakers."<sup>89</sup> Second, he noted that legal language is dependent upon categories drawn from its larger environment, and, insofar as these cultural categories are fixed, they guarantee the fixity of legal language. "Precedent rests on similarity, and some determinations of similarity are incontestable within particular cultures or subcultures."<sup>90</sup> In an image that recalls Justice Roberts's train metaphor,<sup>91</sup> Schauer observed that "[l]egal rules of categorization are like passengers sitting on a train. In an important way, the passengers are moving, but, in an equally important way, the passengers are sitting still."<sup>92</sup>

This paradox not only illustrates Schauer's point that linguistic categories provide a structurally determinate foundation for legal reasoning but also cuts against that thesis for, while it is perfectly true to say that the passengers in a train are moving and sitting still at the same time, the sense of stillness within the train is actually an illusion because the passengers are indeed moving forward in time and space. If fixity in language allows the passengers to enjoy the security of stillness while they are, in fact, moving, then perhaps it serves a tranquillizing purpose but not a constraining purpose. Schauer's image, moreover, obscures the fact that legal change at some point *does* disturb the resting passengers. At some point, they will experience the shock of displacement and, the longer it is deferred, the more abrupt that shock might be.

In fact, Schauer's view seems to be that legal change is usually so gradual and incremental that it can pass unnoticed; however, an alternative and equally plausible view is that change itself is not dispersed evenly, but rather its potential is dispersed evenly—any suitably placed decisionmaker has the

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89. *Id.* at 585.

90. *Id.* at 587.

91. Roberts felt that, without respect for precedent, Supreme Court decisions might come to be treated like "a restricted railroad ticket, good for this day and train only." *Id.* at 571 n.1 (quoting *Smith v. Allwright*, 321 U.S. 649, 669 (1943) (Roberts, J., dissenting)).

92. *Id.* at 586.

opportunity to realize the accumulated potential for change, and, at these strategic points in the practice, the ability of legal categories to constrain legal actors is overcome in a far more dramatic way than envisioned by Schauer.<sup>93</sup>

Moreover, in Schauer's description of legal language, a significant tension exists between long-term and short-term retrospection (as well as between cultural and professional language) that is veiled by the relative stability of the practice at any particular place and time. He seemed to suggest that, as participants in the practice, we can look back in retrospect and see that the practice has changed over time, but the constraining power of precedent prevents "individual or institutional decisionmakers" from independently initiating any such change themselves.<sup>94</sup> This seems true as an empirical observation, a counterpart, perhaps, to the theoretical seamlessness of legal doctrine in Dworkin's right answer thesis, but it does not explain how the practice actually does change<sup>95</sup> or how the outside world communicates with the legal world across the gap separating the professional culture from the larger culture. In fact, the seamless nature of the experience described by Schauer heightens the significance of the spaces he cannot explain, just as Dworkin's right answer thesis makes the appearance of even minor gaps in the doctrine into major crises of legitimacy.

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93. In support of Schauer's view, it should be noted that the experience of dramatic change is so unusual as to have no effect on normal practice; however, to the extent that change is suppressed as a normal experience, it is necessarily magnified when abrupt; angular changes in doctrinal direction occur at moments of legal crisis. The choice between images for change might be historically determined; for a comparison between cyclical and crisis-oriented images for history, see M. ABRAMS, *NATURAL SUPERNATURALISM* 32-70 (1971).

94. See Schauer, *supra* note 63, at 585.

95. In Kafka's parable, "The Trees," he described the paradoxical juxtaposition of stability and change as viewed by a relatively powerless individual: "For we are like tree trunks in the snow. In appearance they lie sleekly and a little push should be enough to set them rolling. No, it can't be done, for they are firmly wedded to the ground. But see, even that is only appearance." F. KAFKA, *supra* note 2, at 382.

b. Holding and Dicta

Regardless of whether purely linguistic legal categories can constrain judges in any meaningful way,<sup>96</sup> the ability of judicial opinions to constrain future judges to precedent also depends upon the determinacy of the formal medium in which those categories are embedded.

The fundamental distinction in any debate over the ratio decidendi, the rule of law represented by a case, is between what the court does and what it says. What the court does, of course, can be surmised from the decision's immediate effect upon the parties involved in the present case. Apart from this effect, the court's decision is supposed to constitute a rule that will bind future judges to act in the same way. From the perspective of future judges, the question is what, exactly, in the present case, is binding upon them?

As soon as we move beyond the actual decision into the area of reasons given for the judgment, the constraining power of the present case weakens. Indeed, if the job of the court is to apply law and not to make it—to settle only actual cases and controversies as they arise—the job conceivably could be done without giving reasons. The justification of decisions, in this view, could be seen as a courtesy to the losing side rather than as an essential element of the judicial function. However, the justification of decisions serves a two-fold purpose: to help future courts interpret the significance of the present decision, as well as to help the parties to the present case live on “amicable terms” with each other after the case is over.

Thus, the judge's decision includes not only the act of judgment itself, but also the reasons offered in support of that act. The reader of the decision, though, must be able to surmise which reasons are necessary to the judgment and which are

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96. It should be noted that even a small degree of flexibility in the determination of a legal category is often sufficient to create a space for judicial discretion. Thus, even a low level of linguistic indeterminacy can be a serious problem for a constraint-oriented defense of discretion. There is, moreover, often significant room for choice between legal categories, as well as large numbers of legal categories that are intentionally vague so as to leave room for judicial discretion. Finally, even if ordinary language to some extent constrains legal language, legal language utilizes terms of art that are allowed to vary from ordinary usage.

inessential comments or dicta. The difficulty in distinguishing between holding and dicta in any single case reflects the larger theoretical problem of finding an intermediate position between the two extreme possible views that (a) *all* reasons are dicta and only the actual judgment itself is binding law, or (b) *all* reasons stated by a court to explain its decision are law, binding upon future courts when the same legal issue arises.

If a present-day court wishes to constrain future courts, it will endeavor to attach securely the reasons for its decision to its judgment so that those reasons cannot be detached as dicta or otherwise be distinguished as inessential to the outcome of the case. Arthur Goodhart's proposal for how to determine the ratio decidendi illustrates the difficulty of creating such a binding set of reasons. Faced with the problem that reasonable people can differ as to the ratio decidendi of a case, Goodhart re-examined the relationship between judicial justifications and the case's material facts to see whether that relationship would yield a method of determining the binding element to which the doctrine of precedent must be applied.

Goodhart started with the observation that, even if the reasons given for a decision are wrong, the case might yet "contain valid and definite principles which are as binding as if the reasoning on which they are based were correct."<sup>97</sup> Indeed, "it is precisely some of those cases which have been decided on incorrect premises or reasoning which have become the most important in the law [because] [n]ew principles, of which their authors were unconscious or which they have misunderstood, have been established by these judgments."<sup>98</sup> Hence, Goodhart concluded that "the first rule for discovering the *ratio*

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97. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 162 (1930). Roscoe Pound, for example, observed:

It is an everyday experience of those who study judicial decisions that the results are usually sound, whether the reasoning from which the results purport to flow is sound or not. The trained intuition of the judge continually leads him to right results for which he is puzzled to give unimpeachable legal reasons.

Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 951 (1923).

98. Goodhart, *supra* note 97, at 163.

*decidendi* of a case is that *it must not be sought in the reasons on which the judge has based his decision.*"<sup>99</sup>

On its face, this conclusion appears to undermine the very rationale for the judicial practice of justification. Goodhart, however, was not saying that there is no *ratio decidendi*; instead, he was proposing a method for its discovery. Turning his attention specifically to problem cases where the court's own statement of the rule of law is not helpful, Goodhart asked how these cases might be made to yield the definite principle which future courts must regard as binding.

He began by describing an even more extreme realist position, although one which he did not advocate: "it is not what . . . [the judge] says but what he does that matters. We can ignore the vocal behavior of the judge, which sometimes fills many pages, and concentrate upon his non-vocal behavior which occupies but a few lines."<sup>100</sup> This theory was unsatisfactory, not because the judge's *reasons* for his or her decision necessarily deserve more respect than the realist critic gives them, but because subsequent readers may not legitimately try to displace the preceding court's view of the *facts* with their own view of the facts. In Goodhart's view, the later reader is permitted to rediscover or reinvent the reasons for the decision in the precedent case but is not allowed to rediscover or reinvent the facts upon which that decision was based.

The judge . . . reaches a conclusion upon the facts as he sees them. It is on these facts that he bases his judgment, and not on any others. It follows that our task in analyzing a case is not to state the facts and the conclusion, but to state the material facts as seen by the judge and his conclusion based on them. It is by his choice of the material facts that the judge creates law.<sup>101</sup>

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99. *Id.* at 164 (emphasis added).

100. *Id.* at 168 (footnote omitted). The realist emphasis on "non-vocal" behavior would not necessarily rule out consideration of judicial justifications (or "vocal" behavior) even if we adopted the realist position that the primary purpose of legal reasoning is to predict correctly judicial behavior from the "outside" because the vocal elements of the judge's performance still might be valuable clues to why she behaved as she did. However, if judicial justifications are only a pretext for hidden motives, then the judge's doctrinal justification (vocal behavior) again would have little predictive value.

101. *Id.* at 169.

What is binding in the precedent case, therefore, is (1) a set of material facts and (2) some action taken on those facts. These two decision-points are fixed; however, the relation between these points—the place where reasons or justifications might be offered—is more often than not left open for the later reader to fill in as he or she wishes.

The greater part of Goodhart's essay was occupied with instructions for how to discover what counts as a material fact in the precedent case. In his view, these instructions were crucial because the determinacy of legal reasoning based on precedent depended almost entirely upon a judge's ability to fix at least the facts of the case before her, even if she could not prevent later judges from displacing her reasons with their own.

Thus, the point of Goodhart's discussion of the ratio decidendi was not to say that there are no legitimate reasons for judicial actions but, rather, that the reasons underlying a judgment are better assessed retrospectively, by future judges, than by the judge who made the decision.<sup>102</sup> In fact, he assumed that there was for each case a correct ratio decidendi whose accessibility to later judges depended upon their ability to extract the relevant material facts from the precedent case.

The effect of this theory, however, is more unsettling in practice than Goodhart intended. Critical theorists like Mark Tushnet have pointed out that retrospective justifications provide an opportunity for judicial "creativity," which undercuts the constraining power of precedent.

At the moment a decision is announced we cannot identify the principle that it embodies. Each decision can be justified by many principles, and we learn what principle justified Case 1 only when a court in Case 2 tells us. Behind the court's statement about Case 1 lies all the creativity to which the hermeneutic theory of historical understanding directed our attention. When *Roe* was decided we might have thought that it rested on Perry's principle, but the funding cases show us that

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102. In contrast, Murray noted that precisely because a case's ratio decidendi is determined retrospectively, it cannot have a single correct meaning over time. "Due to the complications of cleansing the *ratio* from all the *dicta*, the holding of the precedent, which is that aspect of the decision binding on future courts, is constantly being remolded by future decisions, future fact variations, and policy changes." Murray, *supra* note 30, at 850. As Murray noted, the very meaning of the ratio decidendi is determined retroactively because it changes through the actions of future courts. *Id.*

we were “wrong” and that *Roe* “in fact” rested on one of the alternatives just spelled out. The theory of neutral principles thus loses almost all of its constraining force.<sup>103</sup>

Moreover, when reasons are *entirely* retrospective, it means that they can be discovered only after-the-fact. Thus, it would seem that there is always a time lag between a legal judgment and the discovery of its meaning. The meaning of the present decision is inevitably deferred to a later time; what meaning the present decision does contain is the imbedded meaning of the precedent case drawn forward into the present case for which reasons can be discovered now only in retrospect.<sup>104</sup> Later generations of judges undertake the task of justifying the actions of earlier judges, while deferring the justification of their own actions to their own institutional descendants.<sup>105</sup>

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103. M. TUSHNET, RED, WHITE AND BLUE 49 (1988) (footnote omitted).

104. See, e.g., *United States v. Indelicato*, 865 F.2d 1370 (2d Cir.), *cert. denied*, 110 S. Ct. 56 (1989) (redefining “pattern of racketeering activity” under the Racketeer Influenced and Corrupt Organization Act (“RICO”), 18 U.S.C. §§ 1961-1968). The *Indelicato* court reversed the Second Circuit’s earlier position that proof of two racketeering acts, without more, may be quantitatively sufficient to establish a RICO pattern. *Indelicato*, 865 F.2d at 1381. That earlier position was based in part upon *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980), where the court found at least “ten separate predicate acts of racketeering, any two of which would be sufficient to sustain the conviction on the RICO count.” *Weisman*, 624 F.2d at 1124. The Second Circuit changed its definition of the pattern requirement, not by disavowing the result in *Weisman*, but by reinterpreting the relationship between that result and the facts on which it was based.

We note in passing that we do not believe *Weisman* stood for the proposition that two acts of racketeering activity sufficed without more to establish a pattern. While it might have stood for that proposition if only two acts of racketeering activity had been proven, in fact at least 10 (and perhaps as many as 18) racketeering acts had been proven, and *Weisman*’s statement that any two of the proven offenses sufficed to show a pattern must be interpreted against that background. It was plain that no two of these acts could be viewed as isolated or sporadic, for there were at least eight other similar acts.

*Indelicato*, 865 F.2d at 1382.

105. Even Goodhart’s more optimistic assertions must be questioned in this context. He assumed that the relationship between a fixed set of facts and a fixed decision must yield a fixed ratio decidendi that connects them. However, if an earlier judge is unable to control later interpretations of the ratio decidendi, she might also be unable to control later interpretations of the material facts. This is especially true because fact selection is interdependent with the “theory of the case.” See D. BINDER & P. BERGMAN, *FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF* 162-



## 2. Ripple Effect Retroactivity

If the time-sensitivity of judgments means that they are necessarily retrospective in an institutional sense, that is, if latter-day judges necessarily judge the actions of their predecessors by recreating them in retrospect, then the concept of precedent as a form of institutional constraint is effectively turned inside out. Instead of past decisions determining future decisions, future decisions seem to determine the meaning of past decisions.

This thesis, although an overstatement, has the virtue of bringing into focus the time-sensitivity of precedential judgment that we usually take for granted. Despite our normal sense of being constrained by precedent, if we take an extended view of judging, we might find that retrospection invariably entails some degree of revision within a linear sequence of cases, and that this revisionary element of retrospective justification is a typical feature of legal reasoning.

Thus, it would be helpful to examine the retroactivity problem implied by the linear ordering mode of Anglo-American case law in the context of three critiques of Dworkin's coherence theory that, I believe, complement each other. First, Kenneth Kress coined the phrase "ripple effect retroactivity" to describe why, in a retrospective judging mode, legal rights may depend upon the temporal order in which cases are decided.<sup>106</sup>

The ripple effect will occur in any step-by-step technique for generating coherence sets that includes a principle of conservation. By a principle of conservation, I mean that the set's history of element inclusion is a factor in determining whether any current element is included. In other words, the order in which elements are considered determines what gets in the set because it determines what is already there to cohere (or fail to cohere) with. In adjudication, the doctrine of precedent supplies the conservative aspect: legal truths depend in part on prior legal decisions. The mere historical fact of a prior decision influences the decisions in later cases, and thus the law, because it enlarges the settled law with which later decisions must cohere.

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189 (1984); see generally S. FISH, *IS THERE A TEXT IN THIS CLASS?* 338 (1980) ("Disagreements are not settled by the facts, but are the means by which the facts are settled.").

106. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CALIF. L. REV. 369, 383-402 (1984).

What the law is therefore depends on the linear order in which cases have been decided.<sup>107</sup>

The ripple effect as described by Kress does not seem to deny the determinative power of precedent; rather, it is an alternate explanation for why precedent is effective. The latest decisionmaker is not licensed to disregard earlier decisions. To the contrary, her duty is to make her decision cohere with what is already in the set of prior relevant decisions. However, her decisions add to the body of settled law with which later decisions must cohere. In some borderline cases, therefore, a proposition that once cohered with the body of settled law now will fail to cohere. Hence, because of the judge's decision in the present case, the truth value of the proposition in some future borderline case changes.

The metaphor underlying this thesis is an image of law:

a spider's web with propositions at the intersections of the web's strands. Because of the many interconnections among the propositions (or points), any change in the location of any proposition within the field or web will occasion ripple effects on the rest of the propositions in the field or web.<sup>108</sup>

It is perhaps worth noting how Kress's use of this metaphor tends to suppress the worst implications of temporal instability. Kress's image is essentially one of incremental change. His argument against Dworkin's theory is not that there is no right answer at any given point in time but, rather, that the correct answer to any legal question may change over time as the total doctrinal field enlarges to accept new legal propositions. Kress is saying that there may be two different correct legal answers at two different points in time, not that there is no right answer at any single, particular moment. Hence, retrospective justification creates only a limited retroactivity problem because changes in the field affect only a small number of cases, those located on a legal borderline.

However, it might be argued that law's temporal instability undermines its spatial coherence as well—that, to the extent law changes over time, the chances diminish that the “web” is formally perfect at *any* given point in time. The point-and-line

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107. *Id.* at 400 (footnote omitted).

108. *Id.* at 380-81 n.61.

metaphor, it should be noted, describes both the web-like spatial legal universe to which points of doctrine are added over time and the sequential structure of legal time itself. If a decision taken at one point is different from one taken further down the line, even though the facts are the same, then the logical connection between those points is shown to be contingent rather than necessary. With this view, the addition of new pieces of doctrine does not simply occasion ripple effects or realignments between points in the rest of the web but also causes unforeseen breaks between previously linked points. These ruptures or discontinuities are not merely embarrassments or occasional mistakes but are typical features of the doctrinal web. They suggest less a unified web than one divided by significant and irreconcilable contradictions.

An intermediate step toward incorporating the fact of discontinuity into a spatial metaphor of the judging enterprise is Duncan Kennedy's use of similar imagery to describe the mixture of freedom and constraint that a judge experiences inside the practice. According to Kennedy, on the level of the individual case, the relevant adjudicative facts exist as points that must be connected by the "line" of the holding. This line can be extended beyond the present case to intersect the facts of other cases. "The line defines a set of cases that the holding has resolved one way or the other. When I redefine the holding, I inflect the line in some way, changing its direction so that it 'covers' a different set of hypothetical situations."<sup>109</sup>

In the next stage of his description, Kennedy extended the point-and-line metaphor to use it on the higher level of generality of the doctrinal field where individual cases, rather than the facts of a single case, are perceived as "points" and making sensible legal arguments becomes a game of "connecting-the-dots" to create a doctrinal line that supports one's position.<sup>110</sup> In contrast to the coherence model, where the web is unified so that doctrinal lines represent the necessary connections between points that emanate from a central core of fixed princi-

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109. Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 533 (1986).

110. *Id.* at 533-35.

ple, Kennedy saw the boundary lines in legal doctrine as “points of equilibrium [between] opposing forces” or “like the line in a magnetic field formed by iron filings exactly balanced between two distant magnets.”<sup>111</sup>

From this initial description, Kennedy proceeded to give a typology of “typical field configurations”<sup>112</sup> and to describe skill at legal argument as accomplishing “the greatest possible movement of the boundary with the least possible disturbance of the other elements of the field.”<sup>113</sup> Significantly, if the doctrinal lines in the legal field are perceived as boundaries between opposing forces rather than as logically necessary connections within a unified field, then the potential for change through retrospective reconfigurations of the field is greatly enhanced. Indeed, the whole concept of an “immanently intelligible” form is sharply revised by the notion that different judges can have competing definitions of form, which they are invited to apply to the preexisting materials of practice.<sup>114</sup>

Since legal practice consists of an already-interpreted field, the question then becomes: how can a field of pre-interpreted materials offer any meaningful degree of freedom or originality to subsequent interpreters? There are serious constraints on the possibility of original thought where the materials of practice must be taken by the reader as they come pre-formed by previous readers. Precisely this notion of constraint was described by Kennedy when he noted:

you can't do absolutely anything you want with a pile of bricks, and what you can do depends on how many you have, as well as on your other circumstances. In this sense, that you are building something out of a given set of bricks constrains you, controls you, deprives you of freedom.<sup>115</sup>

This description of the constraint imposed by inadequacies in the expressive resources of legal materials leads to a third critique of Dworkin's coherence theory, the Fish/Dworkin de-

111. *Id.* at 535.

112. *See id.* at 538-44.

113. *Id.* at 544.

114. Or, as Felix Cohen put it, “a series of cases which looks like a straight line from one value standpoint may look like a very crooked stick from another.” Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 248 (1950).

115. Kennedy, *supra* note 109, at 526.

bate.<sup>116</sup> Fish's attack on Dworkin might be considered a radical version of the linear ordering problem pointed out by Kress. He was responding to Dworkin's comparison of common law adjudication to the creation of a "chain-novel" where each author, in sequence, contributes a chapter to an ongoing literary work.<sup>117</sup> According to Dworkin, the freedom of the first author should be almost complete because he or she is writing without any constraints imposed by previous chapters; as the novel proceeds, however, the innovative opportunities available to later contributors dwindle because the requirement of coherence creates tighter parameters within which the writers must limit their creative ideas.<sup>118</sup> Fish disagreed with this portrayal of the practice and claimed that later authors in the chain would be just as free as earlier ones because nothing intrinsic to the evolving text could prevent later contributors from interpreting the ongoing story to suit their own needs. Earlier chapters, in other words, could not serve as precedential constraints on the authors of later ones because the meaning of those earlier chapters is *not* a product of "the independent and perspicuous shape of the words."<sup>119</sup> Instead, the interpretive decisions of subsequent authors are what give the words shape.<sup>120</sup>

If the "chain-novel" analogy holds true, then judges cannot be constrained by prior cases in the sense claimed by Dworkin because prior cases can be interpreted to provide precedent for whatever decision the present judge wants to take. Legal (analogical) reasoning, according to this account, promotes rather than deters such retrospective revisions of precedent because legal analogies are based on perceptions of similarity, and:

similarity is not something one finds, but something one must establish, and when one establishes it one establishes the configurations of the cited cases as well as of the case that is to be decided. Similarity, in short, is not a property of texts (similarities do not announce them-

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116. See *Symposium, supra* note 66, at 527-67.

117. See Dworkin, *Law as Interpretation*, 60 TEXAS L. REV. 527, 540-46 (1982).

118. See *id.* at 541-42.

119. Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEXAS L. REV. 551, 554 (1982).

120. *Id.* Fish noted, however, that late-coming authors are no freer than the first author because their interpretations are likewise constrained by the conventions of the practice. See *id.* at 553-54.

selves), but a property conferred by a relational argument in which the statement *A* is like *B* is a characterization (one open to challenge) of *both A* and *B*.<sup>121</sup>

The debate between Fish and Dworkin is actually an irresolvable conflict over the time-perspective from within which each views the process of legal reasoning. Dworkin took the prospective view that present opinions *must* form a constraint for future judges because the practice is only explicable within the context of a preexisting set of materials made available by one's predecessors in the practice.<sup>122</sup> Fish, in contrast, took the retrospective view that the last judge in a series has the power to confer properties upon the "chain," retroactively, since the practice exists only as the product of her interpretation of it. This position is far more radical than Kress's because, here, judicial decisions do not simply change the settled law by adding new pieces of doctrine that incrementally affect intra-doctrinal relationships. Rather, according to Fish, the very existence of settled law is dependent upon the perceiver's "discovery" of it.<sup>123</sup>

In fact, Fish denied that retrospective justification has radical consequences; instead, the present's ability to reconstitute the past in its own image should guarantee that transitions between old and new doctrinal positions will be non-disruptive. There can be no gap between past and present, if the past is continuously revised to support the present. This reassurance, however, requires the simultaneous privileging of two moments of origin. On the individual level, Fish privileged the moment of intuition as the authentic origin of all practical experience. This moment remains behind a veil that cannot be pierced to

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121. Fish, *supra* note 119, at 557-58.

122. Dworkin, *supra* note 117, at 542-43. Dworkin's view was not that judges are *absolutely* limited by the doctrine of precedent, but, rather, that precedent is a weighted factor in the decisionmaking process; in most cases, however, the weight accorded to precedent will require that precedent be followed. Of course, the degree of weight accorded to a prior decision will be the product of several factors, including the quality of the reasoning offered by that prior judge and the place he or she occupies in the institutional hierarchy of the court system. For a discussion of Dworkin's theory of precedent, comparing it favorably to Joseph Raz's less flexible positivist theory, see Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD J. LEGAL STUD. 215 (1987).

123. See Fish, *supra* note 119, at 556-59.

see what preceded the individual judge's intuitive understanding of a situation. On the institutional level, in contrast, Fish seemed to privilege the act of justification as a pseudo-origin that is deliberately projected backward into the history of the practice and mistakenly seen by external observers as the real source of action.<sup>124</sup> He, thus, apparently, eradicated the differences between discovery and justification, as well as between the past history and present state of the practice. The unresolved question of whether such continuity is possible, or whether discontinuity is a necessary and inevitable trait of legal or literary practice, is the final topic left for us to consider.

### III. THE EXPERIENCE OF DISCONTINUITY

According therefore to our relative position on its banks the Sacred History becomes prophetic, the Sacred Prophecies historical, while the power and substance of both inhere in its Laws, its Promises, and its Comminations. In the Scriptures therefore both Facts and Persons must of necessity have a two-fold significance, a past and a future, a temporary and a perpetual, a particular and a universal application. They must be at once Portraits and Ideals.

Samuel Taylor Coleridge<sup>125</sup>

Whereas the symbol postulates the possibility of an identity or identification, allegory designates primarily a distance in relation to its own origin, and, renouncing the nostalgia and the desire to coincide, it establishes its language in the void of this temporal difference. In so

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124. In a general sense, Fish described how, "in the event a fringe or off-the-wall interpretation makes its way into the center, it will merely take its place in a new realignment in which *other* interpretations will occupy the position of being off-the-wall." S. FISH, *supra* note 105, at 356-57. This is because interpretation is not something "external to the center it supposedly threatens," but, rather, it is "constitutive of the center." *Id.* Thus, a successful interpretation is always an orthodox one because it is capable of defining orthodoxy. Fish applied this claim to an institutional context and described how anti-professionalism, if successful, does not dismantle a profession but, rather, revitalizes the professional ethos. Fish, *Anti-Professionalism*, 7 CARDOZO L. REV. 645, 675-76 (1986). This happens when the institution retrospectively adopts the anti-professional's view of what constitutes the profession and recognizes the truth of that critique as constitutive of the profession.

125. S.T. COLERIDGE, *The Statesman's Manual*, in 6 LAY SERMONS: THE COL-

doing, it prevents the self from an illusory identification with the non-self, which is now fully, though painfully, recognized as a non-self.

Paul de Man<sup>126</sup>

Fish's emphasis on "perception" and "seeing" takes us back to the intuition thesis because there we began with the problem that the judge could not account for why or how she saw the necessity for acting in certain ways, nor for why she should have to justify her decision in an external language of justification that was different from the internal language of discovery. It is possible that the experience of discontinuity is merely inconsequential, but the stress between past and future entailed by the retrospective quality of justification makes this possibility suspect on its face.

The experience of discovery, we recall, was not one of freely choosing a path but, rather, one of finding the correct course that one had to follow. It was an experience of "finding," not one of "inventing," and it was an experience of seeing and acting, not one of passive reflection. This is not to say that there is no interpretive dimension to the experience of discovery, but, rather, that interpretation at the discovery stage is not *freely willed* interpretation. At the discovery stage, said Fish, "information only comes in an [already] interpreted form (it does not announce itself). No matter how much or how little you have, it cannot be a check against interpretation because, even when you first 'see' it, interpretation has already done its work."<sup>127</sup> This notion of interpretation as instantaneous and non-volitional is at variance with the usual idea of interpretation as discretionary and creative. At the justification stage, the judge presumably *can* engage in interpretive activity in the normal manner, freely taking advantage of her superior temporal position to reconfigure the materials of practice into a shape to her liking. At the discovery stage, in contrast, the materials of prior practice exercise some type of coercive power upon the reader, although not the type of rational constraint that we usually think of persuasive legal arguments as creating. Fish seemed to suggest that the "work" that interpretation

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126. P. de Man, *The Rhetoric of Temporality*, in *BLINDNESS AND INSIGHT. ESSAYS IN THE RHETORIC OF CONTEMPORARY CRITICISM* 187, 207 (1971).

127. Fish, *supra* note 119, at 554.



does in this latter sense is not projected outward upon the legal texts that will be retrospectively reconfigured, but, rather, the "work" that interpretation does at the moment of discovery is directed against the reader herself. That is, the normal subject-object categories are reversed: instead of reading the law, we find that the law reads us.<sup>128</sup>

This point, which seems correct, might be easier to follow if we look at it on an individual rather than an institutional level and briefly digress to Bernard Williams's discussion of retrospective justification. He began with the case of a moral agent reflectively trying to assess his own culpability for the failure of a life-project. Retrospective assessment of one's prior actions at some later date obviously "does not enable the agent at the time of his [original] decision to make any distinctions he could not already make."<sup>129</sup> From the standpoint of retrospective assessment, it follows that the only possible options for which the agent fairly should be held accountable are those that he could have foreseen at the time of the decision itself. Reasoned choices based on present knowledge are intrinsic, as opposed to unforeseen failure-causing accidents, which must be regarded as extrinsic.

Even if we limited our future self-indictment to those intrinsic reasons for which the agent can justifiably hold himself responsible, there remains an element of doubt about how the

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128. See Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 148-51 (1984) (discussing the effect of structuralism on the subject-object relationship); see also F. KAFKA, *supra* note 2, at 250, where Kafka described an ape in captivity, whose ape-like longing for freedom had been displaced by a human longing for "a way out." *Id.* at 253. The ape realized that by imitating his captors he could become as "free" as they were, and he described the difference between his previous freedom and the "self-controlled movement" of humans.

In variety theaters I have often watched, before my turn came on, a couple of acrobats performing on trapezes high in the roof. They swung themselves, they rocked to and fro, they sprang into the air, they floated into each other's arms, one hung by the hair from the teeth of the other. "And that too is human freedom," I thought, "self-controlled movement." What a mockery of holy Mother Nature! Were the apes to see such a spectacle, no theater walls could stand the shock of their laughter.

*Id.*

129. B. WILLIAMS *supra* note 69, at 25-26.

agent's case will come out when he someday sits in judgment upon himself.

The perspective of deliberative choice on one's life is constitutively *from here*. Correspondingly, the perspective of assessment with greater knowledge is necessarily *from there*, and not only can I not guarantee how factually it will then be, but I cannot ultimately guarantee from what standpoint of assessment my major and most fundamental regrets will be.<sup>130</sup>

The temporal shift in "standpoint of assessment" occurs because there is no fixed and stable position of judgment other than the place one occupies at any given moment of life.

[W]hat one does and the sort of life one leads condition one's later desires and judgments. The standpoint of that retrospective judge who will be my later self will be the product of my earlier choices. So there is no set of preferences both fixed and relevant, relative to which the various fillings of my life-space can be compared.<sup>131</sup>

What Williams denied here is the existence of the type of "standpoint of assessment" whose existence in a judicial context was hypothesized by Anthony Kronman and others.<sup>132</sup> If a neutral standpoint of assessment were possible, whenever a judge standing at the end of a line of precedent attempted to view the history of the practice retrospectively with the intent of offering a coherent justification of that practice, she would create for herself a perspective that would be outside the practice but still constrained by it. That is, she would be free to judge the practice objectively because of her detachment from the subject she is judging, but she would still be constrained from acting arbitrarily because she is governed by the rules that define the practice—rules that have an intrinsic meaning apart from her interpretation of them.

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130. *Id.* at 35.

131. *Id.* at 34.

132. According to Kronman, judges must "remain[] sufficiently detached to survey all the alternatives from a vantage point different from any of their own internal points of view." Kronman, *supra* note 82, at 853. Hence, "the process of deliberation is peculiarly bifocal. Through one lens, the alternatives are seen not merely at close range but actually from within; through the other, all the alternatives are held at an identical distance." *Id.* See Lehman, *supra* note 36, at 1598-99 (providing an example of the objective "standpoint of assessment" as it would function in relation not just to the parties in a particular case but to the rules comprising the law itself).

There can be no such neutral standpoint of assessment, however, because all retrospective justifications are temporally *from here*, and *here* is not a timeless place but, rather, a real place within the line of judges who make up the practice. The judge is most firmly located in an identity-conferring genealogy at the very moment in time when she supposedly has the most freedom to change the direction of the group project by re-interpreting the precedents that constitute the practice. She, therefore, cannot neutrally assess the practice because her powers of judgment are a product of it. This imports a notion of constraint, but an internalized constraint caused by the reader's conception of herself as a product of the practice, rather than an externalized constraint caused by the content of coercive rules.

The time problem implicated by the absence of a temporal standpoint from which one could make objective judgments (or "freely willed" interpretations of precedent) is vividly described in a Kafka aphorism interpreted by Hannah Arendt as a metaphor for the gap between past and future produced by the act of cognition.

He has two antagonists; the first presses him from behind, from his origin. The second blocks the road in front of him. He gives battle to both. Actually, the first supports him in his fight with the second, for he wants to push him forward, and in the same way the second supports him in his fight with the first, since he drives him back. But it is only theoretically so. For it is not only the two antagonists who are there, but he himself as well, and who really knows his intentions? His dream, though, is that some time in an unguarded moment—and this, it must be admitted, would require a night darker than any night has ever been yet—he will jump out of the fighting line and be promoted, on account of his experience in fighting, to the position of umpire over his antagonists in their fight with each other.<sup>133</sup>

The point of the aphorism, as Arendt saw it, is that, without the insertion of the human subject into time, there would be only a continuously flowing everlasting stream. It is "the insertion of man, fighting in both directions, [that] produces a rup-

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133. [1 THINKING] H. ARENDT, *THE LIFE OF THE MIND* 202 (1984) (quoting V GESAMMELTE SCHRIFTEN 287 (1946) (English trans. by W. AND E. MUIR, *THE GREAT WALL OF CHINA* 276-77 (1946))).

ture which, by being defended in both directions, is extended to a gap, the present seen as the fighter's battleground."<sup>134</sup>

This general problem of cognition described by Arendt can be specifically narrowed to the problem of judging in a precedential mode; the judge is caught in the middle of a process that both adjudicates past actions and creates the rules by which future actions will be judged. The retrospective and prospective modes of thought equally are essential to the practice of judging; yet, the disparity between the two inevitably creates a rupture in the practice. It is easy to image that, if not for the insertion of the judge herself in the line of precedent, it could have proceeded smoothly in an uninterrupted stream; instead, her presence turns it into a battleground, where past and future are at war with each other, and she is caught between them. She precipitates the battle, but she is also its victim. She wishes she could be promoted to the role of umpire between the warring antagonists.<sup>135</sup> The seat supposedly occupied by the umpire would be precisely the neutral standpoint of assessment that is posited by theorists who believe in judicial impartiality. This mythical standpoint of assessment is where the judge would sit if she could rise above the field of battle. It is both inside and outside the practice, and inside and outside the perspectives of the two antagonists in the fight she is judging.

Unfortunately, just as the flawless stream of time is ruptured by the insertion of the present, the enunciation of the law is necessarily flawed because it must be spoken by a human judge. The inevitable discontinuity between the processes of discovery and justification results, in part, from the fact that the judge's sense of herself as a judge depends upon her discovery of her own identity in relation to the practice. Her internal sense of judicial role is what allows the judge to "see" right answers intuitively. Practice in this limited but idealized form is pure action, and it is such practical performance, rather than reflection, that characterizes intuitive judging.

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134. *Id.* at 205.

135. Ironically, she already is the umpire, although she experiences the practice from the role of a combatant.

Yet, judging has a second stage of justification, and this retrospective, belated, external stage is at war with the first stage of intuition and creates the rupture in the judge's identity, described, in Kafka's aphorism, as a struggle between perennial, evenly matched antagonists,<sup>136</sup> or, by Kennedy, as the internal conflict between the law as I see it (and cannot help seeing it) and the law as I want it to be.<sup>137</sup> This is the point where discontinuity becomes a problem encompassing not just the judge's subjective task of self-definition but also the objective nature of the legal materials with which she must work.

The false illusion of presence in a single moment of intuition is replaced in retrospective justification by a succession of discontinuous moments that must be reworked into a coherent narrative history that leads up to the decisive moment where finally they all can be seen in proper perspective. Nevertheless, the coherence of legal events in narrative form when retold as doctrinal history must be fictional because the "events" of legal history as it is presently understood are always subject to modification by later events.<sup>138</sup> Thus, the present is filled with meaning beyond its actual content because of the possibility that future cases, in retrospect, will deem the present case a new beginning,<sup>139</sup> on the other hand, the radical contradiction

136. See *supra* note 132 and accompanying text.

137. See Kennedy, *supra* note 109, at 548-49.

138. Any legal explanation containing a doctrinal history of the past is fictional to the extent that it consists of "the *repetition* . . . of a previous sign with which it can never coincide, since it is of the essence of this previous sign to be pure anteriority." de Man, *supra* note 126, at 207. Doctrinal history, put differently, may either be "symbolic," in the sense of Coleridge's "sacred history," or "allegorical," in the sense described by Paul de Man; see *supra* notes 125, 126 and accompanying text. The "painful knowledge" of discontinuity is suppressed only by submitting to "an illusory identification with the non-self." de Man, *supra* note 126, at 207. I am arguing that both the coherence theorists and Fish, in different ways, submit to this illusory identification.

139. See J.P. SARTRE, NAUSEA 59-60 (1964). Sartre wrote that, when telling a story:

You seem to start at the beginning: [you say,] "It was a fine autumn evening in 1922. I was a notary's clerk in Marommès." And in reality you have started at the end. It was there, invisible and present, it is the one which gives to words the pomp and value of a beginning. . . . [T]he end is there, transforming everything.

*Id.*

between past and future contained within the present moment might just as plausibly make the present seem totally intolerable and devoid of meaning.

The succession of cases that create the troublesome line of precedent exists in symmetry with the line of judges who make up the genealogy of practice. On both sides of the division between judge and judge-made law there is a parallel temporal instability; this instability encompasses both the contest for authority between the latest judge and the earliest judge in the line of practice and the struggle for priority between the latest case and the earliest case in the line of doctrine. From the subject-side of the practice, judging is a struggle between intuition and retrospection, decision and justification, while on the object-side, case law is a struggle between purity and completeness, original principle and evolutionary change.

This experience of discontinuity is the fact to which the practice of retrospective justification responds. Retrospective justification tells why the action taken by the agent had to be as it was. In so telling, however, the justification offered by the judge cannot repeat the act of judgment because the explanation has to be something *different* from what it is justifying. Hence, the judge's justification of her decision is not, and cannot be, the same as the decision itself.

In fact, retrospective justification, which is supposed to be pure cognition—that is, a passive reflection on past action—turns out not to be passive at all but rather to be a substitute for the original act of judgment that not only supplements the original act's inadequacy (because the act cannot stand alone) but also displaces the act with something different from itself (just as the latest case in the doctrinal chain explains and displaces its own precedents).<sup>140</sup> The pattern of non-coincidence at the core of the judicial opinion can be said to repeat the experience of discontinuity that characterizes the practice of judging—justification cannot be the same as decision because retrospection cannot be the same as intuition.

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140. As Jacques Derrida put it, "the supplement supplements. It adds only to replace. It intervenes or insinuates itself *in-the place-of*; if it fills, it is as if one fills a void. If it represents and makes an image, it is by the anterior default of a presence." DERRIDA, *supra* note 60, at 145.

Similarly, the difference between judging a case and writing an opinion is the difference between acting and knowing. Judging is an act, and justifying is knowing about the act. The pattern of non-coincidence in both instances ensures an endless future of repetition and rewriting.

Nevertheless, the space between knowing and acting is a gap that is constantly crossed and recrossed in practice; the judge knows the law before she acts upon it and acts upon it after she knows it. Yet what the judge knows *after* acting will not be identical to what she knew before. What was learned in the interim between knowledge and action, between decision and justification, can be the basis for later action, but the application of new legal knowledge must always be deferred to the next case.

All this crossing and recrossing between knowledge and action may seem to obliterate the empty space at the core of practice. The space might virtually cease to exist to those immersed in the practice of law; yet, it does not disappear; rather, it is externalized and turns into gaps in the doctrine or spaces between opposing versions of the same events. This turn outward, where law transfers its own undecidability into real-world binary oppositions that *can* be decided and, indeed, *must* be decided every single time, was the subject of Barbara Johnson's interpretation of Melville's *Billy Budd*.<sup>141</sup> Her interpretation is a way of illustrating the play of binary oppositions set into motion by the fundamental opposition between acting and knowing, which retrospective justification tries to bridge.

According to Johnson, *Billy Budd* can best be read as an allegory of judgment: "the very vehemence with which the critics tend to praise or condemn the justice of Vere's decision indicates that it is judging, not murdering, that Melville is asking us to judge."<sup>142</sup> The initial problem that faces Captain Vere, the judge, is that the two poised antagonists in the novel, Billy and his enemy Claggart (whom Billy murders), are both in some sense mysterious to others. The fact that they are un-

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141. Johnson, *Melville's Fist: The Execution of Billy Budd*, in 18 STUDIES IN ROMANTICISM 567 (1979).

142. *Id.* at 592.

known quantities causes them to become objects of interpretation.

First, they are forced to interpret (and misinterpret) each other. It is "by means of the misreading of gaps in knowledge and of discontinuities in action that the plot of *Billy Budd* takes shape."<sup>143</sup> Billy is a perfectly naive reader, and Claggart a perfectly ironic one. Both types of misreading try to suppress the indecisiveness at the core of the other's character, and such attempts to suppress ambiguity are invariably destructive.

It is significant that both Billy and Claggart [as naive and ironic readers] should die. Both readings do violence to the plays of ambiguity and belief by forcing upon the text the applicability of a universal and absolute law. The one, obsessively intent on preserving peace and eliminating equivocation, murders the text; the other, seeing nothing but universal war, becomes the spot on which aberrant premonitions of negativity become truth.<sup>144</sup>

Second, Captain Vere is required to judge the Billy/Claggart conflict from the impartial position of judge after Billy strikes Claggart dead. In contrast to the misguided attempts of the "naive and the ironic readers . . . to impose upon language the functioning of an absolute, timeless, universal law (the sign as *either* motivated *or* arbitrary),"<sup>145</sup> Captain Vere takes a more pragmatic, political view of his task as judge. He knows that he is responsible for maintaining order on the ship, and his judgment is tempered by awareness of political consequences.

Vere, thus, will apply a military law just as arbitrary and absolute as the law Billy and Claggart applied to each other. Indeed, "the forcible transformation of ambiguity into decidability"<sup>146</sup> characterizes all forms of legal judgment. Yet, what is more striking about the analogy between Vere's judgment of Billy and Claggart, and their judgments of each other, is that in all cases:

the function of judgment is to convert an ambiguous situation into a decidable one. But it does so by converting a difference *within* (Billy as divided between conscious submissiveness and unconscious hostility, Vere as divided between understanding father and military authority)

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143. *Id.* at 584.

144. *Id.* at 587-88.

145. *Id.* at 590.

146. *Id.* at 597.



into a difference *between* (between Claggart and Billy, between Nature and the King, between authority and criminality).

It would seem then that the maintenance of political authority requires that the law function as a set of rules for the regular, predictable misreading of the "difference within" as a "difference between." Yet if . . . law is thus defined in terms of its repression of ambiguity, then it is itself an overwhelming example of an entity based on a "difference within." Like Billy, the law, in attempting to eliminate its own "deadly space," can only inscribe itself in a space of deadliness.<sup>147</sup>

Retrospective justification, in this context, finally appears to be an inevitable consequence of a practice that has defined for itself an impossible task. The space within the practice of judging that lies between knowledge and action is one that is customarily closed in retrospect by the addition of a second layer of knowledge—this second layer of knowledge takes the form of justification. By justifying her decision, the judge figuratively closes the book on the case and unites past and present in a definitive reading that will not have to be repeated in the future.

The political reading, as cognition, attempts to understand the past; as performance, it attempts to eliminate from the future any necessity for its own recurrence. What this means [however] is that every judge is in the impossible position of having to include the effects of his own act of judging within the cognitive context of his decision.<sup>148</sup>

The judicial opinion, in other words, is presented as a piece of knowledge, but it enters the world as an act which cannot contain the effects of its own application. The space within the decisionmaking process represented by the discontinuity of discovery and justification is externalized as the space between cases in the line of precedent to which the present day's case is added. The judge's act of judgment, ultimately, will be the occasion for future acts of judgment by the present judge's institutional descendants; and it is only in retrospect, from a yet unimagined vantage point, that we will learn whether today's justification—itself an act of retrospection—speaks to the future as convincingly as it does to the past.

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147. *Id.* at 596.

148. *Id.* at 599.