Doctrinal Reasoning as a Disruptive Practice

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ABSTRACT

Legal doctrine is generally thought to contribute to legal decision-making only to the extent it determines substantive results. Yet in many cases, the available authorities are indeterminate. I propose a different model for how doctrinal reasoning might contribute to judicial decisions. Drawing on performance theory and psychological studies of readers, I argue that judges' engagement with formal legal doctrine might have self-disrupting effects like those performers experience when they adopt uncharacteristic behaviors. Such disruptive effects would not explain how judges ultimately select, or should select, legal results. But they might help legal decision makers to set aside subjective biases.

> *The characteristic modes of legal reasoning are . . . odd, and odd in a special way. And this special oddness is that every one of the dominant characteristics of legal reasoning and legal argument can be seen as a route toward reaching a decision* other than *the best all-things-considered decision for the matter at hand.*
>
> —Schauer (2009, 7)

I. INTRODUCTION

It is generally assumed that legal doctrine matters only to the extent that it provides answers to legal questions or at least narrows the range of legal results. But the idea that preexisting rules and decisions can objectively limit legal outcomes runs headlong into the equally well-accepted understanding that legal reasoning is an interpretive practice in which doctrinal authorities can be used to ground contradictory conclusions. Indeed, the ability to use available legal authorities to produce as many different valid outcomes as there are clients willing to pay has long been recognized as the paradigmatic legal skill. There is disagreement over the extent and nature of doctrinal indeterminacy. But virtually everyone acknowledges that at least some of the time in at least some judicial decisions

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regarded as important, formal doctrinal reasoning cannot provide substantive answers (Cahn 1952, 856; Greenawalt 1990, 784–85; Tushnet 2005, 108; Schauer 2009; Ware 2013). Yet in most of these decisions, judges continue to reason doctrinally or at least to act as if formal doctrinal reasoning were a significant part of their decision-making process (Allen 2012).

In legal practice and legal education, a variety of narratives have been mobilized, implicitly and explicitly, to justify judges' continued doctrinal practice. But none of these accounts plausibly explains why judges continue to reason doctrinally when doctrine is indeterminate. They either remain explicitly wedded to the idea that doctrinal reasoning directs substantive legal results, or they fail to offer any alternative explanation for how working with doctrine contributes to the rule of law.

In contrast to the current muddled defense, the legal realists of the early 20th century simply assumed that if doctrinal reasoning was not directing outcomes, it was either fraudulent or beside the point (Green 1928; Frank 1930; Cohen 1935). Following the realists, until the 1990s most empirical legal studies treated doctrine as uninteresting or ineffective (Baum 2010, 4–5) and produced a "mountain of evidence" (Klein 2017) that judges' political and cultural views affect their decisions (Segal and Cover 1989; Songer and Davis 1990; Segal and Spaeth 1993, 2002; George 1998; Sunstein et al. 2006). A recent surge of research, however, aims to understand whether "law matters" in judicial outcomes (Benesh and Reddick 2002; Kim 2007; Gilbert 2011; Epstein and Knight 2013). The new work has produced mixed results. In some cases, experimental outcomes track judges' predictable subjective biases (Wistrich, Rachlinski, and Guthrie 2014; Spamann and Klöhn 2016). Others suggest that judges' engagement with legal authority may reduce the influence of cognitive and political biases (Guthrie, Rachlinski, and Wistrich 2007; Kahan et al. 2016). Most of these studies, however, assume that to be effective, doctrine must provide substantive direction. Thus, mainstream defenders, realist critics, and behavioral researchers generally overlook the possibility that doctrine could contribute to legal results in some way other than by providing substantive direction. I want to explore this possibility.

Rather than as a source of substantive answers or an ideological smokescreen, I consider doctrinal reasoning as a cultural practice that might affect the minds of its practitioners. My hypothesis is that, without dictating substance, doctrinal reasoning might have some useful work to do as a practice with psychological effects that shifts judges away from their usual subjective outlooks. If so, doctrinal reasoners might reach results that are not objectively limited, but those results could still be said to meet the basic rule-of-law criterion that they were produced by looking outside the decision maker's own subjective will (Carter and Burke 2007; Bybee 2011).

In virtually all conceptions, legal decision-making requires a turn toward some external, recognized authority (a.k.a. "the law"). A judge is "sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land" (Blackstone 1765, 69). Classically, any distancing from one's ordinary outlook that oc-

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curs through legal reasoning is understood to be a by-product of the substantive direction of doctrinal sources. I suggest reframing the crucial doctrinal turn to make self-distancing primary. In the framework I propose, doctrinal reasoning could "matter" even when doctrine does not identify objectively correct conclusions, as a practice through which a decision maker turns away from her usual subjective point of view. In one sense, this is such a minimal account of doctrinal work that it might seem obvious or trivial. After all, we may disagree about exactly what counts as authoritative "law" and how to go about applying it to a given issue, but surely we can all agree that if I am a judge ruling in a legal case, I am being asked to do something other than just decide what I think is the right result. Nevertheless, as obvious as the point might seem, I propose that exploring how doctrinal reasoning distances its practitioners from themselves might help us see something new about the way doctrinal authorities operate in legal decision-making.

The basic idea is to think of doctrinal reasoning as a practice through which the reasoner changes something about herself. Performance theory is useful for developing this conception because it considers the significance and the mechanics of the turn away from ordinary subjective perspectives that is an avowed goal of both theatrical performance and legal decision-making (Brecht 1964; Schechner 1986, 35–41). I suggest we might think about doctrinal reasoning as something like what actors do when they prepare to play characters who are understood to be different from themselves. After all, both judges and theatrical performers make deliberate moves in order to change their ordinary ways of reacting to the world.

Comparing judges to actors might seem far-fetched. Apart from the public nature of court proceedings, legal reasoning looks very unlike theater. Among other things, doctrinal reasoning seems to lack the overtly physical, embodied quality of actors' work. Moreover, to the extent an actor's outlook changes in the process of characterization, it moves toward another particular subjective point of view. In contrast, legal reasoning is classically regarded as moving away from subjectivity toward an objective mode of thinking that proceeds from rules and abstractions and eschews flesh-and-blood perspectives. As one of my colleagues commented, "One is innately personalized and the other assumes the absence of actual people." Of course, empirical studies of judicial behavior have long considered what actual people do to make legal decisions. But with few exceptions (Guthrie et al. 2007), those studies have assumed that any effects of doctrinal reasoning on judges' decision-making must be substantive.

By comparing judges' doctrinal reasoning with actors' rehearsal techniques, I mean to highlight the potential importance of judges' engagement with doctrinal forms. To play a character, an actor adopts quirks of movement, posture, and speech that are literally formal—that is, they reshape (temporarily) the actor's voice and body. It turns out that such formal changes tend to alter one's subjective outlook. In doctrinal reasoning, judges engage with uncharacteristic verbal and textual forms. Doctrinal authorities—cases, statutes, constitutional provisions—come in notoriously strange and impenetrable language that is a recognizably legal genre. I propose to consider judges' reading, writing, thinking, and

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speaking in these unusual forms as a kind of character work, a performance practice undertaken to shift judges' ordinary points of view in order to satisfy the rule-of-law requirement that they look outside themselves for legal outcomes.

Considering the psychological impact of doctrinal reasoning on decision makers leads to other questions. What might be the social impact of doctrinal reasoning as a formal practice? After all, this is a practice that takes place as part of a public ritual. Of course, judicial review has long been considered a crucial feature of American politics. And the interaction of courts with other political institutions is much discussed. But I am asking specifically about the importance (if any) of the fact that judges are understood to think, speak, and write in particular doctrinal forms. It seems worth considering the social-psychological effects of subjecting familiar policies and practices to public confirmation or renunciation communicated and justified in formal doctrinal terms.

There is an urgent social policy reason for considering what the practice of doctrinal reasoning contributes to legal decision-making. While we remain ostensibly committed to the idea that legal doctrine plays an important role in generating legal outcomes, those outcomes are increasingly reached through informal, nondoctrinal procedures. The well-documented decline of both civil and criminal trials and the rise of alternative dispute resolution and plea bargaining mean that more and more legal disputes are decided with little if any formal doctrinal reasoning (Galanter 2006). In order to understand fully what is lost when informal processes replace adjudication, we need to understand whether and how the formal practice of doctrinal reasoning contributes to legal process.

II. THE PROBLEM OF DOCTRINE

The indeterminacy of legal doctrine is not news. Since the realist critique it has been rare for any lawyer or legal scholar to deny that subjective factors play some part in legal outcomes. For that matter, Tamanaha (2010, 27–43) has pointed out that skeptical views of doctrinal determinacy can be found long before the realist heyday, in writings by lawyers and judges from the 18th and 19th centuries. Nor is it only legal professionals who recognize law's indeterminacy. As Mrs. Dollop in George Eliot's *Middlemarch* observes, "It's well known there's always two sides, if no more; else who'd go to law, I should like to know?" (Eliot 1872/1985, 888).

If we have long acknowledged that doctrine does not and cannot produce substantive legal answers in all the cases that employ doctrinal reasoning, but that tension has not disrupted our legal system, why worry? The problem is that the claim to being governed by the rule of law entails a claim that legal decisions are based on something other than a decision maker's own subjective choices, however well intentioned and wise those choices might be. As a conceptual matter, it seems we do not have the rule of law if doctrine does not point to substantive answers—unless it does something else that could be described as helping judges make decisions in some way other than their ordinary approach.

There is a normative problem bound up in the conceptual issue. The primary reason for adopting a "rule of law, not a rule of men" is, as Dworkin (2006, 18) puts it, that de-

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cisions "deploying the state's monopoly of coercive power . . . should be taken only as required or permitted by true propositions of law." A court's legal decisions are recognized as uniquely significant because they will be enforced, if necessary, by state violence. If preexisting legal authorities do not determine or at least contribute significantly to judges' decisions, then it is hard to see why those decisions justify enforcement. This is a problem, then, of basic legality. In addition, there are problems of integrity and transparency. If judges' decisions are not really driven by doctrinal analysis, but judges articulate their decisions in doctrinal terms, those explanations raise concerns about deception, including self-deception.

In theoretical discussions of legal decision-making today, one finds several different approaches to managing the clash between our ideal of legal outcomes generated by applying doctrinal authorities and our understanding that doctrine is often indeterminate. The most common approach, which I call "integrationist," attempts to rescue doctrinal efficacy by suggesting that doctrinal reasoning works in conjunction with reasoned policy evaluation to somehow narrow or direct the results. A second "fidelity approach" emphasizes the conscious attitudes and good faith of judicial decision makers. This perspective shifts the focus from doctrinal reasoning's capacity to objectively shape legal outcomes to the willingness of judges to subjugate their own preferences to the dictates of legal forms. Finally, a third, less common, model that I call the "legal art" approach analogizes doctrinal reasoning to the techniques of artists or craftsmen. In my view, none of these approaches has so far produced a persuasive explanation of how indeterminate doctrine contributes to the rule of law.

A. Justifying Doctrine as a Substantive Guide: The Integrationist Approach

The view that legal reasoning combines, and should combine, both doctrinal reasoning and subjective policy evaluation seems to be the default position of the legal academy these days (Tamanaha 2006, 132; Posner 2008, 4, 9, 80, 376; Geyh 2011). This integrationist model acknowledges that in many cases doctrine alone cannot identify correct legal outcomes but insists that doctrinal reasoning is still a significant causal factor in legal decision-making. Exactly how doctrine and other kinds of reasoning combine, however, is rarely fleshed out, and when the combination is described, accounts vary.

Integrationists sometimes assert that only some cases require policy analysis, while many legal questions can be answered by doctrine alone. Schauer (2009, 137) observes that adjudicated controversies tend to be "cases in which both sides think that they have a colorable enough legal argument that is worth spending time and money to go to court." He argues, however, that legal rules still play an important social role by resolving everyday questions (do I really have to stop at that red light?) and only leave open the conflicts that make it to formal adjudication. In other versions of the integrationist narrative, however, doctrine seems to work to a limited extent in all or most adjudicated cases. In this view, even in complex, controversial cases, doctrine narrows the field of available results or focuses decision makers on certain objectively relevant aspects of conflicts while

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still leaving room for policy choices (Marshall 2011). So, for instance, Kozinski (1993, 993–94) writes, "Under our law judges do in fact have considerable discretion in certain of their decisions: making findings of fact, interpreting language in the Constitution, statutes, and regulations. . . . The larger reality, however, is that judges exercise their powers subject to very significant constraints."

Integrationist accounts sometimes seem at odds with their authors' overarching legal theories. Thus, Schauer (2009), probably the foremost proponent today of legal reasoning as a rule-bound system, seems comfortable with the view that few, if any, adjudicated cases are actually decided by officially recognized rules. Meanwhile, Posner, an avowed legal pragmatist who maintains that judges should make policy outcomes the linchpin of decision-making, asserts that "legalism," that is, doctrinal reasoning, "drives most judicial decisions, though generally they are the less important ones for the development of legal doctrine or the impact on society" (2008, 8). Note, however, that despite the dramatic (and counterintuitive) differences in their accounts of doctrine's role, both Schauer and Posner present doctrinal reasoning as in some way central to legal reasoning. Posner maintains that doctrine plays a routine role in most adjudication, while Schauer (2009, 137) declares that, although doctrine decides few if any adjudicated cases, outside the courtroom "law abounds with . . . straightforward applications." To be sure, Schauer (2013) has pointed out that in some unknown domain of legal controversies, nondoctrinal factors may in fact be outcome determinative. So, for instance, certain parties may be likely to win a particular type of case in a particular jurisdiction for reasons that have nothing to do with doctrine. What is more, he acknowledges that such "dislocated determinacy" could be quite extensive (769). But Schauer never questions that doctrine could determine results for many or most common legal questions, absent such distorting forces.

This confidence that in some field doctrinal reasoning routinely produces, or is at least capable of producing, substantively determinant answers is important, because it creates a presumption of normality. If doctrine is the normal way to resolve legal questions, it seems less curious that judges continue to reason doctrinally and to write decisions in doctrinal terms even in cases in which doctrine fails to determine outcomes. So, in these accounts, doctrinal reasoning retains its paradigmatic role, even if (according to Schauer) it is not how judges decide most cases or (according to Posner) it is not how most important cases should be resolved. But neither Schauer nor Posner really justifies the practice of doctrinal reasoning when the available legal doctrine is not substantively determinate.

Posner is the rare judge willing to declare outright that a legal outcome is based purely on judicial policy choices rather than on the interpretation of preexisting law. For instance, in an en banc concurrence shortly before his retirement, Posner advocated straightforwardly asserting that the court was "imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted" (*Hively v. Ivy Tech Community College*, 853 F. 3d 339, 357 [7th Cir. 2017]; *en banc*, J. Posner concurring). Nevertheless, over the past decade, Posner has given considerable attention

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to describing how judges go about deciding cases using both doctrine and policy. Those descriptions are not always consistent.

Sometimes Posner suggests that policy is considered only when doctrinal reasoning offers no direction, when doctrinal indeterminacy "create[s] an open area in which judges have decisional discretion—a blank slate on which to inscribe their decisions" (2008, 9). That account avoids the incommensurability of policy and doctrine as decision-making methods but raises the gaping original questions about what role, if any, indeterminate doctrine continues to play and what makes a nondoctrinal decision authoritatively legal. Perhaps for that reason, Posner sometimes suggests that doctrine and policy can combine in legal decision-making. He writes of policy being used to "close the deal," and he contends that while some judges consider policy only after they have tried and failed to decide the case with doctrine, most "blend the two inquiries, the legalist and the legislative, rather than addressing them in sequence" (28, 84). The problem here is that an indeterminate doctrinal result is not unfinished in a way that can be rounded out or revised with policy considerations—at least not in winner-take-all adjudications. Say that a judge using doctrinal reasoning arrives at a decision she views as underdetermined. If the judge then goes on to consider policy, only one of two things can happen: either the policy considerations confirm the original underdetermined doctrinal outcome, or they change it. Of course, the rationale can be revised and supplemented, but the ruling itself—judgment for plaintiff or defendant—either stands or falls.

Schauer's integrationist account avoids the problematic first-doctrine-then-policy model by reversing it. He accepts the realist view that judges initially choose legal outcomes based on social policy preferences and then turn to doctrine to justify those choices (2009, 131). As Schauer points out, doctrine could still provide significant substantive guidance after policy analysis, if doctrinal reasoning could confirm or reject the legal correctness of the initial policy-driven result. But of course this constraining role requires doctrine to ratify one policy-driven outcome over another, and this capacity to objectively identify a doctrinally correct legal result is precisely what observers, including Schauer, concede is absent in many if not most adjudicated cases.

B. Nonsubstantive Accounts of Doctrine's Role

Two other less common approaches suggest roles for judges' doctrinal reasoning not necessarily rooted in a capacity to identify objectively correct outcomes. The trouble is that after abandoning substantive determinacy as the doctrinal raison d'être, they fail to explain what indeterminate doctrinal reasoning actually contributes to adjudicated outcomes.

1. The Judicial Fidelity Approach

Some analyses of judicial decision-making suggest that doctrinal reasoning's contribution to the rule of law depends primarily on the sincerity with which legal decision makers attempt to apply doctrine. This fidelity approach distinguishes strategic uses of doctrine to

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rationalize personally preferable outcomes from sincere efforts to reason doctrinally to a legal outcome. The core concern is a judge's faithful effort to use legal rules to reach correct legal outcomes. But it remains unclear how the sincere application of indeterminate doctrine can produce legality.

Tamanaha is a leading proponent of the fidelity approach. For Tamanaha (2006, 242), "being consciously rule-bound is the essence of a system of the rule of law." He acknowledges that "judges' background views subconsciously influence their interpretation of the law" (242). Nevertheless, according to Tamanaha, judges who engage in doctrinal reasoning are not "deluded, naive, or lying when they claim that their decisions are determined by the law" (242). He reasons that, because legal decision-making "is a human practice," it is necessarily fallible (242). Nevertheless, from his fidelity perspective, conscious commitment can carve out a recognizable domain for law: "As long as individual justices are genuinely oriented in their decision making to produce the correct legal answer, as long as their decisions must be justified in terms of conventionally acceptable legal reasoning and authority, this is legal decision making with political influences more so than political decision making with legal influences" (Tamanaha 2010, 198).

The problem is that there is a gap between a good-faith choice to follow doctrine and doctrinal reasoning's capacity to produce results that satisfy the rule of law. So long as doctrine's only role is substantive, it is hard to see how even the most sincere efforts to follow indeterminate doctrine can lead to outcomes that justify enforcement. As Manderson (2012, 481) observes, "The inability of rules to entirely constrain the decision of the judge is not a *choice*." If legality means being substantively directed by preexisting rules, but preexisting legal rules are incapable of determinate direction, then no amount of good-faith judicial effort will do the trick. Without a theory of how indeterminate doctrine could help a legal decision maker look outside herself for a decision, the fidelity approach fails to explain how efforts to reason doctrinally can produce legality.

2. *Practicing Legal Art*

From time to time, judging is presented as a kind of art, and doctrinal reasoning as a defining technique of that art. The difficulty here is explaining why practicing a technique remains important when it does not seem to shape the resulting artistic product.

The legal art approach emphasizes that judging is a cultural practice with a shared history, methods, and values (Frank 1947; Levinson and Balkin 1991; Posner 1999; Balkin 2013; Sammons 2015). As Cohen (1935, 845) puts it, "Judges are craftsmen, with aesthetic ideals, concerned with the aesthetic judgments that the bar and the law schools will pass upon their awkward or skillful, harmonious or unharmonious, anomalous or satisfying actions and theories." In this view, the value of a judicial decision lies partly in the way the result was reached and is presented. According to Judge Frank Coffin (1980, 196), "While we take pride in whatever contribution we may be favored to make" to substantive law, "we take equal pride in the way in which the contribution is crafted." But why should

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a judge's doctrinal craft matter if that craft cannot identify the correct, or more correct, legal outcome? Legal art accounts either fail to explain how practicing indeterminate doctrinal reasoning matters or harken back eventually to substantive determinacy as the underlying rationale for doctrinal craft.

In 1960, Llewellyn argued that good appellate decision-making was a matter of acquired legal cultural knowledge. Llewellyn (1960) described a "situation sense" with which experienced judges gauged the legal relevance of different aspects of the real-life conflicts they adjudicated and a sense of "fitness and flavor" about how to apply "formally available" doctrinal authorities to those situations. For Llewellyn, such judicial "horse sense" is not "common knowledge" but rather "the balanced shrewdness of the expert in art," in particular an artist's feel for his medium (121). Extending the metaphor, he compares a great judge's use of precedent to a sculptor, "whose chisel woke in wood the beauty asleep in it" (222). Accomplished judicial craftsmen know the characteristic limits and potential of legal material. They aim to "move in accordance with the material as well as within it, to carve with the grain . . . to reveal the latent rather than to impose new form" (222). The comparison gets across the common-law idea that judges are normatively bound to work within relevant precedents even as they extend them creatively to decide new cases. But comparing doctrinal reasoning to wood carving does little to explain how working with indeterminate precedential authorities could satisfy the rule-of-law requirement that judges look outside themselves for legal outcomes. If existing law is indeterminate, how does a judge decide which outcome runs "with the grain" of precedent?

Perhaps Llewellyn intended to endorse a version of the integrationist view that doctrine contributes to legal decision-making by directing substantive results, at least in some cases. He includes "Legal Doctrine" and "Known Doctrinal Techniques" among the "steadying factors" that contribute to making legal outcomes predictable (Llewellyn 1960, 16–18). But predictability and determinacy are different (Rubin and Feeley 1996; Allen 2015). At its best, predictability relies on consensus and the consistency of previous decisions. There is no certainty that the predictable result reflects an objectively correct legal outcome. And Llewellyn (1960, 21) himself acknowledges that "the authorities taken alone" will leave the outcome open "in any case at all decently handled below and also worth appealing." Others have suggested that Llewellyn meant that law's predictability was the result of common "psycho-social facts about judges—their professionalization experiences, their backgrounds, etc." (Leiter 1997, 284). But it is not clear why judges' shared professional or cultural perspective would confer legality on their decisions. Llewellyn (1960, 22–23) suggests, tantalizingly, that there is something about judges' engagement with doctrine—the "known and felt techniques for use of the authoritative materials"—that can define a space of "leeways" within which good judges' decisions are predictably related to preexisting legal authorities, even if that relationship is underdetermined. But how that relationship comes about remains mysterious.

More recently, Posner has compared doctrinal reasoning's role in judicial decision-making with drafting's role as a technique of visual art. "Just as some people think an artist

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must prove he is a competent draftsman before he can be taken seriously as an abstract artist," Posner (1999, 262) observes, a judge may deploy doctrinal reasoning to "prove—anew in every case—that he is a competent legal reasoner before he should be taken seriously as a pragmatic judge." The difficulty is that drafting's place in visual art is every bit as contested as doctrine's place in legal decision-making. While some scholars argue that observational drawing develops "visual thinking" and "the ability to communicate ideas visually" (Fava 2011, 131, 132), others reject the idea that drafting skills "are in any way required to be taken seriously as an abstract artist" (Lieu 2013).

So far, then, the fidelity and legal art accounts have failed to provide an explanation of how judges' work with indeterminate doctrine could satisfy the rule of law. Nevertheless, these theories take a crucial conceptual step in that they shift the focus away from doctrinal reasoning's capacity to identify legally correct substantive outcomes and offer another possible locus of doctrinal reasoning's effect: judges themselves.

III. DOCTRINAL REASONING AS A SELF-DISRUPTIVE PRACTICE

I want to suggest a view of doctrinal reasoning that begins with the observation that judges' use of doctrine might affect decision makers without necessarily pointing to decisions. The idea is that reasoning doctrinally might have psychological effects that without substantive direction could distance the reasoner from her ordinary subjective outlook. If so, doctrine could contribute to legality—not by prescribing objectively correct substantive results but as a practice that disrupts judges' ordinary point of view. This would seem to satisfy, albeit in an unorthodox way, the criterion that legal decision-making entails something different from the exercise of decision makers' own best judgment. Moreover, in this scheme, the something different comes from decision makers' engaging with conventionally recognized sources of legal authority in conventionally recognized ways.

Like the legal art theory of judicial decision-making, this disruptive theory can be illuminated with a comparison to aesthetic practices, in this case, techniques actors use to move away from their habitual behavior patterns in order to play characters. Performers know that by adopting different vocal and physical patterns they can temporarily disrupt their habitual ways of engaging with the world around them and so develop the ability to behave, and feel, different from their ordinary selves (Allen 2001, 706; 2008, 821–25). As the performance artist Martha Wilson puts it, "You have to consciously put yourself in that body position in order to get into the mental state you want to be in" (Sion 2016). I propose that the practice of doctrinal reasoning might have a similarly disruptive effect on judges' ordinary outlook. Because doctrinal reasoning requires legal decision makers to adopt distinctive formal ways of reading, thinking, talking, and writing that are unlike their habitual modes, doctrinal reasoning might function something like the estranging choices performers make in order to play characters.

At first, judges' doctrinal reasoning might not seem anything like the embodied choices actors use to build characters. On reflection, however, doctrinal reasoning's unusual formal verbal and textual patterns require something extraordinary on a perceptual level.

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Moreover, recent psychological studies have produced evidence that a central activity of legal decision-making today—reading—elicits psychological changes that vary with different forms of text (Bal and Veltkamp 2013; Kidd and Castano 2013). If reading produces measurable cognitive and affective changes attributable to different literary forms, that suggests that reading, writing, and thinking in distinctive legal doctrinal forms may have significant psychological effects, unrelated to doctrine's ability to determine substantive legal outcomes.

Performers deliberately alter aspects of their habitual physical and vocal style in order to play characters who behave differently than the performers would under similar real-life circumstances. Likewise, formal doctrinal reasoning forces its practitioners to go through certain perceptual and behavioral steps to produce responses to legal conflicts that are different from their own usual decision-making process. Indeed, Schauer's (2009, 7) description of legal reasoning as finding "a route toward reaching a decision *other than*" what we would choose "if left to our own devices" could be used to describe what actors need to do in order to develop characters.

Of course, performing a character substitutes one subjective outlook for another, whereas legal reasoning is classically viewed as moving from subjective to objective rule-based modes of reasoning. This sort of rule-based objectivity, however, is exactly what a wealth of critical and empirical analysis has taught us is not in fact achievable by human decision makers—in law or anywhere else. Moreover, even if it sometimes makes sense to analyze legal reasoning as an abstract conceptual matter, taking a performance view reminds us that legal reasoning is always in fact an embodied activity. Perhaps that fact is not particularly salient for conceptual analysis, but it is crucial for considering the potential effects of the activity of legal reasoning on the individuals who practice it.

A. Doctrinal Reasoning as Character Work

The shift in emphasis toward embodied effects is a universal aspect of performance theory, for performance itself is always conceived as a production of bodies in time and space (Gedicks 2017). With the model of a performer in mind, we could see judges' turn away from their usual outlooks as meaningful because it alters judges' ordinary viewpoints, even if that turn is not toward an objectively correct conclusion. To see this, though, we have to shift our attention away from substantive results and focus instead on doctrinal reasoning as an activity, a practice with effects on the practitioner that might influence the result in ways other than by identifying a substantively correct outcome. Because reasoning doctrinally forces practitioners to go through certain prescribed motions—reading, writing, speaking, and thinking in formal doctrinal terms—it might cause changes in their way of seeing the world and reacting to it.

In performance, it is taken for granted that methods can be developed and practiced to alter the practitioner's ordinary subjective outlook. For actors playing characters onstage, reshaping the ordinary self is central. As the acting teacher Michael Chekhov (1991, 99) puts it, "The desire and the ability to transform oneself are the very heart of the actor's

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nature." By comparing judicial reasoning to actors' character work, I do not mean simply that judges play defined professional roles when they assume the bench. To be sure, individuals adopt roles at work that are distinct from their everyday or at-home selves (Goffman 1959). These professional roles are constituted and reflected in some sense as performance, including formal elements such as gestures, costumes, sets, and props—the doctor's white coat, the teacher's pointer, the soldier's posture, the CEO's corner office, the psychiatrist's standard queries and scripted silences. This observation applies to judges. As Rubin and Feeley (1996, 2012) observe, "Individuals reconstruct themselves, and more particularly their thought process, as members of the institution to which they belong." From this perspective, doctrinal reasoning is just one of many professional practices and structures that construct the judge's role: robes, wigs, gavels, benches, courtrooms, oaths, the litany of "all rise" and "so ordered" (Allen 2008).

There is certainly room to explore more generally the way role play and the various elements of a judge's performance of her judicial role might affect her decisions. I am after something more specific here, however, about the potential for psychological effects of the particular practice of speaking, reading, writing, and thinking in doctrinal terms. It is relatively easy to see judicial robes and courtroom ritual as performance. Doctrinal reasoning is far more central than robes to most lawyers' and judges' sense of what constitutes the judicial role, but doctrinal reasoning is usually figured as a disembodied, conceptual matter. Here, I mean to focus specifically on a comparison of the embodied practice of reading, writing, talking, and thinking in formal doctrinal terms and the actor's adoption of uncharacteristic postures, gestures, and accents.

Looking at doctrinal reasoning as an embodied behavior highlights the similarity between judges' adoption of the peculiar forms of legal doctrinal language and the physical and vocal changes actors adopt to temporarily disrupt their usual ways of thinking and behaving. It is practically impossible to calculate how a fully imagined character will act and react at every second of a theatrical or ritual performance. Instead, performers need to find some way to change their habitual behavior to produce uncharacteristic actions and reactions. One technique for accomplishing this change is to make a few deliberate, often very subtle changes in posture, movement, or speech. For instance, an actor might adopt a different way of sitting in a chair, take on an alien vocal accent, or change the way she holds her head or jaw. It turns out that such shifts have ripple effects that alter the way one perceives and responds to outside stimuli. So, adopting these alterations changes a performer's characteristic way of acting and reacting. The actor finds herself hearing and seeing things differently and thus behaving differently.

Like judges, character actors are typically viewed as working toward results externally determined by text and tradition. But actors' characters emerge not only from trying to imitate prescribed aspects of their dramatic personae but by changing their own usual habits in some way and then seeing what happens. Subtle, sometimes arbitrary, physical and vocal changes, when rigorously practiced, can produce a cascade of psychophysical effects that alter a performer's way of seeing and interacting with the world. Like actors building

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characters, judges, without choosing a goal, commit themselves to leaving their own ordinary perspectives behind and going where doctrinal practice takes them. I am suggesting that the practice of working with formal legal doctrine could work in a way similar to actors' physical and vocal shifts to produce changes in the way judges react to the world.

A key similarity between performers' character-building technique and the way I am suggesting doctrinal reasoning may work is indirection. Actors make deliberate controlled efforts to alter their usual way of going about things, but they experience the results as not entirely within their control. As Emigh (1996, 26) describes it, when a performer "is at the height of his powers and most 'in control' as an actor, he experiences his feelings and actions as though they are happening to someone else." Like the performers Emigh describes, a judge engaged in finding a doctrinal solution to a legal problem is " 'beyond himself'—not actively guiding the situation . . . , but, rather, caught up and even 'surprised' " by the results of his doctrinal practice (26). Usually we think of this as a matter of judges searching doctrine for substantive instructions. But I am suggesting that, like actors, judges who consciously abandon their ordinary modes of thought, speech, and writing and adopt rigorously formal modes of doctrinal reasoning may produce changes in the way they see things as a result of the shift to doctrinal forms.

One might object that actors' altered postures, gestures, and vocal choices are physical changes, and it is far from obvious that doctrinal reasoning involves any similarly embodied behavior. Indeed, we tend to think of legal reasoning as the opposite of physical action—reading, writing, and thinking instead of doing. We might wonder, then, whether the "mental" activity of reasoning could generate the type of psychological results produced by performers' embodied actions.

One response to this worry would be to note that the most common contemporary image of the rule of law employs an embodied alteration: the familiar icon of blind justice. But that is a metaphor, and the idea that I am introducing here of how doctrinal reasoning might affect judges is not a metaphor. I want to think about the real embodied practice of doctrinal reasoning and consider whether that process might have psychological effects. To do this, we have to consider what judges actually do when they reason doctrinally, which does not typically involve tying blindfolds over their eyes. There are, however, real, albeit subtle, physical and perceptual changes that result from the forms of language the judges read, write, and speak when reasoning doctrinally.

The comparison with actors' work depends on seeing doctrinal reasoning as an embodied practice. As Gedicks points (2017, 12) out, "The bodily activity that constitutes performance can only take place at a particular time and in a particular space." In contrast, the prevailing conceptual approach abstracts doctrinal reasoning out of its embodied context. Some recent empirical research focuses on nondoctrinal physical and situational factors that influence judicial decision makers. The finding in one such study that judges were less likely to grant parole to petitioners who had the bad luck to appear shortly before lunch has been seen as a particularly amusing—or dispiriting—proof of the way judges' bodies interfere with the rule of law (Danziger, Levav, and Avnaim-Pesso 2011). But

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why should we assume that only nondoctrinal aspects of embodied decision-making, such as how long it has been since judges have eaten, produce psychological effects that influence outcomes? Perhaps the characteristic forms of traditional doctrinal practice also exert their influence on the bodies and minds of legal decision makers and through those effects influence outcomes.

Reading and writing have long been understood as embodied activities that elicit significant cognitive effects, which may vary with formal differences. As Ong (1986, 34) puts it, "All writing systems do not have the same psychic or even neuro-physiological structure or effects." The anatomical structure of the human brain is thought to be the same now as it was when cuneiform writing was invented in the fourth millennium BCE (Wolf 2008). But as different forms of writing have appeared and disappeared in various places and historical periods, those changing forms have influenced how people in different cultures see the world and their capacities for certain kinds of thought. Wolf (2008, 58) observes that while written language has not altered inherited human physiognomy, there are "significant effects of culture on the development of presumably innate cognitive processes." So, for example, the capacity of Greeks in the 8th century BCE to memorize extremely long passages of oral epic poetry is likely linked both to the absence of writing and to the formal qualities of the epics (Wolf 2008).

Like all performance techniques, doctrinal reasoning is not "free and easy" (Schechner 1986). Working with doctrinal legal forms requires a rigorous perceptual choreography that is physically challenging, even if the moves are subtle and unconsciously regulated. Reading doctrinal materials requires efforts of focus, at an optical as well as a cognitive level. How many law students have found themselves needing to adjust their eyeglasses prescription at the end of the first year? Indeed, the effort required to read dense texts is central to our cultural concept of legal practice, so much so that, for instance, an episode of the television comedy *Arrested Development* hinges on the running joke that an accused criminal's family and lawyer cannot advise him to accept or reject a plea deal because the document describing it is so long and turgid that no one can bear to read it.

B. Reading and Self-Disruption

A recent series of experiments on the psychological effects of reading different forms of literature provides support for the idea that reading and writing formal doctrinal text might elicit changes in the way judges see things. Much of this experimental work arises from a search for evidence that reading fiction increases readers' ability to understand and empathize with others. My point in bringing up these studies is not that reasoning doctrinally makes judges more empathic. What interests me is the observation that under some conditions, reading a particular form of text can induce predictable changes in the way a person views the world—not because of the content of the text but through the psychophysical effects of the reader's engagement with the textual form.

Reader studies have observed variable psychological effects correlated with different forms of text. In one series of experiments, after reading samples of literary fiction rather

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than popular fiction or serious nonfiction, participants performed better on standard tests of "theory of mind," demonstrating an increased ability to detect and understand other people's thoughts and feelings (Kidd and Castano 2013). Another study found that when readers are "transported," that is, when "all mental systems and capacities become focused on events occurring in the narrative," literary and journalistic texts with similar informational content had different psychological effects (Bal and Veltkamp 2013, 3). Highly transported fiction readers were more likely to report greater empathy, but when readers of newspaper articles were transported, their empathic skills tended to decrease.

Crucially, the psychological changes observed in readers are not understood to be the result of absorbing substantive information conveyed by the texts. As one article observes, "A striking feature of self-change through literature is that the effects are not direct, as occurs with persuasion" (Djikic and Oatley 2014, 498). For instance, the fiction readers whose scores on theory-of-mind tests improved read only a few paragraphs from works that varied widely in subject matter, so it was "unlikely that people learned much more about others by reading any of the short texts" (Kidd and Castano 2013, 379). Instead, the researchers attributed the psychological changes they observed to the form of the texts with which readers engaged. Literary fiction's "style" and "figurative expressions" can "involve the reader" in a way that "can temporarily destabilize the personality system" (Djikic and Oatley 2014, 500).

Reader studies help to bridge the gap between actors' obviously embodied behaviors and judges' cognitive engagement with legal doctrine, much of which entails reading. The fact that under some conditions reading different forms of text elicited observable psychological changes makes it easier to imagine that working with conventional doctrinal texts in the form of case law, statutes, and constitutional provisions could have comparable effects. The embodied practices of reading, thinking, talking, and writing in legal doctrinal forms might disrupt judges' ordinary subjective viewpoints, just as literary fiction is observed to "destabilize" readers' outlooks and actors' physical choices disrupt their habitual emotional responses.

C. Disruption, Fidelity, and Legal Art

Although this disruptive account of doctrinal reasoning is in some ways quite unlike our usual understanding of how doctrine works, it can be related to more familiar fidelity and legal art theories of legal decision-making. Like the fidelity approach, the disruptive account focuses on the attitudes and subjective experiences of judges as they put themselves to the practice of reasoning doctrinally. And both fidelity and disruptive approaches assume a deliberate, disciplined effort on the part of judges to engage with doctrinal materials. The difference is that the fidelity account takes the initial attitude with which a decision maker approaches doctrine as definitive of her doctrinal practice. The disruptive account focuses instead on the effects that ongoing practice might have on the reasoner. And while the fidelity approach conceives the defining judicial attitude as entirely a matter of conscious choice and willful effort, the disruptive account sees the effects of doctrinal

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practice as both conscious and unconscious, more like altered perception than being persuaded, a matter of cultivated openness to a transporting practice rather than of dutifully following directions.

The disruptive account also shares aspects of the legal art approach to doctrinal reasoning. In fact, one could see the ideas I have been developing here as an extension of the legal art account. Like Llewellyn's theory of situation sense, the disruptive account understands doctrinal reasoning's effects as a not entirely conscious response to doctrinal patterns (Kahan et al. 2016). And both accounts suggest that the effects of doctrinal reasoning may be experienced more as perceptual shifts than as deliberation. One difference, however, is the disruptive account's focus on immediate and temporary psychological effects.

Most important, legal art theories generally posit accumulated objective knowledge and skills, acquired from education and repeated engagement in legal practice, comparable to mastery in, for example, drawing or sculpting. Sometimes, as in Posner's (1999) comparison of doctrinal reasoning and drafting, the idea seems to be that like artists, judges prove their professional skill with certain signature techniques. Alternatively, legal art accounts sometimes stress a kind of intuitively accessed expert insight into objectively present aspects of the world (Llewellyn 1960; Posner 1999; Kahan et al. 2016). So, Llewellyn contends that just as a sculptor sees the patterns in the wood he carves at a level of acuity inaccessible to the untrained eye, a judge deploys expert intuitive knowledge of the nature of his doctrinal medium. These accounts, then, ultimately fall back on an assumed ability of doctrine to point to objectively preferable legal outcomes or at least to identify features of a given situation that are objectively legally relevant (Llewellyn 1960; Kahan et al. 2016).

The disruptive approach is different because it focuses on judges' interaction with the *form* of doctrine. The idea is that the practice of doctrinal reasoning itself may produce immediate, transformative—but perhaps temporary—psychological effects that are not correlated with any discernable objective content. It might be that, like accomplished actors or sculptors, experienced legal professionals develop a greater ability to access these effects through practice. But any such increased self-disruptive capacity would not be based on accumulated objective knowledge of doctrinal content or any increased ability to discern objective features of situations involved in legal conflicts that somehow correspond with doctrinal terms or categories. So, the disruptive account is compatible with indeterminate legal doctrine.

IV. TESTING THE DISRUPTIVE ACCOUNT

So far, the hypothesis that judges' use of formal doctrinal methods might disrupt their ordinary subjective outlooks is just that, a hypothesis. An obvious next step would be empirically testing the disruptive theory. One possible approach would adapt methods used in some recent experimental studies in which judges were asked to resolve hypothetical legal disputes. The disputes were designed to trigger widely recognized cognitive effects (e.g., hindsight bias), elicit sympathy or antipathy toward one of the parties, or interact

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with the ideological outlooks of the participants based on previous testing (Guthrie et al. 2007; Kahan et al. 2016; Spamann and Klöhn 2016). Researchers looked to see whether introducing suggestive nonprecedential authorities (Spamann and Klöhn 2016), asking judges for a legal ruling that would entail consideration of a familiar body of complex case law (Guthrie et al. 2007), or referring to a statutory text (Kahan et al. 2016) correlated with decisional results that deviated from the judges' predicted biases.

To test the disruptive effect of doctrinal reasoning, judges could be asked to resolve hypothetical legal conflicts with and without engaging in formal doctrinal analysis. Researchers would look to see whether engaging with indeterminate doctrine affected the decisional outcomes' correlation with participants' previously tested ideological biases or with widely recognized cognitive biases. Possible variations would use more or less complex bodies of authority, or different forms of authority (e.g., statutes or case law), or require more or less formal responses (e.g., written formal opinions or oral rulings), or give judges more or less time to work with doctrinal sources.

Another, simpler, experimental approach would be to run something like the reader studies using short excerpts of doctrinal materials and other texts. Participants would read sections of legal doctrinal texts and then take psychological tests, the results of which could be compared with those of subjects tested after reading texts from other genres such as literary fiction and journalism. Such an experiment would be farther from actual judicial practice, but it could show whether exposure to doctrinal legal texts correlates with measurable psychological effects comparable to the effects observed in studies involving literary fiction and nonfiction. It would also be interesting to see whether different groups' interaction with doctrine produced different effects, comparing the results for lawyers, judges, law students, and individuals with no formal legal training.

Alongside experimental approaches, it would be interesting to ask judges what they think of the disruptive account. From time to time judicial behavior studies have investigated how judges understand their own process through interviews. None of these studies report judges experiencing doctrinal reasoning as inducing character changes. But judges do report coming to legal outcomes that are personally distasteful. As one judge put it, "We'll sometimes get results we don't like at the gut level" (Klein 2002, 21). Indeed, it is common for judges to feel that they are enforcing "rules that they think unwise, or that are contrary to their personal predilections" (*Republican Party of Minnesota v. White*, 536 U.S. 765, 798 [2002]; J. Stevens dissenting). So, for example, one judge reflected, "In a recent case I was on two of us really hated the result but thought the statute clearly dictated it" (Klein 2002, 21). Judges' expressions of personal conflicts with doctrinally justified decisions sometimes become part of ongoing social and political debates. For instance, before eventually repudiating "the machinery of death," Justice Harry Blackmun for many years voted to uphold capital punishment as legal and constitutional, while expressing his personal "distaste, antipathy, and indeed, abhorrence, for the death penalty" (*Furman v. Georgia*, 408 U.S. 238, 405 [1972]; J. Blackmun dissenting). Judicial decisions from the 19th century enforcing slavery are full of judges' assertions of personal abhorrence for

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the results they conclude are doctrinally required (Cover 1975). These avowed conflicts between personal views and judicial outcomes are generally explained by judges as resulting from their duty to follow objective law, an explanation sometimes accepted at face value, sometimes rejected as an excuse for morally unworthy decisions, and sometimes celebrated as evidence that the rule of law actually works. Indeed, some judges proclaim conflicts between personal views and judicial outcomes as a sign of professional competence and integrity. "A judge who likes every outcome he reaches is very likely a bad judge," declared Justice Neil Gorsuch in the recent confirmation hearings for his seat on the Supreme Court (*Chicago Tribune* 2017). We should investigate in more detail the way judges subjectively experience the process of coming to decisions that are avowedly contrary to their own usual best judgment and whether that experience is related to engagement with doctrinal forms.

V. SO WHAT?

What difference does any of this make? Why should it matter if doctrine works to alter decision makers' conclusions through the psychological effects of adhering to a formal practice rather than by dictating substantive results? There are at least two reasons.

First, the disruptive account of doctrinal reasoning can coexist with our realistic understanding of doctrine's indeterminacy. It is widely agreed that legal authority is indeterminate in many important legal controversies, if not most or all adjudicated cases, and existing theories of legal reasoning cannot justify judges' continued resort to doctrine in those cases. A theory of effective but nonsubstantive doctrinal practice, then, could reconcile judges' continued resort to doctrinal reasoning with our recognition that doctrines often do not decide cases.

Second, it is important to know how much the work of legal doctrine depends on actual doctrinal practice, because doctrinal practice is disappearing (Galanter 2006). In state and federal courts, the percentage of cases tried has declined precipitously. Most civil cases settle out of court, and most criminal charges are resolved through plea bargains, bypassing doctrinal analysis of most or all of the legal questions at stake. There has been a commensurate increase in the use of "alternative dispute resolution." Even cases involving politically charged issues, like race and gender discrimination, are more likely to go to arbitration and mediation and to be resolved with much less formal legal analysis. In the case of binding arbitration, at least in commercial cases, there is generally still some doctrinal practice. The arbitrator may produce a written opinion that deals with precedents and interprets relevant legal authorities. But formality is reduced. In mediation, opposing parties aim to resolve their conflicts with the help of a mediator, often without engaging in any formal doctrinal reasoning.

Worries that less formal methods of legal decision-making will erode legal principles are sometimes explained away with the suggestion that informal resolutions take place "in the shadow of the law" (Mnookin and Kornhauser 1979). The idea is that the parties, or their legal representatives, are guided by predictions of how the available doctrinal rules

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would substantively determine the outcome of the dispute, were it to go through a formal doctrinal analysis. That approach assumes that doctrine's contribution to legal decision-making is primarily substantive, providing a repository of knowledge about legal norms that can still influence informal decision-making. But what if doctrine's contribution depends on actually undertaking to reason doctrinally? To the extent that doctrine works through psychological effects generated by the practice of formal doctrinal reasoning, giving up that practice means giving up legality. Then again, there may be psychological effects associated with doctrinal reasoning that are incompatible with the rule of law that we would wish to jettison. It is possible, after all, that if doctrinal reasoning shifts judicial characters, it does so in ways we might regard as antithetical to the rule-of-law requirement of looking outside oneself. For instance, working with texts written in tones of authority might increase judges' tendency to believe in their own received views of things as superior to possible alternatives.

Even if the disruptive theory turns out to be empirically supportable and the effects observed could be said to facilitate the rule-of-law requirement that judges look outside themselves, the disruptive account could not fully explain the legal outcomes judges ultimately reach. The disruptive account proposes that doctrinal reasoning might move legal decision makers away from their usual subjective outlooks, but it does not attempt to explain where they end up after that initial disruption. So, even if formal doctrinal reasoning can disrupt decision makers' usual subjective outlooks, that will not explain how judges go about—or should go about—selecting case outcomes. As a colleague put it (using an appropriately theatrical metaphor), in the disruptive account "doctrinal reasoning clears the stage, . . . but it does not tell us what belongs on the stage."

In this way, the disruptive account is a less ambitious theory than existing integrationist, fidelity, and legal art accounts of legal reasoning. That said, the disruptive account offers a new way to conceptualize the role of formal doctrinal reasoning in judicial decision-making. Usually we think that either doctrine contributes substantively to the decision or it is useless. This kind of either/or conceptualist approach to the role of doctrine has held our attention for a long time and tends to keep us from finding new ways to think about how legal decision makers use and should use doctrine—and expanding our range of disciplinary approaches accordingly. Among other things, it causes us to view doctrine's effects through a lens that is incompatible with empirical work on other factors that influence judicial outcomes as the product of actual human action. Most important, current understandings cannot reconcile doctrinal indeterminacy with legality. They cannot both acknowledge that doctrine fails to identify substantive results and at the same time explain how indeterminate doctrine might still help satisfy the rule-of-law requirement that judges look outside their own subjective will for decision-making criteria.

In the disruptive model I am proposing, the work of doctrine has less to do with acquiring substantive legal knowledge or recognizing special legal patterns and more to do with altering a legal decision maker's ordinary ways of thinking. This account suggests that engaging in the formal practice of doctrinal reasoning might precipitate a rupture with

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ordinary subjectivity that is not necessarily occasioned by acquiring an objective outlook. In other words, "following the rules" may not be only, or even mainly, a matter of being directed toward substantive outcomes. Instead, doctrinal reasoning can be imagined as a practice of engaging with complex formal legal texts in prescribed manners in order to allow oneself to be led away from one's ordinary habits of mind. Perhaps we reason doctrinally—and should keep reasoning doctrinally—not, or not only, because doctrine points to answers but because practicing formal doctrinal analysis disrupts decision makers' ordinary perspectives and so contributes to a kind of relative impartiality.

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