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## Believing Like A Lawyer

Steven D. Smith

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# BELIEVING LIKE A LAWYER

STEVEN D. SMITH\*

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The perplexing truth, at once startling and yet vaguely reassuring, is that lawyers and judges today talk and argue and justify in pretty much the same curious ways that they have used for generations. Largely impervious to decades of sophisticated legal theory, lawyers and judges go on much as they did half-a-century or perhaps half-a-millennium ago—citing and distinguishing precedents, playing off the plain meaning of statutes against their “purposes” and against the legislative “intentions” supposedly implicit in them, and purporting to extract from this conglomeration of materials univocal conclusions about what “the law” really is. As Norman Cantor observes, “A London barrister of 1500 would need only a few months of remedial education to step into an American courtroom today.”<sup>1</sup>

Perhaps Cantor exaggerates. Still, the fact that a distinguished historian could seriously make the statement points to something intriguing, and perhaps troubling, about the law. Could a comparable statement be made with any semblance of plausibility about, say, a London *scientist* of 1500 (if there was one), or a philosopher, or a commodities trader?

The remarkable tenacity of what we might call conventional legal discourse is not high on the agenda of current jurisprudential issues,

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<sup>1</sup> NORMAN F. CANTOR, *IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM* 373 (1997).

but it ought to be. In fact, legal thinkers have learned to treat standard law talk dismissively. Already a generation ago, Grant Gilmore asserted (with perhaps a touch of overstatement regarding legal *scholars* to match Cantor's overstatement regarding *lawyers*) that "[f]or two or three generations past it has been the merest truism, in much American legal writing, that the doctrine which may be found enshrined in case report and treatise is neither important nor relevant."<sup>2</sup> Not taken in by what Holmes called "the fallacy of logical form,"<sup>3</sup> legal scholars quickly penetrate the rhetoric of judicial opinions in order to examine what they suppose to be the real bases of legal decisions.<sup>4</sup> So the jurisprudential debates that engage interest today contend over what those real bases are, or should be.

In probably the most acrimonious controversy of the moment, for example, instrumentalist theorists such as Richard Posner square off against philosophical or "moralist" theorists such as Ronald Dworkin.<sup>5</sup> But the contending parties agree, it seems, on the inefficacy of conventional legal reasoning. They agree, in other words, that judges should not and indeed could not make decisions simply on the basis of the sorts of conventional or legalistic arguments presented on the face of the typical lawyer's brief or judicial opinion. Judges who purport to do this are guilty, Dworkin insists, of "a costly mendacity."<sup>6</sup>

This dismissive attitude toward conventional legal discourse might have been excusable earlier in the century. Thinkers like Holmes and, a few years later, the Legal Realists were confident that once the deficiencies in conventional discourse had been exposed, law would naturally move to adopt—and to adopt for open, public use—a more adequate form of reasoning about legal disputes, such as an instrumentalist "policy science." But a century has passed, and the long awaited transformation in discourse has not occurred; nor does it seem immu-

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<sup>2</sup> See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 13 (1977).

<sup>3</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 468 (1897).

<sup>4</sup> See, e.g., Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 447–48 (1930) [hereinafter Llewellyn, *A Realistic Jurisprudence*] (distinguishing between "real rules" and "paper rules"); cf. George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 546 (1972) (proposing certain important tort cases can best be understood by "stripping the . . . cases of their rhetoric").

<sup>5</sup> Compare Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998) [hereinafter Posner, *Problematics*], with Ronald Dworkin et al., *Responses*, 111 HARV. L. REV. 1718–95 (1998). Judge Posner's Holmes Lecture has since been expanded into a book of the same title. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999). Because the book was not published until after this article was completed, citations here are to the Lecture as published in the HARVARD LAW REVIEW.

<sup>6</sup> RONALD DWORIN, *FREEDOM'S LAW* 37 (1996).

ment.<sup>7</sup> So the persistence of conventional legal discourse deserves closer study. Why is this peculiar way of talking and thinking so resilient? What if anything does the perseverance of this discourse tell us about law, legal culture, and the human beings who compose and inhabit that culture?

In neglecting such questions, jurisprudence betrays its own commitments and threatens to render itself irrelevant. Jurisprudence, after all, is not a discipline independent and sufficient unto itself, like Baroque chamber music or modern nonrepresentational art. On the contrary, jurisprudence is supposed to be a body of thought *about* law; most fundamentally, it is supposed to describe and explain how law works. Indeed, this has been a special point of pride with modern legal thinkers from Holmes to the Legal Realists to Judge Posner: They have purportedly been out to explain what law *really is*, or how law *really works*. They have been ostentatiously concerned (or so they say) with the operative reality, not the appearance or representation—with “law in action,” not “law in the books.”<sup>8</sup> So it is disconcerting to discover, after decades of such “realist” theorizing, that contemporary legal theory is not only unilluminating with respect to legal practice but indeed appears to have drifted away from that practice, thereby becoming an esoteric world unto itself.

This estrangement of legal theory from the world of actual law seems particularly unfortunate because it occurs at a time when the enterprise of law is increasingly beleaguered and unsure of itself. The dean of the Yale Law School describes “a crisis in the American legal profession” and worries that “the profession is in danger of losing its soul.”<sup>9</sup> Public trust in the legal profession is low.<sup>10</sup> Lawyers’ sense of satisfaction in their work has declined precipitously.<sup>11</sup> Even more fundamentally, what critics like Judge Harry Edwards describe as a widen-

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<sup>7</sup> See *infra* notes 105–95 and accompanying text.

<sup>8</sup> See, e.g., Sanford Levinson & J. M. Balkin, *The “Bad Man,” the Good, and the Self-Reliant*, 78 B.U. L. REV. 885, 902 (1998); Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 14 (1910).

<sup>9</sup> ANTHONY T. KRONMAN, *THE LOST LAWYER* 1 (1993).

<sup>10</sup> See Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 808–10 (1998). Galanter reports that “[w]hen, in 1991, a national sample was asked to volunteer ‘what profession or type of worker do you trust the least,’ lawyers were far and away the most frequent response. Almost as many (23%) spontaneously volunteered lawyers as the next two categories (car salesman, 13%, politicians, 11%) combined.” *Id.* at 809.

<sup>11</sup> See BENJAMIN SELLS, *THE SOUL OF THE LAW* 17–18, 99–100 (1994); see also Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 32 VAND. L. REV. 871 (1999).

ing chasm separating the professors from the practitioners of law<sup>12</sup> seems in reality to be something more serious: It is a schism within the very being of professors and practitioners alike, with conventional legal discourse marking the division.

This schism is manifest in the confusing, almost schizophrenic ways in which both academics and practitioners behave. Thus, legal scholars may dismiss conventional legal discourse in their "meta"-reflections, but when addressing a particular issue in a legal brief or law review article, they will often instinctively and easily revert to just that sort of discourse. So the law professor in his jurisprudential mode will disparage or deconstruct conventional legal discourse; but then a substantive issue arises and this same professor will eagerly marshal precedents and legal arguments in the same way that an ordinary lawyer might to show that "the law" requires result X in case Y or that sodomy laws really *are* unconstitutional (whether the Supreme Court knows it or not).<sup>13</sup> Conversely, lawyers and judges may employ conventional legal reasoning in arguing about and deciding cases, but they rarely offer articulate accounts of such reasoning that explain why it is rational or sensible to resolve important personal, social or political issues in this way.<sup>14</sup> Why, to use a recent example, should the question whether an errant but elected and popular President should be removed from office turn on the efforts of innumerable self-certified experts to extract the true meaning of a phrase—"high Crimes and Misdemeanors"—used with almost no explanation in a document over two centuries ago?<sup>15</sup> Called upon to explain this practice, judges and

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<sup>12</sup> See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). For a recent discussion concurring in Edwards's diagnosis and collecting other supporting authorities, see Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 763-71 (1998).

<sup>13</sup> Compare, e.g., Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983) (describing and criticizing formalist approach to law), with Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 U. COLO. L. REV. 373 (1997) (offering standard formalist arguments to show *Bowers v. Hardwick*, though never explicitly overruled, cannot be reconciled with *Romer v. Evans* and hence no longer must be regarded as good law).

<sup>14</sup> See Linda Ross Meyer, *Is Practical Reason Mindless?*, 86 GEO. L.J. 647, 650 (1998) ("Indeed, both Karl Llewellyn and Benjamin Cardozo concluded that judges themselves have no idea how they do what they do."); cf. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 14 (1997) (observing with respect to pervasive practices of statutory construction that "[w]e American judges have no intelligible theory of what we do most"). Mary Ann Glendon observes that mid-century "teachers and scholars of the law . . . could 'do' law very well, but they were tongue-tied when it came to explaining and defending their ingrained, habitual doings." MARY ANN GLENDON, *A NATION UNDER LAWYERS* 231 (1994). I will argue that in this respect the situation has not changed discernibly.

<sup>15</sup> See Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631 (1999).

lawyers may fall back upon one of the currently fashionable "policy" or theoretical accounts of law that they learned from their law professors.<sup>16</sup>

Law students, for their part, learn two conflicting things in law school: They learn to "think like a lawyer"—that is, to address problems in terms of the age-old techniques of applying rules and citing and distinguishing precedents—and they also learn from "realist" or Critical professors that this form of thinking is hopelessly archaic. They may emerge from this training, paradoxically, with entrenched commitments both to legal reasoning and to the idea that legal reasoning is a backward and perhaps vaguely oppressive enterprise.<sup>17</sup>

In sum, the split between academic theory and actual practice does not so much divide scholars from practitioners in the way critics like Judge Edwards have claimed, as it severs both practitioners and many scholars from themselves, sundering the lawyer who is consciously *thinking about* or *trying to explain* law from the same lawyer when she is actually *doing* law. This schizophrenic condition is a sign of something deeply wrong in modern legal thought.

In this Article, I propose to address the current malaise in an unlikely fashion—that is, by taking conventional legal discourse seriously. My purpose is not to rehabilitate conventional legal reasoning—for my part, I find the familiar criticisms of such reasoning largely persuasive—but rather to reflect on the significance of the persistence of such reasoning in the face of powerful and relentless assaults from generation after generation of legal thinkers. Simply stated, my thesis is this: For over a century, legal theorists have been unable to take the discourse used by lawyers and judges at face value because they have suspected, with good reason,<sup>18</sup> that this discourse reflects metaphysical commitments as well as a kind of "faith" that scholars have supposed to be untenable in a modern (or "post-modern") world. Conventional legal discourse implicitly depicts law as a "brooding omnipresence in

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<sup>16</sup> Judge Edwards is a conspicuous example: In a celebrated and controversial article, Edwards criticized the academy for neglecting conventional legal reasoning, but he himself did not attempt to defend the rationality of conventional legal argumentation as a distinct discourse. On the contrary, Edwards seemed to share the familiar academic view in which "theory" provides the standard of rationality by which actual legal doctrine and decisions should be evaluated and guided. See Edwards, *supra* note 12, at 35, 39.

<sup>17</sup> Noting that "[o]n many days, I had not even eaten breakfast before I watched one of my professors deconstruct something," Patrick Schiltz reports that "[t]hree years of law school left me—and many of my classmates—intensely cynical and skeptical." Schiltz, *supra* note 12, at 767; cf. GLENDON, *supra* note 14, at 226 (arguing the common practice of "deconstruction" in law school pedagogy often generates cynicism and nihilism in students).

<sup>18</sup> See *infra* notes 26–116, 195–217 and accompanying text.

the sky,"<sup>19</sup> as Holmes scornfully put it, and legal thinkers regard such a notion as almost self-refuting. Consequently, modern scholars have adopted what they suppose to be "realist" stances toward conventional discourse. Assuming that this discourse cannot on its own terms amount to a cogent form of reasoning and hence that it cannot adequately explain how legal issues either are or should be resolved, legal thinkers have looked past the standard lawyerly ways of talking in order to discover, or devise, the "real" bases of law. And they have often assumed or insisted that the archaic ways of lawyerly argument soon will be or must be replaced by some more "rational"—that is, less faith-dependent and less metaphysically dubious—form of reasoning.<sup>20</sup>

It should be apparent by now, however, that these "realist" expectations were misconceived—history has not unfolded in the way legal thinkers believed it must or should<sup>21</sup>—and that in fact conventional legal discourse, with its metaphysical and faith commitments, is at the core of what law "really" is. So rather than dismissing the commitments implicit in law, a genuinely realistic jurisprudence would need to take those commitments seriously (which is not to say that it must end up by endorsing them). In short, if there is an escape from the current jurisprudential malaise, it lies in the development of a "jurisprudence of faith"—a jurisprudence that would use "faith" at least as a central diagnostic or explanatory concept, if not as a normative criterion.

Legal thinkers may be expected to treat this proposal with skepticism. "Faith" is today a suspect and little understood concept.<sup>22</sup> Hence, to say that law is based on faith may seem both to discredit the law and to render it almost unintelligible. Later in this Article, I try to address this difficulty by describing an "orientation of faith" that, upon reflection, should be familiar to most of us,<sup>23</sup> and by explaining how law can be best understood as an expression of this kind of orientation.<sup>24</sup>

Nonetheless, recognizing that law is at its core an expression of faith *does* provoke daunting questions. *What sort of faith does law reflect? And is that faith a viable one? Is "justification by faith," in other words, a real possibility for modern law? Or should law be seen more*

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<sup>19</sup> *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

<sup>20</sup> See *infra* notes 105–70 and accompanying text.

<sup>21</sup> See *infra* notes 176–217 and accompanying text.

<sup>22</sup> See, e.g., Posner, *Problematics*, *supra* note 5 at 1649 (noting arguments based on religious faith are "not a part of academic moralism"); cf. JOSEPH VINING, *FROM NEWTON'S SLEEP* 110 (1995) [hereinafter *VINING, NEWTON'S SLEEP*] (noting "faith" is "a notion in some academic trouble").

<sup>23</sup> See *infra* notes 218–72 and accompanying text.

<sup>24</sup> See *infra* notes 273–360 and accompanying text.



as the outgrowth of some "quasi-faith"—or perhaps, as critics like Duncan Kennedy and Pierre Schlag argue, of "bad faith"?<sup>25</sup> And if so, what follows? Should law as currently practiced be repudiated? Might it be maintained as a sort of useful fiction, or "noble lie"? These are questions that a jurisprudence of faith would need to confront; this Article can do little more than offer a sort of prolegomenon to such a jurisprudence.

Part I of this Article describes the basic components of conventional legal discourse and suggests how that discourse, taken at face value, reflects a faith and a set of metaphysical commitments that few if any lawyers today would consciously and publicly endorse. Part II discusses the structure of twentieth-century jurisprudence—a structure formed by the efforts of legal thinkers to break free of conventional legal discourse and its underlying commitments. Part III then describes how legal practice in the twentieth century has largely disregarded the prescriptions emanating from legal theory, thus producing the theory-practice split that so alarms critics like Judge Edwards. Part IV returns to the origins of modern legal thought; it argues that the intellectual conditions of the late Victorian period prevented seminal thinkers like Holmes from taking conventional legal discourse seriously and at face value, but that these disabling conditions are no longer in full force. So it may now be possible, for the first time in a long time, to consider the possibility of a jurisprudence that understands law as an expression of faith.

Part V attempts to address a preliminary requirement for such a jurisprudence by discussing an "orientation of faith" that is more substantial than the caricatures of faith that are often tossed about casually and dismissively in academic thought. Finally, Part VI considers various and conflicting ways in which an orientation of faith might inform the discourse and practice of law, and examines some questions and problems for jurisprudence that this perspective provokes.

### I. LOOKING FOR "THE LAW"

From time immemorial, as the saying goes, lawyers in the common law tradition have practiced a special form of thinking and argumentation in addressing legal controversies. It is not easy to specify just what this discourse consists of; indeed, scholars disagree about whether there is ultimately any distinctive form of reasoning peculiar to lawyers.

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<sup>25</sup> See *infra* notes 280–331 and accompanying text.

Still, it is safe to say that to both lawyers and nonlawyers, lawyerly discourse at least seems to be a recognizable if somewhat peculiar mode of talking and thinking. "Thinking like a lawyer" is an elusive but not wholly empty idea; people may have difficulty defining just what such thinking consists of, but they "know it when they see it."<sup>26</sup> Indeed, as Cass Sunstein notes, "to nonlawyers or to people from other cultures" the way lawyers think about problems may appear "weird or exotic."<sup>27</sup>

This Part first describes briefly the basic features that seem central and distinctive to legal discourse. It then notices the commitments that this discourse, taken on its own terms, seems to manifest, but that modern lawyers and legal scholars uniformly disavow.

### A. *The Components of Conventional Legal Discourse*

At least to an outsider, perhaps the most notable feature distinguishing the way lawyers think about issues is the special emphasis on—and the intricate practices for using—precedent.<sup>28</sup> Although the doctrine of *stare decisis* was not explicitly formalized until the nineteenth century,<sup>29</sup> the law's conspicuous obsession with precedent has attracted notice, and often derision, for centuries.<sup>30</sup> Lawyers are hardly

<sup>26</sup> See SELLS, *supra* note 11, at 13–16.

<sup>27</sup> CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 14 (1996). An anecdote may help support this point. I recently participated in an academic conference in which most of the presenters and questioners were lawyers; but one participant was an accomplished historian. Midway through the conference he indicated to me that in all his years in the academy he had never till now worked much with lawyers or law professors, and he found the lawyerly discourse extremely curious. "All of the talk about *doctrines*, all of the invoking and distinguishing of authorities . . .," he commented. "Where else except in theology departments do people talk like this?"

<sup>28</sup> See Anthony T. Kronman, *Precedent and Tradition*, 99 *YALE L.J.* 1029, 1031–32 (1990) [hereinafter Kronman, *Precedent*] (describing special centrality of precedent in law); cf. SCALIA, *supra* note 14, at 7 (observing "an absolute prerequisite to common-law lawmaking is the doctrine of *stare decisis*—that is, the principle that a decision made in one case will be followed in the next.").

<sup>29</sup> For a discussion of how the longstanding practice of following precedents was formalized in nineteenth-century England, see Jim Evans, *Change in the Doctrine of Precedent in the Nineteenth Century*, in *PRECEDENT IN LAW* 35 (Laurence Goldstein ed., 1987).

<sup>30</sup> Gerald Postema explains that "[a]lready in the seventeenth century, at the time of the self-conscious articulation of classical common law theory by Coke, Hale, and others, the doctrine [of precedent] was under severe attack." Gerald J. Postema, *Some Roots of Our Notion of Precedent*, in *PRECEDENT IN LAW* 9 (Laurence Goldstein ed., 1987). See also Jonathan Swift, *Gulliver's Travels*, in *GULLIVER'S TRAVELS AND OTHER WRITINGS* 203 (Ricardo Quintana ed., 1958) (1726):

It is a Maxim among these lawyers, that whatever hath been done before, may legally be done again: And therefore they take special Care to record all the Decisions formerly made against common Justice and the general Reason of Mau-

alone in referring to past decisions or events in addressing current questions, of course, and the "analogical reasoning" that they appear to employ in the use of precedent may not reflect any distinctive kind of *logic*, as some scholars suppose.<sup>31</sup> But lawyers *do* seem to invest precedent with special weight—they often talk about precedent as *authoritative*, or perhaps as qualifiedly "binding"—and they accordingly have developed elaborate methods of using precedent. Karl Llewellyn counted thirty-two "impeccable" techniques for using or deflecting precedents, another twelve methods that he thought legitimate, an additional sixteen methods that are "correct but less usual," and four techniques that he regarded as "illegitimate" but that are nonetheless used.<sup>32</sup>

A second standard feature of conventional legal discourse consists of an array of techniques, maxims, and canons of construction by which lawyers invoke, interpret, avoid, or extend enacted law—statutes, regulations, constitutional provisions. Contemporary scholars sometimes classify the leading approaches to statutory interpretation under three broad headings: *textualism*, *intentionalism*, and *purposivism*.<sup>33</sup> Each of these approaches has a considerable pedigree, and although different periods or jurists or scholars may incline more to one or another of these approaches, arguments and techniques appropriate to each may be found in almost any period or judge.<sup>34</sup>

These distinctive forms of lawyerly argumentation about statutes and common law make up a labyrinthine discourse sometimes described as the "artificial reason" of the law. The description comes from Edward Coke's famous exchange with King James I.<sup>35</sup> James asked why, if "reason" is the essence of the law (as Coke himself insisted), His Highness should not have the final say in legal controversies—his royal reason being presumptively at least as acute as anyone else's. Coke

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kind. These, under the Name of Precedents, they produce as Authorities to justify the most iniquitous Opinions; and the Judges never fail to direct accordingly.

*Id.*

<sup>31</sup> For an argument that legal reasoning is no different from other, non-legal forms of reasoning, see LARRY ALEXANDER, *The Banality of Legal Reasoning*, 73 NOTRE DAME L. REV. 517 (1998); cf. SUNSTEIN, *supra* note 26, at 62-100 (defending idea that "analogical reasoning" is a special form of reasoning central to law).

<sup>32</sup> See KARL LLEWELLYN, *THE COMMON LAW TRADITION* 77-91 (1960) [hereinafter LLEWELLYN, *THE COMMON LAW*].

<sup>33</sup> See Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 227-29 (1999).

<sup>34</sup> For a helpful collection of materials and notes reflecting these approaches and their intermixing in practice, see generally WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 514-631 (2d ed. 1995).

<sup>35</sup> See generally, 5 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 429-31 (2d ed. 1937).

famously replied—or perhaps whimpered, because at this point in the conversation he was evidently prostrate with face pressed to the floor—that the reason of the law is not the “natural reason” with which His Highness was so amply endowed, but rather an “artificial reason” to be acquired only by long training and practice in the special arts and techniques used by lawyers. Modern scholars still invoke Coke’s distinction in contrasting the way lawyers think with reasoning *simpliciter*.<sup>36</sup>

### B. “The Law” Behind the Law

The distinctive character of lawyerly argumentation provokes a vital question: Why should this form of thinking and arguing have the authority that it appears to carry in our political culture? Why is this curious and self-consciously “artificial” dialectic a helpful way to address important questions? Why should the most central issues in our society—issues of life and death, issues of politics at the highest level—be resolved by resorting to this peculiar mode of thought?<sup>37</sup>

On its face, conventional legal discourse offers a straightforward answer to this challenge. The answer is in one sense perfectly familiar, but in another sense it has become almost invisible; that is because the answer has been widely regarded for a century or more as obviously inadequate, or perhaps as metaphorical, or as a shorthand for some more sophisticated and more rational explanation. So the conventional answer is worth reciting despite its familiarity.

#### 1. “The law”

The conventional answer is that legal reasoning is authoritative because it helps us ascertain “what the law is.” Taken at face value, in other words, the conventional explanation implies a belief in some entity—“the law”—that is somehow authoritative for us and the content of which can be ascertained through conventional legal reasoning.

A visitor to our legal culture who paid close attention and who innocently took our talk at face value (as most of us do not) would perceive that this view is constantly expressed in the things lawyers, and many nonlawyers, say routinely. We describe a situation or problem and then ask, “What’s ‘the law’ on that?” Or we make assertions about

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<sup>36</sup> See, e.g., Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981) [hereinafter, Fried, *Artificial Reason*]; see also GLENDON, *supra* note 14, at 181.

<sup>37</sup> The question is sharply posed in PAUL F. CAMPOS, JURISMANIA: THE MADNESS OF AMERICAN LAW. Campos suggests that our pervasive resort to law and legal reasoning to resolve cultural conflicts reflects a sort of collective mental illness. See generally PAUL F. CAMPOS, JURISMANIA: THE MADNESS OF AMERICAN LAW (1998) [hereinafter CAMPOS, JURISMANIA].

"what 'the law' requires." The visitor might at first suppose that such phrases allude to some elaborate, multi-volume rule book, and that the questions call for someone to look up the answers in the same way that we look up unfamiliar words in a dictionary. Indeed, citizens and beginning law students do sometimes come to the law with some such "rule book" notion in mind. Lawyers know better. Alas, if only it were so simple—if only there *were* such a rule book stashed away somewhere. Still, lawyers argue passionately and judges pontificate solemnly about what "the law" is or requires, even when (or especially when) there is admittedly no established rule—no statute or regulation or precedent "on point."<sup>38</sup>

Sometimes we refer respectfully to "the rule of law"—or, more ambitiously and mysteriously, to "the rule of law, not of men." At least to a naive observer, these familiar phrases might seem to treat "the law" as if it were some discrete and authoritative entity, or perhaps as a sort of quasi-*person* who wields authority. The child's "*Mama says* you have to go to bed now" matures into "*The law says* you have to file your tax returns by April 15." Indeed, lawyer and psychologist Benjamin Sells has found that both lawyers and non-lawyers *do* readily picture "the law" as a person—typically as something like "an older man, gray-haired and distinguished looking" who wears a camel coat, carries a briefcase, and drinks his coffee black without sugar.<sup>39</sup> Or the phrases might imply that "the law" is some ethereal and impersonal object—perhaps "an outside and occupying force responsible for imposing and maintaining order."<sup>40</sup> Norman Cantor notices that the common law is sometimes described as if it were "a kind of fixed heavenly firmament, its procedures and principles shining down like beautiful and remote stars, infinitely set apart from the anxieties, confusions, and passions of particular human lives."<sup>41</sup>

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<sup>38</sup> In an earlier period, common lawyers talked as if "custom" constituted the law, but the same difficulty was apparent—there was in fact no established custom for most of the intricate issues considered by common law courts. See SCALIA, *supra* note 14, at 5; A.W. Brian Simpson, *The Common Law and Legal Theory*, in *LEGAL THEORY AND COMMON LAW* 8, 18–21 (William Twining ed., 1986).

<sup>39</sup> SELLS, *supra* note 11, at 24. Sells explains that:

[T]he Law can be imagined as if it has a life of its own. *The Law that lives in our imagination is far more influential than we might think.* Usually it operates unconsciously, affecting our ideology, our everyday practice, how we think about the Law's role in society, how we relate to concepts like order and obedience, and how we understand larger themes like truth and justice.

*Id.* at 27.

<sup>40</sup> *Id.* at 29.

<sup>41</sup> CANTOR, *supra* note 1, at 377.

To be sure, there is probably less of this kind of talk than there once was. Lawyers and judges today typically do not explicitly declare that judicial decisions are merely "evidence" of something else—"the law"—in the way that, say, *Swift v. Tyson* or the lawyers in the heyday of the common law did.<sup>42</sup> Still, the innocent but attentive visitor might note that in more indirect ways lawyers and judges still treat judicial decisions and even statutes as if they were evidence of something else that is latent but somehow real and authoritative.

## 2. "The law" behind the precedents

Consider the familiar practices of "common law" argumentation. Lawyers and judges talk about past judicial decisions as if they were legally authoritative, and this practice might at first lead one to suppose that *the decisions themselves* are being treated as "the law." But a closer examination quickly reveals that the matter is more complex. In the first place, in discussing a prior case lawyers and judges do not treat all parts of the case equally. They often purport to be searching for the "holding" of the case; this is to be distinguished from other, nonobligating features, described as the "dicta," that may in fact make up nearly all of what is written in the decision. There is no consistent method or formula for sorting out these elements;<sup>43</sup> earnest efforts earlier in the century to articulate the operative distinction have been largely abandoned.<sup>44</sup> Moreover, even if agreement is reached about a

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<sup>42</sup> See, e.g., *Swift v. Tyson*, 41 U.S. 1, 37 (1842) ("In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws."); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*70 (asserting the "general rule, 'that the decisions of courts of justice are the evidence of what is common law'"); MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 67 (2d ed. 1716) (asserting judicial decisions "are less than a Law, yet they are greater Evidence thereof, than the Opinion of any private Persons"). The meaning of these various statements has been much debated, of course. For an overview of different interpretations of what Justice Story meant by the statement in *Swift v. Tyson*, see PAUL M. BATOR ET AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 779-80 (3d ed. 1988).

<sup>43</sup> See SCALIA, *supra* note 14, at 8 (asserting "what constitutes the 'holding' of an earlier case is not well defined and can be adjusted to suit the occasion").

<sup>44</sup> The failure of the project can be discerned by comparing the first and second editions of George Christie's jurisprudence text. In the first edition, Christie devoted a substantial block of text and materials to the problem of figuring out exactly how to extract the holding, or ratio decidendi, from a precedent. See GEORGE C. CHRISTIE, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 919-60 (1973). The included readings were already quite dated, and Christie acknowledged with palpable reluctance that "one may be forced to conclude that there is no really satisfactory theory of the concept." *Id.* at 921. But Christie was unwilling to abandon the project because, as he cogently pointed out, without some account, "it is no longer possible to base one's explanation of the binding nature of precedent upon the concept of the ratio decidendi of a case." *Id.* at 958. "We therefore cannot avoid trying to make whatever sense we

particular case's "holding," the lawyers' search is hardly over. The holding of any given case must be harmonized with the holdings of any number of other, often divergent cases to reveal "the law," and there is no standardized method for achieving such harmony.<sup>45</sup> In addition, holdings are sometimes explicitly rejected or overruled on the ground that they are out of line with some higher criterion that can only be described as "the law."

As Norman Cantor observes, "[t]he conventional way of reading common-law cases is to find in each one an example of the exercise of universal reason."<sup>46</sup> So it is too simple, or too evasive regarding real complexities and mysteries, to state flatly that in common law argumentation judicial decisions *are* the law. Modern jurisprudential wisdom notwithstanding, and decades after the ostensible demise of *Swift*, lawyers and judges still, in practice, treat prior decisions as if they were "evidence" of something more subtle and coy and unitary—as evidence of "the law."

Probably the starkest manifestation of this lawyerly presupposition of an independently existing "law," at least to an uninitiated but perceptive visitor, would lie in the common judicial practice of treating decisions as retroactively applicable even to events occurring before the decisions were rendered. The judicial assumption has always been that it is appropriate to subject past actions to a newly-announced ruling because the ruling merely declares what "the law" is and has been. This practice is usually followed even in so-called "cases of first impression," and indeed even when a decision explicitly overrules a prior decision.<sup>47</sup> The new decision is said merely to declare "the law" that obligated the parties all along—even though a previous judicial opinion mistakenly declared otherwise.

To be sure, "realist"-minded scholars and jurists have sometimes criticized this practice of retroactive application, arguing that the kind of law presupposed by the practice does not exist and that decisions

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can of the concept." *Id.* at 921. By the time of the second edition, Christie had evidently conceded defeat; this entire section of the book was simply dropped. See GEORGE C. CHRISTIE AND PATRICK H. MARTIN, *JURISPRUDENCE: TEXT AND READING ON THE PHILOSOPHY OF LAW* (2d ed. 1995); see also Evans, *supra* note 29, at 71 (discussing the "fudginess about the concept of ratio decidendi in English jurisprudence").

<sup>45</sup> As noted, Karl Llewellyn listed over sixty acceptable techniques—as well as several other techniques that he considered illegitimate but that are nonetheless used—for carrying out this operation. See Llewellyn, *THE COMMON LAW*, *supra* note 32.

<sup>46</sup> CANTOR, *supra* note 1, at 377.

<sup>47</sup> For discussion and collected materials on this practice, see ESKRIDGE & FRICKEY, *supra* note 34, at 441-57.

should at least in some cases be applied prospectively only.<sup>48</sup> For a time it appeared that a selective practice of prospective rulings might develop.<sup>49</sup> But more recently both the common law practice and the traditional rationale for that practice have firmly reasserted themselves. Thus, in *Jim Beam Distilling Co. v. Georgia*, Justice Souter observed approvingly for himself and Justice Stevens that retroactive application of decisions is "overwhelmingly the norm." Souter went on to explain that this practice is grounded in the view that "the function of the courts [is] to decide cases before them based upon their best current understanding of the law"—a view that in turn reflects "the declaratory theory of the law, according to which the courts are understood only to *find the law, not to make it*."<sup>50</sup> Justice Scalia, writing for an unusual coalition including himself and Justices Marshall and Blackmun, went even further; he maintained that retrospective application of decisions is constitutionally required because the courts' function is simply "to say *what the law is*."<sup>51</sup> Two years later, in *Harper v. Virginia Department of Taxation*,<sup>52</sup> a majority of the Justices reconfirmed this rule of retroactivity. At least to the untrained but attentive eye, this practice of retroactivity and the reason given for it would clearly indicate the lawyerly commitment to "the law" that exists independent of the decisions that merely declare what is already in existence.

### 3. "The law" behind enactments

Though this commitment to "the law" is most conspicuous in "common law" discourse, a reflective examination discloses a similar presupposition even in the lawyerly interpretation of enacted law. When lawyers and judges interpret a statute or constitutional provision, what exactly are they looking for? They might say they are trying to ascertain the "meaning" of the legal text, of course, but what exactly is that? As noted, answers to this question typically fall into three common categories: The meaning of a statute or constitutional provision is said to be given by the "textual meaning," or by the legislative

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<sup>48</sup> See, e.g., Roger Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533 (1977).

<sup>49</sup> See, e.g., *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971); *Linkletter v. Walker*, 381 U.S. 618 (1965).

<sup>50</sup> 501 U.S. 529, 535-36 (1991) (emphasis added).

<sup>51</sup> See *id.* at 549 (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)) (emphasis added). Scalia added enigmatically: "I am not so naive (nor do I think our forbears were) as to be unaware that judges in a real sense 'make' law. But they make it *as judges make it*, which is to say *as though* they were 'finding' it—or discerning what the law is . . ." *Id.* (emphasis added).

<sup>52</sup> 509 U.S. 86, 97 (1993).



"intention," or by the "purpose" of the statute or provision (or by some combination of these).<sup>53</sup> But in the first place there is no agreement—in fact, there is rampant dissension—about *which* of these factors supplies the meaning of the law. So in an occasional case there even may be effective agreement about the different factors—about the textual meaning and legislative intention, for instance—but lawyers and judges will persist in arguing about which of these factors is really "the law."<sup>54</sup>

In addition, each of these factors turns out to be quite elusive in its own right. Both the "textual meaning" approach favored by, for example, Justice Scalia and the "purpose" approach elaborated in the famous Hart and Sacks "Legal Process" materials posit that the *meaning* of a statute is to some degree independent of the subjective *intentions* of the enactors.<sup>55</sup> But this supposition seems odd. Indeed, attributing to marks on a page "meanings" or "purposes" independent of (and potentially different than) the meanings and purposes of the human beings who wrote or approved those marks might appear to be an exercise in primitive animism. *Persons* harbor purposes, but except perhaps in cultures we regard as animistic, stones or rivers or stellar bodies are *not* thought to have purposes of their own. Neither, it seems, do disembodied words or marks on a page; they can only express a *person's* purposes. So how can "the statute" have a "purpose," or "meaning," independent of the purposes and semantic intentions of the people who made the law?

Textualists typically try to deflect this challenge by making authoritative the meaning that a *reader would receive*, not the meaning that the *authors sought to convey*.<sup>56</sup> But this response only creates further difficulties and puzzles. In the first place, the response does not eliminate, but merely defers, the need for authorial intention because, as scholars like Paul Campos have shown, readers assign meaning to words in a text only by supposing them to be the expressive product of a real or supposed author. Without a supposition of *some* author, a text is quite simply meaningless; indeed, it is not truly a text at all, but merely a

<sup>53</sup> See *supra* notes 32–33 and accompanying text.

<sup>54</sup> For an unusually clear instance in which the court expressly acknowledged that "textual meaning" contradicted "legislative intention," see *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989). For an illuminating analysis of the jurisprudential difficulties and assumptions underlying this conflict, see generally Paul F. Campos, *The Chaotic Pseudotext*, 94 MICH. L. REV. 2178 (1996).

<sup>55</sup> See, e.g., SCALIA, *supra* note 14, at 16, 31, 38.

<sup>56</sup> See, e.g., *id.* at 17 ("We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text . . .").

piece of paper bearing mindless marks.<sup>57</sup> Moreover, if the textualist tries to avoid this problem and salvage "objective meaning" by saying that what counts is not what the *actual legislators* intended but rather what a constructed author such as "the normal speaker of English" *would have intended* by the words,<sup>58</sup> further serious questions arise. If we are not to be bound by the meanings or intentions of the actual authors—that is, the drafters and the legislators who were elected and who actually thought about and voted on the law—why should we treat ourselves as bound by the meanings or purposes of some hypothetical person who was *not* elected and who never in fact considered the text that we are treating as authoritative?<sup>59</sup>

Intentionalists seek to address these difficulties and avoid the animism that seems to inhere in a textualism divorced from authorial intentions by saying that what counts is the "intention of the legislature." Legislators *are*, after all, actual persons who are commonly thought capable of having intentions and conveying meanings. But this position produces its own mysteries; in particular, it presents the familiar difficulty of figuring out how a host of individual intentions (which are themselves often murky and, realistically, unknowable) can be aggregated to form an overall "intention of *the legislature*." This difficulty has led some scholars and jurists to conclude that the perennial quest for "legislative intention" or "framers' intent" is a search for something that does not exist.<sup>60</sup> But although this problem is often noted, in practice both courts and lawyers (and most legal scholars) seem to prefer mostly to pass over it.

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<sup>57</sup> See, e.g., Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065 (1993); cf. RONALD DWORIN, *LAW'S EMPIRE* 58–59 (1986):

For even if we reject the thesis that creative interpretation aims to discover some actual historical intention, the concept of intention nevertheless provides the *formal* structure for all interpretive claims. I mean that an interpretation is by nature the report of a purpose; it proposes a way of seeing what is interpreted . . . as if this were the product of a decision to pursue one set of themes or visions or purposes, one "point" rather than another. This structure is required of an interpretation even when . . . there is no historical author whose historical mind can be plumbed.

*Id.*

<sup>58</sup> See, e.g., Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417–19 (1899).

<sup>59</sup> See generally Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104 (1989). See also Steven D. Smith, *Idolatry in Constitutional Interpretation*, in PAUL F. CAMPOS ET AL., *AGAINST THE LAW* 161–67 (1997) [hereinafter Smith, *Idolatry*].

<sup>60</sup> The classic expression of this skepticism is Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870–71 (1930). In a similar vein, see *Edwards v. Aguillard*, 482 U.S. 578, 637–39 (1987) (Scalia, J., dissenting).

Moreover, as with the common law, even agreement on a particular meaning for a statute or constitutional provision will not necessarily resolve a legal dispute. The meaning may be treated as effectively nondispositive—on constitutional grounds, or occasionally on nonconstitutional grounds,<sup>61</sup> or just because (like the once vibrant but now practically defunct “contract clause” of the Constitution) it no longer seems to fit with something that Guido Calabresi describes metaphorically as the “legal topography” or the “legal landscape.”<sup>62</sup> The enactment’s meaning, it seems, has somehow become ineligible to participate as an active part of that more mysterious entity—lying always beyond or beneath the disparate mass of particular decisions and enactments—that we call “the law.”

### C. *Legal Discourse as Practical Reason?*

The preceding discussion has suggested that not only the casual phraseology but also the common discursive practices of lawyers and judges disclose a commitment to some entity—“the law”—that lies beyond or above the observable legal materials. But perhaps this discussion has been guilty of overearnestness—of taking the linguistic habits and practices of judges *too* seriously. A commonsensical response that both practicing lawyers and some theorists might offer would suggest that law talk is nothing more than a method of “practical reason”; it is simply a vocabulary that lawyers and judges use in fashioning sensible solutions to practical controversies. The various techniques that lawyers use in invoking and distinguishing precedents might be ways of collecting and analyzing the information needed in making practical decisions. And the familiar statement that a case has been decided in a particular way because “the law” so requires might be nothing more than an elliptical, time-honored way of saying that the result seems most consistent with common sense, fairness or sound policy.<sup>63</sup>

In this spirit, some recent scholarship presents legal discourse as a method of practical reasoning.<sup>64</sup> And indeed, it is hard to deny that

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<sup>61</sup> See Steven D. Smith, *Why Should Courts Obey the Law?*, 77 GEO. L.J. 113, 142–45 (1988).

<sup>62</sup> See GUIDO CALABRESI, *A COMMON LAW GUIDE FOR THE AGE OF STATUTES* 121 (1982).

<sup>63</sup> It is crucial to distinguish this claim—the claim that conventional legal discourse is *itself* a sensible form of practical reasoning about disputes—from the familiar but very different (and, I think, far more plausible) claim that conventional legal reasoning is a sort of *post hoc* exercise used to “justify” results reached through a different method that might include “practical reason.” The latter claim is considered in Part II.

<sup>64</sup> See, e.g., Steven J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747 (1991); Daniel

law is a form of practical reasoning in some central senses of the term. Practical reasoning is typically distinguished from *speculative* or *theoretical* reasoning in two principal ways. First, practical reasoning speaks to questions about *how to live*,<sup>65</sup> not merely to speculative questions about the truth or falsity of propositions. Second, practical reasoning lacks the demonstrative certainty of speculative reason.<sup>66</sup> By these criteria, legal discourse would surely fall on the "practical" side of the line: It is primarily concerned with the appropriateness of human actions, not with the truth of abstract propositions, and it falls far short of the certainty of mathematical or logical demonstration.

So it seems perfectly plausible to say that legal discourse is a kind of practical reason. But this observation fails to "explain away" the awkward metaphysical commitments discernible in conventional legal discourse, for two closely-related reasons. First, calling law a form of "practical reasoning" does nothing to account for the unusual and distinctive features of *legal* discourse (as opposed to other, less exotic forms of practical reasoning). Second, these distinctive legal features are ill-suited or even dysfunctional for an enterprise that seeks merely to be a form of practical reasoning; they thus suggest that law aspires to be more than that.

### 1. The inefficacy of generic accounts

Accounts of law as practical reason can be so generic that they provide little insight into the distinctive qualities of *legal* discourse, as opposed to other forms of thinking or talking that might also qualify as "practical reason." Consider Mary Ann Glendon's invocation of Edgar Bodenheimer's "stunning insight" that legal discourse is a form of practical reasoning that can be called "dialectical reasoning."<sup>67</sup> Glendon offers this description as an answer to "Holmes, the Realists, and

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A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992); David E. Van Zandt, *An Alternative Theory of Practical Reason in Judicial Decisions*, 65 TUL. L. REV. 775 (1991). For a skeptical response to these invocations of "practical reason," see generally Larry Alexander, *Practical Reason and Statutory Interpretation*, 12 LAW & PHIL. 319 (1993).

<sup>65</sup> Cf. Gerard V. Bradley, *Overcoming Posner*, 94 MICH. L. REV. 1898, 1905 n.15 (1996) (reviewing RICHARD A. POSNER, *OVERCOMING LAW* (1995)) ("'Practical reason' is *reasoning* . . . about what to *do*.").

<sup>66</sup> For an exposition of the origins of these distinctions in Aristotle's philosophy, see JOSEPH DUNNE, *BACK TO THE ROUGH GROUND: PRACTICAL JUDGMENT AND THE LURE OF TECHNIQUE* 237-44 (1993).

<sup>67</sup> GLENDON, *supra* note 14, at 237.

the crits" who have attacked law for falling short of the standards of proof used in the natural sciences:

Dialectical reasoning is not a single form of reasoning, but an integrated set of related mental operations. It builds on practical reason, but subjects common sense to a process of critical examination and evaluation in which logic has its appropriate but auxiliary role. Similar to scientific method, dialectic method attends to available data and experience, forms hypotheses, tests them against concrete particulars, weighs competing hypotheses, and stands ready to repeat the process in the light of new data, experience, or insight. But unlike the method of the natural sciences, dialectical reasoning begins with premises that are doubtful or in dispute. It ends, not with certainty, but with determining which of opposing positions is supported by stronger evidence and more convincing reasons. That is what has made dialectical reasoning so unsatisfying to the many professional philosophers who have chosen to take their bearings from the natural sciences.<sup>68</sup>

Glendon's appreciative description may be accurate enough as far as it goes, and the description may indeed serve to point out differences between legal reasoning and a familiar (if dubious) depiction of the scientific method. Still, there is nothing distinctively legal about dialectical reasoning as Glendon presents it. Indeed, there is little that is distinctive about it at all; it is simply the way most everyone's cognitive processes work in a whole spectrum of activities of life. For example, although Glendon indicates that "dialectical reasoning" has been rejected by many philosophers, in fact the approach seems very much like the sorts of dialectical epistemologies promoted by many philosophers and scholars in the prevailing "anti-foundationalist" climate of opinion. In the absence of any certain premise or infallible methodology, what else can we do but compare our general hypotheses with our particular experiences and judgments, constantly examining and adjusting and revising in an effort to determine "which of opposing positions is supported by stronger evidence and more convincing reasons," as Glendon puts it?<sup>69</sup> More specifically, the back-and-forth meth-

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<sup>68</sup> *Id.* at 237-38.

<sup>69</sup> See RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* 16-75 (1985). Bernstein's entire book explores the development of a sort of dialectical practical reason in a number of influential modern thinkers including Kuhn, Gadamer, Habermas and Rorty.

od in which the reasoner tests and adjusts disputed premises and hypotheses in light of particular observations and judgments seems remarkably like the process of achieving "reflective equilibrium" advocated by philosophers like John Rawls and Ronald Dworkin.<sup>70</sup> Historians and social scientists—and even literary theorists—seemingly do much the same thing. Nor is such reasoning limited to the academic world. Don't business managers engage in much the same process? Coaches? ("As a general rule it's best to punt on fourth-and-ten, . . . but then again there isn't much time left and we're behind, . . . but then again the wind is behind us and our defense has played well . . ."). Don't all of us address the questions and decisions of life in much this way?

In short, generic descriptions of law as "practical reason" are not so much wrong as unhelpful; they do little either to explain or to justify the particular features that make *legal* reasoning distinctive—its attachment to an elaborate set of techniques for using precedent, its specialized appeals to "legislative intention" and statutory "purpose," its intricate and intimidating vocabulary, its insistence that decisions be applied retroactively because they merely declare "what the law is." Generic descriptions fail to explain precisely those distinctive and metaphysically portentous features that often seem "weird or exotic" to outsiders who may themselves be skilled practitioners of "practical reason" in less exotic, more plausible forms.<sup>71</sup>

## 2. The practical inefficacy of law's *distinctive* discourse

So *could* these distinctive legal features be explained in more pragmatic, commonsensical terms, thereby obviating the supposition that legal discourse is in fact seeking to do what it routinely *says* it seeks to do—that is, ascertain the content of some formidable entity called "the law?" Possible explanations are familiar enough, but they fit awkwardly with the actual practices and vocabulary of legal discourse.

For example, it is often observed that precedents—and perhaps statutes or regulations—convey factual information that would be helpful in crafting a sensible pragmatic decision.<sup>72</sup> And precedents may

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<sup>70</sup> See JOHN RAWLS, A THEORY OF JUSTICE 48 (1971). For a brief description of this dialectical process by Dworkin, see Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718, 1722–25 (1998). Cf. LARRY ALEXANDER & KEN KRESS, AGAINST LEGAL PRINCIPLES, in LAW AND INTERPRETATION 279, 306 (Andrei Marmor ed., 1995) ("In the moral realm, reflective equilibrium is championed as the correct epistemological method for discovering (constructing?) correct moral principles.").

<sup>71</sup> See SUNSTEIN, *supra* note 29.

<sup>72</sup> See Van Zandt, *supra* note 64, at 795–96 ("Although [judges] occasionally cite scientific

have given rise to expectations on the part of people who have relied on them; these expectations would themselves be factors that need to be considered in making a fair and practically sound decision.<sup>73</sup> In addition, precedents and enactments are sometimes viewed as expressions of wise counsel from which judges receive instruction or guidance.<sup>74</sup> In this vein, Robin West contends that we ought to use the Constitution simply as a "source of insight" in the same way that we use "the writings of Aristotle, John Stuart Mill, John Rawls, and Roberto Unger."<sup>75</sup>

Probably these claims all contain a measure of truth. But do these familiar pragmatic explanations fully account for the distinctive features of legal discourse, thereby making it unnecessary to suppose that the discourse is in fact seeking to ascertain the content of any more mysterious entity—of "the law?" Two criticisms embarrass the attempt to give a purely pragmatic account of these distinctive features of legal discourse.

First, case law and enactments are in fact not very good ways of discovering or measuring these substantively relevant factors. For example, legal precedents typically make almost no attempt to convey the general societal or cultural information that a pragmatic decision-maker might want;<sup>76</sup> a standard almanac would usually be a far better source of this kind of data. Indeed, reported cases are often very poor sources of information even about the facts of the cases themselves. "In the received theory of adjudication," Brian Simpson explains, "most contextual information about cases is simply irrelevant," and so it is filtered out of the reported decision.<sup>77</sup> For instance, John

studies, the most important source [of information] for judges is the pool of past decisions, precedent . . . . Precedents are derivative information . . . ."); see also Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1186 (1999) (describing precedents as providing "a wealth of data for decisionmaking").

<sup>73</sup> For example, Emily Sherwin's defense of conventional legal reasoning lays great weight on the importance of following precedent as a way of protecting justifiable reliance interests. See Sherwin, *supra* note 72, at 1186–89.

<sup>74</sup> See generally *id.*

<sup>75</sup> See ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM* 196 (1994).

<sup>76</sup> See RICHARD A. POSNER, *OVERCOMING LAW* 520 (1995) (asserting "prior cases often constitute an impoverished repository of fact and policy for the decision of the present one").

<sup>77</sup> A.W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW* 10 (1995). Simpson adds:

Litigation entails a process of fitting—sometimes pushing and shoving—the messy and untidy business of life into artificial legal categories. Even if we leave on one side the fact that litigants normally tell lies, the picture of reality presented in a law report is more or less bound to be to some degree distorted. Indeed the incidents recorded in law reports may never, in any sense, have happened at all.

*Id.* at 11.

Noonan's essay on the famous *Palsgraf* case shows how virtually every piece of significant or interesting information about the parties, the accident, the context, the relevant enterprises, the judges and the attorneys was methodically excluded from the judges' opinions.<sup>78</sup> In this respect, at least, *Palsgraf* was entirely typical.

Cases or statutes are also unreliable indicators of the extent or depth of expectations. In many instances it would be possible to obtain much more reliable information regarding actual reliance or expectations (or the lack thereof) by direct investigation; often such investigation might convincingly show that a party acted wholly without knowledge of a case or statute. But, in fact, such investigation is virtually never undertaken. Indeed, *actual* knowledge of the law is, for most purposes, treated as irrelevant as a matter of law: That "ignorance of the law is no excuse"<sup>79</sup> may well be the one piece of law that most people know.

Nor are case reports or statutes especially likely sources of wisdom. This is not to deny that these materials contain some insight or good counsel. But the person who is truly in search of wisdom (as opposed to something else, like "the law") would be better advised to go to her favorite columnist, or poet, or philosopher, or prophet—not to the United States Reports or the West Digest system. Indeed, viewed as texts in moral philosophy, the Sherman Act, the Robinson-Patman Act or the Constitution (if we really paid attention to its *text*, as opposed to the volumes of philosophizing that have over generations been engrafted onto it)<sup>80</sup> would be almost pitifully meager. A judge who wants guidance from the philosophical wisdom of an Aristotle would be well advised to read Aristotle—not, as Robin West suggests, the Equal Protection Clause.

A more general way of making this point is to notice that practical reason—and, more specifically, concerns about obtaining information, protecting expectations and learning from the wisdom of others—are central to many enterprises, and perhaps to *all* human activities. As noted, legislators, administrators, business executives, arbitrators, school teachers and principals, coaches, parents and probably everyone else engages in practical reason with similar concerns in mind;

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<sup>78</sup> See generally JOHN NOONAN, *PERSONS AND MASKS OF THE LAW* ch. 4 (1976).

<sup>79</sup> See Richard S. Murphy & Erin A. O'Hara, *Mistake of Criminal Law: A Study of Coalitions and Costly Information*, 5 *SUP. CT. ECON. REV.* 217, 218 (1997) ("'Ignorance of the law is no excuse' is so widespread a maxim that it is one of the few things many people do know about the law.").

<sup>80</sup> For elaboration of the point, see STEVEN D. SMITH, *THE CONSTITUTION AND THE PRIDE OF REASON* 31–32, 43–47, 73–83 (1998).



consequently, all of these actors try to pay due attention to decisions and pronouncements made in the past. But in no other field do these concerns generate the specific and extraordinary treatment of precedent so conspicuous in legal discourse. So without denying that legal discourse does to some extent perform these pragmatic functions, it still seems that more is needed to account for these peculiarly "legal" qualities.

The second difficulty with the wholly pragmatic account of conventional legal reasoning is that it takes the explicit reasoning less seriously than judges and lawyers themselves typically seem to take it. Judges and lawyers, that is, certainly *seem* to regard the formal legal reasoning as a deadly serious matter; in preparing briefs and arguing about an issue they may devote untold billable hours and hundreds of pages to amassing and explicating it. For some purposes, to be sure, judges and lawyers may also consult more pure and direct sources of information or wisdom—compilations of data or, on rare occasions, philosophical works—but these sources are not treated as having actual legal "authority" in the way that precedents, statutes or other actual expressions of "the law" do. And judges and lawyers talk as if the conclusions reached through such explication of the more purely legal materials—the conclusions about the substantive content of "the law"—are authoritative and binding, not just a curious, backhanded way of conveying some more pragmatic decision about what seems sensible or fair.

Once again, perhaps the clearest manifestation of this commitment to "the law" lies in the traditional approach to the question of retroactivity. As noted, courts typically treat a common law decision, even on a previously uncertain or hotly debated question, as governing even transactions that may have occurred well before the decision was rendered. In many cases, such retroactivity could hardly be justified on the assumption that in forming expectations people anticipated, or perhaps should have anticipated, what a court would ultimately say on the issue. Indeed, even when a court *overrules* a prior decision, the new decision is typically applied retroactively; this conventional approach plainly serves not to protect expectations but rather to frustrate them. So the practice necessarily seems based on the premise that the court is merely articulating what "the law" was and is, as indeed the Supreme Court has recently reaffirmed.<sup>81</sup>

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<sup>81</sup> See *supra* notes 45–53 and accompanying text.

In sum, the language and practices of conventional legal discourse seem to be animated by a commitment to finding and enforcing "the law." We can try to explain away this apparent commitment by translating the vocabulary into pragmatic terms or by offering pragmatic explanations for the peculiar ways lawyers and judges talk. But the translation and the explanations seem strained. Were it not for the fact that modern lawyers and scholars insist otherwise,<sup>82</sup> it would be far more plausible to suppose that legal discourse is out to do just what it says it is doing—to discover and declare something called "the law."

#### D. *Legal Interpretation and Scriptural Interpretation*

The *apparent* commitment to faith in a metaphysical "law" is all the more evident if we notice—as a number of legal scholars have done<sup>83</sup>—how similar legal interpretation is to traditional practices of scriptural exegesis and, conversely, how different legal interpretation often is from what we might call "ordinary interpretation." Ordinary interpretation refers to what we might more commonly think of simply as "communication"; it describes what we do when we make plans with a friend, hear a lecture, read a newspaper, listen to a radio talk show or consult a recipe book. Our objective is to communicate as plainly and clearly as possible. So the speaker's goal is to communicate his intentions clearly, and the hearer's intention is to figure out as precisely as possible what the speaker is trying to say.

Scriptural interpretation, by contrast, includes but often goes beyond this familiar practice of communication in at least two ways. First, scriptural interpretation often presupposes that a text contains multiple levels of meaning. These levels may be considered in different ways: as "literal" and "figurative" meanings,<sup>84</sup> as "literal" and "spiritual" meanings,<sup>85</sup> or as "literal," "allegorical," "tropological" and "anagogical" levels of meaning.<sup>86</sup> According to Alister McGrath, Martin Luther eventually distinguished eight different levels of scriptural meaning.<sup>87</sup> This search for multiple levels of textual meaning would seem preposterous in the familiar contexts of ordinary interpretation. One can imagine the reclusive academician, sent unexpectedly to do the grocery shop-

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<sup>82</sup> See *infra* notes 101–09 and accompanying text.

<sup>83</sup> See *infra* notes 98–100 and accompanying text.

<sup>84</sup> See generally WILLIAM C. PLAGHER, *A HISTORY OF CHRISTIAN THEOLOGY* 62 (1983).

<sup>85</sup> See, e.g., JAROSLAV PELIKAN, *CHRISTIANITY AND CLASSICAL CULTURE* 225–26 (1993).

<sup>86</sup> See, e.g., ALISTER MCGRATH, *THE INTELLECTUAL ORIGINS OF THE EUROPEAN REFORMATION* 153 (1987).

<sup>87</sup> See *id.* at 158.

ping, standing paralyzed in Aisle 9 with grocery list in hand: "I know that at the *literal* level this word means 'bread' and this word means 'eggs,' but what are the anagogical meanings? What are the tropological meanings?" Conversely, someone who did manage to find such meanings in an ordinary grocery list would be considered delusional.

A second distinguishing feature of much scriptural interpretation is its assumption of unity among what appear on the surface to be diverse texts. Christian believers or preachers routinely put together a passage from Deuteronomy, say, with one from Isaiah, and then add still other verses from the New Testament, treating these verses as if they were a unified text proclaiming a unified truth. Consider, to pick an example almost at random, John Calvin's defense of the necessity of belonging to the Christian church as against those who advocated withdrawal because the church harbored impure people and practices. In attempting to prove his position, Calvin quoted and cited liberally from a disparate host of poetic and prophetic Old Testament writings—writings in which an uninitiated or more skeptical reader might not detect any reference whatsoever to the Christian church—as well as from New Testament Gospels and Pauline Epistles.<sup>88</sup> All of these texts, widely disparate in origin, content and style, were treated as if they speak in a perpetual present with a single voice.

Again, although this assumption of unity is perfectly familiar in religious contexts, the same assumption would seem outlandish in contexts of ordinary interpretation. You would not take, say, a postcard from Aunt Sal on her Hawaiian vacation, a letter written by your brother Joe during the war, a clipping from the local newspaper and a journal entry from Grandma Prudence's depression-era diary and ask, "Taken together, what are they saying?"

The explanation for these otherwise bizarre hermeneutical practices, of course, is that traditional interpreters of scripture do not suppose that they are merely reading a variety of writings by different human authors. The authority of scripture, Alister McGrath explains, "ultimately derives from the fact that it is God himself who is the author of scripture."<sup>89</sup> In the same vein, Jacob Neusner emphasizes that the intricate and (to the uninitiated) fantastic exercises in scriptural interpretation practiced by Jewish rabbis make sense only on the assumption of divine authorship: "For without theological standing as God's word, the Torah . . . enjoys no privileged position, requires no sus-

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<sup>88</sup> See JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* IV.1.20-29 at 297-303 (Henry Beveridge trans., 1989).

<sup>89</sup> See McGRATH, *supra* note 86, at 123.

tained study, bears no message of consequence."<sup>90</sup> Another commentator explains:

Jewish tradition teaches that the Torah (the Pentateuch) was revealed by God to Moses at Mount Sinai. . . . Not only was the revelation word for word, but . . . it was letter for letter. Consequently, every word, and even every letter, has the plenitude of meaning that only a divine author can endow.<sup>91</sup>

The assumption that a text is divinely-authored, and that the different historical authors were, at least to some extent, scribes for a common, more ultimate and indeed divine author, serves to justify the interpreters' quest to find in scripture hidden, allegorical or spiritual meanings that might have been quite beyond the conscious intentions of the historical, flesh-and-blood scribes.<sup>92</sup> The same assumption accounts for the traditional interpreters' treatment of scripture as a unified (although perhaps developing) whole, rather than as a mass of discrete and diverse texts that happen to have been collected between a single set of covers. Conversely, on the assumption of strongly disparate and purely human authorship, these hermeneutical practices *do not* make sense; hence, modern scholars operating on secular assumptions are unlikely to presuppose unity, and are more likely to emphasize contrasts, inconsistencies or developments among and within different books of scripture.<sup>93</sup>

Although law involves a good deal of ordinary interpretation, especially in its treatment of private documents such as wills or contracts, in its approach to public manifestations of law—judicial precedents, statutes or the Constitution—legal practice often seems more akin to scriptural exegesis both in its assumption that legal texts contain layers of often hidden meanings and in its assumption of unity in the materials to be interpreted. Legal interpreters regularly and self-consciously search for underlying “principles” or “purposes” that were not expressed—and perhaps not even imagined—by the human

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<sup>90</sup> JACOB NEUSNER, *A MIDRASH READER* 28 (1990).

<sup>91</sup> Eric M. Cheylen, *Discovering the Talmud*, 85 *FIRST THINGS* 40, Aug.–Sept. 1998, at 40.

<sup>92</sup> See WERNER JEANROND, *THEOLOGICAL HERMENEUTICS* 18–30 (1991).

<sup>93</sup> For an overview of the development of modern biblical scholarship, see ROBERT MORGAN with JOHN BARTON, *BIBLICAL INTERPRETATION* 44–92 (1988). The more secular approach views the Pentateuch as “a patchwork of disparate pieces.” *Id.* at 77. Likewise, “[t]he centuries-long practice of Gospel harmonization is now intellectually discredited, though far from dead.” *Id.* at 64. Morgan and Barton explain that “[t]he significant divide is between all attempts to read the Bible religiously (on the assumption that it speaks of God) and non-religious readings.” *Id.* at 36.

authors of a constitutional provision.<sup>94</sup> Nor is it only in the interpretation of constitutional provisions or enacted law that this sort of layered interpretation occurs; if anything, the practice is even more apparent in the most mundane arguments about the meaning of common law precedents. As noted, in discussing a prior decision, lawyers and judges do not treat the literal statements of opinions as final and dispositive and they do not—and could not—treat all parts of the case equally. They purport to search for something more elusive—the “holding” of the case—which must then be blended in some not fully specifiable way with the holdings of any number of other often divergent cases to reveal “the law.”

Lawyers and judges also instinctively assume that the various texts of the law will speak with an univocal voice.<sup>95</sup> Thus, Ronald Dworkin argues that the law is and must be understood as if it were a single coherent whole produced by a single author.<sup>96</sup> And in practice, lawyers and judges reflect this assumption by, for example, regularly appealing, through analogical argument, to decisions on matters quite independent of the one immediately at issue in order to show that a given decision would be incompatible with these other, distant decisions—and so could not be consistent with “the law.”

To be sure, critics of prevalent interpretive practices may insist that legal interpretation *ought to be* more like ordinary interpretation—like reading a recipe in a cook book, perhaps<sup>97</sup>—but it is clear (as the critics themselves complain) that this “ordinary interpretation” position is incongruent with large areas of actual practice. Conversely, the similarities between legal and scriptural interpretation are so imposing that they have been noticed by a number of modern legal scholars.<sup>98</sup>

<sup>94</sup> For a recent and very methodical defense of the practice, see MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS* (1994). The practice is hardly limited to “liberal” judges and scholars. See, e.g., HADLEY ARKES, *BEYOND THE CONSTITUTION* 40–57 (1990); ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 81–83, 162–63 (1990).

<sup>95</sup> See Pierre Schlag, *Clerks in the Maze*, in *AGAINST THE LAW*, *supra* note 59, at 218 (“The judge is thus a monistic figure, one who says what the law is. And this law is always announced in the singular: there is always, at the end, . . . just one law.”).

<sup>96</sup> See DWORKIN, *LAW’S EMPIRE*, *supra* note 57, at 225.

<sup>97</sup> In this vein, Gary Lawson argues that “[t]he Constitution of the United States is a recipe—a recipe for a particular form of government.” See Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 *Geo. L.J.* 1823, 1833 (1997). Consequently, “[i]nterpreting the Constitution is no more difficult, and no different in principle, than interpreting a late-eighteenth-century recipe for fried chicken.” *Id.* And “[o]ther approaches to interpretation are simply wrong.” *Id.* at 1834.

<sup>98</sup> See, e.g., SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 9–53 (1988); Thomas C. Grey, *The Constitution as Scripture*, 37 *STAN. L. REV.* 1 (1984) [hereinafter Grey, *The Constitution*]; Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary*

What these scholars do *not* acknowledge, however, is that legal interpretation is, in fact, based on any sort of faith analogous to that inherent in scriptural exegesis.<sup>99</sup> Unlike the interpreters of scripture, modern legal thinkers do not justify their practices by supposing any actual, single author speaks through the disparate materials of the law. Thus, Bruce Ackerman suggests that "a model of interpretation which can do justice to the complexity of American judicial practice . . . bears some striking resemblances to other great interpretive enterprises—most notably those that derive from the major religious traditions." But Ackerman quickly adds that there is not and cannot be any sort of actual faith in legal interpretation: "Most obviously, the American tradition is born in the spirit of the Enlightenment."<sup>100</sup>

### E. *The Paradox of Modern Legal Thought*

As the preceding discussion suggests, both the casual phraseology of lawyers (their questionings about "what 'the law' is" or "what 'the law' requires") and the actual practices and presuppositions of lawyerly argumentation *seem* to betray a sort of faith in some metaphysical abstraction called "the law."<sup>101</sup> But here we encounter a difficulty that will challenge us again and again; although lawyers often talk and act *as if* they believe in "the law," in moments of self-consciousness modern lawyers will disavow any such belief. Perhaps nineteenth-century figures like Joseph Story or Christopher Columbus Langdell may have taken such talk literally—who really knows?—but for twentieth-century lawyers, "the law," when implicitly described as some unitary entity that somehow transcends the concrete cases and enactments, can only be viewed as a fiction or metaphor. Asserting that the federal common law of the *Swift v. Tyson* era presupposed "a transcendental body of law outside of any particular state but obligatory within it," Holmes peremptorily dismissed the notion as a "fallacy and illusion;" in fact, "there is no such body of law."<sup>102</sup> And in this respect, Holmes's jurisprudence had the rare good fortune (for a proposition of *jurisprudence*) to be explicitly adopted by the Supreme Court in a landmark case.<sup>103</sup>

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*Study in Comparative Hermeneutics*, 15 CONST. COMM. 511 (1998); Maimon Schwarzschild, *Pluralist Interpretation: From Religion to the First Amendment*, 7 J. CONTEMP. LEG. ISSUES 447 (1996).

<sup>99</sup> See Grey, *The Constitution*, *supra* note 98, at 20.

<sup>100</sup> See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 159–60 (1991).

<sup>101</sup> Cf. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 823 (1935) (arguing that "[o]ur legal system is filled with supernatural concepts").

<sup>102</sup> See *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 532–34 (1928) (Holmes, J., dissenting).

<sup>103</sup> See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

Brian Simpson summarizes our current condition:

For lawyers, to quote E.P. Thompson, writing in 1975 of what he calls the greatest of all legal fictions, "the law itself evolves, from case to case, by its own impartial logic, true only to its own integrity, unswayed by expedient considerations." There is, of course, a sense in which *nobody really believes this any more*, but it remains the case that much legal behaviour proceeds on the assumption that the law is like that. For example, all legal argument in court makes this assumption.<sup>104</sup>

This paradox—the paradox presented by an elaborate, powerful system of discourse that appears to presuppose a faith in something that its practitioners almost uniformly disavow—runs through the heart of twentieth-century jurisprudence.

## II. AGAINST CONVENTIONAL LEGAL DISCOURSE: THE HOLMESIAN CENTURY

Twentieth-century jurisprudence might aptly be viewed as a massive revolt against conventional legal discourse and its implicit assumptions. Although the century has witnessed a variety of legal theories and movements, most of the influential views exhibit a common structure—a structure that can be captured in four themes: (1) the rejection of metaphysical commitments, (2) the critique of conventional legal discourse, (3) the special emphasis on the form-substance distinction, and (4) the advocacy of a more discernibly rational, more practically ambitious but metaphysically modest substance for legal discourse.

As it happens, each of these themes was put forward in Oliver Wendell Holmes's famous *Path of the Law* essay, published on the eve of the new century. Holmes's essay has often been described as prophetic.<sup>105</sup> "A century later," Mary Ann Glendon observes, "lawyers all over the world are marching to the measure of [Holmes's] thought."<sup>106</sup> Glendon's assessment is in one sense too generous: As I will discuss later, Holmes's prevision was seriously deficient with regard to the

<sup>104</sup> SIMPSON, *supra* note 77, at 10 (emphasis added).

<sup>105</sup> See, e.g., Albert W. Alschuler, *The Descending Trail: Holmes' Path of the Law One Hundred Years Later*, 49 FLA. L. REV. 353, 414 (1997) ("The Path of the Law has molded American legal consciousness for a century . . ."); Martha Minow, *The Path as Prologue*, 110 HARV. L. REV. 1023 (1997); Louise Weinberg, *Holmes' Failure*, 96 MICH. L. REV. 691, 692 (1997) (Holmes' essay was "truly the voice of the future").

<sup>106</sup> See GLENDON, *supra* note 14, at 190.

course that legal *practice* would take. So *lawyers* are not *marching* to the measure of Holmes's thought. But Holmes was remarkably prescient with respect to the shape that legal *theory* would take, which is to say that lawyers, and especially law professors, are often *thinking* in harmony with Holmes. This section considers how Holmes's response to conventional legal discourse set or anticipated the structure of twentieth-century legal thought.

### A. *The Rejection of Metaphysical Commitments*<sup>107</sup>

As noted above, conventional legal discourse *seems* to presuppose that "the law" exists as some sort of authority or entity that speaks with a unified voice through more mundane materials such as judicial decisions and statutes. Holmes regarded this idea as preposterous. He derided the notion of law as some sort of "brooding omnipresence in the sky."<sup>108</sup> And, as noted, he flatly rejected the idea of a "transcendental body of law outside of any particular State but obligatory within it," declaring bluntly that "there is no such body of law."<sup>109</sup> In *Path of the Law*, Holmes rejected the metaphysical conception of the law in more methodical and positive terms by offering a replacement account of what the law is—an account that self-consciously avoided appealing to or presupposing anything mysterious or metaphysical (or even moral). The law is nothing more, Holmes insisted, than a set of predictions about what judges will do.<sup>110</sup> The basic ingredients of this account—judges making decisions and lawyers making predictions *about* judges' decisions—are firmly a part of the lawyer's familiar, workaday world.

Although many later thinkers have criticized Holmes's specific "prediction theory" of what law is, twentieth-century legal thought has been faithful to Holmes in rejecting any faith-dependent, metaphysically ambitious account of law. Holmes's view that law does not exist as anything like a "brooding omnipresence in the sky" has been re-

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<sup>107</sup> It might be more accurate to say that *all* thinking is implicitly committed to *some* sort of metaphysics, so that Holmes and his followers could only have rejected *some kinds* of metaphysical commitments. For present purposes, I am using "metaphysical" in what I think is a standard or familiar (albeit imprecise) sense in which the term refers to ostensible orders of reality that are viewed as exotic or spiritual or beyond what we immediately know in our everyday, commonsense world. Cf. Posner, *Problematics*, *supra* note 6, at 1648 ("I am interested in the type of moralizing that is, or at least pretends to be, free from controversial metaphysical commitments such as those of a believing Christian, and so might conceivably appeal to the judges of our secular courts.").

<sup>108</sup> See *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

<sup>109</sup> See *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 532-34 (1928) (Holmes, J., dissenting).

<sup>110</sup> See Holmes, *The Path of the Law*, *supra* note 3, at 457-61.



garded as so obvious that the view hardly needs to be expressed. As noted, even the occasional scholar who acknowledges that the ordinary discourse of law seems to imply such a conception will hastily add that "of course, . . . nobody really believes this anymore."<sup>111</sup> Indeed, even the proponents of what is called "natural law" typically go out of their way to emphasize that they do not advocate the more exotic metaphysical notions sometimes associated with that term; modern "natural law" is—or tries to be—very much a human and of-this-world affair.<sup>112</sup>

Insofar as legal thinkers reject the idea that law is a "brooding omnipresence in the sky," they need to supply (or at least assume) some other account of what law is—to "redefine supernatural concepts in natural terms," as Felix Cohen put it.<sup>113</sup> Twentieth-century accounts differ, of course. Some theorists have followed Holmes's lead in developing what might be called "behavioral" accounts of law: The law consists of what judges—or perhaps government officials generally—*do*.<sup>114</sup> Other scholars offer hermeneutical accounts—Dworkin's theory of law as a practice of interpretation subject to requirements of "integrity" is a leading example<sup>115</sup>—or more sociological or institutional accounts, as in the theories of H.L.A. Hart and Neil MacCormick.<sup>116</sup> Although accounts diverge in saying what law is, however, they converge in saying what law *is not*. Law is not, and could not be, the sort of univocal authoritative entity that, as discussed above, the discourse of lawyers and judges would suggest that it is (to a naive but perceptive observer, at least).

<sup>111</sup> See SIMPSON, *supra* note 77, at 10.

<sup>112</sup> For a discussion by a leading natural law scholar asserting that natural law does not depend on any mysterious or unusual metaphysical commitments, see Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424, 2491–533 (1992). The other leading contemporary natural law scholar, John Finnis, is sometimes criticized precisely on the ground that his position cannot work without more ambitious ontological commitments that Finnis declines to make; for a discussion of this criticism and a defense of Finnis, see Robert P. George, *Natural Law and Human Nature*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 31 (Robert P. George ed., 1992).

<sup>113</sup> See Cohen, *supra* note 101, at 830.

<sup>114</sup> See Llewellyn, *A Realistic Jurisprudence*, *supra* note 4, at 456 (asserting "the center of law, is not merely what the judge does, . . . but what any state official does, officially").

<sup>115</sup> See generally DWORKIN, *LAW'S EMPIRE*, *supra* note 57.

<sup>116</sup> Hart described law as a system of primary and secondary rules that exist in the sense that they are accepted by legal officials. See H. L. A. HART, *THE CONCEPT OF LAW* 77–114 (1961). Hart sometimes presented this view of law as a kind of "descriptive sociology." See *id.* at v. MacCormick describes law as a complex "institutional fact." See, e.g., Neil MacCormick, *On 'Open Texture' in Law*, in *CONTROVERSIES ABOUT LAW'S ONTOLOGY* 72, 78–79 (Paul Amisolek & Neil MacCormick eds. 1991); see also generally NEIL MACCORMICK & OTA WEINBERGER, *AN INSTITUTIONAL THEORY OF LAW* (1986).

### B. *The Critique of Conventional Legal Discourse*

Stripped of its supporting metaphysics, conventional legal discourse becomes a suspect enterprise. Not surprisingly, much of Holmes's *Path* essay was devoted to criticizing the conventional mode of talking and arguing. His criticisms would be characteristic of legal thought throughout the ensuing century.

The central objections might be reduced to two; they challenge conventional legal reasoning on grounds of its *indeterminacy* and its *artificiality*. Although these objections may appear to be controversial, a close examination suggests that there is less disagreement than meets the eye. In fact, Holmes's criticisms have largely carried the day.

#### 1. Indeterminacy

Holmes maintained that although lawyers and judges talk as if legal conclusions follow from legal premises—as if the precedents, rules or doctrines *require* particular results—the apparent logic of judicial opinions is misleading. Judges present their decisions as if they were compelled by the relevant legal authorities. But in most cases an equally plausible argument can be constructed to justify just the opposite conclusion. So the apparently deductive quality of legal reasoning is largely illusory.<sup>117</sup>

This criticism was elaborated at great length, of course, in the so-called Legal Realist and Critical Legal Studies movements. Advancing or resisting the critique has been a staple item for twentieth-century jurisprudence.<sup>118</sup> But perhaps there is less disagreement—and less resistance to the indeterminacy claim—than the ongoing jurisprudential skirmishes would suggest. The appearance of conflict results in part from the fact that the basic claim is deeply ambiguous about just what is—or isn't—indeterminate.

The problem is this: On the one hand, it seems the critics are plainly right in maintaining that for many or perhaps most legal issues, arguments using the standard techniques of legal discourse *can* be constructed to justify inconsistent conclusions. One hardly needs any fancy theory or Derridean perversity to recognize this fact. It should

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<sup>117</sup> See Holmes, *The Path of the Law*, *supra* note 3, at 466 (stating "the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man . . . . You can give any conclusion a logical form. You can always imply a condition in a contract. But why do you imply it?").

<sup>118</sup> For an overview of the competing arguments, see Lawrence A. Solum, *Indeterminacy*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 488 (Dennis Patterson ed., 1996).

be enough to observe that in virtually all of the cases decided by courts, the record contains briefs by losing counsel offering legal arguments for the position the courts rejected. And, in many of those cases, losing counsel will have convinced themselves that those arguments are indeed correct, so that the courts that ruled against them somehow got "the law" wrong.

On the other hand, the construction of contrary arguments *can* also seem academic, and even a bit sophomoric, because it seems clear that skilled lawyers can make informed and (to differing degrees) reliable predictions about how legal issues will be resolved. Experienced lawyers understand that although a particular argument *can* be made, in practice that argument will be regarded as implausible or even frivolous.<sup>119</sup>

Contestants in the "indeterminacy" debates tend to emphasize one or the other of these facts; critics underscore the abstract possibility of contrary arguments,<sup>120</sup> while defenders of the law point out the practical experience of relative certainty in predicting the proper outcome of most legal controversies.<sup>121</sup> But are these facts necessarily in tension? Legal *decisions*, after all, are likely the product not only of the formal legal arguments offered in the case but of other factors as well—perhaps of underlying "legislative" judgments by the courts (as Holmes thought),<sup>122</sup> or the socialization and craft training of judges (as Karl Llewellyn thought),<sup>123</sup> or background "legal principles" (as Ronald Dworkin has argued),<sup>124</sup> or race and gender, or something else altogether. These other background factors might bring considerable stability and predictability to legal decisions even though the formal "legal reasoning," considered in isolation and on its own merits, might be radically indeterminate.<sup>125</sup>

<sup>119</sup> See, e.g., Schiltz, *supra* note 12, at 767 ("In the substantial majority of cases in which I was involved, the parties, the attorneys, and the judges not only agreed that language had meaning, but even agreed on what it meant (that is, on the content of the legal principles governing the case).").

<sup>120</sup> For an extreme instance, see Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Underaged President*, 84 NW. U.L. REV. 250 (1989).

<sup>121</sup> See, e.g., KENT GREENAWALT, *LAW AND OBJECTIVITY* 38-39 (1992).

<sup>122</sup> See *infra* note 147 and accompanying text.

<sup>123</sup> See *infra* note 126 and accompanying text.

<sup>124</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22-45 (1977).

<sup>125</sup> For a discussion of this possibility, see Solun, *supra* note 118, at 495-97; cf. STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE* 164 (2000):

[M]odernists see easy cases only because they implicitly accept the stability of some background context or assumptions that seem to ground objective textual interpretations. Postmodernists, however, stress that such background assumptions always

Consequently, whether the law is seriously indeterminate might hinge mainly on whether one classifies these determining background factors as part of "the law"—as Dworkin claims with respect to "principles"—or, conversely, as foreign or nonlegal influences. Thus, despite iconoclastic contributions such as his famous "thrust and parry" lists of contradictory canons of construction, the mature Karl Llewellyn was able to conclude that the law is relatively determinate—or, to use his peculiar parlance, that law has considerable "reckonability" or "guidesomeness"—because he counted the "steadying factors" of judicial socialization as part of "the law."<sup>126</sup> The formal arguments might appear contradictory and indeterminate to the detached observer, but a properly socialized judge will know which arguments to accept and which to reject in a given context. Oddly enough, a radical critic who makes what seem exorbitant claims of indeterminacy might in reality hold essentially the same view; she simply does not classify acculturation, or the "deep structure" of prevailing ideology in which judges and others of their class are socialized, as part of "the law."

In sum, apparent adversaries on the indeterminacy question might simply be using terms in different ways. If recognizing this ambiguity narrows the range of actual disagreement, however, it does little to redeem conventional legal discourse as a *form of reasoning* against the objections of Holmes and his successors. On the contrary, it now appears that the experienced stability and predictability of the law results not so much from legal reasoning *per se* as from other sub-surface factors. The formal argumentation itself turns out to be highly indeterminate after all; it is more of a framework around which other sorts of considerations can crystallize, or perhaps a vocabulary in which decisions generated otherwise can be expressed.<sup>127</sup>

This conclusion is starkly confirmed in the jurisprudence of Ronald Dworkin. Dworkin is well-known as a forceful opponent of skeptics who argue that law is indeterminate, or that judges are often required to exercise "discretion" in cases in which the law provides no answer. Indeed, Dworkin is probably the leading contemporary

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can be brought to the foreground and displaced, and by doing so, postmodernists deconstruct textual meanings that previously had appeared uncontroversial.

*Id.*

<sup>126</sup> See LLEWELLYN, *THE COMMON LAW*, *supra* note 32, at 19–51. For a related discussion arguing that the essence of the common law in its heyday was precisely a system of consistent socialization of participants, see Simpson, *supra* note 38, at 18–21.

<sup>127</sup> Cf. LEVINSON, *supra* note 98, at 191–92 (describing constitutional law as "a linguistic system" and asserting that "[t]here is nothing that is unsayable in the language of the Constitution").

advocate of the "one right answer" thesis.<sup>128</sup> But Dworkin purports to achieve rationality and determinacy only by importing a version of moral philosophy into law; he does not defend the rationality or determinacy of conventional legal discourse *in itself*. On the contrary, Dworkin insists on the indeterminacy of *that* form of argumentation; indeed, he suggests that it *could not* provide answers to legal questions, so that judges who purport to reach results through such reasoning without resort to moral judgments or moral theory perpetuate "a costly mendacity."<sup>129</sup>

It seems, in short, that the criticism of *legal reasoning* as indeterminate has gained general acceptance—though it need not follow that *legal decision-making* is vulnerable to the same criticism.

## 2. Artificiality

Although the question of "indeterminacy" has provoked recurring debates throughout the century, from a more detached perspective that question may seem almost like a distraction. That is because even if—or *especially* if—conventional legal reasoning were fully determinate, Holmes's second main objection to traditional legal discourse would be even more telling.

The second objection basically asserts that legal reasoning is an artificial exercise that, whether determinate or not, has no good claim to dictate the results in real world controversies. As noted, proponents of the common law system since Sir Edward Coke have described its form of thought as a kind of "artificial reason."<sup>130</sup> In effect, the second major objection takes this self-description at face value, and then asks why artificial reason should govern "real life" controversies. What sense does it make, after all, that a criminal defendant should be executed—or a substantial sum of money extracted from one person and conferred on another—just because an exercise in "artificial reason" was decided in a particular way? To let actual controversies be decided on the basis of conventional legal reasoning seems much like letting an antitrust suit against AT&T turn on the outcome of a "Monopoly" contest, or like making a game of "hangman" dictate the fate of an accused criminal.

In *The Path of the Law*, Holmes made essentially this same point in a different way by inveighing against the apparently mindless tradi-

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<sup>128</sup> See, e.g., RONALD DWORKIN, A MATTER OF PRINCIPLE 119-45 (1985).

<sup>129</sup> See DWORKIN, FREEDOM'S LAW, *supra* note 6, at 37.

<sup>130</sup> See *supra* note 36 and accompanying text.

tionalism of the law. It makes no sense, he argued, to do something merely because a similar thing had been done or commanded in the distant past.<sup>131</sup> Conventional legal thought, of course, would suggest that Holmes misstated the matter; prior decisions or precedents have authority *not* by virtue of being in the past, but rather because they state or reflect what was—and *is*—"the law." But if, as Holmes thought, there is no such "law" independent of or brooding above the actual decisions, then this account of the authority of precedent will lose its meaning. And so it seems that a court that follows a precedent it may dislike on the assumption that the precedent is authoritative or "binding" is deferring to the past simply *because it is past*. Holmes drew this conclusion, at any rate, and it provoked one of his most oft-quoted aphorisms:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule persists from blind imitation of the past.<sup>132</sup>

By and large, twentieth-century legal thinkers have shared Holmes's conclusion. Making a decision simply because "the law" so requires—a law identifiable through conventional legal reasoning—by now sounds to most lawyers and scholars suspiciously reminiscent of "formalism" and its symbol, Christopher Columbus Langdell—words which today bring to mind images of an anachronistic and virtually incomprehensible way of understanding law from which we have thankfully escaped.<sup>133</sup> Occasionally a would-be defender of conventional legal discourse will make the mistake of taking on the issue in Holmes's terms, arguing that we *are* obligated to follow the past *because it is past*; such defenses have been easy prey for rationalist critics.<sup>134</sup> So most lawyers and scholars will readily agree that in order to be "rational,"

<sup>131</sup> See Holmes, *The Path of the Law*, *supra* note 3, at 468–69.

<sup>132</sup> *Id.* at 469.

<sup>133</sup> Duncan Kennedy comments that "until recently, I had never met an American legal theorist or practitioner who called him- or herself a formalist, except in jest." DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIECLE)* 106 (1997). Linda Meyer observes that "the 'formalist' account of legal reasoning . . . has become a straw man, never defended and often abused." Meyer, *supra* note 14, at 649. *But see infra* notes 139–44 and accompanying text. For commentary on Langdell, see Alschuler, *supra* note 105, at 361 (noting Langdell serves as "the ubiquitous bogeyman of American law"); GILMORE, *supra* note 2, at 41–42 (describing Langdell as "an essentially stupid man" who serves as a "symbol of the new age" of formalism—an age that Gilmore viewed as "the law's black night").

<sup>134</sup> Compare Kronman, *Precedent*, *supra* note 28 (arguing that law should follow the past

legal decisions ought to be determined by "policy" considerations—or political-moral theory, or something more comprehensibly in accordance with "reason" than conventional legal argumentation.

The frailty of conventional legal reasoning as against the charge of artificiality is apparent even in the efforts of its occasional would-be defenders. Almost two decades ago, Charles Fried wrote an essay defending the "artificial reason of the law" and trying to distinguish it from other forms of reasoning, including moral philosophy. "The law's rationality," Fried intoned, "is a rationality apart."<sup>135</sup> Yet, even at the time, Fried seemed uncertain about just what he was claiming. At times he suggested that the law uses a special form of analogical reasoning that is wholly different than moral philosophy; the main value of philosophy in law, he asserted, "is a largely negative contribution, puncturing the bumptious pretensions of upstart social science to have found, in Austin's words, 'the key to the science of jurisprudence.'"<sup>136</sup> But Fried offered no careful defense of the rationality of any distinctly legal method, and as the essay proceeded, legal reasoning came to seem more and more like a sidekick to moral philosophy, functioning mainly to fill in details that are too local and specific to have truly right answers anyway. Instead of serving mostly to protect legal reasoning against the incursions of social science, moral philosophy now supplied the very foundation and superstructure within which legal reasoning did its "filling in" work. So law became "a topic within moral philosophy," and "[p]hilosophy, to be sure, has the last word."<sup>137</sup>

It was hardly surprising, consequently, when Judge Posner recently used the Oliver Wendell Holmes Lectures to attack modern moral philosophy and its importation into law, that Fried not only defended the use of moral philosophy—surely not the "artificial reason" described by Coke and embodied in conventional legal discourse—but seemed incapable of even imagining any other kind of rationality. Responding to Posner's critique of moral philosophy, Fried declared that "the choice is between moral philosophy and . . . what?" Fried went on to depict the alternative to moral philosophy as a stark absence of rationality and reflection, leaving human beings mere "creatures of impulse."<sup>138</sup> The law's "rationality apart," it seems, had fled from Fried's view.

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because it is past) with David Luban, *Legal Traditionalism*, 43 *STAN. L. REV.* 1035, 1040-60 (1991) (raising objections to Kronman's argument).

<sup>135</sup> See Fried, *Artificial Reason*, *supra* note 36, at 58.

<sup>136</sup> See *id.* at 49.

<sup>137</sup> *Id.* at 57-58.

<sup>138</sup> See Charles Fried, *Philosophy Matters*, 111 *HARV. L. REV.* 1739, 1749 (1998).

A more earnest but even less persuasive defense of conventional legal reasoning comes from the rare explicit proponent of straightforward legal formalism. The formalist may assert that law has its own "immanent" rationality,<sup>139</sup> or that legal discourse produces its own particular species of internal or "legal" truth.<sup>140</sup> Proponents of this view may draw on philosophers like Wittgenstein—whether accurately or not is not for me to say—in maintaining that "truth" is not an "objective" quality or a relation of correspondence between statements and some external reality. Rather, truth is defined by or is a product of discourse—of particular language games, or of the "modalities of legal argumentation as practiced by lawyers."<sup>141</sup> So the sort of truth that legal thinking produces will be internal to legal discourse.<sup>142</sup> Critics of "the fallacy of logical form," like Holmes, miss the point, the neoformalist continues, by complaining in effect that legal reasoning cannot yield a kind of truth that it was never designed to yield and by overlooking the kind of truth that legal reasoning *does* yield. "The modalities [of legal discourse] are not true by virtue of something outside the practice of argument," Dennis Patterson maintains. "There is only the practice and nothing more."<sup>143</sup>

In fact, though, it is the occasional proponent of this "internal truth" view, not Holmes, who misses the point. To be sure, one can ascribe to law an immanent rationality all its own; one can label the results of legal reasoning as a species of "legal" truth, or as a "truth" that is a product of the "modalities" of legal discourse and thus "true from a legal point of view."<sup>144</sup> But then the essential question returns: Why does this "immanent" rationality have any claim on us? And what sense does it make to let this sort of *internal* truth determine the results of *external* controversies? Or, if the predicate of that question still

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<sup>139</sup> See, e.g., Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

<sup>140</sup> The leading recent statement of this view is DENNIS PATTERSON, *LAW AND TRUTH* (1996). Patterson's thinking overlaps to a large extent with that of Ernest Weinrib and Phillip Bobbitt, both of whom he discusses. It appears that Patterson differs from Weinrib mainly in his insistence that the forms of legal argument that produce legal truth are the product of culture and history; they are not, as Weinrib seems to suppose, some sort of eternal Platonic reality. See *id.* at 38–40, 182. Patterson's similarities to Bobbitt are even stronger; the main difference seems to be that while Bobbitt believes that judges must turn to individual conscience to resolve disputes when the discourse of law runs out, Patterson believes the discourse must be public all the way down. See *id.* at 143.

<sup>141</sup> See *id.* at 128–29.

<sup>142</sup> See *id.* at 150 (arguing "truth in law is a matter of the forms of legal argument"), 179 (observing that propositions in law can only be "true from a legal point of view").

<sup>143</sup> *Id.* at 142.

<sup>144</sup> See *id.* at 179.



sounds too objectivist, then why should one language game (the "legal" game) get to subjugate other language games (the "politics" game, the "corporate" game, the "personal injury" game)?

In short, the "internal truth" position still leaves us with the problem of deciding whether to execute a convicted criminal based on the outcome of a game of "hangman." In effect, the contemporary neo-Wittgensteinian formalist merely reasserts Coke's claim that the reason of the law is not "natural" but rather "artificial." But that observation describes the problem, not the solution.

### C. *The Special Emphasis on the Form-Substance Distinction*

Pervasive mistrust of conventional legal discourse has led directly to another feature of twentieth-century jurisprudence that would seem remarkable if it were not so familiar. Consider an urgent practical problem that the criticisms of conventional legal discourse might appear to create for the critics themselves: At least on the face of things, it seems that denunciations offered by Holmes and his twentieth-century followers *ought to be* quite revolutionary.<sup>145</sup> After all, if the way judges justify their decisions in crucial legal matters is irrational and "revolting," as Holmes said, doesn't it follow that the law produced by these decisions—and the legal system founded on such decisions—would be "revolting" as well? And the appropriate response to a "revolting" system, it might seem, is . . . revolt. So shouldn't this sort of criticism come more appropriately from desperate radicals than from, say, a staid and sober judge on the state's (and later the nation's) highest court? If Holmes made his criticisms in good faith, then shouldn't he also in good conscience have resigned his office and joined up with some party of insurgents? Shouldn't his intellectual heirs at Ivy League law schools should do the same, as critics of the Critics have sometimes hinted?<sup>146</sup>

In fact, though, Holmes himself drew no such personally inconvenient conclusions from his indictment, and he perceived no conflict between his jurisprudential views and his ability to continue as a revered jurist on the highest tribunals in the land. Holmes was able to avoid genuine radicalism by adopting a tactic by now so familiar to

<sup>145</sup> See Sheldon Novick, *Holmes's Path, Holmes's Goal*, 110 HARV. L. REV. 1028, 1028 (1997) ("Holmes has the passionate idealism of the revolutionary"), 1032 (Holmes was "a radical spirit" with the "willingness to sweep history away and write on a clean slate"); Richard A. Posner, *The Path Away from the Law*, 110 HARV. L. REV. 1039, 1039-40 (1997) [hereinafter Posner, *Path*] (lauding Holmes's "radical challenge to accepted thinking about law").

<sup>146</sup> See Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

lawyers that it usually goes unnoticed: He drew a strong distinction between the "logical method and form" of reasoning offered on the face of judicial decisions and the substantive thinking that ostensibly worked behind the scenes actually to produce those decisions. In essence, what really determined the outcomes in cases was not the logical arguments about rules and doctrines, but rather "a judgment as to the relative worth and importance of competing legislative grounds," or "some opinion as to policy." Although often "inarticulate and unconscious," this sort of policy judgment was in reality "the very root and nerve of the whole proceeding."<sup>147</sup>

Of course, philosophers have often distinguished between "form" and "substance," but Holmes was employing—or perhaps misusing—this age-old distinction in a different way and for a different purpose. In Aristotle's theorizing, for instance, "form" and "substance" are distinguishable in concept but inseparable in reality. Both are necessary to make any particular object what it is. For example, the page in front of you is a piece of paper (rather than, say, a pencil or a stapler) because it has the *form* of a piece of paper, and it is *this* piece of paper (rather than some other similar one, such as the same page in the same article in the library's second copy) because of the particular *material* that composes it.<sup>148</sup> By contrast, in distinguishing "the logical method and form" from the underlying policy judgments, Holmes was describing two entirely different modes of reaching and justifying legal conclusions: One mode was adopted for purposes of public presentation, while the other operated behind the scenes as the real determiner of decisions.

By thus reworking an old distinction, Holmes was able to achieve remarkable things. He simultaneously could be a ferocious critic and a placid upholder of the law, thereby earning admiration for his revolutionary vision and fervor<sup>149</sup> while continuing to enjoy all the perks of high office in the existing establishment. And the law itself could be at once wonderfully inane and yet perversely wise.

Holmes's followers have almost uniformly embraced the same distinction—usually (though not always) for the same apparent purposes. Thus, the distinction between form and substance in legal decision-making—between the reasons presented on the face of a decision and the "real reasons" that underlie those decisions—is taken for granted in much legal scholarship. The typical law review article may

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<sup>147</sup> See Holmes, *The Path of the Law*, *supra* note 3, at 466–68.

<sup>148</sup> See ARISTOTLE, PHYSICS 1–2.

<sup>149</sup> See *supra* note 145.

devote a few pages to discussing the reasoning actually offered by courts for a decision or doctrine; but it will then go on to consider the deeper reasons that are supposed to have been—or should have been—dispositive.<sup>150</sup> Scholarship that actually takes the official arguments at face value and is content to analyze those “legalistic” or “formalistic” arguments is thought pedestrian and naive, worthy perhaps of a mediocre student note.<sup>151</sup>

The form-substance distinction serves some scholars in the same way that it served Holmes; it permits them, that is, to be profoundly critical of the law on one level and yet be positive, constructive participants on another. Of course, for scholars inclined to be more genuinely radical, the form-substance distinction is still useful. Critical scholars can fill in the forms of the law with more objectionable matter—for example, with elitist, or racist, or sexist prejudices. Thus, while mainstream scholars use the form-substance distinction to make the law more rational and appealing than it appears to be on its face, radically-minded Marxists, critical race theorists or feminists can use the same distinction to make the law appear more oppressive.<sup>152</sup>

The near universal usefulness and acceptance of the form-substance distinction perhaps deters legal thinkers from wondering very seriously about the plausibility of such a distinction. But from a detached perspective, the distinction might imply a picture of the world that is at least mildly fantastic. How likely is it that an enterprise could go on for generation after generation with decisions being made on the basis of one kind of reasoning while being publicly debated and justified through a different form of reasoning? The principal actors in this enterprise, recall, consist of hundreds of thousands of lawyers and thousands of judges, in a variety of jurisdictions, and of widely varying backgrounds, who came to their positions in very different ways. How likely is it that these disparate actors, while speaking a common legal language in public, would in fact be making decisions in the privacy of their chambers on the basis of “economic efficiency” calculations, for example, or neo-Kantian moral philosophy? Or, if the assumption is that these actors typically act on the basis of “uncon-

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<sup>150</sup> See *supra* note 5.

<sup>151</sup> For a discussion of this phenomenon in the area of constitutional law scholarship, see STEVEN D. SMITH, *THE CONSTITUTION AND THE PRIDE OF REASON* 127–32 (1998).

<sup>152</sup> For a collection of essays considering law from a variety of such critical perspectives, see *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kaiys ed., 1998); see also FELDMAN, *supra* note 125, at 158, 162, 181–82. Feldman, in discussing “outsider jurisprudence,” states that it “overtly struggle[s] to disclose and transform the oppressive cultural assumptions embedded in American law.” *Id.* at 182.

scious and inarticulate" judgments, as Holmes asserted and as followers like Posner have often claimed,<sup>153</sup> then what does it even mean to make policy calculations unconsciously and inarticulately? Nonetheless, much of twentieth-century jurisprudence works against a backdrop of just this sort of picture.

#### D. *Supplying the Substance*

As just discussed, if conventional legal reasoning is only the "form" in which legal decisions are presented, then it remains for the theorist to discover or provide the substance—that is, the real reasoning that does or should determine the decisions behind the scenes. Legal theorists have eagerly accepted this task, and it is at just this point that the fiercest jurisprudential disagreements rage. Some scholars would continue along the path indicated by Holmes, and hence would guide the law by means of a social science-informed instrumental rationality, or "policy science." Others would fill in the substance of legal decisions with the use of moral philosophy.

Most scholars have chosen to follow Holmes's path more or less faithfully. Thus, Robert Summers explains that "pragmatic instrumentalism" has dominated American legal thought through most of the twentieth century.<sup>154</sup> Beginning about a decade after Holmes's essay, Roscoe Pound gained prominence by criticizing what he called "mechanical jurisprudence" (essentially the conventional approach attacked by Holmes) and advocating a "sociological jurisprudence" in which courts would self-consciously balance social interests and promote social goals.<sup>155</sup> Two decades later, Pound engaged in some less than cordial debates with a younger generation of so-called "Legal Realists." But from a more detached perspective, the contending positions appear to be minor adjustments in a common program. The Realists exhibited the same deep skepticism toward traditional legal methods. Many of them also favored a more policy-oriented law grounded in the learning of the social sciences.<sup>156</sup> The instrumentalist

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<sup>153</sup> See Holmes, *The Path of the Law*, *supra* note 3, at 466–68; see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 21 (3d ed., 1986) (asserting "legal doctrines rest on inarticulate gropings toward efficiency" and that "[a]lthough few judicial opinions contain explicit references to economic concepts, often the true grounds of legal decisions are concealed rather than illuminated by the characteristic rhetoric of opinions").

<sup>154</sup> See generally ROBERT SAMUEL SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982).

<sup>155</sup> See, e.g., Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1910).

<sup>156</sup> See, e.g., Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. L.J. 71, 159–62 (1928); Cohen, *supra* note 101, at 829–49.

or policy view of law was again plainly manifest in the Law, Science, and Policy movement in the 1950s,<sup>157</sup> and later, in perhaps the most influential legal movement of the second half of the century, in the law-and-economics movement.

Only slightly revised or updated versions of the same law-and-social science vision appear with steady regularity—in the writings of Edward Rubin, for instance, or some recent work of Cass Sunstein.<sup>158</sup> Probably the leading contemporary proponent of an instrumentalist approach has been Richard Posner. Despite his sometimes proclaimed maturation into literary or “post-modern” thought,<sup>159</sup> the emphasis on making law more scientific and instrumentalist has been Posner’s dominant theme from beginning to present.<sup>160</sup>

Indeed, the basic idea of law as social policy is by now pretty much axiomatic to scholars who have very different ideas both about what the content of social policies should be and about what means will be most efficacious for advancing those policies.<sup>161</sup> Hence, both the proponents of free market law-and-economics and the advocates of greater regulation by the administrative state easily fit within the capacious category of instrumentalism, or “law and policy.”

But not all legal thinkers have been enthralled by the instrumentalist vision. A different, noninstrumentalist substance for law is advocated by theorists who take their cues not from economics or the social sciences, but rather from modern moral and political philosophy. The leading proponent of this approach in law has undoubtedly been Ronald Dworkin. In early work, Dworkin distinguished between “policies,” which are the subject of instrumentalist calculations, and “principles,” which we treat as subjects of moral reflection.<sup>162</sup> Dworkin has developed an influential jurisprudence—he calls it “law as integrity”—

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<sup>157</sup> For an overview of the movement, see KRONMAN, *THE LOST LAWYER*, *supra* note 9, at 201–09.

<sup>158</sup> See, e.g., Cass R. Sunstein, *Behavioral Analysis of Law*, U. CHI. L. REV. 1175, 1195 (1998); Edward L. Rubin, *Law and the Methodology of Law*, WISC. L. REV. 521, 541–55 (1997).

<sup>159</sup> See GARY MINDA, *POSTMODERN LEGAL MOVEMENTS* 234 (1995). Posner has respectfully distanced himself from the “post-modern” label. See POSNER, *OVERCOMING LAW*, *supra* note 76, at 315–17.

<sup>160</sup> For recent expressions, see POSNER, *OVERCOMING LAW*, *supra* note 76, at 4–21, 391, 395 and Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 12, 22 (1998).

<sup>161</sup> See Edward Rubin, *Legal Scholarship, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 562, 565 (Dennis Patterson ed., 1996) (“Since the legal realist movement, most scholars have been convinced that law is a social instrumentality . . . [I]t is a system whose component[s] are derived from social policy, not from either a universal moral order or the collective wisdom of the ages.”).

<sup>162</sup> See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 124, at 22–23, 82–84, 247–52.

attempting to explain both how moral reasoning operates and how morality enters into legal interpretation and decision making.<sup>163</sup>

The instrumentalist and moralist perspectives have not always been flatly antagonistic. In a colorful little book called *Reconstructing American Law*, Bruce Ackerman argued that conventional legal discourse is inadequate to modern needs and conditions. Ackerman proposed a more "activist" and "legal constructivist" vision for law. The new legal discourse would draw upon social science and computer technology to develop much more sophisticated descriptions of the world—in this respect Ackerman was very much in the lineage of Holmes—but it would assess the legitimacy of that world, and of plans for remaking that world, through the application of moral and political philosophy.<sup>164</sup>

Ackerman did not succeed in reconciling the instrumentalist and moralist camps, however, and the antagonism between these movements has become increasingly evident. As mentioned earlier, the clearest manifestation of this hostility is the recent bitter exchange generated by Posner's Oliver Wendell Holmes Lectures: Explicitly invoking Holmes's *Path* essay, Posner vehemently criticized academic moral philosophy, as well as the efforts of theorists like Dworkin to use it in interpreting or shaping law; such moralizing, he claimed, is little more than "mystification rooted in a desire to feel good about ourselves."<sup>165</sup> An array of academic moral philosophers working within law schools, including Dworkin, countered this attack, in essence accusing Posner of being small-minded and philosophically obtuse;<sup>166</sup> and Posner returned the criticism in a spirited rejoinder.<sup>167</sup> The antagonists disagreed not only about the nature of law and the value of moral philosophy but about whose position was the more dispiriting. Martha

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<sup>163</sup> See DWORKIN, *LAW'S EMPIRE*, *supra* note 57.

<sup>164</sup> See BRUCE A. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 46–104 (1983).

<sup>165</sup> See POSNER, *Problematics*, *supra* note 5, at 1657, 1695.

<sup>166</sup> See, e.g., Martha C. Nussbaum, *Still Worthy of Praise*, 111 HARV. L. REV. 1776, 1782 (1998) (asserting "the reader who knows something about academic philosophy will be surprised at every point by the sheer casualness and inaccuracy of Posner's treatment"). Charles Fried describes Posner's essay as "diatribe," full of "the ad hominem ridicule of opponents" and of argument that is "gross and unnuanced." Fried, *Philosophy Matters*, *supra* note 138, at 1739–40. Not all the respondents were so caustic; though criticizing much of Posner's analysis, John Noonan praised Posner's own more critical comments as "courageous," "candid," and "coolly judicious." See John T. Noonan, Jr., *Posner's Problematics*, 111 HARV. L. REV. 1768, 1768 (1998) (stating "[h]ow . . . unsparingly he unmasks the pretensions to universality of the classics, how conventional and self-contradictory he shows the modern oracles to be").

<sup>167</sup> See Richard A. Posner, *Reply to Critics of The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1796 (1998) [hereinafter Posner, *Reply to Critics*].

Nussbaum found Posner's lectures "an occasion for sadness,"<sup>168</sup> and Anthony Kronman declared Posner's position "despairing from start to finish" and his lectures "depressing";<sup>169</sup> in response, Posner explained his reasons for thinking that "[t]he pessimist is Kronman."<sup>170</sup>

Despite these strident disagreements, the antagonists agree with each other—and with Holmes—on one final thing. They agree, that is, on the need for greater theoretical explicitness in law. To be sure, they disagree on what form that theorizing should take. But on the inadequacy of conventional legal reasoning as an autonomous discourse and on the necessity of supplementing or replacing that discourse with something more understandably "rational," all seem to concur. In sum, legal thinkers by and large part ways for only one segment of Holmes's path.

### III. THE IMPASSABLE PATH OF THE LAW

As discussed above, legal *thinkers* have been following along Holmes's path—or a good portion of it—for the last century. But legal practice has, for the most part, declined to follow their lead. On the contrary, the actual discourse in which lawyers argue and judges explain their decisions remains remarkably like the one that was the target of Holmes's criticisms. The fact that legal *thinkers* and legal *practitioners* are often the same people only serves to deepen the paradox.

Thus, if we begin with that most honored embodiment of law—the judicial opinion—we discover, first, that such opinions still constitute the most commonly used material both for legal argument and for legal pedagogy and, second, that such opinions still present themselves largely as exercises in logically deducing conclusions from past legal decisions and enactments. Judicial opinions still purport to derive the legally required result from a correct statement of the correct legal doctrine. They still engage in the same citing and distinguishing of precedents, the same search for the meanings or intentions or purposes of statutes, and the same effort to extract from this disparate mass of materials univocal statements of what "the law" is.

To be sure, judicial opinions today are not of *exactly* the same character: Courts probably talk more now than they did in Holmes's time about social policies and about "balancing" competing "interests."

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<sup>168</sup> Nussbaum, *supra* note 164, at 1776.

<sup>169</sup> See KRONMAN, *supra* note 9, at 1753, 1767.

<sup>170</sup> See Posner, *Reply to Critics*, *supra* note 167, at 1811.

But such considerations are typically brought in to reinforce more conventional arguments about what "the law" requires. Thus, while emphasizing that "[f]rom the formalist period to the present, the relative proportion of rule orientation has lessened in comparison to the play of instrumental reasoning," Brian Tamanaha acknowledges recent studies showing that more formalistic and conventional legal reasoning "is still more dominant."<sup>171</sup> Moreover, the courts have not begun to attempt to address the conceptual questions or to formulate the methodology that might transform loose talk about policies or social interests into anything approaching a policy "science."<sup>172</sup> Brian Leiter observes that "in retrospect, policy 'science' looks rather silly, a 'science' in name only."<sup>173</sup>

It would not be unfair to place part of the responsibility for this state of affairs on Holmes himself. As Louise Weinberg has pointed out, during Holmes's decades on the bench he did virtually nothing to implement the jurisprudential changes he advocated and toward which he promised "to press . . . with all my heart."<sup>174</sup> Measured against his own prescribed path, Weinberg concludes, Holmes's rhetorically memorable but jurisprudentially conventional opinions amounted to a "colossal waste."<sup>175</sup> Holmes's reticence or incapacity to carry out his own project might prompt doubts about the cogency of his prescriptions.

The persistently conventional character of judicial opinions in turn both reflects and determines the character of legal pedagogy and of lawyerly argumentation in general. Consider legal education, the context in which Holmes's campaign was launched and where, enjoying the luxury of fresh, bright minds not already mired in legal conventions, the campaign might be expected to achieve its greatest success. In Holmes's day, we are told, formal legal education following the "Harvard method" was largely devoted to the study of selected judicial opinions that were collected in casebooks.<sup>176</sup> Holmes's prescriptions called for radical transformations in this mode of study: Law schools should greatly reduce the emphasis on history, as reflected in past

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<sup>171</sup> See BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY* 241-42 (1997).

<sup>172</sup> For a discussion of the failure to address any of the complex questions of "interest balancing" in constitutional law on either a conceptual or empirical level, see T. Alexander Aleinikoff, *Constitutional Law in an Age of Balancing*, 96 *YALE L.J.* 943 (1987).

<sup>173</sup> Brian Leiter, *Is There An 'American' Jurisprudence?*, 17 *OXFORD J. LEG. STUD.* 367, 379 (1997).

<sup>174</sup> See Holmes, *The Path of the Law*, *supra* note 3, at 474.

<sup>175</sup> See Louise Weinberg, *Holmes' Failure*, 96 *MICH. L. REV.* 691, 700, 707 (1997).

<sup>176</sup> See GLENDON, *supra* note 14, at 184.



judicial decisions, and instead devote themselves to developing and inculcating policy science.<sup>177</sup>

And so today, a century later, law students continue to spend most of their time . . . studying selected judicial opinions collected in casebooks. Norman Cantor observes that social sciences have had only a marginal impact on legal education.<sup>178</sup> "The exclusive paradigm taught in American law schools remains that of the common law updated and democratized to a greater or lesser degree."<sup>179</sup> A century after Holmes's famous essay, Richard Posner acknowledged wistfully that "even today most law professors are analysts of cases and legal doctrines,"<sup>180</sup> while the President of the Association of American Law Schools complained that "classroom discussions are . . . too uninformed by insights from allied disciplines such as philosophy, sociology and economics."<sup>181</sup> So it is difficult to sympathize with the hand-wringing of those who worry that theorists in Holmes's lineage have captured legal education and abandoned traditional "case method" pedagogy.<sup>182</sup>

To be sure, many casebooks today include smatterings of "policy"—excerpts from articles about law-and-economics, or questions raising considerations of efficient resource allocation. No doubt some teachers emphasize (and, if they are serious, supplement) these sparse "policy" materials. But it seems that most teachers touch upon policy materials lightly, if at all. Even more crucially, it is the rare course that is systematically organized around a policy perspective—and an even

<sup>177</sup> See Holmes, *The Path of the Law*, *supra* note 3, at 467–77.

<sup>178</sup> See CANTOR, *supra* note 1, at 358:

Efforts made at Yale and Columbia University Law Schools in the 1930s and 1940s to integrate legal study with the leading edges of the social and behavioral sciences had a modest and mostly ephemeral impact. Except for market economics, social and behavioral science has remarkably little impact on American law schools today.

*Id.*

<sup>179</sup> *Id.* at 376.

<sup>180</sup> Posner, *Against Constitutional Theory*, *supra* note 160, at 10.

<sup>181</sup> Deborah Rhode, *Professional Education and Professional Values*, THE NEWSLETTER (Assoc. of Am. Law Schools), April 1998, at 1, 3.

<sup>182</sup> See, e.g., Edwards, *supra* note 12; GLENDON, *supra* note 14, at 225 (criticizing "the legal academy's turn away from law"), 245 (decrying "the law school without law"). The dubious nature of this criticism, perhaps growing out of a conspicuous nostalgia, is apparent in a curious passage in which, within a single paragraph, Professor Glendon begins by complaining that "[t]oday, we no longer teach law in the old-fashioned way," but goes on to quote with approval a study that appears to indict legal education precisely because it *does* still teach law in the old-fashioned way and has not adapted to developments such as "the coming of the regulatory state." See *id.* at 246–47. A different but related worry seems *prima facie* more plausible for traditionalists—that even though law professors largely continue primarily to teach case analysis, their lack of commitment or conviction means that they will not teach it carefully or respectfully, and the presence of critics and deconstructionists in the academy may tend to subvert what is still the dominant pedagogical enterprise.

rarer course, if it exists at all in the law schools, that actually tries to immerse students in the social science data and methodologies that the Holmesian revolution contemplates. Larry Alexander observes that law students receive almost no training in the empirical skills that would be needed to implement the policy science vision.<sup>183</sup> In short, both in its heavy use of case analysis and in its effort to extract the doctrinal content of the cases, law teaching is still highly reminiscent of the so-called formalist methods prescribed by Langdell and disparaged by the Holmesians.

The teaching of tort law can serve as a concrete example. The Holmes essay commented specifically on what the consequentialist perspective might mean for torts,<sup>184</sup> and indeed, perhaps as much as any subject area except antitrust, tort law *has* been a field for the development of economic analysis in academic writing. Moreover, in probably every law school in the country, students are required to study tort law in the first year. Hence, tort law pedagogy seems to be a promising area for promoting the Holmesian revolution. And in fact, a few teachers *do* try to systematically orient the Torts course in a policy direction.<sup>185</sup>

More often, though, the doctrine-oriented, precedent-based approach prevails—with a pinch of law-and-economics or moral theory thrown in from time to time for seasoning. David Rosenberg, who teaches Torts at Harvard Law School, explains:

Constructed on Holmes's model, the course on tort law would concentrate on the systematic risks from business activity, and its general contribution to the curriculum would come from exploring the theories and policies of market regulation. Yet as they did when Holmes wrote, students spend most of their time today parsing the semantic logic of cases to derive, classify, and criticize rules. Few reliable empirical studies exist, and students are neither given the details of nor trained to evaluate critically the few studies that do. There is much talk about the deterrence and compensation functions of tort liability, but the actual costs and net benefits of such a system remain unknown. . . . Basic policy questions (at best presented in short, conclusory, casebook excerpts from scholarly literature) are raised as if they were merely another perspective

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<sup>183</sup> See Alexander, *supra* note 31, at 519.

<sup>184</sup> See Holmes, *The Path of the Law*, *supra* note 3, at 467.

<sup>185</sup> I know this to be true from personal experience; my Torts teacher was Guido Calabresi.

rather than the shaping force and crucial matter at issue. Discussion of policy questions tends to be correspondingly superficial . . . .<sup>186</sup>

And if Rosenberg has described how tort law is taught at a leading national law school (at *Holmes's* law school), consideration of systematic policy analysis at regional schools is likely to be even more cursory. Thus, it seems that Rosenberg is right: "Legal education today falls far short of the mark Holmes set for the future."<sup>187</sup>

But if law students receive little instruction in systematic policy analysis, and instead learn little more than a thin "policy" vocabulary useful mostly for rhetorical purposes, it hardly seems likely that they will have the time or inclination to devote themselves to "policy science" after they have graduated and entered the hectic life of a lawyer or judge. Not surprisingly, it is precisely this rhetorical function that "policy" typically serves in lawyers' briefs and judges' opinions.<sup>188</sup> As revealed in these materials, few if any areas of law can offer anything remotely approaching a "science" for promoting public policy objectives through law. On the contrary, legal briefs and arguments are typically pretty much what they were in *Holmes's* day—labored efforts to cite and distinguish the relevant cases, doctrines and statutes so as to extract a controlling rule of law that will allow the lawyer's client to prevail.

Judge Posner, though a leading advocate of a more instrumentalist jurisprudence, acknowledges the persistence of the very sort of legal reasoning that *Holmes* deprecated. Few lawyers or judges today, he admits, would embrace the *label* of "formalism."

Yet most lawyers, judges, and law professors still believe that demonstrably correct rather than merely plausible or reasonable answers to most legal questions, even very difficult and contentious ones, can be found—and it is imperative that they be found—by reasoning from authoritative texts, either legislative enactments (including constitutions) or judicial decisions, and therefore without recourse to the theories,

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<sup>186</sup>David Rosenberg, *The Path Not Taken*, 110 HARV. L. REV. 1044, 1045 (1997).

<sup>187</sup>See *id.* at 1044.

<sup>188</sup>For example, noting that the Supreme Court has sometimes addressed issues of jury behavior which have been extensively studied by social scientists, J. Alexander Tanford concludes that "[a]n examination of the written opinions in these cases reveals that the Justices ignored, misused, distorted and misinterpreted psychological literature about trials to justify decisions at odds with empirical data." J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L.J. 137, 145 (1990).

data, insights, or empirical methods of the social sciences

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If instrumentalist policy science has only a marginal presence in current legal discourse and pedagogy, moral philosophy has, if possible, even less influence. Most law students probably make at least a passing acquaintance with "law-and-economics" in a torts, contracts or antitrust course; the same probably cannot be said of the neo-Kantian moral theory or Rawlsian political philosophy advocated by legal theorists like Dworkin. To be sure, most law schools probably offer some sort of seminar—Constitutional Theory, perhaps, or Social Justice—dealing with themes in modern moral theory, just as they may offer seminars in law and economics. But these courses are hardly the bread and butter of the curriculum; most students probably go through law school largely or wholly untouched. These students, of course, then go on to become the nation's lawyers and judges.

An inspection of legal education and legal practice thus suggests that Holmes's prophecies are nowhere near "coming true," as disciples like Posner sometimes wishfully assert.<sup>190</sup> Instead, we find a thin, mostly rhetorical "policy" veneer that covers a reality in which legal argumentation and justification work pretty much as they did a century (or perhaps five centuries, or even eight centuries) ago<sup>191</sup>—that is, by muddling along on the basis of precedents and rules while presenting their conclusions as if they were logically compelled by these authoritative historical materials. And seventy years after Felix Cohen described the "Restatement" project as "the last long-drawn-out gasp of a dying tradition,"<sup>192</sup> the project continues to flourish—now in its third incarnation. Indeed, in his less sanguine moments (which seem to come with increasing frequency), Judge Posner admits most of this. "The traditional conception of law is as orthodox today," he laments, "as it was a century ago."<sup>193</sup>

<sup>189</sup> POSNER, *OVERCOMING LAW*, *supra* note 76, at 20.

<sup>190</sup> See POSNER, *Path*, *supra* note 145, at 1043 (asserting Holmes's "article is a prophecy, and it is coming true").

<sup>191</sup> See CANTOR, *supra* note 1, at 192 ("A London barrister of 1540, quick-frozen and revived in New York today, would only need a year's brush up course at NYU School of Law to begin civil practice as a partner in a midtown or Wall Street corporate-law firm"); *id.* at 73 ("Glanville wouldn't be surprised at what he would find if he were to sit in on a class on property in a law school today. It is still his common law."). Cf. M. H. Ogilvie, *Review*, 29 OTTAWA L. REV. 225, 228 (1997-98) ("Despite the best efforts of the social sciences in the 20th century to confound the fundamental principles of the common law they continue to resonate as deeply within the societies of the late 20th century common law jurisdictions as they have done for the eight preceding centuries.").

<sup>192</sup> See Cohen, *supra* note 101, at 833.

<sup>193</sup> Posner, *Path*, *supra* note 145, at 1040.

In short, Holmes's *Path* seems to have become a jurisprudential cul-de-sac, in which theorists travel around and around in the same tedious circles while the main traffic of the law flows along other avenues. Holmes thought that radical changes in legal discourse were imminent. For a century, Holmes's descendants have thought the same thing; with embarrassing regularity they have solemnly, or sometimes breathlessly, proclaimed that conventional law is about to give way to a more rational, or more scientific, or more philosophical discourse. Scholarly careers have been made—and continue to be made—by, in essence, producing the second, and the third, and the tenth editions of the Restatement of Holmes. And in retrospect, the most cogent observation was Grant Gilmore's, made almost four decades ago: "The more things change, . . . the more they are the same."<sup>194</sup>

#### IV. RECONSIDERING THE MODERN CRITIQUE

As discussed above, legal theory and legal practice in this century have taken fundamentally different paths, with the consequence that in their theorizing legal thinkers often can do little except look down on the discourse of legal practice with a mixture of incomprehension and disdain. Setting out to understand law in a "realist" way, twentieth century legal thinkers have ended up with a distinctive and abstract discipline of their own that seems largely disconnected from the ways in which real lawyers and judges act and think. Like a partner in a once promising relationship that has ended in separation and divorce, modern legal theory might naturally look back and wonder just how this breakup came about.

The preceding discussion suggests that what have turned out to be irreconcilable differences between legal theory and legal practice began to emerge as soon as theorists like Holmes concluded—or, more accurately, took for granted—that the faith and the metaphysical commitments manifest on the face of the way lawyers and judges talk and argue could not be taken at face value, and hence that legal discourse would need to be reconceived in less metaphysical and more understandably rational terms. If we consider the origins of modern jurisprudence in their context, it is natural that legal thinkers would make this assumption. The intellectual climate of the time ensured that any sort of "faith" of the kind seemingly implicit in the law could only be considered backward and disreputable, and that an enterprise built on such commitments was destined to wither. Old prejudices, as we know,

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<sup>194</sup> See Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 *YALE L. J.* 1037, 1048 (1961).

die hard. But the intellectual climate has changed, and it may now be possible to reflect more seriously on a possibility that for thinkers since the time of Holmes has been beyond the pale of consideration.

### A. *The Anticipated Demise of Faith*

As noted above, the structure of modern jurisprudence founded in a rejection of conventional legal discourse can be traced back to—and arguably owes much to—Holmes; so it is worth noticing some aspects of the intellectual milieu in which Holmes and his contemporaries and immediate successors worked. The general culture of this country was in the process of breaking free of its traditional Protestant underpinnings. The legal disestablishment effected by the federal and state governments in the late-eighteenth and early-nineteenth centuries had been formal in nature; though losing its official legal status, Protestant Christianity and what Mark DeWolfe Howe called the “de facto establishment”<sup>195</sup> had continued to dominate American culture through most of the nineteenth century. The influence of religious revivals on the culture is well known. Nor was it only less educated citizens who took their guidance from religion; nearly all private colleges were sponsored by churches, and the leading periodicals in circulation among educated citizens were theological quarterlies that discussed not only religious issues *per se* but also politics, science, and culture from generally religious perspectives.<sup>196</sup>

As the century neared its end, however, religion began to recede as the central organizing force in society.<sup>197</sup> Universities became more secular.<sup>198</sup> In law, the longstanding assumption that Christianity was an integral part of the common law lost its force.<sup>199</sup> Insofar as a Christian ethos had undergirded the possibility of believing in a unified law

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<sup>195</sup> See MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS* 11 (1965).

<sup>196</sup> See MARK A. NOLL, *A HISTORY OF CHRISTIANITY IN THE UNITED STATES AND CANADA* 220–32 (1992).

<sup>197</sup> See *id.* at 286–309.

<sup>198</sup> See generally GEORGE M. MARSDEN, *THE SOUL OF THE AMERICAN UNIVERSITY* 99–262 (1994). Marsden describes a “quantum leap from old-time college to modern university within one generation following the Civil War.” *Id.* at 99. One crucial consequence of this transformation was that even at the major universities which had been founded as Protestant institutions and continued to profess a commitment to some sort of “Christian” worldview—Harvard, Yale, Chicago, Princeton—“[s]tandards for science that a priori excluded considerations of faith would become the norm.” See *id.* at 99, 131.

<sup>199</sup> See Stuart Banner, *When Christianity Was Part of the Common Law*, 16 *LAW & HIST. REV.* 27, 58–59 (1998).

somehow above or beyond mundane legal decisions and enactments,<sup>200</sup> that undergirding disappeared.

A related and prominent feature of the Victorian period in which Holmes's notions about law were forming was a perceived and sometimes passionate conflict between science and religion. In retrospect, the controversy may seem to have been characterized by misinformation, misconceptions and needless and reckless charges and countercharges.<sup>201</sup> But in its own day the "science versus religion" debate was perceived by many as a monumental and fundamental clash that defied anyone to remain neutral; and the educated might have little doubt about where their loyalties were owed. Owen Chadwick observes:

Science versus Religion—the antithesis conjures two hypostatized entities of the later nineteenth century: . . . a mysterious undefined ghost called Science against a mysterious indefinable ghost called Religion; until by 1900 schoolboys decided not to have faith because Science, whatever that was, had disproved Religion, whatever that was.<sup>202</sup>

Universities were of course committed to science; and law, as an awkward and self-conscious newcomer into the university, was especially anxious to wrap itself in the mantle of "science."<sup>203</sup> This aspiration might have meant something different to Holmes than to an academician like Langdell, but the general commitment to "science,"—and hence to avoiding the taint of association with whatever was contrary to "science"—was powerful.

The prestige and expected growth of science were closely associated with another major theme of the period: the inevitability of "secularization." As modern scholars often point out, the term "secularization" can mean quite different things, but at its core the secularization thesis trumpeted what Matthew Arnold had thought he heard in 1851:

<sup>200</sup> See *id.* at 50–53, 61.

<sup>201</sup> For an insightful review of the debate, see OWEN CHADWICK, *THE SECULARIZATION OF THE EUROPEAN MIND IN THE NINETEENTH CENTURY* 161–88 (1975).

<sup>202</sup> *Id.* at 161; see also FELDMAN, *supra* note 125, at 85 (explaining "[w]hereas during the antebellum years most Americans had believed that science and religion were in harmony, during the early postbellum period science and religion increasingly seemed separate and irrelevant to each other").

<sup>203</sup> For a description of this development and its motivations, see KRONMAN, *THE LOST LAWYER*, *supra* note 9, at 169–200. I do not mean to imply that the aspiration to make law a "science" began in the nineteenth century. The aspiration has a much longer history. See generally M.H. Hoefflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986).

the "melancholy, long, withdrawing roar" of the "Sea of Faith."<sup>204</sup> Jose Casanova explains:

The theory of secularization may be the only theory which was able to attain a truly paradigmatic status within the modern social sciences. In one form or another, with the possible exception of Alexis de Tocqueville, Vilfredo Pareto, and William James, the thesis of secularization was shared by all the founding fathers: from Karl Marx to John Stuart Mill, from Auguste Comte to Herbert Spencer, from E.B. Tylor to James Frazer, from Ferdinand Toennies to Georg Simmel, from Emile Durkheim to Max Weber, from Wilhelm Wundt to Sigmund Freud, from Lester Ward to William G. Sumner, from Robert Park to George H. Mead. Indeed, the consensus was such that not only did the theory remain uncontested but apparently it was not even necessary to test it, since everybody took it for granted.<sup>205</sup>

As Patrick Kelley has convincingly shown, Holmes in particular was powerfully influenced by the nineteenth-century positivism of thinkers like Comte and Mill.<sup>206</sup> This version of positivism offered a version of the secularization thesis that depicted human thought as progressing ineluctably from a "theological" stage to a "metaphysical" stage, and then culminating in a "positivist" or scientific stage in which both the supernatural beings of the first stage and the metaphysical entities of the second stage are repudiated in favor of purely empirical and scientific understandings.<sup>207</sup> In a similar vein, Holmes suggested that law and legal theory must evolve according to a preordained progression, "each generation taking the inevitable next step, mind, like matter, simply obeying a law of spontaneous growth."<sup>208</sup>

One natural consequence of this academic turn toward science and secularization and away from religion and faith was that the pre-suppositions evident on the face of legal discourse—that is, the apparent commitments to "the law" as an entity that exists independent of the statutes and judicial pronouncements that are expressions or "evidence" of it—became untenable. It was unimaginable that such an

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<sup>204</sup> See Matthew Arnold, *Dover Beach*, in ARNOLD: THE COMPLETE POEMS 253, 256 (Miriam Allot ed., 1979).

<sup>205</sup> JOSE CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD 17 (1994).

<sup>206</sup> See generally Patrick J. Kelley, *Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument*, 14 S. ILL. U. L.J. 427 (1990).

<sup>207</sup> See *id.* at 429–30, 438–39.

<sup>208</sup> See Holmes, *The Path of the Law*, *supra* note 3, at 468.



ethereal entity could exist; and even if it could, it was surely not susceptible to understanding through the methods of science. Instead, "the law" as implicitly conceived in common law discourse would necessarily be an object of faith. But faith was precisely what scientific and secular learning aimed to replace, or at least to relegate to the private sphere.<sup>209</sup>

To be sure, at least according to the standard depiction, Christopher Columbus Langdell and his followers tried for a time to combine the aspiration to legal science with a commitment to law as an independent, almost transcendent object<sup>210</sup> (though this standard depiction of the Langdellians has recently been challenged).<sup>211</sup> Their peculiar project (or the common understanding that they were engaged in such a project) may account for the special revulsion reserved for Langdell and other devotees of "transcendental nonsense" among later students of the law. Earlier, "pre-scientific" thinkers like Hale or Blackstone who had expressed what may sound like faith in an objective law might be excused in the same way that secular social scientists can describe the magic or religion of earlier periods as a sort of primitive science, admirable given the limitations of time and place.<sup>212</sup> But someone like Langdell who tries to preserve a commitment to independent, objective law in a full-blown age of science can only provoke embarrassment.

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<sup>209</sup>James Boyd White describes the environment within which legal scholars work:

In the academic world we tend to speak as though all participants in our conversations were purely rational actors engaged in rational debate; perhaps some people out there in the world are sufficiently benighted that they turn to religious beliefs or other superstitions, but that is not true of us or, if it is true, we hide it, and it ought not be true of them. Ours is a secular academy . . .

James B. White, *Response to Roger Cramton's Article*, 37 J. LEGAL EDUC. 533, 533 (1987).

<sup>210</sup>Grant Gilmore characterizes (or perhaps mischaracterizes) the Langdellian view of law in this way:

[L]aw is a closed, logical system. Judges do not make law: they merely declare the law which, in some Platonic sense, already exists. The judicial function . . . is restricted to the discovery of what the true rules of law are and indeed always have been.

See GILMORE, *supra* note 2, at 62.

<sup>211</sup>See generally W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1 (1997); see also generally ALBERT W. ALSCHULER, 'BLOWING OUT THE MORAL LIGHTS AROUND US': THE LIFE, WORK, AND LEGACY OF OLIVER WENDELL HOLMES (forthcoming, University of Chicago Press 2000).

<sup>212</sup>See Stephen Sharot, *Magic, Religion, Science, and Secularization*, in RELIGION, SCIENCE, AND MAGIC 261, 262-68 (Jacob Neusner et al. eds., 1989) (describing the "intellectualist" position in anthropology that views magic and sometimes religion in primitive cultures as incipient forms of science).

In short, the prevailing ethos of the time greatly restricted the range of possibilities that a thinker like Holmes could take seriously. In particular, Holmes and his descendants could no more suppose that a respectable enterprise like law could be based on commitments of the kind that seemed evident on the face of conventional legal discourse than they could contemplate a department of astrology or witchcraft in the modern university. So they had no choice, in their new academic offices, but to set about putting law on a more respectable footing. Their efforts to do that—and the frustrations that have attended those efforts—were considered in Parts II and III.

### B. *Reconsidering the Unimaginable*

Today the situation is different—though legal thinkers may be slower than scholars in some other fields to perceive the change. The features that made up the framework for late nineteenth-century thought, if they have not disappeared altogether, are at least much more contestable today. Their diminished force may make it possible to consider seriously options that for Holmes and his followers were beyond the pale.

Thus, the developments characteristic of the “second disestablishment” of religion seem to have played themselves out, and it may even be that a reversal of the movement has occurred. More specifically, the assumption that religion would withdraw to the private sphere, thereby relinquishing its role in *public* culture, no longer seems valid.<sup>213</sup> Similarly, the old antagonism between “science” and “religion,” if it has not altogether disappeared, has at least receded. Today it is common to find accomplished scientists describing science as providing support for faith,<sup>214</sup> while religious leaders urge their followers not to disparage and indeed to cultivate learning in philosophy and science.<sup>215</sup> And the “secularization” thesis, once taken as almost axiomatic, has been largely abandoned by social scientists in the face of overwhelming contrary evidence (although legal scholars sometimes seem either not to have noticed this fact or to be unwilling to acknowledge it). Jose Casanova, while adhering to some aspects of the thesis and cautioning against its overhasty dismissal, joins in the consensus concluding that “the old

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<sup>213</sup> The increasingly prominent role of religion in public life has provoked a heated normative debate. See, e.g., *RELIGION AND CONTEMPORARY LIBERALISM* (Paul J. Weithman ed., 1997).

<sup>214</sup> See, e.g., JOHN POLKINGHORNE, *BELIEF IN GOD IN AN AGE OF SCIENCE* (1998).

<sup>215</sup> See *FIDES ET RATIO* (Papal Encyclical, 1998).

theory of secularization can no longer be maintained."<sup>216</sup> Casanova summarizes the current situation:

[O]ne can draw two lessons from religion in the 1980s. The first is that religions are here to stay, thus putting to rest one of the cherished dreams of the Enlightenment. The second and more important lesson is that religions are likely to continue playing important public roles in the ongoing construction of the modern world. This second lesson in particular compels us to rethink systematically the relationship of religion and modernity and, more important, the possible roles religions may play in the public spheres of modern societies.<sup>217</sup>

The jurisprudential focus of this Article is only indirectly related to the sort of rethinking proposed by Casanova. This article, in other words, is not immediately concerned with the role of "religion" in modern society. Insofar as "religion" is linked by close association with "faith," however, and insofar as conventional legal discourse is apparently an expression of faith, the developments described by Casanova suggest both the possibility of and the need for reconsidering that discourse. For the first time in a long time, in short, it may be possible to take conventional legal discourse seriously—to consider forthrightly assumptions that underlie legal discourse and to discuss openly whether those assumptions are viable today.

## V. THE ORIENTATION OF "FAITH"

In modern academic discourse, "faith" is sometimes understood not in terms of what it *is*, but rather in terms of what it supposedly is *not*—that is, "reason." So "faith" becomes almost by definition a form of irrational, or at best, nonrational belief; its ostensible rejection of

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<sup>216</sup> See CASANOVA, *supra* note 205, at 19. Casanova further states that the majority of sociologists of religion . . . have abandoned the paradigm with the same uncritical haste with which they previously embraced it . . . . Armed with "scientific" evidence, sociologists of religion now feel confident to predict bright futures for religion. The reversal is astounding when one thinks that only some twenty years ago nobody was ready to listen when, in the first "secularization debate," the first voices were raised by David Martin and Andrew Greeley questioning the concept and the empirical evidence, or lack thereof, behind the theory of secularization. But how could anyone listen attentively then, when even the theologians were proclaiming the death of God and celebrating the coming of the secular city?

*Id.* at 11.

<sup>217</sup> *Id.* at 6.

reason becomes the very essence of faith. As Mark Twain quipped: "Faith is believing what you know ain't so."<sup>218</sup> In a similar vein, Bertrand Russell mockingly described faith as "a firm belief in something for which there is no evidence."<sup>219</sup>

Given these unappealing depictions, an essential initial step in considering the role of faith in law is to attempt some necessary clarifications. In the first place, both "reason" and "faith" are sometimes used either as epistemological or ethical terms. They are taken as describing possible types of responses, that is, to the questions "What, and on what basis, should I *believe*?" but also to what Bernard Williams calls the Socratic question: "How should I *live*?"<sup>220</sup> Hence, we speak of *believing* something on the basis of reason or faith; but we also speak of the "*life* of reason," or the "*life* of faith." Since this varied usage may be a source of confusion, it will be helpful to stipulate some working semantic boundaries.

In the remainder of this Article, I will treat "reason" as an epistemological term that refers to a way of assessing propositions that present themselves for belief. The content or methods of "reason" are themselves subjects of controversy,<sup>221</sup> of course, but "reason" generally connotes forming and assessing beliefs using the methods of formal logic and also of scientific, empirical investigation.

If "reason" is an *epistemological* term for present purposes, "rationalism" (not "*rationality*") will refer to an *ethical* orientation. In short, "rationalism" will denote an approach to the ethical question "How should I *live*?"—an approach that in its own self-understanding broadly takes the form "I should live in accordance with 'reason.'" This commitment is itself often vague and variable in its specific content. In modern life, though, it typically implies dedication to making decisions in accordance with "instrumental rationality,"<sup>222</sup> or, more broadly, in

<sup>218</sup> 1 MARK TWAIN, FOLLOWING THE EQUATOR 114 (Stormfield ed., 1925).

<sup>219</sup> See BERTRAND RUSSELL, HUMAN SOCIETY IN ETHICS AND POLITICS 203 (1955) (quoted in HELMUT RICHARD NIEBUHR, FAITH ON EARTH 14 (Yale UP) (1989)); cf. WOLFHART PANNENBERG, CHRISTIANITY IN A SECULARIZED WORLD 44 (1989) (observing in a secular culture "faith appears as irrational commitment to a content which is regarded as 'true' only in a private perspective").

<sup>220</sup> See BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 4 (1985).

<sup>221</sup> For a helpful survey of the various and often inconsistent things that "reason" has been taken to mean in modern thought, see ERNEST GELLNER, REASON AND CULTURE (1992).

<sup>222</sup> Charles Lindblom explains:

In contemporary Western cultures, when people are called upon to give reasons—even to themselves—for choosing a volition, they often find it difficult to maintain sustained thought about it other than by exploring connections between it regarded as a means and some other volition as end. Often they cannot think, cannot analyze, cannot debate except about means to assumed ends. If, at the end of the line, they consider a possible volition as an end only and cannot cast it as means to a still

accordance with clearly articulable and measurable criteria keyed to observable factors.<sup>223</sup>

"Faith" will then be used primarily as an ethical concept,<sup>224</sup>— as the principal ethical alternative to "rationalism." In describing faith as an alternative to *rationalism*, I do not presuppose that faith is hostile to *rationality*, or that faith is somehow incompatible with *reason* as a way of formulating and assessing beliefs. Although such incompatibility is often assumed, the relationship among these terms is in fact complex, and it cannot be even tentatively assessed until after the ethical orientation based on faith is first described.

The following discussion will begin by offering a description of that orientation, followed by a brief discussion of the relationship between "faith" and "reason." Part VI will then consider the relationship of this orientation toward the issues of jurisprudence.

### A. *The Elements of Faith*

The basic orientation of faith can be described, I think, in terms of five elements or characteristics.

#### 1. The sense of an overarching reality that is not directly perceived

An essential characteristic of faith is the belief or sense that beyond ordinary, observable facts and events—beyond the ebb and flow of visible day-to-day occurrences—there is a more ultimate truth or reality. This more ultimate reality might be understood in terms that make it seem personal or quasi-personal—the divinity of theistic relig-

further end, their minds stop working on the issue; they fall silent, have nothing to say or think. Their analysis, even if incomplete, terminates. Even sophisticated intellects often cannot define rational thought other than as thought that appropriately connects means to ends.

CHARLES LINDBLOM, *INQUIRY AND CHANGE* 41 (1990).

<sup>223</sup> For a classic critical discussion of this orientation, see Michael Oakshott, *Rationalism in Politics*, in *RATIONALISM IN POLITICS AND OTHER ESSAYS* 5 (Timothy Fuller ed., 1991).

<sup>224</sup> As an ethical concept, the notion of "faith" has been used in various ways. In the discussion that follows, my purpose is neither to be comprehensive nor to explore deeper theological controversies (such as those which have exercised Catholic and Protestant thinkers since the Reformation) about the meaning or efficacy of faith. Nor do I intend to present any specific substantive formulation of "faith"—Christian faith, for instance, or Jewish faith. To be sure, in its real world appearances, faith will usually be expressed in some specific formulation; I have tried to draw on some quite disparate formulations in order to illustrate the orientation. My purpose, however, is not to describe any particular faith, but instead to extract the essential or generic features of a basic orientation toward the ethical question "How should I live?"—one that will be understandable and familiar, and that will depend at its core on something that would widely be viewed as "faith."

ion—or it might be impersonal, as with the Tao, or “way,” of Taoism. The overarching reality might be depicted as static—Plato’s “Forms,” for instance—or dynamic, as perhaps in a Hegelian commitment to an intelligent, teleological process of historical development. Or the more ultimate reality might be depicted as a sort of cosmic or meta-narrative—a grand drama in which individuals are players.<sup>225</sup> The crucial common element in these various forms of faith is a sense that what is manifest or readily observable is not all there is: Beyond the manifest there exists a latent reality that, although not directly perceived, is if anything even more real than the facts and events that immediately present themselves.<sup>226</sup>

Although this commitment to a reality beyond the visible is familiar enough in religion, in poetry, and in certain kinds of philosophy (in particular Platonism), some characteristic expressions may be helpful. Evelyn Underhill wrote of “[man’s sense of] a Wholeness, a Perfection already fully present over against him.” This reality is understood as a “Transcendent Object,” or as “the Absolute and Eternal, standing beyond the present and the past,” or as “the mysterious ‘ground’ of our being.”<sup>227</sup> In a similar vein, Abraham Heschel observed that “[w]e see more than we can say. The trees stand like guards of the Everlasting; the flowers like signposts of his goodness.”<sup>228</sup> Heschel described this “more than we can say” in poetic terms as “the stillness that surrounds the world, hovering over all the restlessness and fear of life—the secret stillness that precedes our birth and succeeds our death,” as “the mystery that animates all beings” or, more succinctly, as “the Infinite” or “the Eternal.”<sup>229</sup>

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<sup>225</sup> Cf. LOUIS DUPRE, *PASSAGE TO MODERNITY* 145 (1993) (observing that in the Middle Ages life was viewed as a “cosmic play” in which “the human person clearly had the lead—but an all-knowing, unchanging God directed the play”).

<sup>226</sup> Drawing on comparative religion, Huston Smith summarizes the recurring themes: “Ontologically, Spirit is more real than everything else. Causally, it occasions everything else. And axiologically, it excels everything else by being perfect.” Huston Smith, *The Ambiguity of Matter*, in *CROSSCURRENTS* 49, 55 (1998).

<sup>227</sup> See EVELYN UNDERHILL, *WORSHIP* 6–7, 15 (rev. ed., 1991).

<sup>228</sup> See ABRAHAM J. HESCHEL, *MAN’S QUEST FOR GOD* 4 (1954).

<sup>229</sup> See *id.* at 3–4, 9. Heschel noted that modern life tends to extinguish awareness of this more ultimate reality:

There is such an abundance of the here and the now, such plenitude of the given and the conceived that our mind has lost itself in the world. All we can trust in is the work of our hands, the product of our minds, and what lies beyond it is considered an illegitimate fancy. The world to us consists of instruments, of tools, and the supreme ideas are symbols only.

*Id.* at xii.

For a more ancient expression, consider the teaching of Lao Tse regarding the "Tao," sometimes translated as the "way":

The tao that can be told  
is not the eternal Tao.  
The name that can be named  
is not the eternal Name.  
The unnameable is the eternally real.

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It is hidden but always present.  
I don't know who gave birth to it.  
It is older than God.

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It is serene. Empty.  
Solitary. Unchanging.  
Infinite. Eternally present.  
It is the mother of the universe.  
For lack of a better name,  
I call it the Tao.<sup>230</sup>

Although a belief in a transcendent or more ultimate reality is characteristic of religion—or even, arguably, the core of religion<sup>231</sup>—the belief is not limited to "religion" in any conventional sense. The example of Plato shows that philosophers may be consciously committed to a realm of more ultimate reality.<sup>232</sup> And probably the most frequent if unsystematic expositions of this belief come from poets, who characteristically attempt to reveal a layer of meaning beneath and beyond what is immediately apparent—"To see the world in a grain of sand,/And a Heaven in a Wild Flower."<sup>233</sup> Thus, for a poet who notes "the dearest freshness deep down things," the world may become "charged with the grandeur of God. It shakes out like shining from shook foil."<sup>234</sup> And even thinkers who are scornful of religion, such as

<sup>230</sup> LAO TSE, *TAO TE CHING* chs. 1, 2, 25.

<sup>231</sup> William James suggested that "were one asked to characterize the life of religion in the broadest and most general terms possible, one might say that it consists of the belief that there is an unseen order, and that our supreme good lies in harmoniously adjusting ourselves thereto." WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 50 (Collier Books 1961) (1901). In a similar vein, Vaclav Havel observes that at the core of all major religions is the belief that "this world and our existence here are not a freak accident having little meaning but are part of a mysterious, yet integral act whose sources, direction and purpose are difficult for us to perceive in their entirety." See Vaclav Havel, *Faith in the World*, *CIVILIZATION* 51, 53 (Apr./May 1998).

<sup>232</sup> See PLATO, *THE REPUBLIC* bks. VI-VII.

<sup>233</sup> See generally WILLIAM BLAKE, *AUGURIES OF INNOCENCE*.

<sup>234</sup> See GERARD MANLEY HOPKINS, *GOD'S GRANDEUR*. In a poet like Hopkins, of course, poetry and religious faith are explicitly joined.

Marx or the eighteenth century *philosophes*, may come to treat something else—a hypostatized “History” or “Posterity,” for example—as a sort of quasi-mindful, super-mundane reality that moves human events along some preestablished course.<sup>235</sup>

This perception of an unseen reality might already be regarded as a manifestation of “faith” in an epistemological sense, since by definition that overarching reality is not immediately accessible to “reason” understood as a combination of formal logic and straightforward empiricism.<sup>236</sup> However, the sense of an unseen reality does not by itself constitute faith as an ethical orientation.

## 2. The normative authority of the unseen

The belief in the unseen becomes an ethical orientation—though not quite yet an orientation of “faith”—when it is supplemented by a commitment or belief that life is somehow to be lived in conformity with a super-mundane reality. The unseen, in other words, provides the normative criterion that should govern decisions about how to live. Persons should live in conformity with God’s will,<sup>237</sup> or with “the Tao”;<sup>238</sup>

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<sup>235</sup> For a discussion of the highly religious quality of Marx’s view of history, see KARL LOWTH, *MEANING IN HISTORY* 42–51 (1949). For an argument that for the eighteenth century philosophers, history—or “Posterity”—became a substitute for God, see CARL BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH CENTURY PHILOSOPHERS* 119–68 (1932). Becker maintains that the thought of posterity was apt to elicit from eighteenth-century Philosophers and revolutionary leaders a highly emotional, an essentially religious, response. Posterity, like nature, was often personified, reverently addressed as a divinity, and invoked in the accents of prayer.

*Id.* at 142.

<sup>236</sup> Because it is not accessible to ordinary “reason,” the person committed to believing nothing but what can be established by reason may of course reject this kind of belief. See LAO TSE, *TAO TE CHING* ch. 41.

When a superior man hears of the Tao,  
he immediately begins to embody it.  
When an average man hears of the Tao,  
he half believes it, half doubts it.  
When a foolish man hears of the Tao,  
He laughs out loud.  
If he didn’t laugh,  
It wouldn’t be the Tao.

*Id.*

<sup>237</sup> “Let us hear the conclusion of the whole matter: Fear God, and keep his commandments; for this is the whole duty of man.” *Ecclesiastes* 12:13.

<sup>238</sup> See LAO TSE, *TAO TE CHING* ch. 37:

The Tao never does anything;  
yet through it all things are done.  
If powerful men and women  
could center themselves in it,



they should live not simply to achieve the satisfaction of their interests, but rather should strive to play their part in the cosmic script or narrative.

Acceptance of a more ultimate reality as normative or regulative produces an orientation toward the question "How should I live?" that differs radically from the more familiar concept of an instrumentally-rational pursuit of human wants, needs, or interests. Evelyn Underhill maintained that from the recognition of a transcendent reality "[i]t follows that . . . the envisaged end is not man's comfort, security, or personal success, but His glory and purpose, the more perfect doing of His Will."<sup>239</sup> Similarly, Rabbi Heschel observed the modern tendency to assume that "all our actions are guided by one consideration, how best to serve our personal interests"; but while conceding that "the self has its legitimate claims and interests," Heschel explained that these do not constitute the primary ethical desideratum. Instead, we should live in accordance with the more ultimate reality, or God.<sup>240</sup> Lao Tse remarked that "[a] good traveler has no fixed plans and is not intent upon arriving . . ." Instead of striving, she simply opens herself to the workings of the Tao.<sup>241</sup>

### 3. Recognition that the ultimate truth or reality is largely inaccessible to human comprehension

The two characteristics described thus far fail to capture a quality typically associated with "faith." Indeed, these beliefs or commitments might readily have been endorsed by earlier "rationalists," such as Plato or that quintessential figure of the American Enlightenment, Thomas Jefferson. As Daniel Boorstin has explained, Jefferson was in some respects very much like the Calvinists for whom he had little patience; the existence of God and the ethical imperative of conforming to God's design were central to Jefferson's political and ethical think-

the whole world would be transformed  
by itself, in its natural rhythms.

*Id.*

<sup>239</sup> UNDERHILL, *supra* note 227, at 9 (stating:

[H]ow strong a pull is needed to neutralize the anthropocentric trend of the human mind; its intense preoccupation with the world of succession, and its own here-and-now desires and needs. And only in so far as it is released from this petty subjectivism, can it hope to grow up into any knowledge of the massive realities of that spiritual universe in which we live and move.)

See also LAO TSE, *TAO TE CHING* ch. 14.

<sup>240</sup> See HESCHEL, *supra* note 228, at xiii.

<sup>241</sup> See LAO TSE, *TAO TE CHING* ch. 27.

ing.<sup>242</sup> Unlike the inscrutable God of the Calvinists, however, Jefferson's deity was conveniently accessible to the human mind. In taking the opposite view, the Calvinists were more representative of an orientation of "faith," which typically insists that we "see through a glass darkly,"<sup>243</sup> so that the ultimate reality is beyond our comprehension (at least in our present, mortal condition).

In this vein, Hebrew scriptures such as the book of Job or the later chapters in Isaiah emphasize the inscrutability of God.<sup>244</sup> In the tradition of the writings of the pseudo-Dionysus and Maximus the Confessor, Christian theologians have similarly insisted that God is far beyond our comprehension, so that anything we say affirmatively about God will misrepresent the divine nature.<sup>245</sup> Evelyn Underhill, acknowledging "the refusal of the Spirit to fit into the neat categories of thought," concluded that "all our attempts to penetrate its mystery must end in acknowledgment of defeat."<sup>246</sup> The *Tao Te Ching* revels in paradoxes as it presents the Tao, and later observes: "The more you know, the less you understand."<sup>247</sup> Consequently, "[t]hose who know don't talk./ Those who talk don't know."<sup>248</sup>

The inscrutability of the ultimate reality presents daunting problems, of course, both epistemological and ethical. How can we discuss or teach about something that by hypotheses we cannot understand? Without pretending to have solved the problem, Christian philosophers and theologians developed a complex interplay of ways both of saying what God is like in an imperfect, suggestive or analogical form—"cataphatic" theology—and of saying what God is *not*—apophatic theology.<sup>249</sup>

But the ethical question is even more pressing: How can we embrace the view that the ethical imperative is to live in accordance with ultimate reality if that reality is beyond our comprehension? How can an inscrutable, unseen reality provide a viable guide for actual living?<sup>250</sup>

<sup>242</sup> See DANIEL J. BOORSTIN, *THE LOST WORLD OF THOMAS JEFFERSON* 29–30 (1993); see also Steven D. Smith, *Nonsense and Natural Law*, 4 S. CAL. INTERDISCIPLINARY L.J. 583, 590–93 (1995).

<sup>243</sup> 1 *Corinthians* 13:12.

<sup>244</sup> See, e.g., *Job* 38:1–42:6; *Isaiah* 55:8–9.

<sup>245</sup> See PLAGIER, *supra* note 84, at 95; JAROSLAV PELIKAN, *THE SPIRIT OF EASTERN CHRISTENDOM* (600–1700) at 30–36 (1974).

<sup>246</sup> UNDERHILL, *supra* note 227, at 8–9.

<sup>247</sup> See LAO TSE, *TAO TE CHING* ch. 47.

<sup>248</sup> *Id.*, ch. 56.

<sup>249</sup> See generally VLADIMIR LOSSKY, *THE MYSTICAL THEOLOGY OF THE EASTERN CHURCH* 23–42 (1991 ed.).

<sup>250</sup> The difficulty prompts Charles Larmore to argue that "God's transcendence has led to

This question leads to the fourth characteristic of the orientation of faith.

#### 4. The recognition of signals or directions for guiding human conduct

The response of faith to this apparent predicament is to accept that although human beings cannot comprehend ultimate reality, they can nonetheless receive direction or guidance from it. Different faiths differ, of course, in their understandings of how this guidance is given. But the most common views, I think, fall into two categories, which adopt what we might call the *method of revelation* and the *method of intimation*.

The first approach holds that ultimate reality issues authoritative directions at discrete times and places, and that these revelations can be preserved, interpreted and followed. The most familiar such belief is the idea that God has given instructions which have been collected in sacred texts, such as the Bible or the Koran. So humans can study and live according to divine instructions even though they cannot comprehend God and cannot grasp God's overall design.

The second approach holds that the ultimate reality presents itself or offers its guidance on a more ongoing basis—but in glimpses, intuitions or “intimations.” I have taken the term “intimations” from the title of a Wordsworth poem which speaks of

those obstinate questionings  
Of sense and outward things,  
Fallings from us, vanishings;  
Blank misgivings of a Creature  
Moving about in worlds not realised . . . .<sup>251</sup>

These “worlds not realised” are presented to us mostly in “shadowy recollections” which lead us to perceive that “[o]ur noisy years seem moments in the being of the eternal Silence.” Such intimations lead us to “truths that wake,/To perish never” and to a “faith that looks through death.”

A different example of this approach is Socrates' account, as presented by Plato, in which Socrates claims to be “subject to a divine

his withdrawal from the world and thus to the autonomy of the world.” See CHARLES LARMORE, *THE MORALS OF MODERNITY* 42 (1996). Consequently, “God's transcendence, if thought through consistently, must lead to secularization.” *Id.* at 43.

<sup>251</sup> William Wordsworth, *Ode: Intimations of Immortality from Recollections of Early Childhood*.

or supernatural experience . . . —a sort of voice which comes to me, and when it comes it always dissuades me from what I am proposing to do . . . .”<sup>252</sup> The Quaker belief in an “inner light” giving directions that the recipient might not fully grasp, but should nonetheless follow, would be another familiar example of the “method of intimation.”<sup>253</sup> So would the “Reason” whereby American transcendentalists like Emerson thought to receive intimations from the “oversoul” of the universe.<sup>254</sup> And of course on a more familiar and mundane level, ordinary people without any pretensions to special spiritual status often feel impelled to do or not to do something on the basis of a “hunch,” intuition, feeling or premonition.

The methods of revelation and intimation are not mutually exclusive. On the contrary, in many faiths they are thoroughly interrelated. It is a common contention of Christians, for instance, that God’s will is revealed in the Bible—and the disciple should therefore study it often and carefully—but that scripture cannot be fully or properly interpreted without the ongoing aid of God’s spirit. In addition, Christians frequently claim to receive inspiration independent of the activity of reading and interpreting scripture.

## 5. Trustful resignation

The cumulative product of the preceding elements is not so much a *method* or technique for making decisions about how to live, but rather an *attitude* in which the believer trustingly turns her life over to the care of a higher reality. The person of faith lives with a full awareness that she cannot see the “big picture.” She cannot predict the particular consequences of her various actions and decisions, nor can she know where her life is destined to take her. Nonetheless, she does not view the enterprise as a simple gamble, or “shot in the dark,” but rather is confident that by entrusting herself to a higher reality her actions will somehow work together for good. Her attitude, in Hans Kung’s description, is one of “fundamental trust”—of “saying yes to reality.”<sup>255</sup>

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<sup>252</sup> See PLATO, THE APOLOGY 31d. As this quotation indicates, the instructions reported by Socrates did not affirmatively direct, but rather prohibited. Whether this report should be taken at face value is, like virtually everything in Plato’s dialogues, subject to debate.

<sup>253</sup> See Robert Barclay, *Turn Thy Mind to the Light, from An Apology for . . . the Principles and Doctrines of the People Called Quakers*, reprinted in THE QUAKER READER 228–39 (Jessamine West ed., 1962).

<sup>254</sup> See PAUL F. BOLLER, JR., AMERICAN TRANSCENDENTALISM, 1830–1860: AN INTELLECTUAL INQUIRY 78–80 (1974).

<sup>255</sup> See HANS KUNG, DOES GOD EXIST? 445, 461, 465, 473 (Edward Quinn trans., Vintage ed. 1981).

Lao Tse emphasized the "resignation" aspect of this attitudinal quality with the concept of "wu wei," translated as "non-ado" or "creative letting-be." The concept counsels resignation rather than striving:

He who stands on tiptoe  
Doesn't stand firm.  
He who rushes ahead  
Doesn't go far.  
He who tries to shine  
Dims his own light.  
He who defines himself  
Can't know who he really is.  
He who has power over others  
Can't empower himself.  
He who clings to his work  
Will create nothing that endures.

If you want to accord with the Tao,  
Just do your job, then let go.

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True mastery can be gained  
By letting things go their own way.  
It can't be gained by interfering.<sup>256</sup>

One of the clearest expressions of this overall approach, and of the contrast between faith and a more rationalistic orientation, is contained in a poem, originally entitled simply "Faith," by John Henry Newman. When later set to music, the poem became one of the most popular Christian hymns (although its lack of specifically Christian language prompted doubts about its orthodoxy). The poem begins:

Lead, kindly light, amid the encircling gloom;  
Lead Thou me on!  
The night is dark, and I am far from home—  
Lead Thou me on!  
Keep Thou my feet; I do not ask to see  
The distant scene—one step enough for me.<sup>257</sup>

<sup>256</sup> LAO TSE, *TAO TE CHING* chs. 24, 48.

<sup>257</sup> The poem is reprinted and its history is discussed in OWEN CHADWICK, *THE SPIRIT OF THE OXFORD MOVEMENT* 86-98 (1990). Chadwick reports that the poem was originally titled simply "Faith." See *id.* at 86. Chadwick also reports that early hymnals often revised the words to

Taken together, these characteristics compose an orientation toward life and decision-making that differs dramatically from that of rationalism. This is not to say that faith and instrumental rationality are mutually exclusive. Typically the counsels of faith will speak to some dimensions of life but not to others. As Rabbi Heschel acknowledged, "the self has its legitimate claims and interests."<sup>258</sup> Moreover, even in the domains where faith and instrumental rationality speak, the revelations or intimations of faith may suggest broad aspirations without supplying detailed directions for day-to-day living.

Consequently, the person of faith, like the rationalist, will inevitably be engaged in the formulation of objectives and the assessment of means for achieving those objectives. Faith, however, will provide the encompassing framework for these pursuits. So although the person of faith will know intimately the daily experience of instrumental calculations, those calculations will by no means make up the core of her ethical commitments or her overall orientation toward life. Moreover, in pursuing instrumental ends within a framework of faith, the person of faith will act with a trust and hopefulness not plausibly available to those who lack such faith.<sup>259</sup>

### B. *Faith and Reason*

As noted, "faith" encompasses living in accordance with beliefs and commitments that cannot be fully justified on the basis of "reason," understood as the epistemology including formal logic and empirical observation. It hardly follows, however, that faith is incompatible with reason. On the contrary, the relationship between the epistemology of reason and the ethical orientation of faith is much more complex, and at least to some degree, mutually supporting.

Far from rejecting reason, faith commonly appeals to reason in at least two different ways. First, although I have tried to describe the generic features of an orientation of faith, in its concrete appearances faith will not be generic—it will typically be maintained in some at least loose formulation that tries to convey something about what the more overarching reality is like and how its guidance can be received—and this more substantive formulation will likely be subject, at least in some

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make them more specifically Christian—to say, for example, "Lead, Saviour, lead amid the encircling gloom." *See id.* at 90. "The Church hymn books objected to the poem because it could be sung by Unitarians." *Id.* at 92.

<sup>258</sup> HESCHEL, *supra* note 228, at xiii.

<sup>259</sup> *But cf.* Annette Baier, *Secular Faith*, in *FAITH* 226, 227 (Terence Penelhum ed., 1989) (arguing for the possibility of "the secular equivalent of faith in God").

respects, to examination by the methods of reason. Given the long history of perpetual commerce between faith and reason, the common modern notion that faith and reason are wholly different realms of experience, so that reason does not speak either to confirm or disconfirm faith,<sup>260</sup> reveals a remarkable innocence.

For example, whether the existence of God can be inferred from logic (as in the so-called "ontological argument") or from the observed facts of nature (as in the "argument from design") is a question—or rather a set of questions—that has been debated for centuries and that continues to be debated in the light of new scientific and theological understandings by people educated in religion, philosophy and science.<sup>261</sup> In a more narrowly empirical vein, at one time the truth of Christianity was often linked to the occurrence of miracles in the New Testament—John Locke's defense of Christianity, for instance, featured an argument based on Jesus' miracles<sup>262</sup>—so that scholarship employing sophisticated methods for determining the origins and historicity of biblical texts reporting such miracles is, at least in principle, relevant to this kind of faith.<sup>263</sup> Similarly, faith often produces predictions or "prophecies," some of which are definite enough to be subject to confirmation or falsification. To be sure, prophecies are notoriously susceptible to new or multiple interpretations, and at least in the short run the apparent disconfirmation of a prophecy may sometimes prompt zealous believers to even greater exertions of faith and proselytizing.<sup>264</sup> Still, faith may be, in some instances, strengthened or (as thousands of shattered followers of William Miller learned)<sup>265</sup> invalidated as these prophecies are or are not fulfilled.

How many people have been converted—or unconverted—by these sorts of considerations is uncertain, to be sure. Those who are

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<sup>260</sup> See, e.g., Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963, 969–70 (1993) (describing sharp distinction between beliefs based on "philosophy" and beliefs based on a "leap of faith"); cf. STEPHEN J. GOULD, *DINOSAUR IN A HAYSTACK* 48 (1995) (asserting science and religion cannot actually conflict because they are "utterly different" enterprises—"science as an enterprise dedicated to discovering and explaining the factual basis of the empirical world, and religion as an examination of ethics and values").

<sup>261</sup> For a consideration by an accomplished scientist and theologian of some traditional arguments for theism in light of modern developments in science, see POLKINGHORNE, *supra* note 214, at 1–24.

<sup>262</sup> See JOHN LOCKE, *THE REASONABLENESS OF CHRISTIANITY* 35–37 (George W. Ewing ed., 1964) (1695).

<sup>263</sup> For an overview and balanced assessment of the implications of modern scholarship for the historicity of the Christian Gospels, see GRAHAM N. STANTON, *THE GOSPELS AND JESUS* 150–64 (1989).

<sup>264</sup> See generally LEON FESTINGER ET AL., *WHEN PROPHECY FAILS* (1956).

<sup>265</sup> See I SIDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 579–81

skeptical of religion may suspect that religionists are impervious to reason and empirical evidence; persons skeptical of science, or at least of particular scientific theories, sometimes turn the suspicion around.<sup>266</sup> But many people have reported conversion (and unconversion) experiences influenced at least in part by such considerations<sup>267</sup> and it would seem unduly dogmatic simply to deny their sincerity *en masse*. It is surely true that individual religious believers sometimes cling to their faith even in the face of seemingly contrary evidence. Individual scientists often do the same.<sup>268</sup> Over time, however, the pressure of contrary experience tends to dislodge both insupportable scientific theories and insupportable faiths: There are few devotees today of either Ptolemaic astronomy or Zeus and Athena.<sup>269</sup>

A second way in which faith interacts with reason is more internal to a tradition of faith: Reason is employed in the understanding, continuing assessment, revision and application of the teachings of faith. Christianity, Judaism, Islam and Buddhism all provide examples of how a community or tradition of faith may be subject to vast transformations—and internal divisions—as the core of faith is expounded, interpreted and reconceived in the light both of logical examination and of ongoing human experience.

If faith is to a significant degree dependent on reason, it is also true that reason is to an extent dependent on faith. This dependency is evident in what proponents of reason typically regard as the most central and successful exemplar of reason—that is, science—because “empiricism,” as understood in the realm of science, already entails a significant exercise of faith. At a time when science was achieving its

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(1975). Leon Festinger and his colleagues discuss the Millerite movement in FESTINGER ET AL., *supra* note 264, at 12–23.

<sup>266</sup> See, e.g., PHILLIP E. JOHNSON, REASON IN THE BALANCE: THE CASE AGAINST NATURALISM IN SCIENCE, LAW AND EDUCATION (1995).

<sup>267</sup> For a collection of such conversion accounts by contemporary philosophers, see generally GOD AND THE PHILOSOPHERS: THE RECONCILIATION OF FAITH AND REASON (Thomas V. Morris ed., 1994). For an engaging account of the *unconversion* stories of a number of nineteenth century thinkers, see A.N. WILSON, GOD'S FUNERAL (1998).

<sup>268</sup> Thomas Kuhn notes that when confronted with apparently contrary evidence, scientists will typically “devise numerous articulations and ad hoc modifications of their theory in order to eliminate any apparent conflict.” THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 78 (3d ed. 1996). Indeed, “some scientists, particularly the older and more experienced ones, will resist indefinitely . . .” *Id.* at 152. Kuhn denies that there is anything disreputable or embarrassing about this phenomenon; such resistance is simply part of the puzzle-solving and occasional paradigm-testing that make science what it is.

<sup>269</sup> Although arguing that the failure of prophecy initially stimulates devout believers to even greater faith and effort, Leon Festinger and his colleagues acknowledged that “there does seem to be a point at which the disconfirming evidence has mounted sufficiently to cause the belief to be rejected.” See FESTINGER ET AL., *supra* note 264, at 12.



preeminent status in modern culture, David Hume disturbingly demonstrated that neither abstract logic nor what we might call "raw observation" could support the most essential assumptions of the scientific enterprise; a combination of logic and barebones empiricism is incapable of establishing the reality even of physical causation, nor does it support the efficacy of the inductive reasoning that is central to the scientific enterprise.<sup>270</sup> These necessary features of science, or of human life generally, are supplied by the scientists or by human beings; they represent, in an important sense, acts or "leaps" of faith.<sup>271</sup> This is not to say that scientific assumptions about order and causality are held blindly; they are to some extent subject to confirmation or disconfirmation as the enterprise proceeds. Michael Polanyi explains that science, "while using the experience of our senses as clues, transcends this experience by embracing the vision of a reality beyond the impressions of our senses, a vision which speaks for itself in guiding us to an ever deeper understanding of reality . . ."<sup>272</sup> Much the same could be said of other forms of faith which, like scientific hypotheses, are constantly growing or waning as their animating vision of reality is or is not sustained by ongoing human experience.

In sum, if "faith" goes beyond what "reason" can establish, still the two are not simply antagonists. They clash at times, at least in their particular manifestations and conclusions, but in the long run they are mutually supporting—and to some extent, mutually correcting—allies.

## VI. LAW AS AN EXPRESSION OF FAITH?

The preceding discussion has tried to describe an "orientation of faith" that is a familiar human response to the question "How should I live?" But even if this orientation is recognizable as an approach to *life* adopted by many individuals, how is faith relevant to *law*—or to jurisprudence?

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<sup>270</sup> See generally DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING, (Tom L. Beauchamp, ed., Oxford University Press 1999) (1748).

<sup>271</sup> F.R. Tennant explains:

There is no a priori reason why the world should be amenable to scientific reasoning: a world conceivably might be of such a nature that any kind of event in it succeeded on any other kind of happening. But science has approached the world with the quasi-religious faith that the world is thus amenable, and has maintained its hope against the world itself, throughout its struggle to reduce brute facts to order and law.

F.R. Tennant, *Faith*, in FAITH 99, 101 (Terence Penelhum ed., 1989).

<sup>272</sup> MICHAEL POLANYI, PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY 5-6 (1958).

Recognizing the orientation of faith is most immediately of jurisprudential value in helping to account for how law as we know it (and, even more importantly, as we *do* it) actually works. Its value in this respect can be described simply: Central features of legal practice that seem inexplicable from a rationalist perspective—and hence that rationalist theorists have criticized throughout the past century—come to seem entirely natural and appropriate from the standpoint of a certain kind of faith, or from what we might call “legal faith.”

As discussed in Part I, a close examination of the conventional legal discourse practiced by lawyers and judges in Holmes’s time and still practiced by lawyers and judges today suggests that the discourse is calculated to do just what it purports to do—that is, find “the law.” Conventional legal discourse, in other words, appears to reflect a faith in an objective law that is somehow authoritative for us. Rationalists, like Holmes, have found this project next to incomprehensible on its own terms; hence they have either proposed that conventional legal discourse be replaced by something more rational—such as “policy science”—or else they have offered alternative, more rational accounts of what (beneath the surface) lawyers and judges are “really” doing and saying. But these alternative accounts typically do not fit well with the way lawyers and judges actually talk and behave. Conversely, the puzzling aspects of legal discourse and practice come to make sense if one supposes that lawyers and judges are operating within a framework of “legal faith.”

### A. *The Legal Faith*

In order to investigate this suggestion, we need first to engage in a sort of imaginative experiment. We need to conjure up a cultural or intellectual climate in which people affirm, consciously and without embarrassment, that “the law” is something unitary and real—in which phrases like “brooding omnipresence in the sky” do not provoke amused or contemptuous denials, but rather assenting nods. What would such a faith be like? My argument will be that the assumption of a legal faith provides at least a plausible “as if” account of our own legal discourse and practices that seem inexplicable within a rationalist framework.

Indulge for a moment, then, in a thought experiment. What sort of faith might make the mysterious enterprise of legal method or legal argumentation seem natural and sensible?<sup>273</sup>

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<sup>273</sup> Readers familiar with his work will detect the heavy influence of Joseph Vining in the

We might begin by imagining that behind the day-to-day, tangible products associated with legal practice—lawyers' briefs, judicial opinions, statutes, regulations—there is some less visible but overarching reality. We could call this reality "the law." If we wanted a metaphor for "the law" (which perhaps can only be understood metaphorically), "brooding omnipresence" might well be a helpful image. Like the divinity of theistic religions, no man hath seen "the law" at any time—not directly, not with mundane eyes at least. "The law," like the Tao, is "hidden but always present." But though "the law" itself exceeds our vision, its visible manifestations are plentiful; countless volumes of them are collected on the law library shelves.

Moreover, "the law" is not just a dry fact; it is the definitive normative criterion. Legal officials are to act and make decisions, not primarily on the basis of their own interests, or even on the basis of pragmatic calculations about human interests generally. They are to act in conformity with the law.

As noted, "the law" itself cannot be seen directly, and even a cursory study of its history and manifold manifestations should be enough to show that it also cannot be fully reduced to human comprehension. Consequently, one generation's fallible understanding of "the law" may come to seem grossly inadequate, or perhaps iniquitous, to a later generation—even though the public manifestation of "the law" is in words that remain unaltered. An expression such as "equal protection of the laws" may be understood in one way in 1897 and in a drastically different way in 1954<sup>274</sup>—the earlier understanding may come to seem not merely mistaken but indeed shameful—and several decades later "the law" may speak through the same seemingly innocuous phrase to address topics (gender distinctions or matters of sexual orientation or laws regulating assisted suicide) and to issue demands that no one living at the time the phrase was first adopted would even have imagined. The legal faith might account for these changes by supposing that earlier generations failed to understand the instructions of "the law" fully or correctly. Or the faith might conceive of the overarching reality as a dynamic or "living" entity whose meaning changes over time. Either way, the guardians and interpreters of "the law" would insist that the newly announced requirements of racial and gender and other kinds of equality are not the imposition their own

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following discussion. Vining's work is discussed more explicitly *infra* at notes 335–67 and accompanying text.

<sup>274</sup> Compare *Plessy v. Ferguson*, 163 U.S. 537 (1896) with *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

preferences or politics, but are an interpretation of what "the law" demands.

Since "the law" is not in itself visible and is not fully accessible to human understanding, conformity to law necessarily means fidelity to partial guidance emanating from "the law." As in other faiths, this guidance is dispensed mostly in two ways. Sometimes major revelations are given and recorded in central canonical texts, which later generations then devote themselves to interpreting. In our own legal culture the Constitution and its major amendments—especially the Fourteenth—would be the primary examples of this sort of text, but there might also be lesser but still important instances: the Judiciary Act of 1789, *Marbury v. Madison*, *Brown v. Board of Education*. More routinely, however, "the law" reveals itself in small, incremental glimpses or intimations. Case law is the principal repository of these intimations. Cases may record intimations *about* the meanings of the primary and central texts. Or cases may contain instructions from "the law" that are more or less independent of those particular texts.

The legal faith thus supports a form of lawyerly discourse that is largely devoted to the study of cases—of cases interpreting enactments, and of cases that express the "common law"—in an effort to discern the directives of "the law." The essential point of this exercise, it is important to note, is not to determine what these lesser texts themselves would mean in some other context or discipline (which is one reason why any suggestion that law could be made determinate and scientific by simply importing the discipline of linguistics<sup>275</sup> would reflect a gross misunderstanding of the subject matter), but rather to use them as aids in receiving the instructions of "the law." There is no set formula for achieving this kind of understanding—indeed, the interpreter must herself be in tune with "the law" in order to read its previous expressions properly—and so naturally the techniques for correct interpretation cannot be confined to a fixed list. How these techniques should be selected and combined in any particular case is something that can only be decided under the subtle urgings of "the law."

So it is hardly surprising that an activity that might seem utterly discordant—suitable mostly for "trashing"<sup>276</sup>—to the critic who adopts

<sup>275</sup> For a wide-ranging discussion of the possibility, see *Proceedings of the Northwestern University/Washington University Linguistics Conference*, 73 WASH. U. L.Q. 3 (1995).

<sup>276</sup> See Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984). Kelman asserts that "[m]ost of the arguments that law professors make are not only nonsensical according to some obscure and unreachable criteria of Universal Validity but they are also patently unstable babble." *Id.* at 322.

a detached and faithless perspective will in fact resonate with a sort of beautiful necessity for those devotees who have learned to hear and harmonize with the "Singing Reason" of "the law."<sup>277</sup> Moreover, what might seem to an outsider—to a pragmatist, for example, or a skeptical critic—like a reckless or wicked disregard for the real world consequences of decisions is not troubling, because the practice reflects a deep trust that all will be well so long as we follow the teachings of "the law."

This imaginative depiction might be qualified in a way that would add realistic complexity without greatly detracting from the legal faith. This qualification would acknowledge that legal artifacts, such as judicial opinions and enacted statutes, have a dual character. In part, they are expressions of "the law," as discussed above. But they might also have a more positivist dimension insofar as they are expressions of the "will" of particular human legislators or perhaps of human judges. In the enterprise of construing these legal artifacts, therefore, interpreters might try to give effect to both aspects, attempting to respect the will of the mundane makers while at the same time listening for the deeper teachings of "the law" and seeking to reconcile the enactments with that more ultimate reality. And with the passage of time, as the immediate willed purposes of the enactments fade from memory, their more lofty and legal dimensions naturally come to dominate.<sup>278</sup> Hence, "the law" would over time "work itself pure" of more local, and perhaps more willful, impositions upon it.<sup>279</sup>

This depiction of the "legal faith" suggests ways in which the supposition of such a faith might help make sense of the ways in which lawyers and judges actually talk and argue and justify. Just as a physicist might try to explain particular behaviors of atomic particles by observing that they act "as if" they were influenced by some new particle that has not previously been detected, we might explain the behavior of lawyers and judges by saying that they act "as if" they adhered to something like the legal faith just described.

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<sup>277</sup> See LLEWELLYN, *THE COMMON LAW*, *supra* note 32, at 182-83.

<sup>278</sup> Cf. ACKERMAN, *supra* note 100, at 98, 115, 121, 141, 161 (arguing constitutional principles only become visible as the "lived experience" surrounding constitutional provisions fades and gives way to "book learning").

<sup>279</sup> See DWORKIN, *LAW'S EMPIRE*, *supra* note 57, at 400-03 (discussing and endorsing the "old trope" that the law "works itself pure").

### B. *Faith and its Imitations*

There is an obvious difficulty with the preceding discussion; it proceeds on a premise that seems patently false. Perhaps the methods and forms of argument that lawyers and judges use might be understandable on the supposition that lawyers and judges hold a certain kind of faith in "the law." But the fact is—or at least seems to be—that lawyers and judges emphatically do not maintain any such faith.

As discussed in Part I, few if any lawyers today would confess to believing that "the law" exists as a sort of "brooding omnipresence." This denial of faith is a manifestation of the central predicament of twentieth century legal thought. In the rare contexts in which explicit discussion of ethical and metaphysical commitments is called for, lawyers and judges are likely to express some metaphysically modest and suitably secular understanding of what law is. There is no legal order or reality beyond the one that we ourselves construct. Consequently, the task of law is to construct a social order that best promotes our human interests, wants and needs. These views, as Holmes and his innumerable successors have repeatedly insisted, imply that law ought to be radically transformed into an instrumentalist engine for the promotion of social policies—subject, perhaps, to the considerations of justice emphasized in modern political-moral philosophy as practiced by thinkers like Dworkin. But lawyers and judges seem unwilling or unable to carry out this transformation. Instead, they continue to adhere (sometimes quite aggressively, as in the recent prominent writings of Judge Edwards, Professor Glendon and Dean Kronman) largely to traditional legal methods that upon examination can be seen to reflect a very different orientation—an orientation of faith, and indeed of "legal faith"—that scholars and legal practitioners are likely to disavow.

Although this state of affairs may seem peculiar, upon reflection it appears that participants in the enterprise of law are hardly alone in carrying on activities that seem premised on beliefs they would not consciously affirm. In fact, we are quite familiar with a variety of attitudes that resemble faith in some respects, but that lack the inner conviction and commitment of genuine faith. Three such attitudes, or what we might think of as "quasi-faiths," could be called *fictional faith*, *ancillary faith* and *bad faith*. Each of these attitudes might help to supply an explanation of why lawyers and judges do what they do in light of what they believe or, more to the point, do *not* believe.

## 1. Fictional faith

One possibility is that law expresses a sort of fictional or "as if" faith. This attitude would have all of the features of the faith described above, except that its practitioners at bottom do not believe that the overarching reality on which the practice depends—in this case, "the law"—"really" exists. Instead, for benevolent or prudential reasons they talk and act *as if* they believe in that reality. They adopt a sort of quasi-belief, or calculated suspension of disbelief, for purposes of engaging in a valued activity, much in the way that readers of novels or viewers of films suspend disbelief while engaged in the activity of reading or viewing. This suspension of disbelief serves a valuable purpose. Readers of novels gain an enjoyment and enrichment that they would not derive if they constantly kept reminding themselves that "this didn't really happen." Practitioners of law deliberately suspend disbelief in order to make the celebrated "rule of law" ideal possible.<sup>280</sup>

An understanding of law as a fictional faith seems consistent with familiar features of legal practice and culture. First, fictional thinking seems to come easily and naturally to lawyers and judges.<sup>281</sup> Indeed, the fictional application of terms and concepts has been a principal vehicle by which the common law has adapted to changes in the world.<sup>282</sup> And lawyers today routinely deal in "constructive" trusts, "constructive" notice, contractual terms "implied in law" and a variety of intellectual tricks for pretending, for different purposes, that "the state" both is and is not being sued in a given lawsuit.<sup>283</sup>

These are what we might call "little fictions"; they function to extend, round off, and fill in the law. But at its core, legal thinking also contains "big fictions." In the jurisprudence of Hans Kelsen, for example, the very existence of law as a system of norms depends on the assumption that there is one central and basic norm from which the rest of the system derives its legitimacy.<sup>284</sup> The status of this central entity is mysterious. The basic norm could hardly be thought to be an

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<sup>280</sup> For a discussion of the nature and purposes of fictional thinking in law, see Steven D. Smith, *Radically Subversive Speech and the Authority of Law*, 94 MICH. L. REV. 348, 362-67 (1995).

<sup>281</sup> See generally LON L. FULLER, *LEGAL FICTIONS* (1967). For a critical analysis of the use of legal fictions, see Peter Birks, *Fictions Ancient and Modern*, in *THE LEGAL MIND* 83 (Neil MacCormick & Peter Birks eds., 1986).

<sup>282</sup> See S.F.C. MILSON, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 34-35, 61-65 (2d ed. 1981).

<sup>283</sup> For an explanation of the fictions involved in suits against a state for constitutional violations, see ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 346-47 (1989).

<sup>284</sup> See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 115-22 (Anders Wedling trans., 1945).

empirically observable reality, although its effects (that is, the positive laws) are observable. It is not legally enacted—and logically could not be, since all legal enactments already depend upon it for their “legal” character. Instead, the basic norm is “presupposed” or “postulated”;<sup>285</sup> it “exists in the juristic consciousness”<sup>286</sup>—or, more accurately, in the juristic unconsciousness, thus presenting the curious spectacle of an entity that exists only in thought but is rarely if ever actually thought of.<sup>287</sup> In short, the basic norm is in the nature of a necessary postulate, or big fiction—something that we need to treat “as if” it were real in order to have a legal system at all.

The “rule of recognition” that H.L.A. Hart perceived at the foundation of law<sup>288</sup> has a comparable quality. Hart’s rule of recognition is paradoxically circular: The rule achieves its status and content, he explained, from the fact that legal officials accept it as authoritative in a particular form;<sup>289</sup> but those officials enjoy their own status as legal officials because the rule of recognition or subsidiary rules confer it upon them. So the rule of recognition seems to be a kind of boot-straping, self-realizing fiction.

In a similar vein, Ronald Dworkin’s jurisprudence literally teems with fictional entities: a whole array of “legal principles,”<sup>290</sup> a “community of principle” that is necessary for law to have authority,<sup>291</sup> a “single author” of the whole law who permits law to be viewed as a unified, coherent body of principles.<sup>292</sup> Dworkin never suggests that any of these things have any reality independent of our legal practices and their implicit assumptions, and it is not easy to imagine how they *could* have any such reality.<sup>293</sup> On the contrary, some of them, such as the “community of principle,” seem flatly contrary to empirically observable reality, and Dworkin himself describes this community as having its

<sup>285</sup> See *id.* at 115.

<sup>286</sup> See *id.* at 116.

<sup>287</sup> See *id.* (“By formulating the basic norm, we . . . merely make explicit what all jurists, mostly unconsciously, assume . . .”) (emphasis added).

<sup>288</sup> See HART, *supra* note 116, at 97–114 (1961).

<sup>289</sup> See *id.* at 111–13.

<sup>290</sup> See generally DWORKIN, A MATTER OF PRINCIPLE, *supra* note 128; DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 124, at 22–45.

<sup>291</sup> Dworkin explains the “community of principle” in this way: “people are members of a genuine political community only when they accept that their fates are linked in the following strong way: they accept that they are governed by common principles, not by rules hammered out in political compromise.” DWORKIN, LAW’S EMPIRE, *supra* note 57, at 211.

<sup>292</sup> See *id.* at 225.

<sup>293</sup> Larry Alexander observes that legal “principles” of the kind so often invoked by Dworkin and others are “ontologically queer.” Alexander, *supra* note 31, at 532. For more detailed discussions, see ALEXANDER & KRESS, *supra* note 70 and Smith, *Idolatry*, *supra* note 59, at 181–86.



existence through an act of imagination that he calls "personification."<sup>294</sup> These entities exist because and in the sense that they are presupposed—treated "as if" they existed—in our legal practices. They are, in short, fictions.

This lawyerly proclivity to fictional thinking is consistent with a view of law as the practice of a fictional faith, a faith built on the fiction of "the law" itself. That view also helps to explain the ludic or game-like quality of much of law.<sup>295</sup> We *can* plausibly speak of "the law" as something that exists, or as a "fact," in the same way that we say it is a fact—a provable fact, within an understood game, that is—that Miss Scarlet killed Colonel Mustard in the library with the candlestick. Someone who thinks Mr. Green killed Mrs. White in the lounge with the revolver is simply and demonstrably wrong—within the framework of the game, of course.

The supposition that law is a fictional faith also may help to explain the puzzling double-mindedness—the peculiar combination of skeptical sophistication and apparent naivete—that lawyers and legal scholars so often exhibit regarding the ontological status of "the law." As noted, if the issue is raised in a context calling for critical self-consciousness, lawyers and especially legal scholars will scoff at the notion that "the law"—an entity exhibiting some of the qualities of a "brooding omnipresence"—somehow exists. But then the conversation changes ("Did the Fifth Circuit get the law right in *Smith v. Jones*?" or "Does section five of the Fourteenth Amendment authorize Congress to expand constitutional rights?") and these same worldly-wise skeptics will immediately launch into earnest doctrinal arguments that make no apparent sense except on the presupposition that "the law" *does* exist. Or the lawyers mock "legal formalism" and recite "we are all realists now," but go on writing briefs or opinions or articles that sound for all the world like the work of formalists; and then if a critic raises anti-formalist objections, they will yawn and say, "We all understand that. Please don't be patronizing."

A detached critic might well feel constrained to classify these familiar but seemingly schizophrenic phenomena as a kind of mental illness.<sup>296</sup> But this double-mindedness becomes less puzzling if we suppose that lawyers instinctively know they are playing a game. While

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<sup>294</sup> See DWORKIN, *LAW'S EMPIRE*, *supra* note 58, at 167–75.

<sup>295</sup> See Arthur Leff, *Law and*, 87 *YALE L.J.* 989, 998–1005 (1978).

<sup>296</sup> See generally CAMPOS, *JURISMANIA* *supra* note 37; R. George Wright, *What's Gone Wrong with Legal Theory?: The Three Faces of our Split Personality*, 33 *WAKE FOREST L. REV.* 410 (1998) (describing dimensions of "the split legal personality").

engaged in the game, they may *act like* formalists—believers in “the law”—because that is what the game calls for. Nor is there anything cynical or dishonest about this practice so long as everyone understands, at least tacitly, that the practice is part of the game. But realist or anti-formalist criticisms are a cue to step outside the game, and in that context lawyers and judges are perfectly well aware that “the law”—the metaphysical law—does not “really” exist.<sup>297</sup>

If the depiction of law as a fictional faith seems to fit and explain much of legal practice, there is one quality of practice that the depiction does not adequately account for—that is, the trust that lawyers place in law as a method for making real world decisions. As discussed in Part I, legal practice does not make decisions, even decisions of vast social importance, in the way that political leaders or business executives or investment advisors or ordinary people usually do—that is, by a forward-looking assessment of future consequences (with a decent respect for the past as a source of information relevant to the future and of expectations to be honored). Instead, legal practice mainly tries to derive decisions by figuring out what “the law” requires. As discussed in Part II, it is precisely this nonconsequentialist, “artificial” aspect of conventional legal reasoning that Holmes and his descendants over the past century have found so deplorable. The typical lawyer or judge appears to trust, however, that all will be for the best if decisions are made in accordance with “the law.” But a depiction of law as a sort of game involving a fictional faith fails to account for this trust.

It may be *possible*, in other words, to talk and act “as if” the law were real. Lawyers and judges seem adept at doing just that. But if we also believe that in fact “the law”—the metaphysical “law”—is *not* real, or if it is real only in the sense that a fiction is real, then what sense does it make to entrust vitally important, sometimes life-or-death decisions to that imaginary entity? Why should we let real world results flow from a game of pretend? If law is a game, it is, as Arthur Leff observed, “like a game of chess in which, when the King is mated, a real king dies.”<sup>298</sup> We can imagine seeing such a game in an eerie episode of, say, “Alfred Hitchcock Presents” or “The X Files.” By analogy, there may be value in allowing children to play at cops and robbers, but we do not let them play the game with real guns. So why should real consequences be left to turn on a merely fictional faith?

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<sup>297</sup> This depiction of the way in which law might have reality and yield “truth” is very similar to the position of modern legal formalists like Dennis Patterson. See *supra* notes 139–44 and accompanying text.

<sup>298</sup> See Leff, *supra* note 295, at 1005.

In short, although the idea of "fictional faith" illuminates some aspects of legal practice, it also seems that the operations of law presuppose a faith in a law that is more than merely fictional. So we should consider other types of quasi-faith that might provide a plausible account of the workings of law.

## 2. Ancillary faith

As a historical matter, law usually has not operated as an independent or free-standing faith; instead, it has typically functioned as a sort of appendage to a more complete and self-conscious faith. Through much of Western history, law operated under the broad canopy of Christendom, so that in both its content and its form Western law has reflected the powerful influence of an explicit Christian faith. This interrelationship is thoughtfully explored in Harold Berman's *Law and Revolution*. Berman argues that although many cultures and civilizations have developed legal systems, Western law developed distinctive features, and these features began to form at the same time and as a direct result of the Papal Revolution of the Eleventh Century—a development that self-consciously sought to solidify the Christian underpinnings of society. Indeed, some of the central features that are most indicative of law's grounding in an orientation of faith—in particular, the idea of "the law" as a unified whole that develops according to its own internal workings and not merely in response to outside pressures or the instrumentalist pursuit of social goals—developed during this period.<sup>299</sup> So Western law, in this view, is intimately tied to the Christian faith.

And indeed, through much of its history, the Anglo-American common law in particular was thought to be closely related to Christianity. Stuart Banner observes that when the great common law judge and scholar Matthew Hale stated in 1676 that Christianity was part of the common law, Hale was merely making explicit what would widely have been regarded as self-evident.<sup>300</sup> The association persisted in this country. Thus, in the nineteenth century, "[f]rom the United States Supreme Court to scattered local courts, from Kent and Story to dozens of writers no one remembers today, Christianity was generally accepted to be part of the common law."<sup>301</sup>

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<sup>299</sup> See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 8–10, 139–98 (1983).

<sup>300</sup> See Banner, *supra* note 199, at 29.

<sup>301</sup> *Id.* at 43. Not everyone agreed; Jefferson, for example, rejected the common belief. See *id.* at 55.

Attachment to a more self-conscious and developed faith might support the practice of law as a sort of corollary or quasi-faith in two quite different ways. First, and most directly, the explicit faith might supply both an ontology and an epistemology directly supporting the practice of law. Thomist philosophy, for example, provides an intricate framework in which "the law" *is* viewed as real, not merely fictional. Simply described, this framework understands God's design for the world to be the "eternal law." That subset of the eternal law which is directly accessible to human understanding without the aid of revelation is called the "natural law," and insofar as this law is enacted in positive form by temporal political authorities it becomes the "human law" or the "positive law."<sup>302</sup> In addition, Thomist philosophy offers an explanation for how custom acquires legal significance.<sup>303</sup> In this way, an explicit faith provides possible justifications for many of the core assumptions and practices of conventional legal reasoning.<sup>304</sup>

In a similar way, its association with Christianity may have supported the common law's distinctive methods of reasoning. In his account of the nature of law, Blackstone offered a framework strikingly similar to the natural law framework expounded by Aquinas.<sup>305</sup> In a similar vein, Stuart Banner maintains that the proposition that Christianity was part of the common law was "not a doctrine so much as a meta-doctrine"; the meta-doctrine helped support a "non-positivist" view of the common law "as having an existence independent of the statements of judges."<sup>306</sup> This jurisprudential function was hardly trivial; the "non-positivist" jurisprudence was precisely what underlay the view that the law was there to be "discovered"<sup>307</sup> and not made. Additionally, the non-positivist jurisprudence supports the forms of conventional lawyerly argument that accompanied that view. Quoting Richard

<sup>302</sup> See *Summa Theologica*, Questions 90–91, reprinted in SAINT THOMAS AQUINAS ON LAW, MORALITY, AND POLITICS 11–28 (William P. Baumgart & Richard J. Regan, S.J., eds. 1988).

<sup>303</sup> See *id.* at 79–81 (noting question 97, article 3).

<sup>304</sup> As Harold Berman explains, the Western notion of law as a unity that develops organically "was rooted . . . in the theological conviction that the universe itself was subject to law." BERMAN, *supra* note 299, at 536.

<sup>305</sup> See BLACKSTONE, *supra* note 42, at \*38–43. Blackstone states

[t]his law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

*Id.* at 41.

<sup>306</sup> See Banner, *supra* note 199, at 50, 61; see also FELDMAN, *supra* note 125, at 159 (discussing Joseph Story's view that a natural law closely associated with Christianity undergirds all law).

<sup>307</sup> See Banner, *supra* note 199, at 60.

Hooker's statement that law sits "in the bosom of God, her voice the harmony of the world," Robert Gordon contends that pre-Holmesian lawyers "had, as they saw it, a direct line to God's mind through their knowledge of the principles of legal science."<sup>308</sup>

Less directly, but perhaps as importantly, a consciously- and sincerely-held faith might help to create the mindset and the kinds of habits reflected in legal practice, even if the faith does not directly endorse the assumptions of that practice. In this way, an explicit faith might support law in the same way that Weber thought Protestantism had supported capitalism: By instilling in people qualities such as industriousness, self-denial, and a sense of calling, Protestantism had laid "the religious foundations of worldly asceticism" that comprised "the spirit of capitalism."<sup>309</sup> So Benjamin Franklin was a sort of quintessential Protestant—minus the religion.<sup>310</sup> In similar fashion, persons immersed in an explicit faith might naturally learn to think of an unseen reality as normatively authoritative. And they would become accustomed to making decisions—to orienting their lives—by looking to a variety of supposed revelations or intimations that are taken as dispensing guidance from that unseen reality. In this way, legal practice might be parasitic even on an explicit faith that did not directly provide any justification for the particular content or practices of the law. Moreover, an ancillary faith might well generate the sort of habitual trust that a merely fictional faith could not support.

In this vein, Pierre Schlag describes modern law as "the continuation of God by other means."<sup>311</sup> Schlag explores parallels between the classic philosophical arguments for the existence of God and the defenses of the enterprise of law raised by modern legal thinkers, ranging from formalists such as Joseph Beale to contemporary mainstream, pragmatist and post-modern scholars like Owen Fiss, Margaret Jane Radin, Frank Michelman and Jack Balkin.<sup>312</sup> These legal thinkers do not explicitly or consciously embrace the theological framework that they inadvertently imitate; nonetheless, Schlag argues, their ways of thinking and arguing show that they are engaged in a "residually theological discourse."<sup>313</sup>

<sup>308</sup> Robert Gordon, *The Path of the Lawyer*, 110 HARV. L. REV. 1013, 1013 (1997).

<sup>309</sup> See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 95, 47 (Talcott Parsons trans., Scribner 1958) (1904-05).

<sup>310</sup> See *id.* at 48-56, 151.

<sup>311</sup> See Pierre Schlag, *Law as the Continuation of God by Other Means*, 85 CAL. L. REV. 427 (1997).

<sup>312</sup> See *id.* at 428-37.

<sup>313</sup> See *id.* at 439; cf. Cohen, *supra* note 101, at 833 (describing conventional approach to law as "legal theology").

An ancillary faith, however, would naturally encounter serious difficulties if it were cut off from the explicit faith to which it was attached. Trouble would arise, in other words, with the religious disestablishment—not formal disestablishment so much as *de facto* disestablishment<sup>314</sup>—that would inhibit law from drawing on the primary faith that previously sustained it. This observation suggests a possible diagnosis of the course of legal thinking in this country. Despite formal disestablishment in the late eighteenth and early nineteenth centuries, legal culture in this country continued to enjoy a symbiotic relationship with Protestant Christianity. As discussed in Part IV, however, as the nineteenth century moved into the twentieth, this relationship was ruptured. More fully than in the past, law was accordingly left on its own<sup>315</sup>—a condition that was accentuated by the growing secularism of the academy.

So it is no coincidence that at about this time disenchanted prophets like Holmes began to find the traditional operations of law—operations grounded in a law that served as an ancillary faith—“revolting” and unintelligible. And they naturally began to understand law in more secular and rationalist terms—as the product, for example, of instrumentalist calculations that judges make without quite being aware of what they are doing, and that now should be brought into the open. Unfortunately, this newly-supplied rationalist framework, however appealing, had little to do with the enterprise that for centuries had gone under the name of “law.” Consequently, secular rationalists such as Holmes and his descendants might be compared to uninitiated observers who look over a golf course and, surmising that the golfers must be trying to keep the grass short, point out disdainfully that there are far more efficient methods of achieving this objective. In each case, the observers have badly misunderstood the enterprise they are trying to explain and regulate.<sup>316</sup>

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<sup>314</sup>For a discussion of the “de facto disestablishment” and some of its consequences, see generally Steven D. Smith, *Legal Discourse and the De Facto Disestablishment*, 81 MARQ. L. REV. 203 (1998).

<sup>315</sup>See Morton J. Horwitz, *The Book Nomination and American Constitution History*, 39 SYRACUSE L. REV. 1029, 1033 (1988) (“If you look at the relationship between law and religion in American society, you will see the tremendous connection between the two and the ways in which law came in the late nineteenth century to replace religion as one of the dominant forms of certainty and legitimacy in social life.”); see also Christopher Shaunon, *The Dance of History*, 8 YALE J. L. & HUMAN. 495, 503 (1996) (book review) (“The nineteenth century disestablished religion, but it did not disestablish law. Legal discourse retains an air of sanctity largely lacking in the humanities due to its connection to ‘sacred,’ pre-scientific interpretive traditions.”).

<sup>316</sup>Harold Berman asserts in this vein that “Western legal science is a secular theology, which often makes no sense because its theological presuppositions are no longer accepted.” BERMAN, *supra* note 299, at 165; see also HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF

This depiction of law as a parasitic faith that has been cut off from its host thus provides a plausible account of how the features of law developed and of why the law as it actually operates has seemed so alien to twentieth century theorists. This depiction leaves a question, however, about the current character of legal practice. If law arose out of and has depended on attachment to a more explicit faith, then why does the practice of law persist even though the attachment on which it depends has long been dissolved? Are the mental habits and practices produced by a now discarded faith really so entrenched that they can endure for years, or even generations, after the tie to the primary, explicit faith has been severed? And if they can, does it make sense to continue to describe that practice as "ancillary" when it has long been disjoined from its former principal?

Moreover, it would seem that, deprived of the conscious faith that once supported it, the merely habitual continuation of a practice would be possible only if the practitioners managed to avoid reflecting critically on what they were doing. Conversely, if they *did* stop to reflect, they seemingly would be forced either to admit that the practice makes no sense on current assumptions—and should therefore be abandoned—or else to maintain the practice by embracing a strategy of deception or self-deception.<sup>317</sup> Schlag suggests that such a practice might be maintainable only by resorting to "bad faith."<sup>318</sup> Not surprisingly, this is just what some critics think law does rest on.

### 3. Bad faith

Pursuing this suggestion, we might wonder whether lawyers and judges are routinely acting from "bad faith." The concept of "bad faith" is both a familiar legal term and a notion used more broadly in ethical discourse, especially by existentialist thinkers like Sartre.<sup>319</sup> For present purposes, we can say that a person is in bad faith if she purports to act on the basis of a set of beliefs—or a faith—that in fact she does not sincerely hold. Bad faith is a close cousin to the common notion of

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LAW AND RELIGION 45 (1993) ("The primary cause of the crisis of the Western legal tradition is, I believe, the disintegration of its religious foundations.").

<sup>317</sup> In Mark Kelman's view, "[l]aw professors are, in fact, a kiss away from panic at every serious, self-conscious moment in which they don't have a bunch of overawed students to kick around." Kelman, *supra* note 276, at 322.

<sup>318</sup> See Schlag, *supra* note 311, at 440.

<sup>319</sup> For a helpful exposition, see MIKE W. MARTIN, SELF-DECEPTION AND MORALITY 53-79 (1986).

hypocrisy, in which a person pretends in public to hold commitments and beliefs that in private he does not maintain.

One diagnosis of the contemporary situation in law is that legal practitioners—lawyers, judges and law professors—act pervasively in bad faith. In this vein, Roberto Unger famously described the pre-CLS legal professoriat—and there is no apparent reason to treat the post-CLS professoriat differently—as “a priesthood that had lost their faith and kept their jobs.”<sup>320</sup> Recently, Duncan Kennedy has offered an extensive diagnosis of modern legal culture that pervasively depends on ascriptions of bad faith. Through the use of the concept, Kennedy seeks to explain “the simultaneously critical and ‘believing’ character of American legal consciousness, its paradoxical combination of skepticism and faith.”<sup>321</sup>

The source of the bad faith, in Kennedy’s analysis, is the conflict between the commitment to “rule of law”—a commitment that requires law to be determinate, deductive and, above all, nonideological—and the knowledge that in fact law does not and cannot work in the way the ideal contemplates. Judges resolve this conflict by presenting decisions as deductive, and by half-believing that law in fact has this character, even though at another level they know this is not so. They do not (and could not, at least in a systemic way) engage in “conscious, deliberate, strategic misrepresentation;”<sup>322</sup> rather, their denial of the ideological character of legal decisions is “half-conscious, or conscious and unconscious at the same time.”<sup>323</sup> Drawing on the work of Freud and Sartre, Kennedy suggests that “there is some part of the psyche that registers the possibility of the unpleasant truth and then mobilizes to keep from knowing it.”<sup>324</sup> Consequently,

[t]he ideological element [in law] is a kind of secret, like a family secret—the incestuous relationship between grandfather and mother—that affects all the generations as something that is both known and denied.<sup>325</sup>

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<sup>320</sup> See Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 674–75 (1983).

<sup>321</sup> See KENNEDY, *supra* note 133, at 106.

<sup>322</sup> *Id.* at 193. Kennedy suggests that legal culture probably could not practice conscious dishonesty because “it would then have the instability of any conspiracy that involves many thousands of people and has to constantly renew itself by recruiting new Grand Inquisitors.” *Id.* at 192. A few judges, however, may be guilty of conscious lying. See *id.* at 202.

<sup>323</sup> *Id.* at 200.

<sup>324</sup> KENNEDY, *supra* note 133, at 199.

<sup>325</sup> *Id.* at 191.



Kennedy's diagnosis of legal culture is a nuanced one. He acknowledges that denial and bad faith work differently in different judges.<sup>326</sup> And he does not depict law as simply and purely an exercise in bad faith. Legal texts *do* effectively and legitimately constrain, in a non-ideological way, to a limited extent: Hence, critical claims that exaggerate the indeterminacy and ideological quality of law are implausible and may themselves reflect bad faith on the part of the critics.<sup>327</sup> Moreover, the bad faith representation of law as nonideological is not simply a device by which one class—judges and lawyers—deceive and oppress other classes. On the contrary, the bad faith engulfs us all—perhaps for our benefit:

Judges keep the secret, even from themselves, in part because participants in legal culture and in the general political culture want them to. Everyone wants it to be true that it is not only possible but common for judges to judge nonideologically. But everyone is aware of the critique, and everyone knows that the naive theory of the rule of law is a fairy tale . . . .<sup>328</sup>

In short, we manage to maintain faith, albeit "bad faith," in the law because we think "the rule of law is . . . a beneficent illusion." To be sure, the illusion confers a dangerous authority on judges. Still, if the illusion were shattered, then perhaps "judges would tyrannize us worse than they do already."<sup>329</sup> Consequently, the legal academy and the legal culture have reason to ignore or censure anyone who threatens the illusion by telling the truth about the law.<sup>330</sup>

Although in some respects this seems a plausible depiction of contemporary legal culture, it fails to appreciate the full complexities of the internal dissonance in contemporary legal culture. It may be true, as Kennedy suggests, that judges routinely present their decisions as the product of deductive, formalist reasoning. This is the aspect of legal culture, of course, that underlies Kennedy's charges of bad faith.

<sup>326</sup> See *id.* at 194–98.

<sup>327</sup> See, e.g., *id.* at 198 (observing "the insistence that law is always and everywhere ideological" involves as much denial as the more common and formalist position, reflecting the fact that "[r]adicals have commitments to the presence of ideology in adjudication that it would be hard to give up").

<sup>328</sup> *Id.* at 192; cf. CAMPOS, JURISMANIA, *supra* note 37, at 176 (suggesting that law is "an institution that survives, and even thrives, because it fill[s] a deep cultural need for the maintenance of some atavistic set of rituals that will obscure the inescapably troublesome and often tragic relationship between moral belief, political practice, and social power").

<sup>329</sup> See KENNEDY, *supra* note 133, at 206.

<sup>330</sup> See *id.* at 209.

But Kennedy seems insufficiently attentive to another important feature of legal culture—to the fact, that is, that judges and lawyers today typically do *not* avow a belief in the sort of law that their practices seem to presuppose. In this respect, legal culture does not conform to the familiar pattern of bad faith.

In ordinary bad faith, in other words, a person professes *to believe* in something that in fact he does not believe. His hypocrisy or self-deception serves his interests, because without a (false) profession of belief he would lose something he values. In contemporary legal culture, on the contrary, practitioners profess *not to believe* in something—the metaphysical law—that their actions suggest they actually *do* believe in. And since their practice—or, more generally, “the law” itself—is something that they evidently value, their dissonant professions of disbelief in the presuppositions of law are not self-serving in any straightforward sense.

To put the point differently, if lawyers were practicing bad faith in the typical sense, then one would expect them to protect their practice by *avowing* the faith presupposed in the practice, not by *disavowing* it. Disillusioned ministers or pastors, it is said, sometimes do this; Unger’s comparison of law professors to a “priesthood that had lost their faith”<sup>331</sup> draws on this sort of reference. But on closer examination, it seems that lawyers and law professors do just the opposite of the bad faith pastor: They persist in the practice while *denying* the faith. Or rather, they avow faith *in the practice*, but *not in the premises that seem necessary to support the practice*.

This perplexing condition invites us to consider a different and almost opposite possibility: Could it be that at some level legal practitioners *do* believe in “the law,” and that if they are guilty of “bad faith,” their misrepresentation or self-deception occurs *not* when they engage in the faith-presupposing practices of law but rather when they consciously or explicitly disavow that faith? In short, although lawyers and judges might be in bad faith when they engage in the *practice* of law, their overall behavior seems more consistent with the hypothesis that the self-deception occurs when lawyers and theorists engage in explicit *theorizing* about law—and when in the course of such theorizing they affirm rationalist, metaphysically reductionist commitments that are inconsistent with their practice.<sup>332</sup>

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<sup>331</sup> See Unger, *supra* note 320, at 674–75.

<sup>332</sup> There is still another possibility: Lawyers might be in bad faith *both* in their practice and in their theorizing. They might in fact adhere to a kind of faith that they hide or disavow in their explicit theorizing, but that faith might not be one that would support the current operations of legal practice.

This possibility brings us full circle—back to the “legal faith.” And so we should consider once again the question whether law is in fact the expression not of a “quasi” or “bad” faith, but of an actual “legal faith.”

### C. *The Hidden Faith of the Law?*

The most searching investigation of this counterintuitive possibility occurs in the recent work of Joseph Vining, and in particular in his book *From Newton's Sleep*. Vining aims to discover what sort of faith lawyers (and human beings in general)<sup>333</sup> really hold—a task that is both complicated and perilous because Vining does not assume that our beliefs are transparent or immediately accessible even to ourselves through casual inspection or introspection. “We hardly know ourselves,” he confesses.<sup>334</sup> Consequently, what I *think* I believe is evidence—but *only* evidence—of what I *really* believe. The ways I use language (as opposed to what I explicitly assert), and the ways in which I act and plan and live are also evidence of what I believe.<sup>335</sup> So discovering what I believe entails a careful reflection upon what I think, say and do in order to reveal the underlying beliefs that authentically are part of me.<sup>336</sup> In the same way, the investigation of what lawyers (or human beings generally) believe involves a close examination not only of what people *say* they believe but also of what they tacitly concede in the way they talk and of the presuppositions that seem to underlie their actions.<sup>337</sup> These various kinds of evidence may often contradict each other—for example, Vining frequently identifies statements or actions in which lawyers, scientists or philosophers tacitly deny what they explicitly assert, and *vice versa*<sup>338</sup>—so that the determination of belief is no easy task that can be finally and confidently completed.

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<sup>333</sup> Vining argues that human existence is permeated by law and legal thinking, hence examining legal practice and the kind of belief reflected in it is a way of studying human belief generally. See VINING, *NEWTON'S SLEEP*, *supra* note 22, at 107.

<sup>334</sup> *Id.* at 344.

<sup>335</sup> See *id.* at 128, 130, 189.

<sup>336</sup> In this respect, Vining's project is very much like that described by Michael Polanyi:

I believe that the function of philosophic reflection consists in bringing to light, and affirming as my own, the beliefs implied in such of my thoughts and practices as I believe to be valid; that I must aim at discovering what I truly believe in and at formulating the convictions which I find myself holding; that I must conquer my self-doubts, so as to retain a firm hold on this programme of self-identification.

POLANYI, *supra* note 272, at 267.

<sup>337</sup> See VINING, *NEWTON'S SLEEP*, *supra* note 22, at 5 (asserting “it is too often overlooked that law is evidence of view and belief far stronger than academic statement and introspection can provide”); see also *id.* at 60, 224, 331.

<sup>338</sup> See, e.g., *id.* at 136, 140, 176, 187.

Vining's mode of presentation reflects these difficulties. He offers no linear analysis leading to any definite and confident conclusion, but rather a series of reflections ranging from near aphorisms to short essays. The argument—and despite its self-consciously meandering method<sup>339</sup> the book plainly contains an overall argument—advances slowly, haltingly, and with many changes of direction, detours and returns. In the end, the argument leaves a good deal open or uncertain. No summary could hope to capture the range or quality of the reflection but some recurring central themes can be identified.

In the first place, Vining repeatedly observes that the activity of a lawyer involves the careful reading of texts—statutes, cases, contracts, regulations. Moreover, lawyers read texts with a particular purpose in mind; they aim to encounter “authority”—something that deserves our attention and respect. But it makes no sense to read carefully—much less to read a text seeking authority—unless one supposes that the text is the expression of some *person*. Without a person speaking to us there would be no meaning in the words at all, much less a meaning that we would respect and struggle to understand.<sup>340</sup> Thus, Vining emphasizes that if we were to come upon what might appear to be a text only to discover that, in fact, it is the product of random, mindless processes—of waves on the beach, or of a manual containing form letters—then we would not engage in close reading to determine the text's meaning. Indeed, we would be embarrassed to be caught in such an activity, feeling “the blush of foolishness that comes with an awareness no one is speaking.”<sup>341</sup> Much less would we regard the mindless marks as worthy of deference or respect.

The activities of law, therefore, betray a constant presupposition of *mind* behind, and expressing itself in, the texts lawyers study.<sup>342</sup> Law is, in effect, a restless “search for voices.”<sup>343</sup>

Insofar as he insists that bare words have no meanings and that interpretation must look to what an *author* was trying to say, it might almost seem that Vining is arguing for the familiar “intentionalist” versions of constitutional or statutory construction. But Vining suggests that our practices cannot be accounted for by supposing that we are

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<sup>339</sup> This method of indirection and repetition is consciously chosen. “If you are writing, rather than speaking intimately face to face,” Vining explains, “you do not rush to bare yourself. Any writing is distillation of vacillations, resolution of doubts, linking of intermittent perceptions you know you have some days and times and have not on others.” *Id.* at 343.

<sup>340</sup> *See id.* at 183, 239.

<sup>341</sup> *See* VINING, NEWTON'S SLEEP, *supra* note 22, at 243; *see also id.* at 7–8, 182–83.

<sup>342</sup> *See id.* note 22, at 180.

<sup>343</sup> *See id.* at 117.

merely looking for the intentions of the flesh-and-blood authors of a statute or constitutional provision. After all, not just any author would be worthy of deference. In order to merit that respect, and hence to justify our interpretive practices, the author would need to speak *to us, now*—would need in some sense to be actually *present*.<sup>344</sup> The author would also need to address us not in a game of manipulation, but in “good faith.”<sup>345</sup> And the author would need to display the qualities of caring, and of mindfulness, that warrant our continued attention and respect.<sup>346</sup> Rarely, if ever, would the enactors of some dated statute or ancient constitution have these qualities.

Nonetheless, we continue to interpret the materials of law in ways that presuppose some such mind speaking to us through the assorted texts that lawyers study and invoke. So we must be seeking an author beyond the particular enactors.<sup>347</sup> “Lawyers are caught by legislation and their reading of it,” Vining argues. “Either they must believe what they do with legislation is often foolish and deceptive; or they do believe and confess a belief in *an informing spirit* in the legislated words that is *beyond individual legislators*.”<sup>348</sup>

We thereby reveal a faith that there is something—or, better, *someone*<sup>349</sup>—who communicates to us through the texts that lawyers study, but who transcends the flesh-and-blood authors of those texts. Just who or what that someone is remains obscure, an object of Vining’s continual musings. He describes the ultimate author as “spirit” and as the “transcendent.”<sup>350</sup> At times he hints at a sort of pantheism, in which through the practices of the law we come to know the universal mind, while at the same time we come to know our own true selves, and these somehow turn out to be the same thing.<sup>351</sup> In this spirit, Vining wonders whether “our whole life outer and inner exists forever as a memory in

<sup>344</sup> See, e.g., *id.* at 109 (stating “[b]ut the authority of law is not the clutch of the past. . . . The ‘dead hand of the past’ is just that: dead, gone. The past cannot touch us.”).

<sup>345</sup> See VINING, NEWTON’S SLEEP, *supra* note 22, at 111, 239.

<sup>346</sup> See *id.* at 180.

<sup>347</sup> See *id.* at 74 (stating we act on “the premise . . . that there is a unity and spirit. Without spirit there is nothing in law, no reason to read or listen closely, to defer, to be deferred to”).

<sup>348</sup> *Id.* at 200 (emphasis added). Vining adds: “As in all large matters, there is a mixture, the usual combination, of doubt and belief, made easier to live with, as usual, by strong doses of self-deception.” *Id.*

<sup>349</sup> See VINING, NEWTON’S SLEEP, *supra* note 22, at 201 (“So the first and last thing we know, the ultimate object of knowledge and belief, is a person, not a principle. . . . This is what we know, what is real, what has meaning.”).

<sup>350</sup> See *id.* at 157, 222.

<sup>351</sup> See *id.* at 128 (“[T]he question of what the law ‘is’ is not so very different from the question of what we ‘are.’”).

a greater mind"<sup>352</sup> and he asks "[w]hat is that original mind if not a mind something like our own, and what are it and our own but points to a larger mind?"<sup>353</sup>

But from these hints, and given Vining's own description of writing as "distillations of vacillations," one could hardly conclude that Vining is proselytizing for pantheism. Ultimately, the object of the faith that Vining finds in the practices of law lends itself more to poetic suggestion than to creedal formulation. Fittingly, therefore, the book ends with a poem, which itself ends not with a period but with a dash. The poem, called "Present Meaning," concludes:

What we say—  
 Always behind us,  
 You, me,  
 In the silence,  
 The present silence,  
 Existing beyond words,  
 Always beyond words,  
 In the clear silence,  
 The moving stillness—<sup>354</sup>

In any case, it is that someone—that "spirit" or that "transcendent," necessarily personal—that we actually seek in the practices of law. And what that someone speaks to us is what we call "the law." So the texts we study are not themselves "the law," Vining repeatedly asserts, but rather "evidence" of the law<sup>355</sup>—which is to say that they are evidence of the mind we seek to understand and respect. In treating statutes and precedents as "evidence" of law, Vining's reflections seem much like the view expressed in the classic statements of the common law (like Blackstone, or *Swift v. Tyson*)—a view that modern rationalists like Holmes have found so incomprehensible.<sup>356</sup>

A skeptic would no doubt say that Vining's law *is* incomprehensible. Has Vining in fact lapsed into a sort of "transcendental nonsense?" Is his version of what lawyers search for—of what "the law" must be—beyond the pale of plausibility? Anticipating such doubts, Vining's own response is that our behavior shows that we *do* harbor some such belief.

<sup>352</sup> *Id.* at 353.

<sup>353</sup> *Id.* at 220.

<sup>354</sup> VINING, *NEWTON'S SLEEP*, *supra* note 22, at 355.

<sup>355</sup> *See id.* at 116, 128, 240.

<sup>356</sup> *See supra* notes 102–04, 108–16 and accompanying text.

But if, the way we and the world and the universe are, we cannot do without authority, without saying you ought, you must, we will produce suffering and take responsibility for it, I ought, I must suffer if I do not—and if authority is impossible should this something more not exist—then we have some evidence that what we must believe, is. What we must believe, must be, not because it exists if we believe it exists, but because we exist and have been given the means, by our work, to continue existing.<sup>357</sup>

Although Vining's at times mystical and perhaps romantic depiction of law seems almost antithetical to that of an unrelenting critic like, say, Pierre Schlag, in many ways their assessments coincide. Both perceive that law is at its core an enterprise of faith and that legal discourse is essentially theological;<sup>358</sup> consequently, the rationalist jurisprudences of the twentieth century have served mostly to misrepresent or conceal law's real character. Both scholars also perceive the immense gap between what lawyers *profess* to believe (and profess *not* to believe) and the beliefs that seem *presupposed* in the way lawyers actually speak and act. In the end, the difference seems to be that Schlag is more willing to credit or accept modernist non-belief, so that insofar as the operations of law appear to presuppose some sort of faith, it follows that law is incoherent and probably in bad faith. Vining, on the other hand, takes seriously the possibility of genuine belief and seeks to use law to rescue that possibility from the "cynical acid"<sup>359</sup> of modern rationalism. In a sense, Vining acts on the Augustinian maxim that one must first believe in order to understand—"Without faith," Vining observes, "we know nothing beyond ourselves"<sup>360</sup>—and thereby discerns in law (or thinks he discerns) what Schlag has dismissed from the outset.

Vining acknowledges that when it is approached in this way, law becomes "an object of amazement to the modern and postmodern mentality."<sup>361</sup> And he points out that, reflectively studied, law and its

<sup>357</sup> VINING, NEWTON'S SLEEP, *supra* note 22, at 264-65.

<sup>358</sup> As noted, Schlag describes contemporary law as a "residually theological discourse." See Schlag, *supra* note 311. Vining has long emphasized the affinity between law and theology. See VINING, NEWTON'S SLEEP, *supra* note 22, at 133, 217, 263, 312; see also JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN 187-201 (1986); Joseph Vining, *Legal Affinities*, 23 GA. L. REV. 1035, 1035-37 (1989).

<sup>359</sup> Cf. Holmes, *The Path of the Law*, *supra* note 3, at 462 (proposing to understand law better by "wash[ing] it with cynical acid").

<sup>360</sup> See VINING, NEWTON'S SLEEP, *supra* note 22, at 103, 179 (asserting that the mind cannot be known until it is searched for, and the search must be driven by faith).

<sup>361</sup> See *id.* at 110.

presuppositions will be “subversive” of twentieth century thought—of the materialism evident in so much work in the sciences and social sciences, but also of “what goes by the name postmodernism in literary and philosophic studies.”<sup>362</sup> Nonetheless, Vining insists that his approach of faith is not incompatible with, and indeed is thoroughly grounded in, reason. “Reason in its largest sense, respect for evidence that includes all experience,” he asserts, “is the very ground of faith.”<sup>363</sup> We may want to banish “transcendence” and the “mysterium tremendum,” he says, but in doing so we are “not true to experience.”<sup>364</sup> Moreover, in starting with faith, he is only doing what lawyers always do—and must do: “The lawyer . . . approaches the words with a faith to be tested in her work with them.”<sup>365</sup>

But even if one joins Vining in perceiving an underlying faith in human activities, and even if in that respect one departs from the skeptical modernist assumptions in which Schlag places his trust, still it does not follow that *law*, as currently practiced, reflects any viable formulation of faith. From different starting points and with vastly different attitudes, both Vining and Schlag point to the need for a jurisprudence of faith. But whether such a jurisprudence would serve to *vindicate* law—or faith, or both—or on the contrary, would serve to *subvert* them remains an open question.

## VII. CONCLUSION: CRISIS OF FAITH

In departing from the “Path of the Law” laid out by Holmes and followed by the large majority of twentieth-century legal thinkers, Vining and Berman, Schlag and Kennedy strike out in very different, sometimes almost opposite directions. Still, these disparate thinkers agree on a good deal; they agree that, among other things, law as it is practiced today is a very dissonant enterprise. This dissonance suggests that the “crisis” that critics like Professor Glendon and Dean Kromman diagnose as a loss of tradition and professional ideals, and that critics like Judge Edwards perceive as a gap between academics and practitioners, is at bottom a crisis of faith—one that runs through the souls of academics and practitioners alike. The gap is between our practices and our beliefs—or between the beliefs that seem to be presupposed

<sup>362</sup> See *id.* at 208.

<sup>363</sup> *Id.* at 103.

<sup>364</sup> *Id.* at 329–30 (stating “[t]he world is full of oddnesses and incongruities, and this is not the least of them, this departure from the empirical taken by so many whose chief pride is their empiricism.”).

<sup>365</sup> See VINING, NEWTON’S SLEEP, *supra* note 22, at 160.



in our practices and the beliefs that we are willing consciously and publicly to affirm.

Understood in this way, the present crisis is hardly unprecedented. There have been times when a large body of prevailing practices came to seem insupportable—to some people, at least—by reference to any viable formulation of faith; and the result has sometimes been a wide-ranging re-examination both of faith and practice in an effort either to reestablish and reaffirm those practices on a more secure basis or else to reform, or even repudiate, those practices.<sup>366</sup> In the Reformation era, for example, controversies over then-current church practices, such as the sale of indulgences, and over extant forms of spirituality led both proponents and critics of the Church to debate and formulate what Christian faith consisted of, and then to apply such formulations to defend or criticize the existing order. Such debates led one kind of reformer—Erasmus, for example—to advocate relatively modest changes within existing ecclesiastical structures and religious practices. Other reformers, like Luther and Calvin, interpreted the faith to support a more thorough-going criticism, culminating in a rupture within the existing structures, while still others, such as the Anabaptists, were led to adopt a much more radical separation from Christendom altogether. In the Counter-Reformation response, the Council of Trent undertook a sort of restatement of the faith that sought both to preserve and reform traditional Christian understandings and practices.<sup>367</sup>

A similar re-examination seems called for at the present time in law. It would be helpful, in other words, for lawyers and scholars to examine and articulate the underlying assumptions and ontological commitments of legal practice, to try to determine what sort of faith is presupposed in that practice, to assess the acceptability of that faith in itself and with respect to other prevailing beliefs, and to deliberate about whether law, either as it currently operates or in some modified form, is supportable on the basis of premises that we do or might actually believe.

In fact, however, there is at present little evidence that such an examination is occurring. On the contrary, the decade of the 1990s seems, if anything, to have been a period of exhaustion and defensive

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<sup>366</sup> Though he does not describe the process in quite these terms, Harold Berman argues that Western law is primarily the product of a series of such revolutions. See generally BERMAN, *supra* note 299.

<sup>367</sup> For an overview and analysis of the various Reformation movements and responses, see STEVEN OZMENT, *THE AGE OF REFORM 1250-550* (1980).

retrenchment in which radical questionings, such as those associated with the Critical Legal Studies movement, were quieted or marginalized.<sup>368</sup> One reason for this professional reticence grows out of a crucial difference between our situation and that of earlier periods such as the Reformation. All parties to the Reformation controversies understood that they were participating in an enterprise of faith. By contrast, legal thinkers in this century have not acknowledged that law is a discipline of faith at all. On the contrary, they have adamantly maintained that in understanding and justifying law "no ultimate mysteries [may] be invoked to legitimate its exercise—no transcendent authority, no Kierkegaardian leap of faith."<sup>369</sup> Consequently, legal thinkers have persistently tried to present law within a broadly rationalist framework, even though (as the theorists themselves repeatedly insist) the actual practices of law are largely incongruent with that framework. So the deep presuppositions of legal practice have remained largely unacknowledged and, hence, immune from discussion, criticism or reformulation.

As a result, modern law presents a peculiar spectacle of an activity grounded in an *orientation* of faith but lacking the support or guidance of any *formulation* of faith, much less any conscious *commitment* of faith. One might say that in its attempts at self-reflection, modern law presents a spectacle of arrested development. Consequently, in its practices, modern law reflects a complex of habits carried on without conviction or self-understanding. We cannot move forward in either the understanding or the operation of law because we cannot acknowledge the commitments to which law is responsive.

This is the predicament in which law and lawyers currently find themselves. And the most important task facing jurisprudence is to address this predicament. Students of the law need to do what a long line of "legal realists" have aspired to do but (misoriented by reductionist aspirations and rationalist demands) have not quite managed to do—to try to understand law as it really operates. And we need to consider how law, as it really operates, relates to what we really believe.

If, that is, we are any longer capable of thinking about such questions.

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<sup>368</sup> See, e.g., GLENDON, *supra* note 14, at 250 (noting law schools in the 1990s seemed characterized by a "postideological mood"); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1519–20 (1991) ("In law, people continue to go through the motions of defending . . . center-left jurisprudence, but it has become almost tiresome even to the people doing the work . . ."). For sake of clarity, I note that Critical Legal Studies to my knowledge never proposed that law be understood in terms of a serious engagement with the concept of faith.

<sup>369</sup> See Grey, *The Constitution*, *supra* note 98, at 6. Grey was discussing judicial review specifically, but his assumption derives from the legal culture at large.