

3-1-2003

What is the "R" in "IRAC"?

Michael B.W. Sinclair

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters

Recommended Citation

46 N.Y.L. Sch. L. Rev. 3-4

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

WHAT IS THE “R” IN “IRAC”?

MICHAEL B. W. SINCLAIR*

What does the “R” in “IRAC” stand for? One student suggested “ridiculous.”¹ But we know better than that: it is for “Rule.” “IRAC” is an acronym for a popular procedure for briefing cases or “synthesizing” sets of cases: “I-R-A-C” for “Issue” (the problem), “Rule” (the rule of the case, or the rule you synthesize from the precedent cases), “Application”² (how your case comes under that rule), and “Conclusion” (not, one hopes, “client goes to jail.”) The “I”, “A”, and “C” are pretty innocuous. This essay is about the “R.” Are the proponents of IRAC serious about there being rules in cases? If so, what sort of rules could they be? I shall argue that this key aspect of IRAC is not merely wrong: it is seriously misguided.³

The conception of judge-made rules that is the most prevalent and the most objectionable is a quite simple one. Judicial decisions (cases) stand for rules; there are rules in opinions, of much the same kind as we find in statute books. One eminent jurist, Ronald Dworkin, called it the “enactment theory.”⁴ It is this sense that Judge

* Professor, New York Law School. I abandon my copyright in this essay: copy it if you please, in whole or in part, with or without attribution. But note that the editors of this journal claim copyright in the issue in which this article appears. I thank Dean Yeotis and Professors Daniel O. Conkle and Randolph N. Jonakait for helpful criticism of earlier drafts.

1. She also suggested that rather than “Iraq” we say “Irate.” Obviously enough, she must remain anonymous.

2. Sometimes “Analysis,” or possibly “Argument.”

3. The difference of opinion is a live one. Three sources exemplifying the range of positions are: NEIL MACCORMICK, *Universalisation and Induction in Law*, LEGAL REASONING AND LEGAL THEORY (1978) (says there are rules underlying judicial decisions and discoverable therein); Robert S. Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common Law Justification*, 63 CORNELL L. REV. 707 (1978) (says there are not judge-made rules; the judicial decision is particular as to facts only); Steven J. Burton, *Professor MacCormick’s Claim Regarding Universalization in Law*, INTRODUCTION TO LEGAL REASONING (1985) (says judge-made rules are not universal but are limited generalizations acceptable to the legal community).

4. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 111 (1977). “Enactment theory” is an accurate enough expression, but a bit too derogatory for my purposes: One wants to show the error of IRAC without negative name-calling. An English eminent, recently transposed to the United States, wrote, “This may be called the ‘School-rules concept’ of law, and it more or less assimilates all law to statute law.” A.W.B. (Brian) Simpson,

Easterbrook used when he wrote, "Judges both resolve disputes and create rules."⁵

How does this "enactment theory" of common law decision-making account for *stare decisis*, the power of precedent? Dworkin again:

Judges, when they decide particular cases at common law, lay down general rules that are intended to benefit the community in some way. Other judges, deciding later cases, must therefore enforce these rules so that the benefit may be achieved. If this account were a sufficient justification of the practices of precedent, then [a judge] could decide these hard common law cases as if earlier decision were statutes⁶

The use of precedents is thought of as akin to the use of a code: "A legal rule established by the ratio of a case forms a precedent for application in future cases."⁷

It is rules thus conceived that the "**R**" stands for in IRAC. This enactment theory, the foundational presupposition of IRAC, is the null hypothesis of this essay.

What are the criteria by which one might test this enactment theory? First there are some limitations on what might properly be called a "rule." One does not want to turn this into a mere verbal question, but on the other hand it is pointless to say the hypothesis works by definition, *i.e.*, whatever is required for the "**R**" in IRAC we will call a rule. In section two, I make a preliminary sketch of the meaning of "rule" as we use it in expressions like "the rule of law." That we are talking about law, that aspect of society that we call "the legal system," puts some functional constraints on what we can count as a rule. A key aspect is the doctrine of *stare decisis*: "the method of precedents, . . . the characteristic and all-pervading method of the common law, for better or worse."⁸ But it is another thing about which one ought not

The Common Law and Legal Theory, OXFORD ESSAYS IN JURISPRUDENCE 77, 82 (2d ed. 1973).

5. Frank Easterbrook, *The Supreme Court 1983 Term, Forward: The Courts and the Economic System*, 98 HARV. L. REV. 4, 5 (1984).

6. See DWORKIN, *supra* note 4, at 110.

7. COLIN MANCHESTER ET AL., *EXPLORING THE LAW: THE DYNAMICS OF PRECEDENT AND STATUTORY INTERPRETATION* 3, 4 (2d ed. 2000). See also Simpson, *supra* note 4, at 79-82.

8. The Right Hon. Lord Wright, *Precedents*, 8 CAMBRIDGE L.J. 118, 118 (1943), reprinted in 4 U. TORONTO L.J. at 247 (1942); see also EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING*, 2 (1949); see generally SALMOND ON JURISPRUDENCE 162 (12th ed. 1966).

be overly dogmatic or precious; it must be accounted for, but the account should not depend on a precise stipulation of the doctrine. Quite generally, "[T]he common law doctrine of *stare decisis* gives a decided case authoritative force with respect to future decisions in other cases, whether or not the case is later thought to have been decided correctly in the light of principle."⁹

In section three, the central section of the paper, I provide some arguments rejecting the null hypothesis as failing to account for *stare decisis* and other basic rule-of-law requirements. Section four deals with counter arguments: there are occasions in which we all talk of rules in cases –“the *Rule of Foalkes 'n' Beer*” for example - and there are ways in which judicial decisions show a rule-like quality; completely to knock out the “rule-of-the-case” hypothesis I have to account for these. In section five I explain why IRAC and its *Rule* have proven so popular. Finally, there is a conclusion, wrapping up the argument.

II. WHAT IS A RULE?

I do not propose to define rules. We do not define things, even intangible social things like rules. We define only words, or a little more generally, signs in systems of signs. Rephrasing the question as “What is the meaning of ‘rule’?” does not help. Like everyone else, I do not have the power to define words. Perhaps I do have that power for the purpose of this paper, but were I to do so you should put your hand over your intellectual pocket; you could be pretty sure I was about to try to pick it.¹⁰ Still, if we are to get very far and avoid merely verbal disputes, we need some constraints on the use of “rule.”

In law, our paradigmatic rules are statutes. A statute, in Ronald Dworkin’s apt turn of phrase, is a string of words with the appropriate pedigree.¹¹ The pedigree rules are those governing enactment, ratifi-

9. Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 24 (1983); see DWORKIN, *supra* note 4, at 113 (“A precedent is the report of an earlier political decision; the very fact of that decision provides some reason for deciding other cases in a similar way in the future.”).

10. It is a commonplace rhetorical scam: The speaker carefully defines a key term; the audience quickly forgets that careful definition and is drawn to an unexpected conclusion; if challenged as to the generality of that conclusion, the speaker can revert to the stipulated definition. For example, check John Locke’s definition of “property” in the second *Treatise on Government*. See, e.g., JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* 87 (1690). His argument goes through with his definition of “property” as “life, liberty, and estates,” but it also gives the franchise to everyone, even women. He wanted to and rhetorically succeeded in justifying the franchise for only those with property as everyone commonly understood it at that time: estates.

11. See DWORKIN, *supra* note 4, at 17.

cation, and promulgation.¹² The pedigree rules distinguish statutes from other social rules.

Functionally, statutes convey control data from the government to the governed. Any rule of law, such as the hypostasized case rules of IRAC, must serve this function. This distinguishes rules of law from the rules of natural science: Rules of nature apply whether or not their subjects know of them.¹³

Conveying control data means rules tell us what we may and may not do, how to do certain things, and what might be the consequences of failure to comply. They may do more than that too; think of statutes that define words for use in other statutes, or of statutes conferring honors. But the central function of legal rules is *prescriptive*, not *descriptive*.¹⁴ I may say, truly, "As a rule I wake up at five thirty," but that is merely a descriptive generality, not the sort of thing that could be enacted into a statute. Compare, "Everybody must wake up at five thirty," which might be daft but could be a statute.¹⁵

The prescriptive content of a rule must be backed by some kind of authority. This was a central thesis of the pedantic and boring, but nevertheless foundational jurisprudence of John Austin.¹⁶ Legal rules have the backing of society; that's one of the things we (as society) do through courts and administrations and armed might: we back up the legal rules. A rule is hardly prescriptive if it lacks authoritative backing; imagine planning a transaction in reliance on a formula with no au-

12. See, e.g., Abbot Low Moffat, *The Legislation Process*, 24 CORNELL L.Q. 223, 223 (1939); WILLIAM J. KEEFE & MORRIS S. OGUL, *THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES* 46 (1985); see also any of the numerous textbooks on legislation presently in print.

13. See MICHAEL SINCLAIR, *GUIDE TO STATUTORY INTERPRETATION* Chs. 1 & 2 (2000).

14. This is truly old hat. See, e.g., ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Question 90, Art. 1 (1273).

15. It would be puffed up in legal fashion, something like this:

- (a) [Definitions of 'person', 'wake up', terms of time, etc.] . . .
- (b) [Disclaimer about gender in using masculine pronouns]. . .
- (c) If a person is found guilty of failing to wake up at five thirty on any morning he shall be subject to a fine of not more than . . . , imprisonment for not less than nor more than . . . , or both.
- (d) [Exceptions for narcoleptics, the comatose, night watchmen, billionaire campaign contributors, etc.] . . .

16. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832) (he argued that laws were orders backed by threats; there may be lots in that formulation to disagree with, but its kernel of truth has survived).

thority. That being the case, something or someone with power must invest a string of words with that authority for it to be a legal rule.

A rule of law has preemptive power: one is justified in following a rule because it is a rule, without investigating the reasons for it or the rationality of its application.¹⁷ An enacted rule of law is not just a ground for action in addition to other justifying reasons, it supplants those reasons. This is characteristic of rules generally, not just of rules of law. For example most of us remember that $dax^n/dx = nax^{n-1}$; but few would ever want to work through the reasons for it — we would rather rely on it as a rule. So too with most statutes. But notice that legitimate political authorities can go wrong in their use of justifying reasons in a way that the mathematician in the above example cannot. If the legislature or other authority misses some relevant reasons, or if the relevant reasons have changed in the extra-legal world so that the rule is not in fact justified, the rule still stands.¹⁸ In such a case, a subsequent decision-maker could not be faulted for following the rule; that it is a rule provides a complete justification and excuse. This flows from legal rules' having authority, the weight of society, behind them. Think of a statute: whether or not it accords with ordinary human decencies, and especially when it does not, it operates as an insulation from legal blame.

Must a rule of law be a string of words? If it were not, then how could it function to convey control data to the governed? What would it be like to say: "There is a rule governing . . . , but it is impossible to express in words."? Or, "There is a general rule governing . . . , but nobody can *tell* you what it is."? Words are our most common means of expression, perhaps not necessary but certainly convenient. So a rule of law is expressed in words, hopefully complying with the grammatical requirements for a sentence in the language.

Must a rule have a single formulation? A rule that lacked a form, stable over time and persons governed, could hardly communicate control data. Just imagine planning a business transaction or settling a

17. I got this idea from the work of Joseph Raz. See, e.g., *Joseph Raz, Ethics in the Public Domain: Essays in the Morality of Law and Politics* 196-99 (1994). Raz's analysis is, as you'd expect, much richer and more subtle than the little I have extracted. But note that his warning: "No blind obedience to authority is here implied," *id.* at 199.

18. Of course an authority *should* make rules only based on good and sufficient reasons; so a rule *should* be such that the subjects would obey it anyway even if not enacted simply because of those good and sufficient reasons. But this is not *necessary* to the exercise of rule-making power, such as that of a legislature (with administrative approval.) See SINCLAIR, *supra* note 14, at 10.

dispute pursuant to a variable verbal formula: variable according to what? at whose whim? at what time? at what place? Who would risk their wealth or livelihood on that? I wouldn't for a kick off. The same sort of argument suggests that a rule must be quite stable in content. So a rule must have a stable verbal formulation, reliable, not at issue between parties to a transaction or dispute. That's a bit too strong; it looks like it eliminates the "*R*" in "IRAC" by stipulation. So backing off somewhat one might say that a rule should be reasonably stable in verbal expression even though there may not be a canonical form such as statutes must have.

One might draw a useful contrast with a domestic rule, such as a parent's authoritative requirement that a child do her homework, backed by the threat of deprivation of television or a good whipping with barbed wire. That is too particular to be a rule of law: rules of law have some generality. That means their verbal formulation must include in the specification of to whom they are to apply at least one common noun phrase. They must be general as to action too, not, for example, "At 2:00 p.m., Eastern Standard Time, on January 6, 2003, no person may ride Trek 1200 bicycle #C96-2/59231." That is simply too particular as to action to count as a rule. So rules, including rules of law, are general.¹⁹ This immediately excludes some of the constraining edicts courts regularly issue from the class of rules. For example, the outcome of a civil action may be that the defendant pay the plaintiff a specified sum of money; this is not a rule, as it is specific as to both whom it applies to and what is required of them.²⁰

We've already contrasted "rule of law" with "rule of science" and "social generality". We might also contrast it with "social norm" such as for example –H.L.A. Hart's example²¹ – that men take their hats off in church. That norm might well be backed by society, as for example when one is hissed at or preached at for failure to comply; but it is not a rule of law. And we might contrast rules with wishes, exhortations,

19. "The word 'law,' however, necessarily implies generality and uniformity, which can operate only in practice by some method and mechanism." Wright, *supra* note 8, at 118. Austin drew the distinction between commands and rules — a command is to a specific person or group of persons requiring the performance or restraint from performing some specific act or acts. A command is not a rule: it is isolated in time, place, and scope.

20. In Austin's terms it would be a command.

21. H.L.A. Hart, *THE CONCEPT OF LAW* 54 (1961) ("[I]t is the rule with them that the male head is to be bared on entering a church" is the first, but he makes frequent use of the example.).

complaints, promises – one might generate some interest there, especially in contract law – vituperations But I think we’ve got enough here to have corralled the term “rule” in the kind of way we use it in law, at least well enough to have a sensible disagreement about its use in “IRAC” with respect to cases.

III. WHY CASES DO NOT MAKE RULES

A. *Power: The Authority Behind a Rule*

To be a rule, a string of words must have some sort of authority behind it. Whence cometh a judge’s power to back a string of words with authority? To make, that is, a rule? Certainly courts can make rules governing their own procedures, but we are talking here of rules governing societal interaction outside the court room. Even where a court in an opinion announces that it is “adopting a rule,” where would it get the power to make that a rule of law? Look, for example at the federal constitution. Article III sets up the courts. It gives the judicial power of the United States to “one supreme court,” and authorizes Congress to give judicial power to “such inferior courts as [it] may, from time to time, ordain and establish.”²² But nowhere does the constitution directly or through Congress give courts the power to make rules. Contrast Article I, where it does give that power to the Congress.

Suppose there were rules in cases, as IRAC says. Then a court – presumably a supreme court in most cases – would have the power to establish as law formulaic generalities with scope beyond the facts of the case before it. Rules announced in this way would be – just like statutes — sufficient reasons in and of themselves for subsequent decision-makers’ actions; not only would they preempt the need to resort to any other reasons, not to follow them would be contrary to law. So a subsequent court would in some case have to make a less than optimal, less than just decision on facts coming within the scope of that rule,²³ a decision it would not otherwise have made.²⁴ Authority in a rule means one must follow it even if one would rather not.²⁵

22. U.S.CONST. art III, § 1.

23. But not identical to the precedent case; that only occurs in *res judicata*.

24. Otherwise the subsequent court could simply decide on grounds of justice, then say: “Oh yes, and this comes within the rule laid down in”

25. The power of vertical *stare decisis* can make it appear otherwise. *See infra* notes 108-111.

This is not the case in common law decision-making. If the reasons that proved sufficient to decide the precedent case no longer obtain, then the new reasons should provide sufficient ground to distinguish the present facts from those of the precedent, or for overruling. Justice Kennedy: “We have overruled our precedents when the intervening development of the law has ‘removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies.’”²⁶ If the reasons remain relevant, the precedent governs: that is the power of *stare decisis*; the present judge may not decide differently simply because she assesses values differently. But this is distinguishing facts under evaluative criteria, not deciding whether a rule applies. Values, reasons, technologies – as Holmes said, “[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy . . .”²⁷ – are the key determinates, not judge-made rules, and all these are, for the most part, determined exogenously to the law.

Thus, I think, the common law judge does not make a rule that preempts the reasons for her decision for anybody but the parties before her. All other parties, advisors, advocates and judges must base their positions on reasons, which remain as good and as bad as ever, but mostly beyond the power of courts.

Would we want judges to have the power to make rules? Some people would. Some people even treat the Restatements as though they were statutes, parsing them as if they had been enacted into law. The Restatements may be a very useful secondary source, but they are still only the formulaic wishes of an exclusive and self-appointed club of rich, old, white men. In our constitutional democracy we do not

26. *Neal v. United States*, 516 U.S. 284, 295 (1996).

27. O. W. HOLMES, JR., *THE COMMON LAW* 1 (1881). Judge Richard Posner of the 7th Circuit recently wrote to similar effect:

[A]t the higher levels of the judiciary, where the conventional materials of decision cannot resolve a case and the judge must fall back on his values, his intuitions, and, on occasion, his ideology, public-intellectual work may have an effect on the judicial process. How large an effect one cannot say. But what is clear is that the work of public intellectuals is only one of the non-legal influences on judges, others being temperament, life experiences, moral principles, party politics, religious belief or non-belief, and academic ideas.

RICHARD A. POSNER, *PUBLIC INTELLECTUALS: A STUDY OF DECLINE* 364 (2001).

give such groups the power to make law.²⁸ Nor, I think, would most people want it.

Yet the American Law Institute is better set up to make rules than is the judiciary. It can collect information in much the same way as a legislative committee, it can muster considerable expertise, and it can test its drafts on relevant segments of the bar. Even so, I'd prefer the judiciary to the American Law Institute as a law making body;²⁹ at least a judge's appointment is part of the democratic governmental process. But the bench would have to be differently structured and have the additional powers essential to rule making. For example, what if the case before the court was the one that should (under a sensible rule making regime) have the second best decision, the later one the more typical and thus the one needing the more just decision? The accident of time, and the extreme informational constraints imposed by the rules of evidence preclude justice for the later, and so also for all the more typical cases. Were the enactment theory of IRAC correct, temporal happenstance would control society's future. So we would need to re-constitute the judiciary as a legislative panel with the power to call on expertise and gather information ranging over wider social circumstances than involved in the case.

We put great faith in judicial decisions, whether by a judge with expertise in the subject area or not, because judges decide under great social and moral pressure, under "decisional fire":³⁰ before them are the parties whose wealth, freedom, and sometimes (I'm sorry to say) lives are at stake. We follow the wisdom that flows from a court decision ahead of expert commentators who put in a life-time's professional study of the area. Deciding with immediate consequences to fellow humans is importantly different from deciding hypotheticals. But that critical quality of decisional fire does not stretch beyond the actual decision; it does not reach the other, future, and hypothetical cases that would come under a rule. So we do not have the same reasons for putting our trust in anything a court may say beyond the decision itself. That's why we have the relegatory category *obiter dictum*: it is that part of an opinion not necessary to making the connection be-

28. Even England is at last giving up most of its hereditary upper house; in the United States we never had one, and we don't have a self-made one either.

29. Either of them would be preferable to the most common law school source of "the rule of the case", viz, guide books like Gilbert's, Sum & Substance, the Black Letter Series, etc.

30. This apt expression is not original; but I cannot find from whom I learned it.

tween the facts and the outcome. It is *not* the part of an opinion that doesn't come under some rule.

We might sweep up some remaining arguments by further contrasting common law with statutory law. Legislatures decide future and hypothetical disputes; and they collect information, including expert speculations, to help them formulate general solutions to societal problems. Legislatures do not decide particular disputes; they enact strings of words as rules.³¹ That is all; a legislature speaks by enacting statutes.³² But a legislature may choose whether or not to act. Contrast a court. A common law judge can decide only the controversy before her, but once it is before her she must decide it. She may not decide other contemporaneous, future or hypothetical issues; any attempt in an opinion to do so is downgraded as dicta, at most advisory, easily dismissed. Under the rules of evidence, a judge is not provided factual information about any other, potential disputes; she decides particular disputes between particular parties, arising out of events from the past. She may decide according to law, but except for the decision as to how the law applies to the particular dispute, the judge has no power to decide further, and certainly not to make a rule for resolving disputes yet to occur.

B. Notice, and Arguments Following from its Necessity

A person cannot be bound by a law of which he or she has no notice.³³ How could a person follow a rule if she didn't know it? As Jeremy Bentham said: "That a law may be obeyed, it is necessary that it should be known."³⁴ Well, couldn't one find out if there was a rule covering what she wanted to do? That is what is said of statutory law:

31. As Chief Justice Marshall wrote, it is "the peculiar province of the legislature to prescribe general rules for the government of society." *Fletcher v. Peck*, 10 U.S. 87, 136 (1810); accord *United States v. Brown*, 381 U.S. 437, 446 (1965).

32. Max Radin, *A Case Study in Statutory Interpretation: Western Union Co. v. Lenroot*, 33 CAL. L. REV. 218, 223 (1945) ("[T]he constitutional power granted to Congress to legislate is granted only if it is exercised in the form of voting on specific statutes.").

33. See ST. THOMAS AQUINAS, *TREATISE ON LAW SUMMA THEOLOGICA*, Question 90, arts. 1 & 3 (1273); JOHN LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT* 33 (1690); 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 45-46 (1938); JEREMY BENTHAM, *Essay on the Promulgation of Laws and the Reasons Thereof; With Specimen of a Penal Code*, in *THE WORKS OF JEREMY BENTHAM* 155, 157 (1859); LON L. FULLER, *THE MORALITY OF LAW*, 34-35, 39 (1964); *Lambert v. California*, 355 U.S. 225 (1957); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

34. BENTHAM, *supra* note 33, at 157; AQUINAS, *supra* note 33, at Question 90, art. 4; LOCKE, *supra* note 33, § 57, at 33.

you are subject to it because you could look it up. It is also behind the requirement that to be valid as law a statute must be promulgated; Bentham continued, "that it may be known, it is necessary that it be promulgated."³⁵

Suppose that IRAC were an accurate theory of common law: how would one take notice of those rules? Certainly not by looking up cases. Very few people have any idea how to do that.³⁶ Among those that do, put them on opposite sides of a dispute and they will come up with different rules from different cases, and different interpretations of the cases they find in common. This counts as notice? *Prospective* notice, available to a person before she takes action? Hardly.

When a judge decides a case, the events giving rise to it have already happened. But what of landmark cases, the big ones that change the course of common law? The parties to such a case could not, *ex hypothesi*, have had notice of the decision. This prompted Bentham's scathing comparison of common law with dog training:

Do you know how they make [common law]? Just as a man makes laws for his dog. When your dog anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me.³⁷

Were cases to set rules, he would have a point. The rule of the case could not have been known to the parties to it because it had not been decided; in a major case going right through the court system it would not be decided until three to six years after the event, or even later. A new decision would enact a rule retroactively.³⁸

35. BENTHAM, *supra* note 33, at 157; *see also*, LOCKE, *supra* note 33, § 57, at 33 ("[N]obody can be under a law, which is not promulgated to him.").

36. There are still fewer than half a million lawyers in this country, out of over two hundred and fifty million people.

37. JEREMY BENTHAM, *Truth Versus Ashhurst; or, Law as it is, Contrasted With What it is Said to be*, THE WORKS OF JEREMY BENTHAM 231, 235 (1792).

38. *See* Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CAL. L. REV. 369 (1984).

Retroactive laws have long been thought an abomination;³⁹ the Constitution prohibits them at both the federal and state level.⁴⁰ If the enactment theory were correct, common law would indeed have a problem. One takes notice of common law requirements from prevailing standards of decent behavior, not from anything peculiar to law. That is one of the reasons that the reasons for a decision refer to society, its qualities, conditions, and requirements. We cannot and do not expect better behavior than social conditions justify.

In section two, I distinguished between the mathematical rule for simple differentiation and rules of law. Here is another useful distinction: The mathematical rule is much more accessible than the reasons justifying it. The judicial decision is much less accessible to most people than are the reasons for it. Those reasons abound in our social organization and morality. Judicial decisions are wretchedly difficult to find even for lawyers. If a person is to be governed by a law, she needs to be able to find out what it is; if she can't find the case, how then is she to find the rule in it by which she is governed? Contrast the ease with which she can find the reasons.

Suppose again that there were rules in cases; suppose "judge made law" were just like legislated law, authoritative rules. They would govern an awful lot of social interaction: everything our legislatures have not seen fit to cover with statutes. (Actually, that gets less by the year, doesn't it?) Surely, as decent citizens wishing to be law abiding we should find out about those rules before taking action. Hardly anybody *knows* much law. Even the better informed lawyers know only a small part of it, the part of their area of expertise or whatever the litigation of the moment is about; what we know is how to find it out. But in an IRAC governed world, everyone would need to find out the rules. Some of those rules were laid down a good time ago, since when much has changed; so relying merely on good behavior would be unwise. Think of how much time would have to be spent "looking it up" or sitting in classes being told. Simply put: we haven't the time. There

39. Demosthenes called a retroactive statute "the most disgraceful and scandalous ever enacted in your assembly." Demosthenes' *Speech against Timokrates*, XXIV DEMOSTHENES 371, 388 (353 B.C.) (J.H. Vince, trans. 1935).

40. U. S. CONST., art. I, §§ 9, 10. However this was interpretively restricted to criminal statutes only in 1798; *Calder v. Bull*, 3 U.S. 386 (1798). See Laura Ricciardi & Michael Sinclair, *Retroactive Civil Legislation*, 27 U. TOL. L. REV. 301, 302-28 (1996); DANIEL E. TROY, *RETROACTIVE LEGISLATION* (1998).

are better things to do.⁴¹ That's one reason why, if IRAC were correct, we would want to give it up pretty damned quick.⁴²

C. How Can You Pick the Rule?

The governed need to know, or to be able to find out by what they are governed. As we have seen, notice of the law is essential to its justice as well as efficacy. This means that how we pick the rule of a case is critically important to the enactment theory of IRAC. As an introductory text puts it, "Since legal rules are established by judges when deciding cases, it is important to become familiar with how these rules are formulated."⁴³

The key is the *ratio decidendi* connecting the facts with the outcome.⁴⁴ In appellate courts, providing the reasoning that generates the outcome is a primary judicial function. This is why we publish significant opinions. Thus if the judge "lays down a rule" in a case, the *ratio decidendum* is where you'll find it. That is certainly what the true believers say about hunting out the "**R**" for an IRAC model of a case.⁴⁵ The reasoning sets the rule for future cases.

Just how does one find what it is in the reasoning that sets the rule? Even the true believers disclaim a determinate method. For starters, it is often difficult to determine what is the reasoning, what is essential to the decision, and what is not. "Although the most important part of a case is the *ratio*, there is no agreed way of discovering the

41. Could we, in the prevailing custom, substitute money for time? Hire expert advice? We don't even have the time to consult experts (lawyers) before taking action, let alone devoting such a large portion of the economy to a non-material function.

42. This is a ground for distinguishing the kind of behavior suited to legislative control from the kind suited to common law. See MICHAEL SINCLAIR, GUIDE TO STATUTORY INTERPRETATION 8-9 (2000).

43. COLIN MANCHESTER ET AL., EXPLORING THE LAW: THE DYNAMICS OF PRECEDENT AND STATUTORY INTERPRETATION 3 (2d ed. 2000) (Note that this is an English text; it is notable for its clarity and forthrightness about the subject under examination).

44. A quotable English text identifies *ratio decidendi* and rule: "There have been many definitions of the *ratio decidendi*. My own is –a proposition of law which decides the case, in the light or in the context of the material facts. If there appear to be more than one proposition of law that decide the case, it has more than one ratio and both are binding Any statement of law, however carefully considered, which was not the basis of the decision is obiter." MICHAEL ZANDER, THE LAW MAKING PROCESS 263 (5th ed. 1999).

45. "What is important is what is known as the *ratio decidendi* A legal rule established by the *ratio* of a case forms a precedent for application in future cases." MANCHESTER, *supra* note 43.

ratio and no simple mechanical procedure for doing so.”⁴⁶ Suppose we overcome this difficulty; we agree as to what is reasoning and what *dicta*. How do we pick what it is in that reasoning that is the rule of the case?

If we’re lucky there will be suitably rule-like abstraction in the opinion, nicely expressed in a sentence or two. But if it suits your position and not mine, I won’t concede it’s the rule; as we’ve seen, judges do not have the power to give authority to a verbal formula as law. But if not the judge, the author of the opinion, then who? Surely an abstraction formulated by you or me will be no better. As Simpson writes, “. . . it is a feature of the common law system that there is no way of settling the correct text or formulation of the rules, so that it is as a single rule in what Pollock called ‘any authentic form of words.’”⁴⁷ There are indefinitely many ways that a rule may be formulated to fit an opinion, and none is more authoritative than another. As lawyers and students of law we are entitled – *empowered* — to dispute any claim to authority in a particular formulation. But how is the poor denizen, untrained in law, to find a reliable rule?⁴⁸

We are familiar enough with the difficulties legislatures have in formulating strings of words covering all and only the behavior they wish to govern and in the way the wish to govern it. Those words are to be struggled with, fought over, and only enacted when settled to a majority’s satisfaction. If the rules coming out of cases are to have the same power of governance, that is, to be rules of law, their formulation and its determinacy should be similarly vital. Ninth Circuit Judge Alex Kozinski writes, “[a]s lawyers well know, even small differences in language can have significantly different implications when read in light of future fact patterns, so differences in phrasing that seem trivial when written can later take on a substantive significance.”⁴⁹ But a reli-

46. *Id.*

47. A.W.B. Simpson, *supra* note 4, at 89.

48. Even given the implausible supposition that she can find the case.

49. *Hart v. Massanari*, 266 F.3d 1155, 1179 (9th Cir. 2001). To be fair, in this opinion Judge Kozinski is unabashedly adopting the enactment theory. In this section he is arguing against permitting reliance on unpublished opinions because they are not written with the care necessary to a potential precedent. Requiring all opinions to be published would have an additional downside effect explained immediately before the passage quoted in the text: “[P]ublishing redundant opinions will multiply significantly the number of inadvertent and unnecessary conflicts, because different opinion writers may use slightly different language to express the same idea.” *Id.* at 1179. Here he wishes to give enhanced rule-making power to the first opinion in the field. *Cf. infra* IIe.

able, determinate rule from a case is not available; the supposed "rules" of judicial decisions simply cannot be expressed with any precision. Simpson again says it well:

[I]f six pundits of the profession, however sound and distinguished, are asked to write down what they conceive to be the rule or rules governing the doctrine of *res ipsa loquitur*, the definition of murder or manslaughter, the principles governing frustration of contract or mistake as to the person, it is in the highest degree unlikely that they will fail to write down six different rules or sets of rules.⁵⁰

Nothing similar to a statute or "school rule" can be found in the supposed rules of judicial decisions.

But maybe I've got the idea wrong. Don't we extract rules not from single cases but from sets of cases? And isn't that exemplified by standard teaching practice?

Typically, early in one's first year at law school, one is introduced to a set of cases — the opinions in appellate decisions, a new and formidable literary mode — and given a problem, that is, a set of facts and a client. My research and writing teacher in my first year of law school told us to "synthesize a rule" from the precedent cases. Such a "rule" is a verbal formula that accounts for all of the cases we'd been given. Then we were instructed to use that rule to tell the outcome of the case we had been given as a problem. This has proved successful as a method of introducing the mysteries and uncertainties of common law to nervous and bewildered One-Ls.

This approach to common law as rules derived from sets of cases is attributable to Christopher Columbus Langdell, first dean of Harvard Law School.⁵¹ Langdell advocated a scientific approach to the discovery of legal rules, treating the reports of judicial decisions as raw data. Just as with the phenomena of nature, we can classify that data and generate rules to explain it in a coherent and intelligible way. Langdell thought that all law was contained in the Harvard Law Library. One entered the library as a botanist might enter an Amazon jungle: to collect a set of specimens from which to extrapolate a rule governed taxonomy based on their similarities and differences. Isn't this what we all do when we find and advocate theories for reconciling sets of cases? On this view, individual judges may not make rules but collectively the judicial system does.

50. Simpson, *supra* note 4, at 89.

51. WILLIAM LA PIANA, LOGIC & EXPERIENCE 55 (1994); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

As a method of initiation, Langdell's is probably not especially harmful, but it is misleading. There are many problems with it (some of which we've seen already),⁵² but primarily it tempts one to invest too much authority in the formula called "the rule." There are indefinitely many such "rules" that will fit all the cases in any given set of precedents *and* the present case (which we call "reconciling") or that will fit all the precedents and *not* the present case (which we call "distinguishing").⁵³ So *nothing* flows from the mere fact that a rule synthesized by a student does one or the other. Such a synthesized rule gets its force from whatever *independent support* — moral, economic, social, or political argument — can be mustered for it. In other words the "rule" is valuable only insofar as it captures values of society determined for the most part exogenously to the legal system. In litigation one must convince a judge of the correctness of those societal values if one is to induce her to follow the chosen "rule." The Rule of IRAC is no better or worse than the reasons that can be adduced for it, and in common law those reasons do not come from inside the law.

But the method may also be misleading in a converse way. Some among the academic celestials talk of the law as autonomous, meaning that it exists and functions independently from and free of exogenous inputs.⁵⁴ If a set of records of previously decided cases could serve as an adequate data base for discovering the law, then law might indeed be autonomous. At least a student might be deceived into thinking so. It is a dreadful idea, an idea prohibitive of change, correction, adaptation to a changing extra-legal world. Nobody, I think, would teach such a conception in a substantive course. Yet it is implicit in this method of initiation, and it is implicit in IRAC with its *R*ules generated from cases.

52. For some others, *see, e.g.*, M.B.W. Sinclair, *The Semantics of Common Law Predicates*, 61 IND. L.J. 373, 382-386 (1985-86).

53. This is simply an instance of the fact that infinitely many true explanations can be drawn through any set of data. CLARK GLYMOUR, *THEORY AND EVIDENCE* 10 (1980). For a simple proof, *see* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925, 932 n.19 (1996).

54. For a subtle and sophisticated account, *see generally* ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995). Perhaps the extreme is reached in the "autopoietic theory of law" of Niklas Luhmann. *See generally* Symposium, *Closed Systems and Open Justice: The Legal Sociology of Niklas Luhmann*, 13 CARDOZO L. REV. 1419 (1992); *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* (G. Teubner, ed., 1988); Jacobson, *Autopoietic Law: The New Science of Niklas Luhmann*, 87 MICH. L. REV. 1647 (1989). I have argued that Luhmann's theory, notwithstanding its academic following, crosses the boundary from latent to patent nonsense: M.B.W. Sinclair, *Autopoiesis: Who Needs It?*, 16 LEGAL STUDIES FORUM 81 (1992). The general idea took a significant battering from Judge Posner fifteen years ago; Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

How, if it is not purely misleading, is the commonplace exercise of "closed universe" reasoning to be accounted for? Were it completely wrong, presumably it would not have found such widespread acceptance in first year research and writing courses. Conversely, to the extent it is not completely wrong, aren't there rules in cases? The answer is easily explained, and in fact supports the opposite conclusion, *viz.*, that there must not be rules in cases. It is the normal practice of lawyers, both academic and otherwise, to look at a set of cases and devise a way of reconciling them, and if necessary, of distinguishing those that appear irreconcilable. This presupposes at least two accepted propositions: (a) that the judge making a decision is not necessarily authoritative as to the grounds of her decision, and (b) that no particular case stands for an authoritative rule. If cases did announce rules, then this normal lawyerly game would be illegitimate; the only grounds for comparison, reconciliation, or distinguishing would be those rules stated by the deciding courts. Thus, the usual practice of the legal profession, statements to the contrary notwithstanding, belies the notion of court made rules.

The IRAC formula is pure Langdell in its jurisprudence. The period following the civil war was one of social uncertainty; society had recently failed dramatically in its most basic function of providing security for its denizens. Accordingly, our judges adopted an extremely formalistic jurisprudence.⁵⁵ It is from this era that we got the notion of the "rule of the case," that rule being an exact equivalent of a statute of natural law. This was not faith in society but faith in the "brooding omnipresence in the sky,"⁵⁶ fixed rules waiting to be exposed and enunciated. To inculcate this jurisprudence, Langdell developed the "Socratic method." Few would now subscribe to Langdellian jurisprudence; but equally few reject the Socratic method. Are the two inextricably connected? Did Langdell lose the overt battle only to win the covert war?

D. *Such Rules Can Clash*⁵⁷

We would like our governing rules to be consistent. By that we mean that there ought not to be rules requiring one to do thus-and-so,

55. See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 62 (1977).

56. *Guaranty Trust v. York*, 326 U.S. 99, 113 (1945).

57. I learned much of the following argument from chapter 2 of Ronald Dworkin's *TAKING RIGHTS SERIOUSLY* (1977). He allows for generalities derived from cases but calls them "principles" and points out many ways in which they are quite different from the statute-like rules of IRAC.

but also prohibiting doing thus-and-so.⁵⁸ The entire body of statutory law is now so vast that we cannot require perfect consistency of it, but we do treat consistency as a goal and we have ways of resolving conflicts when they arise.⁵⁹ But the common law imposes no such requirement.

Ronald Dworkin attacks the question of the consistency of IRAC's rules by example, his prime case being the rule of *Riggs v. Palmer*.⁶⁰ Elmer Palmer murdered his grandfather in order to take under the old man's will. That was too much of a manifest injustice for New York's Court of Appeals, which accordingly denied Elmer the bequest: "[N]o one shall be permitted to profit from his own fraud."⁶¹ Dworkin points out that, "in fact, people often profit, perfectly legally, from their legal wrongs. The most notorious case is adverse possession — if I trespass on your land long enough, someday I will gain a right to cross your land whenever I please."⁶² Thus the rule of *Riggs v. Palmer* can scarcely be called a rule at all; it does not apply consistently in different situations. How would a law abiding citizen know whether hers was a problem governed by it or not?

E. Fact Sensitivity (A More Sporting Argument)

A feminist luminary who gave a talk here said she wanted a "more multi-faceted, more continuous"⁶³ decision-making, a closer and more fine-grained attention to facts. It is a staple of critical argument, be it "critical-feminist" or "critical-race" or just plain "critical,"⁶⁴ that law should be more "fact sensitive;" that is what the visiting feminist meant.

58. For a different and more elaborate analysis of consistency in law, see John E. Coons, *Consistency*, 75 CAL. L. REV. 59 (1987).

59. One of the more trivial rules of interpretation solves this problem: take the later enacted on the presumption that it amends preceding inconsistent statutes by implication.

60. *Riggs v. Palmer*, 115 N.Y. 506 (1889).

61. *Id.* at 511 (but over a vigorous and intelligent dissent). *Riggs v. Palmer* reversed the Supreme Court decision; thus the aggregate opinion of the New York judges was equally divided. And not all other state courts, given the opportunity, agreed with *Riggs v. Palmer*, see, e.g., *Demos v. Freemas*, 43 Ohio App. 426 (1931).

62. DWORKIN, *supra* note 4.

63. She seemed quite oblivious to the oxymoron.

64. "Critical," as of some theory, is a word we are supposed to have picked up from the great Frankfurt Institute of Social Research (big names: Theodore Adorno, Max Horkheimer, the director from 1930), which characterized its positions as critical in opposition to the then fashionable phenomenology and Marxism. Goodness knows what it means in its ubiquitous adoption by legal academics, other than "what's in fashion can't be correct, even if it is critical theory that's in fashion."

The argument is misguided;⁶⁵ what it usually means is that the speaker would like the law to pay more attention to facts she thinks important, less to those in vogue with the present law makers – but that is not our concern here. What is of concern is that the generality of a rule precludes precise particularity. In law that means rules cannot be especially fact sensitive; they must choose some classes of facts as variables despite variations in detail within those classes.

Common law decision-making has the power to be infinitely fact sensitive. Any fact can be outcome determinative if you can convince the court it matters. A court can sift as finely as the advocates make possible and through whatever class of facts however denominated. But if there were rules in cases they could not; they would be bound to those classes of facts at the level of generality determined by the precedent court. The difference between statutory rules and common law decisions would evaporate; and with it would evaporate the traditional empirical wisdom that progress in common law is from homogeneous to heterogeneous. And it would be anti-feminist to boot!

F. Anti-Positivism

In three very influential papers now collected into chapters two, three, and four of the book *Taking Rights Seriously*,⁶⁶ Ronald Dworkin launched a sustained attack on positivism, in particular that of H.L.A. Hart.⁶⁷ Part of this attack involved argument against the enactment theory of case law; a judge who adopted this theory, Dworkin wrote, “will encounter fatal difficulties if he pursues that theory very far.”⁶⁸ IRAC fits legal positivism, with the “**R**” as the positive element: there is

65. Isn't the willingness to look into unlimitedly specific facts what led to the “poverty of equity”? Feminists and critical race theorists claim that they are more sensitive to facts, like equity, casting their nets wider; if given power they would install a legal regime of greater fact sensitivity. That's all very well, but the costs are not only in the enactment and enforcement transactions, where the finer grained detail requires many more words and pages in the statute books and much more time in figuring the meanings and inter-relationships. The greater cost is surely in loss of certainty to those who must refer to “the state of the law” to plan future actions, for example persons wanting to build a hospital, or a college, or finance an institute of critical feminist theory. And more: the more detailed the statute the less confidence it reflects in one's fellow denizens, and in the enforcement agencies. This is quite the sort of thing the crit-feminist and crit-race theorists should be aghast at.

66. DWORKIN, *supra* note 4.

67. See H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

68. DWORKIN, *supra* note 4, at 110.

a rule put in place (“enacted”) by the precedent court, and owing its status as a rule to that court’s action. It controls because of its position.

Looking at Dworkin’s arguments from the vantage point of twenty-five years’ hind-sight, those he takes to be dispositive appear quite skimpy. But they are, nevertheless, significant, and not just because of their adoption by one of the most important jurisprudences of the late twentieth century. For the most part they point out ways in which the enactment theory does not fit what we do in practice.

In chapter four of *Taking Rights Seriously*, Dworkin writes, “even important opinions rarely attempt that legislative sort of draftsmanship. They cite reasons, in the form of precedents and principles, to justify a decision, but it is the decision, not some new and stated rule of law, that these precedents and principles are taken to justify.”⁶⁹ He then goes on about the “gravitational force” of precedent. I have sometimes used a similar metaphor, calling certain land-mark cases – *Hadley v. Baxendale*,⁷⁰ *Dickinson v. Dodds*⁷¹ — “black holes” because their gravitational force is so great that they suck everything into them, including light.⁷² As an explanation of precedent, gravitational force fails; unless we can down-load the metaphor onto practice it has no operational value. Later, Dworkin attempts to justify the nebulous “gravitational force” as fairness: “The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike.”⁷³ This merely begs the key question of the criterion of similarity: what makes two cases alike? Dworkin’s failure to provide an adequate account of precedent does not detract from the force of his argument against the positivist notion of rules in cases: one very seldom finds courts attempting to enunciate rules in their opinions. Further, his:

general explanation of the gravitational force of precedent accounts for the feature that defeated the enactment theory, which is that the force of a precedent escapes the language of its opinion. . . . If an earlier decision were

69. *Id.* at 111.

70. 9 Ex. 341, 156 Eng. Rep. 145 (Ct. Exchequer 1854).

71. 2 Ch. D. 463 (N.Y. 1876).

72. But this is only a device for expressing disagreement with the deference with which they are treated, and for casting doubt on the present rationality, or adaptivity, of those cases; it is not an attempt to account for precedent as a control on judicial decisions.

73. DWORKIN, *supra* note 4, at 113 (the origin of “justice as fairness”).

taken to be entirely justified by some argument of policy, it would have no gravitational force. Its value as a precedent would be limited to its enactment force, that is, to further cases captured by some particular words of the opinion.⁷⁴

It is a sound empirical point; neither judges nor advocates attempt to confine a precedent to a particular string of words. Many cases have a domain of influence considerably more expansive than any of the formulae attributed to them by enactment theorists. In perhaps more cases, the precedential power of an uncongenial decision is "confined to its facts."

H.L.A. Hart, in a justly famed section of *The Concept of Law*, says that the rules created by cases have an "open texture"⁷⁵ and so stand in need of substantial interpretation in application to hard cases. Dworkin takes this up, contrasting such rules with those of chess:

In adjudication, unlike chess, the argument *for* a particular rule may be more important than the argument *from* that rule to the particular case; and while the chess referee who decides a case by appeal to a rule no one has ever heard of before is likely to be dismissed or certified, the judge who does so is likely to be celebrated in law school lectures.⁷⁶

But judges agree that precedents do matter, even though in a particular case they may disagree as to which, and how much. And in making new decisions good judges explain the limitations of what they are doing, as compared with a legislature.

They say, for example, that they find new rules immanent in the law as a whole, or that they are enforcing an internal logic of the law through some method that belongs more to philosophy than to politics, or that they are the agents through which the law works itself pure, or that the law has some life of its own even though this belongs to experience rather than logic.⁷⁷

74. *Id.* at 113.

75. HART, *supra* note 67, at 124-136.

76. DWORKIN, *supra* note 4, at 112.

77. *Id.* There is no acknowledgement of the sources he is using here: Lord Mansfield; see *Omychund v. Barker*, 26 Eng. Rep. 15, 22-23 (Ch. 1744) (argument of Mr. Murray, then Solicitor-General of England, later Lord Mansfield: "[A] statute very seldom can take in all cases, therefore the common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of parliament."); and the most famous of all quotable passages generated by OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

G. Empirically, It's Just Not What We Do

What do we do when we use previously decided cases? Do we say things like, "The rule of that case tells us that plaintiff must prevail here." No; we say things like, "The facts of that case are indistinguishable from the facts before us." Or, "These two decisions can be reconciled on the grounds that" So we look first to similarities in facts, not to some abstraction from its reasoning called "the rule of . . . case." We take the facts of a prior case, a set of sentences over which that prior court had control and which we cannot dispute,⁷⁸ and test their similarity with those of the case before us. But you can find similarities and differences between the facts of any pair of cases according to your choice of criterion of similarity. Where do we get the criterion? Is it "the rule of the precedent?" The "**R**" of "IRAC"?

Reasoning depends on the security of starting points. If we are to get anywhere, there must be some propositions about which we feel comfortably certain, propositions which, in Holmes' words, one can't help believing.⁷⁹ Looking at a precedent case, we are certain of the facts and the outcome; at least they cannot be contested.⁸⁰ What about the reasoning that connects them, the *ratio decidendi*? If there is a rule in the case, it will be a generalization on the facts according to the constraints of the reasoning, and vested with authority because of the power of the court to make it so. That rule would be a secure point for

78. You can equivocate about this. One of Justice Cardozo's methodological favorites was to re-order, or change the priorities among facts of prior cases so as to fit a rationale for the decision different from that of the opinion. But Justice Cardozo did not invent or change facts.

79. Oliver Wendell Holmes Jr., *Ideals and Doubts*, 10 ILL. L. REV. 1, 2 (1915) ("When I say that a thing is true, I mean that I cannot help believing it.")

80. That does not mean the facts of a prior case are unaffected by the judge's reasons:

The facts of precedent cases, however, are always filtered through the courts' rationales in those cases. In other words, the court in the case at hand, lacking direct access to the facts of the precedent cases, is entirely dependent on the precedent courts' determinations of what facts were worthy of mention; and such determinations in turn depend on what general norms the precedent courts invoked, and how abstract or particular they were.

Larry Alexander, *Incomplete Theorizing: A Review Essay of Cass R. Sunstein's LEGAL REASONING AND POLITICAL CONFLICT*, 72 NOTRE DAME L. REV. 531, 537 (1997). So, for example, it was of no relevance to the author of *State v. Davis*, 1 HILL 46, 19 S.C.L. 46 (1833), that the property from which the defendant separated the plaintiff was a slave; presumably that fact would be given central importance today. The facts of a prior case may be determined at the time of that decision, but their relative importance is determined by the present judge according to present values.

legal reasoning in the future. Our reasoning in a present case would be a matter of deduction from this rule. If the facts of this case fit within the scope of that rule, this case is decided, *stare decisis*; if not, then we must search elsewhere for a different rule from which to deduce our answer. If there were a doubt about the application of such a rule to these facts, we should have to look for further resources to resolve that doubt. The rule, remember, has authority because it was laid down by a court. So, just as in statutory interpretation, we look to the reasons for the enacting legislature's decision, here we would appropriately look to the reasoning of the court that made the rule. Why did it choose this rule? What won over a majority of the judges? The "felt necessities of [that] time, the [then] prevalent moral and political theories" The deduction from the rule will become clear once we have resolved the difficulty of the intent of the rule-making judge(s). It all looks reasonable and somewhat familiar, doesn't it?

Only as a parody. This is undoubtedly *not* what common law reasoning is about. When Holmes wrote: "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men . . .,"⁸¹ he was not referring to the time, the prevalent theories, the public intuitions, or the judges' prejudices at some past date when a precedent case was decided; he was referring to the time of the decision at hand: now. Otherwise common law would remain static, incapable of adapting to changing times, changing technology, changing mores and values. Change would be impossible. The first supreme court to get a shot at a type of issue would settle it forever. The necessities of a different time, the prejudices of another age, would set the law. Even worse: Because it didn't all happen at once, the times whose social make-up determined the rules would vary according to the time of the first decision.⁸² Judges and lawyers would become historians, seeking not justice now but justice as it was perceived at various times past. So, obviously, the enactment theory does

81. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

82. This would not be like the British under *London Street Tramways Co. v. London City Council*, [1898] A.C.375 (and prior to the House of Lords Practice Statement on Precedent, [1966] W.L.R.1234, 3 All E.R. 77), when a judge was absolutely bound by prior decisions. The British always eschewed the idea of there being rules in cases, requiring each member of a panel in the House of Lords to write a separate opinion (speech) to inhibit the use of catchy turns of phrase as if they were rules. For a period in the 18th century the House of Lords even barred publication of its opinions (speeches) to prevent their being quoted as rules.

not fit the common law as we know it. Common law could not have endured for so many centuries in such a wide variety of social circumstances without being sufficiently malleable to adapt constantly to multifarious and changing societal needs.

Just as the governed take notice of common law's behavioral constraints from the requirements of decent behavior in society, judges also draw their reasons from that same source. The criteria of similarity a judge must use to rely on or distinguish a precedent come from society at the time of decision; that is, where we look for the resources on which an opinion stands. Great opinions ring true to their audience: they are in accord with the "felt necessities," they are convincing to a public that need know nothing of the social conditions at the time some historical precedent was laid down. A rule gets its power from the authority of the rule maker; the common law gets its power from its ongoing rationality. An irrational or immoral common law decision is a wrong decision. Chief Judge Charles Breitel in a deservedly oft-quoted passage wrote of common law decision-making:

The judicial process is based on reasoning and presupposes — all antirationalists to the contrary notwithstanding — that its determinations are justified only when explained or explainable in reason. No poll, no majority vote of the affected, no rule of expediency, and certainly no confessedly subjective or idiosyncratic view justifies a judicial determination. Emphatically, no claim of might, physical or political, justifies a judicial determination.⁸³

As Lord Mansfield said long ago, common law "works itself pure" by drawing on "the fountain of justice," not by relying on the utterances of officials from the past.⁸⁴

Finally, the enactment theory of common law decisions is incompatible with ordinary academic practice. From the hypothesis that a

83. Charles Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 772 (1965).

84. This account of common law and stare decisis is often called "reasoning by analogy:" "[Analogical reasoning in law] presumably involves comparing the facts of the case at hand with the facts of various precedent cases in order to determine which of the precedent cases are relevantly like and unlike the case at hand." Alexander, *supra* note 80, at 537. It is pretty much accepted today. See, e.g., Edward H. Levi, *An Introduction to Legal Reasoning* 7-18 (1948); *Planned Parenthood v. Casey*, 505 U.S. 833, 854-856, 864 (1992); M.B.W. Sinclair, *The Semantics of Common Law Predicates*, 61 IND. L.J. 373, 390-395 (1986); MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 58-61 (1988); Heidi Li Feldman, *Objectivity in Law*, 92 MICH. L. REV. 1187 (1994); MICHAEL SINCLAIR, *GUIDE TO STATUTORY INTERPRETATION* 21-24 (2000).

common law decision makes a rule, it would follow that theoretical approaches such as law-and-economics could be dismissed a priori. The legal economists' procedure of showing how diverse cases can be understood in terms of a uniform goal of maximizing economic efficiency is incompatible with the notion of judge-made rules. Only where the judge in her opinion actually relied on an economic efficiency analysis would the typical "law and economics" argument apply. That we take such theories and their proponents seriously shows yet again that we do not take the notion of "rules in cases" seriously.

IV. COUNTER ARGUMENTS

A. *What about the Rule in Shelley's Case?*

In *Foakes v. Beer*,⁸⁵ the House of Lords decided that a creditor's promise to accept a lesser sum in full satisfaction of a debt was not enforceable. It is known as "the rule of *Foakes 'n' Beer*." Who knows the facts of *Foakes v. Beer*? Not many; but all lawyers (all?) know the rule. Surely that must be a rule made by a court in a case. And do we not have a "Rule in *Shelley's Case*,"⁸⁶ something about sequential future interests, learned for an exam but otherwise known only to estate planners, even though the name is remembered by all?⁸⁷ Don't these examples show that, at least in great cases, courts do make rules?

They don't; but it takes a little work to explain them away.

Up through the second half of the nineteenth century, the western world believed that there was one true morality, laid down by God at the construction of our universe, an ethical blueprint just like the empirical blueprint scientists sought out in their experiments.⁸⁸ This blueprint for ethical behavior was the source of the common law. Common law decisions were manifestations of the universal moral law in action. So they could be seen as deductions from, or illustrative glimpses of that universal and timeless law.⁸⁹ Christopher Columbus Langdell at Harvard Law School could consistently posit that all there was to be known about law could be found in the cases in his law li-

85. 9 A.C. 605 (H.L. 1884).

86. 76 Eng. Rep. 206 (K.B. 1581) it had a predecessor, *Abel's Case*, Y.B. 18 Edw. II. 577 (1324).

87. It is said to be defunct in the law of future interests, but in some parts of the country it is used as a euphemism for "My client hasn't paid my bill."

88. See SINCLAIR, *supra* note 84, at 31-32.

89. For this reason they controlled statutes in the early days – see *The Case of the College of Physicians, Dr. Bonham's Case*, 77 Eng. Rep. 646 (C.P. 1610) – and when statutes became supreme, those in derogation of the common law were construed narrowly.

brary; those cases were windows to a coherent, seamless scheme, the “brooding omnipresence in the sky.”⁹⁰

Even when faith waned as a source of moral determinacy at the start of the twentieth century,⁹¹ it didn’t matter much in England. Most of England’s lawyers and judges, and all of its law lords, came from an upper class education system that espoused a common set of values, the superiority of which to any other in the world they saw no reason to doubt. Thus, their decisions would draw on a uniform source, very slow to change, appearing to them as “The Moral Law.” But in the United States it did matter. Immigrants from all over the world brought enlightened and variegated ways to different parts of the continent; rapid technological development and changing economic structure along with advances in scientific understanding of the empirical world undermined the universality of any one conception of rectitude. Common law cases decided in local fora depended on local customs and local values. How else would a denizen, far too busy on the farm or in the factory to be looking up books, have notice of it? How else were judges like Mansfield, Holmes, Brandeis, Cardozo, and Traynor able to put such moves on the tradition?

Throughout long periods, most of the law remains stable. Just think of those basic torts: one may not wield one’s scythe so negligently as to lop off one’s neighbor’s arm without paying compensation; and that goes for anything similar to a scythe in negligent implementation. A society simply could not survive without some such rule, especially a society too big and complex for everyone to know everyone else. In commerce, where people commonly inquire as to the law before acting, at least in larger transactions, there is an incentive to keep law stable “because . . . it is more important that the applicable rule of law be settled than that it be settled right.”⁹² When such fundamental

90. *Guar. Trust v. York*, 326 U.S. 99, 113 (1945).

91. It appeared to be making a comeback towards the end of the twentieth century when post-modern *nouveau solipsists* had to put their faith in faith because they denied everything else. Mercifully, that fad seems to have fallen from fashion as fast as it arose.

92. *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 406-407 (1932), (Brandeis, J., dissenting) (the full sentence is: “Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”) Lord Mansfield himself said much the same, but explicitly restricted to commercial contexts: “In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.” *Vallejo v. Wheeler*, 1 Cowp. 143, 153, 98 Eng. Rep.

cases come before the courts and get decided according to society's needs, it does no harm to talk of them as "the rule of . . .". In contracts, we have for a long time had a fetish about consideration. *Foakes v. Beer*⁹³ was a manifestation of that fetish, not the first of its line, but the first to reach the highest court of its jurisdiction, and so it took on a mana and a momentum well beyond its true worth. "The Rule of *Foakes 'n' Beer*" simply names a regularity in legal thinking that has persisted over hundreds of years, and persists in classrooms and in England and New York to this day, even if people in commerce mostly ignore it.⁹⁴ It shows *stare decisis* in action when the source of reasons doesn't change in relevant respects.

B. Courts Today say They are Adopting or Following Rules

Courts today sometimes *say* they are adopting or following rules; doesn't that show that courts make rules? Take as a familiar example the rules laid down by California's supreme court for determining whether a plaintiff might recover for negligently inflicted emotional harm, the *Dillon* factors.⁹⁵ Other courts have adopted the rule, adopted it with modifications,⁹⁶ and rejected it.⁹⁷ California itself has stuck with it in egregious circumstances that would tempt even the most stone-hearted to wilt.⁹⁸ Surely this is treating *Dillon* as stating a rule.

1012, 1017 (K.B. 1774). Robert Coase, in the only law review article to earn its author a Nobel Prize, provides a reasoned economic argument that these great jurists' instincts were correct. But this same point makes commerce more suited to statutory than common law control, and so it has, for the most part, become.

93. *Foakes v. Beer*, 9 App. Cas. 605 (1884) relied on *Pinnel's Case*, 5 Coke's Rep. 117a, 77 Eng. Rep. 237 (Com.Pl.1602).

94. Estate planning shares the quality remarked by Mansfield and Brandeis of needing certainty more than justice: may *Shelley's Case* live on.

95. *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968) ("(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.").

96. *See, e.g., Portee v. Jaffee*, 417 A.2d 521 (N.J. 1980) (adding a 4th, horribleness, requirement).

97. *See, e.g., Tobin v. Grossman*, 24 N.Y.2d 609 (1969); *Bovsum v. Sanperi*, 61 N.Y.2d 214 (1984); Florida still requires some personal impact to the plaintiff; *R.J. v. Humana of Florida Inc.*, 652 So.2d 360 (Fla. 1995).

98. *See Thing v. LaChusa*, 771 P.2d 814 (Cal. 1989).

This is one of the last remaining areas of pure common law, not yet interfered with by legislation. *Prima facie*, it appears to govern an area of social behavior where people do not take notice of the law before acting. The New Jersey supremes said as much: "We are not dealing with property law, contract law or other fields where stability and predictability may be crucial. We are dealing with torts where there can be little, if any, justifiable reliance and where the rule of *stare decisis* is admittedly limited."⁹⁹ That may be true of primary interpersonal behavior; the state of the law doesn't matter, decent people just don't do it. But the state of the law certainly is important to insurers and lawyers who must settle claims. These days it is so important that the California supremes in 1988 wrote, "a bright line in this area of the law is essential."¹⁰⁰ Didn't *Dillon* lay down a rule drawing that bright line?

Because a court defers to a prior decision, and in doing so cites the need for certainty, does not mean that there must be a rule? There can be stability and certainty, and a court can defer to a prior decision without there being a rule. That we have *stare decisis* makes this the *normal* judicial behavior, the default decision-making, the course that can be followed with little further justification.¹⁰¹

But what is the difference between that and rule making? After all, the *Dillon* factors come to us in a verbal formulation of the requisites for a plaintiff to prevail, and that is a rule, isn't it? Not quite. The key difference is this: a common law position rests on reasons telling us why it suits the needs of society; when that adaptive connection fails, so does the power of the precedent. It will show up in the ease with which the old cases will be distinguished or re-justified on new grounds.¹⁰² As Chief Judge Breitel wrote, common law "is based on reasoning and presupposes . . . that its determinations are justified

99. *Falzone v. Busch*, 214 A.2d 12, 17 (1965) (in the course of justifying putting a big move on a New Jersey position stable since 1900).

100. *Elden v. Shelden*, 758 P.2d 582, 588 (Cal. 1988) (denying emotional distress damages to the homosexual life partner of the victim because he was not closely related, the third of the *Dillon* factors).

101. I first picked up the style of much of the argument of this section, and of many other parts of this paper, from LUDWIG WITTGENSTEIN, *THE BLUE AND BROWN BOOKS* (1958); it is as clearly set out as anywhere in the first part of *The Blue Book*, although, of course, about our use of words, not about law.

102. *See, e.g., MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916) (where not a single rule gets changed).

only when explained or explainable in reason."¹⁰³ Rules are formulae with authority; they are formulated by an authority, and they control because they are there, that is, by force of their enactment.¹⁰⁴

Thus – and this ought not to be surprising — one needs to look to the reasoning of a case. These cases are about limiting potential liability. Our courts have always been so afraid of imposing on an unsuspecting populace, in Cardozo's incomparably stylish words, "a liability in an indeterminate amount for an indeterminate time to an indeterminate class."¹⁰⁵ But on its own this will just not do as a decisional limitation; it may motivate a limiting requirement, but alone, it would work to support *any* decision so long as it was limiting. So it finds its expression in more or less arbitrary limitations that hold their precedential course because they are sufficiently stable, reasonably determinate, and adequately in tune with societal needs. This is not about rules, it's about social rationality.

C. Courts Draw Lines, which is the Same as Making Rules

We've seen an example above, of the California supreme court's saying, "a bright line in this area of the law is essential."¹⁰⁶ As one court said, it may be difficult to do, but a line must be drawn.¹⁰⁷ Legislatures draw lines when they make statutes. Courts draw lines when they make rules akin to statutes. The argument is clear: Courts draw lines; drawing lines is making rules; *ergo*, courts make rules.

The short answer is that courts don't draw lines. They don't have to, nor do they have the power to. Nobody in decisional law needs to draw a line. Suppose you are an advocate: you say, in effect, that although the line is hard to draw, it is clear for *x-y-z* reasons that your client is on this side of it. Counsel for the opposing party says those are

103. Breitel, *supra* note 83, at 772.

104. As Breitel said, quite the contrary of common law: "Emphatically, no claim of might, physical or political, justifies a judicial determination." *Id.*

105. *Ultramares Corp. v. Touche*, 255 N.Y. 170, 178 (1931).

106. *Elden v. Sheldon*, 758 P.2d 582, 588 (Cal. 1988) (denying emotional distress damages to the homosexual life partner of the victim because he was not closely related, the third of the Dillon factors).

107. *See, e.g.*, *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954) ("[T]he line between infringement and non-infringement is indefinite and may seem arbitrary when drawn; nevertheless it must be drawn.") *citing* *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2nd Cir. 1930) (Hand, J.) ("[W]hile we are as aware as anyone that the line, wherever it is drawn, will seem arbitrary, that is no excuse for not drawing it; it is a question such as courts must answer in nearly all cases.").

very persuasive reasons, but nevertheless, for reasons *u-v-w*, it is clear that your client is on the other side of the line. Then the judge, oozing sagacity, says that the case is a close one with neither party clearly prevailing, the line is indeed difficult to draw, and although reasons *x*, *y*, *v*, and *w* are quite compelling, she is persuaded that your client is just over this side of it. Nobody drew a line. What they did was give reasons for deciding one way or the other using the line as metaphor for the decision. There is never a line: there are only competing reasons and the evaluation of them. That's common law: rationality in action.

D. *How Can There be Stare Decisis Without Rules?*

Oddly enough, this question should run the other way. Remember the distinction between *horizontal* and *vertical stare decisis*?¹⁰⁸ Horizontal *stare decisis* requires a court to follow its own prior decision unless something exogenous to the law has changed sufficiently to make the prior decision now discordant with justice. That's the interesting and difficult one. Vertical *stare decisis* requires a court lower in the hierarchy to follow decisions of courts senior to it. This one is easy to see: it is not much more than what it is to have a hierarchical system. However, it is extremely powerful, incorporating horizontal *stare decisis* and all the social power of the mandarin on top. And, as a practical matter, overworked trial court judges, seldom specialists in an area of law in which they are called upon to rule and not in a position to start a jurisprudential empire, are just as happy to follow the words of their seniors.

At least for horizontal *stare decisis*: how can there be precedent if cases enact rules? Some writers of enactment theory textbooks say there is no horizontal *stare decisis*. For example, "[A]ppellate courts, or so-called 'higher' courts, are not legally bound to adhere to the principle of *stare decisis*."¹⁰⁹ This follows simply from the concept of rule. "A legal rule established by the *ratio* of a case forms a precedent for application in future cases."¹¹⁰ If it's an established rule of law, then a subsequent court must follow it; but a supreme court has the power to

108. The earliest I have found this distinction drawn, although not with its present appellation, is *Veley and Joslin v. Burder*, 163 Eng. Rep. 127, 133-34 (Consistory Ct. of London 1837).

109. CATHY GLASER ET AL., *THE LAWYER'S CRAFT* 23 (2002). See also MANCHESTER, *supra* note 7, at 3-4.

110. MANCHESTER, *supra* note 7, at 3. See also Simpson, *supra* note 4, at 79-82.

overrule its precedents;¹¹¹ so it would be *false* to say that a supreme court *must* follow the rules of its prior cases. And being consistent, these authors therefore say that *stare decisis* does not apply to highest level courts, like New York's Court of Appeals, England's House of Lords, or the United States Supreme Court.

That is perhaps the worst and most misleading fall-out of the enactment theory of IRAC. It is quite simply false, and quite simply gives the students a truly half-baked conception of *stare decisis* – and a conception of very little social interest or power.

Yet how is it possible to have *stare decisis* without rules in cases? This is not the place for a full-blown account of *stare decisis*. But let me offer a very brief example borrowed from a recently published introductory textbook.¹¹²

Shlomo is in the 10th or 11th grade. He wants to go to Milly's birthday party, her "sweet 16th." Will his parents let him? In the previous month, he was not allowed to go to Jerry's party because it was on a Wednesday and he had to go to school the next day. That doesn't apply here. That is distinguishable: Milly's party is on Saturday. And he was not allowed to go to Rosie's party because there was no parental supervision. That doesn't apply here. That is distinguishable: Milly's Mom is going to supervise this one. (Notice in passing that we distinguish facts in this case from facts in the precedent cases, not facts under an antecedently determined rule.) Now we know there's a presumption: parents always say "No" unless convinced otherwise. That puts the burden on Shlomo to come up with an argument, and it shouldn't be difficult. All his classmates are going, and he would stand out as exceptionally infantile if not allowed. Parties are normal processes of adolescent socialization, which he needs. It would help him a lot to have a precedent, something like having been allowed to go to Julie's party on a Friday night, which was supervised by Julie's parents. But in its absence he will be trying to set a precedent – at which he will surely succeed someday, if not this time. He's in this with a chance – unless of course his oldies find out that Milly's Mom is a

111. "For any number of reasons, the United States Supreme Court, and state supreme courts, might decide that a previous rule was wrong and OVERRULE the case or cases that established it." GLASER, *supra* note 109. *But see* Planned Parenthood v. Casey, 505 U.S. 833, 854-856, 864 (1992).

112. GLASER, *supra* note 109, at 9-10.

lush, or that she has a voracious appetite for high school boys, especially those who, like Shlomo, can say “Piero della Francesca.”¹¹³

In that story there were no rules. There were only cases with facts, outcomes, and reasons. There are other reasons of potential importance waiting in the wings; there always are. Some of those reasons might change. For example, the supervision reason should change as Shlomo grows older. There is a presumption in favor of one outcome; there always is. But such presumptions also change as society changes, as one expects this one will over time.

For now, Shlomo can put his hopes in his arguments from normalcy and social utility – and his oldies’ ignorance of the propensities of Milly’s Mom. Nowhere in the story is there a rule. Talk of a rule would be quite superfluous.

E. Prospective Stare Decisis Requires Rules

Professor Fred Schauer has argued that courts should always eschew justice in the particular case in favor of global rule-making efficiency.¹¹⁴ According to Schauer, common law courts should forego optimal immediate decisions for the sake of more general ideals, expressible as rules (more characteristic of legislative decision-making.) The only restrictions on the scope of Schauer’s thesis are implicit: the court should be of consequence and its opinions reported. The constraint of precedent, Schauer argues, applies prospectively as well as retrospectively:¹¹⁵ “the conscientious decisionmaker must recognize that future conscientious decisionmakers will treat her decision as precedent, a realization that will constrain the range of possible decisions about the case at hand.”¹¹⁶ Thus, the judge is restrained by the force of precedent even if there has never been a similar case in the past: this decision will, as a precedent, have progeny for which the court must take responsibility. *Ergo*, in making a decision the judge must acknowledge how, in the future, that case may be interpreted and used in “the many directions in which it might be extended.”¹¹⁷ So in

113. *AMERICAN PIE* (Universal/MCA Pictures 1999) (the last words of the geeky Finch before the scene fades as he is seduced by Stiffler’s mom).

114. Frederick Schauer, *Precedent*, 39 *STAN. L. REV.* 571 (1987). Dean Roscoe Pound made a somewhat similar argument but limited to the situation of dispersed, newly developing communities in the United States with weak and inactive legislatures. See generally ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 120 *et seq.* (1921).

115. Schauer, *supra* note 114, at 571-74, 578, 589.

116. *Id.* at 589.

117. *Id.* at 574.

reaching her decision, the judge must take into account future cases that might be assimilated under the description of this one.¹¹⁸ "The decisionmaker must then decide on the basis of what is best for *all* of the cases falling within the appropriate category of assimilation."¹¹⁹ Taking account of all future decisions that are the potential progeny of this decision can require a less than optimal, less than just decision in the case at hand.¹²⁰

This argument is misconceived. Remember that the general principles used to justify a decision are not binding on a future decisionmaker. Common law, as we have already noted, is not expressible in any definitive string of words. Thus to make Schauer's argument work in practice, the present court would have to withhold some facts and/or reasons from its report, facts and reasons that would have been relevant had it been making an optimal judgement. But if some particular fact in a future case is significant enough to matter it will *for that very reason* be grounds for distinguishing that case from the one presently being decided. Only if the present court were more competent or more thorough and dedicated than future courts would Schauer's argument hold. And of course there are no sufficient grounds for the present court's taking such an attitude. Parties to present litigation should not be denied a just decision merely because the judge takes a patronizing attitude to other and future judges.

F. *Bad Decisions by Great Judges*

I said earlier that a characteristic of a rule is that it preempts reason, becoming itself a complete reason for following it. That means one would be required to follow a rule even when one correctly thought it wrong (morally, economically, or suchlike.) The point was that the "rules" of cases are not like that; they are not applicable independently of the reasons on which they were posited. What then do I say about the obvious counter-examples? Holmes got it wrong in *Moore v. Bay*;¹²¹ Brandeis got it wrong in *Buck v. Jewell-LaSalle Realty Co.*¹²² Yet

118. This is not as implausible as it may first appear. Think of the example used by Schauer: "[F]ear that allowing restrictions on Nazis because they are Nazis will establish a precedent for restrictions on socialists because they are socialists. . . ." *Id.* at 578. As he notes, the example is a reference to the dispute over allowing Nazis to march in Skokie, Illinois.

119. *Id.* at 589.

120. "[I]n some cases we will make decisions that are worse than optimal for that case taken in isolation." *Id.*

121. *Moore v. Bay*, 284 U.S. 4 (1931).

these decisions survived and did in fact preempt good reason, which these eminent justices had missed and/or mis-applied.¹²³

One of the things that we know about judges such as Holmes, Brandeis, Cardozo, Hand, Traynor, or Francis (add your favorites) is that they were very, very good at assembling and expressing reasons justifying decisions. That's one reason they wrote so many landmark opinions compared with other judges. Subsequent judges have been inclined to defer to their abilities in a way that they do not seem to be inclined to defer to judges of lesser stature. These great jurists were authoritative because they were expert. We are similarly inclined to defer to Einstein, but many of the more enlightened are not.

This phenomenon is rather like our acceptance of the differentiation rule for x^n : "the mathematics teacher said it, and that's good enough for me;" "Brandeis said it, and that's good enough for me." That certainly must be the feeling of many an overworked judge. Even if she aspires to blazing a jurisprudential trail, she is not going to do it in all fields, or in every case on her crowded docket. If somebody has done the reasoning before, and with style, authority, and wit, why do it again? The answer is: only if an advocate can convincingly demonstrate the non-applicability of the precedent's justifying reasons to this case.¹²⁴

So these are not counter-examples. In fact, they are just what you would expect of courts that do not and cannot make rules. If courts could and did make rules, then we would have real trouble accounting for the differential stature of judges. Each judge would in virtue of her office have equal rule making power; it would go with deciding cases. Awarding some judges more rule making power than others would be acceding to a government of men, not of law.

G. *Vertical Stare Decisis Produces Rule-Governed Common Law*

Let's return to the distinction between vertical and horizontal *stare decisis*. One effect of vertical *stare decisis* is to give rule-like power to the *dicta* of Supreme Court opinions. Think, for example, of the impact of

122. *Buck v. Jewell La-Salle Realty Co.*, 283 U.S. 191 (1931).

123. Both those decisions were interpretations of statutes; thus their endurance had going for it the fact that Congress could have but did not correct them. But that is an excuse of no present interest.

124. Or, perhaps, the case is in an area upon which the judge really wants to leave her mark.

footnote four of *Carolene Products*.¹²⁵ It was merely an aside suggesting that instead of a presumption of constitutionality, a stricter scrutiny would be given to laws affecting a "discrete and insular minority," but it "helped launch both a new substantive due process and equal protection doctrine by which the Court would closely scrutinize laws affecting political and personal rights."¹²⁶

So I concede: the pronouncements of recent higher courts, especially supreme courts, whether *dicta* or holding, do have a rule-like function to lower court judges and legal practitioners.¹²⁷ Advocates find it effective to put quotes from Supreme Court opinions in their briefs, especially memorably well turned phrases. A quotable string of words – like the "discrete and insular minority" of *Carolene Products* – has its own legs, although not always for the better.¹²⁸ Alliteration has, perhaps, made as much bad law as hard cases.

At first glance this appears to be a very big concession, almost big enough to eat up the rest of the argument. After all, in practice one would seldom advise a course of action expecting to change the Supreme Court's mind when the ensuing dispute got there. One advises deference and negotiating around the problem. Prosecutors, estate planners, front office social workers – all in the front lines of legal decision-making – follow the jurisdiction's decisions: "theirs is not to reason why." And that is most of the practice of law. So why not treat pronouncements from above as rules?

In one respect that is correct. Recent opinions do come down to the legal cogniscenti as commanding, even in their *dicta*. But that doesn't make them rules; it just makes them commanding, and only to

125. *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the fourteenth. . . . [T]hose political processes ordinarily to be relied upon to protect discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry.").

126. JETHRO K. LIEBERMAN, *THE EVOLVING CONSTITUTION* 89-90 (1992).

127. I had to add the modifier "recent:" it is hard to believe that a trial court in, say, Connecticut today would entertain an action by a father for the seduction of his daughter, merely because the most recent decision of the supreme court approved it. *Smith v. Richards*, 29 Conn. 232 (1860).

128. The same pen that gave us the line about falsely shouting fire in a crowded cinema also gave us "three generations of imbeciles are enough" to justify the forced sterilization of a competent woman. *Buck v. Bell*, 274 U.S. 200, 207 (1927). See STEVEN JAY GOULD, *THE MISMEASURE OF MAN* (1996).

that limited population that knows about them, little more than a selection of lawyers. So this is not really much of a concession. This conception of common law rules by vertical *stare decisis* is a conception of rules for lawyers only, and those who take and pay for their prospective advice. The ordinary denizen without legal training will have no notice of and no duty to comply with the so-called rule. That is hardly a rule of the law as we know and love it. Even for lawyers it is superficial at best. Usually those following a supreme court decision will formulate their own version of the "rule;" so it will be neither stable nor reliable as a formula, but have to compete with alternative formulations. Any particular formulation will carry no authority as a rule, so will always be suspect beyond the clear scope of the precedent. Practicing law by headnotes is hardly to be encouraged.

H. Verbal Tricks

But, it might be objected, I have misconceived the concept of *rule* as it is used in IRAC and "the rule of the case." Rules can change from case to case. In the important cases, the ones that make it into casebooks, the prior rule always gets modified or completely replaced; that is what makes such cases important. This, I have heard it said, is one of the more difficult points to convey to students. They tend to think that because *such-and-such* was the rule, it must control *this* decision; but no, it can be modified.¹²⁹ All of my arguments above, like these students, have missed this point.

In section two, above, I sketched the perimeters of the common usage of rule. The idea was to avoid a merely verbal dispute, but without being dogmatic. If "rule" can mean whatever the IRAC proponent chooses, then there is no discussion. And if "rule" can mean something quite unlike what in everyday usage we take it to mean, then IRAC might be saved, but the students will be deceived, defrauded even.

A rule that can change from case to case is not a rule of law. Lon Fuller's good King Rex's seventh way to fail to make law (he was a codifier) was to change the code at every change in social condi-

129. "Holding"? I think those wedded to finding the "holding" of a case mean some verbal formula of rather low level of generality, perhaps substituting common nouns, like "defendant" and "taking," for the proper names and actions, like "Eleanor Rigby" and "theft of rice."

tions.¹³⁰ Recall the argument from section two: If the content of a rule could change at any time then the governed cannot rely on it to plan their actions or settle their disputes. Statutes cannot be changed without the proper ritual and notice to the governed. No such mechanism is available to the common law judge; her decisions are about facts that occurred well in the past. Thus the students' pre-law, common place understanding of the word "rule" is correct: A rule cannot change from case to case and still be a rule. No wonder it is hard to convince them of the contrary.

But of course the teacher of the IRAC method seldom has to deal with these arguments. They occur at separate times, and in separate courses. IRAC can be explained and defended to unsuspecting first year students by stipulating the meaning of the "rule" of its "**R**" as being of the variable kind. It is a straightforward example of the stock rhetorical ploy mentioned in section two. If all one wants is to save a thesis in a particular forum, it will often work. But if one is to convey understanding of the phenomena in question, it won't do at all.

5. WHY IS IRAC SO POPULAR?

Why do so many sell such a bill of goods to unsuspecting first year law students?

A. *Security?*

Students of law in their first year suffer desperate intellectual insecurities. Many report that their introduction to law is like learning a new language, but all the while being required to answer questions in it. One hears even from the brightest that they do not know what is going on, that they are struggling through a terrain quite foreign to them with maps whose signs and symbols are in a language equally foreign. They commonly believe that the teacher is "hiding the ball," that there are answers, and that they are being gratuitously tormented with their own ignorance when grilled on some fact pattern. This is all familiar, you've heard it all before, right?

Reasons rooted in society exogenous to the law books make for uncertainty. The student is as authoritative as the professor? ("Give me a break!" you can hear the anxious students mutter.) Justice Scalia

130. The citizenry protested in a pamphlet "carrying scurrilous cartoons of the king and a leading article with the title: 'A law that changes every day is worse than no law at all.'" LON L. FULLER, *THE MORALITY OF LAW* 37 (1964).

says it “explains why first-year law school is so exhilarating: because it consists of playing the common-law judge, which in turn consists of playing king How exiting!”¹³¹ My impression is rather that it creates rampant insecurity, sending students scurrying for the shelter of black letter study guides. How many times does one hear a student say “So you say that . . .,” wanting to confirm what she’s written down as the real thing? Finding the source of common law’s reason in society is doubly burdensome: first one has to identify the relevant values; second one has to see how those values support or undermine a proposed decision. It is a heavy trip to lay on a new student.

Compare rules. Rules are secure. You can even learn them off by heart and recite them back. A rule has authority; it is reliable; it saves one the responsibility of thinking, of justifying, of supporting some reasoned priorities. A rule, as we have seen, stands in for reasons, preempts thought and the risk and responsibility associated with it. IRAC provides just the straw for a floundering I-L to clutch. It may not be easy to spot the issue, but once you do, you can recite the rule and apply it to yield a decision, an authoritative decision, justified because it is under the rule. What a substitute for understanding!

It would be so nice if only it would work. But it won’t; too many changes, especially in case-books, spanning, as they do, centuries within a sub-section. So we have to introduce the notion of changeable rules, rules that cannot be relied on because the next case may abandon them in favor of the minority or the new or the California or even the Restatement position. What really count are the reasons supporting a rule. Why keep calling them “rules”? At its best it is verbal sleight of hand, at worst patronizing delusion.

B. Perhaps it is Effective to Convey Substance

How then could a teacher in good conscience pass off IRAC as a workable model? It isn’t even an approximation. Remember in junior high school chemistry when you learned that an acid plus an alkali yields a salt plus water, and the whole thing gets a bit warmer? There was somebody with the wit to ask why it gets warmer. We were told “It’s the latent heat of fusion.” What patronizing bilge water! That’s merely big words for “It gets warmer.” But we swallowed it and regurgitated it on exams! Is that all that is going on with IRAC? An easy and patronizing way for a teacher to duck hard questions?

131. ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 7 (1997).

I don't think so. There are any number of serious scholars who have believed, and some who have argued that there are rules in cases. There are even people who teach the Restatements as though they were statutes; whether from an inability or unwillingness to come to grips with the common law, I don't know, but they do it and quite possibly it is effective in conveying substance to students. In the end few students seem to be taken in methodologically. Somehow most come out of the three years of law school with a reasonable grip on what it is to distinguish and reconcile cases, and what counts as a theory for such purposes.

Could it be that IRAC allows a teacher to suspend serious questions about the nature of reasoning in law in order to get on with the substance of his subject area? Surely there is enough to do for both teacher and students in a torts or contracts class without having also to do legal reasoning. If there doesn't seem to be much harm done in the end – if, that is, the students do seem to graduate without the illusion of rules in cases – why not duck the methodological jurisprudence?

This last would seem to be a reasonable answer, if a bit too speculative. Empirically it is unsound, because it is primarily in introductory legal reasoning and research and writing classes that we find IRAC, not in substantive courses. But this and the insecurity hypothesis of the previous subsection are all that I can come up with.

VI. CONCLUSION

I suppose I might be accused of waging a merely verbal war: I want to stiffen up the definition of "rule" so as to preclude the "**R**" of IRAC. But if that is correct, just think what sort of rule that "**R**" must stand for. It will not have the authority, or the power, of the state behind it;¹³² it will be a rule one must obey without notice of what it requires,¹³³ and one that can operate retroactively;¹³⁴ it will be a rule that does not have a stable formulation, one which is subject to change at any moment;¹³⁵ if you can discover the relevant rule in advance of action, a judge may change it if you go to the mats;¹³⁶ and it will be a rule that may have a contradictory first cousin, consistency not being

132. See text *supra* at § 3A.

133. See text *supra* at § 3B.

134. See *id.*

135. See text *supra* at § 3C.

136. See text *supra* at § 3A, C.

especially dear to its heart.¹³⁷ If IRAC's **R**s can bear all that and still be called rules, so be it. But could they be rules of law?

The great twentieth century jurisprude Lon L. Fuller summarized his story of good King Rex and the eight-fold path to failure in law making:

The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only itself cannot guide action, but undercuts the integrity of rules prospective in effect, since it puts them under threat of retroactive change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.¹³⁸

The list is disjunctive: failing any one is failing to make law. The "rule" that would fit the "**R**" of IRAC would also fit (2),¹³⁹ (3),¹⁴⁰ (5)¹⁴¹, (7),¹⁴² and (8).¹⁴³ Five failures out of eight when any one would do is a pretty bad score. My thesis is that these failures in and of themselves make such "rules" also violate (1), the "failure to achieve rules at all."¹⁴⁴ The absence of authority behind the verbal formulations called "rules" in IRAC makes that failure complete.¹⁴⁵

But suppose I concede that IRAC's "rules" are indeed rules. Could they be rules of law? Fuller at least concludes that one ought not have to obey them:

137. See text *supra* at § 3D.

138. FULLER, *supra* note 130.

139. *Id.* at 39, 49-51.

140. *Id.* at 39, 51-62.

141. *Id.* at 39, 65-70.

142. *Id.* at 39, 78-81.

143. *Id.* at 39, 81-91.

144. *Id.* at 39.

145. That leaves IRAC's "rules" with a chance at beating only Fuller's failures (4) and (6): "(4) a failure to make rules understandable; [and] . . . (6) rules that require conduct beyond the powers of the affected party." FULLER, *supra* note 130, at 39. It will survive (4) because any formulation that is not understandable can be changed ad hoc.

Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that . . . is kept secret from him, or that came into existence only after he had acted, . . . or was contradicted by another rule of the same system, . . . or changed every minute.¹⁴⁶

Few would disagree.

So if the "**R**" in IRAC stands for "rule" then it is a pretty unruly kind of rule for which it stands. Not the sort that I should like to have to follow; certainly not the sort that I came to this great land to live by. And certainly not the sort to allay the insecurities that cause such agitation in the I-L breast.

One might think of common law as like a path down a hillside. It follows the contours of the land, sometimes with easy stretches, sometimes steep, even dangerous, sometimes gentle and easy, sometimes rough and difficult, requiring careful attention. There will probably be some well-trodden parts, and even some flats where people regularly stop for a breather or to admire the view. Statutory law is like a set of steps cemented into that hillside. It has clearly defined treads, flat to take one's foot, with even risers. It may be steep in parts, but it has a hand rail for added security, and one is well advised to use it if in a hurry. It is commonplace among architects: steps are secure, slopes are not. So it is with statutory law and common law. The path down the hill follows the nuances of nature, as subtly as need be; so too the common law reflects society and its values, that "fountain of justice," but it is often uncertain, and one must take care – and responsibility — to establish a good footing. Statutes, like steps, impose a measure of stability on unruly nature; they may be secure, even to those of nervous step, but they ignore much of the variability and richness of the natural topology. Common law can be as fact sensitive as a situation calls for; statutes perforce lump facts into classes, and choose among them which is to count. That is why Justice Scalia wrote, "[b]ut the whole point of rulemaking (or of statutory law as opposed to case-by-case common law development) is to incur a small possibility of inaccuracy in exchange for a large increase in efficiency and predictability."¹⁴⁷

Those who would impose IRAC on the common law, who would force cases into rules, would abandon the subtlety, wisdom, and resilience of the common law in favor of security. They would walk the hillsides only if they could find stairs; their rules would sacrifice justice

146. *Id.*

147. *Ass'n of Data Processing Serv. Org., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 689 (D.C. Cir. 1984) (Scalia, C.J.).

for certainty. But, as I have argued, that certainty is illusory. It would be a stairway of constantly varying treads and risers, a stairway nobody could traverse with confidence.

If not “rule”, then for what should the “R” in “IRAC” stand? I think “hypothesis” is the best choice. As Lord Goff put it, “common lawyers worship at the shrine of the working hypothesis.”¹⁴⁸ That would make it “IHAC”. That’s nice: it’s homophonic with “I hack,” which is often how I feel when I’m working in a common law field, as for example preparing a torts class. I hack around among the cases like a bad golfer hacks around in the rough. Just as she may seldom get a clear shot at the pin, I but seldom am able to draw a clear or precise bead on my subject. But I don’t mind that. Uncertainty¹⁴⁹ makes not only for interest,¹⁵⁰ but for opportunity – not merely opportunity for one’s client: opportunity for progress, improvement, justice!

Perhaps that is showing my age: IHAC is also eponymous with what the adventurous do on computers. That too is not a bad metaphor for common law research. Hackers take what scattered scraps they can get and with persistence and technique find their way to goals they treasure. The pots of gold sought by both computer hacker and common lawyer are informational and variable. What is the computer hacker’s grail? Whatever he wants it to be at that moment. And the common lawyers? Whatever his client of the moment wants it to be. Building on fragmentary and limited information to reach a successful goal, itself also information: that roughly characterizes both computer and common law hacker.

Overall though, wouldn’t we all be better off without a pretense to formulaic validity? Why put on blinkers when looking around is so much more interesting, and accurate?

148. Lord Goff of Chieveley, *The Future of the Common Law*, 46 INT’L & COMP. L.Q. 745, 752 (1997).

149. “Under-determination” is a more accurate term.

150. In this sentiment I have good company; Dante wrote “Che non men che saper dubiar m’agrada.” INFERNO, XI, at 93 (“It pleases me as much to doubt as to know.”).