Louisiana Law Review

Volume 66 | Number 1
Fall 2005

Why the Rule of Law?

Richard K. Greenstein

Repository Citation
Richard K. Greenstein, *Why the Rule of Law?*, 66 La. L. Rev. (2005)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol66/iss1/5

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Why the Rule of Law?

*Richard K. Greenstein**

[W]e as judges must decide this case on the law.[1]

I. Introduction

Why should we care about the rule of law? The rule of law[2] is enjoying a resurgence in the public consciousness. As the various constituents of the former Soviet Union seek membership in the European Union and as the People's Republic of China seeks greater integration in the world economy, the willingness of these nations to publicly commit to the ideals of the rule of law has assumed the status of a near prerequisite for their success. Recently, the United States Supreme Court invoked constitutional and statutory law to effectively constrain the war-making power of the President of the United States.[3] At the same time, other high-profile decisions of American courts were seen by many as "legislating" by creating new rights in the absence of explicit

---

Copyright 2005, by LOUISIANA LAW REVIEW.

* Professor of Law, Temple University. I wish to thank Charles Crampton, John Hasnas, and Dave Hoffman for their perceptive thoughts in response to earlier versions of this article. I especially want to express my gratitude to Jane Baron, who patiently, carefully, and insightfully read and commented on multiple drafts.

1. Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1229 (11th Cir. 2005).

2. This article will raise a number of questions about the idea of the rule of law. However, at this point I am using the phrase in the following sense: A community operates under the rule of law if (1) the community claims a monopoly on the use of force to resolve disputes and to protect the community's health and welfare; (2) the coercion is deployed in accordance with rules or principles that are publicly promulgated; and (3) the coercion in accordance with these rules or principles applies to all members of the community, including those who are responsible for exercising the coercive power on the community's behalf.

3. Hamdi v. Rumsfeld, 542 U.S. 507, 124 S. Ct. 2633 (2004) (citizen has due process right to judicially challenge basis of detention as an "enemy combatant"); Rasul v. Bush, 542 U.S. 466, 124 S. Ct. 2686 (2004) (foreign nationals captured abroad and held in military custody have federal statutory *habeas corpus* right to challenge incarceration).

textual authorization[4] or as destabilizing legal doctrine by overruling recent precedent[5] and injecting personal values or political allegiances into adjudication.[6] Consequently, these decisions have raised questions about the current vitality of the rule of law.[7] And, of course, *Schiavo ex rel. Schindler v. Schiavo*[8] has ignited a furious debate about the rule of law that has involved all branches of state and federal government and has spilled into the public forum. Moreover, all this renewed interest in the rule of law has stimulated significant academic discourse on the topic, typified by Brian Tamanaha's recent publication *On the Rule of Law*.[9]

All of these developments beg a fundamental question: Why should we, or, in general, any community, care about the rule of law? There is, of course, a traditional answer: The rule of law protects a community against tyranny.[10] That is, law sets limits on the use of governmental power. Law does this in two ways: by requiring the government to act in accordance with preexisting rules, principles, and standards, and by incorporating into those standards supralegal norms[11] that reflect the polity's understanding

4. For example, the right of same-sex couples to marry. Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003).

5. For example, the United States Supreme Court's overruling of *Bowers v. Hardwick*'s ruling that the enforcement of state sodomy statutes against homosexual conduct is constitutional. Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472 (2003), *overruling* Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841 (1986).

6. For example, the Supreme Court's decision in *Bush v. Gore*, which effectively enabled George W. Bush to receive the crucial Florida electoral votes in the 2000 presidential election. 531 U.S. 98, 121 S. Ct. 525 (2000).

7. *See, e.g.*, *Lawrence*, 539 U.S. at 2488, 123 S. Ct. at 561 (Scalia, J., dissenting).

8. Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223 (11th Cir. 2005).

9. Brian Z. Tamanaha, On the Rule of Law: History, Politics, Theory (2004).

10. *See id.* at 139. There is another familiar answer: The rule of law protects an array of individual rights against government intrusion. This justification, characteristic of Western liberal democracies, is for that very reason a controversial answer, for it depends heavily on particular cultural values that are not universally shared—most especially, are not shared by nonliberal polities that have nonetheless embraced the rule of law. As Tamanaha persuasively argues, protection against tyranny is probably as close as we have come to a universally appealing justification for the rule of law. *Id.* at 137–39.

11. Examples of supralegal norms include natural, divine and customary norms.

of unalterable (or very hard to alter) limitations on the government power.

Of course, for the rule of law to protect against tyranny, law must be knowable. That is, law's limits must be sufficiently specified so that they are known in advance of the state's use of coercive power. This requirement of knowability focuses us on the profound paradox of law. On the one hand, law is rule-like. Our everyday experience is that law is relatively clear, enabling us, including government officials, to reliably know what the law permits, forbids, and requires.[12] On the other hand, law is incorrigibly malleable, open-textured, and indeterminate, the very quality that enables lawyers to advocate different legal positions, judges to concur and dissent in specific cases, and courts to justify distinguishing, limiting, and overruling precedent.

An important debate within twentieth-century jurisprudence sought resolution of this paradox. Typically, legal theorists privileged one or the other of law's facets. Fans of law's rule-like quality asserted, for example, that indeterminacy is limited to a proportionately small subset of "hard" cases,[13] while proponents of law's indeterminacy argued that the predictability of law is a function of external stabilizing forces, variously identified as convention, ideology, morality, norms, or structure,[14] which shape the way we understand cultural meaning, including the meaning of legal doctrine.

Not surprisingly, the century ended with the debate at a standoff, for it seems likely that law's two faces are real, but irreconcilable.[15] My concern, however, is not to resolve the issue, but to think about what it implies for justifying the rule of law. The protection-against-tyranny rationale speaks to one aspect of law's character: its "ruleness," i.e., law's manifest ability to say in advance what is permitted, forbidden, and required. But what justifies the rule of law in light of law's malleability, open texture, and indeterminacy, i.e., law's manifest *inability* to say what is permitted, forbidden, and requires? Perhaps more to the point, just what does the rule of law *mean* in light of law's malleability, open texture, and indeterminacy?

---

12. We know, for example, that the law normally requires us to come to a full stop at a red traffic light. We go through each day successfully relying on a myriad of such legal provisions.

13. *E.g.*, H.L.A. Hart, The Concept of Law 121–44 (1961).

14. *See infra* notes 28–30 and accompanying text.

15. Phenomena exhibiting irreconcilable qualities occur in other contexts. For example, light can be accurately described both as consisting of discrete particles and as a continuous wave.

This essay is about making sense of and justifying the rule of law when we think about law as indeterminate and, therefore, unable to specify the limits on governmental power that protect us from tyranny. In order to do this, it is first necessary to be clear about just why law is indeterminate. Social interactions, including, but not limited to disputes, invoke the multiple, heterogeneous values held by various individuals and groups in a pluralistic society.[16] Law, which mediates social interactions, reflects those distinct values. That is, multiple, heterogeneous values are buried within all legal doctrine.[17] These values have to do variously with matters of social policy, with the purposes of particular legal doctrines and particular legislative provisions, with the purposes of law itself, with the institutional allocation of coercive power among governmental branches and subdivisions, and so forth.[18]

An ordinary zoning case from the 1950's, *Pierro v. Baxendale*,[19] provides an illustration. In that case, the Supreme Court of New Jersey was called upon to decide whether a zoning ordinance, which explicitly permitted rooming and boarding houses in a certain zoning district, thereby permitted the construction of a motel. To reach its ultimate ruling that the ordinance prohibited motels within the district, the court threaded its way through multiple constellations of values.

One set of value choices at stake in this case concerned interpretation. Literally construed, the ordinance defined permitted

16. For example, the decision whether to comply with the request for money from a stranger on the street raises a host of conflicting social and political values about benevolence, encouraging self-reliance, empowering those arguably dispossessed by the regnant economic and political system, an asserted right to be left alone, and so forth. Disputes are sometimes about different understandings of the facts, but can also be about conflicting values. Abortion, gay rights, and the progressive income tax are some especially familiar examples.

17. This idea developed through the example of the cases developing the due process limitations on judicial assertions of personal jurisdiction in Richard K. Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm*, 387 Hastings L.J. 855 (1987).

18. For examples of the interaction between multiple doctrinal values and different approaches to the ranking of these values (approaches which themselves reflect different values), see Richard K. Greenstein, *The Three Faces of ORPP: Value Clashes in the Law*, 54 La. L. Rev. 95 (1993).

19. 118 A.2d 401 (N.J. 1955). For a similar, but differently focused, discussion of *Pierro*, see Jane B. Baron and Richard K. Greenstein, *Constructing the Field of Professional Responsibility*, 15 Notre Dame J.L. Ethics & Pub. Pol'y 37, 69–73 (2001).

rooming and boarding houses in a manner that seemed to include motels.[20] But, should the words of the zoning ordinance be given their literal meaning or a meaning determined by an assessment of the meaning intended by the legislators or a meaning driven by a determination of the provision's purpose? Reading an ordinance in terms of its literal meaning values the notice function of law by helping to ensure that ordinary persons subject to the law's command will understand from the literal meaning of the legislative language just what the law permits, requires, or forbids. By contrast, interpreting an ordinance in terms of legislative intent serves the political value of deference to the will of elective representatives. If the will of the legislators as expressed in the ordinance is accurately discerned and obeyed,[21] even when inconsistent with the ordinance's literal meaning, then the locus of power resides in the electoral process where the judgment of the legislature and of individual legislators is approved or rejected through the popular vote. Finally, construing an ordinance to effectuate particular purposes or policies values legislation as a tool for social engineering. Statutes and ordinances exist to realize identifiable objectives, and legislative language should therefore be interpreted to achieve those objectives, even if such a reading is inconsistent with the literal meaning of the language or the particular understanding of that language by the enacting legislators.[22]

A second set of values in play in *Pierro* concerned the objectives of New Jersey zoning legislation in general. One purpose was to limit land use in order to preserve a particular quality of life;[23] a second was to bring order to the use of land

20. "The ordinance defined a boarding house as 'any dwelling in which more than six persons not related to the owner or occupant by blood or marriage are lodged and boarded for compensation'; it defined a rooming house as 'any dwelling where furnished rooms are rented to more than six persons for compensation, provided however, the lodging of relatives, by blood or marriage, of the owner or occupant of such dwelling shall not come within these terms.'" *Pierro*, 118 A.2d at 402.

21. The problems, both conceptual and practical, with the notion of legislative intent have long been recognized. For a useful survey of several of these difficulties see Gerald C. MacCallum, Jr., *Legislative Intent*, 75 Yale L.J. 754 (1965).

22. *See, e.g.*, Holy Trinity Church v. United States, 143 U.S. 457, 458–62, 12 S. Ct. 511, 511–13 (1892).

23. *See Pierro*, 118 A.2d at 408.

within a community;[24] and a third, to respect and protect the autonomous use of private property.[25]

Yet other collections of values loom over virtually every case. Some of these can be termed "institutional" and concern such matters as the role of courts *vis-à-vis* other branches of government, the hierarchical arrangement of courts, and the relationship between state and federal courts. Others can be called "jurisprudential." These values concern such matters as respect for precedent, which implicates the utility of stability, consistency, and predictability in the law; justice, one understanding of which argues for departure from precedent when prior decisions are thought to have been poorly reasoned; and the importance of law's adaptability, which argues for departure from precedent when changing social circumstances favor revisiting rulings from an earlier era.

Thus, the meaning of the *Pierro* decision can be cast in terms of a variety of values: substantive values having to do with zoning, interpretive values having to do with what makes legislation important, institutional values having to do with authority and efficiency, and jurisprudential values having to do with stability, justice, and adaptability. This collection of values constitutes the matrix for *Pierro* as an expression of legal doctrine.

But even these observations fail to capture the full messiness and potential ambiguity of *Pierro*'s legal dimension. Consider the entire group of values identified thus far as the matrix for the case. Why are *these* the relevant values? What determines the meaning of these values? Do these values have a ranking with respect to one another and, if so, is this ranking fixed, or does it vary from case to case?[26] If they vary from case to case, what determines their relative weight?

It is this multiplicity of values and the ambiguities regarding their meanings and rank that enabled lawyers to make opposing arguments in the *Pierro* case. Accordingly, the decision in *Pierro* was dependent on which of these multiple and heterogeneous values were given priority by the court, and this, in turn, largely accounted for the dissenting opinion in the case. Moreover, because these values persist, they do not vanish simply because a

---

24. *See id.* at 409 (Hether, J., dissenting).

25. *See id.* at 409–10.

26. We might, for example, expect the values animating the doctrine of *stare decisis* to be consistently ranked highly; on the other hand, we might expect the substantive debate about zoning values to swing back and forth over time. For an extended treatment of the ranking of doctrinal values, see Greenstein, *supra* note 18.

decision has been made; they enable lawyers to subsequently argue for different interpretations of *Pierro* as precedent.

Recall that the point of this *Pierro* digression is to remind us that while law can be perceived as rule-like, it does not have to be. Law can also be accurately described as malleable, open-textured, and indeterminate precisely because legal doctrines, generally, and their application to concrete cases, specifically, embrace multiple and heterogeneous values that can drive decisions in different directions. Moreover, this can be demonstrated to be the case not only in what we normally think of as "hard cases," but in all cases.[27]

The question, then, is what can the rule of law mean when law is understood in this way? On one level, this question is simply practical. Again, the rule of law seems to require that law be knowable, i.e., that law's meaning be more or less transparent and its applications more or less predictable, so that anyone can consult the law both to determine what the law permits, prohibits, or requires, and to identify the limits, such as constitutional limits, on the coercive use of law. But how is knowability possible when law is seen as indeterminate?

The answer to this practical question is well known and merely requires that we identify the forces that, in fact, stabilize the meaning of law without at the same time denying its malleable and indeterminate quality. After all, our everyday experience of the law is not one of malleability and indeterminacy; instead, we experience the law as relatively stable and predictable, and thus knowable, in very much the manner required by the rule of law idea. Such experiences suggest that officials, in fact, feel significantly constrained in answering the many value questions before them when deciding a case. What generates this sense of constraint? What gives the matrix of law shape and a stable structure?

---

27. Indeed, a close examination of *any* application of legal doctrine will reveal the same thing: a multiplicity of heterogeneous values. If we imagined an utterly homogeneous society, in which all members valued the same things in the same way, this would not be the case. Consequently, in such a homogeneous society legal doctrine would not be necessary (although legal process would be), for when all members value the same things, custom should suffice for transmitting a stable understanding of what is permitted, required, and forbidden. Disputes in such a society will be generated by disagreement over facts or by someone's failure to do what everyone, including the actor, understands to be the right thing. In short, legal doctrine is needed as a tool for dealing with heterogeneity, and its protean quality is a product of that function.

One answer has been offered in different forms by Marxists,[28] liberals,[29] and, most recently, critical theorists.[30] The basic idea is that our culture is pervaded by what is variously called "convention," "ideology," "morality," "norms," or "structure," which shapes the way we understand cultural meaning. What this tells us with regard to law is that, while legal doctrine encompasses multiple, heterogeneous values, widely-shared ideology tends to stabilize the set of values at play in any particular doctrinal field, to stabilize the relative ranking of those values when they clash on a particular question, and to stabilize our understanding of the meaning of those values when applied to concrete cases.

It bears emphasizing that the existence of this stabilizing ideology does not contradict the heterogeneity of values within doctrine. Rather, consensus or a dominant view about values represents a snapshot of the current understanding and ordering of these values at the current moment.[31] Values appear and fade from view, change their meanings, and ascend and descend in relative strength, often slowly, and sometimes dramatically.[32] Moreover, the fact that a particular set of values, rank, and meaning

---

28. *See, e.g.*, Antonio Gramsci, Selections from the Prison Notebooks 195–96, 246–47 (Quintin Hoare & Geoffrey Nowell-Smith eds. trans., 1971).

29. *See, e.g.*, Andrew Altman, Critical Legal Studies: A Liberal Critique 183–84 (1990).

30. *See, e.g.*, Robert W. Gordon, *Some Critical Theories of Law and their Critics*, *in* The Politics of Law: A Progressive Critique 641, 646–52 (David Kairys ed., Basic Books 3d ed. 1998); J.M. Balkin, *Ideology as Constraint*, 43 Stan. L. Rev. 1133, (1991).

31. For example, *Pennoyer v. Neff*, 95 U.S. 714 (1878), reflects an era when territorialist thinking dominated the understanding of the constitutional limits on personal jurisdiction. By 1945, notions of "fair play and substantial justice" had come to dominate that understanding. International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154 (1945).

32. For example, see the adoption by the California Supreme Court of a theory of manufacturer's liability for injuries caused by an unreasonably dangerous drug without a showing of causation in *Sindell v. Abbott Laboratories*, 607 P.2d 924 (1980). There are many variations of these dramatic changes in the law. Sometimes the groundwork was carefully laid for an overthrow of the prevailing doctrine, as in the case of the rejection in *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686 (1954), of the separate-but-equal principle first announced aver half a century earlier in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Sometimes a court simply changes its mind within a brief period of time, as in *Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178 (1943) (finding mandatory recitation of pledge to the flag by school children unconstitutional). For an empirical testing of three different models of doctrinal change in the context of statutory interpretation, see Daniel A. Farber, *Earthquakes and Tremors in Statutory Interpretation: An Empirical Study of the Dynamics of Interpretation*, 89 Minn. L. Rev. 848 (2005).

represented by the "snapshot" will tend to dominate at a given time does not mean that it will not be contested.

It is also important to emphasize that the stability discussed here is not one that strictly determines the outcomes in new cases. The stability created by ideology restricts the range of considerations apparently available to decision makers. It tells us, for example, that when making a zoning decision, officials may consider the impact of the decision on the quality of community life and on the free use of private property, but they should not consider the ethnicity of the applicant.

A second answer to the question of what stabilizes the meaning and application of law has to do with a set of institutional structures in place that is designed to channel the interpretation and application of legal doctrine toward the conventional understandings shaped by ideology. These institutions are characterized by hierarchy. For example, within every judicial system in the United States, courts are arranged in a pyramid in two different, but interlocking ways. The hierarchical structure of these courts has a multitude of trial courts at its base. At various levels of appellate review, the number of courts diminishes, funneling cases into a single court at the top with ultimate authority. One effect of this structure is to progressively reduce the number of institutional bodies, with their varying perspectives, that are involved in shaping legal doctrine for the jurisdiction. Because of the power arrangement of these courts, this effect exists even though a relatively small percentage of cases actually reach the highest court.

Superimposed on this structure is a second, inverted pyramid. Trials are conducted by a single judge. But the number of judges considering a case tends to increase as it moves higher through the appellate structure, and supreme courts universally consist of a substantial number of judges. The need for the highest court to reach decisions as a group tends to move decisions toward a predictable middle ground either as a result of compromise among the judges or by relegating judges with extreme views to an outlying dissenting role.

Yet another stabilizing institutional hierarchy exists among different types of law, a relationship derived from both the United States Constitution and tradition. Along one dimension, constitutions trump legislation, which trumps administrative regulations and the common law. Along another dimension, federal law is superior to state law, which is, in turn, superior to local law. This trumping relationship substantially reduces the

uncertainty that might otherwise be caused by clashes among laws.[33]

Finally, a third answer to the question of law's source of stability needs special attention, and that is the inclusion within ideology of norms designed specifically to stabilize law by giving presumptive authority to past legal decisions. A number of them have already been mentioned. They include doctrines that are designed to limit reconsideration of previously decided issues, such as the doctrines of *stare decisis* and *res judicata.*[34] They also include institutional norms that give presumptive authority to the past decisions of particular bodies, for example, the doctrine of judicial review,[35] which gives courts the final say as to the meaning and validity of legislation, and of legislative supremacy, which ties the meaning of legislation to the intentions of the legislative body and to the particular textual formulation of that body, as is required, for instance, by the "plain meaning rule."[36] While these stabilizing norms are themselves subject to multiple and sometimes inconsistent meanings and sometimes clash with one another, their overall effect is to encourage interpretive consistency between the past and present.

Based on the foregoing we can distinguish between easy and hard cases. If it is true that all disputes encapsulate multiple, heterogeneous values, but that the range and understanding of these values is drastically constricted by ideology, institutional structures, and stabilizing norms, then an easy case is one in which experience enables us to confidently predict that the court will identify and understand all the values in such a way that they point to the same outcome or to confidently predict that the court will rank clashing values in a particular way that points to a specific outcome. Conversely, a hard case is one in which experience

33. It should be noted, however, that there is no such generally applicable hierarchical relationship among conflicting laws promulgated by different states.

34. Another such norm is the "law of the case" principle, which limits the relitigation at a later stage of a case of issues authoritatively resolved at an earlier stage. *See, e.g.*, Cadillac Motor Car Co. v. Johnson, 221 F. 801 (1915).

35. Of course, the fountainhead of judicial review in American law is *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

36. *Compare* Holy Trinity Church v. United States, 143 U.S. 457, 458–59, 12 S. Ct. 511, 512 (1892) (legislative will expressed through the "spirit" of the statute), *affirming* United States v. Church of the Holy Trinity, 36 F. 303, 304 (S.D.N.Y. 1888) (legislative will expressed through plain meaning of statutory language), *with* Caminetti v. United States, 242 U.S. 470, 490, 37 S. Ct. 192, 196 (1917) (legislative intent expressed through plain meaning of statutory language).

enables us to confidently predict that the court will understand the proper application of the competing values to be up for grabs, this because the culture remains divided over their identity, relative ranking, meaning, or application and because the division has not been authoritatively resolved within the hierarchical structure of the courts.[37] *Pierro* was, in this sense, a hard case. The values at stake pulled the decision in different directions, as reflected in the majority and dissenting opinions.

Something important is missing from this account of law's stability. Neither ideology nor moderating institutional structures nor stabilizing norms can effectively fix the meaning of legal doctrine unless officials are, as a general matter, committed to consistency with the past. This commitment is perhaps the most fundamental of the stabilizing factors, for unless officials *care* about precedent, unless they *care* about the decisions of particular institutions, unless they *care* about reflecting any societal consensus that has developed over time and has informed those prior decisions, these artifacts of the past will exert little influence on the decision to be made in the present. Hence, in some very important way, the rule of law depends upon this commitment.[38]

Put another way, the rule of law reflects the presumptive authority of past legal acts, whether it be the enactment of statutes or the deciding of cases or the promulgation of regulations or the interpretation of those acts by various officials, but past legal acts have authority only if those subject to them recognize them as

---

37. Abortion cases, perhaps, exemplify such a set of values. Of course, even legally hard cases in the sense just discussed may be predictable. Such cases will often turn on the particular predilections of one or more judges. To the extent these preferences are consistent and knowable, an attorney, for example, can by careful research discover them and consequently predict with accuracy what kinds of arguments will persuade the particular judge or judges in question.

38. Nor is it just judges whose decisions reflect the commitment to which I am referring. When the United States Supreme Court ordered President Nixon to turn over the Wategate tapes, which ultimately implicated him in criminal and potentially impeachable wrongdoing, he complied; he turned over the tapes. United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090 (1974). But why? It might be because he was afraid—afraid that other forces in the government (the military, perhaps) would turn against him, afraid that he would be harshly judged by the public or by history. But one sensed that Nixon turned over the tapes in significant part because, notwithstanding his apparently lawless actions, as an official he did, in some important way, respect the law, and specifically that his conduct displayed an important level of commitment of the Executive to respecting the decisions of courts.

having authority. In short, authority is a quality that is bestowed on the decisions of the past. However, this commitment to bestowing authority on the decisions of the past is a contingent matter. There are many judicial decisions that depart from *stare decisis*;[39] some Southern governors refused to respect the United States Supreme Court's rulings mandating integrated public education;[40] trial judges occasionally reject the binding status of decisions by higher courts;[41] and appellate courts sometimes issue rulings that fail to reflect an existing social consensus.[42] To a fan of the rule of law, these actions may seem the work of rogue officials.[43] But it is important to see that each may, in fact, be highly principled; each may reflect a decision on the part of officials that there are values at stake, indeed, values *within the law* that outweigh the values of consistency with the past.

Let me pause here to review the argument made thus far: For the rule of law to make sense, law must be knowable. If we view law not as a compendium of rules but as a malleable and indeterminate doctrine, then for law to be knowable, the meaning of legal doctrines must be stabilized, which is to say, the meaning given to legal doctrine *in the past* must be stabilized. Not only is this stability possible, but it is, in fact, our experience of law. I have identified several factors that create this stability and have suggested that the most crucial of these factors is a commitment, especially on the part of officials, to bestow authority on decisions of the past.

And so we have arrived at the normative question: Why should we and, more specifically, officials commit to giving special deference to these ideological, institutional, and stabilizing norms? Particularly, why should we treat past legal decisions as authoritative? In short, why should we care about the rule of law?

---

39. *See* cases cited *supra* note 32.

40. Cooper v. Aaron, 358 U.S. 1, 78 S. Ct. 1401 (1958).

41. For example, a colleague of mine was present when a trial judge forthrightly refused to apply decisions of the state appellate courts interpreting a state consumer protection statute, calling them "immoral."

42. *E.g.*, Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686 (1954) (ruling state segregation of public education unconstitutional); Lawrence v. Texas, 123 S.Ct. 2472, 123 S. Ct. 2472 (2003) (ruling enforcement of state sodomy statutes against homosexual conduct unconstitutional); Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973) (ruling state criminalization of abortion unconstitutional); Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003) (ruling state prohibition of marriage by same-sex couples unconstitutional).

43. *See* Balkin, *supra* note 30, at 1141.

One answer, of course, is self-interest. There is usually lots of personal benefit, for ordinary people and officials alike, in going along with convention. For instance, a judge who ignores the decisions of higher courts or the norm of *stare decisis* probably should not expect to advance far in her career.

However, the rule of law might prove to be pretty fragile if its force depends upon the sum of the individual calculations of personal costs and benefits made by officials. The kind of commitment needed to nourish the rule of law is a strong ethical commitment.[44] But what argument can be made for such a commitment? I now turn to this question.

II. ARGUMENT

In this section, I offer an argument for the rule of law that is very different from the protection-against-tyranny argument. Specifically, I pursue the idea that it is important for communities to engage in an ongoing project of self-definition and that the rule of law is a valuable tool for that project. To develop this thesis more clearly and precisely, I focus initially on the trial judge who is considering whether to allow the Pierros to build their motel in the district zoned to permit boarding and rooming houses. As noted above, the relevant legal doctrine consists of multiple, heterogeneous values that can justify different and inconsistent results. The trial judge might, therefore, be tempted to start from scratch; if the legal doctrine does not determine a particular result, then the judge might decide for herself what the relevant values are and what, all things considered, is the best resolution of the case. Or the judge might be tempted to just flip a coin; if the legal materials will justify different and inconsistent results, why, if only for the sake of efficiency, should legal questions not be decided by chance?

The expectation, however, is that the judge will take a different tack—to reach an outcome consistent with past legal decisions. Indeed, we take the judge to be *obligated* to respect those norms that give presumptive weight to what has happened in the past and forbid the judge from starting from scratch or flipping a coin. And while what counts as a decision consistent with the past might itself be debatable, these stabilizing norms will tend to limit and direct the judge's decision-making in ways that make the outcome more predictable than it would be if the judge did start from

---

44. *Cf.* Hart, *supra* note 13, at 111–14 (the existence of a legal system depends on officials' accepting an obligation to recognize and apply the system's rules for legal validity).

scratch and certainly more predictable than if the judge decided by flipping a coin.[45]

The focus is on the trial judge because, as we will see, the argument for a commitment to continuity with the past applies with special force to officials who frequently make legal decisions without having to publicly state their reasons, officials such as trial judges, bureaucrats, and police officers. Conversely, the argument will turn out to apply with less force to officials who are expected to publicly explain themselves—appellate judges, legislators, the President, etc. This distinction accords with our expectation of a less stringent adherence to the rule of law among this latter group of officials.[46]

The question, then, is why should a trial judge be committed to following those norms that tie her present decisions to the decisions of the past, a commitment which makes the rule of law possible? There is an interesting answer to this question that does not depend on a particular political philosophy. Rather, it has to do with the importance of law as an expression of civic values and, hence, as a tool for defining the community. To make this particular case for commitment to the rule of law, let us leave the legal realm temporarily and begin with an example of the kind of difficult choices that an individual, rather than a community, might face.

A. Decisions Made by the Flip of a Coin

My daughter is getting married on Saturday. She and her fiancé have largely taken responsibility for setting up the wedding, which will be fairly traditional and large, with some guests coming from long distances. She has asked me to walk her down the aisle, and I have promised to do so.

It is Friday, the day before the wedding. Many of the out-of-town guests have arrived. I receive a phone call from the mother of a close friend, who was invited to my daughter's wedding. My friend has been struck down by a sudden, acute, and fatal illness. He is in a hospital a thousand miles away and is not expected to live for more than a couple of days. He has asked to see me.

45. For a discussion of the relationship between rule-enforcement and predictability see Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 137–45 (1991).

46. For example, appellate judges, legislators, and the President are expected to occasionally make new law, which trial judges, bureaucrats, and police officers are not expected to do.

What should I do? No doubt, some readers will find the reasons for one course of action persuasive and will, therefore, have a clear sense of what I ought to do. But I am torn. For me the reasons, including powerful moral reasons, for attending and participating in my daughter's wedding confront more or less equally compelling reasons, including powerful moral reasons, for rushing to the side of my friend a thousand miles away. So how do I choose? I could struggle with the competing reasons and choose whether to attend my daughter's wedding or my friend's death bed. Suppose, however, I flip a coin.

Whatever you may think about the dilemma I face, you would, I suspect, recoil from the idea of my flipping a coin. But why is that? If the reasons for the different courses of action are well balanced, then there is, perforce, no decisive reason for choosing one course of action over the other. Deciding by a coin flip would, therefore, seem to recommend itself on grounds of efficiency, if nothing else. However, I think I would be expected to reject the coin-flipping strategy for several considerations having to do with character.

First of all, flipping a coin seems to deny significance in the decision-making process to the reasons for the different courses of action, and these reasons are, all would agree, important. It is true that I arrive at the idea of flipping a coin only after I conclude that the competing reasons are well-balanced, and that required taking those reasons seriously. But, have I thereby taken those reasons seriously enough?

In everyday life, of course, we do not make choices, even in hard cases, by flipping a coin. And one reason, I think, is that it feels like an abandonment of important principles. A decision has to be made whether the competing considerations seem well-balanced or not. Certainly, if the reasons are well balanced, they cannot themselves determine the outcome, and so the potentially endless struggle with those reasons has to stop so that we can get on with our lives; so, that I can either attend my daughter's wedding or rush to my friend's bedside. But to flip a coin is not just to cease consideration of the competing reasons so that a decision can be made; it is to abandon those reasons before the decision is made and to decide instead by chance. And that seems to deny the continuing importance of the reasons. If I take the relevant reasons seriously enough, I should want to struggle with them up to the bitter end, but I give up when I decide to flip a coin. If I show myself to care so little about the competing values in the hard case, can we be confident that I will take them seriously enough in the easy case? In short, the giving up seems like a failure of character.

There is a second point about character. To me, the contending reasons in my daughter-friend dilemma seem well-balanced. But even if they were not, even if the justification for one course of action felt clearly stronger than the other, my choice is an occasion for remorse. For whatever I choose to do, I sacrifice something important. And I should feel remorse. If I go to my friend's bedside, my daughter, even if she approves of my decision, will be justifiably disappointed and vice versa if I attend my daughter's wedding. But if I flip a coin, I blunt my responsibility for the decision,[47] and, consequently, I blunt my acknowledgment of responsibility for my daughter's or my friend's justified disappointment, this acknowledgment of responsibility which is a prime ingredient of remorse. I should not do that. Remorse in this instance is crucial; through it I acknowledge and reaffirm my caring for and my allegiance to the person, the relationship, and the values that were sacrificed in this instance.

All this talk about character might suggest a preeminently social concern: what kind of person I am for others. But my point here is at least as much about what kind of person I am for myself. Let me illustrate this idea with the story about how I acquired my first dog. It all began when a stray had attached himself to a friend, and she, in turn, urged me to "adopt" him. The dog and I met at a social event at my friend's house, and we got along really well. Still, I was unsure what to do. There seemed to be good reasons for acquiring the dog and good reasons for remaining dog-free. To resolve this impasse, I devised a simple test. The next day I went to my friend's home, where the dog was sitting on the lawn in front of her house, and I stood across the street and called to the dog. I resolved that if the dog came to me, then that was a "sign" that I was meant to take him in; if he did not come to me, I would return home without him. So I called the dog. The dog sat still, looking at me. I called again. The dog did not move. I called a third time. Nothing. So I walked across the street, picked up the dog, and took him home with me.

When I tell this story, a common interpretation, indeed, for a long time, *my* interpretation, is that I *really* wanted the dog, and that I had more or less deluded myself about the significance of the "test." In this interpretation, my calling-the-dog strategy functioned not as a decision-making procedure, but as a device for focusing my mind and enabling me to clarify for myself what I really wanted. Alternatively, in this interpretation, I could have

47. I am still responsible for the choice of the decision-making procedure, but not directly for the decision itself.

just as well flipped a coin to force myself to focus on what I really wanted. Since under this interpretation my preference already existed, no matter how the coin landed, I would have taken the dog.

I now think that this interpretation is wrong. I do not believe that I had within me an inchoate preference that became clear to me by means of my silly test. Rather, I think that up to the very end I had no determined preference and that the test was the final step that enabled me to decide what I preferred.[48]

I could, of course, have left the matter to chance; I could have simply flipped a coin and either taken or left the dog, depending on how the coin landed. In the end, there was no uniquely correct answer to the question of whether I should adopt the dog, and random chance might be thought to be at least as effective a determinant as my subjective preference. But we can easily see that my preference was exactly what was important. Flipping a coin would have given me an answer as to whether to take the dog, but it would not have enabled me to decide what I preferred, and that was what I needed to know. Whether I took the dog or not mattered in my life at that time, and so deciding whether to take the dog was deciding some small, but significant thing about how I wanted to live my life. I wanted to take responsibility for how I live my life, and so if I took the dog, I wanted to do so "for reasons . . . that appear[ed] to [me] valid."[49]

The same, of course, is true of my decision regarding whether to participate in my daughter's wedding or go to my dying friend's bedside. If I struggle with this problem to the point of decision and then choose to go to my friend, it will be for reasons, i.e., that he is dying, that he has asked this one last thing of me, that my daughter has a life ahead of her in which I will still be able to meaningfully participate, that I love my friend, and that my daughter will understand. If, instead, I struggle with this problem to the point of decision and then choose to go to the wedding, it will also be for reasons, i.e., that this is a unique day of surpassing importance in my daughter's life, that I made a promise, that my relationship with my friend is coming to an end while my relationship with my daughter is ongoing and could be endangered by my absence, that I love my daughter, and that my friend will understand.

When I decide, I am not making clear what I always "really" wanted to do. I am not simply reasoning backwards from results

48. For example, see Hillary Putnam's discussion of "coming to see" how one should act, in Hillary Putnam, *On the Rationality of Preferences*, *in* The Collapse of the Fact/Value Dichotomy and Other Essays 79, 93–94 (2002).

49. *Id.* at 88.

already reached, but perhaps only dimly perceived. The notion that I have decided and decided for these reasons is neither rationalization nor self-delusion. In other words, the decision I reach is not a matter of retrospection; it is a step forward in defining what kind of person I want to be. How much do I value promises? How much do I value friendship? How much do I love my daughter? How much do I love my friend? How compassionate am I toward the dying?

In saying what kind of person I want to be, my concern is not simply about who I am for others, i.e., for my daughter, my dying friend, my family, and my neighbors. It is just as much about who I am for myself. Do I understand myself to be someone who leaves important matters to chance, the flip of a coin, or am I someone who identifies decisions with important values?

The existential power of deciding for reasons, then, lies in this: How I ultimately resolve the struggle, what I decide to do, to that extent, defines who I am to myself and to others. When I decide by flipping a coin, I deny that values are important to what I do, that values matter in my life. When I decide for reasons, I say what values are important to me and, by doing so, assert that my life itself has value.

B. To Maintain Continuity or Break with the Past

If we say who we are by the choices we make and by how we make those choices, then one of the fundamental decisions we confront at times of choice is whether to redefine ourselves or choose with an eye to maintaining continuity between who we have been in the past and who we aspire to be in the future. Put another way, I might try to make decisions, such as whether to attend my daughter's wedding and whether to adopt a dog, by starting from scratch, i.e., by taking into account all of the competing considerations without preassigned weights. Or I might think about the kinds of decisions I have made in the past and seek to make a present decision that values personal consistency, i.e., a decision that accords with the kind of person that those past decisions show me to be.

On the one hand, there are good reasons for starting from scratch without presumptions in the hopes of "getting it right."[50] After all, my concern is not only to show proper respect for the competing values at stake, but to show proper concern for achieving a good outcome. On the other hand, there are good

50. *See* Schauer, *supra* note 45, at 135–37.

reasons for acknowledging the importance of continuity with the past. Some are practical reasons. For example, there is the simple fact that I cannot fully free myself from the past. As noted before, the pervasive, ideological character of culture shapes the ways in which I understand the world and the possible choices I perceive at each juncture. It makes little sense to think that I can somehow step outside that matrix and truly start from scratch.[51] Such a thought can only be a type of self-deception that may well impair my ability to critically and realistically assess the situation.

There is also the question of efficiency. "Reinventing the wheel" ignores the lessons learned from successful past choices in the face of competing values.

There are other, one might say, more existential, reasons for giving special weight to making our decisions consistent with the past. We are aware of ourselves as temporal, and something that might seem important to our conception of ourselves is integrity in the sense of our actions being integrated over time into a coherent, stable self. Any need we might have to stabilize our own self-conception of who we are will press us toward some degree of consistency in our choices of how to act in the world.

However, beyond that, we are aware of ourselves as existing for other people and of the importance of our being recognized by others.[52] Others recognize, judge us, and come to understand who we are, through our actions. In most instances, we do not bother or, perhaps, do not have an opportunity to explain ourselves. Yet our actions can be both intelligible to others and communicate something about our character. But just how do our actions communicate who we are to others? Two sources of this communicative effect of our actions seem especially important.

One source is the combination of experience and the conventions that structure and stabilize social meaning. For example, driving to work one morning, I see two cars stopped in the middle of the street. Each has visible damage. Two men are standing in the street and appear to be engaged in conversation. I cannot hear what is being said, but I conclude from their gestures that there has been a collision, that the two men are the drivers, and that they are angrily yelling at each other about the collision and about who is at fault. Of course, there might be a different explanation. The cars might have been left by others and these two men might be friends who have just seen each other and are

---

51. *See generally* Stanley Fish, Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies (1989).

52. *Cf.* Jean-Paul Sartre, Being and Nothingness: An Essay on Phenomenological Ontology 220–430 (Hazel Barnes trans., 1956).

excitedly planning an outing to a baseball game in the middle of the street. But past experiences, including experiences with cultural conventions of the body language through which we express anger, lead me to confidently conclude that this is a livid encounter over a car crash.

Sometimes, though, actions are ambiguous, but if we know the actor, then we can interpret even ambiguous actions on the basis of that knowledge. For example, when someone is late for a meeting, that act of being late might signify rudeness or indifference or lack of conscientiousness or inadvertence. If I know the person well, I might be able to narrow down the meaning of the lateness. I might know this person, for instance, to be polite, engaged, and conscientious and therefore conclude that something unexpected must have happened to make her late.

The point is not that we can fully determine how our actions will be understood by others, just as an author cannot fully determine how readers will interpret her texts. But insofar as I wish to say intelligibly to myself and to others who I am, I must take into account that the meaning of my actions is communicated in significant part through a combination of social conventions and others' knowledge of me as a specific person, which is to say, knowledge of my specific past. Hence, in order to effectively communicate my intentions and, more generally, my character, I rely in large part on the way in which my actions reflect both conventions and my past acts. And if, on the other hand, I intend an action in something other than its conventional sense or insofar as I act "out of character," I need to explain myself, both to others and to myself, in order to make clear how my choice of action says who I am.

C. Commitments as a Member of a Group

Saying who I am would be hard enough if I were just an individual with individual commitments to various values, attitudes, goals, and beliefs. But I am not just an individual; I am deeply enmeshed in a vast array of relationships with individuals,[53] groups,[54] institutions,[55] and larger, more impersonal communities.[56] In most of my life, *I* am *we*; so in most of my life, saying who *I* am involves saying who *we* are, the identity of that "we" constantly shifting, depending on which of my affiliations is

53. Such as my daughter and my friend.
54. Such as my family and my neighborhood.
55. Such as my workplace and my schools.
56. Such as my profession and my country.

in focus.[57] And each of those "we's" is defined in significant part by its own set of commitments to various values, attitudes, goals, and beliefs.[58]

There are several important features of my having commitments as a member of a group. First of all, I can commit myself in ways that are not included in, and possibly inconsistent with, my individual commitments. For instance, as an individual, I object to neo-Nazism and, specifically, to a planned march by a neo-Nazi group through a predominantly Jewish section of my town. In fact, I am sufficiently opposed to the march that I am engaging in a variety of actions designed to stop the event, including demonstrating outside of the organization's headquarters.

However, it turns out that a lawsuit has been filed seeking an injunction prohibiting the march, and I am a partner in a law firm that has been approached by the neo-Nazis to represent them in this suit. As an individual, I wish that my firm did not take the case, and I might even actively oppose accepting these clients on the ground that what the neo-Nazis wish to do is wrong. However, if my firm does accept the case, while I certainly would not work on it, I would, as a member of the firm, actively support providing the clients with high-quality representation even as I oppose their march. At the same time, that support might become a reason for curtailing my individual acts of public opposition to the march.

Secondly, just as I might struggle with defining my individual commitments, commitments can be contested within a group. Within the firm, we might have a robust debate over whether we should represent the neo-Nazis, a debate that may well implicate a variety of important and distinct values for which the firm stands. If the debate seems fundamental to the identity of the firm, it might continue on some level even after the matter has been resolved through some formal decision-making process. Thus, certain members of the firm might continue to object if the neo-Nazis were, in fact, accepted as clients. More positively, members of the firm might properly argue that our counseling of these clients should raise serious moral objections to their planned march.

A third interesting feature of having commitments as a member of a group is that I expect other members of the group to act in ways that express the commitments that define the group. Thus, notwithstanding my own antipathy toward the neo-Nazis, I would

---

57. *See generally* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. Pa. L. Rev. 1503, 1514–20 (2000).

58. *See id.* at 1517.

expect the actions of all members of the firm to reflect concern that the client receive excellent legal representation. Accordingly, I would object strongly to lackadaisical work by a lawyer assigned to the case caused by the lawyer's animosity toward the neo-Nazis. I might object as a professional; that is, I might regard as unprofessional the lawyer's letting his personal feelings undermine his commitment to the client. This sense of professionalism, of what kind of behavior is expected of lawyers, is likely shaped in significant part by conventions, conventions within the community of lawyers and conventions within the larger society.

Moreover, I might object to the lawyer's carelessness because I regard his actions as inappropriate for a member of the group to which I belong, that is, as part of a law firm that is committed to certain attitudes and values. These expectations will be shaped in significant part by the past conduct of the firm; I will expect members of the firm to act "in character" by reflecting the firm's attitudes and values, which have become *my* attitudes and values insofar as I am a member of the firm and, therefore, are part of what defines who I am. Accordingly, I might regard actions inconsistent with those attitudes and values to reflect badly on the firm and, by extension, on me. As an individual with individual commitments, only my own inappropriate actions can reflect badly on me. However, as a member of a group with group commitments, the inappropriate actions of any member of the group acting as a member of the group can reflect badly on me. As a professional, I might be disappointed by the actions of the lackadaisical lawyer; as a member of the firm, I might be ashamed.[59]

This latter feature connects to the earlier point about contestable commitments in this way: I might have feelings such as shame even if the commitment in question was in dispute. Thus, I might feel ashamed if the firm accepts the neo-Nazis as clients, even though the institution was divided over the appropriateness of this action and the values and attitudes it expresses, and even though I would, as noted above, be committed to providing these clients excellent legal representation.

All these observations apply to a citizen's affiliation with the nation. During the Vietnam War, for example, many citizens protested the prosecution of that war by the American government. In one sense, they objected to the war on moral and political

59. For a moral and political argument for group responsibility and consequent feelings of shame see Ronald Dworkin, Law's Empire 167–75 (1986).

grounds that mirrored similar opposition around the world.[60] In another sense, American citizens' resistance to the war was unique in its reflection of their anger and shame, for *their* government was waging a war that, in their view, violated fundamental values to which the American polity should be committed, values that did not just happen to be the commitments of individual Americans, but were subscribed to by many Americans in large part because of social conventions, ideology,[61] and past political and social acts that contributed to defining what it means to be an American.[62] In this latter sense, the war expressed values that its citizen-opponents deemed inconsistent with what the country stood for and, therefore, reflected badly on them as citizens.[63]

Similarly, we can approve or criticize the enactment of a law, such as a law criminalizing stem cell research using the tissue of human embryos, on the ground that the values it expresses either are or are not good values for American society to embrace.[64] As with objections to the Vietnam War, this kind of approval or criticism is internal, i.e., it is made by members of the group, American society, as part of the ongoing enterprise of debating what values the group should be committed to and should express through its laws. From this perspective, approval is often accompanied by some degree of pride, and criticism by some degree of shame or embarrassment. This contrasts with external approval or criticism of the law, which might be made by anyone, anywhere and would not normally reflect emotions such as pride, shame, or embarrassment.[65]

Whether we are considering the treatment of the neo-Nazis or the prosecution of a war or the enactment of a statute, the expressive meaning of these actions is not necessarily congruent with the intentions of the actor, just as the expressive meaning of

---

60. For example, some around the world, including some in the United States had political sympathies with the aspirations of the North Vietnamese leader Ho Chi Minh.

61. *See* Balkin, *supra* note 30.

62. Some, for instance, were morally affronted by the use of napalm by the American military with its devastating effects on the civilian population.

63. For a more recent example, consider Governor Howard Dean's plea, "I want my country back!" Howard Dean, Speech at Sacramento, California (March 15, 2003), *available at* http://www.crocuta.net/Dean/Transcript_of_Dean_Sacramento_Speech_15March2003.htm.

64. We can also criticize laws on the ground that they express our best values inadequately. That is, our objection can be aimed at the mode of expression, the values expressed, or both.

65. *See* Dworkin, *supra* note 59.

my individual actions is not necessarily congruent with my own intentions. Thus, the lackadaisical lawyer in my firm might not actually intend to express dislike for the neo-Nazis; he might just be careless.[66] Nor might the prosecutors of the war understand their conduct to express the values despised by the protesters.

In short, the expressive meaning of an act is its public meaning, the meaning that best makes sense of the act from the point of view of the observer. Just as an individual cannot reliably determine how others will understand her acts, so the public meaning of a group's acts may well be contestable. Individual observers might disagree on how best to interpret the act in question and, therefore, what values it expresses. But, as is the case for an individual actor, for a group's acts to be publicly intelligible at all, one of two situations will normally occur: Either the act must conform to social conventions or the observer's knowledge of the group's past acts, or the group must explain itself.[67]

The common distinction between ministerial and discretionary acts trades somewhat on these alternatives. Ministerial acts of, say, an administrative agency are intelligible largely because they strictly conform to convention and to past behavior.[68] On the other hand, discretionary acts, such as the decision to go to war, will be intelligible if the decision conforms either to international conventions about conducting war or with past behavior of this particular government in question; otherwise, we expect an explanation. Not surprisingly, the vast majority of governmental acts that we encounter in our daily life seem to be ministerial, i.e., acts that we expect to conform both to past practice and to conventions, including the norms that stabilize the meaning of legal doctrine. That is, we expect our government to mostly act in ways that are intelligible without special explanation, and the commitment on the part of government officials to give preference

---

66. Or the dislike might be unconscious, or the lawyer might erroneously believe he is successfully hiding his feelings.

67. For example, we would understand and not be surprised if the American Civil Liberties Union opposed a proposed statute allowing suspected terrorists to be held for an extended period of time without being formally charged. This reaction would follow from our prior knowledge of the aims and activities of the organization. Conversely, if the ACLU were to enthusiastically embrace the proposed statute, we would likely be puzzled and need an explanation in order to make sense of this position.

68. For example, when we apply for Social Security benefits, we expect the bureaucrats in the Social Security Administration to process the application in a manner consistent with how such applications have been processed in the past.

to stabilizing norms, including those associated with the rule of law, helps make this possible.

By contrast, the enactment of a statute often requires starting from scratch, i.e., to be a product of all-things-considered deliberation about policy that gives no presumptive weight to past legislative decisions, except, of course, the Constitution.[69] Consequently, legislative acts do not necessarily rely on conventions or past behavior for intelligibility. And so we would expect the statute criminalizing research using human embryos to be accompanied by all manner of official and unofficial public discussion, the effect of which would be to explain the point and provide justification of the enactment in question.

D. The Public Meanings of Legal Decisions

Like the decision to prosecute a war or the vote to enact a statute, the adjudication of an individual legal case has public meaning. At the appellate level, since the public is not privy to the intra-court deliberations leading to a decision, the public meaning of that decision is almost necessarily a function of the opinion that accompanies it. Thus, the public meaning of the New Jersey Supreme Court's decision in *Pierro*, holding that the motel could be excluded from the zoning district in question, is largely shaped by the majority opinion. And like the decision to prosecute a war or to enact a statute, the values expressed by appellate court decisions, being important public acts by a community of which citizens are members, reflect on those citizen-members. Just as we might feel pride or shame along with our approval or criticism of the American government's prosecution of a particular war, so we might feel pride or shame accompanying our evaluation of a particular Supreme Court decision.[70] The published opinions in our great national cases are widely discussed among lawyers, academics, and the general public in large part because we understand that through the decisions of our judicial institutions we define our public self in important ways. *Brown v. Board of Education* and *Bush v. Gore* were not merely difficult cases to decide, but each of these decisions makes a claim about the values that the country is committed to and, therefore, about who we are; claims that I, as a citizen, might accept as true or reject as wrong, inapt, and untrue to who we really are.

---

69. *See* Ronald Dworkin, Taking Rights Seriously 112 (1977).

70. Think of *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686 (1954) and *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525 (2000).

As was true of the public meaning of individual actions, the public meaning of an appellate opinion is not necessarily congruent with the actual intentions of the judges. Even if the New Jersey Supreme Court's decision in *Pierro* was based on the judges' "personal values" and the rationale of their written opinion constructed after the fact to obscure the true basis of that decision, the public meaning of their decision may well be shaped by the conventions invoked by the writing. But this is not necessarily the case: If an appellate opinion fails to connect with recognized conventions or if it seems unaccountably inconsistent with past decisions of the court, the public meaning of the decision might well be understood as a departure from law, a decision based not on the values that are understood to be relevant to such legal disputes, but on the individual preferences of the judges.[71]

At the trial level, while there is typically no published opinion explaining the court's judgment, that judgment still has public meaning. Consequently, the typical absence of a public explanation reinforces the independence of the public meaning of a trial judgment from the actual intentions of the judge. Thus, the decision by the trial judge permitting the Pierro brothers to build their motel has a public meaning.[72] At the time, the community to whom the decision was addressed might likely have understood its public meaning as having to do with valuing the Pierros' autonomous use of their own property, as well as with many of the interpretive and jurisprudential values discussed earlier.[73] And we do not know whether this public meaning reflects the actual intentions of the judge. That is, the judge might have been a thoughtful and conscientious judge, who actually intended to express particular preference among the relevant values; on the other hand, he might have actually ruled in favor of the Pierro brothers simply because he personally liked them. The public meaning of the decision was independent of that in significant part

71. It is this understanding of the public meaning of *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, that accounts for the fact that many perceive it as an illegitimate judicial usurpation of the political process for electing Presidents.

72. Of course, in many cases, the trial judgment will follow a jury's verdict. The addition of a jury's deliberation alters the public meaning of a judgment in ways that are ignored in the text.

73. My colleague Dave Hoffman points out that the means by which a court ruling is communicated can affect its public meaning. If, for example, a ruling is reported in the newspaper, not only does the reporter's interpretation of the ruling help shape the public's understanding, but the very fact of the newspaper account may lend additional weight to the ruling.

because the judge's intentions remain private.[74] Indeed, the public meaning of the decision would have been unaffected by the judge's having decided by a private flip of a coin.

Here, again, we see the inappropriateness of resolving the choice among competing doctrinal values by a coin flip. If the public acts of our government officials, such as prosecuting a war, enacting a statute, and deciding a case, have public meanings and if these public meanings express values that, in turn, contribute to the definition of who we are as a community, then we might want those public acts to be the result of reasoning, of careful consideration of just what meaning is going to be expressed, of thoughtful reflection on just what is going to be said about who we are. If the war or the legislation or the judicial decision is the product of a coin flip, then we are defining ourselves through chance, and this seems bizarre. It is as though I were to decide by flipping a coin whether to be and to express the values of a conventional law professor or to be and express the values of an international terrorist. Or it is as though I were to decide by flipping a coin whether to be and to express the values of the kind of person who would miss his daughter's wedding to rush to the bedside of a dying friend.

Of course, one solution to this problem of public meaning is to institutionalize the coin flip. That is, judges could publicly announce that they will decide by coin flip, at least in hard cases when the arguments for different outcomes seem to the judge to be well balanced. As a result, the public meaning of the decision would change. It would no longer reflect an evaluation of the merits or commitment to various interpretive or jurisprudential principles because the outcome of the decision would be publicly known to be random.

But now *this* act, i.e., this decision-making-by-coin-flip, has a public meaning. That is, the judge says who we are as a community not only by *what* she decides, but *how* she decides. And what is that public meaning of decision by coin flip? It is the very meaning that would attach to my decision to flip a coin to resolve my daughter-friend dilemma, i.e., giving up by refusing to continue to struggle with the competing values at stake in the case. But if, as citizens, we take these values seriously because they are

74. However, even if the judge's intentions are public, they will not necessarily determine the public meaning of the ruling. Thus, for example, in the long run, the meaning of the decision in *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, is likely to be determined more by the relationship of the reasoning of the majority opinion to precedents than by biographical facts about the political preferences of the individual Justices.

values to which we as a community are committed, we might want our community officials, including the judge, to struggle up to the bitter end.

Moreover, because values are in conflict, no matter what the judge decides, some important values that we as a community governed by law take to be important will be sacrificed. And because these values are important constituents of who we are as a community, their sacrifice would be an occasion for regret and even remorse. Indeed, we *should* feel remorse whenever our actions as a community sacrifice important values. But if the judge, and we, through the judge, flip a coin, we blunt our acknowledgment of responsibility for the decision, acknowledgment that is a prime ingredient of remorse. And we should not do that. Remorse in this instance is crucial; through it we acknowledge and reaffirm our caring for and our allegiance to the values to which we as a community are committed and those we sacrificed in this instance.

But, of course, the coin flip is not the only, nor probably the most appealing, option open to the judge who must make choices among competing doctrinal values. More realistically, the judge could try to start from scratch; she could try to make an all-things-considered judgment about what values ought to be considered, what those values mean, how they rank with each other, and how they best apply to the instant case. For the fact that the multiple, heterogeneous values constituting legal doctrine might support different and inconsistent outcomes does not disable the judge's judgment that some outcomes are more desirable than others. Indeed, one of the hallmarks of my focus in this essay on the malleability and contingency of legal doctrine is an insistence that our very recognition of multiple possibilities frees decision makers, i.e., judges, lawyers, bureaucrats, as well as legislators, from the excuse of legal determinism and, accordingly, makes them responsible for the choices they make and for the worlds they consequently create. In other words, taking seriously the value choices inherent in every case, whether hard or easy, does not require giving any special privilege to the decisions of the past and to the norms that stabilize legal meaning. Taking value choices seriously does not require special commitment to those values that support the rule of law.

However, if the judgments of courts, like all acts of public officials, contribute publicly to defining who we are as a community, how is this public meaning rendered intelligible? In the case of trial courts, the absence of public explanation of their judgments in the form of written decisions requires us to fall back on conventions and past decisions in order to understand the

meaning of a court's judgment. That is, there is good reason for trial judges to commit themselves to the rule of law in order to make the meaning of their acts understandable both to themselves and to the public.

In the case of appellate courts, things are more complicated. The hierarchical structure of our legal system requires trial judges to follow the lead of decisions by courts higher in the system. If the unexplained decisions of trial judges are intelligible largely through the lens of conventions and past decisions, then appellate courts must pay significant respect to that lens and produce consistent and predictable decisions; otherwise, the judgments of trial judges in accordance with the dictates of appellate courts will lose their intelligibility.

But appellate courts also have another function. As I suggested earlier, appellate decisions are a vehicle through which we debate important questions of civic values. Hence, appellate courts have the responsibility to reconsider what values are relevant to different legal problems, what the values mean, and how they rank with each other. This reconsidering is in tension with the rule of law. On the one hand, reconsideration always holds out the possibility of a more or less radical break from the past. On the other hand, the rule of law can inform the reconsidering so that the reconsidering would not be truly a starting-from-scratch; rather, past decisions would be both the starting point and the object of the reconsideration.

Given these two heterogeneous functions of appellate courts, i.e., to promote the intelligibility of trial court decisions and to reconsider doctrinal problems, we might expect that the presumptive weight given to stabilizing norms and past decisions will be looser at the appellate level. We might, that is, expect the commitment to the rule of law to be weaker. And, indeed, that is the case. On the other hand, departures in appellate decisions from conventions and past decisions will, to that extent, undermine the intelligibility of those decisions and thus require public explanation to compensate. And, indeed, the almost universal use of written opinions by appellate courts serves this need.

III. CONCLUSION

Read one way, the preceding argument is about autonomous choice and decision. An individual *chooses* to be a certain kind of person. That choice, in turn, implicates a particular constellation and ordering of values, and the individual expresses those values and, thereby, who he or she is by *choosing* to act in particular ways. By extension, members of a polity define themselves as a

political community by choosing to act in certain ways, thereby expressing a particular constellation and ordering of values. And this is true both for private citizens and for officials, like judges, who express what the community stands for through their *decisions*. In this reading, I am describing the rule of law as an instrument for the community's self-actualization. Through the rule of law, the community projects an ongoing, coherent account of its defining values and an ongoing, coherent charting of change in those values.

Such a reading is consistent with that road of postmodernism that leads to existentialism. Thus, a brief word about postmodernism is in order. Postmodernism challenges the reality of stable foundations for meaning in both the interpretive sense, i.e., what a text or an event "means" is indeterminate, and the existential sense, i.e., what my life "means" is indeterminate.[75] Meaning, then, must be determined by choice. I define myself and give meaning to my life by the choices I make. The same holds true for communities.

However, postmodernism is ambivalent with respect to the very idea of choice. For the autonomy that meaning-making choice seems to entail is at odds with another important postmodern tenet: our situatedness. By this light, each of us is the product of many intersecting forces, and we cannot achieve the existential distance from our situation needed to make autonomous choices. Hence, our sense of ourselves as individuals with an aspect of being that is independent of the world in which we are situated is an illusion. Our choices, accordingly, are not "our own," but are the product of preferences, which are themselves constructed by these same forces that construct us as individuals. We cannot, therefore, be self-defining.

A safe perspective on all this would seem to be the following: We cannot know whether we are free or not. Our individual sense of ourselves, as in some crucial respect standing apart from and independent of our world, may or may not be illusory, but we

---

75. "That postmodernism is indefinable is a truism. However, it can be described as a set of critical, strategic and rhetorical practices employing concepts such as difference, repetition, the trace, the simulacrum, and hyperreality to destabilize other concepts such as presence, identity, historical progress, epistemic certainty, and the univocity of meaning." Gary Aylesworth, "Postmodernism," The Stanford Encyclopedia of Philosophy, http://plato .stanford.edu/entries/postmodernism (last visited Oct. 5, 2005). *See also* Douglas E. Litowitz, Postmodern Philosophy and Law 140–141 (1997) (discussing Richard Rorty's ideas about the contingency of "language, selfhood, and community").

cannot achieve the epistemological distance from ourselves to answer that question. We simply cannot know.

Given that practical fact, we need a different reading of my argument, one that is no longer about autonomous choice and decision, but rather about the phenomenon of self-identity. More specifically, my argument can be read as a prediction that individuals will tend to experience themselves as having coherent identities, identities that include commitments to various values and to identifiable rankings among those values. Accordingly, as individuals we tend to "choose" actions that express those values and rankings. Whether those choices are free or constructed or something in between is unknowable and beside the point.

Similarly, we can predict that communities tend to experience themselves as having more or less coherent identities. To the extent that they do, those identities include commitments to various values and to identifiable rankings among those values, and the communities through private and official actions will tend to "choose" actions that express those values and rankings.

In this reading, the identities in question are not fixed. Coherence does not preclude development and change, but the change will tend to be incremental and connected to the past. Even when a significant change in identity occurs, as when, for example, an individual with left-wing commitments as a youth becomes a politically conservative adult, this reconsideration of what one stands for will often be perceived as continuous with one's past, rather than as a radical break.

For communities, then, the value of the rule of law will lie in its usefulness as a tool for connecting to the community's past an important class of public actions that express the community's values and, thus, its identity, namely, legal actions, i.e., the class of actions that implicates the community's coercive power.

Various political justifications have been offered for the rule of law, such as Lockean liberalism, European rationalism, and American egalitarianism. These are, of course, culturally specific, reflecting peculiarly Anglo-European history and values. The argument I am advancing here is, I think, less parochial, for I suspect that, like protection against tyranny, self-definition turns out to be important universally for communities. Our ability to cope with the world requires that we continually make judgments about what is important, that is to say, that we continually make value judgments. And it may well be that we can make such judgments more efficiently and effectively if we have some sense of who we are and what we stand for, not in a fixed, unalterable sense, but to the degree necessary to have a clear starting point for our deliberations about the problems we encounter in the world.

Of course, the rule of law is not necessary for a community's identity. Perhaps a culturally homogeneous community can say who it is without law. In such societies, custom might suffice to express what the community stands for.

But as a practical matter few, if any, communities are homogeneous. Accordingly, the argument made in this part might explain the trans-cultural appeal of the rule of law that seems sooner or later to insinuate its way into democratic, theocratic, and totalitarian societies alike. For in societies comprising different populations whose members embrace a multitude of heterogeneous and often irreconcilable values, one powerful way that the polity can say what it is through the public resolution of disputes by means of an ongoing series of choices among these different values. However, to serve that function, the choices must be intelligible. If every legal decision were explained and justified, civic business would grind to a halt. In large part, therefore, we depend for the intelligibility of legal decisions on conventions, which are the stabilizing norms, and past decisions, whose meaning and authority for the present are established by those norms. In other words, we depend, in large part, on the rule of law.