Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles

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ARGUMENT AND AUTHORITY IN COMMON LAW
ADVOCACY AND ADJUDICATION:
AN IRREDUCIBLE PLURALISM OF PRINCIPLES

MICHAEL SEAN QUINN*

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* Shareholder, Sheinfeld, Maley & Kay, P.C. (Austin, Texas). From time to time, Mr. Quinn teaches Insurance and other subjects at the Law School of the University of Texas-Austin. In the Fall Semester of 1999, Mr. Quinn taught “Legal Malpractice.”
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INTRODUCTION

Serious lawyers take legal arguments seriously. After all, lawyers argue seriously to courts, to court-like entities, such as administrative agencies, and to each other all the time. No one denies that legal argument plays a material role in resolving many, many cases. Everyone agrees: legal argument should be sensible, persuasive, and attuned to the important balance which must always exist between tradition and stability on the one hand, and change and idealism on the other.

Thus, sound legal argument is like a prism. It faces the past (upon which it relies), the present (where it resolves cases), and the future (toward which it is oriented). Legal argument artfully presented to courts essentially takes one archetypal form no matter how it is dressed-up:

Your honor. These are the facts. Here is the law. Here is how the law applies to the facts. Please decide this case in accordance with your duty to apply the law correctly. The legally-correct conclusion in this case is the one which happens to favor my (very sympathetic) client. More importantly, it is the only just result.

Almost every time an argument of this form is given, counsel will be arguing that the court is bound by the past. In presenting arguments in this way, counsel attends to the past by focusing on precedents, emphasizing stability, and accentuating predictability. In effect, counsel will be arguing that law, as it already exists, yields a single answer to a dispute at bar. Similarly, recommendations for change—whether limited or substantial—must be based on the proposition that while good things are to be found in the past, better things are to be found elsewhere. From a formal point of view, the very best of these arguments proceed by saying that apparently-binding precedent

2. “On the one hand, the law must have stability and predictability so that people may order their conduct and affairs with some rationality. On the other hand, the judge must consider the harm of compounding error by reflectively applying a clearly erroneous decision . . . .” Texas Dep't of Mental Health & Mental Retardation v. Petty, 848 S.W.2d 680, 689 (Tex. 1992) (Cornyn, J., now the elected Attorney General of Texas, dissenting for himself and three other justices). The issue that concerns Justice Cornyn is, as he describes it, the “deeply troubling” matter of what the judge of a court of last resort should do with a precedent “she believes to have been incorrectly decided.” Id.

For no very good (or very bad) reason, many of the citations in this article come from Texas courts. There are citations here and there from other jurisdictions, but it seemed appropriate to focus on one state, and Texas is as good as any.
was perfectly good in its time, but that times have changed, and, hence, so has the binding force of the once-good precedent. New conditions nullify old rules and stimulate new ones. In effect, counsel again argues that there antecedently exists a valid principle of law that is binding, if only that fact could be recognized. Form is revelatory again. Rhetorically, legal argument always presupposes that there is an "out-there-ness" to legal rules. In serious legal argument, there is never the sense that legal rules are something we make up as we go along. Even new rules emerge from the past and are presented by courts as rooted in the past.

Sometimes, poets of the common law say that it is a seamless web. They are implying that it is complete, that it is internally consistent, that there are no discordant tensions among its various parts, and that there are no fragments, as it were, floating loose. Of course, Legal Realism has taught that these kinds of inspiring poetics are false. Indeed, the very idea that the common law evolves suggests that it cannot be complete at any given time and that it is not perfectly consistent. Nevertheless, the archetypal form of advocacy just recounted presupposes the antecedent existence of correct legal answers just waiting to be found and then applied to the case at bar. Legal Realism notwithstanding, frequently there are correct answers to legal questions. As in every other significant human activity, form is important. Invariably, the form of advocacy reveals significant truths.

Lawyers give similar arguments to each other as cases develop:

Look, Charlie. You have to figure out what you think the law is yourself. I've worked it out, for my part. Of course, neither of us will know until the jury decides and the court rules. Nevertheless, even you may have to concede that the law favors us. Also, think of how the jury may look at the facts of this case, not to mention how they may contrast our clients.

Obviously, there is no explicit appeal to justice here. Nevertheless, there is a covert appeal—through how the jury may look at the facts—and every lawyer would understand that the theme of justice is inherent in the argument. The tactful—perhaps, "good-ole-boy"—suggestion is that there is a right result in that it favors the speaker's client. As stated, this is the archetypal form of advocacy that lawyers

give when they are taking legal argument seriously.

Of course, lawyers always try to make their clients out to be as sympathetic as possible. Sometimes commentators suggest that this is the heart of lawyer argument: “My client is a neat guy (or at least not as bad as the other fellow), so please—oh please!—give him what he needs.” Legal argument seldom actually works like this, although poor jury argument occasionally does. The reason why lawyers always try to make their clients look at least a little sympathetic, is that, as Mary Poppins put it, “A spoonful of sugar helps the medicine go down.” One wants to make it as easy as possible for a judge to apply the law correctly. If the judge is blinded by passion or hatred against someone—perhaps because he really has been a wretch—then the danger of error increases.

Of course, lawyers give other kinds of arguments as well. They start with invocations of fear (“I’m going to kick your ass.”); they refer to subjugation arising out of the asymmetry of resources (“My client means for this to drag on for years.”); they refer to asymmetries in competence (“I’ve tried a bunch of these cases, my friend, and I’ve never lost one yet.”); they refer to the impassioned willfulness of the client and his determination to prevail (“George, my client, is one mean son of a bitch, and he means to have revenge here.”); and they refer to special connections with the judge (“The trial judge was my brother’s law partner for years. My! My! What do you make of that?”). These are serious matters, and lawyers may be arguing, but nobody thinks that these sorts of exchanges are legal argument.

Insofar as justice is an inherent part of archetypal serious legal argument—whether express, implied, or downright covert—some version of the so-called Doctrine of Natural Law is vindicated. The name of this doctrine—the “Doctrine of Natural Law”—is misleading to the contemporary English speaker. It derives from the practice among Roman Catholic theological philosophers to distinguish between revealed moral law (knowable only with special divine help,
e.g., scripture or revelation) and natural moral law (knowable by any normal, rational human being through the use of natural faculties). In the modern world, there are two significantly different versions of the Doctrine. On the stronger version, there is no legal obligation to obey the law if it conflicts in significant ways with important naturally-knowable moral principles. On the weaker version, any legal system worth the name—and in particular the Anglo-American legal system—is shot through with moral principles. Being “shot through” with naturally-knowable moral principles does not imply anything violent or disruptive. Indeed, the way moral principles get into the legal system is by seepage and permeation. Thus, the weaker version of the Doctrine of Natural Law could be called the Doctrine of Moral Seepage. How morals seep into law is not well understood and has not been systematically studied. Probably there is significant seepage before the formation of an actual legal system. Hence, there will never be a time when the legal system was not thoroughly penetrated by moral principles.

There is another set of versions of the Doctrine of Natural Law. Classically, according to that doctrine, there were certain basic moral propositions that could be known to be true. This knowledge was acquired through reason in some manner. This approach to moral epistemology is controversial. Consequently, there are several different epistemologies for the Doctrine of Natural Law. This is true on either the stronger version or on the weaker one. First, there is the classical epistemology: there are moral propositions that are known by the natural light of reason. Second, there is a “faculties” epistemology: certain moral propositions are known to be true, but not by reason. Instead, they are known by a special—perhaps intuitive—faculty. Or perhaps we do not know how they are known, we just know they are known by the mind but not through the faculty of reason. Third, there is a view that basic moral principles are not known at all. They are simply embraced, or, perhaps, they are

expressions of what David Hume called the "calm passions." If the last version is the correct one, then if human beings in different societies have different fundamental "calm passions," or if the "calm passions" are malleable by social forces, then moral systems would be relativistic to some degree. This would spell the bankruptcy of the traditional Doctrine of Natural Law. Morality would become relativistic through and through because its fundamentals would be socially conditioned. This last account of the nature of morality is probably the prevailing one in our own day. Interestingly, there can be a society-by-society moral relativism and the Doctrine of Moral Seepage could still be true. The contention of that theory would then be that, whatever the fundamental moral principles of a society were, they could be counted upon to seep into the legal system, and the legal system should embrace them. The exact sense of the "should" in the last sentence is unclear and controversial. That, however, is a matter for a different essay.

The rhetoric of advocacy involves the person arguing as well as the argument. A lawyer's finding of good things in the past must be authentic. It cannot be ersatz. Phoney promotions of the authority of the past are likely to be found out; judges are adept at sniffing out this sort of thing; inauthentic argument often fails. Just as form is revelatory, so is persona. Sometimes lawyers say they argue legal propositions they know to be false. Although I have only anecdotal

10. A point commonly made in manuals on legal argument and in sermons on advocacy is that counsel is more effective when he believes in the justice of his client's cause. In general, this requires counsel to believe that the law favors his client's position. This is commonly-received wisdom among lawyers. See generally Stephen D. Easton, The Power of Truth: An Honest Attorney's Guide to Winning Jury Trials in a Dishonest World, 62 TEX. B.J. 234 (1999). Under the section-heading "Ya Gotta Believe," Professor Easton of the University of Missouri at Columbia wrote this:

You cannot be an effective advocate if you do not believe, in your gut, that your client's position is just, correct, and fair. If you do not believe that a verdict against your client would be a manifest injustice, you are in serious trouble. This does not mean you should believe that your client is perfect or that he made no mistakes. But if you do not believe your client should and must win the trial, you should find someone else to try the case or urge your client to settle. The jurors need to see and feel the strength of your conviction.

Id. at 238. Of course, all commonly-received wisdom is subject to doubt. Sometimes, cynical lawyers reject this view and claim that they are extraordinary thespians. Interestingly, Stanislavsky Method Acting calls for something like (near) belief that the actor really is the character he says he is.

evidence, this is not my experience or that of people who talk to me seriously.

I. SERIOUS LEGAL ARGUMENT

So what is it to take legal argument seriously? This simple-sounding idea has many variants. Consider the following alternatives. First, taking legal argument seriously is arguing seriously. It means that when one is giving a legal argument, one should not be joking around; one should give legal arguments with a straight face. Humor and ridicule have hardly any place in legal argument. Even wry wit is suspect and usually ineffective, even if memorable. Serious legal argument precludes levity. Snottiness is verboten; snide remarks are usually ill-advised; sneering is almost always a bad idea. Even scoffing is to be avoided. Very restrained sarcasm is permitted; scorn is not. Even irony is dangerous ground, though for contradictory reasons.12

Second, taking legal argument seriously is believing that superior legal arguments determine the results in cases. On this view, a good argument will always trump a bad one, so that the better argument will always win.13

Third, taking legal argument seriously is embracing the view that substantively-good and rhetorically-good legal argument quite often

12. Obviously, this is not all that is meant when someone suggests that legal argument should be taken seriously. The point is not to argue seriously (i.e., earnestly, logically, and after good preparation), the point is to be serious when thinking about the role of argument in legal affairs. Nevertheless, as an admonition about advocacy, the foregoing is probably correct for the most part. An exception: reductio ad absurdum arguments have a place. They produce absurdity when well done, and absurdity is both funny and a form of ridicule. On a different level, incivility in front of a court also tends to suggest a lack of seriousness, not to mention weakness. In any case, there are two approaches to the idea that legal argument should be taken seriously. One derives from rhetoric, the other from jurisprudence.

13. Obviously, this is both a jurisprudential view and an admonition about rhetoric. This conception of legal argument is both false and unrealistic. (1) As an empirical point about rhetoric, the best argument does not always win. Some lawyers are quite adept at presenting arguments, and some are not so good, and yet the inferior arguer may have the more-just case. (2) Sometimes, the facts favor one litigant so clearly over the other that no amount of brilliant argumentation will save the day. Occasionally, the same is true with respect to the law. (3) On very rare occasions, judges have been bribed. At other times, they are stupid, biased, inattentive, or in the grip of a false theory. (4) There are two concepts of good legal argument. (a) In one sense, a legal argument is a good one when it is rhetorically well-structured and highly polished in delivery. In legal context, rhetorically-good arguments will cite obviously-relevant cases in a sensible way. (b) In another sense, a legal argument is a good one substantively and normatively. A good legal argument is one that entails a conclusion consistent with the legal system, including its surface provisions, its patterns, and its deep structure. These arguments attend to precedent with both depth and integrity. They attend to context and change. Empirically, such arguments do not always win. In a perfect legal system, they would always prevail. In sense (b), legal argument should be taken very seriously indeed. Of course, it does not always happen in the real world. No legal system is perfect.
has something important to do with how cases are decided. There is usually not a one-to-one relationship, but there is some important relationship.¹⁴

Fourth, legal arguments are best framed in terms of truth, sound legal principle, sound and widely-embraced social and moral values, and without the overstatement of any of the foregoing. The best legal arguments are well-crafted ones, both in their oral and in their written aspects. Humility and modesty in presentation are not requirements, though the absence of arrogance is. This is what it really is to take legal argument seriously.¹⁵

Fifth, the legal system, at its core, is about rights and obligations (or “duties”), as well as—perhaps—some correlative concepts.¹⁶ Establishing who has which rights and who has which obligations is essential to legislation and administrative rule-making. Similarly, adjudication is about the vindication of rights. Curiously, explicit rights-discourse and duties-discourse are de-emphasized in contemporary legal argument. Often, negotiation letters do not expressly refer to the rights of the plaintiff as against the defendant. Frequently, there is no explicit reference to the defendant’s legal obligations. The gist of the matter is quite clear, but the words “right” and “obligation” are frequently not used when they well could be. The same is true of a great deal of both briefing and oral argument before courts, at least in civil litigation. Part of the reason may be attributed to the general “revolt against formalism” which has characterized the modern world.¹⁷ Rights-talk and obligations-talk

¹⁴. This proposition is obviously true, and it is a sense in which legal argument should be taken seriously.

¹⁵. All of this is probably true. Judges stop listening and reading attentively when there are errors or exaggerations. Passion in legal argument is best understated. Here I intend to contrast legal argument with jury argument. No legal argument should ever be presented in a cavalier manner. Attention to all these rhetorical virtues is one sense in which legal argument should be taken seriously. A lawyer’s reputation is created and judged on how well-crafted are his arguments and presentations. This point applies both to written and to oral argument. Of course, what constitutes style and good craftsmanship varies with the forum. None of these truths implies that effective advocacy requires that the lawyer be consciously attuned to philosophical or jurisprudential matters. Lawyers need not be philosophical moralists, logicians, or scholars of jurisprudence. Many fine advocates have never heard of John Rawls, Ronald Dworkin, Duncan Kennedy, or Tim Scanlon, and few have ever read much of them.


have a brittle, crystalline feel to them which suggests that legal rules are antecedently complete. Rights-talk is inconsistent with the idea that there is a good deal of judicial discretion. It is fashionable to address courts as though they have substantial discretion, even when they do not. It is unfashionable to argue to a court that it is bound by antecedently-existing law and, therefore, hemmed in. The fear is that the judge will say to himself, “I’ll show this fellow how hemmed in I am!” and then decide an issue adverse to counsel simply to teach him a lesson in humility. Fashionable advocacy, these days, which may also be prudent advocacy, often proceeds by invitation and fairly-genteel suggestion, as opposed to slam-dunk, deductive argument based on black-letter, and obviously applicable, rules. 18 19

There are two concepts of how legal argument may be taken seriously. First, it can be taken seriously as a rhetorical matter. This

18. The best advice I ever got about oral argument was from Justice Ben Overton of the Florida Supreme Court. “Oral argument is the time when all the judges have read the brief and the record and are prepared to decide the case,” he said. “You should think of your argument as the beginning of the judicial conference, and you are privileged to be there.”

Oral argument is a conversation you have with the court at the beginning of its deliberations on your case. More than that, it is part of a continuing conversation that the court has with lawyers about the development of the law.

Talbot D’Alemberte, Oral Argument: The Continuing Conversation, LITIGATION, Winter 1999, at 12, 12. Obviously, slam-dunk, deductive argument designed to force people to conclusions is no way to conduct a conversation.

19. Unquestionably, so far as adjudication is concerned, disputes over rights and obligations are central. Why the rhetoric of the law uses these terms and concepts less frequently than one would expect is a bit of a mystery. Much rights-talk these days is a shade suspect. According to the media, criminals are always standing on their rights. The ACLU is continually yammering about the right of free speech. Television shows contain rather unattractive characters saying things like, “I know my rights.” In addition, duties-talk sounds rather old-fashioned, even Victorian. Rhetorical style has no necessary implications for logical structure. Nevertheless, form is revelatory. But of what? It is probably no accident that most advocates are not able to integrate classically-pure legal argument—argument that has to do with cases and statutes—with public-policy argument. Often, high-level arguments in adjudicatory contexts proceed by attaching public-policy arguments to the end of legal arguments. Often, that is how law students are taught to do it in moot court classes, and their conceptions do not mature as they grow as advocates. More’s the pity! It should not be thought that the language of duty is entirely alien to legal argument. It is impossible to give a jury instruction on simple negligence without reference to the term “duty,” and the formulation of other torts is similar. Nevertheless, it is far less common to hear arguments presented in terms of the duty of the alleged tortfeasor to be reasonable and how breaches of that duty have violated the rights of the victim. Here is a speculation. The way the rhetoric of negligence works may provide a key to why rights-talk and duties-talk have been displaced. To some extent, the forces of darkness have been successful in reconceptualizing negligence in terms of some sort of cost-benefit calculation. This is fairly easy to do because negligence essentially involves the idea of reasonable conduct. How else could one think about the reasonableness of conduct except in terms of what it costs to do it, the benefit of doing it, the costs of doing it carefully, and so forth? It is very difficult, however, to translate more complex duties-talk and rights-talk into the language of cost-benefit calculations. Cost-benefit discourse sounds much more like making policy than it does like vindicating rights or establishing breaches of duty.
has to do with how much impact an argument can have on an actual
decision and what a lawyer can do when crafting and presenting an
argument to maximize that impact. The second concept of taking
legal argument seriously is a normative conception. On this
conception, legal argument is taken seriously when it is thought that
logically-valid and legally-revelatory arguments that plumb the
depths of the law are more likely to contribute to the production of
correct legal solutions to the problems presented. Of course, there are
always rhetorical difficulties in setting forth a truly deep vindication
of any legal proposition. Sometimes, such vindications are simply too
complicated. In addition to rhetorical difficulties there are also
economic problems. Sometimes, it is too expensive to do the research.
It may be, therefore, that it is possible to take legal argument
seriously only in cases where the economics of the case will withstand
the expense. Another rhetorical problem in serious legal argument is
audience reaction to deep presentations. Argument must be attuned
to the audience. Finally, as indicated, in order to take legal argument
seriously, it must be recognized that, at its core, legal argument is
about certain kinds of duties and certain kinds of rights. This is
particularly true in the context of adjudication. To the extent that the
rhetorical practices of our times require some muffling of the
language of rights and the language of duties, rhetoric impedes truly
serious legal argument. Rhetoric is important, but rhetoric enslaves.
Nevertheless, one should do the best one can.

All forms of serious legal argument must involve the explication
of past court decisions. Both rhetoric and jurisprudence recognize and
embrace this fact. The past is a great generator of both rights and
duties. Extracting binding precedent from the past is one hallmark of
legally-revelatory common law argumentation. It is the way lawyers
in common law legal systems take legal argument seriously.\textsuperscript{20} In the
vast majority of circumstances, the common law will yield an answer
that is uniquely determined, i.e., \textit{the} one right answer.\textsuperscript{21} Because the
common law, and its cousin, statutory interpretation, constitute a
large, detailed, and complex system of norms, under the vast majority
of circumstances, correct application of the common law will yield a
uniquely-appropriate answer.\textsuperscript{22} So far, this contention is

\begin{itemize}
  \item \textsuperscript{20} See generally Markovits, supra note 1.
  \item \textsuperscript{21} See generally RICHARD S. MARKOVITS, MATTERS OF PRINCIPLE: LEGITIMATE LEGAL
  \item \textsuperscript{22} See generally GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES
  (1982).
\end{itemize}
uncontroversial. Do interrogatory answers have to be sworn? There is an answer. Are captains of industry allowed to monopolize with wild abandon and raise prices extravagantly? There is an answer. Are Girl Scout troops permitted to exclude female children who are HIV-positive for that reason alone? All of these questions, and, indeed, most dispositive legal questions that come up in the law courts, have determinate answers that can be found out (i.e., discovered) and about which there is little or no doubt. There are exceptions.

A. Determinate Answers

There are areas of the law where everyone knows there are no determinate answers. Whenever a judge has discretion, there cannot be a uniquely determinate answer. In this area, a judge gets reversed for abusing his discretion, not for getting an answer wrong. On the other hand, there is a determinate range of answers, and the judge's decision must fall within that range, or else she will be reversed for an abuse of discretion. The granting of injunctive relief is an explicitly discretionary matter. It is not always clear from the language of the governing rules that answers are indeterminate. Discovery rules are frequently formulated in black-and-white terms, yet everyone knows that there is a good deal of play in the application of those rules. District-court discovery decisions are reviewed against an abuse-of-discretion standard. The range of acceptable decisions is discretionary, and practitioners, for the most part, have a "feel" for, or "sense" of, the range of acceptable answers. This "feel" becomes more and more articulated as the applicable rules (such as discovery rules) are used more and more over the years. Sometimes this "feel" is widespread among lawyers, only to be overthrown by an appellate court. Of course, this "feel" is also relative to individual judges. Some judges are loath to grant temporary injunctions in, for example, covenant-not-to-compete cases, while they are perfectly prepared to grant injunctions in domestic-violence cases. Some judges are relatively open when it comes to discovery matters and are willing to let lawyers press the outer limits of the rules, while other judges

23. The common law rules governing the validity of covenants not to compete are far from black and white. Covenants not to compete will not be enforced as written unless they are reasonable under the circumstances; this is the law in most states. Some judges regard it as unreasonable to prevent a person from working in his trade just because it will hurt a large company. Obviously, economic, moral, and personal values are at the forefront of such cases. See generally Michael Sean Quinn & Andrea Levin, Post Employment Agreements Not to Compete: A Texas Odyssey, 33 TEX. J. BUS. L. 7 (1996).
maintain a much tighter control. Still, even with these judges, there is a range of possible decisions outside of which judges may not go.

Someone might argue that for every well-developed legal system, there are right answers even for questions where the standard of review is abuse of discretion. If some answers are better than others within the permissible range, an appellate court will not reverse the trial court if it is in the range, but that does not mean the trial court will be absolutely right. There was a better answer. Of course, this is true. Sometimes, there may be right answers, but it is too expensive to figure out what they are. On the other hand, it is sometimes simply indeterminate what the right answer is. This truth does not follow from the fact that we use an abuse-of-discretion standard in some cases. That standard could be a response to the needs of efficiency. Nevertheless, its use does suggest that the legal system does not always contain uniquely-correct and findable answers in these sorts of situations.

Of course, all this depends upon what question is asked. If one asks, "Are there uniquely correct, findable answers in every case which is governed by an abuse-of-discretion standard?" Then the answer is "No." If one asks, "Can one pretty confidently give a range of answers that, if given, will be wrong, when an abuse-of-discretion standard is applicable?" The answer is pretty certainly "Yes." If one asks, "Is there a range of answers which will be deemed acceptable?" The answer is "Yes." If one asks, "Can one formulate a principle that will express the theme to be found among the correct answers?" The answer is again "Yes." The theme-expressing principle may or may not be the rule of law that the trial court is expected to apply in finding its answer and against which the trial court's actions will be reviewed for an abuse of discretion. Such a principle might either be a rule of law or it might be the considerations outside any rule of law that justify the rule. In covenant-not-to-compete cases, for example, the extra-legal justifications might have to do with the morality of promising, the need for protecting working people, the need for protecting start-up companies, and so forth. None of these would be, strictly speaking, a legal consideration, although they justify legal considerations. At the margin, it may be difficult to tell the difference between legal considerations and nonlegal considerations. Often, it is easy to tell the difference. As in most matters, however, these types of considerations shade off into one another, and there will be an unclear domain. One wonders if there is pressure toward clarification in that domain. In any case, it is not true to say that it is always clear
whether the proposition is a legal consideration or a nonlegal one.

There is another way to conceptualize this situation. Perhaps, in at least some cases where the abuse-of-discretion standard is used, there are some things like general rights but not specific rights. Thus, in a righteous covenant-not-to-compete situation involving a departing employee, perhaps the former employer has the right to some remedy, but not a right to an injunction. Or, better yet, perhaps he has a right to an injunction of some sort, but not a right to specifically this or that injunction. Even better, perhaps he has a right to an injunction of, say, six months, but it also might be appropriate, under the circumstances, for him to receive a longer injunction. In other words, the departing employee (or his new employer) does not have a right that the injunction be shorter than six months, although he might have a right that it be shorter than a year. Thus, in at least some abuse-of-discretion situations, perhaps there are gray areas where rights are simply not at stake. This is a very difficult idea to work out, especially where there are multiple remedies. It is difficult to state, in traditional legal terms, why somebody should be awarded a remedy if he does not have a right to it.24

Except for the abuse-of-discretion situations, almost the only occasions when anyone seriously questions the presence of determinate answers arise in close cases. Sometimes, these are new situations with novel problems. Sometimes, they are old situations with novel problems. An extremely interesting example of this sort of thing came up in Texas this year. One of the issues in Douglas v. Delp25 was whether someone who lost a business as the result of attorney malpractice could recover mental-anguish damages from the attorney. The court classified the loss of business as economic loss (an obvious-enough truth, although it is probably not mere economic loss) and, through Governor Bush's appointee, Associate Justice Deborah G. Hankinson, held that "when a plaintiff's mental anguish is a consequence of economic losses caused by an attorney's negligence,

24. Courts seem to recognize this problem and they say very strange things about it. Injunctions are governed by an abuse-of-discretion standard, for example, and in one case the Texas Supreme Court remarked: "No injunction decree will ever be perfectly just to both sides." San Antonio Bar Ass'n v. Guardian Abstract & Title Co., 291 S.W.2d 697, 703 (Tex. 1956) (unauthorized practice of law case). On one level, this remark is so obviously true as to be trite. On another level, it entails that every injunction will be unjust to one or both parties. Surely that is an odd doctrine to embrace. Probably, a court could not embrace it if, and to the extent that, injunctions pertain to legal rights.

25. 987 S.W.2d 879 (Tex. 1999).
AN IRREDUCIBLE PLURALISM OF PRINCIPLES

the plaintiff may not recover damages for that mental anguish."26 Attorney malpractice is obviously an odd situation, and most instances of attorney malpractice cause nothing more than economic loss, although there are significant exceptions where personal losses are involved. Nevertheless, the question is a relatively novel one, because in most jurisdictions, for many years, the recovery of mental anguish required physical injury, except in a narrowly-defined range of cases. The holding in Delp raises a very interesting question: do judicial decisions involve internally-right answers?

Cases positing new rules, cases reversing old rules, cases writing on blank slates, and cases considering novel questions are significant for legal education, and this has both salutary and deleterious effects. These are the ones that are studied in law school, for the most part, so many law students become lawyers thinking that lots and lots of issues are open to argument, are essentially contestable, and are obdurately indeterminate. Many professors, because these are the cases they teach, think about, and write about all the time, perhaps believe that the law itself is radically indeterminate. Studying these cases can be intellectually very exciting: the issues are often new, judges seem innovative and courageous, the results and the arguments are endlessly debatable, minds are enriched, spirits are nourished. Such discourse is also clever, and it gives the speaker lots of room to show off. One can take any word and show that it has fuzzy edges, queer usages, and odd definitions.27 The truth of the matter is that most cases that come up in litigation are, from the standpoint of legal rules, quite clear. Most litigation has to do with factual disputes. Lawyers may twist and turn (or squirm) almost

26. Id. at 885.
27. See generally H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994) (explaining that all terms are open-textured to some degree). But see BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY (1993) (disputing the implications of Hart's theory). Millions of dollars have been spent, for example, in recent years arguing about the meaning of the word "sudden." A number of dictionaries say that "sudden" means "unexpected." Of course, not every unexpected event happens abruptly or quickly. Most people think that in order for an event to be sudden, it must be, in some sense, quick or abrupt. Dictionaries say both things, and litigants have been squabbling over the matter for years. See generally H. Michelle Caldwell, Insurance Contracts and Semantic Inquiry: The Limited Pollution Exclusion in Light of Amelia Bedelia, 5 ENVTL. CLAIMS J. 349 (1993); Michael Sean Quinn & H. Michelle Caldwell, Insurance, Ambiguity, and the Sophisticated Insured, 4 ENVTL. CLAIMS J. 89 (1991) [hereinafter The Sophisticated Insured]; Michael Sean Quinn & H. Michelle Caldwell, Insurance Contracts and Semantic Inquiry: The Case of the Limited Pollution Exclusion, 4 ENVTL. CLAIMS J. 275 (1992). One recent case turned on the meaning of a single word. The word was "occupy." One side took the view that "occupy" meant physical presence, while the other side took the view that it meant something else. See Kelley-Coppedge, Inc. v. Highlands Ins. Co., 980 S.W.2d 462, 464, 467 (Tex. 1998) (mistakenly holding five-to-four that "occupy" does not mean mere physical presence).
experimentally at the start of a lawsuit as they learn the law of a new area and try to interpret it as favorably as possible, but most often, as a lawsuit matures, a near consensus emerges as to which law applies and what that law means. The existence of consensus is not always obvious from the briefs, but what is not apparent from the writings is usually acknowledged in the hallway discussions.

Sometimes all this goes wrong. What counts as a genuinely new situation is a matter of some dispute, and lawyers will occasionally try to make cases appear to be more controversial (or significant) from a legal point of view than they really are. I once opened an oral argument to a panel of the Eighth Circuit by stating that I was bringing them a case of "national significance." Each of the judges on the panel immediately looked up and, I thought, became much more alert. I then tried to support my claim by stating that this was the first case in which an important provision of the Uniform Trade Secrets Act was to be interpreted. The judges immediately and discernibly became much less interested, and a kind of disgusted look crossed the face of the presiding judge. So far as these federal judges were concerned, construing the Uniform Trade Secrets Act and "national significance" were inconsistent notions. Self-importance has its limits. I was a young lawyer then, and I have not tried that kind of nonsense since.

Many cases which come before even courts of last resort are not genuinely new, novel, or even close. Such cases come to intermediate appellate courts because appeal is a legal right, because some people do not know when to give up, because negotiations are continuing and more time is needed, because lawyers are giving bad advice, because hope springs external from some wallets or purses, and so forth. Such cases come before high courts (where jurisdiction is discretionary) because they involve points upon which there is no authoritative pronouncement, or because some lower court got it wrong. Here is an example: for some time, it has been the law in

28. A column appears from time to time in a lawyers' newspaper in Texas called THE TEXAS LAWYER. The title of the column is Power Practice. The linkage between the effective practice of law and power is obvious. Nevertheless, a recent contribution to this column made a number of perfectly-sensible points about how to deal with new discovery rules. It had nothing to do with power. It had everything to do with elucidating rules, using them effectively, not making mistakes, and being rational. See Mark C. Lenahan, Practice Makes Perfect: Tips on Avoiding New Rules Pitfalls, TEXAS LAW., Apr. 12, 1999, at 33. Writers like to talk in terms of power even when the real topic is rationality. In the minds of many lawyers, anything having to do with strategy and tactics is really about power.

29. See ARK. CODE ANN. § 4-75-601 to -607 (Michie 1997). For the court's discussion, see Hi-Line Electric Co. v. Moore, 775 F.2d 996 (8th Cir. 1985).
Texas, as it is in many places, that general contractors can be liable for premises-defects created by their independent subcontractors if the general contractor had a right to supervise the subcontractor (say, as a result of the contract documents), even if it did not do so. In early 1999, the Texas Supreme Court was presented with a case in which employees of the independent subcontractor had said that they would have done what the general contractor told them to do, if he had spoken. The question before the court was whether such testimony constituted some evidence that the general contractor had a right to control the subcontractor. Both the trial court and intermediate-level court of appeals had held that it did. The supreme court quite correctly held that it did not. The fact that I will obey you does not imply that you have a right to command me. This case was not novel; it was not new; it was not even close. Many, many cases before courts of last resort are just like this one. The Supreme Court of the United States is perhaps an exception.

B. Postulates of Adjudication

This is not to deny that there exist legitimate contests over what the law is, i.e., what the legal principles of the system actually are. It is not to deny that under some circumstances competing answers as to what the law should be may all be attractive. And it is not to suggest that there is an internally-right answer, i.e., a right answer given the nature and character of the legal system (and, therefore, its societal matrix), for absolutely every legal question. We know that claim cannot be true, given the amount of "play" (or "give") in the abuse-of-discretion standard of review. There are internally-right answers for many legal questions presented to courts, however, and it is a necessary Postulate of Adjudication, to be delineated shortly, that there are wrong answers in every case. Even the abuse-of-discretion standard presupposes this truth.

Sometimes empirically-false propositions are valuable regulative ideals. Lawyers, judges, public-affairs intellectuals (including those who reflect upon the law, government, and politics), government officials, and many others distinguish between legislation and adjudication. Some knowledgeable people would say that this

30. See, e.g., Clayton W. Williams, Jr., Inc. v. Olivo, 952 S.W.2d 523 (Tex. 1997).
31. See Coastal Marine Serv., Inc. v. Lawrence, 988 S.W.2d 223 (Tex. 1999).
distinction is inherent in the idea that governmental powers are separate. Now, adjudication is a very special enterprise. It is to be distinguished from making policy; it is to be distinguished from laying down rules in the abstract to govern the future; it is to be distinguished from the administration of institutions. Similarly, adjudication is not adjustment, and judges are not adjusters. Adjudication is not simply authoritative conflict resolution. It is that, of course, but by conceptual necessity it is objective and rational authoritative conflict resolution, with a dedication to truth.

Several other fundamental postulates (and regulative ideals) distinguish adjudication from other activities. We have already discussed the first one: (1) There are objectively-wrong answers (given the nature and character of the legal system) for every legal question. Here is the second one: (2) There are objectively-right answers for a great many legal questions. And the third one: (3) Resolving the presently-disputed case correctly is the principal function of adjudication. Courts must focus upon the cases before them. Legal disputes concern who has a right to what. In general, legal disputes concern who failed to do his duty. The third essential characteristic of adjudication yields a fourth one: (4) Adjudication is about rights and duties. The fifth Postulate of Adjudication is: (5)

33. Often, courts are criticized for being legislative, i.e., for paying too much attention to the future and to broad rules rather than to deciding the cases before them. In the early history of America, legislatures sometimes adjudicated. See generally Christine A. Desan, The Constitutional Commitment to Legislative Adjudication in the Early American Tradition, 111 HARV. L. REV. 1381 (1998).

34. There has been a good deal of scoffing among legal intellectuals at the idea that there is such a thing as truth, that some propositions are true while others are false, and that it can be known that some are true while others are false. The soon-to-be-passed movement known as "Post-Modernism" takes up this theme with vigor. See generally THE TRUTH ABOUT THE TRUTH (Walter Truett Anderson ed., 1995). For a different approach, see FILIPE FERNANDEZ-ARMESTO, TRUTH: A HISTORY AND A GUIDE FOR THE PERPLEXED (1999). Legal intellectuals who embrace Post-Modernism will find the very idea of taking legal argument seriously humorous, and they will laugh to scorn the Postulates of Adjudication. The foundation for their mirth is both radical and moderate. The radical version would result from skepticism about truth, rationality, and logical persuasion. The more moderate version would rest on a critique of adversariality. The more moderate view would hold that "binary," oppositional argumentation is incapable of getting at subtle and nuanced truth. See generally Carrie Menkel-Meadow, The Trouble with the Adversary System in a Postmodern, Multicultural World, 38 WM. & MARY L. REV. 5 (1996). When legal argument is placed in not-very-subtle mouths, the moderate Post-Modernist has a point.

35. Some observers suggest that when the abuse-of-discretion standard applies, there is adjudication which is not about either rights or duties. This is an extremely-difficult position to formulate and defend. It is necessary to develop an account of appropriate judicial action and inappropriate judicial action in the absence of a claimant having a right. This is no easy matter. Obviously, sometimes litigants have a right to a judgment. Are we to suppose that if a litigant does not have a right to a judgment, then whatever the court does, within specifiable limits, is a matter of grace? This polarity does not sound right, and yet we lack the legal vocabulary to
Courts should proceed in as reasonable and rational a manner as is pragmatically possible given the requirements of adjudication. Adjudication is authoritative resolution on the basis of reasons. Adjudication should never be arbitrary. (6) Not only should courts use reasoning and rely upon reasons, but those reasons should be normatively sound. They should be good reasons—the best available reasons, indeed. (7) Courts should rely only upon reasons that are somehow importantly rooted in community practices. Some of these norms are statutes. Others are common law rules. Some of those norms are deep canons of law. Some are extra-legal. Usually, systems of norms widely governing conduct in communities and in societies can be counted on to be relatively moral. Thus, at its foundation, virtually by conceptual necessity, adjudication focuses on individual, disputed cases and strives for both rationality and morality. To some extent this postulate is a manifestation of the Doctrine of Moral Seepage.

Advocacy within the context of adjudication necessarily presupposes these postulates. If adjudication is to be both rational and moral, it will attempt to find, if not the best resolution between the parties, then at least a very good one, given the law. But for any two proposed resolutions to a conflict, one of them is likely better than the other. Advocacy in the context of adjudication presupposes
discuss further options.

36. Even cases in which there are widespread social atrocities tend to confirm this. The atrocities are at variance with well-established moral norms in the society and with much of the deep structure of that society’s law. That is one of the facts that makes the atrocity shocking. The case of Nazi Germany was like this. Of course, at the same time, there were social tendencies which supported the atrocities. In the civilized world, those tendencies are almost never univocal.

Japanese military leaders had adopted the ancient samurai ethos of Bushido to develop a military code that engendered what two scholars have described as “a range of mental attitudes that bordered on psychopathy,” including the notion of “surrender as the ultimate dishonor, a belief whose corollary was total contempt for the captive.” That contempt the Japanese troops now vented savagely on the American and Filipino captives they herded along the route of the “Bataan Death March,” a grizzly sixty-five-mile forced trek to crude prisoner-of-war camps near the base of the Bataan Peninsula. Japanese guards denied water to parched prisoners, clubbed and bayoneted stragglers, and subjected all the captives to countless humiliations and agonies. Some 600 Americans and as many as 10,000 Filipinos died along the route of the march. Thousands more perished in the filthy camps. This death march presaged the pitiless inhumanity that came to possess both sides in the ensuing three and a half years of war in the Pacific.

David M. Kennedy, *Victory at Sea*, ATLANTIC MONTHLY, Mar. 1999, at 51, 56. Obviously, there has been substantial shame experienced for this kind of conduct. That suggests the existence of an underlying morality of decency which was temporarily overwhelmed by war. Of course, I am not suggesting that the details or even the contours of that morality of decency would be the same for all societies.
that this is true, and the goal of adjudicative advocacy is to persuade the decision-maker to adopt a good solution favoring one side or the other. Thus, all adjudicative advocacy is result-driven. This is the essence of the adversary system. Lawyers represent clients. At the same time, adjudicative advocacy is also driven by the idea of finding a good resolution to a dispute—of the resolutions proposed by the parties, the better one (or the best one, if there are more than two parties). (Of course, adjudication is not restricted to the approaches suggested by the parties, although that is where courts mostly focus.)

Remember, I have argued that the rhetoric of advocacy works best if the lawyer actually believes what she is saying. Hence, for the most part, lawyers either believe propositions, ab initio, or talk even themselves into positions. It is not as though lawyers generally start off disbelieving some legal proposition and then convince themselves that the proposition is true in order to advocate it effectively. The process is much more incremental than that. The lawyer starts off skeptical; she takes on the client; she doubts; she embraces the client’s cause; she sees the direction in which she must go; she comes to believe. Miracle of miracles!

One of the psychological and spiritual dangers facing dedicated advocates is repeated self-deception. I believe that a variety of my observations suggest that repeated lying and repeated self-deception are inconsistent with leading a happy life. For most people, overall happiness over time requires a sense of integrity. Dishonesty in its various forms undermines the sense of integrity.

How a lawyer must believe in the legal arguments he gives is somewhat complicated. Believing in an argument is certainly not the same thing as being convinced of the truth of its conclusion. Many times, I have given to courts arguments of which I was personally uncertain. At the same time, I was certain that other courts (or perhaps even this court on other occasions) had found these kinds of arguments compelling, convincing, or at least persuasive. No advocate should be so arrogant that he regards his personal belief as the litmus test for whether an argument should be given or embraced. Every advocate has to concede that his vision of the law may be partial or wrong. Under these circumstances, it will become the advocate’s job to formulate the argument in question in as convincing a way as possible, anticipating and refuting or defusing objections, and to keep his own personal qualms out of the rhetorical transaction. Still, as I said earlier, most of the time this means that the lawyer will end up believing the legal position he advocates—at least for a time. It is a
disconcerting experience the first time you stop believing a legal position you formerly believed with your whole heart.

Lawyers, in my experience, do not tend to advocate for positions which they do not think courts can rationally accept.\textsuperscript{37} Most good advocates will not knowingly give fallacious legal arguments. Of course, such arguments are given all the time, but that results from weakness of mind, not from intent. Nobel laureates and their ilk may not suffer from this weakness, but all lawyers do—at least now and again. There are no exceptions.

Sometimes, poor lawyers, or people who do not know very much about what lawyers actually do, think that the duty lawyers have to advocate zealously for their clients requires lawyers to produce for judicial inspection every argument they can unearth or devise, including perfectly-wretched ones. Sometimes, half-baked instructors of advocacy at weak Continuing Legal Education programs suggest that advocates should give judges shopping lists of available arguments and that they should be arranged in descending order of plausibility, judged by the lawyer’s lights. This is a simple-minded conception of advocacy which is completely unworthy of the grander traditions of the profession. Zealous advocacy does not require that every non-nauseating argument be submitted. It requires that good legal arguments be submitted. Of course, “good” here does not mean only those arguments that one knows in advance lead to internally-right answers. However, it does mean—subject to the intellectually-and morally-corrupt but fortunately very narrow suggestions set forth above—that only arguments which one believes have a very good chance of persuading the reasonable judge should be given. As stated, frequently the dedicated advocate will end up believing these arguments herself, at least for a time.

Of course, most legal argument is not about legal principle in the abstract, although, occasionally, legal argument is about whether a broad principle should be subject to some new exception. For the most part, legal argument turns on how a principle should be applied to the facts of a given case. Often that argument turns on a kind of argument which is more difficult to formulate succinctly, to wit: given a background legal culture, which facts in a given case should be thought of as predominant, pre-eminent, and pervasively influential?

\textsuperscript{37} There is an exception. It arises when an advocate knows that a judge is a fool or that a judge has an impassioned and irrational attraction to a stupid position. In that case, the lawyer will give the argument the judge wants to hear. Most good lawyers can barely stomach doing this, however.
Such arguments are difficult to formulate succinctly or, as it were, to wind around legal principle. They also seldom play a role in anything which should be called precedent, and it is here where the most enduring disagreements among lawyers persist. Not long ago, a distinguished Texas appellate advocate, Rusty McMains, addressing the Dallas Bar Association, stated unequivocally that “the supreme court does not understand insurance law.” This lawyer is given to provocative statements. At the same time, he probably meant what he said. In addition, what he probably meant was that the supreme court did not have a feel for how facts fit together in insurance cases. He was saying that the members of the court do not have an educated sensibility about which facts are significant in insurance cases (broadly conceived) and which ones are not. He is saying they do not have a sense for factual patterns and their significance. Of course, a jurist must have a sensitive, sensible, and reliable conception of different factual paradigms and their variations. This is one reason why broadly-experienced lawyers are frequently better judges than inexperienced or only narrowly-experienced ones.

Some lawyers, especially when they talk to each other or when they are giving iconoclastic speeches, enjoy repudiating the framework of rationality I am suggesting. Some lawyers enjoy saying cynical things to each other, which extol the role of power in persuasion over the role of rationality. Some of this is braggadocio and swaggering. But not all. The Postulates of Adjudication are by no means perfectly fulfilled in the real world. Courts make mistakes, even courts of last resort. Venue matters. Reputation matters. Whom you know sometimes matters, as does how you know them. Connections can be important. Campaign contributions are not always causally insignificant. Judges are people; therefore, they have personalities, passions, and predilections. Persona can be as important as rationality. (This follows from the fact that argument must be embodied correctly, as well as formulated correctly.) The same case may be decided differently if different facts contained within the case are highlighted differently, conceived differently, emphasized differently, embraced differently, and so on. The fact that adjudication is a series of completely-human institutions does not, however, imply the falsity of the postulates. It simply recognizes the

38. For an interesting general, though speculative, account of these matters, see Peter Sloterdijk, The Critique of Cynical Reason (Michael Eldred trans., University of Minn. Press 1987).
complexity of the real world and the fallen state of man. The status of these postulates is further complicated by the tension that inevitably and always exists between stability and change in the system of norms that should govern adjudicative decision-making. Nevertheless, genuine adjudications happen; our legal system is not even remotely corrupt (except for occasional pockets here and there); and sensible decisions are reached all the time. Often, all objective observers agree that the court reached the only truly correct answer. Often, after allowing a period for recovery and an interval for refocusing on the forest (as opposed to the trees), even the defeated lawyer will agree. A lot of criticism of this decision or that holding focuses not so much on the decision itself as on where the court might go with the rule it employed or laid down. Such slippery-slope anxieties are not necessarily really a critique of the decided case.

C. Puzzles and Paradoxes

Obviously, taking legal argument seriously does not require believing that the law always, always generates—or even mostly generates—uniquely-correct answers. It requires only that the law have a strong tendency in that direction. The idea of internally-correct answers, however, is significantly linked to important jurisprudential ideas. Precedent is one of them, while the systematic nature of the common law is another. Indeed, these two ideas are themselves intimately connected. To use the words of Melvin Eisenberg, the common law all at once tries to satisfy standards of "social congruence, systemic consistency, and doctrinal stability."\(^3\) It is impossible to generate internally-right answers without attending to these characteristics. One important way to do this is to attend to precedent and systems of precedent. But these are not the only values that shape the law's search for uniquely-right answers, and not all of the values at stake are consistent, as Eisenberg implies. How can there be right answers when there are uneliminable tensions within the common law itself, the most important of which is the triangular tension among (i) history-tradition-predictability,\(^4\) (ii) rationality


\(^4\) See the dissent of Justice Lloyd Doggett in Texas Association of Business v. Texas Air Control Board, 852 S.W.2d 440, 452-79 (Tex. 1993) (Doggett, J., concurring and dissenting). This question is especially problematic for a judge when the judge agrees that the particular change requested by the advocate is warranted but is concerned about the amount of change which has preceded the case in question and which will likely come afterward. (Justice Dogget sits in...
(and appearing reasonable in the present), and (iii) future-oriented moral rectitude?

The proper use of precedent is crucial to forming and using this triangle correctly. To do this the concept of precedent must be understood correctly. In order to explore precedent, it is necessary to elucidate some quite-theoretical legal meta-doctrines. In particular, the meta-doctrine of stare decisis (also known as the Doctrine of Binding Precedent) is riddled with vagueness, ambiguity, and multiplicity. As a direct result, the basic nature (and, hence, the principles) of legitimacy for common law regimes seems murky. If the fundamental principles out of which the authority of a legal regime is generated are vague and ambiguous, then must not the legitimacy of the regime itself be uncertain and, therefore, ambiguous in various ways? Actually not. It is, in part, vagueness, ambiguity, and multiplicity that give stare decisis its social and political power. Knowing how to manipulate this murkiness constitutes one (rather mysterious), but very important, dimension of effective advocacy.

Does not its murkiness give ruling elites the leeway they need to change the law incrementally? After all, the ambiguities in the law will be more known to educated legal elites than to others. But how can vagueness and murkiness support the idea that legal argument should be taken seriously or the idea that sound legal arguments will mostly produce internally-right answers? Are not murkiness and ambiguity the friends of subjectivism, relativism, and mush?

There is a paradox here. Two fundamental values underlying the Postulates of Adjudication, and, therefore, underlying legal practice, rhetoric, and philosophy are Truth and Justice. (That these terms are frequently capitalized—"T" and "J"—testifies to how fundamental they are.) To say that truth is a fundamental value is to say, first, that we should base our actions (and, hence, our beliefs) on true propositions and not false ones, and, second, that we should look for Congress.

41. Meta-doctrines are doctrines about doctrines, or, better, doctrines about deciding doctrines. They might also be called theories about thinking about theories, principles about arguing principles, or rules about applying rules.


43. The ambiguity inherent in stare decisis also illustrates the extent to which implicit consent makes the functioning of government—in this case the judiciary—possible. Implicit consent is itself a notoriously-obscure concept, as every student of political theory and fundamental jurisprudence knows.

truth and hope to find it. Therefore, courts should base their decisions on correct apprehensions of the law, i.e., upon true propositions of law, and not false ones, and they should insist upon looking for truth. Surely, vagueness, ambiguity, and multiplicity are enemies both of truth and of all sound truth-seeking processes. Just as surely, this claim is true for institutions seeking truth no less than for evidentiary procedures and people. Of course, Aristotle was right: one ought not to seek more precision than can be found. Nevertheless, one ought to seek all the precision one can afford. In contrast, states of affairs will be adjudged just on a widespread basis (in social life at least) only if major standards of justice have certain imprecisions, vaguenesses, and ambiguities at their foundations. Justice is always blurry. Consensus, and, therefore, legitimacy, is possible only upon this basis. Precision in evaluating the morality of social and political states of affairs creates disagreement and precludes agreement. (Many are the young lawyers who discover, to their initial chagrin, that huge numbers of deadlocks in contractual negotiations can be solved only through ambiguity and vaguenesses.) Hence, truth (which requires precision) and justice (which requires inexactitude) cannot both be obtained in any political regime vaguely resembling democracy. Most people will find these observations disturbing, if not offensive. For better or for worse, most people are Platonists in the sense that they believe that the moral order is not only “out-there” objective but through-and-through consistent at its foundations.

The argument just sketched suggests that detailed truth and precise justice are inconsistent in any large social system, especially a pluralistic one. There are more, and somewhat different, problems. Justice hinges on finding legal truth, but what counts as legal truth is determined by a measuring rod that cannot be read univocally. Justice requires truth, but knowing the truth about what-the-law-is cannot be had. How can this be? The meta-doctrine of stare decisis values getting adjudications right, doing justice, focusing on practicality, achieving wide-spread fairness among the populace, achieving a public perception that adjudication is more or less

rational, and creating and maintaining a belief on the part of the public that common law adjudication is moral, on the whole. At the same time, the doctrine of stare decisis tries to accommodate itself to both stability and change. These are tall orders, which—ultimately—cannot all be accomplished at the same time. It is for this reason that the common law is in perpetual, complex tension. Tensions must be glossed over to get cases adjudicated or settled. Hence, the world demands murkiness. But how can there be right answers in these situations?

D. Digression on Lawyers and Truth

The preceding discussion should not be confused with the currently-popular suggestion that the activities of lawyers have almost nothing to do with either truth or justice. "Kick-ass" lawyers love to say things like this either when they have just won a case or when they are recruiting clients. Cynical lawyers love to insinuate that cases they have won should have been lost (and would have been, in the hands of lesser persons) and that their clients should bring them business because they will work miracles. Such lawyers imply that facts have little to do with the resolution of lawsuits, that jurors are incapable of grasping the truth, and that justice is invariably ephemeral if not downright illusory. This is power-trip rhetoric and—for the most part—should not be taken seriously as an account of the legal profession. Some legal academics, however, share the view, if not the rhetoric. Sanford Levinson adopts this view wholeheartedly: "[N]othing could be further from the day-to-day life of the lawyer than the search for truth."47 I have put Levinson's Theorem to a large number of litigators. By far, the majority of them think the claim is not just a little bit untrue, but radically false.

Most disputes involving legal rights are resolved before suit is filed. Frequently, the role of the lawyer in these disputes is to find out what the facts are. Although law schools do not do much of a job of intentionally training law students in fact-finding, lawyers are, for some mysterious reason, frequently better than are people trained in other disciplines at isolating and articulating undisputed facts, in describing factual disputes and evaluating their implications, and in fitting facts together with rules. Often, when lawyers get involved and figure out what (some of) the facts are, disputes are resolved.

47. Sanford Levinson, What Do Lawyers Know (and What Do They Do with Their Knowledge)? Comments on Schauer and Moore, 58 S. CAL. L. REV. 441, 455 (1985).
same thing is often true after cases are filed. This observation is especially true when the lawyers know each other. Frequently, discovery is a process of finding out what witnesses think is true. In the average case, much more time is spent finding out what the witnesses believe they saw, heard, and so on than is spent undermining these views. (Of course, some time is spent limiting or eliminating testimony.) In that context, the question is whether the witness’s testimony is credible. Questions of credibility turn on whether a witness should be believed by a rational fact-finder. The central focus of that part of discovery known as “document production” is focused on finding out what a range of documents say. Surely, that is a step in finding the truth.

Settlement is no different. Of course, there is a good deal of posturing that goes with the processing of any lawsuit. This is especially true of settlement negotiations. However, virtually all experienced litigators know how to ignore such carrying on, and I confess that I do not understand its psychological and social functions. It has zero impact on knowledgeable and dedicated litigators. Mediation as a settlement device is all the rage these days, all over the country. Mediation is extremely effective at encouraging both direct and indirect dialogue among lawyers and sophisticated litigants. One of the key questions in any settlement negotiation is: “What is the fact-finder likely to believe at the end of the day?” Most of the subsidiary questions which arise under this general rubric pertain to facts, credible testimony, arguments from experts, and the like. All of these are connected to the truth. (Of course, the talents of opposing counsel are figured into the mix, and often if opposing counsel has an impressive record of winning jury trials, he is portrayed as a rhetorical magician who can make the worse argument appear the better. Often, it is quite clear that this rhetoric is a self-deceptive cover. It is a way for defendants with liability to authorize settlement, without having to admit to themselves and to their superiors that someone has misbehaved.)

Levinson follows his Theorem with this remark: “The task of the lawyer is that of the ancient Greek orator—the production of belief on the part of an audience, regardless of the merits of the belief. It is belief alone, and not knowledge, with which the lawyer is concerned.” This cynical observation is quite false. This is so for two reasons. First, lawyers argue. Argument does not cause belief in free
and relatively-rational agents. There is all the difference in the world between hypnotically inducing belief and convincing someone that a proposition is true. To be sure, lawyers are in the business of persuading. They are in the business of convincing. But, for the most part, their job is to convince by means of arguments. Even many so-called emotional appeals in jury trials are actually arguments. For example, when the plaintiff's lawyer argues that a certain accident has ruined the life of the plaintiff—destroyed love, wrecked beauty, laid waste to a marriage, destroyed effective parenting, and so forth—the plaintiff's lawyer is trying to get the jury to take seriously the emotional dimensions of the injury allegedly caused by the plaintiff's allegedly-actionable conduct. The second reason why lawyers care about knowledge and not just about belief is that in the vast majority of cases, the most reliable way in which to bring about belief is precisely to bring about knowledge of certain facts and to limit the significance of other alleged facts. Belief is certainly important. Fact-finders define facts based on what they believe them to be. But one of the most reliable ways to induce the sort of belief upon which someone will base a significant decision is to provide rational grounds for that belief. After all, knowledge has something to do with justified true belief, even if that is not the actual definition of knowledge.  

Of course, these remarks do not imply that the adversary system always, or even quite frequently, guarantees justice. In every rhetorical situation, there are both facts and spin. They cannot always be distinguished reliably, although they are obviously distinct conceptually. It is surely one of the responsibilities of a lawyer to place as attractive a spin as possible on whatever facts are introduced into evidence. It is also a lawyer's responsibility to deconstruct, as it were, the spin placed upon the facts by opposing counsel. Some lawyers are better spin-doctors than others. Sometimes, very good lawyers make mistakes. Sometimes, excellent lawyers overlook things. And not every lawyer is either excellent or very good. Of course, some of these defects will be present in any human system. Others are a product of the adversary system. Under no circumstances, however, do the problems and deficiencies in the adversary system establish the Levinson Theorem. In fact, it should not be treated as a theorem at all.

II. COMMON LAW DECISION-MAKING AND THE NATURE OF PRECEDENT: BEGINNINGS

Perhaps the defining characteristic of common law decision-making is that precedent is taken seriously. If one takes legal argument seriously in a common law system, one must take precedent seriously, and one must take arguments from precedent seriously. So far as common law causes of action are concerned, the foundation of legal rights and legal duties is precedent. Consequently, insofar as the common law is concerned, the source for all rights-talk and all duties-talk is precedent. Of course, there may be extra-legal glosses on the meaning of various precedents, or upon the meaning of key concepts to be found in those precedents. Nevertheless, precedents themselves are internal to the law, the glosses—such as those which are currently suggested from economic theory—come from outside the law.

The common law consists of judge-made law. Judges do not view themselves as nabbing decisions or reasons out of thin (or even thick) air. Common law judges work very hard to create texts that will make their decisions appear to be anything but plucking. Sometimes, the judges will try to suggest that they have been driven to a conclusion. Sometimes they will argue that their conclusion is the only reasonable one. Sometimes they will suggest that it is the best decision, or—at least—a very good one. Common law judges try to do this on the basis of the facts proved and on the basis of the law as they understand it. Frequently, both the law and the facts are laid out at some length. This form of common law decision-making presupposes the idea that not just any principle can be counted as a legal principle, that principles cannot be interpreted to mean just anything, and that there is an "out there-ness" about legal principle. In general, judges will try to suggest that the legal principle they are applying in a given case was not created by them for that case but antecedently existed, somehow, "out there," outside the mind of the individual judge making the decision. The meta-doctrine of stare decisis, of course, is designed to serve this function. Even in cases of first impression, judges will say they are trying to determine whether a jurisdiction

50. For a helpful summary of typical discussions of the nature of precedent, see RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 39-55 (1961) ("many consider precedent to constitute the essence of the case-law system," id. at 56).

recognizes this or that rule, principle, or cause of action.

A. Stare Decisis

Black's Law Dictionary defines the phrase "stare decisis" this way: "To abide by, or adhere to, decided cases."52 This authoritative source is the starting point whenever a lawyer tries to get a handle on a legal concept or legal doctrine. It is important to notice how complicated and many-limbed Black's "definition" of stare decisis really is. The entry continues as follows:

Policy of courts to stand by precedent and not to disturb settled point. Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same. Under doctrine a deliberate or solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy. Doctrine is one of policy, grounded on theory that security and certainty require that accepted and established legal principle, under which rights may accrue, be recognized and followed, though later found to be not legally sound, but whether previous holding of court shall be adhered to, modified, or overruled is within court's discretion under circumstances of case before it.... The doctrine is limited to actual determinations in respect to litigated and necessarily decided questions, and is not applicable to dicta or obiter dicta.53

An enormous amount lies hidden in this lengthy definition, if that is what it really is. The bottom line is that, if a court decides a point of law, after the adversarial parties have raised it and argued it and after the court has thought about it carefully, then it is binding on some range of courts (possibly including the court that decided the point) if it was a matter of some importance in the decided case. A good deal still lies hidden. To use the words of the definition itself, what are the criteria for when the court has made a "deliberate or solemn decision"? When does one know that a court has made such a decision? Is it really the decision which constitutes stare decisis, or is

it the principle that generates the decision? This last question has generated conundrums in jurisprudence for years. Obviously, any decision can be generated by a large number of principles, so that if legal principle is what constitutes stare decisis, then one is always asking what the true justificatory principle of a case really is.

This generates all sorts of practical problems. One standard gambit in advocacy is to narrow a precedent. This can be done in lots of ways. One can point out that other jurisdictions do not follow it. One can show that it is not used in analogous cases. Or one can demonstrate that the language used to state the rule is broader than was warranted by the facts of the lodestar case or cases. When is such advocacy legitimate? And how can one know?

Moreover, at its core, the doctrine of stare decisis implies—quite generally—that even if a legally-authoritative rule is wrong at inception, or becomes wrong over time, it should still be followed years later by “lower” courts, if it is not very, very, very wrong. Because the thesis is quite general, authoritative rules that are morally wrong should be followed by lower courts years after the decision, even if they are proved morally wrong. But, the doctrine of stare decisis is itself thought to be a moral rule. This will be brought into focus presently when a relationship between the doctrine of stare decisis and the ideal of the Rule of Law is discussed. Thus, broader, system-related considerations—such as fairness—dictate that single, isolated rules that are morally wrong be applied in individual instances. Besides, the argument goes, if appellate judges know this, they are likely to take their original epistemic and decisional duties more seriously. Still, there is something disturbing about claiming that a moral rule can require that avoidable, less-than-moral acts be performed.

These considerations create two sorts of problems: practical and moral. How can it possibly be morally obligatory that courts should apply and follow a law which is manifestly unjust? How can it be moral for a court voluntarily to apply a law which it knows to be immoral? How can lawyers in good conscience argue for the application of a law that they know to be unjust and immoral? Is this kind of commitment really a good idea from a practical point of view?

54. For some historical reflections on this problem, see Gerald J. Postema, Some Roots of Our Notion of Precedent, in PRECEDENT IN LAW 9 (Laurence Goldstein ed., 1987). That essay is immediately followed by Jim Evans, Change in the Doctrine of Precedent During the Nineteenth Century, at page 35. Evans demonstrates how the authority of precedent depends upon more-fundamental philosophical theories about the nature of law.
Is not this kind of commitment really impossible if legal argument is a moral enterprise?

Then again, how often do such crises arise? How often is it obvious that an established legal rule will not only be immoral but will appear unequivocally immoral to the populace? Surely, such a wrenching dissonance will—at least over time—present itself as a crisis in legitimacy. This almost never happens in commercial law, nor in most regulatory areas (e.g., environmental law), nor in most areas of property law. (The law of slavery in the last century is the principal exception.) Moreover, some rules that are immoral in isolation or in contemplation are much less so when taken as part of a system or when they have become conventionally received among all the players in a given game.

Of course, sometimes common law backs away from a hard-and-fast rule but does so without expressly overruling it. This is the stuff of which legal history is made. A hundred years ago, if a party breached a contract, the other party was excused from performance. This doctrine was routinely applied, for example, in insurance cases. If the insured failed to give timely notice to the insurance company, the insurance company did not have to perform. This is no longer the law in most jurisdictions. Now, if an insured fails to give timely notice, but the insurer is in no way injured, the insurer still has a duty to perform. In some states, old cases were overruled; in some states, they faded away; in Texas, the supreme court said it could not bear to overrule its own relatively-recent decisions, so it begged the executive branch to fix the problem, which it promptly did. The solution created by what is now called the Texas Department of Insurance was to create a mandatory endorsement. Interestingly, the mandatory endorsement does not cover certain important areas of now-existing insurance policies. The Fifth Circuit, not long ago, predicted that the Texas Supreme Court would not stick by its now-aging reluctance, but would, by decision, extend the rule of substantial compliance.


56. See Klein v. Century Lloyds, 275 S.W.2d 95 (Tex. 1955); New Amsterdam Cas. Co. v. Hamblen, 190 S.W.2d 56 (Tex. 1945). For a comprehensive treatment of this entire matter which is both historical and systematic, see 1 Allan D. Windt, Insurance Claims and Disputes, § 1.04, at 11-19 (3d ed. 1995).


B. Precedent, Principle, and Policy

There is a well-known distinction between, on the one hand, moral entitlements, which are a matter of right (as in A has a right to x) or a matter of principle (B has a duty to refrain from repeating A's obtaining x) and, on the other hand, matters of policy (as in It would be a really good idea for A to do y). In this sense of the term "policy," it is probably not true that the doctrine of stare decisis is a matter of policy, as the quoted entry in Black's Law Dictionary indicates. Probably, people who live in common law jurisdictions have a defeasible (i.e., defeatable or overridable) moral entitlement that the judiciary shall use meta-doctrines of stare decisis. The traditional justifications for this moral entitlement are defective, however. Here is one of the usual, traditional arguments. One of the most important features of a stable society is the ability to plan for the future on the basis of the past. If people engage in transactions or spend money to create authoritative plans (such as trust documents, wills, complex gifts, and so forth), they have a right to be able to rely upon publicly-available and authoritative rules. Think in terms of this analogy: if I am invited to come upstairs to a second-story room and it is indicated to me that I should use the stairs, I have a right to rely on the idea that the stairs will hold me. This analogy does not apply perfectly to society, however.

Having the right to rely on legal rules is an exquisitely-complex matter. The right to stare decisis is a very complicated right, if there is such a right. It is subject to all sorts of qualifications, and those qualifications correspond to the true nature and the strength of the meta-principle itself. As a consequence, the moral entitlement one might have to stare decisis is no simple matter to express. I will not try here—perhaps later, in another place. There is a more pressing problem, however. There is not one meta-doctrine of stare decisis. There are several such doctrines. Which version of stare decisis is applied in a given case can critically affect the outcome of the case. Indeed, it is possible to generate different answers in the same case, depending on which meta-doctrine is used. This more-complex and more-realistic conception of stare decisis is not consistent with the reliance argument just developed, if the only entitlement is that stare decisis be used, i.e., that one of the meta-principles bearing that name

59. See Ronald Dworkin, Taking Rights Seriously 90-100 (1977); Markovits, supra note 21, at 95-97.
be used.

C. Stare Decisis and the Rule of Law

Some version of stare decisis is probably required by the Rule of Law—which is, perhaps, at the apex of the hierarchy of metadoctrines governing adjudication and legal decision-making.\textsuperscript{60} Compliance with the requirements of the Rule of Law is an oft-lauded political ideal, which is only occasionally spelled out in any detail. Antonin Scalia, an Associate Justice on the United States Supreme Court, has suggested that the Rule of Law requires that the law consist of rules.\textsuperscript{61} This claim is probably wrong if there is a distinction between rules and principles as Ronald Dworkin has so famously suggested.\textsuperscript{62} Nevertheless, Justice Scalia is on the right track. The fundamental idea underlying the ideal of the Rule of Law is that arbitrary power be limited through stable general norms.\textsuperscript{63} Surely they play a crucial role in achieving the Rule of Law.

Sketchily put, the Rule of Law consists of ten meta-principles. First, the government (including courts) should not act or refrain

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\textsuperscript{60}. Anthony Kronman has suggested that stare decisis is a necessary component of every legal system. See Anthony T. Kronman, \textit{Precedent and Tradition}, 99 \textit{Yale L.J.} 1029, 1032 (1990). I suspect he is right, because every legal system is trying to regulate a social system over time, and every social system changes. Some change more slowly than others, but all change. \textit{But see generally} Peter Wesley-Smith, \textit{Theories of Adjudication and the Status of Stare Decisis}, in \textit{PRECEDENT IN LAW}, supra note 54, at 73. Wesley-Smith distinguishes stare decisis as conceived by legal positivism and stare decisis as conceived by the declaratory theory of law. According to Wesley-Smith, a common law judge should be attracted to the declaratory theory of law, because it absolves them of personal responsibility for bad decisions, since they are—after all—simply declaring law which is already binding on them. At the same time, the declaratory theory of law cannot provide an account of stare decisis, which requires that judges follow previous decisions that are wrong. See \textit{id.} at 80. “Positivist assumptions ... thus provide intellectual support for ... \textit{stare decisis}.” \textit{Id.} at 82.

We are therefore led to the position which prevailed when the declaratory theory of law was orthodox: \textit{stare decisis} cannot be law, precedents cannot be absolutely authoritative. Judges owe their fidelity, not to the pronouncement of predecessors, but to the law. They might not now identify that as ancient custom, and in practice they will usually discover it in the law reports, but they are ultimately free to reject a precedent if they do not believe it represents the law. \textit{Id.} at 87 (footnote omitted).


\textsuperscript{62}. \textit{See} DWORKIN, supra note 59, at 22-28.

from acting, and it should not require others to act or to refrain from acting, except upon the basis of legal norms. Second, the commands, mandates, demands, and directives of government officials (including judges) are not legally obligatory unless they are based upon law. Third, all provisos of law must be at least minimally clear. Fourth, all legal norms are public. Fifth, all legal norms are general. Sixth, all systems of administering legal norms must involve regularity: similar cases must be treated in a similar manner. Seventh, and this may come to the same thing, legal norms must be applied fairly. Eighth, the process of applying legal norms must be as peaceable as possible, orderly, and not subject to extra-legal influences. Ninth, the process of creating, invoking, and applying legal norms must be reasonably rational, and the process of presentation must maintain the appearance (and, therefore, the encouragement) of substantial rationality. (Of course, rationality in a legislative context may differ from rationality in judicial or administrative contexts.) Tenth, legal norms should not require the impossible. As a consequence, for the most part, legal norms may not retroactively require conduct. The past cannot be changed. That is impossible.

There is a significant question as to whether (and the extent to which) the common law can conform to the ideal of the Rule of Law. The tenth component of that ideal creates most of the problem. When common law courts create causes of action, they create them retroactively, for the most part. In other words, when \( P \) begins a lawsuit against \( D \) in jurisdiction \( J_j \), seeking a remedy on the basis of a cause of action which exists in \( J_j \) but not \( J_j' \), or which exists nowhere at all, the court of original jurisdiction will (probably) dismiss the lawsuit for failure to state a claim (i.e., for failure to articulate a cause of action). Chances are good that the intermediate-level court of appeals will affirm the trial court. Sometimes the supreme court of \( J_j \) will reverse. If it does, it will find that the relevant cause of action does exist in \( J_j' \), and it will apply the new cause of action in the very lawsuit before it. One must either say that (some) common law rules

64. For a survey of various conceptions of the Rule of Law, see THE RULE OF LAW (Ian Shapiro ed., 1994). In their contribution to this volume, William N. Eskridge, Jr., and John Ferejohn suggest that the Rule of Law is met if the commands of the legal system "are general, knowable, and performable." William N. Eskridge, Jr., & John Ferejohn, Politics, Interpretation, and the Rule of Law, in THE RULE OF LAW, supra, at 265, 265; see also Margaret Jane Radin, Reconsidering the Rule of Law, 69 B.U. L. REV. 781 (1989). Professor Radin's paper contains a list of components of the Rule of Law very similar to my own. She says they boil "down to two principles: first, there must be rules; second, those rules must be capable of being followed." Id. at 785.
exist before they are declared to exist or that—to some degree—the common law fails to conform to the tenth principle. It is tempting to say that the rule existed all along and that most informed observers would have guessed that it existed. That is what the counsel of lawyers is for—to explain these risks. But hindsight is much better than prediction, and whether a given jurisdiction is going to adopt a new cause of action is almost always a highly-contingent, speculative matter until adoption actually happens. For these reasons, it is difficult to see how common law adjudication can completely conform to the ideal of the Rule of Law, when courts create causes of action retroactively. If we say that the law exists before the courts apply it, then not all legal norms are public, and the fourth principle is violated, as well as—perhaps—the tenth. If we say that courts create new legal norms after the fact, then the tenth and perhaps the third principles are endangered. Fortunately, this phenomenon does not happen very often. Moreover, when new causes of action are created, there are frequently harbingers of their creation. It has certainly happened in the middle of the twentieth century, when courts all over the country adopted strict liability in tort. Harbingers included previous court decisions, the Restatement (Second) of Torts, and many scholarly writings. Perhaps it is a breach of the Rule of Law we can live with if the common law and the Rule of Law otherwise fit together pretty well. Law students see courts create more causes of action in their case books than any practicing lawyer sees created in a lifetime. As a consequence, many law students come out of law school believing that the common law is much more generative and creative over short periods of time than it actually is.

The meta-doctrine of stare decisis fits reasonably well with the
ideal of the Rule of Law. Here I am discussing actuality and not just possibility. Stare decisis is designed to give a rough-and-ready decision-procedure for determining what rules constitute a valid common law norm. Now, does this meta-doctrine comply with the Rule of Law? Apparently, it complies with the first meta-principle: it provides a method for restricting governmental mandates to legal norms. Second, it helps distinguish legitimate government commands (those based on law) from illegitimate ones. Third, it helps guarantee that all legal norms are at least minimally clear. If a norm were not minimally clear, it could not be selected by stare decisis. Fourth, stare decisis applies only to public rules; the meta-doctrine helps preserve the requirement that legal norms be public. Fifth, stare decisis is designed to pick out general norms. Sixth and Seventh, stare decisis is designed to pick out general rules, which will help judges treat like cases alike. These rules are supposed to be, and to sound like, good reasons for making decisions. Eighth, stare decisis cannot guarantee fairness, but it can guarantee that general rules are what get applied. Ninth, stare decisis resists disorder and extra-legal influences. Tenth, the application of stare decisis (on most theories of its nature) is a rational process.

Of course, no actual legal system ever conforms (or could ever conform) to the criterial marks of the Rule of Law perfectly. In these matters, everything is a matter of degree. On the other hand, it is obvious that some legal systems finish way ahead of others. It does not take deep, scholarly knowledge to know this, although, perhaps, only scholars can work out the details of these matters. Moreover, it may also be that the legal system is thought to be poor from the point of view of the Rule of Law and that opinion turns out to be mistaken. Such opinions can be held broadly in various cultures for ideological reasons, and those widely-held opinions can be wrong. In any case, law provides decision-makers with a bank of good reasons for their decisions.

68. See WASSERSTROM, supra note 50, at 56 (“many consider precedent . . . to exemplify all that is truly magnificent in the notion of ‘the rule of law’”).

69. Keep this in mind, however, when we discuss the Subjective Critical Theory. It is not clear, however, that the meta-doctrine of stare decisis does not, from time to time, assist courts in requiring the impossible.

70. Courts from time to time adopt the Good Reasons Approach quite expressly. For example, the New York Court of Appeals laid down a new rule: “There is no controlling decision in this jurisdiction on the question here involved. In various opinions there may be found statements which indicate conflicting views. We are at liberty, therefore, to adopt the view which seems to us to be supported by the best reasons.” Davis v. Modern Indus. Bank, 18 N.E.2d 639, 641 (N.Y. 1939) (emphasis added).
III. THESES

Obviously, I have been sketching with bold strokes. This pattern will continue. I have two inter-related theses to argue in this paper. One of them is a practical thesis focusing on effective advocacy. The other one is a normative thesis, and it focuses on how legal reasoning ought to be done as a matter of sound jurisprudence.

A. Practical Thesis

My first thesis is a practical one, and it is this. There are different theories regarding the nature of stare decisis within its usual—"black-letter"—canonical formulations. Some formulations of stare decisis are much stronger than others. Effective advocacy sometimes requires selecting and relying upon that theory of stare decisis most conducive to the argument presented. Learning how to do this is not difficult. Experienced appellate lawyers already know that what I am saying is true. Sophisticated lawyers already do what I am recommending, although they may not think about it systematically. Advocacy to judges involves not only highlighting the right facts and selecting the right legal principles and arguments, but also involves deploying the right meta-doctrines and meta-principles. Taking legal argument seriously involves using the right meta-doctrine. It is like what the pianist does with his left hand. At the same time, this kind of unauthorized shifting around is not to be encouraged in philosophical jurisprudence (and political theory). Its responsibility is to formulate the doctrine (or group of doctrines) correctly. How stare decisis works in actual, honorable advocacy is a necessary prolegomenon to a correct jurisprudential formulation. But that is all it is.

B. Normative Thesis

These reflections lead to my second thesis, which is normative. I will suggest that there is an irreducible pluralism within the doctrine of stare decisis itself. Courts conceal—or, at least, do not emphasize—the irreducibility of this pluralism, because that might affect the public’s perception of the legitimacy of the common law. Nevertheless, this irreducible pluralism exists, because it is found in sound and honorable legal practice. An irreducible pluralism means that there are different principles of stare decisis that cannot be eliminated or translated into each other and that lead to inconsistent results. Does this mean that it is possible to take legal argument
seriously and yet to confess that serious legal argument will not always converge upon one internally-right answer? (If there is an irreducible pluralism of competing meta-doctrines of stare decisis, then there is an inevitable pluralism of internally-acceptable answers to legal problems. There will still remain internally-wrong answers, however.)

I say that the pluralism among meta-principles of stare decisis is irreducible because there are no (meta)-meta-principles for deciding when to use which rule of stare decisis. The problematic character of this situation can be overstated. Decades ago, Karl Llewellyn suggested that there was such a thing as a "situation-sensibility," by which he meant that experienced lawyers—because of their training and experience—had an understanding of situations that other people do not have. It is a way of being able to classify the world so that life-situations in flux can be seen as members of a type.\textsuperscript{71} There is a situation-sensibility at work when applying various meta-principles of stare decisis. It is surprising how quickly knowledgeable, sophisticated, and reflective lawyers grasp which common law rules from the past should apply and how they should be formulated. Almost anybody who observes the legal scene for very long knows that this is true, although the only evidence for it is anecdotal. Still, there is a significant irreducible pluralism, albeit for a fairly-narrow range of cases.

I certainly do not mean to suggest that each meta-principle formulating a variant of stare decisis is overall as good as the others, although every one of them has some virtues and some vices. A thorough, moral, jurisprudential, and political evaluation of these competing principles will have to await another day, however. There is space here to sketch only a few different approaches, show that each of them is independently rooted in the law, discuss their use in advocacy a bit, and explore a few vices and virtues briefly and more or less dogmatically. Fortunately, advocacy is structured and limited by moral considerations.\textsuperscript{72} In the end, I will be arguing for the rather odd and paradoxical proposal that, although there is considerable relativity regarding which meta-doctrine of stare decisis counsel may

\textsuperscript{71} See Karl N. Llewellyn, The Common Law Tradition 60-61 \& passim (1960). For a recent discussion of Llewellyn's situation-sensibility, see Chris Williams, The Search for Bases of Decision in Commercial Law: Llewellyn Redux, 97 Harv. L. Rev. 1495 (1984) (reviewing Leon E. Trakman, The Law Merchant: The Evolution of Commercial Law (1983)). One does not have to have practiced law amongst excellent practitioners for very long to see this kind of practical intelligence work quickly and very well.

\textsuperscript{72} See Markovits, supra note 21, at 61-74.
appropriately use, there is very much less relativity about how cases should be decided. On every issue as to what the law is and how it should be applied to a stipulated, agreed, undisputed, or somehow-fixed set of facts, an array of answers are wrong and demonstrably so. For a great many such questions, there is only one correct answer, and it can be proved by means of serious legal argument (although not generally to the lawyer who loses the case). Finally, in the small set of cases where, in the end, there remain competing answers among which no sound choice can be made, this fact implies that there is a narrow range of cases where no right answer can be found, when it is needed. There may be right answers out there to be discovered in many of those cases. It is just that we do not have the information, the time, the money, the discernment, or the wisdom to find them. For all of these situations, of course, there are wrong answers that can be found and which should be rejected. What I have said still does not imply that there exists a right answer to every question. There might be some questions that are simply indeterminate, even when all the law and all the facts are known. Perhaps the legality of taking sperm from the body of a dead man for the purpose of inseminating his widow is a question like that for the late 1990s.73

C. The Common Law and Stare Decisis Meta-Doctrines

There are at least six distinct versions (or theories) of stare decisis and its component concepts.74 I call these meta-theories the Imperial Theory, the Holdings Theory, the Holdings-Plus Theory, the Flexible Theory, the Subjective Creative Theory, and the Objective Creative Theory. These categories are part of the multiplicity discussed earlier; they are “ideal types,” of course.75 In actual, concrete, historically-significant opinions, these Theories may be asserted or used concurrently. Often, courts explicitly commit themselves to more than one Theory at the same time. Their implicit usages and commitments are more complex. In fact, judicial opinions do not come anywhere near embracing any version of the Creative Theories. Sometimes, judicial opinions may exemplify one of those

74. For a different way of categorizing different doctrines of precedent, see WASSERSTROM, supra note 50, at 53-54.
Theories, but judges can be counted on not to *espouse* either of those Theories. The reasons for all this are discussed later. This is part of the generative and stabilizing murkiness discussed earlier. Lawyer-advocates are very wise, most times, not to spell out specifically the meta-theory upon which they are relying, even if they themselves should know. It is best simply to speak in terms of precedent, without reference to any theories. In the practical world of litigation, "under theorization" is a very good idea, indeed. For their part, legal scholars distinguish the various meta-doctrines of stare decisis in different ways. Actually, although I pluralize only the Creative Theories, each of these Theories is really a family of theories; for each Theory there are subspecies. All the Theories, however, will be sketched here, but no more. Only a few of the subspecies can be even mentioned. A full taxonomy will have to await another day.

In illustrating these Theories, it is important to focus on one body of law. Skipping around from one state to another is *a priori* not a good idea. I contend that each Theory (or traces of them) will be found in every jurisdiction. Besides, most states focus on their own law most of the time. This is true even when the high court says that courts of a given jurisdiction should pay attention to what is going on in other states. Many discussions of stare decisis by American lawyers focus on the role of the doctrine in constitutional law. I have deliberately focused elsewhere because most law arises elsewhere. Undoubtedly, the concept of the common law has tremendous prestige all over the United States and is at the heart of our legal regime. For no reason except the accident of residence, a large population, considerable public wealth, media attention to its legal affairs, and antecedent familiarity, I use Texas law to develop the doctrine. Texas law seems typical, though I have no guarantee of

See generally Anthony D'Amato, How to Understand the Law (1989).


See, e.g., National Union Fire Ins. Co. v. CBI Indus., Inc., 907 S.W.2d 517, 522 (Tex. 1995) ("Courts usually strive for uniformity in construing insurance provisions, especially where, as here, the contract provisions at issue are identical across the jurisdictions").

See Note, Constitutional Stare Decisis, 103 Harv. L. Rev. 1344 (1990); see also John M.M. Greabe, Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damage Actions, 74 Notre Dame L. Rev. 403 (1999).

Moreover, I have drawn much of my material from insurance cases. This is a harmless-enough bias: insurance cases involve themes of contract, tort, and public policy, so they reflect many of the themes to be found in the common law generally.

The Texas Supreme Court has written several prose poems in honor of stare decisis on a number of occasions. These paeans contain all the usual elements of venerating history, worshiping custom, embracing successive adaptations, glorying in flexibility and growth, celebrating continuity and predictability, while all the time keeping precedent in mind. Courts and great judges frequently write this way. There is a theory of epistemology called the Verstehen Doctrine, according to which knowledge of human affairs consists of fundamental and unanalyzable cognitive intuitions—fundamental graspings of the understanding. Thoughtful judges and their courts appear to adopt this view when they talk about how lawyers know which aspect of the common law to accent. They seem to think that there is a sufficiently rich and uncontroversial Verstehen Doctrine to account for how we know when a legal argument has come to the right conclusion. This is obviously not very satisfying. Nevertheless, systematic, rigorous discussions of stare decisis are not to be found in judicial opinions. Odes to stare decisis tend to be more inspirational than they are rigorous. Alas, even the inspirational component is thin.

Let’s try a somewhat different approach. Roughly put, the metaprinciple of law known as stare decisis is the proposition that something about previous decisions of supreme courts (at least) provides a very, very, very good reason for deciding subsequent similar cases in the same way. This could be called the Good

81. There are at least two ways in which Texas is atypical. First, it has two courts of last resort. The Texas Supreme Court hears only civil cases, while the Texas Court of Criminal Appeals hears only criminal cases. Occasionally, the two courts interact. For example, in the recent controversies over scientific expert witnesses, the two courts have moved, more or less, in tandem. See Michael Sean Quinn, Memory, Repression and Expertise: Civilly Actionable Sexual Misconduct in Texas and Individual Rights, 3 Tex. F. Civ. RTS. & CIV. LIBERTIES 1 (1997). Second, Texas has many intermediate-level courts of appeals. Many states do not have this geographic regionalization. It is entirely unclear that a holding from one court constitutes precedent for another.

82. See Davis v. Davis, 521 S.W.2d 603, 608 (Tex. 1975).


84. For a systematic exposition of the ideal of Verstehen, see H.P. Rickman, Wilhelm Dilthey: Pioneer of the Human Studies, 74-87 (1979).

85. See Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 571 (1987) ("The bare skeleton of an appeal to precedent is easily stated: The previous treatment of occurrence X in matter Y constitutes, solely because of its historical pedigree, a reason for treating X in manner Y if and when X again occurs"). The phrase "a reason" does not really capture the force of
Reasons Approach to precedent. At this point it does not involve any account of why the reasons are good. Moreover, it does not involve any account of whether judicial decisions need to be persuasive (for political reasons) or how judges can make them persuasive. The Good Reasons Approach is not a theory of persuasion. What counts as a good reason is determined by the normative-conceptual structure of the context in which a reason may be a good one or a bad one, not by whether it actually persuades anybody of anything. The word "good" is ambiguous in rhetorical contexts. A good argument may be a persuasive argument, or it may be one that has true premises and is formally valid. The Good Reasons Approach suffers from the same ambiguity.

It starts with a phenomenology of reasoning in legal contexts. The strength of the reason which precedent supplies is really prima facie dispositive. In other words, an applicable precedent is, in and of itself, a crushingly-good reason for deciding a case in a given way, barring overriding opposing reasons. Perhaps the best way to put this is to say that precedent is binding. A reason is binding in an institutional context if the decision-maker is wrong to decide a case contrary to what that reason prescribes. Unfortunately, all of this phraseology does not really illuminate much of anything. All I am coming up with here are different multi-syllabic ways of saying pretty much the same thing. Then again, this negative point is true of most accounts of precedent.

Thus, not only does the doctrine of stare decisis help maintain "systemic consistency" and "doctrinal stability," it also contributes to our sense of the objective—external object-like—reality of the common law. Stare decisis suggests that there is objectivity inherent in the law. Moreover, the use of precedent creates a sense of evenhandedness and a notion that decisions are replicable. In precedent.

86. See WASSERSTROM, supra note 50, at 83 (viewing precedents as reasons); Frederick Schauer, Giving Reasons, 47 STAN. L. REV. 633 (1995). Courts from time to time adopt the Good Reasons Approach quite expressly. See, e.g., supra note 70.


88. EISENBERG, supra note 39, at 50.
addition, it serves the ends of due process, broadly conceived, because the application of stare decisis involves notice and, hence, facilitates the values both of justified reliance and of the avoidance of unfair surprise. In other words, stare decisis seems fair. None of the grounds of the doctrine of precedent explains its meaning, however. None of the grounds of the doctrine of precedent shows how stare decisis can be reconciled to the need for moral rectitude in authoritative legal decision-making.

The true meaning of stare decisis—the proposition that the rule of a precedent provides a very, very, very good reason for deciding similar cases in the same way—depends upon the meaning of the phrase “very, very, very good reason.” Essentially, this phrase is the matter under discussion here. Each of the Theories named above and discussed below gives a different account of this phrase’s scope and meaning. Nevertheless, whatever the correct understanding of the doctrine of stare decisis, its conceptual components and contrasts are always the same: precedent, holdings, dicta, judicial dicta, and obiter dicta. How these concepts relate is the key to understanding different theories of stare decisis.

IV. THE IMPERIAL THEORY OF STARE DECISIS

According to the Imperial Theory, when a principle of law has been deliberated upon (i.e., thought about), expressly formulated, and posited as law by an appellate court, it must be followed in similar cases. This rule is especially powerful where the precedent was set by the supreme court of the appropriate jurisdiction. This rule applies to any principle of law that has been decided by the highest court. It is particularly inflexible where trial or intermediate-level appellate courts are concerned. In other words, authoritative expressions of the law, deliberately stated, constitute precedent when stated by the supreme court and other appellate courts.

A. Imperial Inflexibility

Four components of the Imperial Theory are significant. First, stare decisis applies to all principles of law that have been decided.

89. Eisenberg discusses these values at some length. See id. at 47-49, 50-76. He thinks that stare decisis also contributes to social congruence and the enrichment of the law by the courts.

Second, it appears to apply with full force to legal decisions of supreme courts but with lesser force to legal decisions of intermediate appellate courts. Third, stare decisis applies to some components of some decisions of intermediate-level appellate courts. Fourth, the force of the idea of a "very, very, very good reason" is quite high. It is virtually indefeasible when it involves a decision of the supreme court. The age of a case does not matter. The fact that the case was decided five-to-four, or its equivalent, does not matter. Thus, if an appellate court reflectively and deliberately lays down a rule, then that rule is virtually decisive in any relevant case in any lower court. This meta-principle is to be inflexibly applied.

B. Authoritative Expression/Deliberate Statement

The Imperial Theory tries to capture the idea of a principle of law having been decided and, therefore, having become inflexibly to be applied. Some courts have said that this characterization applies to any principle of law which is an "authoritative expression" of the high court or which is a "deliberate statement" of a principle of law by the high court. The mature Antonin Scalia appears to subscribe to the Imperial Theory.

So far as I know, no court has ever specified criteria for what constitutes an "authoritative expression" or a "deliberate statement" of the law. Is everything the supreme court says deliberately about the law binding upon the courts of appeals? What are the criteria for determining whether a statement is deliberate? What are the criteria for determining the authoritativeness of an expression? Obviously, if these are questions without definitive answers, then what constitutes an "authoritative expression" or a "deliberate statement" is essentially contestable. Significantly, there is nothing about the phrases "authoritative expression" or "deliberate statement" which suggests that stare decisis is limited to the factual situation (abstractly conceived) in the authoritative case. On the Imperial Theory, the reach of stare decisis is very broad. As a theory of precedent, these phrases are generative, open-ended, and protean. The concept of what-has-been-decided is not a self-defining concept, and it is not


92. See Scalia, supra note 61, at 1185 ("I believe that the establishment of broadly applicable general principles is an essential component of the judicial process").
necessarily restricted to the actual facts of a given case. After all, a reason for a decision is necessarily more general than the decision, and giving a reason necessarily commits the giver of the reason to the general application of that reason.  

Do these phrases suggest that everything the supreme court says—not otherwise described, say, as dicta—be binding upon lower courts? After all, we are all aware that supreme courts take an enormous amount of care with their decisions. They are argued, researched by counsel, researched again by the court personnel and by the judges themselves (perhaps), written slowly, reviewed a number of times, discussed by justices and their minions, and so forth. Probably, the best way to determine what is precedent on the Imperial Theory is to look to the actual law-language of the court. One should attend to only that language that constitutes a deliberate statement of the law, and attend to only that language that constitutes an authoritative expression. How these matters are determined will vary from case to case. Expressly-designated tentative musings, legal history, and targets of reputation are treated differently. On the Imperial Theory, however, text is crucial.

Sometimes, advocates use this general idea of what constitutes a more-authoritative expression, although it is not usually said. In the (second) alternative, an "authoritative expression" may be anything the court says on a general topic of the case establishing that the matter has been briefed and argued and carefully considered. This can be determined from the content, length, and form of the court's prose, as well as the tone of the language used. In the (third) alternative, perhaps there are other ways to limit the phrase "authoritative expression." One of the hallmarks of the Imperial Theory is the smashingly-decisive strength precedent is supposed to have.

93. See Schauer, supra note 86, at 638, 656.

94. Occasionally, this point is made in perverse ways. Some intermediate courts have held that the doctrine of stare decisis is not only a rule of precedent but also a rule of preclusion. See, e.g., City of San Antonio v. Aguilar, 696 S.W.2d 648, 653 (Tex. App. 1985, writ ref'd n.r.e. and dism'd). Most courts, to be sure, refer to stare decisis as a rule of precedent and say nothing about preclusion. There is a striking contrast between stare decisis and res judicata: "The doctrine of stare decisis ... is based upon the legal principle or rule involved and not upon the judgment which results therefrom. In this particular stare decisis differs from res judicata, which is based upon the judgment." Horne v. Moody, 146 S.W.2d 505, 509 (Tex. Civ. App. 1940, writ dism'd judgm't. cor.). Under the Imperial Theory, the reach of a binding supreme-court precedent can be quite broad. For example, under the Imperial Theory, if the supreme court construes two similar statutes with nearly-identical wording, then its construction of one statute is binding precedent with respect to the construction of the other. See Neie v. Stevenson, 663 S.W.2d 917, 919 (Tex. App. 1983, no writ). The temptation to conflate the two must be very
C. Range of Application

Under all theories of stare decisis, but especially under the Imperial Theory, precedent is extraordinarily powerful in the areas of statutory construction, property rights, and regulating the practice of law. The reasons are different in each case. Regulation of the bar is said to be a matter especially within the power of the courts. Notice and reliance are particularly strong values in the area of property rights. And judicial constructions of statutes, not subsequently changed by the legislature, are often taken to have become part of the statute itself. The idea is that if the legislature does not overrule the judicial construction, it has adopted it. (Have you ever heard a more naïve account of legislative process?)

Stare decisis does not apply to findings of fact. It applies only to rules of law. Even the Imperial Theory agrees on this point. As a result, stare decisis is less strong in areas which are pervasively fact-intensive. One good example is the construction of a will. However, Texas courts occasionally have departed from the principle that stare decisis applies to the law only and not to findings of fact. This departure has arisen mainly in boundary disputes. There are several cases in which appellate holdings regarding boundaries have been deemed to govern subsequent litigation regarding the same boundaries, even though the new litigants were not parties to the old case. This is a misapplication of the doctrine of stare decisis. It
probably represents a triumph of reliance over justified reliance in the area of property ownership. Nevertheless, the late and authoritative commentator of Texas law, Gus Hodges, calls it a “radical extension of or departure from” the doctrine of stare decisis and, therefore, to be rejected.\(^{100}\) Perhaps the court confused the construction of deeds, a purely-legal matter where stare decisis is relevant, with boundary disputes, which frequently involve issues of fact.

Under the Imperial Theory, the innovative powers of intermediate courts are quite circumscribed. Obviously, courts of appeals have a duty to follow clear rules which are laid down by the supreme court.\(^{101}\) Additionally, courts of appeals must exercise self-restraint in creating exceptions to well-settled rules or in elaborating new doctrines;\(^{102}\) they may not change rules by adopting new legal theories;\(^{103}\) and they may not discard legal theories which have the imprimatur of the supreme court, even if those theories are manifestly outmoded and very likely to be rejected by the supreme court at its next opportunity.\(^{104}\) Under the Imperial Theory, the function of intermediate appellate courts is to review trial courts, apply rules laid down by the supreme court, deal with conflicts among them, trace out their implications, and fill in gaps. They do not create. (To the extent that the Imperial Theory diminishes the role of intermediate-level appellate courts in articulating, elaborating, and developing new themes in the common law, the Imperial Theory also—implicitly and silently—assumes that principles of the common law, as articulated by the court of last resort, form a—relatively—seamless web, part of which is explicit and part of which is inferential. Thus, the Imperial Theory, without ever saying so, subscribes to the view that the common law of any mature jurisdiction is virtually complete.)

Note, 17 TEX. L. REV. 49 (1939).

100. See Gus M. Hodges, Stare Decisis in Boundary Disputes: Let There Be Light, 21 TEX. L. REV. 241, 241 (1942-1943). For many, many years Professor Hodges taught in the Law School of the University of Texas-Austin. He is a venerated figure among all well-educated Texas trial and appellate lawyers.

101. See Slocum v. Galveston County, 410 S.W.2d 487, 488 (Tex. Civ. App. 1966, writ ref'd n.r.e.) (“This Court finds itself in the same position of the trial court in that it is our constitutional duty to follow the law as announced by the Supreme Court where the identical question has been decided”).

102. See Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App. 1983, writ ref'd n.r.e.).


104. See Lynch v. Port of Houston Auth., 671 S.W.2d 954, 957 (Tex. App. 1984, writ ref'd n.r.e.).
In summary, the Imperial Theory construes, as broadly as possible, the obligation of lower courts to follow reflected-upon statements of law of the supreme court. From time to time, courts formulate the Imperial Theory succinctly. They accomplish this end, in Texas, through the use of felicitous but obscure phrases, such as "authoritative expression" and "deliberate statement" of the law. One trial court once wrote this, in a case which became highly influential: "This court is, of course, bound by all pronouncements of the present or former high tribunal of [the relevant state.]" Unquestionably, however, text is crucial. The obligation to follow rules laid down by the supreme court is construed as very strong, inflexible, and broad. According to the Imperial Theory, once a higher court has laid down a principle of law, a lower court has a very, very, very good reason for following it, and almost nothing can overcome the force of that reason. Courts of appeals are not only required to follow the express dictates of an authoritative expression of the law, but they are barred from any express creativity outside that limit. Furthermore, according to the Imperial Theory, principles formulated by the courts of appeals themselves have precedential significance. Finally, this Theory views virtually any discussion of the law contained in an opinion of the supreme court not only as binding precedent for intermediate courts of appeals but also as (strongly) presumptive precedent for later decisions facing the supreme court itself.

The meta-doctrine of stare decisis is no relic. It is a living, animating, very strong component of the law. The Supreme Court of Texas of the present is quite clear that it is, to a considerable degree, bound by its own previous decisions. The doctrine of stare decisis is, after all, "inflexible," even when it comes to the very court which laid down the rule. It would be inefficient, unfair, and delegitimating for


106. In Weiner v. Wasson, 900 S.W.2d 316 (Tex. 1995), the court was called upon to reconsider its decision and opinion in Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983), which held that a portion of the Texas Medical Liability Act was unconstitutional as applied to malpractice claims owned by minors. The decision rested upon the "Open Courts Provision" of the Texas Constitution. See Sax, 648 S.W.2d at 664. The decision in Sax was unanimous, and it explicitly considered and rejected the argument that a child's parent could bring a malpractice action on behalf of the child and that such a legal capacity was a reasonable substitute for a child bringing such an action. See id. at 667. In Weiner, the majority pointed out that "Sax has been frequently cited as authority by this Court, the courts of appeals, and even by high courts of other states." Weiner, 900 S.W.2d at 319. Moreover, the Sax case has been the "cornerstone" of many decisions made by the supreme court since the Sax case was decided. See id. On this basis, the supreme court declined to overrule Sax:
a high court to overrule very many of its precedents. High-court precedent creates expectations. Over the years, these become settled, and litigants should be able to rely upon such precedents.\(^{107}\) Legitimacy, i.e., the perceived authority of a legal regime, requires stability and the sense on the part of the public that the law is based upon principles and not upon individual proclivities. Without such an outlook, the legal system will be regarded as lacking integrity.\(^{108}\)

**D. The Name**

I call this theory the "Imperial Theory" because an imperial power is a strong, domineering, expansionist power. The Imperial Theory of precedent is an expansive—indeed, expansionist—theory: virtually everything the supreme court says is binding precedent upon lower courts. The Imperial Theory of precedent is also a theory of domination. The past dominates the present. Higher courts dominate lower courts. Any feedback from lower courts to higher courts is accomplished informally. Lower courts have little discretion. Also, imperial powers rule through the *imperium*. This necessarily carries with it the notion of *dignitas*. There is a certain majestic quality about

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\(^{107}\) Id. at 319-20 (citations omitted). Even Justice Priscilla Owen, writing a dissent for herself and two other justices, agreed with the abstract proposition set forth by Justice Cornyn in the majority opinion. She wrote this:

> A fundamental tenet in our jurisprudence is the recognition of the need for consistency and predictability in the decisions of our courts. This Court should be loath to overrule its prior decisions, particularly where an opinion has been cited and relied upon as frequently and as recently as has *Sax*. Our Court should not succumb to a temptation to continually revisit prior decisions as new fact situations arise or the concerns of the public shift. The Court similarly stresses the importance of stare decisis, but misapprehends the application of that doctrine to the case before us.

\(^{108}\) See *Weiner*, 900 S.W.2d at 320 (citing *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986)).
the language of the supreme court. It is always to be treated respectfully, perhaps even reverently. Thus, under the Imperial Theory, the supreme court stands to other courts as Mother England stood to, say, India. On the other hand, there is nothing really necessary about this name. It could also, easily, have been called the Deliberate Statement Theory or the Authoritative Expression Theory.

One sees the Imperial Theory used all the time. Even so eminent a jurist as Justice Scalia adheres to it. Whenever an advocate makes express reference to the "deliberate statements" or the "authoritative expressions" of a higher court, she is invoking the Imperial Theory. Whenever an advocate invokes the language of the supreme court as authority, without reference to the role that language played in the decision in which it is to be found, she is implicitly relying upon the Imperial Theory. Often, when an advocate uses quoted language from the high court to suggest that a lower court is bound by a previous decision, she is invoking the Imperial Theory.

Thus, the Imperial Theory can play an important role in appellate advocacy, even if no one could bring herself explicitly to espouse the Theory. Advocacy relies upon a theory when its gambits make no sense but for the theory. Theory does not have to be stated to be presupposed. Moreover, a theory can be semi-stated in the context of advocacy without being explicitly stated. One does this by citing cases which embody the theory and selecting appropriate language from those

109. For a discussion of the virtues of imperialism, see ANTHONY QUINTON, The British Empire and the Theory of Imperialism, in FROM WODEHOUSE TO WITTGENSTEIN 175 (1998). Or, from an opposite point of view, consider a remark of Richard Rorty: "National pride is to countries what self-respect is to individuals: a necessary condition for self-improvement. Too much national pride can produce bellicosity and imperialism, just as excessive self-respect can produce arrogance." RICHARD RORTY, ACHIEVING OUR COUNTRY 3 (1998). It would be easy to imagine Rorty's remarks adapted to a legal system.

110. It is currently out of fashion to say to lower courts that they are bound by previous decisions of higher courts. The current wisdom is that telling your judge that she is bound is like telling her that she wears a strait-jacket. It is like telling her she is dominated. It is like telling her that she is under the authority of the Master. Judges have power as well as authority, so many appellate advocates regard such rhetoric as a very bad idea. Perhaps they are right. One wonders if the current fashion may be, to some extent, the result of the currency of feminist jurisprudence, which emphasizes the soft touch in an argument. See CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). This is the fountainhead of feminist jurisprudence. It makes it quite clear that feminism predisposes a different form of reasoning from the more difficult, masculine paradigm. Then again, maybe it is simply good sense. Kinder, gentler argument creates less distance and, hence, less alienation. There is little point in emphasizing to "inferior" courts what they already know but they may not much like. See Katharine T. Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829 (1990); Martha Minow, Justice Engendered, 101 HARV. L. REV. 10 (1987); Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543 (1986).
cases for use in argument.

There are really two themes in the Imperial Theory. One of them is that the pressure precedent exerts on later judges is strong and domineering. The other theme is that what constitutes precedent is to be construed expansively. In theory, these two themes can be split apart. They often go together, however, in the minds of judges and lawyers, and for that reason I have treated them as a single Theory. Each of these themes carries with it certain problems. With respect to the first theme, there is no method for gauging the "pressure" precedent exercises on subsequent courts. Nor is there a metric for gauging the strength of precedent on lower courts as opposed to on the same court. It would be nice to have one. Nevertheless, you can be fairly confident that the Imperial Theory is not being employed. Consider this language: "While not an insurmountable bar, the doctrine of stare decisis preponderates against reexamining . . . issues [already decided]." 111 The significant words here are "not . . . insurmountable" and "preponderates." These terms suggest that the pressure precedent exerts is not smashing.112 The second theme (i.e., the theme of expansive interpretation) has limits. Obviously, not every justification of an authoritative expression of the law is itself an authoritative expression of the law. Not every reason given for a legal proposition is itself a legal reason. Obviously, if the justifications for authoritative expressions of law are legal propositions, then, according to the Imperial Theory, they should be construed as having maximum force. When they are not legal propositions, however, it is unclear what force they should have. It is not always easy to tell the difference between a proposition of law given as a reason for an authoritative expression and a proposition external to the law given as a reason. One of the temptations of the Imperial Theory is to convert justifications of authoritative expressions of law into legal rules. There is no mechanical procedure for drawing this distinction. Most lawyers make the divide with some facility. Indeed, being able to do this is one of the marks of excellence in lawyering. Nevertheless, it remains an intractable difference.

It is important to observe that the Imperial Theory depends very


112. Oddly, this court cites cases in which stare decisis is said to create "a strong presumption," id. (quoting Guterriez v. Collins, 583 S.W.2d 312, 317 (Tex. 1979)), and language that stare decisis "requires" that subsequent courts follow precedent, id. (quoting Carpet Servs., Inc. v. George A. Fuller Co., 802 S.W.2d 343, 347 (Tex. App. 1990) (en banc) (Baker, J., dissenting), aff'd, 823 S.W.2d 603 (Tex. 1992)).
much upon the intentions of the opinion-writing court. Surely, if a proposition of law is intended to be an authoritative expression or a deliberate statement of the law, then it is. At the same time, it seems unlikely that a proposition of law would be a deliberate statement of the law if the court did not intend it to be binding. Thus, the Imperial Theory is beset by all the genuine problems which have ever been raised with respect to determining authorial intent. The Imperial Theory is not quite a mechanical theory, even though it is text-based. It requires identifying deliberate statements or authoritative expressions of the law. Sometimes, this is easy. Sometimes, it is just a matter of quotation. Sometimes, it is just a matter of describing an opinion and the result. Nevertheless, there is no mechanical decision-procedure for determining what constitutes an authoritative statement of the law or a deliberate expression of the law. Still, experienced readers of cases seldom disagree about this sort of thing, except when they are adversaries.\footnote{113}

From a rhetorical point of view, it is probably a bad idea to suggest to a court that the Imperial Theory is the way to understand stare decisis. If this Theory is articulated to a court explicitly, the court will probably reject it. Courts use it all the time, and many lawyers and judges embrace it in some context, while they hardly ever assert it. If an advocate is going to use the Imperial Theory as a mode of presenting legal argument, it is best simply to lay out the key language of the court, document the numerous times language of a similar sort has been used (if at all possible), quote key passages, and leave it at that.

\textit{E. A Note on “Formalism”}

In certain ways, the Imperial Theory is similar to what others have called “Mechanical Jurisprudence”\footnote{114} and what is popularly

\begin{itemize}
\item \footnote{113. Arguably, this is the wrong way to look at the Imperial Theory. Suppose there are actually two versions of the Imperial Theory. One of them could be named the Intentionalist Imperial Theory. It is the one described in the text above. On that Theory, what counts as a deliberate statement or what counts as an authoritative expression depends upon the intentions of the writer, those judges who join him, and the institution. The other version would be called the Textual Imperial Theory: on this Theory, precedent would not be determined from the intentions of the court but from the language it used. The rules of interpretation would have to be developed. In fact, most lawyers who are experienced readers of opinions can do this on the basis of “feel” without any rules.}
\item \footnote{114. Roscoe Pound, \textit{Mechanical Jurisprudence}, 8 COLUM. L. REV. 603 (1908). Bernard Schwartz has called Professor Pound the “Schoolmaster of the Bar.” \textit{BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT} 466 (1993).}
\end{itemize}
known as Formalism.¹¹⁵ These two theories are more or less the same, and they both involve three important propositions. First, rules of law are mechanically extracted from judicial decisions. The idea of a mechanical extraction suggests objectivity. It suggests that anyone who is knowledgeable can do it. It suggests that the methodology of the common law is scientific, or at least objective. It suggests that the methodology of the common law is anything but literary interpretation, creative hypothesizing, or guess-work. I have already shown that, because it is sometimes difficult to distinguish between the authoritative expression of legal propositions and the justifications of those authoritative expressions which rest on nonlegal premises, mechanical extraction is not always possible even on the Imperial Theory. Second, both Theories suggest that once rules are formulated, they are rigid and not subject to the endless generation of ad hoc exceptions. On a Formalist Theory, the existence of rules means something. Judicial decisions are to be based on legal rules as they exist. They are not to be based on the direct application of the justifications that vindicate the rules. Nor are exceptions to be created as things go along. Thus, the scope of rules can, fairly generally, be determined from their general terms. Third, legal reasoning looks very much like deduction.¹¹⁶ There is a universalistic major premise which is a legal rule. There is a minor premise which is the description of some facts. There is a conclusion generated by applying the major premise to the minor premise.

The Imperial Theory does share some characteristics with Formalism and the Mechanical Theory. According to the Imperial Theory, it is fairly easy to extract decided, authoritative propositions of law from judicial texts. Copying out quotations is one such mechanical procedure. In addition, the Imperial Theory does see legal rules as inflexibly to be applied. Judges should not make up exceptions as they go along, on the Imperial Theory. Nevertheless, if exceptions need to be created, those with authority should be able to

¹¹⁵ See Frederick Schauer, Formalism, 97 YALE L.J. 509, 510 n.1 (1988); see also Lyons, supra note 6, at 42-44. "Formalism" is principally a term of abuse. The impulse underlying Formalism, the "yearning for consistency, for certainty, for uniformity of plan and structure . . . ., the constant striving of the mind for a larger and more inclusive unity, in which differences will be reconciled, and abnormalities will vanish" is helpful, honorable, and generative. Cardozo, supra note 83, at 50 (describing "the method of philosophy"); see Duxbury, supra note 3, at 9-12; Llewellyn, supra note 71, at 38-39; Schwartz, supra note 114, at 473-82.

do so at appropriate intervals and for the right reasons. The Imperial Theory is not necessarily reactionary or brittle in its approach. Further, the Imperial Theory need not commit itself to a deductive approach to legal reasoning. It could acknowledge that all legal rules are prima facie-authoritative only, so long as there was a vertically-authoritative procedure for deciding what to do after the prima facie-binding rule had been defeated. It is consistent with the Imperial Theory that this procedure would be: *Let a high court figure out what to do.* The Mechanical Theory and Formalism would be very uncomfortable with this decision procedure.\(^\text{117}\)

V. HOLDINGS AND DICTA

The Imperial Theory has an enticing elegance about it. Its simplicity is problematic, however. Most significantly, the Imperial Theory does not honor, if it even pays lip service to, the distinction between "holdings" and "dicta." Most believe that this distinction is, in fact, crucial to a correct understanding of stare decisis; courts certainly talk this way, much of the time. To the extent that the distinction is significant, the Imperial Theory is troubled. Counsel espousing arguments based upon readings of cases predicated upon the Imperial Theory are often greeted with critiques—whether from opposing counsel or from the court—based upon the distinction between holdings and dicta.

The meaning of the concept of holdings is not rigorously spelled out in Texas cases. My impression is that this situation is not uncommon. The concept of dicta is somewhat better explained, although there is substantial confusion about the different kinds. Once the idea of dicta is partially understood, however, the concept of holdings can be elucidated. The two concepts are, after all, intended to be reciprocal and complementary: if something is a holding, it cannot be a dictum, while if something is a dictum, it cannot be a holding. This is a universally-understood equation in common law. Texas law is not unusual.

A. Dicta

The best Texas exposition of the concept of dicta is found in Grigsby v. Reib.¹¹⁸ According to that case:

"Dictum" is defined to be: "An opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication; an opinion expressed by a judge on a point not necessarily arising in a case; an opinion of a judge which does not embody the resolution or determination of the court, and made without argument, or full consideration of the point; not the professed deliberate determination of the judge himself."¹¹⁹

There are a number of separate ideas in this passage. First, dicta could be anything not necessary to the resolution of the case. Second, dicta could be anything stated with insufficient force to constitute an adjudicative remark. Third, they could be any remarks by a judge irrelevant to the issues before the court. Fourth, dicta could be anything presented by the judge without full argument in the text of the opinion. Fifth, dicta could be anything said by a judge and not fully argued by the parties. Sixth, dicta could be anything other than deliberate statements by the judge writing the opinion.¹²⁰ In this plethora of ideas, there are really two themes in Grigsby. One theme is that all remarks of a court about the law (or expressing the law) not necessary for vindicating the decision constitute dicta. The other theme is that only those remarks not well thought out or not responsive to an argument presented constitute dicta. Thus, we get the "Deliberate Statement" doctrine used again. Obviously, these two ideas are not the same. Obviously, a case could be decided based upon a principle that was not well thought out. An ill-considered principle could be necessary to the resolution of a case. On the other hand, an opinion could discuss a legal norm elaborately and in a well-thought-out manner that was not necessary to the actual resolution of the case. Which is the correct view? Before anything more can be said about this question, something must be said about holdings.

¹¹⁸. 153 S.W. 1124 (Tex. 1913).
¹¹⁹. Id. at 1126.
B. Holdings

The language in the Grigsby opinion begins to characterize the nature of holdings. Grigsby implies a number of propositions: holdings are propositions of law necessarily involved in the resolution of a case; holdings are legal norms integral to an adjudication; the holdings of a case are legal norms that necessarily arise in that case; holdings are those legal norms which are necessarily involved in a resolution or determination of a case; and holdings are legal norms the enunciation of which is preceded by fully-considered legal argument.

Unfortunately, the phrases drawn from Grigsby are rather vague, and at least the last one is not similar to the others. Fortunately, other cases also elucidate the nature of holdings. For example, in Wiener v. Zwieb, the court stated as follows: "Ordinarily a decision on the question in a case, not necessarily presented, will not be treated as binding authority, but merely as persuasive." Still other cases make clear that one of two things must be true in order for a proposition of law to be a holding. First, the holding of a case is frequently said to be that rule of law the direct application of which is necessary to resolve the dispute between the litigants. These might be called "Level-1 Holdings." Second, a proposition is also a holding if it is necessary to vindicate or justify another proposition of law that is also a holding. These can be called "Level-2 Holdings." If a proposition of law justifies another Level-2 Holding, then it, too, is a Level-2 Holding.

121. 141 S.W. 771 (Tex. 1911).
122. Id. at 774.
124. See Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 193 n.1 (Tex. 1968). The choice-of-law doctrine set forth in Marmon has been rejected. See Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979). The meta-discussion of stare decisis, however, is still sound. Technically, Gutierrez does not overrule Marmon: Gutierrez involved a nonfatally injured person, so that only the common law was involved. In contrast, Marmon involved a death, so that the wrongful-death statute was involved. The Marmon majority refused to reject the ancient rule of lex locus delicti for wrongful-death cases on the grounds of principles of statutory construction. The Texas Supreme Court never overruled Marmon; it was overruled by statute. See Total Oilfield Servs., Inc. v. Garcia, 711 S.W.2d 237, 239 (Tex. 1986) (citing Hearings on H.B. 974 Before the Senate Comm. on Jurisprudence, 64th Leg. (Tex. 1975) (statement by committee chairman)).
125. A very nice example of Level-1 and Level-2 Holdings is found in the Texas Supreme Court’s decision of Twyman v. Twyman, 855 S.W.2d 619 (Tex. 1993). It laid down the Level-1 Holding that the claim for intentional infliction of emotional distress could be brought in a divorce proceeding, and predicated that holding upon the Level-2 Holding that the tort of intentional infliction of emotional distress existed in Texas. Of course, this Level-2 Holding is not sufficient, but it is necessary, for if there were no such cause of action, it could not be
Obviously, Level-1 Holdings are more general than the facts of a case; Level-2 Holdings that justify Level-1 Holdings are more general than the Level-1 Holdings; Level-2 Holdings that justify other Level-2 Holdings are more general than the Level-2 Holdings they justify, and so on.

Traditionally, the nature of a holding was stated as follows: a proposition of law is the holding of a case if it is necessary to decide the case, or, as the English say, it is the *ratio decidendi*, i.e., the conclusion of a line of argument necessary to vindicate the decision. There is some confusion about the relationship between holding and the *ratio decidendi* of a case. Sometimes, people say that the *ratio decidendi* of a case is the reasoning which leads to the holding. Far from it. The *ratio decidendi* and the holding are exactly the same. Of course, holdings must be vindicated by reasoning. Holdings must be justified. Indeed, many times, they are the result of a deductive argument from the set of legal and factual premises. Often, the justifications for holdings are not deductive, but deductive-looking, and sometimes the structure of the argument is quite lose.

Of course, there may not actually be very many Level-2 Holdings whose only function is to justify other Level-2 Holdings. Seldom is one abstract legal proposition necessary to justify another. Almost every legal proposition can be vindicated in a variety of ways. (Still, room must be left for the possibility that one abstract legal proposition may be necessary to vindicate another.) Notice that a proposition of law can be an upper-level holding only if it is necessary to justify a Level-1 Holding. The fact that an upper-level holding is sufficient for a lower-level holding does not make it a new type of holding.

### C. Dicta Again

It would be easy to say that holdings constitute binding precedent under the doctrine of stare decisis, and that dicta never do.

litigated in a divorce case.

126. *Black's Law Dictionary* somewhat-misleadingly defines this phrase as: “The ground or reason of decision. The point in a case which determines the judgment.” BLACK'S LAW DICTIONARY, supra note 52, at 1262. The Texas Supreme Court sharply distinguishes between the holding of a case and the reasoning which yields the holding. See, e.g., Boyles v. Kerr, 885 S.W.2d 593, 595 (Tex. 1993); ATIYAH & SUMMERS, supra note 120, at 124-25.

127. See MACCORMICK, supra note 116, at 52.

Such a formulation would have a simple elegance. Alas, matters are slightly more complicated, for the realm of dicta falls into two parts. There are obiter dicta and judicial dicta.

1. Obiter Dicta

Obiter dicta are sometimes called *mere* dicta or *pure* dicta, and they include "a mere remark made in passing, [which is] quite unnecessary to the issue upon which the Supreme Court of Texas" is writing.\(^{129}\) Obviously, obiter dicta, in this sense, are never binding precedent. Indeed, their value even as persuasive authority is limited.\(^{130}\) One wonders why obiter dicta are even present. Sometimes, they are included for reasons of contrast. Sometimes, judges appear to be writing short essays on the law. Perhaps the judge wants the opinion included in a case book. Perhaps he is bucking for another job. Perhaps the judge writes well and is looking for a mode of self-expression. Perhaps he does not write the opinions at all but leaves them to law clerks who do not know any better, or who think they still are writing term papers. Perhaps all of these reasons apply, and perhaps there are others as well.

2. Judicial Dicta

The supreme court characterized a judicial dictum as a formulation of the law "deliberately made for the purpose of being followed by the trial court. It is not simply 'obiter dictum.' It is at least persuasive and should be followed unless found to be erroneous."\(^{131}\) *Palestine Contractors* cites *Thomas v. Meyer*, and the definition formulated there includes this language: "[The court's statements were] deliberately made for the guidance of the bench and bar upon a point of statutory construction not theretofore considered by the Supreme Court. It therefore seems that these holdings must at least be considered as judicial dicta rather than mere obiter."\(^{132}\) Thus, judicial dicta are those statements of the court which, while not part of the holding, are nevertheless set forth with the deliberate intent of not merely exploring the legal issue but instructing the bench and bar. Thus, a court's reasoned consideration and elaboration upon a legal

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129. *Ex parte Harrison*, 741 S.W.2d 607, 609 (Tex. App. 1987, no writ); *see* *Thomas v. Meyer*, 168 S.W.2d 681, 685 (Tex. Civ. App. 1943, no writ) (obiter dictum is language "lightly used").


132. *Thomas*, 168 S.W.2d at 685.
norm constitute judicial dictum, if not part of the holding.

Do judicial dicta constitute fully-binding precedent? Or is it defeasibly—prima facie—binding precedent? Must a lower court follow judicial dicta in a different case? The language of "binding precedent" versus "persuasive precedent" is no help at all. The whole idea of "persuasive precedent" is a very obscure idea. It boils down to the notion that a court once (or more than once) made some favorable statements about something. The thrust of the idea of "persuasive precedent" is that the fact that a court has said anything favorable about something should stimulate the bench and the bar to take those remarks very seriously. After all, there is a convention that high courts do not talk about things either favorably or unfavorably simply for the hell of it. The existence of that convention suggests that if a high court writes about something, then it means to guide other courts and lawyers by what it has said. The good-reasons approach to thinking about precedent provides a methodology for ranking the force of judicial dicta.

Of course, according to the Imperial Theory, whether a position of law is a holding or any kind of dictum is irrelevant in determining whether it constitutes precedent. The proposition of law is precedent if it is an authoritative expression or a deliberate statement of the law by an appropriate court. Dicta may be very elaborately spelled out and, therefore, be both authoritative and deliberate. In order to distinguish judicial dicta from binding precedent as conceived by the Imperial Theory, perhaps judicial dicta should not constitute "very, very, very good reasons" but would be only "very, very good reasons"? Or are they merely "very good reasons"? Perhaps obiter dicta are simply very good reasons, rather good reasons, or simply good reasons. But how can these distinctions be drawn? Obviously, "very good reasons" must at least be clear, and "very, very, very good reasons" must also be compelling. But where is the middle level? Perhaps they must be cogent. These distinctions are intuitively appealing, but no one has ever set out the criteria for their application. Perhaps it cannot be done.

In the face of these doubts, one suspects that variations upon the Imperial Theory would say that judicial dicta from the supreme court are fully binding—DO IT!—on lower courts and that they are presumptively binding on the supreme court. Some variations of the Imperial Theory might say that the use of the phrase "obiter dicta" signals the reader that whatever is thereby classified cannot possibly constitute an authoritative expression or a deliberate statement of the
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law. Indeed, they only leave some conventions to that effect. Of course, this view combines judicial dicta with holdings in terms of their precedential significance. That conflation is consistent with the logic and rhetoric of the Imperial Theory. Underneath its surface, the Imperial Theory might silently loosen the conditions under which the supreme court could reasonably reject its own judicial dicta. These remarks are speculative, of course. It is well to remember that courts are institutions, and they persist over time. It may be just as difficult for a court in Year Twenty to determine what a court in Year Two meant (i.e., intended by a text) as it is for anybody else; even if some members of the Year Two court are still there, memories fade.133

Kumho Tire Company v. Carmichael134 provides an example of judicial dicta as conceived by the Imperial Theory. Several years ago, the Supreme Court of the United States laid down principles and rules for dealing with scientific evidence in federal courts under the Federal Rules of Evidence.135 The question in Kumho Tire was how to treat engineering testimony. The expert testimony at issue in Kumho Tire was that of an expert in tire-failure analysis. The majority of the Court, led by Justice Stephen Briar, however, formulated the question before it in a much broader fashion.

This case requires us to decide how Daubert applies to the testimony of engineers and other experts who are not scientists. . . .

. . . .

. . . The initial question before us is whether this basic gatekeeping obligation applies only to "scientific" testimony or to all expert testimony. . . .

. . . .

Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases. . . . In other cases, the relevant reliability concerns may focus upon personal knowledge or experience. . . . [T]here are many different kinds of experts, and many different kinds of expertise.136

Obviously, the rule enunciated in Kumho Tire far exceeds the factual issues before the court. Presumably, the court wanted to put an end to any further expert-testimony cases before it, so it—quite sensibly—embraced a broad, black-letter rule mandating a "Gatekeeper Function" for federal judges in all cases involving expert testimony.

133. Of course, on the Textual Imperial Theory, this problem goes away.
testimony. The most plausible account of what the United States Supreme Court did here is to be found in the Imperial Theory. Another plausible account might be found in the Holdings-Plus Theory, to be discussed later. In any case, everything puzzling about this decision issues from how we think about judicial dicta.

D. Obiter Dicta Again

Do the categories of judicial dicta and obiter dicta exhaust all of the dicta there might be? Obviously, the answer to that question depends upon how the categories are defined. If judicial dicta are defined as expressions of law made for the deliberate purpose of guiding future litigation, and if obiter dicta are defined as off-hand remarks about the law, then many dicta do not fit in either category. Given these definitions, there are various grades of "considered" dicta that are neither judicial nor obiter. If, on the other hand, obiter dicta are defined as all judicial expressions and discussions of the law, other than those that are necessary for deciding or vindicating the decision, and other than those that are made for the deliberate purpose of guiding future litigation, then judicial dicta and obiter dicta exhaust the field of dicta. Conceptual elegance and theoretical economy argue in favor of this definition of obiter dicta that makes judicial dicta and obiter dicta the only categories. However, experiential familiarity with appellate rhetoric sets up an absolute impediment to this simple division and requires a more spectrum-oriented account of dicta.

Nevertheless, the broad definition of obiter dicta does appear in some cases. In Thompson v. McAllen Federated Woman's Building Corp.,137 the court held that it was not necessary for a subscription agreement involving a charity to be in writing in order to be enforceable.138 On a motion for rehearing, the appellant suggested that the decision conflicted with Wasson v. Clarendon College.139 In Wasson, A had promised to give B a sum on money, if B could raise a specified sum. The issue was whether C's agreement to make a contribution counted toward the specified sum; if it did, then the condition upon A's subscription was met; otherwise, it was not. There was language in the Wasson decision to the effect that it was relevant

138. See id. at 107.
to determine whether $B$ might recover from $C$. The *Thompson* court held that this discussion was not binding precedent but merely obiter dicta, basing its conclusion on the ground that the legal rights of $B$ as against $C$ were not at issue in the *Wasson* case. This characterization is, in effect, the broad definition of obiter dicta.

It should be kept in mind that the term obiter dicta is to some degree a term of abuse. Thus, its use by courts is not always purely descriptive. In advocacy, when one wishes to sneer at something that someone else wants to call precedent or precedent-like, one refers to it as "mere obiter dictum." There is little logic to this. It is mostly rhetoric. Obviously, it is unwise to use that rhetoric on something that is unquestionably a holding or a very-obviously-lovable judicial dictum.

**E. Judicial Dicta: A Paradox**

Notice that in setting forth judicial dicta, the supreme court is functioning as a quasi-legislature. It is laying down rules in the abstract for the guidance of litigation. If the case is reversed and sent back, some of the directions will be for the lower courts in completing the litigation before them. Most of the directions, however, will be for future courts. The idea that a common law court might function as a legislature is bothersome to many legal thinkers. The notion of judicial dicta as semi-binding rules is contrary to the theory of stare decisis as classically conceived. Nevertheless, it is reality. For example, when a court describes a purely-prospective ruling as a holding, it cannot possibly be right. It is a necessary truth that a holding must be used to resolve an issue in the case in which it is a holding. Prospective-only rules are necessarily legislative in nature. Sometimes, they are adopted "as a matter of sound administration."

Where then is the line between judicial dicta and merely-advisory opinions? We all think we know the difference, but actually drawing the reason-based line is no simple matter. Frederick

140. See id.
141. See *Thompson*, 273 S.W.2d at 109.
142. Minyard Food Stores, Inc. v. Newman, 612 S.W.2d 198, 198 (Tex. 1980) (quoting *Whittlesey* v. Miller, 572 S.W.2d 665, 669 (Tex. 1978)). The court of appeals classified the "prospective only" rule which the Texas Supreme Court had formulated in *Whittlesey* as dictum and bad law. The supreme court was not amused.
143. See *General Land Office v. OXY U.S.A.*, Inc., 789 S.W.2d 569, 570 (Tex. 1990); Firemen's Ins. Co. v. Burch, 442 S.W.2d 331, 337 (Tex. 1968); see also United Servs. Life Ins. Co.
Schauer has suggested that the aversion of the common law to advisory opinions stands in tension with its commitment that appellate judges should give reasons for their decisions. According to Schauer, reasons are always more general than the propositions which they are supposed to vindicate, and the giving of a reason is a kind of act that involves a commitment to deciding similar cases in a similar manner.¹⁴⁴

**F. A Covey of Problems**

Many problems beset the division of judicial assertions into holdings, judicial dicta, and obiter dicta. The problems that come up in distinguishing these three concepts constitute real impediments to both the Holdings Theory and the Holdings-Plus Theory.

First, courts often set forth alternative holdings. How can there be such a thing as alternative holdings, given the definition of the term "holding"? Nevertheless, Texas courts, like most other courts, say that alternative holdings really are holdings and, therefore, are entitled to full dignity.¹⁴⁵ This dogmatism renders incoherent the orthodox account of the nature of holdings. It would be far better to treat the most important alternative holding as a genuine holding and the other one as a judicial dictum.¹⁴⁶ But how is this matter to be judged? By what criteria do we determine the order of importance? No one has ever developed rational principles to solve these problems, or, at least, no set of such principles has ever acquired wide-spread public agreement.

Second, plurality opinions cannot be treated as containing any holdings at all, even though that word is often used.¹⁴⁷ Plurality opinions of the Texas Supreme Court are not binding precedent upon either the supreme court itself¹⁴⁸ or upon lower courts.¹⁴⁹ Nevertheless, over time, plurality opinions acquire some force. One wonders what to do with a plurality opinion when there is a concurring opinion.

¹⁴⁴ See Schauer, supra note 86, at 655.
¹⁴⁶ This is obviously true when one of the alternative holdings is that the court does not have the legal power to do whatever it is that is asked. Consider, for example, Griggs v. Capitol Machine Works, Inc., 690 S.W.2d 287, 294 (Tex. App., writ ref’d n.r.e.).
Obviously, the two opinions will have to come to the same decision. They will not necessarily involve the same holding, although they might, and they will almost certainly not involve the same reasoning. As a practical matter, in the "Four Plus One" situation, lawyers often treat the decision as if it had considerable precedential force. Thus, lawyers' practice is, to some degree, at variance with legal doctrine.

Third, if a plurality opinion is not binding precedent at all, is a five-to-four opinion just-barely-binding precedent, and, therefore, weaker than (say) a unanimous opinion? Of course, if the composition of a court has changed, there is marginally more of a chance that a five-to-four decision will be overruled, if the new judge has been on the court long enough to have a sense of independence. On the other hand, many judges are unwilling to overrule previous decisions, even when they were vigorously contested and voting was close.\(^\text{150}\) Many advocates believe that five-to-four opinions constitute weak, pale, or somehow-faded authority. This is seldom true in lower courts, and it is often not true in the very court that decided the case. Of course, occasionally courts overrule fairly-recently-decided cases. This is quite rare, however. At least in theory, a five-to-four decision is just as strong as a six-to-three decision, or one that is decided seven-to-two, eight-to-one, or nine-to-nothing. This fact is a testament to the strength of a subtext of the doctrine of stare decisis, to wit: let things that have actually been decided stay put. The general intuition is that the strength of authority is too complex a matter for either the legal public or the lay public to grasp. One wonders if this sensibility is always correct.

Fourth, sometimes a court adopts a new cause of action and argues that the cause of action is necessary because of various social considerations. In *Arnold v. National County Mutual Fire Insurance Co.*,\(^\text{151}\) for example, the Texas Supreme Court created a common law tort cause of action for insurer breach of the duty of good faith and fair dealing.\(^\text{152}\) Any insured might bring such a claim. The court posited the existence of a duty, characterized the duty, stated the social foundations of the duty, and articulated the elements of the

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\(^{150}\) See State Farm Lloyds v. Nicolau, 951 S.W.2d 444, 455 (Tex. 1997) ("I am not in favor of abolishing the tort of bad faith, although I would not have been in favor of creating it").

\(^{151}\) 725 S.W.2d 165 (Tex. 1987). *Arnold* is especially interesting, because the supreme court had just a few years earlier refused to imply the duty of good faith and fair dealing in contracts outside the Uniform Commercial Code. See English v. Fischer, 660 S.W.2d 521 (Tex. 1983).

\(^{152}\) See *Arnold*, 725 S.W.2d at 167.
cause of action.\textsuperscript{153} What did the court hold? What constitutes judicial dicta? What constitutes obiter dicta? It is very difficult to tell. The language that the court said was its holding was formulated in quite-general terms, but the justification for the holding had to do with the economic power that insurance companies often have vis-à-vis their insureds.\textsuperscript{154} The rationale for the decision would suggest that the holding should be narrow rather than universal. Moreover, it became clear later that the decision in \textit{Arnold} applies only to first-party insurers.\textsuperscript{155} Moreover, subsequently the supreme court became dissatisfied with the rule and replaced it with another one.\textsuperscript{156} Cases like \textit{Arnold}, which adopt new causes of action, indicate that there may be some problems with the categories of holdings, dicta, judicial dicta, and obiter dicta.

Fifth, consider the realm of definitions, jury questions, and jury instructions. From time to time, the supreme court approves one of these.\textsuperscript{157} Almost certainly, the approval of an entire charge, a whole slate of questions, or even a definition, will go beyond that which is necessary for deciding the case before the court. If so, then such approvals are not entirely holdings, and, of necessity, involve some dicta. Are they judicial dicta? The Imperial Theory, of course, tries to blur these distinctions, so that what constitutes a holding is construed as broadly as possible. Courts seem to be aware of the problems involved in approving jury instructions. In fact, recently, the Texas Supreme Court precisely classified such an action as dictum.\textsuperscript{158} This is an awfully hard view to swallow, although it can get a court out of rhetorical trouble. If a supreme court approves a jury instruction, it is very difficult to argue to another district court that it should decline to submit that instruction because the statements made by the supreme court were really only dicta. This is especially true when the

\textsuperscript{153} See id. These elements were modified recently in \textit{Universe Life Insurance Co. v. Giles}, 950 S.W.2d 48, 69-71 (Tex. 1997). There is a deep philosophical and jurisprudential problem surrounding \textit{Arnold} and all of the bad-faith cases like it. Those cases appear to tend toward communitarian ideals, as opposed to strictly atomistic and individualistic notions of the proper relationship between businesses and customers. See Daniel Bell, Communitarianism and Its Critics (1993).

\textsuperscript{154} See \textit{The Sophisticated Insured}, supra note 27, at 89.


\textsuperscript{156} See Giles, 950 S.W.2d at 64; Michael Sean Quinn, \textit{Insurer Bad Faith, Expertise, and Appellate Review}, 20 INS. LITIG. REP. 774, 776 (1998).

\textsuperscript{157} See Ranger County Mut. Ins. Co. v. Guin, 723 S.W.2d 656, 660 (Tex. 1987) (jury instruction and definition).

supreme court has supervisory authority over courts and promulgates approved jury instructions.

Sixth, the holdings-dicta classification scheme may not always be adequate. In *Total Oilfield Services, Inc. v. Garcia,* a Texas resident was killed in an industrial accident in Oklahoma. His survivors sought worker’s compensation benefits under Oklahoma law. Subsequently, they sued for exemplary damages for wrongful death under Texas law. The trial court dismissed the action on the ground that worker’s-compensation benefits were exclusive under Oklahoma law. The court of appeals reversed and remanded on the ground that the Texas Wrongful Death Act had extra-territorial effect. The Texas Supreme Court refused application for writ of error, with a notation: “no reversible error.” Nevertheless, it went on to voice its disapproval of certain language in the court of appeals’ opinion, to the effect that the case presented no choice-of-law question. The court of appeals said that the “most significant relationship” rule already adopted by the Texas Supreme Court did not apply. The supreme court remarked that the “most significant relationship” test was most assuredly applicable, but it also noted that the court of appeals actually applied the “most significant relationship” test. What is the holding here? What is judicial dictum here? What is mere dictum here? These questions do not have straightforward answers.

Many cases make these distinctions. Two examples should suffice. In the highly-regarded case of *Sparks v. Saint Paul Insurance Co.,* the court was called upon to determine whether a claims-made insurance contract was to be enforced in accordance with its terms. The court held that the particular claims-made contract before it was invalid because it did not have any retroactive coverage. This was the holding of the case. At the same time, the court said, “[W]e would not hesitate to enforce [the insurance] policy in this case if it

159. 711 S.W.2d 237 (Tex. 1986).
160. See id. at 238.
161. See id.
162. See id.
163. See id.
164. See id.
165. Id.
166. See id.
167. See Gutierrez v. Collins, 583 S.W.2d 312, 313 (Tex. 1979).
168. See Garcia, 711 S.W.2d at 239.
170. See id. at 407.
171. See id. at 416.
comported with the generally accepted expectations of ‘claims made’ insurance.” Obviously, this second remark is dictum. Nevertheless, it is extremely-powerful dictum in New Jersey and throughout the insurance world. The same sort of problem arises when a complex case comes before a high court, and many issues need to be resolved. In *Carter v. Carter*, the issue was whether a wife who killed her husband could recover his insurance policy. The holding of the case was that murderers could not recover under insurance policies. At the same time, the court held that the guilt of the beneficiary had to be proved only by a preponderance of the evidence, but that a withdrawn plea of guilty could not be admitted to prove the beneficiary’s guilt. The court assumed that all of these were holdings. It then went on to discuss a situation which had not yet arisen, namely, who should take if the beneficiary were disqualified as the result of having murdered the insured. This second question could not possibly have involved a genuine holding. At the same time, the court treated it as comprehensive and clear instruction on how the case was to be handled below.

Seventh, the law of closing arguments in Texas, spelled out in *Standard Fire Insurance Co. v. Reese*, illustrates another problem with the categories. In that case, Justice Pope restated the law of appellate review of closing arguments in seven numbered principles. Many of these were not at issue in *Reese*. As a result, most of the principles are dicta. Apparently, Justice Pope was trying to resist what he thought might have been weakening judicial resolve with respect to the harmless-error rule. His principles have succeeded magnificently: *Reese* is, at least for the present, the beginning of all wisdom on reviewing error in argument. *Mirabile dicta!*

So, what we have in *Reese* is *extraordinarily influential dicta*—principles that are, by agreement, the prevailing restatement of the law. Such a restatement of the law is not merely obiter dictum. Then again, it is not quite judicial dictum, either. Perhaps the passage of time can transform something from one sort of dictum into another or

172. Id. at 410.
173. 88 So. 2d 153 (Fla. 1956).
174. See id. at 155.
175. See id. at 158.
176. See id.
177. See id. at 159-60.
178. See id. at 161.
179. 584 S.W.2d 835 (Tex. 1979).
180. See id. at 839-40.
from dictum into holding. Has history made holdings out of Reese dicta? Is tradition transformative? Justice Pope himself must have intended his remarks to be judicial dicta, since he sets them out as precise elements. Nevertheless, once they are carefully studied, the inevitable conclusion is that they are problematic. Does this fact have any effect on their status as judicial dicta? If a directive that was intended to be judicial dictum turns out—upon reflection—to be problematic, does it become obiter dictum? Can reason make obiter out of judicial dictum? Of course, supposing that history can transform dicta into holdings or holdings into dicta is contrary to the usual characterizations of these ideas. Fundamentally, the ideas of holdings and dicta should be determined by a role of the norm in an argument. That is a matter to be derived from text, logic, and intent, not from public perception. (Of course, the distinction between arguments-in-themselves—logic—and arguments-as-perceived-by-the-public—rhetoric—is a particularly difficult distinction to make in our time, since much of Post-Modernist thought conlulates audience perception—rhetoric—with reason—arguments-in-themselves.181)

If history, agreement, consensus, or convention can convert holdings into dicta or dicta into holdings, can anything else establish the status of a judicial remark as a holding? In particular, if a court says that a given proposition is a holding, does that make it a holding? Unquestionably, law students first identify holdings in cases by circling the word "holding" and then underlining the "that" clause which follows. Law clerks, brief-writers, lazy partners, and appellate judges, I suspect, do much the same thing. And it is frequently a good idea. Consider again, for example, the case of Twyman v. Twyman.182 In that case, Justice Cornyn wrote: "[W]e expressly . . . hold that such a claim [i.e., a claim for the tort of intentional infliction of emotional distress] can be brought in a divorce proceeding."183 Circle the word "holding" here and underline what comes after it; you have one of the key holdings of the Twyman case. Nevertheless, it is questionable whether the fact that a court states that a proposition of law is a holding makes it a holding. More will be said about this presently. A proposition of law becomes a holding only if it plays a certain function in the decision. Indeed, arguably, whenever a court characterizes something as a holding, that characterization is dictum.

182. 855 S.W.2d 619 (Tex. 1993).
183. Id. at 620 (emphasis added).
Obviously, this is a subtle point, more to be loved by the logician than by the advocate. Nevertheless, the point is true.)

Here is an eighth problem with these categories. Frequently, courts characterize something they say as a holding. They characterize the contents of a current opinion less often as dictum, but they even do that from time to time. What force should such a characterization have? Someone might claim that when a court says that a proposition constitutes a holding, it is not characterizing. Such a person would be claiming that the court is not asserting a proposition that is true or false. Someone might claim that the court is engaging in a performative utterance—what is sometimes called a speech act. One speech act, of course, is assertion. It is precisely that speech act that is not being performed on this view. Another speech act is promising. When one promises, one does not assert anything, one acts: one commits oneself by the very act of speaking the promise. Such speech constitutes an act. The speech act under discussion here, which only some courts can perform, does not have a name, but it would amount to something like transformative endowment. This act would be committed whenever a court said that a proposition of law was a holding. When a court said this, it would transform the legal proposition into a holding and endow it with the characteristics of a holding. This transformation would occur whether or not the proposition functioned as a holding in any legal argument. The trouble with this speech-act account is that courts have not generally recognized the existence of such a performative speech-act, and its nonrecognition suggests its nonexistence. Moreover, if holdings must be about questions that are specifically presented to a court, then a court need not be always correct when it characterizes a legal norm it sets forth as a holding. Moreover, if holdings are only those legal norms that are necessary for the decision or for a necessary premise itself necessary for the decision, then a court could err in characterizing something as a holding. At the same time, an advocate should, at least as a methodological starting point, treat everything that a court marks as a holding as, indeed, a holding.

A paradox now arises. If, on the one hand, that which a court characterizes as a holding is not in fact a holding, but, on the other hand, an advocate should, under many circumstances, urge it as a

holding, then advocates under many circumstances lie to courts. A lie is the assertion by someone of a false proposition he knows (or, at least, believes) to be false with the intent of deceiving.\textsuperscript{185} The advocate knows that something is not a holding but believes he can convince the court it is a holding, precisely because a previous court characterized it as a holding. If so, then because of the ethics of advocacy, which prescribe zealous representation, the advocate must lie—in fact he must lie to a court.

A ninth problem, which is somewhat theoretical, arises out of those contexts in which a supreme court creates—or, adopts—a new cause of action. Obviously, when, as in \textit{Twyman}, a court creates a new cause of action, it goes well beyond what is \textit{necessary} to decide the case. All a court would need to do to decide a case is to create a cause of action restricted to the facts as presented in that case. But that is not what happens when a court adopts a new cause of action. Thus, when the supreme court creates a new cause of action, its action transcends any possible holding. It follows that at least part of what the court does is judicial dictum. And yet, that division seems wrong when it comes to the creation of new causes of action. One wants to say that if the court creates a new cause of action, that creation is—or is equivalent to—a holding. At the same time, one must represent that the articulation of a new cause of action is, to some degree, a legislative act.

A tenth set of problems with this system of categories is federalism. All theories of stare decisis agree, however, that holdings of federal courts on state law do not bind state courts. Moreover, holdings of federal courts, other than the Supreme Court, on federal law do not bind state courts. Decisions of the United States Supreme Court on matters of federal law do bind Texas courts.\textsuperscript{186} Holdings of the Fifth Circuit in diversity matters are not stare decisis for Texas courts.\textsuperscript{187} Thus, the holdings of Fifth Circuit cases are not holdings in

\begin{itemize}
    \item \textsuperscript{185} See Sissela Bok, \textit{Lying: Moral Choice in Public and Private Life} (1978);
    \item \textsuperscript{186} See Virginia Indonesia Co. v. Harris County Appraisal Dist., 910 S.W.2d 905, 911 (Tex. 1995); \textit{Ex parte} Twedell, 309 S.W.2d 834, 844 (Tex. 1958).
    \item \textsuperscript{187} The doctrine of \textit{stare decisis} requires that all courts adhere, as a general rule, to the principles and rules laid down on a question of law by any court to which obedience is owed in the matter. Consequently, the doctrine binds all Texas state courts to the decisions of the Supreme Court of Texas on a particular question of law arising in a civil case and to the decisions of the Texas Court of Criminal Appeals in “criminal law matters.” But the various Courts of Appeals are free to differ among themselves on a question of law that remains undecided by the two courts to which they owe
\end{itemize}
Texas state courts, although they play an important role in serious legal argument. Obviously, whether a proposition of law is a holding or not is jurisdiction-relative. This point is true from state to state and true from federal courts to state courts. In contrast, holdings of the Texas Supreme Court are binding through *Erie*\(^1\) for federal courts deciding Texas law matters. Still, they are not stare decisis. In contrast, when choice-of-law principles result in a Texas court applying the law of another state, then Texas courts are bound by the opinions of the highest court of that other state.\(^2\) In the absence of an applicable supreme-court decision from another state, Texas courts will look to intermediate-level courts, although they do not appear to feel as bound by those decisions.\(^3\) On the other hand, when Texas courts apply the law of a foreign country, no account of the law of that country given by any American court constitutes binding precedent.\(^4\)

It might almost go without saying that when Texas courts are faced with cases of first impression, and they are trying to determine what Texas law should be, they may look to "[d]ecisions of courts of other jurisdictions, [but those decisions] are no more than persuasive, and they are persuasive only to the extent that their reasoning is regarded as logical."\(^5\) No such cases can be anything more than obedience. "Obedience, rather than rank, is the key."

On questions of federal law—such as the proper interpretation of a federal statute—all courts in every state owe obedience to the Supreme Court of the United States. . . . And when no decision by the Supreme Court appears to be directly in point, Texas courts look to analogous decisions by that Court in arriving at the meaning proper to be assigned the federal statute . . . . . . [However] the decisions of one federal Court of Appeals on a question of law do not bind any other federal Court of Appeals under the doctrine of *stare decisis*. Nor do they bind any Texas court, even on federal questions, although they are of course received with respectful consideration . . . .


190. *See* Francis v. Herrin Transp. Co., 432 S.W.2d 710 (Tex. 1968). In this case, the issue was whether a Louisiana statute specified what we would call a statute of limitations or a statute of repose. The Louisiana language is "prescription" versus "preemption." *See id.* at 714. The Texas Supreme Court noted that there were no decisions by the Supreme Court of Louisiana. *See id.* at 715. However, the Texas court said the wording of the Louisiana statute appears to resolve the matter, and there are a number of intermediate-level Louisiana appellate decisions and Fifth Circuit decisions. *See id.* at 716-17. The supreme court's conjunctive argument illustrates the difficulty of figuring out whether something is judicial dictum or a holding.

191. *See* *In re* Contests of the City of Laredo, 675 S.W.2d 257, 270 (Tex. App. 1984, writ ref'd n.r.e.).

192. Mauzy v. Legislative Redistricting Bd., 471 S.W.2d 570, 573 (Tex. 1971); see also
persuasive. No one thinks that Texas courts have a legal duty to look to the courts of other jurisdictions, although they quite often do.\textsuperscript{193} Another aspect of federalism which creates puzzles for stare decisis is the institution of certification.\textsuperscript{194} This is too complex a matter to be discussed here. However, some cases which come to the Texas Supreme Court on certification receive detailed consideration.\textsuperscript{195}

Eleventh, sometimes, when a court is silent in a timely way and in the right context, silence is pregnant with meaning. Sometimes, silence can be significant dictum. There has been a controversy for several years over whether insurance defense counsel is also counsel for the insurance company. After all, he provides the insurance company with legal advice, and the insurance company frequently acts on that advice. Most often, that advice comes in the form of legal evaluations of the case together with estimates of settlement value. At the same time, defense counsel provided by an insurer is unquestionably counsel for the insured/defendant, and—as such—that lawyer may not assist the insurance company in ways that would be injurious to the defendant/insured/client. It has been the law, for example, for many years, that the insurance-defense counsel may not act as coverage counsel for the insurer. He most assuredly may not deliberately collect for the insurer evidence that would defeat coverage.\textsuperscript{196}

A controversy has been raging for the last several years around these matters. It has focused on the work of the American Law Institute in trying to formulate the \textit{Restatement (Third) of the Law}}
How insurance-defense counsel were to be conceptualized in that work has been widely discussed. Some argue that insurance-defense counsel may never (from the point of view of legal ethics) represent the insurance company in the same matter. Some argue that it must happen to some degree. And some argue that it is a matter of contract to be determined on a case-by-case basis. The Texas Supreme Court is well aware of this controversy and of the various positions.

Recently, the Texas Supreme Court went out of its way to avoid commenting on this problem. It did this by stating that insurance-defense counsel was an independent contractor with respect to the insurer and, hence, that an insurer was not vicariously liable for an attorney’s malpractice. Part of the reason the court gives for its holding is that insurance-defense counsel owes a duty of loyalty to his client, the insured, and for this reason is legally barred from taking, from an insurer, instructions that would be to the detriment of his client, the insured. In addition, the court observes that a liability-insurer does not have the right to control the details of insurance-defense counsel’s work, from which it follows that defense counsel is not an agent of the insurer.

At the same time, the court does not discuss whether insurance-defense counsel may ever simultaneously have a client-attorney relationship with the liability-insurer that is funding (and perhaps controlling) the defense. This is a pregnant silence. Many attorneys will draw the inference that insurance-defense counsel should not become an attorney for the insurer, according to the Texas Supreme Court. This case will not bear that analysis from a strictly-logical point of view. Nevertheless, its silence is suggestive, and insurance-defense counsel must proceed with caution. Silences are pregnant. A court could easily have indicated that it was not citing something. From time to time, indeed, courts explicitly indicate that they are leaving an issue for another day. Silences are always ambiguous, even when they are suggestive. Nevertheless, they can be influential.


199. See SUNSTEIN, supra note 46, at 39.
G. Dicta and Advice

Obviously, dicta—whether obiter dicta or judicial dicta—should by no means always be regarded as chaff. Frequently, dicta are designed to give advice to someone.\textsuperscript{200} Sometimes, that someone is the lower court that will think about this very case. Sometimes, it is judges sitting on courts of appeals where similar problems are likely to come up. Sometimes, it is a section of the bar. And sometimes, it is the legislature. Other times, it is industry groups or politically-active sections of the public. One typical group to which advice is frequently given is the insurance industry. Thus, courts complain from time to time that insurance contract language is badly drafted, even though they decide in favor of the insurance company.\textsuperscript{201}

Any sort of equation between dicta and advice runs into an immediate problem. The distinction between judicial dicta and obiter dicta has to be handled. Surely we would not wish to say that the former constituted good advice while the latter did not. Nor would we wish to say that the former constituted considered advice, while the latter did not. Obviously, advice can be given in different tones. Sometimes, courts can give advice by saying that they think the legislature really should do such-and-such, or that some state agency should promulgate some regulations. Sometimes, advising can sound like begging.

If advice is dictum, it can provide smooth transitions from the past to the future. It has been argued that unless courts are encouraged to give this kind of advice openly, they will do so behind the scenes, as many judges have done at various times in American history.\textsuperscript{202} Similarly, the great Lord Mansfield is said to have engaged in ex parte advice-giving. It is said that he met with many London merchants from time to time in order to exchange views. He was certainly trying to find out what their customs were. He might also have been trying to formulate general principles.

H. Summary

In summary, the doctrine of stare decisis has four crucial conceptual components: precedent, holdings, judicial dicta, and obiter dicta. Precedent is logically independent of the other three, which are

\textsuperscript{202} See Katyal, supra note 200, at 1816-21.
conceptually interdependent. Precedent is that which is binding on subsequent courts. Holdings are expressions of the law necessary to resolve the litigation in which they are formulated or legal propositions necessary to justify that proposition of law which is necessary to resolve that litigation, or which are reasonably characterized as such by a deciding court. Judicial dicta are reflected-upon remarks of a court, which are intended to guide subsequent litigation, even though they are not necessary to the present litigation. (Generally speaking, a piece of judicial dictum will not be characterized as a holding.) Finally, obiter dicta are any other discussions of the law which occur in an opinion. They might be historical; they might be simply scholarly; they might be critical of other cases; they might be suggestions about what a court might do in the future; and so forth. (The only trouble with these categorizations is that they sharply divide all dicta into judicial and obiter. Truly, there is spectrum of considered dicta, ranging from the most considered to the least. Thus, black-and-white divisions into two categories are probably wrong.)

In any case, when the concepts of holdings and dicta are used, gradations of binding-ness are created. Holdings of a supreme court are fully binding on appropriate lower courts. Prior holdings of a supreme court are also presumptively binding on that court. Probably, judicial dicta are defeasibly binding on both the supreme court and lower courts, while obiter dicta are not binding at all. Perhaps the supreme court does not need as good a reason to depart from judicial dicta as it needs to reject previous holdings. One problem with the Imperial Theory is that it does not encompass these commonly-used distinctions.

VI. THE HOLDINGS THEORY OF STARE DECISIS

One popular theory of the doctrine of stare decisis is that all holdings—but only holdings—of high courts bind lower courts and all holdings—but only holdings—of intermediate-level courts bind trial courts. In general, the Holdings Theory provides that courts are bound by their own holdings, although with somewhat less force than lower courts are bound. Grigsby exemplifies this view, and it is a recurrent theme in many cases. In some ways, the Holdings Theory is the opposite of the Imperial Theory. While the Imperial Theory has a broad and expansionist approach to precedent, the Holdings Theory has quite a narrow and restrictive one. This narrowness is entailed by
the nature of "holding" itself. Moreover, the Imperial Theory looks at what a court actually says to determine what is binding, whereas the Holdings Theory analyzes the subtext of an opinion to determine what is really necessary to generate the decision. However, in another respect, the Holdings Theory may resemble the Imperial Theory. In general, the rhetoric of this Theory is that holdings constitute very, very, very good reasons for applying those holdings to similar cases in the future. Part of the reason for distinguishing between holdings and everything else is to give holdings tremendous force. In this sense, the Holdings Theory resembles the Imperial Theory because it is a theory of domination. Both of the Theories are inflexible when it comes to the application of whatever it is that constitutes precedent.

One of the things that recommend the Holdings Theory is the rhetoric of courts. Courts frequently designate what they take to be their holdings. Whether they are always right about this, whether their designations play a crucial role in analyzing opinions for precedent, or whether the identity of a holding is always subject to analysis, courts surely think they are doing something by demarcating holdings, and distinguishing them from dicta of various gradations. Holdings are important. Everyone thinks so. It is easy to slide from there to holdings-and-only-holdings' constituting precedent.

The Holdings Theory is well-loved by academics, advocates, and judges alike. Academics love it (in part) because it provides potential for ingenious analysis and clever refutation. Advocates love it because it gives them lots of arguing room. Judges like it because they have more space in which to make decisions. Justice Scalia has said that he subscribed to it in his youth. Amazingly, few decisions of the Texas Supreme Court actually subscribe to it, and the court often uses different language to describe stare decisis. An authoritative

203. See Scalia, supra note 61, at 1178.

Of course, in a system in which prior decisions are authoritative, no opinion can leave total discretion to later judges. It is all a matter of degree. At least the very facts of the particular case are covered for the future. But sticking close to those facts, not relying upon overarching generalizations, and thereby leaving considerable room for future judges is thought to be the genius of the common-law system. The law grows and develops, the theory goes, not through pronouncement of general principles, but case-by-case, deliberately, incrementally, one-step-at-a-time. Today we decide that these nine facts sustain recovery. Whether only eight of them will do so—or whether the addition of a tenth will change the outcome—are questions for another day.

When I was in law school, I was a great enthusiast for this approach—an advocate of both writing and reading the "holding" of a decision narrowly, thereby leaving greater discretion to future courts. Over the years, however—and not merely the years since I have been a judge—I have found myself drawn more and more to the opposite view.

Id. at 1177-78.
expression of the law or a deliberate statement of the law can easily be broader than the holding. It is hard to see how it might be narrower.

The Imperial Theory can be made to converge upon the Holdings Theory by limiting the definitions of authoritative expressions and deliberate statements to holdings only. This is seldom done, and it is doubtful that most courts would want to strait-jacket themselves like that. Then again, there could be conventions by means of which courts signal what is and what is not authoritative and deliberate. However, if there are such signals, the legal public would have to know about them in order for the signals to override actual language of authoritative-looking expressions and deliberate-looking statements. I cannot think of any such signals. "This is dictum you idiots. We're just fooling around. Don't pay much attention to it" would do the trick. Then again, there are strong conventions against saying things like this in judicial opinions, and that claim is true for more reasons than one. One of the reasons is that courts want lawyers and other courts to pay attention to dicta. Sometimes, they even want dicta treated as holdings, or something close.

The Holdings Theory is deeply troubled, however. First, it is unempirical. Both courts and lawyers treat much more than holdings as significant and, indeed, as binding precedent. Second, the Holdings Theory presupposes that the holding of the case can be found, at least most of the time. The fact of the matter is that both judges and advocates experience enduring disagreement as to what the holding of the case really is. They may agree as to what a court said, but they simply do not agree as to what the holding was. Such are the vicissitudes of analysis. This is not a result of ignorance, incompetence, bull-headedness, or deficiencies of analytical intelligence. Law professors and legal intellectuals have the same problem. Third, many legal rules are treated as precedential even though they are not really necessary to decide the case at hand. This last fact alone bankrupts the Holdings Theory.

An instance of this came up not long ago in the Texas Supreme Court. In State Farm Fire & Casualty Company v. Morua, the issue was whether a Texas Rule of Civil Procedure required that supplementary interrogatory answers be verified. In its short opinion, the court held that they do indeed have to be verified. However,
because the opposing party waited over a year before objecting to this defect and objected only at trial, the court also held that the objection had been waived.\textsuperscript{206} It seems perfectly clear that the waiver resolution is the holding in the case, and the resolution of the question regarding the verification of supplementary answers is dictum. However, Justice Greg Abbott, who wrote the opinion, called them both holdings,\textsuperscript{207} and there are probably only a few lawyers in the state who will not treat the requirement that supplementary interrogatory answers be sworn as binding precedent. The resolution of \textit{Morua} and the instant consensus that developed around it with respect to its holdings are significant, and they completely refute the Holdings Theory.

The Holdings Theory can provide an extremely-powerful rhetorical tool, whether in the hands of an advocate or in the hands of a judge. The Holdings Theory is a marvelous way to reduce the power of language in other cases. This Theory permits advocates and judges to narrow the rule a case stands for by analytical means. If an advocate can convince a court that a case stands for a very narrow proposition, then the advocate can classify everything else as dicta and, hence, not binding. This is a standard ploy for both judges and advocates alike.

From a more-philosophical point of view, if the rhetorical uses of the Holdings Theory reflected the actual state of the law, then the common law would be much less developed than people usually think it is. It would be much gappier. It would resemble a pond with a few lily-pads, rather than the grassy marsh that it is usually thought to be. One doubts that the public really wants the legal system to be conceived along the lines suggested by the Holdings Theory. It leaves too many gaps. It creates too large a sense of uncertainty. It is a standard joke among the business public that lawyers are forever saying "It depends." Those who interact with the legal system frequently want rules, at least under many circumstances.\textsuperscript{208}

\textbf{VII. THE HOLDINGS-PLUS THEORY OF STARE DECISIS}

If holdings alone do not constitute binding precedent, if more

\textsuperscript{206} See id. at 619.
\textsuperscript{207} See id. at 621.
\textsuperscript{208} Still, there is much to be said for judicial minimalism. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (arguing that courts should decide most constitutional issues upon grounds that are both narrow and shallow). While Sunstein's minimalism is not the same as the Holdings Theory, they overlap to a considerable degree.
than holdings constitute binding precedent, what might that "more" be? One natural candidate is judicial dictum. Another is the reasoning which justified or sought to justify the rule of law that was or that generated the holding. Thus, many discussions of precedent posit that binding precedent consists of holdings plus judicial dicta. This kind of precedent is created whenever a court adopts a rule when it does not have to. Supreme courts sometimes do this because they believe a rule is necessary for the administration of a particular kind of lawsuit that is relatively common. For example, most auto-insurance policies cover "permitted users." In other words, if the insured gives someone else permission to use his car, then that person is covered by the liability sections of the policy while he is using the car. As a matter of standard jargon, this portion of an auto-insurance policy is called the "omnibus clause," and permitted users are called "omnibus insureds." The ordinary discourse of ordinary life is quite fluid, gappy, fragmented, and generally incomplete. Thus, the contours of permission are not always clear. So, how do you judge whether a particular use is a permitted use? In Coronado v. Employer's National Insurance Co., the Texas Supreme Court considered exactly this issue. The facts of the case involved a foreman who had the permission of his company to use one of its trucks to take his crew home. There was an eight-hour drinking incident followed by an accident. The court observes that "[t]here are three different approaches to the problem of deviation [from a permission] in the United States." The court describes these three approaches, each of which is a rule. The court then adopts one of the rules and applies it to the facts. The rule the court adopts is not necessitated by the facts. One of the other rules would have led to the same result. In other words, when the court adopted a rule, it went well beyond the facts, but it was perfectly clear that the court's intent was that this rule should be followed in all subsequent Texas decisions.

209. On the importance of justifications in the context of precedent, see Neil MacCormick, Why Cases Have Rationes and What These Are, in PRECEDENT IN LAW, supra note 54, at 155.
210. 596 S.W.2d 502 (Tex. 1979).
211. See id. at 503.
212. See id.
213. See id.
214. Id. at 504.
215. See id.
216. See id. at 505.
217. See id. at 505-06.
The Holdings-Plus Theory is quite a sensible one. In dealing with auto insurance and the "permitted user," there needs to be a rule. If the legislature will not give us one, the courts must, and it is better for the courts to lay down the rule than it is for the legislature to do so. Moreover, the Holdings-Plus Theory also solves the problem just discussed in *Morua*. Obviously, the court's discussion of whether supplementary interrogatories need to be sworn was a carefully-considered matter and, therefore, judicial dictum. The Holdings-Plus Theory might very well explain part of the Imperial Theory. Holdings plus judicial dicta might be what courts have in mind when they use language like "authoritative expression" and "deliberate statement." On this account, the Imperial Theory would simply be the Holdings-Plus Theory "with an attitude." The "attitude" would be the attitude of domination, distrust of uncertainty, and a whole-hearted veneration of the past.

One problem with the Holdings-Plus Theory is that it is not always easy (or even possible) to tell what constitutes judicial dicta. There are many mechanically-discoverable features which suggest that a discussion comprises *judicial*, as opposed to *mere*, dicta: the length of the discussion, the consideration of arguments, the presence of citations, the discussion of other cases, and so forth. Nevertheless, distinguishing types of dicta is by no means purely mechanical, and there may be areas of controversy as to whether some kinds of dicta—even "considered" dicta—constitute judicial dicta. Indeed, it may be that what constitutes judicial dicta, as opposed to other kinds, hinges in part on the course of history. It may be that one generation's judicial dicta are another generation's obiter dicta. If so, then the kind of objectivity that one wants to see built into a theory of precedent will not be present.

As with the Imperial Theory, there may be two versions of the Holdings-Plus Theory. One would be the Intentional Holdings-Plus Theory. On this view, whether something constituted judicial dictum would depend upon the intentions of the relevant judges. The other theory would be the Textual Holdings-Plus Theory. On this Theory, what constituted judicial dictum would depend upon the face of the text, and no reference to the intentions of the judges would be permitted. Obviously, specialized rules of interpretation would have to be developed. At the same time, most lawyers can distinguish judicial from other kinds of dicta without too much difficulty, and there is frequently a consensus as to which is which.

As with the other Theories, there is a triangular tension between
It would be nice and clean to say that every significant judicial opinion in one way or another has a particular holding, involves certain judicial dicta, and so forth. The collective memory of the legal profession, however, or, at any rate, the collective memory of the attentive, specialized legal public, has a great deal to do with what a case stands for. Often, these memories are shaped by what people are taught in law school, so that enunciated conceptions of law professors are frequently quite important in shaping the collective memory. This is less true with cases, which are constantly subject to review and critique. It is less true with so-called landmark cases, which have stood the test of time. Thus, the meaning of *Raffles v. Wichelhaus*218 (for example) is very dependent upon a fairly-stable collective memory created by the professoriate, whereas the meaning of *Roe v. Wade*219 is much more a matter of the text plus political context and cross-currents. These observations ought to be disquieting to anyone who would like to believe that, in theory, there are stable precedents and they are largely a function of text.

**VIII. THE FLEXIBLE THEORY OF STARE DECISIS**

The Flexible Theory of precedent does not have a mechanical or a quasi-mechanical notion as to how to pick out what is binding about a case. First, according to the Flexible Theory, it is good enough to say that a *proposition of law in a case constitutes precedent if it is an important proposition of law in that case*. Obviously, *importance* is a very flexible idea. The idea of *importance* is probably enough to distinguish the Flexible Theory from all others. However, two other propositions tend to go with this first one. Second, the Flexible Theory tends to subscribe to the view that a proposition of law is an important one only if it was *squarely decided*. Third, most versions of the Flexible Theory emphasize the continuous evolutionary change of the law. This idea, too, flows from constraints generated by what it is to be an important proposition of law. The Flexible Theory is not enamored of sharp, revolutionary changes in the law. There may be many subspecies of the Flexible Theory, depending upon what dimension of precedent is being regarded flexibly. There are a number of such dimensions. First, how much force should precedent have? I have suggested that if a proposition is precedent, then it is a

very, very, very good reason for deciding a subsequent appropriate case. I also conceded that this notion is far from clear. The Flexible Theory would, as befits its name, have a flexible approach to what constituted a good reason, a very good reason, and so on. The Flexible Theory would say that it depended on the circumstances, on the amount of time that elapsed, on the type of case that was involved, on the judge who wrote the opinion, on the number of dissenters, on their identity, on the nature of the controversy, on the identity of the parties, and on many other factors. Another dimension of precedent with respect to which the Flexible Theory may be flexible is the role of text. Each of the Theories outlined up to now emphasizes the role of the text of a court's opinion in determining what constitutes precedent. Some variants of the Flexible Theory might say that, while text is important, history, attitudes of the bar, and social consensus are at least as important as the language of the case. This is certainly true in some instances. Precedent applies only to similar cases. This is true by definition. What constitutes a relevant similarity? This is a problem over which legal scholars have struggled for years. Whatever the ultimately-correct answer is, similarity among social states of affairs is partly determined by social rules and rules of language.220 Those rules can evolve, so that what once was precedent no longer is.

The expressions of the Flexible Theory (or subspecies of the Flexible Theory) in cases often may not be distinguishable from the expressions of the Imperial Theory, the Holdings Theory, or the Holdings-Plus Theory. The wording may be identical. What distinguishes the Flexible Theory (and its subspecies) is accented by attitude, not formulation. The way the Flexible Theory looks at good reasons, however, will be different from the way every other Theory does. It will always see the goodness of a reason in terms of its context. It will always see the strength of precedent as less than the previously-discussed Theories see it. At the same time, however, the Flexible Theory will move with the times. It will conceptualize itself and everything else in pragmatic terms.221 Pragmatism implies not

220. See Schauer, supra note 85, at 591-92.
221. There has been a revival of pragmatism in recent years. The intellectual leadership is provided by Richard Rorty. The cornerstone of his work is PHILOSOPHY AND THE MIRROR OF NATURE (1979). Rorty's leadership is complemented by HILARY PUTNAM, PRAGMATISM: AN OPEN QUESTION (1995) and by the earlier WILFRID SELLARS, SCIENCE, PERCEPTION, AND REALITY (1963). For a recent discussion of pragmatism, politics, and the law, see THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE (Morris Dickstein ed., 1998). Pragmatism as a philosophical doctrine, pragmatism as a world-outlook, and
only practicality, however, it implies an accommodation to the social world as currently understood. The Flexible Theory may be reformist in its orientation (or not), but it will never be confrontationally critical. In this sense, the Flexible Theory fits well with some moderate versions of Legal Realism and with many versions of the Legal Process Theory of legal institutions. Both empiricism and reasoned elaboration are important.

pragmatism as a conception of the law may or may not be related to each other. In Freestanding Legal Pragmatism, in The Revival of Pragmatism, supra, at 254, Thomas C. Grey suggests that pragmatist jurisprudence may be nothing more than "a theoretical middle way between grand theorizing and anti-intellectual business as usual." Id. at 266. In What's Pragmatic About Legal Pragmatism?, in The Revival of Pragmatism, supra, at 275, David Luban implies that legal pragmatism is often nothing more than "eclectic, result-oriented, historically minded antiformalism." Id. at 280. According to Luban, whatever legal pragmatism is, Formalism—a theory of law which cabins "legal analysis to logical and analogical manipulation of pre-existing doctrine"—is its sworn enemy. See id. at 276. The linkage between pragmatism—whether conceived as a philosophical theory or as a loose outlook on life—and the law has been around for a long time. Judge Cardozo recognized this fact in his great and influential The Nature of the Judicial Process, supra note 83, at 102:

Not the origin, but the goal, is the main thing. There can be no wisdom in the choice of a path unless we know where it will lead. The teleological conception of his function must be ever in the judge's mind. This means, of course, that the juristic philosophy of the common law is at bottom the philosophy of pragmatism. 222.

The Flexible Theory probably fits best with moderate Legal Realism, such as that of Karl Llewellyn. See Llewellyn, supra note 71, at 5; K.N. Llewellyn, On the Good, the True, the Beautiful, In Law, 9 U. Chi. L. Rev. 224, 224 (1941-1942); see also K.N. Llewellyn, The Rule of Law in Our Case-Law of Contracts, 47 Yale L.J. 1243, 1246 (1938). The Flexible Theory does not fit quite so well with more radical Legal Realisms such as those of Jerome Frank. See Jerome Frank, Law and the Modern Mind (1930). Nor does it fit well with the cynical Legal Realism characteristic of the Critical Legal Studies school. For the classical systematic statements of the Critical Legal Studies school, see Roberto Mangabeira Unger, The Critical Legal Studies Movement (1986). See also Andrew Altman, Critical Legal Studies: A Liberal Critique (1990); Mark Kelman, A Guide to Critical Legal Studies (1987). For a recent statement of Critical Legal Studies, see Duncan Kennedy, A Critique of Adjudication (1997). For a contemporary variation on the theme, see Paul F. Campos, Jurismania: The Madness of American Law 38-44 (1998). See also Arthur Austin, The Empire Strikes Back: Outsiders and the Struggle Over Legal Education (1998); Pierre Schlag, Laying Down the Law (1996). Radical Legal Realists tend to believe that language is completely malleable and absolutely subject to all sorts of manipulation, so much so that virtually all judicial decisions were nothing but discretionary. Obviously, on a radical Legal Realist jurisprudence, stare decisis is nothing but window dressing. One of the (fictional) lawyers Laurence Joseph interviewed says this:

Cynical? Of course I am. How can you be a lawyer and not be cynical? But a cynic? I am not a cynic. Cynics are the second-, the third-raters. For the cynics I have nothing but contempt. There are rules, basic rules—they may change, they may or may not be to your liking—but there are rules. The cynics don't give a damn about the rules.


224. For more on reasoned elaboration, see Schauer, supra note 86, at 633 n.1. For more on empiricism, see John Henry Schlegel, American Legal Realism and Empirical
If the Imperial Theory is to be characterized by its "having an attitude," the Flexible Theory is to be characterized by its having the opposite attitude. It is not particularly attached to fixed rules. It does not worship custom. It is not particularly attached to the status quo. It does not view rules in an expansionist way. And it does not necessarily view the relationship between sovereign and subject as an imperial one of dominance. The Flexible Theory would characterize itself in pragmatic, evolutionary terms. There is a distinction, however, between the Flexible Theory (which is pragmatic) and something people are now calling the Pragmatic Theory of Law: at least in principle, one could advocate a pragmatic theory of adjudication and not take stare decisis seriously.225

Indeed, whenever a supreme court emphasizes the importance of change, as opposed to fixity or stability, in the common law, one can be assured it will not be articulating the Imperial Theory of stare decisis.226 If there is an emphasis on pragmatic and evolutionary


225. See Richard A. Posner, Pragmatic Adjudication, in THE REVIVAL OF PRAGMATISM, supra note 221, at 235, 238: a pragmatist judge sees precedent as merely "sources of information" and as "limited constraints on his freedom of decision"; in truly novel cases, the judge instead looks for "sources that bear directly on the wisdom of the rule that he is being asked to adopt or modify." Notice that Judge Posner, if he in fact does not take stare decisis seriously, is just a hair's width over the line with this passage. He comes off differently in other passages: "[T]he positivist [judge] starts with and gives more weight to the authorities, while the pragmatist starts with and gives more weight to the facts." Id. at 240. "[C]ommon law judges reserve the right to 'rewrite' the common law as they go along," Id. at 245.

226. As demonstrated by the actions of the majority of states, the common law is not frozen or stagnant, but evolving, and it is the duty of this court to recognize the evolution. Indeed, it is well established that the adoption of the common law of England was intended "to make effective the provisions of the common law, so far as they are not inconsistent with the conditions and circumstances of our people." Our courts have consistently made changes in the common law of torts as the need arose in a changing society.

El Chico Corp. v. Poole, 732 S.W.2d 306, 310-11 (Tex. 1987) (citations omitted) (quoting Grigsby v. Reib, 153 S.W. 1124, 1125 (Tex. 1913)). Perhaps the best explication of the theory is to be found in the oft-cited case of Swilley v. McCain, 374 S.W.2d 871, 875 (Tex. 1964) (emphasis added):

As originally conceived and as generally applied, the doctrine of stare decisis governs only the determination of questions of law and its observance does not depend upon identity of parties. After a principle, rule or proposition of law has been squarely decided by the Supreme Court, or the highest court of the State having jurisdiction of the particular case, the decision is accepted as a binding precedent by the same court or other courts of lower rank when the very point is again presented in a subsequent suit between different parties. As a general rule the determination of a disputed issue of fact is not conclusive, under the doctrine of stare decisis, when the same issue later arises in another case between persons who are strangers to the record in the first suit.

Thus, according to Swilley, stare decisis applies only to questions of law; it applies only to decisions of the supreme court; the propositions of law must have been "squarely decided"; the new case must involve the very same question; the precedent binds all lower courts; it also binds the supreme court.
change, if there is an emphasis on balancing a variety of factors, and if there is an emphasis on the law's not getting too far ahead of the public, then the Flexible Theory is likely under discussion. Notice that the same features are not necessarily characteristics of the Holdings Theory, although they are consistent with it.

The Flexible Theory subordinates the meta-doctrine of stare decisis to the necessity of historical change and, hence, the desirability of legal change. It is less rigid, therefore, and less inflexible than the Imperial Theory, although—as an institutional matter—intermediate-level courts may have to follow the supreme court in a manner that is less than fully-flexible. (Obviously, the Flexible Theory permits the supreme court to overrule its own decisions, as is unquestionably the law in Texas.227) The Flexible Theory uses the distinction between holdings and dicta and the distinction between judicial dicta and obiter dicta, as well as the distinction between binding precedent and persuasive precedent. Indeed, one of the problems with the Flexible Theory is that it (all-too-flexibly) slip-slides among these various categories.

One difficulty for the Flexible Theory is to state when legal change should take place, i.e., to state when stare decisis should give way to other considerations. And what should those other considerations be? In the succinct phrasing of Benjamin Cardozo, "The final cause of law is the welfare of society."228 He also wrote this: "[I]n every department of the law . . . the social value of a rule has become a test of growing power and importance."229 He describes the examination of rules in this manner as "the functional attitude."230 The power of stare decisis is thus limited by public policy. It is limited by the analysis of public institutions, societal needs, and the direction of history in moral terms. Unfortunately, bare references to public policy and moral considerations will not do. These forms of analysis and critique must be worked out in convincing detail. Of course, all such analyses will become political in a democratic order. Consequently, the Flexible Theory shades off into high-class but pretty-much-recognizable political analysis. There is a continuum here.

227. See Federal Royalty Co. v. State, 98 S.W.2d 993 (Tex. 1936). In contrast, according to Federal Royalty, even the supreme court does not have the power to set aside its own previous judgments. See id. at 995.
228. Cardozo, supra note 83, at 66.
229. Id. at 73.
230. Id.
Another difficulty with the Flexible Theory is that it relies upon the splendidly-attractive phrase "squarely decided." It is important to notice that the phrase "squarely decided" is much narrower than the phrases "authoritative expression" or "deliberate statement." Nevertheless, unclarities shroud that phrase like fog. For example, does it apply only to holdings or does it extend also to judicial dicta?

A quite-modern case, in line with the Flexible Theory, is *Gutierrez v. Collins*.

31 Gutierrez adopted the "most significant relationship" test for conflicts of law in the area of tort. In criticizing the rule of *lex loci delicti*, the court acknowledged that the "law of the place of the tort" rule was mandated by stare decisis. However, said the court,

the doctrine of stare decisis does not stand as an insurmountable bar to overruling precedent. Stare decisis prevents change for the sake of change; it does not prevent any change at all. It creates a strong presumption in favor of the established law; it does not render that law immutable. Indeed, the genius of the common law rests in its ability to change, to recognize when a timeworn rule no longer serves the needs of society, and to modify the rule accordingly.

Much is unclear in this language. Most importantly, there is a great distance between change for the sake of change, at one end of a spectrum, and change compelled by social need, at the other. In between, there are many gradations of the need for change. Still, one thing is obvious in this passage from *Gutierrez*: the supreme court is talking only about itself when it talks about explicitly overthrowing timeworn rules. Nevertheless, it is making clear that even the most-applicable precedent should not bind a subsequent supreme court, unless the rule "makes sense or follows logical reasoning."

It is impossible to distinguish the Flexible Theory from the other Theories in terms of the language in which the Theories are formulated. Unlike the Holdings and Holdings-Plus Theories, the Flexible Theory does not use a criterial mark for what counts as precedent. The difference between the Flexible Theory and the Imperial Theory is really a matter of emphasis. The Flexible Theory

231. 583 S.W.2d 312 (Tex. 1979).
232. See id. at 319.
233. Id. at 317.
235. Consider the following language:

What is stare decisis? It is "A deliberate or solemn decision of a court or judge made after argument on a question of law, fairly arising in a case, and necessary to its
is much more amenable to change than the Imperial Theory. It simply takes less to obtain change on the Flexible Theory than it does on the Imperial Theory. In the formulations of the two Theories, change plays a larger role in the way the doctrine of stare decisis is discussed when it is the Flexible Theory that is being discussed. There may be very deep political and ideological differences between those who hold the Imperial Theory and those who hold the Flexible Theory. I would expect those who adhere to the former Theory to be traditionalistically conservative, more in tune to the idea of very slow, organic growth, more fearful of change, and so forth. One would expect those who adhere to the Flexible Theory to be somewhat more enthusiastic about the possibility of change, less devoted to the past, and so forth.

One of the most significant arguments in favor of the Flexible Theory in recent years is given by Frederick Schauer in his book *Playing by the Rules.* Schauer sketches what he calls “the pure common law model.” On this model, the common law decision-making system is barely rule-based. First, common law rules do not have canonical formulations, because there are no authoritative formulations of the rules. Many great judges see the rules as opportunity for change [rather] than as constraint against it.” According to Schauer, rule-based decision-making focuses on the determination.” Stare decisis does not arise when there is “an opinion expressed by a judge on a point not necessarily arising in a case; an opinion of a judge which does not embody the resolution or determination of the court, and made without argument, or a full consideration of the point.” The strength of the common law and its stare decisis rules lies in that thoroughness with which a case is tried after investigation and argument of issues fairly arising. To the extent that a court overflows the issues and seeks to declare rules of law into being by avulsion instead of accretion, it destroys the system. Courts are not legislatures; courts decide cases. Until the case arises, there is no precedent; there is no stare decisis. Comments on sterile abstract situations lack the vitality of actuality. The solemnity and seriousness with which a court investigates and writes upon an irrelevant point, may entitle it to respect, but it is the respect due any learning and not the respect of a rule of law by which inferior courts are bound. Chief Justice Marshall once wrote concerning general expressions, “If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”

State v. Valmont Plantations, 346 S.W.2d 853, 878-79 (Tex. Civ. App. 1961) (citations omitted) (quoting Grigsby v. Reib, 153 S.W. 1124, 1125 (Tex. 1913) (alteration in original)), aff’d and adapted, 355 S.W.2d 502 (Tex. 1962). It is important to notice that the supreme court not only affirmed but adopted this decision. It did this even though it subtly warned other intermediate courts to tread lightly upon supreme court precedent. Is it not odd that the author of Valmont Plantations, Justice Pope, who was then on the intermediate-level court of appeals, does not refer to the distinction between holdings and dicta?


237. Id. at 179.

238. Id. at 178.
rules and not on the justification for the rules. According to him, the common law frequently looks to the justification and not to the rule. Thus, common law rules in his "pure common law model" are very much like weak rules of thumb, rather than like real rules. In other words, the common law is focused on "case-specific optimization rather than rule-based stability."  

Seemingly, reliance on precedent is inconsistent with this theory of the common law. However, according to Schauer, because there are no canonical formulations of rules, the lawyer or judge reasoning from precedent must construct a new rule every time; it is this discretion in constructing rules which permits the common law as practiced to converge upon the pure model of the common law.  

After all, no two events are ever completely alike, and the later court has substantial discretion in describing the previous case. There are hardly any constraints on this process, says Schauer, and so courts can approach the matter flexibly. Often, the flexibility is to be found in how they describe the facts of the new case. That will determine what was important about the old case and, therefore, what it has to do with the new case.

A. Convention

What counts as a holding and what counts as a dictum, according to the Flexible Theory is—at least to some degree—a matter of convention. These conventions are not easily articulated, and most lawyers could not state them with any clarity, but most good lawyers know that what is being said here is true, and they have a "feel" for when different conventions apply. The conventions vary, for example, from field of law to field of law. Thus, it is conventional for a supreme

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239. What is central to the common law is the way in which what had previously been thought to be the rule is a rule only in a very peculiar sense, for it will be applied to new cases if and only if that application is consistent with the full array of policies and principles that, in a more complex rule system, occupy the same place that justifications occupied in many of our earlier and simpler examples. The common law appears consequently to be decision according to justification rather than decision according to rule. It abounds with rules of thumb, but avoids the use of rules in a strong and constraining sense.

Id. Judge Posner holds a view somewhat like this. He believes that a pragmatistic account of the nature of law will be neutral with respect to whether the law consists of, or should be dominated by, rules. The pragmatist jurist will be interested in approaching this matter pragmatically. See Posner, supra note 225, at 247.

240. SCHAUER, supra note 236, at 181.

241. See id. at 183.

242. See id. at 184.
court all at once to overthrow the old rules governing, for example, choice of law. In the area of tort law, for example, it is not done tort by tort. The replacement of *lex locus delicti* with some sort of substantial relationship or similar test\(^{243}\) was accomplished in one decision. Other decisions may have refined the rule a little, but the overthrow of the old rule was accomplished swiftly and boldly, not piece by piece.

Supreme courts have had no hesitation about doing this, and the bar was not outraged by the bold and sweeping character of the decisions, even if some members of the bar lamented the passing of the old rule. Technically, the holdings in these conflicts-of-law cases would be much narrower if they were conceived in orthodox terms, or if they were conceived along the lines of the Holdings Theory. Thus, a change in the choice-of-law rules for negligence law does not *necessitate* a change in the choice-of-law rules for the intentional infliction of emotional distress. Indeed, a choice-of-law holding involving roadway accidents does not necessarily apply to a case alleging negligence in warning consumers about manufactured products, to negligence in the provision of legal services, or to other exotic forms of negligence.

Often, a high court will indicate what it wants the scope of the holding to be. The Flexible Theory generally honors the intentions of a precedent-setting court, although the Theory is not committed to anything so drastic as either the Imperial Theory or the Holdings Theory. I doubt that the Flexible Theory is dedicated to the idea that precedential propositions should always be understood quite narrowly. The Flexible Theory is just that: flexible. Hence, what constitutes precedent in a given case may vary with the intentions of the court. Courts do not usually discuss this feature of the Flexible Theory.

What is problematic about the Flexible Theory is that no one has ever articulated a comprehensive set of criteria, or even guideposts, for determining when this or that convention applies. Even though sophisticated lawyers seem to be able to figure out what the conventions are, the laity has great difficulty with this; many users of the legal system—including sophisticated businessmen—believe that all talk about conventions is mumbo-jumbo, and that the courts

\(^{243}\) A particularly-interesting case of this is to be found in California law, which differs strikingly from most of the rest of the country with respect to choice-of-law rules and methodology. *See* Michael Sean Quinn, *California Choice of Law, Insurance Contracts, and Environmental Litigation*, 8 ENVTL. CLAIMS J. 29 (1995-96).
simply do as they please. Obviously, when such an attitude is widespread, the legitimacy of the law is diminished.

There is another problem with my formulation of the Flexible Theory. I characterize that Theory as stating that precedent is any proposition of law that is important in a case. But what is it to be “in a case”? Does this hinge on the intention of the judges deciding the case? If a judge says, “Listen up, you all! What I’m about to say is really important in this case,” is that sufficient to make the proposition he is about to utter binding precedent? What is the relationship between the logic of the justification for the holding and the proposition’s being important, according to the Flexible Theory? The closer this relationship, the more the Flexible Theory begins to resemble the Holdings Theory. Or does importance hinge on what the legal community takes to be important about a case?244

B. Accent and Emphasis

What really characterizes the Flexible Theory is partly a matter of emphasis. What is emphasized is the inevitability of social change and, hence, the mutability of judicially-ordained rules. Another thing that contributes to the Flexible Theory is a narrower approach to what constitutes precedent. The Imperial Theory ultimately does not rest upon distinctions between holdings, judicial dicta, and obiter dicta. The Flexible Theory fully encompasses these distinctions and thrives on them. It is not always clear what the Flexible Theory is doing with them, however.

The Flexible Theory is neither text-based nor based on authorial intent. Those two features of any opinion are not excluded from the Flexible Theory, but they are not decisive. What is decisive? Who knows? As is characteristic of balancing theories, one does not know in advance what will be decisive. One must look at the totality of relevant factors, and it is usually not possible to know in advance what those factors are.

C. Actions and Arguments

In addition to its use of the distinction between holdings, judicial

244. It is well-known that some precedent is more important than other precedent. Some cases have enormous influence. Usually, such cases are well-written specimens by important judges in politically-significant areas of the law. Most significantly, perhaps, they exemplify the frame of mind or a mode of reasoning which is important. For a general theory of this matter, see Richard Bronaugh, Persuasive Precedent, in PRECEDENT IN LAW, supra note 54, at 217.
dicta, and obiter dicta, its use of convention, and its use of audience-oriented tools, the Flexible Theory departs from the Imperial Theory in another way as well. According to the Imperial Theory, lower courts are bound by any authoritative expression of the law to be found in a supreme-court opinion. Thus, according to the Imperial Theory, what constitutes binding precedent may be determined from the face of an opinion. If the supreme court said something, if what it said had to do with the case then at hand (and is not simply a technical essay), and if what the court said is an expression of law, then the court’s statement is binding precedent. For the Imperial Theory, it is possible to tell from the words and opinion alone what constitutes binding precedent.

Many say that, under the Flexible Theory, what constitutes binding precedent in a case is determined more by what the court did, than by what it said.\(^{245}\) Some people try to say that, on the Flexible Theory, it is the decision itself that is precedent and not any particular principle of law. Some people use this as a foundation for saying that legal reasoning is substantially different from other types of reasoning. They say that legal reasoning is essentially reasoning by analogy from one decision to another situation.\(^{246}\) This idea of reasoning is nonsense. Reasoning is always propositional: what is binding is not a decision but a principle. A decision cannot be binding. Only a principle or a rule can be binding. Nevertheless, one

\(^{245}\) The bindingness of a series of holdings of a court of last resort under the rule of stare decisis is determined by the “decision” rather than the opinion or rationale advanced for the decision. The controlling principle of a case is generally determined by the judgment rendered therein in the light of the facts which the deciding authority deems important. Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 193 n.1 (Tex. 1968) (citation omitted).

\(^{246}\) See Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, 109 Harv. L. Rev. 923 (1996). For a critique of analogical reasoning, see Larry Alexander, Bad Beginnings, 145 U. Pa. L. Rev. 57 (1996). For an elaborate defense of analogical reasoning in the law, see Sunstein, supra note 46, at 62-100. For an equally elaborate defense of analogical reasoning, see Emily Sherwin, A Defense of Analogical Reasoning in Law, 66 U. Chi. L. Rev. 1179 (1999). A remarkable amount of analogical reasoning goes on whenever the law encounters an ostensibly-new problem and tries to cope with it. Dealing with the problem of communicating with clients in the new “cyberworld” is such a situation. Lawyers are terribly concerned about whether e-mail communications are sufficiently protected to count as confidential, or whether lawyers might inadvertently violate the rules demanding that lawyers never—or, hardly ever—betray the confidences of their clients. In this area, most of the thought begins by thinking through analogies between e-mail systems on the Internet and telephones, cordless phones, radio transmissions, letters, FedEx deliveries, and the like. The law of e-mail communications is now beginning to develop in a stable direction, and much of it is based upon analogies. See David Hricik, Lawyers Worry Too Much About Transmitting Client Confidences by Internet E-Mail, 11 Geo. J. Legal Ethics 459 (1998).
determines which principles are important in a case by determining, at least in the first instance, what the court did.

This mode of determining which principles have precedential authority is strikingly different from the Imperial Theory. According to the Flexible Theory, a court might express a proposition of law authoritatively and, ostensibly, use it in resolving the case, when in fact it relied on a different legal principle or on a much narrower one. Courts do not infallibly know which legal principles they are using in resolving cases, according to the Flexible Theory. It is even more true that courts do not ineluctably know which legal principles they need to rely on or which legal principles—as a matter of logic—are necessary to their argument. This is a striking contrast with the Imperial Theory, assuming that authorities generally know what they intend. The idea that precedent is to be found in what courts do rather than in what they say is a clever one, but as an account of precedent, it is wrong-headed. Even if doings constituted some sort of precedent, it would be the descriptions of the doings, or the principles embodied in the doings, that actually constituted helpful prescriptions for future actions. The simple performance of actions—even the deciding of cases—cannot by itself be normatively interesting. There must be principles behind that performance, and those principles must instruct the articulation of yet other principles.

D. More Differences

The Flexible Theory differs from the Imperial Theory in other important respects as well. First, one version of the Flexible Theory fully recognizes that some binding precedent arises out of holdings; it acknowledges that quasi-binding precedent also arises out of judicial dicta; yet at the same time it is committed to the view that precedent can arise from convention and consensus about a case, as well as from the language of the decision and from the intent of the judges. Obviously, in this sense, the Flexible Theory also differs from the Holdings Theory and from the Holdings-Plus Theory. The Flexible Theory also differs from the Holdings Theory in the way it determines what constitutes a holding. Both proceed, to some degree, by analysis. On the Holdings Theory, however, the analyst is restricted to the logic of the decision in determining what constitutes a holding. On the Flexible Theory, the analyst may use the logic of the decision—indeed, she must—but she may also look to values and to other things. The goal of the Flexible Theory is to determine not
what is logically necessary to a decision but what is important about a case. The Imperial Theory has a much broader view of what constitutes real binding precedent than any of these.\textsuperscript{247} Second, the Flexible Theory embraces the view that the question of what constitutes a precedent must be approached through analysis and cannot be determined mechanically. Third, the Flexible Theory accents the changing nature of the common law, whereas the Imperial Theory tends to emphasize the stability of the common law. The Holdings Theory is ambiguous on this point. If holdings are construed narrowly, then there is lots of room for new decisions. This outlook can be consistent with the idea that the common law is evolving, and the judges need lots of room to make decisions. The Holdings-Plus Theory tends to fill in the canvas quite a lot, so there is not so much room for new judicial decisions. Fourth, the Flexible Theory (like the Holdings Theory and the Holdings-Plus Theory) is much more likely than the Imperial Theory to focus upon the relationship between stare decisis and holdings in the supreme court as opposed to in other courts. The Imperial Theory, in contrast, is likely to blur the distinction between the supreme court and relevant courts of appeals, insofar as trial courts are concerned. This difference is harmless enough where trial courts are concerned, because, whichever Theory is true, trial courts tend to feel a strong pull toward decisions made in the courts of appeals that govern them. Some cases even say specifically that decisions of courts of appeals are stare decisis for trial courts.\textsuperscript{248} It is not at all clear that the common law doctrine of stare decisis was intended to apply to intermediate courts of appeals.\textsuperscript{249}

Matters become more interesting when one considers the extent to which decisions of one intermediate court of appeals constitute

\textsuperscript{247} The only potential exception to this will be when history, convention, and collective memory, as it were, impose a holding on a landmark case. That “holding” may be quite broad.

\textsuperscript{248} See City of San Antonio v. Gonzales, 737 S.W.2d 78, 80 (Tex. App. 1987, no writ).

\textsuperscript{249} Whatever is true about the ancient law, decisions of intermediate courts of appeals are—as a matter of practice—recognized as some sort of authority. How does one footnote the experience of every litigator? Perhaps indirectly. Rule 90(i) of the Texas Rules of Appellate Procedure provides that “[u]npublished opinions shall not be cited as authority by counsel or by a court.” This language is perfectly general with respect to which unpublished opinions one is forbidden to cite. Nevertheless, it clearly includes opinions of courts of appeals. See Berry v. Berry, 647 S.W.2d 945, 947 (Tex. 1983); see also Carlisle v. Philip Morris, Inc., 805 S.W.2d 498, 501 (Tex. App. 1991, writ requested); Bullock v. Sage Energy Co., 728 S.W.2d 465, 469 (Tex. App. 1987, writ ref’d n.r.e.); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum, 666 S.W.2d 604, 610 (Tex. App. 1984, writ ref’d n.r.e.), cert. denied, 469 U.S. 1127 (1985). In McCollum, the court toys with the issue of which unpublished opinions cannot be cited, and it also ponders what sanction there should be for citation of unpublished cases. The court gives no clear answers, however. See McCollum, 666 S.W.2d at 610.
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precedent for another. At least one court of appeals has said that it felt bound by the decision of another court of appeals. Interestingly, the West Reporter headnote for this case summarizes the rule as follows: "A Court of Civil Appeals is bound by a decision of another Court of Civil Appeals, and especially by its own decision." The headnote is a blatant error. In fact, once the decision is analyzed, it does not actually say that the court is bound by the holdings of another court of appeals. What it says is that when a court of appeals decides a point of law having bearing on the meaning of an insurance contract, and when that form is not subsequently modified, then the decision of the court of appeals is read into the contract as an implied term. This type of reasoning is a familiar principle of statutory construction, and the court of appeals is applying it to form insurance contracts, apparently because they are statute-like. The reasoning may be wretched, but it is not poor reasoning regarding the authority of other courts of appeals. A number of other intermediate appellate courts deny that they are bound by other courts of appeals. One case explicitly states that the doctrine of stare decisis in no event applies to any decision of a court of appeals.

IX. THE CREATIVE THEORIES OF PRECEDENT

The Creative Theories constitute an extension of the Flexible Theory—sort of. The Imperial Theory construed precedent broadly. The Holdings Theory, the Holdings-Plus Theory, and the Flexible Theory differ considerably on what counts as precedent. In determining what constitutes precedent, however, the Flexible Theory is just that, flexible, when it comes to having any methodology. According to the Holdings Theory and the Holdings-Plus Theory, precedent is somehow extracted, teased out, or elucidated by analysis. According to the Flexible Theory, many things may assist in finding the law that is truly important to a case. The same approach applies to the Creative Theories. At the same time, the Creative Theories emphasize imagination, invention, and

251. Id. at 290.
252. See id. at 292.
construction. While the Flexible Theory emphasizes the evolutionary nature of the common law, the Creative Theories celebrate its essentially-inventive and -improvisational nature.

A. The Subjective Versus the Objective Creative Theory

The Creative Theories are not one big, happy family. They comprise a number of families, but there are two opposing clans. One of them is the Subjective Creative Theory, and one of them is the Objective Creative Theory. Both Theories emphasize imagination and inventiveness in what should be counted as precedent.254

1. Subjective Creative Theory

The Subjective Creative Theory asserts that there is no context of justification.255 In some contexts, people discover things. In others, they justify their claims about their discoveries. In the law, the process of pre-trial discovery is a little like the context of discovery in science, while summary judgment and trial are sort of like the context of justification in science. The argument of Frederick Schauer in his book Playing by the Rules illustrates this point.256 He thinks that no stable, fixed, or dispositive rules are to be found in older cases. This is true because there are always factual differences to be found between any two cases. Schauer’s “pure” model of the common law is undoubtedly wrong. The common law involves both particularistic and generalistic tendencies. It involves both narrowness and rulishness. Nevertheless, if one takes Schauer’s particularism seriously, it affords lots of room for inventing rules by distinguishing past cases with wild abandon. Different judges with different outlooks can come up with different rules for new cases and claim they are somehow connected to the old cases when adapted for more modern times. If there are no ways to check this assertion, we have the Subjective Creative Theory in all its glory.

A second version of the Subjective Creative Theory posits that

254. Not every theory of adjudication that emphasizes judicial creativity is a Creative Theory, because as I am using the term, a Creative Theory is a theory of stare decisis. There are theories of creative adjudication that are not theories of stare decisis and that, indeed, do not take stare decisis seriously as an animating legal doctrine. See Posner, supra note 225, at 245.

255. See WASSERSTROM, supra note 50, at 26-27. It is sometimes said that the context of justification has a “logic,” while the context of discovery is much more free-wheeling—filled with imagination, fantasy, analogy, or what have you. The locus classicus for the distinction between these two contexts is HANS REICHENBACH, EXPERIENCE AND PREDICTION 4-5 (1938). It has become a standard distinction in epistemology.

256. See SCHAUER, supra note 236.
creativity certifies itself and that—at best—the superiority of creatively-produced theories should be recognized through Verstehen, if at all. The trouble with all Verstehen doctrine is that there is no way to distinguish a mere assertion of understanding from genuine, fundamental intuition. The mere presentational feel of the intuition is not enough. One can believe that one has grasped a social structure and be wrong. Similarly, one can believe that one has grasped the spirit of the law and be quite wrong. This is, after all, a highly-political situation, at least broadly speaking.

A third version of the Subjective Creative Theory contends that, in construing previous cases, judges are really fobbing off their political preferences under the guise of rationalizing the law. One of the premier exponents of this view is Pierre Schlag. According to him, "the reason of law not only underwrites the rule of law but provides a sense of comfort and control to jurists and citizens alike." Schlag believes that reason is "an essential aspect of the rule of law," but he also believes that the rule of reason, as conceived by American law, is phoney. In particular, Schlag is critical of the balancing that is central to most versions of the Flexible Theory. He calls it a "Noble Scam." The general idea is that if prestigious elites claim that something is authoritative, then it becomes authoritative by a kind of social magic. The general idea is that prestige has its privileges.

On Schlag's version of the Subjective Creative Theory, legal reasoning, especially balancing, essentially masks political vision. In this sense, legal reasoning is ideological. This third version of the Subjective Creative Theory might be called nonpolitical romanticism. On this view, diverse legal imaginations create as many rules of law as possible, and they provide diverse approaches to dissolution of legal problems. The motto of this approach is "Let a Hundred Flowers Blossom." It is not clear that this approach, however, will lead to a flourishing legal system. Indeed, it may very well fail to be compatible with the Rule of Law. Uniformity in law is a virtue, even if it is not an art.

2. Objective Creative Theory

In contrast to the Subjective Creative Theory, the Objective Creative Theory holds that even ingeniously-invented explanations
for cases—even brilliantly-derived principles of law—must be justified as precedent somehow. Probably the best-known exemplar of the Objective Creative Theory is the approach of Ronald Dworkin in his justly-celebrated treatise *Law's Empire*.\(^{260}\) In that volume, Dworkin develops a synthesis of interpretive hermeneutics, narratology, and legal reasoning. He argues that, in finding precedent, the thoughtful judge, whom he names "Hercules," should carefully analyze the potentially-applicable cases, arrange them in order, create a story of legal development and evolution that matches social evolution, extract or impose upon the cases the best interpretive principle possible from the moral point of view, and then treat that principle as the binding precedent. Obviously, this is a very creative activity. Equally obviously, it can be a rational activity. And, without doubt, it is a profoundly-moral activity. Dworkin submits that, for every such activity, there will be a uniquely-correct answer. The essence of legal argument—when taken seriously—is the finding of such answers and their presentation. Dworkin's theory has been summarized, explicated, reviewed, and criticized so many times and at such length that hardly anything new can be said about it. Everyone would agree, however, that Dworkin's account of the nature of legal reasoning and of the nature of precedent links both reasoning and precedent to deep moral and political theories. On Dworkin's account, judges are applied philosophers.

A recent theory of jurisprudence which exemplifies the Objective Creative Theory is that of Professor Richard Markovits in his new book, *Matters of Principle*. Although Markovits does not focus on judges in the same way Dworkin does, his judges, too, are applied philosophers. Interestingly, Markovits treats the subject of precedent systematically and at length. Markovits's view is "an anthropological, secular version of natural-law jurisprudence."\(^ {261}\) The central contention of his argument is that "our society is morally committed to making 'arguments of moral principle' the dominant form of legal argument and that such arguments will yield internally-correct answers to all legal-rights questions."\(^ {262}\)

Markovits starts from the proposition that American culture is rights-based, through and through. He takes the concept of moral obligation to be reciprocally correlated with the idea of a moral right,

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261. **MARKOVITS, supra** note 21, at 1.
262. *Id.* (emphasis added).
whereas the idea that someone ought morally to do something is a weaker idea and does not imply the existence of a correlative moral right. Markovits believes that the moral-rights-related practices in American culture are "sufficiently rich and dense" to determine "internally-right" answers to virtually all moral-rights questions. By an "internally-right" answer, Markovits does not mean one that is objectively correct and filled with truth everywhere and for all time or even true everywhere at one given point in time. For Markovits, an "internally-correct" moral determination is one to which a given society is morally committed. It is fundamental to our culture that it be embedded with basic moral principles, and their more-concrete corollaries "are not only automatically part of the law but provide the basis of the type of legitimate legal argument—arguments of moral principle—that we are committed to making dominant in our legal culture." Markovits believes that our many, many legal and moral practices are rich enough to enable legal principles, together with arguments from basic moral principles and their corollaries, to yield internally-right answers to all legal-rights questions. Obviously, societally-internally-right legal answers to legal-rights questions will be internally correct both from a legal point of view and from the society's moral point of view. Obviously, Markovits has wholeheartedly embraced the Doctrine of Moral Seepage.

In addition, he subscribes to the view that legal rules and legal practices are to be evaluated in terms of the basic moral principles of the society in which the legal system exists. Our society, for example, subscribes fundamentally to a liberal basic moral principle according to which everyone at all times is morally obligated to treat all moral-rights holders as equals in the sense that liberalism would define that egalitarian notion—namely, treat with equal, appropriate respect all creatures who have the neurological prerequisites to become and remain individuals of moral integrity and show equal, appropriate concern for all such creatures' actualizing their potential to be individuals of moral integrity.

Obviously, this is not a version of utilitarianism. Indeed, it is much closer to Kant. One wonders, of course, if one can, in all circumstances, show equal respect and equal concern for all persons. In the abstract, it is tempting to think that if A has fiduciary duties to B and none to C then, by virtue of that fiduciary relationship, A owes

263. See id. at 2.
264. Id. at 3 (footnotes omitted).
265. Id. at 12 (footnote omitted).
B duties of concern she does not owe C. At a more concrete level, sometimes, the showing of concern for one person requires that showing respect for another person be deferred. This is potentially an acute problem for the trial lawyer. It is difficult to know what would count as showing appropriate respect for a lying witness. It is not clear how opposing counsel should show concern for an opposing party that has brought a frivolous lawsuit based upon, say, forged documents. It is difficult to know what would count as proper respect toward a corporate entity that is engaging in coercive and oppressive litigation. Indeed, what is appropriate respect toward any artificial legal entity? Curiously, the ambiguities in these problems and the proper way to respond to them have not yet been seriously developed. Kantian duties in a world in which black and white are present, streaked, and mixed, are not easily discerned, articulated, or vindicated.266

Nevertheless, Markovits has a significant theory of moral integrity. According to him,

an individual has moral integrity when he takes his life morally seriously not only by giving appropriate consideration to his obligations but also by attempting to establish a reflective equilibrium between his personal value-convictions and his life choices.267

According to Markovits, in order to be “a person of integrity, an individual must take her obligations seriously, make a meaningful personal-ultimate-value choice, and make meaningful other choices that make her life conform with her value choices.”268 Generally speaking, people of moral integrity live examined lives and live with a view toward being autonomous (i.e., free and inner-directed).

Legitimate legal argument in a liberal rights-based society will involve several significant features. First, it will not offend the basic moral principle of the culture. Second, it will respect those principles and values that are corollaries of the basic moral principle. Third, every decision will be examined against the rights-based interests of all moral-rights holders in the society, and only those decisions that are morally positive, on balance, will be repeated over time. Fourth, the state will enforce morally-legitimate private legal rights of members of the society.

266. For a recent move in that direction, see ARTHUR ISAK APPLBAUM, ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE (1999).
267. MARKOVITS, supra note 21, at 22.
268. Id. at 39.
As a consequence of these fundamental principles, argument from precedent will be a significant component of legal argumentation. Obviously, they are not the last word: arguments from the basic moral principle in the culture will be the last word, and they will trump every other form of legal argument. Nevertheless, precedent will always be a primary consideration in legal reasoning. If precedent were not an important form of argument, then the state would be creating legitimate expectations on the part of its citizens and then disappointing those expectations. Such conduct on the part of the state hardly manifests either respect or concern.

In addition, according to Markovits, precedent should be interpreted in such a way that it reflects the moral-obligation- and moral-rights-commitments of our society. In other words, basic moral principles should seep into the legal system and inform it in all sorts of ways, including how legal rules are interpreted.

Markovits also spells out a number of ways in which arguments from precedent should be limited. (1) If people have not relied upon the precedent, then it is weaker than if it has been relied upon to a considerable extent. (2) If precedent has been weakened to the extent that it has been undermined by subsequent, analogous, legal developments, it is not as binding. (3) Precedents are weaker when they are based upon factual considerations that are outmoded. Thus, a precedent which necessarily hinged upon the use of the mail to communicate would be weaker in 1999 than it was in 1899. (4) If a precedent is designed for a factual situation which never obtained, precedent should be weaker than it would be if the situation for which it was designed actually existed. (5) Precedent which was never fully argued to any court should not be given the same kind of weight that should be given to precedent which was fully argued and, therefore, presumptively fully considered. (6) Precedent narrowly conceived should be given more weight than precedent more broadly conceived.

269. See id. at 56.

270. Arguments of moral principle reveal that our practice of giving judicial precedent and practice weight in themselves is an outgrowth of our duty to show respect to all moral-rights holders by giving them fair notice (by making our conclusions about their legal rights and obligations consistent with their reasonable expectations). I do not think that this obligation to give fair notice can be fulfilled only through giving weight to precedents.

Id. at 70.

271. Interestingly, Cass Sunstein also argues in favor of desuetude as a precedent-weakening device. See SUNSTEIN, supra note 46, at 155.

272. Interestingly, both Markovits and Sunstein count heavily upon analogies. See id. at 62-100.
Broad precedential rules are probably not going to have been fully argued, and it is the established and well-known practice in American legal culture to tend to give narrow precedents more weight than quite-broad ones. This is the point to distinguishing, says Markovits, between holdings and dicta.\(^\text{273}\) (7) If a given decision was wrong right from the start, its weight as precedent should be inversely proportional to the seriousness of the original error. And finally, (8) if precedent has proved unworkable in practice, then it should not be counted as very strong precedent.\(^\text{274}\)

At the same time, the mere fact that overruling a precedent would "undermine our belief in the rule of law"\(^\text{275}\) should not prevent it from being overruled. Similarly, the fact that overruling a precedent would "destroy social peace in relation to the issues in question,"\(^\text{276}\) does not require keeping a precedent which should otherwise be overruled. This is where fundamental moral rights and the action of legal precedent will clash seriously. These were the kinds of arguments which were given against \textit{Brown v. Board of Education}.

(Markovits would, without doubt, agree that \textit{Brown} was correctly decided. In fact, he would suggest that it was long overdue when it was decided.)

Quite clearly, Markovits's jurisprudence is a version of the Objective Creative Theory. In \textit{Matters of Principle}, Markovits is not terribly interested in the nature of advocacy or in the nature of judicial decision-making. Nevertheless, it is clear from his discussions of the substantive law that both advocates and judges need to approach legal argument in a creative spirit. At the same time, it is crystal clear that he provides criteria for distinguishing direct creative suggestions from all others. Those criteria consist of the liberal basic moral principle he articulates, its corollary rules, and its corollary...

\(^\text{273}\) Obviously, Markovits has little use for the Imperial Theory and is suspicious of the Holdings-Plus Theory. Nevertheless, he is not committed to the Holdings Theory either, because he believes that precedential propositions of law shade into one another. Probably, he does not think that hard and fast distinctions between holdings and judicial dicta can be reliably formulated. Markovits would probably be tempted by the Flexible Theory, but in every case he would want to know whether the "important" proposition that has become precedent was actually fully argued to some court, whether people have relied upon it, and whether it fits with the true facts both of the past and of the present world (as opposed to lawyer-, judge-, and law professor-concocted facts), and he would want to know how it fits in with his Basic Moral Principle (together with its corollaries).

\(^\text{274}\) \textit{See} MARKOVITIS, \textit{supra} note 21, at 73 (describing all eight judicial-precedent practices).

\(^\text{275}\) \textit{Id.} at 74.

\(^\text{276}\) \textit{Id.}

values.

A third version of the Objective Creative Theory may be found in the recent writings of Professor Cass R. Sunstein. Sunstein argues that law in the pluralistic—indeed, heterogeneous—society involves a certain miracle. How can this be decided and decisions be made when there are significant disagreements about fundamental values and politics? Sunstein has developed the idea of an "incompletely-theorized agreement," which, he believes, holds the key to understanding the nature of precedent.\(^ {278}\) The general idea is that skilled lawyers and jurors can end up agreeing on how a certain case should come out without at all agreeing on the proper reasoning or upon the philosophical foundations of the proper reasoning. Judges with different political visions can agree, if they focus narrowly and stay away from controversial areas. They can also come up with reasoning, if they proceed by using analogies. Established precedent plays the role of the "fixed point" in analogical reasoning. In general, judges deciding controversial matters should stay away from general rules, about which there will be substantial disagreement, and should pay close attention to the drift of the law. Almost every good lawyer has a good grasp on what the law is and on the direction in which it is going to go. An insightful lawyer is very much like a musician, in some ways. He has a good ear for the melody and rhythm in the law. Some very intelligent people have a "tin ear" for legal argument. These matters are frequently subject to a broad consensus.

Sunstein and Markovits are obviously polar opposites in their approaches to the law. Markovits believes that significant judicial opinions should be deep, in the sense that they are connected to important moral, political, economic, jurisprudential, and philosophical truths. Because Sunstein is skeptical about the existence of much agreement about what is true at a deep level, he believes that judicial decisions should be shallow and should stay away from the search for deep truth. Probably, Markovits is more sympathetic to broad decisions than is Sunstein, although there is nothing about Markovits's theory that requires that judges always articulate broad rules. In some circumstances, Markovits would love narrowness as much as does Sunstein and sometimes for the same reasons. Still, the fact that it is proper to include Sunstein among Objective Creative Theorists, tends to show that "objective creativity" is not linked to the embracing of deep philosophical theories.

\(^ {278}\) See Sunstein, supra note 46.
B. Narrow Scope

According to the Creative Theories, binding precedent is to be construed narrowly—indeed, some say as narrowly as possible. In this respect, the Creative Theories converge upon the Holdings Theory. The theme of narrowness is one way to distinguish the Creative Theories from the Imperial Theory. The Creative Theories want to give themselves as much room as possible in which to create. This distinguishes them sharply from the Imperial Theory. Most of the time, the Creative Theories will be every bit as evolutionary as the Flexible Theory. The Creative Theories, however, leave room for revolutionary changes in the law, after the manner that Thomas Kuhn described revolutionary scientific changes. Of course, in theory, some versions of the Flexible Theory could de-emphasize the role of evolution in jurisprudence, but that is unlikely.

279. See Korioth v. Briscoe, 523 F.2d 1271, 1275 (5th Cir. 1975) (emphasis added) (“Cases are to be decided on the narrowest legal grounds available”). Of course, Korioth is not a statement of Texas law, but of federal law. Indeed, no Texas case appears to go as far as Korioth does. Nevertheless, strains of Korioth are to be found in Texas cases.

The applicability of the doctrine of stare decisis is ... thus: “to make an opinion a decision there must have been an application of the judicial mind to the precise question necessary to be determined ....” .... “A decision is not authority upon a question not raised and considered in the case, although it may be involved in the facts.” .... “Furthermore, the former holding or decision is binding only to the extent of the precise question passed upon; and is confined to the application of a legal principle to the same, or substantially the same, state of facts, and is not binding as to facts or issues not adjudicated or involved in the former decision or ruling.”

State v. J.M. Huber Corp., 193 S.W.2d 882, 885 (Tex. Civ. App. 1946) (citations omitted), aff'd, 199 S.W.2d 501 (Tex. 1947). This language is very close to Korioth, because it narrows the focus of binding precedent as much as possible. Although it does so in terms of the question presented, rather than the rule applied, the idea that binding precedent must be construed quite narrowly shines through this passage.

280. Although our duty is to apply the law as decided and declared by the supreme court, we are not bound by assumptions and implications in its opinions. Justice in the particular case, as well as rational and orderly development of the law, demands that the doctrine of stare decisis be limited to questions raised and decided on full consideration. Otherwise, application of precedents to cases without such full consideration would inevitably result in anomaly and injustice. Consequently, we consider ourselves free in this case to construe the Act in question in accordance with our own determination of the intention of the legislature as expressed in the Act and in the light of pre-existing law.


282. In American Transfer, Justice Guittard says that one court is not bound by the implications of a rule set down in a previous case. One form of implication is surely an entailment. But if one proposition entails another, then the truth of the entailed proposition is a necessary condition for the truth of the first. Hence, at least on the Holdings Theory and on the Holdings-Plus Theory, surely subsequent courts are bound by the entailments inherent in previous decisions. Thus, doctrines espoused by Justice Guittard are quite different from the doctrines to be found in some of the other Theories. Four factors impose narrowness:
Other cases that tend to support the Creative Theories have said the following sorts of things: courts should interpret the law in order to avoid inequity and antiquated doctrines; to the extent that courts should use considerations of substantive justice in statutory construction and in rethinking the common law, the scope of binding precedent is reduced; rules may not be disassociated from their facts. Obviously, the more seriously, or stringently, this principle is understood, the narrower a binding precedent will be. Thus, the Creative Theories and the Imperial Theory are opposites (sort of). The Creative Theories almost certainly tend to weaken stare decisis. This goes along with trying to make room in which courts may create. Usually, formulations of Creative Theories do not actually say this. They simply emphasize the ability of courts to overturn previous decisions.

One rather indirect source of authority for the Creative Theories comes from the way in which dissents are characterized by the Texas Supreme Court. It is odd that a dissenting opinion would be counted as any form of precedent. After all, dissenting opinions support positions that have lost. The majority of the court will have rejected not only the conclusion of the dissenters but important parts of their reasoning. So how can a dissent count as any form of precedent? In O'Connor v. First Court of Appeals, Justice Oscar Mauzy relied upon the writings of Charles Evans Hughes, a former Chief Justice of the United States, to characterize dissenting opinions. Chief Justice Hughes had stated that dissenting opinions are "an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting

rationality, the theory of evolution in the common law, the concept of holdings, and substantial justice. The Court of Civil Appeals' opinion in American Transfer states that there is a moral dimension to the requirement that precedent be construed narrowly. See American Transfer, 584 S.W.2d at 298. Thus, the area of judicial generativity is enhanced. Sometimes, a formulation of one or another of the Creative Theories actually commits itself to a logical absurdity in order to maximize its "wiggle" room.

284. See Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (holding that developing public policy regarding employer/employee relationships mandated a narrow exception to the employment-at-will doctrine); see also Cox v. Thee Evergreen Church, 836 S.W.2d 167, 171 n.6 (Tex. 1992).
288. 837 S.W.2d 94 (Tex. 1992).
289. See id. at 96.
judge believes the court to have been betrayed." The Texas Supreme Court also relied upon the writings of Ruth Bader Ginsberg, now a Justice upon the United States Supreme Court, in characterizing dissents. She says that the prospect of the dissenting opinion "heightens the opinion writer's incentive to 'get it right.'" Chief Justice Phillips, who currently leads the Texas Supreme Court, has also recently attributed to dissenting opinions the function of "meaningful[ly] disciplining" the writer of the majority opinion. Perhaps a dissent counts as very weak precedent because it suggests that certain legal arguments are within the canons of acceptability, and the larger the number of judges that join the dissent, the more acceptable the dissenting argument is, other things being equal. (Other things are not equal when an eminent jurist writes a dissent. In that case, a one- or two-judge dissent—like "Holmes and Brandeis Dissenting"—gives an argument a certain pedigree, which is valuable.)

In addition, the ideas put forward by Chief Justice Hughes, Justice Mauzy in O'Connor, and Chief Justice Phillips in Dallas Morning News create a dialogic or dialectical conception of the relationship between majority opinions and dissenting opinions. Focused and reasoned conversation about the law is almost always creative, and the law requires imagination to interpret it. Thus, the fact that a learned judge, after reflecting upon a matter for a period of time, has written a dissent in Year One may help an advocate in Year Six to construct an argument in favor of change. This is particularly true if not just one judge promulgated such a dissent, but several others joined him. This is particularly true if the judges who turned out the dissent are "forward looking," "progressive," and still on the court.

C. Interpretation, Imagination, and Invention

The Imperial Theory conceptualizes the idea that binding

292. See Dallas Morning News v. Fifth Court of Appeals, 842 S.W.2d 655, 661 (Tex. 1992) (Phillips, C.J., separate opinion).
293. One of the problems about conversation is that it can become too shrill, too much like a high-school debate, and too rhetorical. Where does vigorous, productive dialogue end and meaningless, verbal pushing and shoving begin? As we all know, that in itself is currently a matter of debate among legal circles in Texas.
precedent is to be discovered by reading the text of the opinion, reflecting upon it, and placing it in several large contexts. The Holdings Theory and the Holdings-Plus Theory hold that binding precedent is to be discovered by analyzing an opinion. The Flexible Theory also emphasizes analysis, but it is much more free-wheeling. The Creative Theories hold that binding precedent is not discovered but teased out by interpretation, seized by imagination, or perhaps even invented first by vision, then by lawyerly agreement, and ultimately by social consensus.

The basic point of the Creative Theories is that what constitutes the narrowest—or even simply, a quite-narrow—ground for a legal holding is not something that can be discovered. Thus, the Creative Theories posit that not even holdings are things that can be discovered. What constitutes the narrowest ground is a shifting matter, which will depend upon practicalities, upon individual purposes, upon the context of the litigation, upon the context of the original decision, and so forth. In other words, the Creative Theories are committed to the view that there is no identifiable narrowest legal rule constituting or justifying a decision. Hence, what constitutes the binding precedent of a case will depend upon a variety of extrinsic factors.\textsuperscript{294}

In some ways, this concept is similar to the interpretation of literature.\textsuperscript{295} Obviously, not every proposed interpretation of a poem is satisfactory. However, every good poem is susceptible to more than one plausible, acceptable, or even correct interpretation. This is true

\textsuperscript{294} Theoretically, there could be yet another theory. This theory would hold that stare decisis applies only to (1) those propositions of law in a given case that express the narrowest-possible legal ground upon which judgment could have been entered and (2) the narrowest propositions of law that justify the holding. If this theory were committed to the view that one could always find the narrowest holding in the narrowest ratio, then the theory would be possible. Arthur Goodhart tried to spell out this view some years ago. See Arthur L. Goodhart, \textit{Determining the Ratio Decidendi of a Case}, 40 \textit{Yale L.J.} 161 (1931). This view was demolished by J. Stone, \textit{The Ratio of the Ratio Decidendi}, 22 \textit{Mod. L. Rev.} 597 (1959); see also A.L. Goodhart, \textit{The Ratio Decidendi of a Case}, 22 \textit{Mod. L. Rev.} 117 (1959); A.W.B. Simpson, \textit{The Ratio Decidendi of a Case}, 20 \textit{Mod. L. Rev.} 413 (1957).

\textsuperscript{295} The relationship between law and literature is all the rage these days. See RICHARD WEISBERG, \textit{POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE} (1992); \textit{see also RICHARD A. POSNER, LAW AND LITERATURE} (rev. ed. 1998); \textit{INTERPRETING LAW AND LITERATURE} (Sanford Levinson & Steven Mailloux eds., 1988). There is a particularly-interesting essay in the Levinson and Mailloux anthology by Richard Weisberg. Although the verbiage may be alien, what advocate cannot profitably contemplate the following: "Nietzsche links textual accuracy with the urge to justice. Clearly, for him, living well means reading well or, at a minimum, reading vitalistic, performative texts with an aspiration toward the dynamic growth and the necessary constraint of the individual will to power." Richard Weisberg, \textit{On the Use and Abuse of Nietzsche for Modern Constitutional Theory}, in \textit{INTERPRETING LAW AND LITERATURE}, supra, at 181, 185.
even if the criteria for adequacy in interpretation are to be found in authorial intent. Authors frequently do not know what they intended; poets frequently adopt the interpretation of others as consistent with an enriching of their intent, and so it is with courts. Frequently, in a given case, the court does not intend just exactly this legal rule, as opposed to precisely that one, although there are many legal rules that the court manifestly does not intend: textual nihilism is completely wrong-headed. The Creative Theories have a free-wheeling account of what constitutes interpretation. It is not a matter of finding out facts. It is not a matter of objective analysis. It is a matter of preventiveness, and there will be several interpretive inventions that cannot be falsified for any given text. Lots of people—even lawyers—subscribe to these Theories of interpretation. There is no necessity that interpretive processes must be relativistic in this way. Even the most basic of human experiences involve the interpretation of sensory stimuli, yet relativism seems out of place here.

The difference between the Creative Theories and the other Theories harks back to the distinction between finding and making legal rules. To put the matter differently, so long as self-evident textual readings are not the sole source, the essential difference between the Creative Theories and the other Theories is whether the recovery of binding precedent is seen in terms of archaeology or in terms of literary interpretation. In archaeology, one digs and digs and then one finds, say, a pot. According to an archaeological theory of stare decisis, one digs and digs—analyzes and analyzes—and then finds the binding precedent. One may have to analyze the shards one finds before determining what one has really found, but the enterprise is essentially a matter of discovery. In contrast, there is the interpretive theory of stare decisis, in accordance with which, after the digging is done, interpretation begins. The interpretation is not, of course, on the level of saying, "That is a bone," and, "That is a spoon." The process of interpretation is more nuanced and more subtle, as well as unfalsifiable, at its core. Moreover, because the purpose of the interpretation is not merely to find the truth, but also to solve contemporary practical problems, legal interpretation is to some extent inventive. As such, it essentially involves relativity. Acts of creation always involve differing products.

The Creative Theories are the darlings of law professors. There are several reasons for this. Law professors are frequently the most-creative legal thinkers around. Creative legal thinkers are frequently
drawn to the professoriate because it is in precisely such a profession that people can be most creative in their legal thinking. Besides, professors can write almost anything and call it work, and if other professors like it, tenure is likely to follow. Once tenure is achieved, there is even more freedom to think creatively. There is actually not a great deal of demand for creative thought in most aspects of legal practice. In fact, many parts of legal practice discourage most types of creativity much of the time. The points of error one files in appellate court should look like the points of error other lawyers file. Briefs should follow a prescribed formula. Outlandish, exotic ideas seldom prevail, and both the ethics and economics of advocacy focus on winning. Of course, creativity—like subtlety—has an appropriate role to play in advocacy. But it is not a pervasive role in most cases. Indeed, it is quite limited.

And this is not all. The Creative Theories are an imperative of pedagogy. The common law does change. At some point, those bound for the law must be tuned in to the brooding nature of the law. The law at any given time contains the seeds of its own change. Law students must be taught to look for this. The only way to look for, discern, and “plug into” tendencies toward change is to exercise creativity followed by the right sort of Verstehen. Law professors see generation after generation of bright but, usually, quite-orthodox young people coming into law schools. These professors believe that these minds have not only to be shaped into legal molds but blasted into creativity. The latter is much more difficult than the former, and teaching the Creative Theories of stare decisis is one way to accomplish this pedagogical goal.

There is another reason why the Creative Theories are more popular among professors than they are among lawyers. The Creative Theories are naturals for intellectuals. Yet there is a deep divide between practitioners of the law and legal intellectuals, who tend to

296. See Southern Pac. Co. v. Jensen, 244 U.S. 205 (1916). In his dissenting opinion, Holmes remarked that “[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.” Id. at 222 (Holmes, J., dissenting). Holmes seems right in part and wrong in part when he here embraces Legal Positivism with a vengeance. He is no doubt correct that the common law is the product of some sovereign or quasi-sovereign. And he is also right that the sovereign can probably be identified. However, he is wrong when he says that the voice of that sovereign (or quasi-sovereign) is always articulate. Sometimes, the voice is anything but articulate. And sometimes the sovereign, speaking through courts, speaks with many voices. Indeed, sometimes there is a virtual cacophony. To the extent that decisions sensibly conflict with each other, it makes sense to say, metaphorically, that the common law broods. Of course, it does not do so in the sky, even metaphorically. Probably it does so in a cave, metaphorically speaking.
be law professors. Intellectuals tend to be individualistic (in a certain sense). They love to stand out as exponents of exotic ideas. Flashiness in argument is not a virtue, but flashes of genius are, as are meteoric displays of creativity. Intellectuals who take on a public role are outsiders; they are by temperament committed to disturbing the status quo. Intellectuals pride themselves on manifesting glistening brilliance, on taking unpredictable positions, on eschewing slogans, on anathematizing party lines, on devastating—if not humiliating—the opposition, and on scoffing at fixed dogmas. Few things lie closer to the soul of the intellectual than embarrassing orthodox dogma. Few things are more embarrassing to an intellectual than being co-opted by an orthodox institution. In general, public intellectuals regard their *raison d'être* as representing “all those people and issues that are routinely forgotten or swept under the rug.”

Much of the confrontational work of intellectuals depends upon adherence to universal principles: we should attend to the down-trodden because it is morally wrong not to. In our time, one of the universal principles many intellectuals embrace is a skeptical principle that little can be known, and less can be known with certainty. Obviously, this skeptical stance is a critique and an embarrassment to those attempting to vindicate the common law. However, because their discourse must pierce into everyday public conversation from the outside, the style of intellectuals tends to be confrontational. How else could intellectuals get people to pay attention to what they are saying? Public intellectuals—of which legal intellectuals are a species—are not performing a function when they are making “audiences feel good: the whole point is to be embarrassing, contrary, even unpleasant.”

Public intellectuals—and, therefore, legal intellectuals—assume a role that involves “both commitment and risk, boldness and vulnerability.” “They cannot be mistaken for any anonymous functionary or a careful bureaucrat,” or for a work-a-day lawyer.

297. EDWARD W. SAID, REPRESENTATIONS OF THE INTELLECTUAL 11 (1994). Much of what I am saying about intellectuals is supported by this source. Said follows Karl Mannheim in conceptualizing intellectuals. See KARL MANNHEIM, IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE (Louis Wirth & Edward Shils trans., Harcourt, Brace & Co. 1946) (1929). Both of them stand in stark opposition to Marx, who thought that intellectuals were always tools of the ruling class.

298. SAID, supra note 297, at 12.

299. Id. at 13.

300. Id.

301. Consider the following statements: The lawyer is in exile. He tends to be happy with the idea of unhappiness. Lawyers passionately embrace dissatisfaction and dyspepsia. Lawyers
Dazzling and meteoric brilliance is an important virtue for intellectuals. Brilliance is also important to the lawyer who engages in a good deal of legal argument, but it is of a much different kind. Indeed, it is a self-effacing brilliance. The point in too much legal argumentation is not to be novel or provocative. The objective of legal argument is to take novel ideas and make them appear commonsensical, simple (even obvious), mostly analogous to that which is settled, and requiring only a baby-step or two forward from what has already been established. Revolutionary argumentation has almost no place in legal argument. Revolutions do occur, maybe, once in a generation or so. Brown v. Board of Education was revolutionary, but that case hardly sets the standard or gives a model for legal argumentation. That noble case is politically a shining jewel, but from the point of view of legal argumentation, it is a sport case.

D. Improvisation

The narrower the scope of each binding precedent, the less decided is the law as a whole. The fewer binding precedents and the more judicial decisions are workable improvisations, the more they become juristic inventions designed to do justice and to move the naturally tend toward curmudgeonly disagreement so much so that it becomes an entire style of life. Do these sentences sound like sane lawyers anybody knows? Here is how Said describes the intellectual: “[T]he intellectual as exile tends to be happy with the idea of unhappiness, so that dissatisfaction bordering on dyspepsia, a kind of curmudgeonly disagreeableness, can become not only a style of thought, but also a new, if temporary, habitation. The intellectual as ranting Thersites perhaps.” Id. at 53. Said’s prototype for description is Jonathan Swift. It is hard to imagine him functioning as a lawyer. Interestingly, lawyers passionately embrace professionalism. According to Said, professionalism constitutes the great threat to the position of the intellectual. See id. at 73-74. Said demands that intellectuals eschew specialization, avoid “the cult of the certified expert,” id. at 77, and renounce both “power and authority,” id. at 80. Instead, intellectuals must embrace amateurism and the critique of power. These properties do not characterize the lawyer very well and certainly not the advocate who is clearly an agent for the client she represents. Most of the time, advocating lawyers embrace ingratiation and the Argument by Nudge. In general, lawyers know what intellectuals do not, to-wit: the medicine goes down easier with honey than with vinegar. (I am using the word “agent” loosely here. Recently, the Texas Supreme Court said that lawyers were not the legal agents of their clients, but were, instead, independent contractors. See State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625 (Tex. 1998).)

302. Many intellectuals, but few lawyers, would care to be described as someone who "radiated intellectual intensity." James Atlas, The Lose Canon, NEW YORKER, Mar. 29, 1999, at 60, 64. In this article, Judith Butler, Chancellor’s Professor in the Department of Rhetoric and Comparative Literature at the University of California-Berkley, is described as having an "electrifying lecture style," as someone who transfixes audiences with her charisma, and as someone who appears flamboyant in her lectures, but is not in real life. Lawyers would like to be clear, attended to, heard, and so on. Most lawyers also crave respectability. Lots of intellectuals at least say they do not want this, although they appear to want respect from one another—hence, the problems of political correctness and ideological purity in the academy.
culture from one temporal point to another. At this point, the Creative Theories stand in stark contrast to the Imperial Theory, which takes as an heuristic (if implicit) first principle that the common law is somehow complete. The structure of the law is so abstract that it must be understood by mere mortals in metaphoric and symbolic terms. Most people would like to understand the structure of the law in concrete terms (as in, "written in concrete") rather than in the wispy and ephemeral ideas of consent, interpretation, and improvisation. The latter make the capacity of the law to govern too miraculous. In short, the Creative Theories are too much like a miracle, and we all know that miracles are transitory, subjective, anything-but-concrete, and perhaps quite unreal. Nevertheless, according to the Creative Theories, there is nothing short of a secular miracle at the heart of social orders based upon the common law. That miracle is a peculiar admixture of quasi-consensus and creative change.

X. SOME PRELIMINARY EVALUATIONS

Each of the Theories of precedent sketched here has virtues and vices. The Imperial Theory accords well with the theoretical characterizations provided by some textbooks and by many judges for the contours and limits of stare decisis. On the other hand, the Imperial Theory presents an extremely strong account of what it takes to overcome a "very, very, very good reason" for deciding a new issue in an old way. The Imperial Theory tends to be rickety; it tends to be conservative; it can easily become reactionary. The Flexible Theory, in contrast, accords well with the pragmatic, incremental behavior of courts, and it provides a better account of the common law’s openness to change when it comes to picking and choosing precedent, but the Flexible Theory lacks intellectual integrity. For their part, the Creative Theories are exciting and attractive, but they constitute more of a temptation than a solution. Because the history of common law jurisprudence has concentrated mainly on the Imperial Theory and on the Flexible Theory, and because I have already said something about them, I will confine my remarks to the Creative Theories.

A. Some Positive Thoughts

Courts almost never say that they are embracing either of the Creative Theories. It would be inconsistent with the political imagery
surrounding judging to do that. Moreover, while the Flexible Theory, the Holdings Theory, and the Holdings-Plus Theory all purport to be universal insofar as their descriptions of what courts do, the Creative Theories do not purport to describe what courts always do, or even what they think they do. Indeed, courts frequently lay down broader rules than they need to, and then subsequent courts interpret those rules as binding precedent. In this way, over time, dicta can evolve into holdings. This means that what was obiter dicta in a first case might become judicial dicta in a second case and holdings in yet a third case.

Nevertheless, there is much to be said for the Creative Theories. Appellate courts perform best when they do not lay down broad, abstract rules, but when they focus on and respond to narrow problems thoughtfully, openly, flexibly, and creatively. Further, the idea that binding rules of law are always to be found by discovery or analyzed into existence is implausible. Complex texts are simply too indeterminate to bear univocal analysis. (Of course, this truth does not imply that any interpretation of any text is acceptable. Some interpretations are flatly wrong.) Finally, there are moral reasons—reasons of justice—for preferring narrow rules. To be sure, like cases should be treated alike, but cases which appear to be alike, at first blush, are frequently not alike, and historical changes, sociological transformations, and changes of context make two cases which were alike in a previous generation quite unlike in the present.

The Creative Theories draw support from other considerations as well. Narrowness in conceiving holdings is only one feature of the Creative Theories. Indeed, it is a subordinate feature. Precedent is kept narrow in order to encourage creativity and flexibility, according to the Creative Theories. Occasionally, creativity can become entirely disconnected from the text of a given opinion. In that case, it is difficult to guarantee that the holding will be narrow. We are all familiar with situations in which a general rule of law turn out, upon scrutiny, not to be found in the particular case with which it is associated. If nine lawyers out of ten say that Smith v. Jones stands for such-and-such a rule, then it does—at least under most circumstances—even if the text does not bear that reading, and even if the putative rule cannot be teased out of the language, facts, and context of the opinion. This means that what constitutes binding precedent is partly a social construction. If everyone, including high-court judges, accepts the idea that such-and-such a rule is binding precedent, then it is. Of course, this fact is inconsistent not only with
the Imperial Theory and the Flexible Theory, but also with one of the

The Imperial Theory and the Flexible Theory, but also with one of the
crucial elements of the Creative Theories, to wit: that binding
precedent is always the most narrow rule to be found in the case.

Then again, the Creative Theories have more than one important
element.

B. Some Negative Thoughts

In some ways, it is very difficult to distinguish between the
Flexible Theory and either of the Creative Theories. All three
Theories will be looking for what is important in a case. The Creative
Theories have a different way of going about finding what is
important, or creating importance, and they are more willing to
engage in conceptual leaps, but clearly all three Theories are related.

The Subjective Creative Theory comes at an enormous price.
Some components of that price are technical difficulties. It is one
thing to emphasize invention over discovery. It is a more problematic
thing to suggest that invention replaces justification. This is
particularly true in the law where one wants arguments to convey a
sense of inevitability. This sense of inevitability requires that an
argument for a narrow point must be shown to fit within a family of
arguments and to fit within the broader web of the common law.

There is a far-larger price for the Creative Theories, however,
and that is a social price. Many people in a democratic polis will find
the Theories repugnant. The people will believe that the Theories are
nothing more than rank subjectivity. They will believe that they
destroy the principled basis of law. And they will cry out against the
Theories. Such people will believe that judges who adopt the Creative
Theories are simply saying to the polis, "Trust me," and they will
believe that too much trust is unwise in any political order. Thus,
many will believe that the Creative Theories are elitist, relativistic,
subjective, and politically dangerous.303 If the use of the Creative

303. Indeed, the Subjective Creative Theory smacks of pernicious Post-Modernism. One
very seductive account of Post-Modernism is RICHARD RORTY, CONTINGENCY, IRONY, AND
SOLIDARITY (1989). For another, see ALBERT BORGMANN, CROSSING THE POSTMODERN
DIVIDE (1992). A specifically legal text on Post-Modernism and the law is COSTAS DOUZINAS
ET AL., POSTMODERN JURISPRUDENCE (1991). It is much less attractive than Rorty's; it is much
too ponderous to be seductive. Pierre Schlag, of course, is an exponent of Post-Modernism. See
also GARY MINDA, POSTMODERN LEGAL MOVEMENTS (1995); LAW AND THE POSTMODERN
MIND: ESSAYS ON PSYCHOANALYSIS AND JURISPRUDENCE (Peter Goodrich & David Gray
Carlson eds., 1998) (mostly about purported French thought, for example, Pierre Legendre).
For another elaboration of Post-Modernism, see the essays of MARY JOE FRUG, POSTMODERN
LEGAL FEMINISM (1992); for a somewhat more general treatment of Post-Modernism in the
context of social and political theory, there is AGNES HELLER & FERENC FEHÉR, THE
Theories were widely publicized, it might very well delegitimate the law. The laity and the bar should not—and probably cannot—be that separated.304

Notice that this last objection applies both to the Subjective Creative Theory and to the Objective Creative Theory, although for different reasons. On the Subjective variant, there is no rational or conceptual check on judicial decision-making, and the judge is simply saying, “Trust me.” On the Objective variant, there is a check, but it is essentially controversial and too difficult for many people to understand. Dworkin named the judge who invents new rules and finds them in historical cases “Hercules” for a reason: his labors are Herculean. There will be substantial disagreement about whether the job has been done right. It is not an easily-solvable disagreement, and it is not likely to go away when there are social and (broadly speaking) political reasons for the existence of the controversy. Without a publicly-professed ideology that judges are not creating but explicating the law, the public could easily see the members of a creative judiciary as usurpers.

Any theory of precedent that is facially subjective and relativistic is unacceptable. It is inconsistent with the Postulates of Adjudication, and it does not fit with the experience of the advocates and of the judges alike. However, as was just pointed out, in a democratic order, no theory of precedent should be too esoteric for the laity to grasp. Not only must the laity be able to understand it, it must seem plausible to the legal laity. These requirements create immediate problems for any theory of precedent. First, there is a strong streak of relativism in every culture. The public’s attraction to relativism is neither structured nor nuanced. On the other hand, at least in contemporary American culture, it is rather odd. The people seem to

POSTMODERN POLITICAL CONDITION (1988); and for a general treatise on Post-Modernism, one may consult DAVID HARVEY, THE CONDITION OF POSTMODERNITY (1989). Those who want a very simple introduction might try the snippets and cartoon approach to be found in JIM POWELL, POSTMODERNISM FOR BEGINNERS (1998) (illustrated by Joe Lee), a comic book. For a marvelously instructive and extraordinarily humorous, parodic put-down of all things Post-Modern, see Dennis W. Arrow, """"Article"""": Pomobabble: Postmodern Newspeak and Constitutional “Meaning” for the Uninitiated, 96 MICH. L. REV. 461 (1997) (with outrageous footnotes and one illustration: the reader has been warned). For another powerful, though less Puckish, critique, see ALAN SOKAL & JEAN BRICMONT, FASHIONABLE NONSENSE: POSTMODERN INTELLECTUALS’ ABUSE OF SCIENCE (1998).

304. Also, once the Creative Theories are recognized as Post-Modernism, they will become political anathema to many people. This is particularly true of religious people who regard Post-Modernism as necessarily atheistic. For a sophisticated discussion of the relationship between evangelical Christianity and Post-Modernism, see the special issue entitled Postmodernism, 12 MARS HILL REV. 9 (1998).
want to say that morals are relative, but law is not. Indeed, being subject to relativism is one of the ways that the laity distinguishes law from morality. Of course, as every lawyer knows, this idea is troublesome. Law, like any complex theory involving norms, has a hurdle to climb over. The laity may want the law conceived nonrelativistically, but once someone starts talking about legal theory, relativism returns to the popular consciousness with a vengeance. Perhaps this is a perfectly-general point about systems of norms. It is difficult to make any complex and complicated theory involving the articulation and application of norms plausible. The reason is that the laity has little patience with, and has even less time for, complications, complexities, and cross-currents. Practicalities tend to require that legal theories, such as the theory of precedent, be simple enough to be understood fairly quickly. Alas, no acceptable theory is of this sort. If the length of this paper proves nothing else, it proves that.

So we are stuck with a paradox. Any rational theory of precedent is complicated and requires patience. Any acceptable theory of precedent must be the sort of thing which can be made plausible to the laity. The laity will not—or will refuse to—grasp and embrace any theory which takes time and effort to learn. No theory of precedent, therefore, will be completely acceptable to the lay public. Consequently, no theory of stare decisis will ever have anything approaching complete legitimacy.

As if that news were not bad enough, there is more. The bar is fragmented and stratified in lots of ways. There are rich lawyers and poor lawyers. There are lawyers who represent people most of the time, and there are lawyers who represent companies most of the time. There are lawyers who do deals; there are lawyers who try lawsuits; and there are lawyers who (mostly) do appeals. There are also lawyers who are political, economic, or religious ideologues. Some of them can keep separate their profession and their extra-professional commitments; some cannot. In addition, there are many lawyers who are just barely competent; there are many, many lawyers who are work-a-day competent, but who have no real grasp of the nature of the law; and then there is the intellectually-elite bar. Sometimes, the intellectually-elite bar is the same as the social-status-elite bar (i.e., the country-club bar), and sometimes not. The problem is that the meta-principles of stare decisis and the theories of stare decisis are not well understood outside the intellectually-elite bar. This means that no rational theory of precedent will ever have complete legitimacy in the bar. This sad fact is exacerbated by the
enormous expansion of the size of the bar over the last several decades. One cannot count on tradition to teach through seepage in a rapidly-expanding social system. But most members of the public get their conception of the law, either directly or indirectly, from watching, listening to, or hearing about the activities of lawyers. Most lawyers do not have a firm grasp on the nature of precedent or on what would count as a rational theory of precedent; how can the public be expected to have one, and, from a political point of view, where will one come from?

Therefore, if the Creative Theories are really the best accounts of common law adjudication, that fact might have to be kept quiet. The courts certainly do not subscribe to it openly, and few judges sign on overtly.\textsuperscript{305} In other words, it might be best to publicize common law adjudication as according with one or another of the other Theories and suppress the fact that the Creative Theories are the best ones. Alas, this is Plato's "Noble Lie," and that idea is always a troubling idea in any democratic order. If the Creative Theories have to be concealed in order to be effective, if the Creative Theories presuppose that much elitism, then maybe they are not such good Theories after all.

On the other hand, I have a feeling that most elite lawyers already know that the Creative Theories are descriptively and prescriptively a powerful way to describe how appellate advocacy—and, therefore, common law adjudication—really works. If so, then we already have an elite that knows about the Creative Theories, uses them as concealed subtexts in argument, and discusses the matter freely, as it were, among itself, but does not discuss it with non-elites. Is this one reason that so many Americans distrust lawyers? Do not many judges violently reject the Creative Theories?

\textit{C. Implications for Advocacy}

What does all this have to do with advocacy? Surely, approaching the "analysis" of a case in the interpretive spirit—in the spirit of imagination and invention—is enormously liberating. It is amazing how often ostensibly-straightforward, but unhelpful, rules can be reformulated in interesting and helpful ways. Of course, counsel must conceal the creativity and formulate the creative gloss

\textsuperscript{305} Maybe Jerome Frank embraced the Subjective Creative Theory from time to time. See FRANK, supra note 222.
upon a case or group of cases in a way that effaces their very creativity. The whole point is to make the interpretation look inevitable, and the easiest way to do that is to make it look as obvious as possible.

Here are three rather important consequences of using the Creative Theories. First, one should not expect intermediate appellate courts explicitly to limit, create exceptions to, or overtly criticize propositions of law mandated by supreme-court decisions. Nevertheless, they may undermine them, distort them, overrule them silently, and so forth. The Creative Theories give lower courts the widest possible discretion in working with, and around, supreme-court authority. Hence, in arguing an innovative view to an intermediate court, it is best not to present precedent in terms of the Creative Theories, and one should always provide to the intermediate court avenues for appearing consistent with the announced rulings of the supreme court. Use cases supporting the Flexible Theory.

Secondly, we are all familiar with what is involved in distinguishing cases. If one keeps the Creative Theories in the back of one's mind, the vast majority of cases can be distinguished from other similar cases, at least to some degree. This makes the Creative Theories extremely valuable as mind-sets for approaching legal argument. Distinguishing one case from another is an ordinary-enough experience for the advocate. It involves showing that the holding of one case is not the holding of another, that what is judicial dictum in one case is obiter dictum in another, that an authoritative expression of the law in one case does not apply to the facts of another case, that a deliberate statement in one case would be inappropriate when applied to a second case, and so forth. Approaching the activity of distinguishing cases in an inventive spirit is no doubt extremely helpful. Discovering differences is terribly important. The Creative Theories release this kind of energy, when embraced, but they do not require it. Moreover, distinguishing cases is not something that is done simply in the context of discovery. Distinctions made amongst holdings must be vindicated, not just found or invented. The third way in which the Creative Theories are helpful

306. The stimulus that the Creative Theories have on the mind should not be underestimated. Ronald Dworkin, in effect, recommends that advocates find precedent by reading an opinion, or group of opinions, and then inventing the rule of law which places those opinions in their morally best light. See DWORKIN, supra note 260. Surely, this is a noble approach to constructing (i.e., inventing) precedent. Surely, the creative spirit can be found both
is in the presentation of the argument itself. When one is arguing for change, and even when one is arguing for the status quo in the face of immense pressure for change, argument must be given in a matrix that recognizes and encourages judicial creativity. Emphasis on the theme of narrowness of precedent in the Creative Theories is one way to achieve this end. That emphasis may be explicit, or it may be implicit. The emphasis is explicit when the advocate argues openly to the panel that a given precedent “must” or “should be” conceived in the narrowest-possible terms. It is argued implicitly when the holdings of cases are simply formulated as narrowly as possible, and all broader formulations are subject to critique. But what are the other themes in the Creative Theories? What about the twin themes of relativity and invention? Using the techniques mandated by the Creative Theories in actual argument has dimensions both of honesty and of disingenuity. Honesty arises because, in applying the Creative Theories, it is absolutely necessary to point out to appellate courts that an “analysis” of the holding of the case differs from the surface of the text and perhaps from received opinion. At the same time, a certain element of concealment arises because it would probably be impolite to espouse the Creative Theories expressly. Effective advocacy dictates that one should probably not explicitly adopt the view that the formulation of binding rules of law is a relative matter or, at least, a matter subject to substantial relativity. Judges abhor legal skepticism, at least in public.307

On the other hand, one form of disingenuousness should probably be resisted. Some appellate lawyers and many trial lawyers feel tempted to argue that their interpretations of the law are inevitable—dictated by text, analysis, or simple justice. Sometimes, no doubt, this view is true. Many times, it simply is not. It is disingenuous and ineffective to play the poseur and claim that it a view is inevitable when it clearly is not. Is it not more honorable and more effective to proceed in a more-subtle way and to argue that one’s position is the best—although not the only—reading of the opinion, or group of opinions, under discussion? This kind of humility in adjudicative

307. There are exceptions, of course. See JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1950); see also KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).
advocacy is uncommon, except among the best advocates. Its very rarity may call attention to itself, however, and this mode of presentation may—under at least some circumstances—be the most persuasive and be a good way to take legal argument seriously. This is a very, very subtle matter. One does not wish to appear uncertain, perplexed, overwhelmed, or in a quandary. Indeed, one wants one’s argument to have a tone of gentle inevitability. Expressions of certainty in excess of actual knowledge, however, are almost always shrill. Judges are quickly and profoundly turned off by the shrill.

CONCLUSION

There are important academic arguments surrounding the nature of legal reasoning. Many of these can be arranged around the question: Is legal reasoning, at its best, objective? Legal Realists, such as Jerome Frank, had their doubts. Every generation has its skeptics; some eras have more than others. Post-modernists are the current cultured despisers of objectivity everywhere, including the law. Another important academic question is whether legal reasoning is purely positivistic, in the broad sense spelled out by H.L.A. Hart and his followers, or whether it involves a moral component. Of course, if the foundation of legal reasoning involves a moral component, then new questions about objectivity arise. Recently, the idea of moral relativism has become popular once again among some philosophers, as well as among college students and social scientists. If one wishes to argue that law, conceived as fundamentally-moral, is also objective at its best, one then has to give accounts of (1) the nature of morality, and (2) the relationship between law and morality. Prima facie, one would expect that law could be both moral and objective only if there was One True Morality—only if, that is, relativism and subjectivism are both false. In contrast, Markovits believes that the law is objective, shot through with moral considerations, and yet fundamentally-relativized to the differing moral outlooks of different societies. How can this be?

These academic questions are all terribly important, although most practicing lawyers sneer at those who raise them. This attitude

310. See Markovits, supra note 21, at 53-78.
may be a function of tone and time. At the same time, there are a number of general questions about legal reasoning that concern practical lawyers. Indeed, they are the same questions that concern academics, just differently phrased. Practicing lawyers, like legal academics, are concerned about the role of morality in legal argument. Probably, most lawyers are more relativistic than jurisprudentially-sophisticated academics. Indeed, the specter of relativism is probably a reason many practical lawyers are skeptical about moral argument. They want to protect the law precisely from what they regard as pernicious and waffling subjectivism. It is precisely because lawyers want objectivity that they suspect the Doctrine of Natural Law. Lawyers know that litigated cases (such as allegations of fiduciary-duty breaches) have to be decided as objectively as possible within a relatively-short period of time. They also know that the natures of charity, kindness, trust, and respect (for example) have never been coherently explicated, that rules and principles employing these concepts are murky at best, and that attempts to use these moral ideas often lead to self-deception, which is in turn used to justify selfishness, cruelty, self-dealing, and treating people as means rather than ends. Morality seems mushy, ineffective, and unreal. Law seems structured, hard-bodied, and real. Many practicing lawyers try to use law—divorced from morality—to somehow make social life better. How is that for consistency?

The skepticism many practicing lawyers have toward integrating law and morality is short-sighted. It is not possible to give a positivistic account of the nature of adjudication once the concept of adjudication is linked to the ideal of the Rule of Law. When the Rule of Law is taken to be fundamental to any legal system worthy of the name, the law is, of necessity, linked to moral considerations. It is not possible to specify an account of the Rule of Law without a full-blooded commitment to some version of the Doctrine of Natural Law. It need not be a fully-Markovitsian version, wherein for every elaborated legal-rights claim there is a correct answer. If to every legal-rights claim, there are many wrong answers and only a few right ones, then my case is secure.

In Part II.C above, I sketch what I think is involved in the concept of the Rule of Law. The account includes “fundamental postulates” and “regulative ideals.” I do not seek to deduce them from other, even-more-fundamental, axioms. Nevertheless, I believe that if thoughtful lawyers are conversationally drawn out on the underpinnings of the Rule of Law, they will affirm that the postulates
I posit are all actually components of the Rule of Law. Articulate and insightful citizens will also agree, I bet.

Serious legal reasoning involves a commitment to serious reasoning, which—in turn—involves a twin commitment to reasoning seriously and to giving serious reasons. Indeed, cases should be decided upon the very best reasons realistically available, and they should be decided in ways that will make sense to the populace. Thus, cases must be decided on the basis of understandable principles that are linked to both simple and reasonable values and to the understood past. Continuity and rationality require that indistinguishable cases be decided in the same way. Serious legal reasoning must, therefore, include precedent, and a theory of taking legal reasoning seriously must encompass a theory of precedent.

At this point, things become interesting. The theory of precedent is often regarded as unitary. If I have proved anything in this paper, it is that there are different, non-equivalent, and potentially-conflicting principles of precedent. Judges, to the extent that they understand that there are different principles of precedent, conceal this fact by speaking as if there were only one doctrine of stare decisis. Such a concealment is a deception, when it is deliberate, and as such it is inconsistent with fundamental principles of democracy. At the same time, the suppression seems inevitable. Social life is always messy. The use of unified, stable, bright-line principles and rules in complex situations over time is unlikely. The use of a family of principles is much more likely. Most of the time, the selection of the specific doctrine of stare decisis will not matter much. Most legal questions—especially those facing lower courts—are pretty simple. Occasionally, it will matter, however.

What is tolerable to legal elites would be threatening to others. Consequently, courts do not refer to different approaches to binding precedent. Nevertheless, because there are different theories of precedent, and because there is a fair amount of intellectual fog covering the terrain where precedent, reasoning, and dicta coexist uneasily, there is a danger not only of intellectual chicanery, but also of serious, well-intended lapses in reasoning. If reasoning is devoted to clarity, validity, truth, and soundness, then intellectual fog is always the enemy. Paradoxically, however, some fog is necessary from a social and political point of view. Thus, the requirements of stability in the democratic order place some limitations on how crystalline legal reasoning can be and, hence, how seriously it can be taken by the rational mind.
To the extent one is persuaded by any of this, one should be uncomfortable. One source of discomfort is the democratic theory itself. On virtually any account of democracy, openness of governmental processes and decision-making is important. Fog enshrouds and, therefore, eliminates openness. Another source of discomfort is to be found in Markovits's conception of moral integrity. According to him, the person of moral integrity takes his life seriously from a moral point of view. In doing so, he articulates his moral obligations, considers them carefully, gives them appropriate weight, and then, in all the areas which are not controlled by these obligations, decides upon long-range courses of action in the light of his personal-value convictions, having subjected them to rational critique. Now, consider the lawyer who strives for moral integrity. Any such person is committed to taking legal argument seriously. He is, therefore, committed to clarity, truth, argumentative validity, and morally-acceptable rhetoric. This person is, therefore, committed to driving out fog. But the legal system appears ineluctably committed to embracing patches of fog. This paper has explored one such patch, and it does—indeed—seem to be present, tolerated, necessary, and perhaps even cherished. Whither integrity?

312. See SUNSTEIN, supra note 46, at 151-52.